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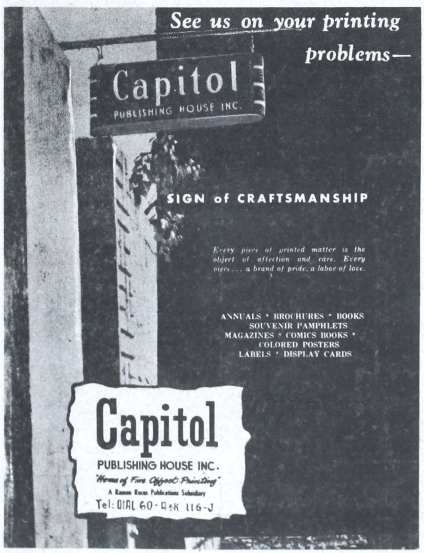

# MAY REBELLION BE COMPLEXED WITH OTHER CRIMES?

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The courts have had no occasion to rule squarely on the question of whether rebellion complexed with other crimes can legally exist. Justice Tuason opined that there is no such creature known to law (Nava vs. Gatmaitan, GR L-4855; Hernandez vs. Montesa, GR L-4964; Angeles vs. Abaya, GR L-5102). But our post-war government prosecutors seem to be of the contrary view. In the so-called polituburo and other rebellion cases, they have been making charges of rebellion complexed with other crimes. The same is done in the recent case of Luis Taruc, which has currently occupied the headlines. Are the government prosecutors influenced by the public clamor to "throw the book" at the surrendering Huk Supremo instead of being guided by the correct appraisal of applicable laws?

1. *The law and reason for complex crimes.*—According to Art. 48 of the Revised Penal Code, a complex crime can be committed only in either of two instances: first, when a single act constitutes two or more grave or less grave felonies; and, secondly, when an offense is a necessary means for committing the other.

Although a provision on complex crimes similar to our own is found in the Penal Code of Spain (Arts. 77, Code of 1850; 90, Code of 1870; 75, Code of 1932; 71, Code of 1944), said provision, however, had never been resorted to for the purpose of increasing the penalty, much less had it been applied to political crimes. The principle behind complex crimes and the reason for its adoption is to afford the accused the benefit of a single penalty for two or more offenses, and the penalty cannot be increased over and beyond that of a single offense.

> La unificacion de penas en los casos de concurso de delitos a que hace referencia este articulo, esta basado francamente en el principio pro reo, de tal suerte que cuando este fin no se logra con la aplicacion del castigo unico correspondiente al delito mas grave de los varios calificados, el mismo precepto sancionador dispone que se penen separadamente todas las infracciones que integra el compuesto criminoso atribuido al culpable; como hubo de entenderlo y realizarlo la Sala de instancia, al advertir que el grado maximo de la pena aplicable al atentado compredido en el parrafo ultimo del articulo 259 del Codigo Penal de 1932 alcanzaba la duracion de tres años, nueve meses y cuatro dias a cuatro años y dos meses, mientras que impuesta dicha pena en su grado medio y a ella sometida la de cuatro meses y un dia que aplica al delito de lesiones, resultaba esta suma inferior en duracion y, por ende, mas beneficiosa para el reo que aquel castigo, unico especificamente prescrito en la norma sustantiva ya citada. (S. 30-11-945; R. 1. 377) (II Rodriguez Navarro, Doctrina Penal del Tribunal Supremo, p. 2168).

To resort, therefore, to the application of complex crime provided for by Art. 48 in order to increase the penalty, is a manifest contravention of the principles of penal law, that the penalty should be strictly construed and always in favor of the accused. With less reason should Art. 48 be applied to rebellion, inasmuch as the penalizing law defines it as "rising publicly and taking arms against the government" for the purpose therein stated (Art. 134) and "engaging in war against the forces of the Government, destroying property or committing serious violence." (Art. 135). "Engaging in or levying war" is a technical term that has received judicial construction and acquired a definite meaning. (U. S. vs. Lagnason, 3 Phil. 473). The attendance of crimes penalized in other provisions of the Revised Penal Code may be considered within the codal definition of rebellion.

2. *Leniency in political crimes notwithstanding their factual complexity.*—Our Supreme Court has definitely ruled that all other crimes committed with treason form the essential element of the given crime and cannot be divided into parts for each one to stand as a separate ground to convict the accused of a different crime. It also had occasion earlier to rule on cases of treason and rebellion under Act 292 and under the Revised Penal Code before the war. (U.S. vs. Ayala, 6 Phil. 151; U.S. vs. Lagnason, 2 Phil 473; U.S. vs. Baldello, 3 Phil 510; League vs. People, 73 Phil 155). Said cases involved murders, physical injuries, destructions and other crimes, yet they were not held to be complex crimes but plain rebellion. Rebellion is closely related to treason having the same elements. The difference is that treason involves the delivery of the country to a foreign power, and therefore, remained punishable as a capital offense. But rebellion might even be committed for love of country and therefore was given a lighter penalty. Reason for this is in the changed attitude on political crimes.

> El origen de este cambio se remonta, segun opinion muy difundida, a la revolucion que tuvo lugar en Francia en el año 1830. El gobierno de Luis Felipe establecio una honda separacion entre los delitos comunes y los politicos, siendo estos sometidos a una penalidad mas suave y sus autores exceptuados de la extradicion. Irradiando a otros paises tuvieron estas ideas tan gran difusion que en casi todos los de regimen liberal individualista se ha llegado a crear un tratamiento desprovisto de severidad para la represion de estos hechos. No solo las penas conque se conminaron perdieron gran parte de su antigua dureza, sino que en algunos paises se creo un regimen penal mas suave para estos delincuentes, en otros se abolio para ellos la pena de muerte. Tan profundo contraste entre el antiguo y el actual tratamiento de la criminalidad politica en la mayoria de los paises solo puede ser explicado por las ideas nacidas y difundidas bajo los regimenes politicos liberales acerca de estos delitos y delicuentes. Por una parte se ha afirmado que la criminalidad de estos hechos no contiene la misma inmoralidad que la delincuencia comun, que es tan solo relativa, que depende del tiempo, del lugar, de las circunstancias, de las instituciones del pais. Otros invocan la elevacion de los moviles y sentimientos determinantes de estos hechos, el amor a la patria, la adhesion ferviente a determinadas ideas o principios, el espiritu de sacrificio por el triunfo de un idea. (I Cuello Calon, Derecho Penal pp. 250-251.)

The leniency with which the American Courts had viewed the various crimes committed in furtherance of armed uprising is reflected in the refusal to extradite former President Ezeta of Salvador, where he had been charged for murders and robberies on the ground that said crimes were committed during the progress of actual hostilities of a revolutionary uprising and therefore of political character not subject to extradition. (In re Ezeta, 62 Fed. Rep. 972). The court therein had occasion to cite the reasons for the tenderness of the law for political offenses.

> "In the revolutions, as we conduct them in our countries, the common offenses are necessarily mixed up with the political in many cases. A revolutionist has no resources. My distinguished colleague General Caamano (of Ecuador) knows how

we carry on wars. A revolutionist needs horses for moving, beef to feed his troops, etc., and since he does not go into the public markets to purchase those horses and that beef, nor the arms and saddles to mount and equip his forces, he takes them from the first pasture or shop he finds at hand. This is called robbery everywhere, and is a common offense in time of peace, but in time of war it is a circumstance closely allied to the manner of waging it." (Inter. Am. Conference, vol. 2, p. 615.) (In re Ezeta, 62 Fed. Rep. 972).

3. *Background of our rebellion and sedition laws.*—Our law on political crimes have undergone changes, starting with the enactment of Act 292, that abrogated, among others, the old Penal Code provisions in the case of rebellion. Considering that it does not involve a delivery of the country to a foreign power, and that the people then were engaged in a justifiable purpose of trying to obtain their independence, the rigorous penalty of the old Code was changed by Act 292, and the change later on was adopted in the Revised Penal Code, the very same law to this day for which rebellion cases are prosecuted.

Our laws on treason, rebellion and sedition had been modified to be in harmony with American laws. Significant of these changes is the reduction of the penalty on rebellion without the least changing or lessening the scope of the offense. There was also the virtual abrogation of Art. 244 of the old Penal Code which otherwise indicated a separate penalty for common crimes committed in pursuance of rebellion. In the enactment of the Revised Penal Code, some of these changes in Act 292 have been adopted to alleviate the rigorous penalty provided for by the old Code. There was no intention, whatsoever, to expand the application of the provision on complex crime by extending it to rebellion in order to increase the penalty. Subsequent decisions of the court tend to show this liberal change.

In the case of Ayala, where the defendants rose in arms, liberated prisoners and robbed the barracks of weapons, money and commissary supplies, killed constabularymen and caused terror in the town, the trial court convicted them of treason. The Supreme Ccurt, however, found them guilty of plain rebellion and reduced the sentence accordingly. (U.S. vs. Ayala, et al., 6 Phil 151).

In the case of Lagnason, where the lower court convicted the defendant to death for the crime of treason for an attack upon the pueblo of Murcia during the course of which there was a fight with the constabulary causing about twenty-two casualties, two of whom were policemen, the Supreme Court, instead, convicted appellant of rebellion and accordingly reduced the punishment. (U. S. vs. Lagnason, 3 Phil 473).

In the case of Baldello, where the defendants attacked a municipal building, wounded a policeman and overpowered the clerks, robbing the municipal building of guns and ammunitions, causing deaths and physical injuries during the running fight, the Supreme Court again held that the crime committed was not treason but rebellion. (U. S. vs. Baldello, 3 Phil 509).

4. *Spanish and Philippine laws on rebellion and sedition distinguished.*—The Philippines had departed from Spain in the treatment of attendant crimes committed during a rebellion or sedition. Heretofore our old Penal Code in its Art. 244 had substantially the same provision as Art. 259 of the Spanish Penal Code of 1870 (formerly Art. 184, Penal Code of 1850; then Art. 254, Penal Code of 1932; and now, Art. 227, Penal Code of 1944) which reads:

> ART. 244. Los delitos particulares cometidos en una rebelion o sedicion, o con motivo de ellas, seran castigados respectivamente segun las disposiciones de este Codigo.
>
> Cuando no pueden descubrirse sus autores, seran penados como tales los jefes principales de la rebelion o sedicion.

This provision has no more counterpart in our present Revised Penal Code. The retention of this provision in all the Spanish Penal Codes of 1850, 1870, 1932, and 1944, as well as the retention, at same time, of the provision on complex crime (Art. 77, Code of 1850; Art. 90 Code of 1870; Art. 75 Code of 1932; and Art. 71, Code of 1944) in said codes are indicative of the fact that the article on complex crime has never been envisaged to be made to apply to rebellion and sedition with their attendant common crimes.

This becomes doubly significant when we consider that our Revised Penal Code has excluded any semblance of Art. 244 therefrom, thus, leaving and limiting punishment of all other crimes committed in the course or in furtherance of rebellion and sedition, to those respectively provided for in said articles on rebellion and sedition. Certainly the article on complex crime cannot and should not be made to extend its application to these political crimes, for, otherwise, the Revised Penal Code would have declared so, or else specially provide that they should be treated as common crimes as heretofore provided in the old Penal Code.

5. *Rebellion not complexed with other crimes.*—In rebellion there is an attendant physical activity which may be, and often is, in itself an otherwise criminal offense under another codal provision. The crime of rebellion or of inciting it is by nature a crime of masses, of multitudes. It always presupposes a vast movement and a complex net of intrigues and plots.

In the *Sakdalista* uprising of 1935, at Sta. Rosa, Laguna, the rebels cut the telegraph, telephone and electric-light lines, robbed vehicle passengers of their arms and engaged in a bloody encounter with the constabulary resulting in deaths and physical injuries. The Supreme Court held that these acts constitute rebellion. (League vs. People, 73 Phil. 155). In another *Sakdal* uprising constituting similar acts and an encounter with the constabulary, there were fifty-nine killed and several wounded, and although the defendants were acquitted, the Court of Appeals held that said acts constituted rebellion. (People v. Almazan, 37 O.G. 100.) It can be gleaned from these cases that notwithstanding the occurrence of robberies, multiple murders, frustrated murders, and other acts of violence and destructions, no pretense was made whatsoever that the crime of rebellion therein committed were complexed with the other attendant crimes.

6. *Treason not complexed with other crimes.*—Treason in its form of commission and its political nature is closely related to rebellion. Yet treason cannot be complexed with other crimes. The Supreme Court in several decisions have been explaining and clarifying the nature of treason.

> In the nature of things, the giving of aid and comfort can only be accomplished by some kind of action. Its very nature partakes of a deed or physical activity as opposed to a mental operation. (Cramer v. U.S., ante) This deed or physical activity may be, and often is, in itself a criminal offense under another penal statute or provision. Even so, when the deed is charged as an element of treason it becomes identified with the latter crime and can not be the subject of a separate punishment, or used in combination with treason to increase the penalty as Art. 48 of the Revised Penal Code provides. (People v. Prieto, 45 O.G. p. 3329)

And again, specifying the elements of treason, that leaves no room for other interpretations.

> The essential elements of a given crime cannot be disintegrated in diffugient parts, each one to stand as a separate ground to convict the accused of a different crime or criminal offense. The elements constituting a given crime are integral and inseparable parts of a whole. In the contemplation of the law, they cannot be used for double or multiple purposes. They can only be used for the sole purpose of showing the commission of the crime of which they form part. The factual complexity of the crime of treason does not endow it with the functional ability of worm multiplication of amoeba reproduction. Otherwise, the accused will have to face as many prosecutions and convictions as there are elements of the crime of treason, in open violation of the constitutional prohibition against double jeopardy. (People v. Labra, 46 O.G. supp. (1), 159.)

It is clear from all the consistent decisions of the court that murders and other attendant crimes, are ingredients of treason, and can

not be complexed. (see People v. Alibotod, 46 O.G. 1005; People v. Vilo, 46 O.G. 2517; People v. Delgado, 46 O.G. 4213; People v. Suralta, 47 O.G. 4594; and People v. Navea, 47 O.G. Supp. 12, 252)

7. *Contrary arguments considered.*—Some arguments may be advanced to support the view that rebellion may be complexed with other crimes. But their weaknesses are self-evident:

(1) *Article on complex crime, never conceived by framers of Penal Code to apply to common crimes.*

A superficial reading of Art. 48 together with Art. 134 of the Revised Penal Code may give the impression that it is easy to foresee therefrom that the complex crime of rebellion with murder and arson can, and does exist, by saying that the crime ceases to be plain rebellion the moment excessive force or violence upon persons or serious destruction of property result in the course of the rebellion. This would be disregarding the implication of a public armed uprising. This would do away also with the provisions of Art. 135 of the Revised Penal Code in which the inherent factual complexity of the crime of rebellion is said to involve "engaging in war against the forces of the Government, destroying property or committing serious violence". In effect, it would limit and restrict the context of the law on rebellion as specifically provided for in Arts. 134 and 135 of the Revised Penal Code.

Said reasoning would also disregard evident historical facts in that since its inception and through the many successive revisions of the Spanish Penal Code down to this day, the article on complex crimes which we had adopted in our old Penal Code and Revised Penal Code, had never been made to apply to the cases of rebellion and sedition. The Spanish Penal Codes as well as our old Penal Code, had, instead of applying the article on complex crime and increase the penalty to the maximum of the gravest act committed during a rebellion, had made a special provision that said acts should only be penalized in accordance with the appropriate codal provision, which may not, therefore, be necessarily the maximum thereof. Now under the more liberal intention and spirit behind Act 292, followed in our Revised Penal Code, this special provision was abrogated and the penalty for said concommittant crimes, therefore, had been relegated to that of rebellion and sedition only. To make the punishment more severe by extending thereto the provision on complex crimes would certainly go against the spirit and purpose of said Act 292 and the Revised Penal Code.

It is clear that without lessening the magnitude of the offense, our legislature had purposely converted the crime of rebellion in all its forms of commission, into a non-capital offense. In so considering, and penalizing rebellion as a non-capital offense, even the theory of absorption, does not apply. Rather, the imposition of the penalty therefor may fluctuate according as to how it may be aggravated by other crimes resorted to in the commission of the rebellion, but can never be made to exceed the maximum of *prision mayor* provided for rebellion.

(2) *The legislators' sense of proportion.*

It may be maintained that the penalty for rebellion is very much less than that of destructive arson, of homicide, murder or kidnaping and that the legislature should be credited with a sense of proportion in the sense that in defining rebellion and prescribing a lower penalty, the legislators had in mind rebellion without the attendance of other more serious punishable crimes. This would be a grave mistake, for this is to lose sight of the fact, that the legislators had merely followed the modern trend of penology. As far back as the French Revolution, the crime of rebellion had been penalized with death. The present trend is that being a political crime of lesser degree than treason, the motive of the participants is the form taken into account and not the extent or result of their acts. In rebellion the participants do not kidnap, kill, rob and burn purely for personal motives and for the sake of perverse kidnaping, killing, robbing and burning but only in furtherance of their common political objectives.

(3) *"Force and intimidation" essential to common crimes, is of lesser degree than what is involved in treason or rebellion or sedition.*

It may be asserted also that the mere fact that a rebellion necessarily implies the use of arms and a public uprising does not justify the assumption that it cannot be committed without kidnaping, arson or murder. No such assumption or argument is intended herein because rebellion can be committed in so many ways and kidnapings, killings and burnings, among others, certainly, are committed in rebellion.

A "public uprising and taking arms" against the government, "engaging in war" against government forces and "destroying property or committing serious violence" in plain rebellion; and, rising publicly and tumultously to attain by force, intimidation or other illegal methods, any act of hate or revenge or the despoiling of property for political or social end in plain sedition, can never justify any assumption that kidnapings, killings, burnings, pillagings and sackings must not occur in these crimes against public order. It will be seen that the force and intimidation essential to certain common crimes is of much lesser degree than what is involved in treason, rebellion and sedition.

In the case of rape with physical injuries (U.S. v. Andaya, 34 Phil. 690) it is said that the term "force and intimidation" if used to excess therein such that injuries are sustained, it is converted into a complex crime. True, but it does not follow that when "serious violence," indicated in the altogether different crime of rebellion, is resorted to in excess, the rebellion becomes converted into a complex crime. How anything could exceed serious violence is inconceivable. While excessive force is not contemplated in the use of force and intimidation in the common crime of rape, there can be no more excessive violence than serious violence itself indicated in the political crime of rebellion.

(4) *Direct assault without public uprising should not be confused with rebellion.*

It may be claimed that if direct assault under Art. 148 can be complexed with other crimes as in the cases of Lojo (52 Phil. 390), Ginosolongo (23 Phil. 171), Baluyot (40 Phil. 385) and Montiel (9 Phil. 162), there is no reason for rebellion not to be equally complexed inasmuch as direct assault is committed in some ways with the purposes enumerated in rebellion and sedition.

Direct assault, unlike rebellion and sedition, is committed only without public uprising in any of the two ways. (Art. 148). The first is the employment of force or intimidation for the attainment of any of the purposes enumerated in rebellion and sedition. Here, while the purpose to which it makes reference may be the same, yet the means employed — and here is where direct assault differs from rebellion — cannot go beyond the use of force or intimidation, as in certain other common crimes. Clearly, the article does not indicate whatsoever that in the commission of direct assault, the various means employed in the commission of the crimes of rebellion and sedition can be resorted to. The second way of committing direct assault is when one shall attack, employ force or seriously intimidate or resist persons or agents in authority while officially performing their duties. Here there is no reference, much less similarity with rebellion and sedition. And it is under this second instance that Lojo was held guilty for assault with homicide; Ginosolongo and Baluyot, for assault with murder; and, Montiel, for assault with lesiones graves. To underscore the provision on direct assault and cite the above cases of complexed common crimes, is to emphasize only too well that rebellion and sedition have to be considered in an entirely different manner so as to avoid extreme confusion between the purpose of a crime and the means employed in the commission thereof.

(5) *In rebellion with attendant common crimes, it is not the theory of*

*absorption but of aggravation that applies.*

The theory of absorption is not an exclusively fixed criterion in determining the penalty. The rule on complex crimes may also apply as well as the rule on aggravating circumstances, in certain cases. In other cases, however, where several offenses may otherwise be considered committed, the Code separately applies a distinct penalty as an indivisible crime. Take, for instance, robbery with homicide (Art. 294 par. 1); or robbery with rape, robbery with intentional mutilation, robbery with serious physical injuries (Art. 294 par. 2); treason with all its modes of commission (Art. 114); piracy with murder, homicide, physical injuries or rape (Arts. 122 and 123 par. 3); rebellion and sedition with all their modes of commission (Arts. 134, 135 and 139) — just to cite a few of them. The minimum or maximum of the penalty therein specifically indicated may be imposed depending as to how said special crimes are aggravated by the seriousness of the co-existing attendant acts.

(6) *Analogy from treason cases.*

It has already been shown that the crime of treason is specially penalized by a particular provision of the Code, and that there is an overwhelming number of decisions that Art. 48 on complex crime does not apply thereto. The crime of rebellion is also specially penalized by a particular codal provision, and likewise should not admit of the application of Art. 48 on complex crimes.

Attention may however be called to the unpublished treason case of Labra (G.R. L-1240, May 12, 1949) and the case of Barrameda (47 O.G. 5082). But in neither of said cases were the accused actually held guilty of a complex crime.

(a) *Clerical error in the Labra case.*—Examining the decision in the case of Perfecto Labra, the opening statement of the Supreme Court started by saying that Labra was declared by the trial court guilty of "treason *aggravated* with murder" and was sentenced to death. After discussing the facts, the Court held:

> "Wherefore the verdict of guilt must be affirmed. Arts. 48, 114 and 248 of the Revised Penal Code are applicable to the offense of treason with murder. However, for lack of sufficient votes to impose the extreme penalty, the appellant will be sentenced to life imprisonment."

The insertion of Art. "48" was clearly an inadvertent clerical error, for the verdict of guilt that was affirmed in this case is not treason complexed with murder, but rather, treason aggravated with murder. In view of the definite stand of the Supreme Court before and after this Labra case was decided, that treason cases are incapable of being complexed with other crimes, the inclusion of figures "48" in said decision becomes clearly incongruous and unnecessary and can be attributed to no other than clerical mistake. Hence, this Labra case cannot be considered as a correct precedent.

(b) *Barrameda case — not a complex crime.*—The clerical error in the Labra case becomes more patent in the decision on the Barrameda case, when the Solicitor General took the wrong cue from the former and advocated for extreme penalty on the ground that Barrameda was guilty of treason complexed with multiple murder. Because it so happened that the Supreme Court meted out the death penalty, it may now be claimed that the theory of complex crime of treason with murder won the approval of the Court. This would be confusing the reasoning for that of the penalty recommended. This is a case where the Court adopted the Solicitor General's recommendation but not his reasoning. Nowhere in the decision of said case had the Court ever stated that it is a complex crime. The penalty of death was imposed not because it is a complex crime but because the treason committed by appellant was "*accompanied*" not only by apprehension of Americans but also by several individual killings and also mass killings and slaughter. So the death penalty imposed was not on the principle that treason may be committed complexed with other crimes but, rather was so imposed because it was accompanied or aggravated by others deserving maximum punishment under the codal provision on treason.

As it has been explained, treason is of a similar nature with rebellion. If treason can not be complexed with its attendant crimes, it goes without saying that rebellion can not be complexed also. But treason is already a capital offense and there may be no need for the government prosecutors to complex the crime to make the punishment sting upon the culprit, while rebellion is a non-capital offense. Are our prosecutors justified in converting rebellion into a capital offense by the simple expedient of complexing it with the attendant crimes?

Multiple murders, kidnapings, arsons and robberies attendant in rebellion could not have been produced by a single act but rather by a series of different acts at different times and by and against different individuals in different places. Therefore, the charges in these post-war rebellion cases could not come under the purview of the first instance contemplated in Art. 48.

The informations in these rebellion cases invariably allege that the attendant crimes perpetrated were the necessary means for committing the rebellion, hence, seemingly coming under the second instance.

The crime of rebellion, however, is already of factual complexity and may be committed in many different ways already comprehended in its codal definition. According to Arts. 134 and 135, the crime of rebellion is committed the instant persons rise publicly and take arms against the Government for the purposes mentioned therein and in engaging, among others, in war against the government forces, destroying property and committing serious violence. Public armed uprising is, therefore, an essential part of the offense. It is natural that acts of violence, kidnaping, murder, arson, and robbery would be committed in the course of the rebellion. And as long as injuries and destructions are necessarily connected with or committed in furtherance of the rebellious purposes, which are political in nature, they are deemed to be a part of the rebellion and cannot be considered as separate offense. Therefore, under the second instance, such acts alleged could not also be made to fall under the article on complex crime.

The cases wherein the article on complex crimes was extended to rape with physical injuries, assault with homicide, resistance to agents of persons in authority with murder, and attempt against the authority with lesiones graves, which are all common crimes, certainly cannot serve as analogy for the crime of rebellion, which is of a political nature. Without the killings, burnings, sackings and kidnapings during the course of a rebellion, where would be the rebellion complained of? Hence, plain rebellion does not cease to be such by the use, in furtherance thereof, of attendant excessive force or violence resulting in serious injuries upon persons and destruction upon property.

In popular governments, where the influence of the passions is strong, the struggles for power are violent, the fluctuations of party are frequent, and the desire of suppressing opposition, or of gratifying revenge under the forms of law and by the agency of the courts, constant and active, (Ex Parte Bollman, 2 U.S. 599) it is all the more important that this question be resolved not in the light of present prejudices but in the interest of justice for all time.—e

## 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 of 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.

*"Nothwithstanding 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. 2C 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. Kupclian 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. 73.

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
Manila

Sir:

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 and 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 those 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

(*Continued on page 543*)

# DECISION OF THE UNITED STATES SUPREME COURT

(Advance Reports — 1953 Term)

VICTOR EMANUEL PEREIRA AND EUGENE H. BRADING, PETITIONERS,

v.

UNITED STATES OF AMERICA

**Witnesses § 42 — competency of wife to testify against husband in criminal case — after divorce.**

1. Divorce removes any bar of incompetency of a wife to testify in a criminal prosecution against her husband.

**Evidence § 704 — marital communications — effect of divorce.**

2. Divorce does not terminate the privilege for confidential marital communications.

**Evidence § 704 — what constitutes confidential marital communications.**

3. The privilege of confidential communications between husband and wife is inapplicable to bar the testimony of a wife in a criminal prosecution against her husband, where her testimony involves primarily statements made in the presence of third persons, acts of the husband which do not amount to communications, trips taken with third persons, and her own acts, where much of her testimony relates to matters occurring prior to the marriage, and where any residuum which may have been intended to be confidential is so slight as to be immaterial.

**Evidence § 704 — marital communications — presumption.**

4. Although marital communications are presumed to be confidential, that presumption may be overcome by proof of facts showing that they were not intended to be private.

**Evidence § 704 — marital communications — presence of third person — intention to convey information to third person.**

5. The presumption of privacy of marital communications is negatived by the presence of a third person or by the intention that the information conveyed be transmitted to a third person.

**Evidence § 698 — confidential communications — scope of privilege.**

6. A privilege of confidential communications, generally, extends only to utterances, and not acts.

**Evidence §§ 990, 991.3 — sufficiency — mail fraud — transporting stolen property interstate.**

7. Convictions of violating the mail fraud statute (18 USC § 1341) and the National Stolen Property Act (18 USC §2314) are not subject to attack on the ground that there was no evidence of any mailing or transporting stolen property interstate, where it is established that the two defendants planned to defraud a woman, that collecting the proceeds of a check drawn by her on an out-of-state bank was an essential part of that scheme, and there was substantial evidence to show that the check, which was delivered by one of the defendants to a bank for collection, was mailed by that bank to the out-of-state bank, in the ordinary course of business.

**Post Office § 48; Receiving or Transporting Stolen Property § 1 — mail fraud — actual mailing or transportation not necessary.**

8. To constitute a violation of the mail fraud statute (18 USC § 1341) or the National Stolen Property Act (18 USC § 2314), it is not necessary to show that accused actually mailed or transported anything himself; under 18 USC § 2(b) it is sufficient if he caused it to be done.

**Post Office § 48 — mail fraud — elements of offense.**

9. The elements of the offense of mail fraud under 18 USC § 1341 are (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme. It is not necessary that the scheme contemplate the use of the mails as an essential element.

**Post Office § 48 — mail fraud — causing the mails to be used.**

10. A person "causes" the mails to be used within the meaning of the mail fraud statute (18 USC § 1341), where he does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended.

**Criminal Law § 7 — mail fraud statute — National Stolen Property Act — separate offenses.**

11. Violations of the mail fraud statute (18 USC § 1341) and the National Stolen Property Act (18 USC § 2314) constitute two separate offenses, and a defendant may be convicted of both even though the charges arise from a single act or series of acts, so long as each requires proof of a fact not essential to the other.

**Receiving or Transporting Stolen Property § 1 — National Stolen Property Act — elements of offense.**

12. The National Stolen Property Act (18 USC § 2314) requires (1) knowledge that certain property has been stolen or obtained by fraud, and (2) transporting it or causing it to be transported in interstate commerce. The transporting charge does not require proof that any specific means of transporting were used, or that the acts were done pursuant to a scheme to defraud.

**Receiving or Transporting Stolen Property § 1 — collection of check drawn on an out-of-state bank.**

13. When a defrauder delivers a check, drawn by his victim on an out-of-state bank, to a domestic bank for collection, he "causes" it to be transported in interstate commerce. It is common knowledge that such checks must be sent to the drawee bank for collection, and it follows that he intends the domestic bank to send the check across state lines.

**Trial § 288 — Instructions to jury — aiding and abetting.**

14. In a prosecution against two defendants for violations of the mail fraud statute (18 USC § 1341) and the National Stolen Property Act (18 USC § 2314), committed by one of the defendants by causing a check drawn by the defrauded person upon an out-of-state bank to be transported to the drawee bank, the jury is, as to the other defendant, properly charged on the theory that one who aids or abets the commission of an act is as responsible for that act as if he had directly committed the act himself, where there is ample evidence of the defendants' collaboration and close co-operation in the fraud from which the jury could conclude that the second defendant aided and abetted the first in the commission of the specific acts charged.

**Criminal Law § 36 — double jeopardy — substantive offense and conspiracy as separate offenses.**

15. The commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both. Only if the substantive offense and the conspiracy are identical does a conviction for both constitute double jeopardy.

**Criminal Law § 36 — double jeopardy — substantive offense and conspiracy as different offenses.**

16. The doctrine of double jeopardy does not preclude the conviction of two defendants on charges of violating, the one as a principal, and the other as an abettor, the mail fraud statute (18 USC § 1341) and the National Stolen Property Act (18 USC § 2314), and on charges of conspiracy to commit the substantive offenses, since the substantive offenses do not require more than one person for their commission and the conviction on the substantive grounds, of both the principal and the abettor, do not depend on any agreement.

**Criminal Law § 16 — aiding and abetting.**

17. Aiding, abetting, and counseling are not terms which presuppose the existence of an agreement, but have a broader application, making the defendant a principal when he consciously shares in a criminal act, regardless of the existence of a conspiracy.

**Conspiracy § 9.5, 20 — to violate mail fraud statute or National Stolen Property Act.**

18. To constitute a conspiracy to violate the mail fraud statute (18 USC § 1341) or the National Stolen Property Act (18 USC § 2314), it is not necessary that an agreement to use the mails or transport stolen property exists from the inception of the scheme to defraud; it is sufficient if there was such an agreement at any time.

**Trial § 157 — question for jury — use of mails for perpetration of fraud.**

19. Where two defendants were closely associated in a scheme to defraud, it is not improper to allow the jury to determine from the circumstances whether one of the defendants shared the other's knowledge that a check obtained by the latter from their victim was drawn on an out-of-state bank and agreed with him on the use of the mails as the only appropriate means of collecting the money.

Argued October 20, 1953. Decided February 1, 1954.

ON WRIT of Certiorari to the United States Court of Appeals for the Fifth Circuit to review a judgment affirming petitioners' conviction in the District Court for the Western District of Texas of violating the mail fraud statute and the National Stolen Property Act, and of a conspiracy to commit these offenses. Affirmed.

See same case below, 202 F2d 830

## DECISION

WARREN, *C.J.*:

The petitioners, Pereira and Brading, were convicted in the District Court for the Western District of Texas under three counts of an indictment charging violation of the mail fraud statute, 18 USC (Supp V) § 1341, violation of the National Stolen Property Act, 18 USC (Supp V) § 2314, and a conspiracy to commit the aforesaid substantive offenses, 18 USC (Supp V) § 371. The Court of Appeals for the Fifth Circuit affirmed. 202 F2d 830. This Court granted certiorari to consider questions which are important to the proper administration of criminal justice in the federal courts. 345 US 990, 97 L ed 1399, 73 C Ct 1134.

On April 19, 1951, Mrs. Gertrude Joyce, a wealthy widow, fifty-six years old, and her young half-sister, Miss Katherine Joyner, were accosted by the petitioner Brading as they were about to enter a hotel in El Paso, Texas. Mrs. Joyce and her sister had just arrived from their home in Roswell, New Mexico, and were preparing to register at the hotel. Brading identified himself, assisted them in parking their car, and invited them into the hotel bar to meet a friend of his. They accepted. The friend was petitioner Pereira, thirty-three years of age. After a few drinks, the men suggested that they all go to Juarez for dinner. The women accepted, and after dinner visited some night clubs with the petitioners. Pereira devoted himself to Mrs. Joyce, telling her that their meeting was an "epoch" in his life. He mentioned that he was getting a divorce. This same performance was repeated the following night. When Pereira said that he would like to return to Roswell with the women, Mrs. Joyce invited the two men to be her house guests, and they accepted. Pereira commenced to make love to Mrs. Joyce, and she responded to his attentions. On May 3, Pereira exhibited a telegram to Mrs. Joyce, in the presence of Brading and Miss Joyner, stating that his divorce would be granted on May 27, but that he would not receive his share of the property settlement, some $48,000, for a month.

Brading represented himself as a prosperous oil man, dealing in leases, and Pereira as the owner and operator of several profitable hotels. Brading then told Mrs. Joyce that Pereira was about to lose an opportunity to share in the profits of some excellent oil leases because of the delay in the divorce property settlement, and persuaded her to lend Pereira $5,000.

Pereira suggested that he and Mrs. Joyce take a trip together to "become better acquainted." He borrowed $1,000 from her to finance the trip. Brading joined them at Wichita Falls, and the three of them continued the trip together as far as Dallas. Pereira discussed his purported hotel business in Denver during this part of the trip. He stated that he was giving two hotels to his divorced wife, but intended to reenter the hotel business in the fall. In the meantime, he was going to "play a little oil" with Brading. In Hot Springs, Arkansas, Pereira proposed marriage and was accepted. Brading reappeared on the scene, expressing great joy at the impending marriage. Pereira then told Brading, in the presence of Mrs. Joyce, that he would have to withdraw from further oil deals and get a hotel to assure himself of a steady income.

Pereira and Mrs. Joyce were married May 25, 1951, in Kansas City, Missouri. While there, Pereira persuaded Mrs. Joyce to procure funds to enable him to complete an arrangement to purchase a Cadillac through a friend. She secured a check for $6,956.55 from her Los Angeles broker, and drawn on a California bank, which she endorsed over to Pereira. The price of the car was $4,750, and she instructed Pereira to return the balance of the proceeds of the check to her. He kept the change.

From that time on, Pereira and Brading, in the presence of Mrs. Joyce, discussed a hotel which by words and conduct they represented that Pereira was to buy in Greenville, Texas. They took Mrs. Joyce — by this time Mrs. Pereira — to see it, and exhibited an option for its purchase for $78,000 through a supposed broker, "E. J. Wilson." Pereira asked his then wife if she would join him in the hotel venture and advance $35,000 toward the purchase price of $78,000. She agreed. It was then agreed, between her and Pereira, that she would sell some securities that she possessed in Los Angeles, and bank the money in a bank of his choosing in El Paso. On June 15, she received the check for $35,000 on the Citizens National Bank of Los Angeles from her brokers in Los Angeles, and gave it to Pereira, who endorsed it for collection to the State National Bank of El Paso. The check cleared, and on June 18, a cashier's check for $35,000 was drawn in favor of Pereira.

At five o'clock in the morning of June 19, Pereira and Brading, after telling their victim that they were driving the Cadillac to a neighboring town to sign some oil leases, left her at home in Roswell, New Mexico, promising to return by noon. Instead Pereira picked up the check for $35,000 at the El Paso Bank, cashed it there, and with Brading left with the money and the Cadillac.

That was the last Mrs. Joyce saw of either petitioner, or of her money, until the trial some seven months later. She divorced Pereira on November 16, 1951.

The record clearly shows that Brading was not an oil man; that Pereira was not a hotel owner; that there was no divorce or property settlement pending in Denver; that Pereira arranged to have the telegram concerning the divorce sent to him by a friend in Denver; that there were no oil leases; that the hotel deal was wholly fictitious; and that "E. J. Wilson" was the petitioner Brading. The only true statements which the petitioners made concerned the purchase of the Cadillac, and they took that with them. Pereira and Brading contrived all of the papers used to lend an air of authenticity to their deals. In short, their activities followed the familiar pattern of the "confidence game."

The petitioners challenge the admissibility of Mrs. Joyce's testimony as being based on confidential communications between Mrs. Joyce and Pereira during the marriage. Petitioners do not now contend that Mrs. Joyce was not a competent witness against her ex-husband. They concede that the divorce removed any bar of incompetency. That is the generally accepted rule. Wigmore, Evidence § 2237; 58 Am Jur, Witnesses § 204. Petitioners rely on the proposition that while divorce removes the bar of incompetency, it does not terminate the privilege for confidential marital communications. Wigmore, Evidence § 2341 (2); 58 Am Jur, Witnesses, § 379. This is a correct statement of the rule, but it is inapplicable to bar the communications involved in this case, since under the facts of the case, it cannot be said that these communications were confidential. Although marital communications are presumed to be confidential, that presumption may be overcome by proof of facts show-

Headnote 1

Headnote 2

Headnote 3

ing that they were not intended to be private. Blau v. United States, 340 US 332, 95 L ed 306, 71 S St

Headnote 4

301; Wolfle v. United States, 291 US 7, 78 L ed 617, 54 S Ct 279. The presence of a third party negatives the presumption of privacy. Wigmore, Evidence § 2336. So too, the intention that the information

Headnote 5

conveyed be transmitted to a third person. Id., § 2337. A review of Mrs. Joyce's testimony reveals that it involved primarily statements made in the presence of Brading or Miss Joyner, or both, acts of Pereira

Headnote 6

which did not amount to communications, trips taken with third parties, and her own acts. Much of her testimony related to matters occurring prior to the marriage. Any residuum which may have been intended to be confidential was so slight as to be immaterial. Cf. United States v. Mitchell (CA2d NY) 137 F2d 1006, 1009.

The court below was not in error in admitting Mrs. Joyce's testimony.

The petitioners challenge their conviction on the substantive counts on the ground that there was no evidence of any mailing or

Headnote 7

of transporting stolen property interestate, the gist of the respective offenses. These contentions are without merit.

The mail fraud statute provides:

"§ 1341. Frauds and swindles

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both." 18 USC (Supp V) § 1341.

The National Stolen Property Act provides:

"§ 2314. Transportation of stolen goods, securities, monies, or articles used in counterfeiting.

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . .

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both . . . ." 18 USC (Supp V) §2314.

To constitute a violation of these provisions, it is not necessary to show that petitioners actually mailed

Headnote 8

or transported anything themselves; it is sufficient if they caused it to be done. 18 USC (Supp V) § 2 (b).

Petitioners do not deny that the proof offered establishes that they planned to defraud Mrs. Joyce. Collecting the proceeds of the check was an essential part of that scheme. For this purpose, Pereira delivered the check drawn on a Los Angeles bank to the El Paso bank. There was substantial evidence to show that the check was mailed from Texas to California, in the ordinary course of business.

The elements of the offense of mail fraud under 18 USC (Supp V) § 1341 are (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme. It is not necessary that the scheme contemplate the use of the mails as an essential element. United

Headnote 9

States v. Young, 232 US 155, 58 L ed 548, 34 S Ct 303. Here, the scheme to defraud is established, and the mailing of the check by the bank, incident to an essential part of the scheme, is established. There remains only the question whether Pereira "caused" the mailing. That question is easily answered. Where one does an act with knowledge that the use of the mails will follow in

Headnote 10

the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he "causes" the mails to be used. United States v. Kenofskey, 243 US 440, 61 L ed 836, 37 S Ct 438. The conclusion that Pereira's conviction under this count was proper follows naturally from these factors.

As to the charge of causing stolen property to be transported in interstate commerce, the validity of Pereira's conviction is even more apparent. Sections 1341 and 2314 of Title 18 constitute two separate offenses, and a defendant may be

Headnote 11

convicted of both even though the charges arise from a single act or series of acts, so long as each requires the proof of a fact not essential to the other. Gavieres v. United States, 220 US 338, 55 L ed 489, 31 S Ct 421; Blockburger v. United States, 284 US 299, 76 L ed 306, 52 S Ct 180. 18 USC (Supp V) § 2314 requires (1) knowledge that certain property has been stolen or obtained by fraud

Headnote 12

and (2) transporting it, or causing it to be transported in interstate commerce. It is obvious that the mail fraud offense requires different proof. The transporting charge does not require proof that any specific means of transporting were used, or that the acts were done pursuant to a scheme to defraud, as is required for the mail fraud charge. United States v. Sheridan, 329 US 379, 91 L ed 359, 67 S Ct. 332. When Pereira delivered the check, drawn on an out-of-state bank, to the El Paso bank for collec-

Headnote 13

tion, he "caused" it to be transported in intestate commerce. It is common knowledge that such checks must be sent to the drawee bank for collection, and it follows that Pereira intended the El Paso bank to send this check across state lines. United States vs. Sheridan, supra (329 US at 391). The trial court charged the jury that one who "aids, abets, counsels, commands, induces, or procures" the commission of an act is as responsible for that act as if he had directly committed the act himself. See 18 USC (Supp V) § 2 (a). Nye and Nissen v. United States, 336. The jury found Brading guilty in the light of this instruction. The Court of Appeals affirmed on the ground that the evidence supported conviction under this charge.[1]

The evidence is clear and convincing that Brading was a participant in the fraud from beginning to end. Brading made the initial contact with the victim. He persuaded her to part with $5,000, as a loan to Pereira for investment in some non-existent oil leases. He was present and participated in conversations about buying the hotel lease. He engaged a telephone answering service under the name of "'E. J. Wilson," broker. The evidence established that he sent a telegram to Pereira authorizing an extension of the supposed option to purchase the hotel, signing it "E. J. Wilson." He supplied the false excuse for Pereira's departure from the victim, and went with Pereira to collect the proceeds of the check. He and Pereira fled together with the money.

The "aiding and abetting" instruction entitled the jury to draw inferences supplying any lack of evidence directly connecting the petitioner Brading with the specific acts charged in the

1 The Government argues that Brading's conviction on the substantive offenses can be affirmed on the basis of Pinkerton v. United States, 328 US 640, 90 L ed 1489, 66 S Ct 1180, since the record demonstrates that he conspired to defraud Mrs. Joyce and the acts charged in the substantive offenses were acts in furtherance of that design. The Pinkerton case, however, is inapplicable here since the jury was not instructed in terms of that theory. Nye & Nissen v. United States, 336 US 613, 93 L ed 919, 69 S Ct 766.

indictment from the abundant circumstantial evidence offered. The jury was properly charged on this theory.

Headnote 14

There is ample evidence of the petitioners' collaboration and close cooperation in the fraud from which the jury could conclude that Brading aided, abetted, or counseled Pereira in the commission of the specific acts charged. See Nye & Nissen v. United States, supra (336 US at 619). The Court of Appeals has passed on the sufficiency of the evidence to sustain Brading's conviction on this theory. We see no reason to upset the findings of the courts below.

Headnote 15

The petitioners allege that their conviction on both the substantive counts and a conspiracy to commit the crimes charged in the substantive counts constitutes double jeopardy. It is settled law in this country that the commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both. See Pinkerton v. United States, 328 US 640, 643, 644. 90 L ed 1489, 1494, 1945, 66 S Ct 1304, and case cited therein. Only if the substantive offense and the conspiracy are identical does a conviction for both constitute double jeopardy. Cf. Gavieres v. United States, 220 US 338, 55 L ed 489, 31 S Ct 421. The substantive offenses with which petitioners were charge do

Headnote 16

not require more than one person for their commission; either could be accomplished by a single individual. The essence of the conspiracy charge is an agreement to use the mails to defraud and/or to transport in interstate commerce property known to have been obtained by fraud. Pereira's conviction on the substantive counts does not depend on any agreement he being the principal actor. Similarly, Brading's conviction does not turn on the agreement. Aiding, abetting, and counseling are not terms which pre-

Headnote 17

suppose the existence of an agreement. Those terms have a broader application, making the defendant a principal when he consciously shares in a criminal act, regardless of the existence of a conspiracy. Nye & Nissen v. United States, supra (336 US at 620). Thus, the charge of conspiracy requires proof not essential to the convictions on the substantive offenses—proof of an agreement to commit an offense against the United States—and it cannot be said that the substantive offenses and the conspiracy are identical, any more than the two substantive offenses are identical.

Petitioners further contend that there was no evidence that they *agreed* to use the mails in furtherance of the scheme to defraud Mrs. Joyce or that they

Headnote 18

*agreed* to transport stolen property in interstate commerce. It is not necessary that an agreement to use the mails or transport stolen property exists from the inception of the scheme to defraud. If there was such an agreement at any time, it is sufficient. The existence of a conspiracy to defraud Mrs. Joyce is not denied. Pereira obtained a check from the victim for the purchase of an automobile. That check was drawn on a Los Angeles bank by Mrs. Joyce's brokers. When the subject of purchasing the hotel was broached, Mrs. Joyce told Pereira that she would have to have her California broker sell some stocks to obtain the funds for the purchase. When there was a delay in contacting the broker, Brading, as "E. J. Wilson," sent a telegram extending the spurious option for the purchase of the hotel. There is no doubt about Pereira's knowledge that a check on an out-of-state bank would be involved. From what we have said with regard to the substantive offenses, it is also clear that an intent to collect on the check would include an intent to use the mails or to transport the check in interestate commerce. It was certainly not improper to allow the jury to determine from the circumstances

Headnote 19

whether Brading shared Pereira's knowledge and agreed with him as to the use of the only appropriate means of collecting the money. It would be unreasonable to suppose that Brading would be so closely associated with Pereira in the scheme to defraud without knowing the details related to the realization of their common goal. There is no reason for this Court to upset the jury's finding of conspiracy.

For the foregoing reasons, the judgment below is Affirmed.

*Mr. Justice Reed* took no part in the consideration or decision of this case.

*Mr. Justice Minton*, with whom *Mr. Justice Black* and *Mr. Justice Douglas* join, concurring in part and dissenting in part.

That a monumental fraud was perpetrated by the petitioners on Mrs. Joyce in the true fashion of a confidence game cannot be disputed. Such fraud could be punished by the States. For the United States to take cognizance of the offenses, the mails had to be used to carry out the fraud or the check fraudulently obtained must have been carried across state lines. That is what the Government charged. Count one charged that they caused a letter to be mailed from El Paso, Texas, to Los Angeles, California, on June 15, 1951. Count ten charged that on or about the same date they caused the check, in the amount of $35,286.78, to be transported in interstate commerce from El Paso to Los Angeles, knowing it was obtained by fraud. Count 11 charged a conspiracy to commit the substantive offenses.

I would affirm the convictions except as to Brading on the substantive counts. To convict on the substantive counts, the petitioners must have actually used the mails to transport the check from El Paso to Los Angeles. The use may be proved by direct or circumstantial evidence, but it must be proved. Brading must have used, or must have known or from the facts and circumstances be reasonably expected to have known, that Pereira actually would use the mails. United States v. Peoni (CA2d NY) 100 F2d 401, 402. To be guilty of the conspiracy, Brading had only to reasonably anticipate that Pereira might use the mails, and if he did subsequently use them, then Brading is bound.

The elements of the offense under the Mail Fraud statute are (1) a scheme to defraud which (2) reasonably contemplates the use of the mails, and (3) use of the mails in furtherance of the plan. The National Stolen Property Act is violated if (1) one transports securities or money of the value of $5,000 or more in interstate commerce and (2) does so knowing they have been taken by fraud.

Concededly, Brading did not participate directly in the use of the mails to transport the thirty-five thousand dollar check from El Paso to Los Angeles. He can be convicted, if at all, only as an aider and abettor. Nye & Nissen v. United States, 336 US 613, 618, 93 L ed 919, 924, 69 S Ct 766. There is no evidence to establish that he could reasonably have expected that the mails would be used in carrying out the scheme.

Three financial transactions are mentioned by the Court in its opinion. First, the $5,000 transaction. That all took place in Roswell, New Mexico, where Mrs. Joyce cashed a check on a Roswell bank and gave the proceeds to Pereira. No federal offense there. The Cadillac transaction was liquidated by a check received from Los Angeles by Mrs. Joyce and turned over to Pereira, who cashed it in Kansas City, Missouri. Brading was not shown to have known where this money came from, and, more important, it was not proved that that check was mailed, as was done in the case of the third check, for $35,286.78.

Mrs. Joyce arranged for this check, the only transaction upon which the convictions are based by selling securities in Los Angeles. She received the check and turned it over to Pereira in Roswell, New Mexico, from whence he took it to El Paso, and there, on June 15, 1951, after securing Mrs. Joyce's endorsement, caused it to be sent through the mails for collection. The evidence does not show where Brading was at the time these events occurred. He next appeared at Mrs. Joyce's home in Roswell after the completion of the acts constituting the federal crimes, and on June 19, 1951, left with Pereira, ostensibly to see about some oil leases in Texas. The same day Pereira collected the money at the El Paso bank. There is no direct evidence that Brading actual-

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.—s

## OPINIONS OF THE SECRETARY OF JUSTICE

*Continued from page 538)*

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

I

*H. E. Heacock Co., Petitioner-Appellant, vs. National Labor Union et al., Respondents-Appellees, No. L-5577, July 31, 1954, Paras, C.J.*

1. EMPLOYER AND EMPLOYEES; FINDINGS OF FACT OF COURT OF INDUSTRIAL RELATIONS, CONCLUSIVE IN APPEAL BY CERTIORARI. — The findings of fact of the Court of Industrial Relations in an appeal by certiorari are conclusive on the Supreme Court.

2. ID.; BONUS; PAYMENT ON EQUITABLE CONSIDERATION. — For the year 1947 the petitioner paid a bonus of one month salary to all its employees, and for the years 1948 and 1949, realizing necessary profits, it also paid a bonus to its executives and heads of departments, omitting only the low salaried employees. *Held*: Even if a bonus is not demandable for not forming part of the wage, salary or compensation of the employee, the same may nevertheless be granted on equitable considerations.

3. ID.; ID.; ITS CONSIDERATION. — Any extra concession granted by the employer to his employee or laborer is necessarily premised on the need of improving the latter's working conditions to the highest possible level, in return only for the efficient service and loyalty expected from the employee or laborer.

*Perkins, Ponce Enrile* and *Contreras* for the petitioner.

*H. A. Ferrer* for the respondent court.

*Eulogio R. Lerum* for the respondent Union.

DECISION

PARAS, *C.J.*:

The National Labor Union, hereinafter to be referred to as the Union, filed a petition under date of June 26, 1950 in the Court of Industrial Relations against H. E. Heacock Co., hereinafter to be referred to as the Company, praying that the latter be ordered to pay to all its low salaried employees their bonus for the years 1948 and 1949, in an amount equivalent to one month salary for each year, it being alleged in substance that on the occasion of the distribution on April 17, 1948 of the same bonus for the year 1947, the Company promised that said benefit would be granted yearly to the employees, provided sufficient profits were made; that in 1948 and 1949 the Company, notwithstanding available profits, distributed bonus only to its high salaried employees; that upon the Company's failure to accede to the Union's demand for the payment of the stipulated bonus for the years 1948 and 1949, and upon its refusal to submit the matter to the labor-management committee in accordance with the collective bargaining agreement of April, 1949, the employees declared a strike on June 19, 1950.

In its answer, the Company in substance alleged that it had never bound itself to pay an annual bonus and that granted for the year 1947 was purely an act of grace and liberality on the part of the Company; that while the Company made some profits and paid to its executives and chiefs of departments bonuses for the years 1948 and 1949, the same was a voluntary concession to said officials who had received no increases in pay and were not entitled to and did not actually collect compensation for overtime work; that the compensation of the employees was never made to depend wholly or in part upon profits, and all wages to which were set out in the agreement of July 11, 1949, and any other payment or gratuity was entirely within the Company's discretion; that the illegal strike staged by the Union led the Company to suffer damages in the sum of ₱12,000.00.

After hearing, the Court of Industrial Relations, through Judge Jose S. Bautista, rendered a decision in favor of the employees, ordering the Company to pay them one month salary as bonus for the year 1948 and another one month salary for the year 1949. A subsequent motion for reconsideration filed by the Company was denied by the resolution of the Court of Industrial Relations *in banc*, dated July 16, 1951, by a vote of three to two. The instant petition for certiorari was filed by the Company, assailing the decision of the Court of Industrial Relations.

The lower court found that on April 17, 1948, the Company distributed to all its employees a bonus equivalent to their salaries for one month for the year 1947; that the Company realized profits in 1948 and 1949, and although it paid bonus to its high officials and executives for said years, it did not extend the same privilege to any low salaried employee; that the Union duly filed with the Company a protest against such omission, and demanded the payment of the same bonus to all the low salaried employees; that in the protest of May 15, 1950, the Union gave notice that, upon failure of the Company to grant the demand, steps would be taken for the protection of the members of the Union; that upon denial of the Company and its failure to submit the matter to the labor-management committee, as requested by the Union, the employees staged a peaceful strike on June 19, 1950, although they returned to work in obedience to a directive of the court; that the Company in fact made a promise to all its low salaried employees on April 17, 1948, that a bonus of one month salary would be distributed among them yearly, as for the year 1947, as long as the Company would realize sufficient profits.

The Company, however, contends that it had never assumed the obligation of paying the bonus claimed by the Union, and that there is no evidence whatsoever tending to prove such obligation.

It appears that the issues of *The Manila Times* and *The Manila Chronicle* of August 22, 1948 featured a "Heacock Supplement" containing the following statements:

> "The steady growth and enviable reputation of the H. E. Heacock Co., as an institution well known in the Philippines and in the entire Far East for its quality merchandise and courteous service exemplify a modern tenet of progressive employer-employee relationship founded on mutual confidence and good-will.
>
> "The Heacock employees are given all the benefits that can reasonably be expected from the management, Jose Y. Orosa, the firm's first vice-president and assistant general manager, declared. 'For this reason,' he added, 'we have never had the unfortunate experience of seeing our employees go on strike since the company was organized in 1905. And we don't expect to have any strikes.'
>
> "That the sound relationship between the management and the employees redounds to the good of everybody concerned was also pointed out by Mr. Orosa. The employer's goodwill is returned with a spontaneous manifestation of loyalty, cooperation, efficiency and unstinted honesty on the part of the employees, it was further explained.
>
> "The present mutual confidence and good-will of Heacock's personnel is maintained for the ultimate benefit of the buying public, Mr. Orosa said. Employees who are treated right have sufficient reasons to give their employers full cooperation so that in the final analysis, the customers are the recipients of the rewards of such cooperation.
>
> "Since the H. E. Heacock Co. resumed business after the war, 87 of its 200 employees have been given salary increases, Mr. Orosa revealed. There are other meritorious cases which deserve similar consideration in due time, it was pointed out.
>
> "One of the most helpful and progressive steps ever taken by a firm like Heacock's is the setting up of a special fund for which the employees may draw a cash loan equivalent to a half-month salary and payable within 60 days. This privilege, it was explained, is a boon to those employees who may be forced

by circumstances beyond their control to meet emergency needs.

"Another benefit extended to Heacock employees is a 25 per cent overtime pay in addition to their regular pay. In other words, the employees are paid 25 per cent for all hours of work beyond the eight-hour limit fixed by law, it was also stressed. This makes it fair and profitable for the employee of this firm to render overtime service whenever the need arises, and that generally is during special sales and the Christmas season.

"At the end of every year, Mr. Orosa declared, the Heacock employees enjoy a profit-sharing privilege when they are given bonuses by the management, the amount depending on the profits realized during that year. This progressive policy, he pointed out, makes for a genuine interest on the part of the employees to work honestly and sincerely for the good of the company — a company which is theirs in a sense.

"Every year the employees of Heacock's are given 15 days vacation leave and 15 days sick leave with pay. They are also entitled to free medical and dental service rendered by the company physician and dentist.

"The management of the H. E. Heacock Co. firmly believes that athletics fosters fraternity, cooperation and 'a sound mind in a sound body.' With this end in view, the firm formed an athletic association whose membership is open to all employees of the company. Followers of the basketball game in this country are familiar with the reputation of the Heacock quintet which has time and again garnered laurels in the local sporting world.

"Mr. Orosa revealed that the H. E. Heacock Co. is a bona fide member of the Manila Industrial and Commercial Association (MICA). Such membership, he said, assures both the management and the employees with a solid foundation for profitable and sound business relationship. Problems affecting both parties which may arise are met and solved with open minds on common grounds. Fortunately for Heacock's, 40 years of public service have proved that the management and the employees have joined hands in mutual confidence and good-will.

"'Heacock's has a splendid reputation,' Mr. Orosa declared, 'and this has been built up by the employees and the government. We have lived up to the expectation of the public. We continue to do so, and to better serve our customers, we are opening our new air-conditioned store this week.'"

The same publication was carried in the issue of *The Manila Daily Bulletin* of August 23, 1948. The Union presented oral evidence tending to show that the President and General Manager of the Company, Donald O. Gunn, was the one who made the promise of April 17, 1948, to pay to all its employees yearly one-month salary as bonus, provided there were profits. This testimony is controverted by Mr. Gunn; but the lower court considered, in addition to such oral evidence, the publication of the "Heacock Supplement" on the occasion of the opening of the new store of the Company in Dasmariñas Street, Manila, as conclusive proof of its commitment to pay the bonus in question.

The "Heacock Supplement", in the portion pertinent to the case at bar, contained the following paragraph: "At the end of every year, Mr. Orosa declared, the Heacock employees enjoy a profit-sharing privilege when they are given bonuses by the management, the amount depending on the profits realized during the year. This progressive policy, he pointed out, makes for a genuine interest on the part of the employees to work honestly and sincerely for the good of the company — a company which is theirs in a sense." These statements are denied by Mr. Orosa, Vice-President and Assistant General Manager of the Company; and attorneys for the latter argue that Guztavo M. Torres, Assistant Manager of the Personnel Service Advertising Bureau which was then handling the advertising account of the Company, prepared the "Heacock Supplement", and, testifying on his interview with Mr. Orosa, declared that he was not certain as to the nature of the bonus talked about, and that he thought that it referred to the Christmas bonus which the Company gives to its employees at the end of every year, and that this was what he had in mind when he wrote the article in question. The Court of Industrial Relations gave no weight to the denial of Mr. Orosa, and observed that the latter was aware, or should have read and known the Supplement in question, and his failure to make any correction or denial of its contents shortly after its publication, negatives the stand now taken by him.

The Company also points out that both Mr. Gunn and Mr. Orosa could not legally bind the Company which can only act through its board of directors, and there is nothing in the record to show that the board promised to pay any yearly bonus or ratified the alleged promise made by Mr. Gunn or Mr. Orosa. Counsel for the Union, however, observes that notwithstanding the publication of the "Heacock Supplement" which undoubtedly must have been noticed by all the officials of the Company, no correction or denial ever came from its board of directors which, by such silence, must be deemed as having ratified the commitment of Mr. Gunn and the statement of policy featured in the "Heacock Supplement".

The Court of Industrial Relations also invoked, as another circumstance confirming the promise made by Mr. Gunn to pay an annual bonus to all the low salaried employees of the Company, the following passage contained in his letter of February 19, 1949, addressed to the Union: "The company desires to call your attention to the fact that the salaries, bonuses (on plural por referirse al bono de Navidad y al bono por razon de utilidades) paid vacation leaves, paid sick leave, medical and dental services, and other privileges and facilities, accorded to its employees are the highest in the city of Manila for comparable positions and, as a consequence, we cannot consider any general increase in wages at the present time without doing violence to the stability of the labor situation here, of which you are fully aware."

Attorneys for the Company have exerted great efforts in disputing the findings of the lower court, but we are not in a position to pass upon, much less alter, said findings which are conclusive in this instance. Even so, the decision favorable to the Union may further be predicated upon the case of Philippine Education Company, Inc. vs. Court of Industrial Relations et al., G. R. No. L-5103, December 24, 1952, in which we held that, even if a bonus is not demandable for not forming part of the wage, salary or compensation of the employee, the same may nevertheless be granted on equitable considerations. It appears herein that for the year 1947 the Company paid a bonus of one-month salary to all its employees, and for the years 1948 and 1949, realizing necessary profits, it also paid a bonus to its executives and heads of departments, omitting only the low salaried employees. The payment of the bonus in 1947 already generated in the minds of all the employees the fixed hope of receiving the same concession in subsequent years, and on the ground of equity they deserved to be paid the bonus for the years 1948 and 1949, when the Company admittedly realized enough profits. The Company insists that its high officials were given bonus for 1948 and 1949 because they had never been granted any salary raise or paid for any overtime work. This is, however, answered by the Union which alleges that no salary increase or overtime pay was necessary for the high officials of the Company, since they have already been receiving adequate compensation.

The Company also maintains that no valid obligation to pay the bonus in question could arise, because there was no consideration therefor. It is sufficient to state that any extra concession granted by the employer of his employee or laborer is necessarily premised on the need of improving the latter's working conditions to the highest possible level, in return only for the efficient service and loyalty expected from the employee or laborer.

Wherefore, the decision of the Court of Industrial Relations is hereby affirmed, and it is so ordered with costs against the petitioner, H. E. Heacock Co.

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

## II

*Juan Galanza, Plaintiff-Appellee, vs. Sotero N. Nuesa, Defendant-Appellant, No. L-6628, August 31, 1954, Paras, C. J.*

PURCHASE AND SALE; RIGHT OF REPURCHASE; STIPULATION ON THE PERIOD FOR LEGAL REDEMPTION. — The parties to a sale with *pacto de retro* may stipulate on the period for redemption, unaffected by registration or by section 119 of Commonwealth Act No. 141.

*Alejo Mabanag* and *Mauro Verzosa* for defendant and appellant.

*Fidel Sor. Mangonon* for plaintiff and appellee.

### DECISION

PARAS, *C.J.*:

The plaintiff Juan Galanza owned a parcel of land covered by original certificate of title No. I-2247 issued on July 23, 1934, and acquired as a homestead. On September 7, 1940, he sold said land to the defendant Sotero N. Nuesa with a right of repurchase within 5 years from the date of execution of the deed of sale. The original certificate of title No. I-2247 was not cancelled until July 17, 1947, when a transfer certificate of title No. T-172 was issued in the name of the defendant. On May 19, 1951, the plaintiff instituted in the Court of First Instance of Isabela a complaint against the defendant, praying that the latter be ordered to reconvey the land to the plaintiff in accordance with Section 119 of Commonwealth Act 141. In his answer, the defendant set up the special defense that the plaintiff had failed to exercise his right of redemption within the period stipulated in the deed of sale executed on September 7, 1940, and that therefore the title to the property had already consolidated in the defendant. The parties entered into an agreement of facts, and the Court of First Instance of Isabela, on June 23, 1952, rendered a decision ordering the defendant to convey to the plaintiff the land in question, upon payment by the plaintiff to the defendant of the sum of ₱1,328.00 as the repurchase price, and ordering the Register of Deeds of Isabela to cancel transfer certificate of title No. T-172 and issue another in the name of the plaintiff, after the proper deed of reconveyance shall have been presented for registration, without pronouncement as to damages and costs. From this decision the defendant has appealed.

The question that arises, as expressly framed in the stipulation of facts is "whether the period to repurchase the land in question shall be counted from the execution of the deed of sale with right to repurhcase or from the issuance of transfer certificate of title of the herein defendant." The trial court held that the 5-year period of repurchase should be computed from the day the deed of sale with *pacto de retro* was registered on January 17, 1947, applying section 50 of the Land Registration Law which provides that "the act of registration shall be the operative act to convey and affect the land." In his brief, counsel for the plaintiff-appellee admits that the latter's right of repurchase under the deed of sale executed on September 7, 1940, had already expired, but it is contended that the present action is based on the right of repurchase granted by section 119 of Commonwealth Act 141 which provides that "every conveyance of land acquired under the free patent or homestead provisions, when proper, shall be subject to repurchase by the applicant, his widow, or legal heirs, within a period of 5 years"; and that the term "conveyance" imports the transfer of legal title, which in the present case took place only after the issuance of the transfer certificate of title in the name of the defendant-appellant.

In our opinion, appellant's title had already become absolute, because of appellee's failure to redeem the land within five years from September 7, 1940. Both under section 50 of the Land Registration Law and under section 119 of Commonwealth Act 141, the owner of a piece of land is neither prohibited nor precluded from binding himself to an agreement whereby his right of repurchase is for a certain period starting from the date of the deed of sale. Indeed section 50 of the Land Registration Law provides that, even without the act of registration, a deed purporting to convey or affect registered land shall operate as a contract between the parties. The registration is intended to protect the buyer against claims of third parties arising from subsequent alienations by the vendor, and is certainly not necessary to give effect, as between the parties, to their deed of sale. In the case of Carillo vs. Salak, G. R. No. L-4133, May 13, 1932, we made the following applicable pronouncement: "While we admit that the sale has not been registered in the office of the register of deeds, nor annotated on the torrens title covering it, such technical deficiency does not render the transaction ineffective nor does it convert it into a mere monetary obligation, but simply renders it ineffective against third persons. Said transaction is, however, valid and binding against the parties.

In the stipulation of facts, it is provided that in case judgment be in favor of the defendant, "the plaintiff will pay the amount of FIVE HUNDRED PESOS (₱500.00) to the defendant in concept of damages suffered." Even so, we are inclined to disallow appellant's claim for damages, in the same manner that, in the appealed decision, no damages were awarded in favor of the plaintiff in the absence of evidence to show how said damages accrued.

Wherefore, the appealed decision is hereby reversed and the complaint dismissed, without pronouncement as to costs.

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

*Montemayor* reserved his vote.

BENGZON, *J. concurring*:

The idea occurs to me that the five-year period under section 119, C.A. 141 did not begin to run until *after expiration* of the conventional 5-year period of redemption. I should like to mull it over. Nevertheless I concur in this opinion, now because anyway the plaintiff allowed more than ten years to elapse before exercising his rights (Sept., 1940 to May 1951).

## III

*Esperanza V. Buhat, et al., Plaintiffs-Appellants, vs. Rosario Besana, Etc., et al., Defendants-Appellees, No. L-6746, August 31, 1954, Paras, C. J.*

ACTIONS; PRESCRIPTION; MORTGAGE; REGISTRATION OF MORTGAGE DOES NOT MAKE IT IMPRESCRIPTIBLE. —The fact that a mortgage is registered does not make action to foreclose it imprescriptible.

*Vicente Abalajon* for plaintiffs and appellants.

*Santiago Abella Vito* for defendants and appellees.

### DECISION

PARAS, *C. J.*:

On May 31, 1924, Jose M. Besana mortgaged his undivided one-half share in lot No. 1406 of the cadestral survey of Panay in favor of Luis Bernales, to secure an indebtedness of ₱900.00, payable within six years from said date. On October 27, 1926, original certificate of title No. RC-1354 (10255) was issued in the name of Jose M. Besana and Rosario Besana, brother and sister, covering lot No. 1406 in undivided equal shares; and on said certificate the mortgage in favor of Luis Bernales was noted. Jose M. Besana died and his portion passed to his surviving sister, Rosario Besana. Luis Bernales also died and his mortgage credit against Jose M. Besana was inherited by Antonio Bernales who in turn transferred the same to the herein plaintiffs, Esperanza V. Buhat and Mauro A. Buhat. Rosario Besana sold her portion to Manuel B. Bernales who, on June 30, 1950, conveyed it to the plaintiffs. As the indebtedness above referred to remained unpaid, the present action was instituted in the Court of First Instance of Capiz by the plaintiffs against Rosario Besana and her husband

Lorenzo Contreras on December 6, 1952, for the foreclosure of the mortgage of May 31, 1924. The defendants Rosario Besana and Lorenzo Contreras filed a motion to dismiss the complaint, on the ground that plaintiffs' cause of action had prescribed, the complaint having been filed more than ten years from May 31, 1930 (in fact some 22 years after the obligation had become due and demandable). On May 6, 1953, the Court of First Instance of Capiz issued an order dismissing the case without costs. The plaintiffs have appealed.

Appellants' contention is that, as the mortgage was registered, the action to foreclose did not prescribe, because section 48 of the Land Registration Act, No. 496, provides that "No title to registered owner shall be acquired by prescription or adverse possession." This is clearly without merit. The citation speaks of the title of the "registered owner" and refers to prescription or adverse possession as a mode of acquiring ownership, the whole philosophy of the law being merely to make a Torrens title indefeasible and, without more, surely not to cause a registered lien or encumbrance such as a mortgage — and the right of action to enforce it — imprescriptible as against the registered owner. The important effect of the registration of a mortgage is obviously to bind third parties.

Wherefore, the appealed order is affirmed, and it is so ordered with costs against the appellants.

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

## IV

*Ben L. Chuy, Demandante y Apelado, contra Philippine American Life Insurance Company, Demandada y Apelante, G. R. No. L-6672, Junio 29, 1954, Pablo, M.*

1. LEY DE SEGURO; SEGUROS DE VIDA; LA CERTIFICACION DE MEDICOS DE LA COMPAÑIA ASEGURADORA PREVALECE CONTRA LA DECLARACION NO CORROBORADA DE OTRO MEDICO QUE NO ES DE LA COMPAÑIA. — Después de examen físico por médicos de la compañía aseguradora, se expidieron a Dee Se pólizas de seguro de vida. Las primas correspondientes fueron pagadas debidamente. Después de un año, Dee Se falleció de cancer. Su beneficiario reclamó el pago del importe de las pólizas. Después de siete meses de trámite, la cosa aseguradora le envío una carta dándole cuenta de que rescindía los contratos de seguro, y se negaba a pagar el importe de las polizas y le envió dos cheques que venian a constitutir la restitución de las primas pagadas con sus intereses. La negativa de la casa aseguradora a pagar el importe de las polizas se fundaba en la declaración de otro medico que no era de la compañía aseguradora, de que Dee Se, bajo el nombre de José Dy, había sido tratado por aquel por estar enformo de cancer por más de tres años de su muerte. *Se declara*: Que las opiniones de los doctores de la casa aseguradora son de más peso que la declaración no corroborada de otro medico que no es de dicha compañía. Los medicos de las casas aseguradoras son los que debian tener interes en saber el verdadero estado de salud del solicitante, y si expidieron certificados de buena salud será porque estaban convencidos de la verdad de lo que certificaban. No hay el menor indicio de que ellos hayan obrado de mala fe. No existe en autos ninguna prueba de que el asegurado haya engañado a la casa aseguradora haciendo creer que él gozaba de buena salud cuando en realidad estaba enfermo de cancer.

2 ABOGADOS; HONORARIOS; SENTENCIA POR HONORARIOS CONTRA LA PARTE QUE PERDIO EL ASUNTO; LA MANIFESTA Y EVIDENTE MALA FE, DEBE PROBARSE. — Se reclama también contra la casa aseguradora honorarios de abogado que asciende a ₱10,000. *Se declara*: "In the absence of stipulation, attorney's fees and expenses of litigation, other than judicial costs, cannot be recovered, except: . . . (5) Where the defendant acted in gross and evident bad faith in refusing to satisfy the plaintiff's plainly valid, just and demandable claim" (Art. 2208, Cód. Civ. de Filipinas). La casa aseguradora no obro con manifesta y evidente mala fe al no pagar el importe de la poliza. El tramite de siete meses demuestra la precaución que ha tenido en cerciorarse de si Dee Se era el mismo José Dy que había sido información de dicho médico, cualquiera que estuviese en lugar de la casa aseguradora hubiera hecho lo mismo. Si después de una vista larga en que declararon varios doctores, el Juzgado ha llegado a la conclusión de que Dee Se no era el mismo José Dy, no se debe deducir necesariamente que la demandada ha obrado con abierta y evidente mala fe.

*J. A. Wolfson* and *Manuel Y. Macias* por el demandado y apelante.

*Primicias, Abad, Mencias* and *Castillo* por el demandante y apelado.

### DECISION

PABLO, *M.*:

Ben L. Chuy presentó una demanda contra la Philippine American Life Insurance Company (que se denominará PHILAMLIFE en el curso de esta decisión) en el Juzgado de Primera Instancia de Pangasinán, causa No. 12033, pidiendo que se condenase a la demandada a pagarle la suma de ₱46,008.75 con su interés legal desde el 22 de junio de 1951 hasta su completo pago, más la cantidad de ₱10,000 en concepto de daños. También se presentó otra demanda por Ben L. Chuy y Lee Sin contra la Lincoln National Life Insurance Company, causa No. 12034, en el mismo juzgado, reclamando el pago de igual cantidad con igual causa de acción.

A petición de ambas partes, las dos causas se vieron conjuntamente, sometiendo un convenio de hechos además de presentar otras pruebas. Después de considerar las pruebas presentadas, el Juzgado dictó sentencia concediendo la reclamación de los demandantes. Las dos compañías aseguradoras apelaron; pero antes de la aprobación del expediente de apelación, la Lincoln National Life Insurance Company, considerando tal vez inútil todo esfuerzo, pagó a los demandantes la cantidad de ₱50,000, abandonando la apelación. Por eso solamente se decidirá por este Tribunal la apelación de la Philamlife.

Eutiquiano P. Nava, un agente asegurador de la Lincoln National Life Insurance Company, consiguió convencer a Dee Se para asegurarse en ₱25,000; los doctores G Oreta-Dizon y Godofredo A. Antonio le examinaron y expidieron el certificado médico correspondiente, que fué aprobado por el director médico de la Lincoln National Life Insurance Company. La solicitud de Dee Se fué aprobada y la póliza No. 812 254 por la suma de ₱25,000 se expidió en 8 de mayo de 1950; otra póliza No. 812 411 por igual cantidad se expidió a Dee Se en 10 de junio de 1950 después de cumplidas todas las formalidades indispensables.

Paula Dolores Sendaydiego, agente de la Philamlife, consiguió también convencer a Dee Se de que se asegurarse en su compañía en la suma de ₱25,000. El Dr. Braulio M. Venecia examinó a Dee Se y su certificado médico fué aprobado por recomendación del doctor de la oficina central. En 2 de mayo de 1950 se expidió a Dee Se la póliza No. 97310 por la suma de ₱25,000. Por medio de la agente Paula Dolores Sendaydiego, Dee Se otra vez solicitó otra póliza por la suma de ₱25,000. El Dr. Ricardo B. Villamil le examinó y expidió el certificado correspondiente que fué aprobado por el Dr. Valenzuela, director médico de la Philamlife. Se aprobó la solicitud y se expidió a Dee Se otra póliza No. 101840 por la suma de ₱25,000 en 18 de julio de 1950. Las primas de las cuatro pólizas fueron pagadas debidamente.

En 22 de junio de 1951 Dee Se falleció de cáncer en la región naso-faríngea en el Hospital Provincial de Pangasinán, situado en la ciudad de Dagupan; su beneficiario, que es el demandante en esta causa, reclamó el pago del importe de las dos pólizas. Después de siete meses de trámite, la demandada, con fecha 24 de enero de 1952, le envió una carta dándole cuenta de que rescindía los dos

contratos de seguro; se negaba a pagar el importe de las dos pólizas y le envió dos cheques, uno por ₱1,723.58 y otro de ₱2,570.90 contra el Bank of America, cantidades que venían a constituir la restitución de las primas pagadas, con sus intereses.

La demandada, en apelación, alega que el juzgado erro: (1) al declarar que José Dy, el paciente del Dr. Chikiamco, no era el asegurado Dee Se; (2) al declarar que Dee Se gozaba de buena salud al tiempo de solicitar su seguro y que no había hecho ninguna manifestación falsa en su solicitud de seguro; (3) al no declarar que dichas dos pólizas de seguro eran nulas y de ningún valor; y (4) al conceder al demandante honorarios de abogado.

La demandada contiende que Dee Se, bajo el nombre de José Dy, había sido tratado por el Dr. Paterno S. Chikiamco por estar enfermo de cáncer desde el 19 de abril de 1948 hasta el 20 de enero de 1951, fundandose en la declaración del mismo doctor, el cual declaró así:

> "I think I have a clear memory of his features because—except when I was away for six months in the State in 1949—most of the treatment was done by me although some of the records are jotted down by my assistant." (Exhibit "17", page 23.)
>
> "I remember very well that he looks the same as the patient by the name of Jose Dy." (Exhibit "17", page 24.)

¿Es suficiente la declaración no corroborada del Dr. Chikiamco para concluir que el asegurado Dee Se fué su paciente José Dy?

Este testimonio del Dr. Chikiamco es incompatible con el de varios doctores. El Dr. Braulio M. de Venecia, médico de la Philamlife, asegura que al tiempo en que le examinó, Dee Se gozaba de buena salud; que le había conocido por unos dos años porque era su vecino y que trabajaba en una tablería; que al tiempo en que lo llamó para examinarle, Dee Se acababa de venir de su trabajo con la tablería, un trabajo árduo, y estaba aún sudando cuando él le examinó; si Dee Se — asegura el Dr. de Venecia — hubiera estado sufriendo de cáncer y había estado bajo un tratamiento médico por más de tres años, no habría podido afrontar los rigores del trabajo en una tablería.

Dee Se había sido examinado, además del Dr. de Venecia, por el Dr. Villamil de la Philamlife y los doctores Oreta-Dizon y Godofredo A. Antonio de la Lincoln National Life Insurance Company y los certificados médicos que ellos expidieron fueron aprobados por los directores médicos de las dos compañías demandadas.

El Dr. Amado Tan Lee declaró que había tratado a Dee Se en 28 de diciembre de 1950 y enviadole al Dr. Sevilla en 13 de febrero de 1951. (Exh. E.)

El Dr. Manuel D. Peñas declaró que en 18 de febrero de 1951 había hecho un exámen hispatológico de dos especímenes sacados de la nasofaringe de Dee Se por recomendación del Dr. Sevilla.

El Dr. Carlos L. Sevilla declaró que había tratado por primera vez a Dee Se en 13 de febrero de 1951 por recomendación del Dr. Amado Tan Lee. Creyendo que padecía de cáncer, le envió al Dr. Valencia en la misma fecha (13 de febrero de 1951) para que se lo sometiera a rayos X; dos días después él sacó especimenes de la nasofaringe para ser examinados por el Dr. Peñas, quien hizo constar en su informe que halló "Granulation tissue with Subacute and Chronic Inflammation (non-specific)."

Si el Dr. Sevilla fué el que envio a Dee Se al Dr. Chikiamco en 1951, entonces debía ser otro y diferente el paciente a quien el Dr. Chikiamco había estado tratando con el nombre de José Dy desde el 19 de abril de 1948 hasta el 20 de enero de 1951. Si Dee Se y el Dr. Chikiamco eran ya antiguos conocidos, ¿qué necesidad tenía Dee Se de una recomendación del Dr. Sevilla? Esta recomendación llevada por Dee Se al Dr. Chikiamco nos convence que Dee Se era el nuevo paciente y no el antiguo: que Dee Se y José Dy eran dos distintas personas.

Cuando acudió a los Drs. Lee y Sevilla y enviado al Dr. Chikiamco, Dee Se ya estaba asegurado. Si él solicitó el seguro para medrar o favorecer a sus beneficiarios haciendo creer que gozaba de buena salud cuando en realidad ya padecía de cáncer por tres años, ¿por qué entregó al Dr. Chikiamco la recomendación (Exh. 2) del Dr. Sevilla? ¿Para que se descubriese más tarde su impostura? Eso es contrario al sentido común. Debía de haber destruido la recomendación y proponerse no ver ya al Dr. Chikiamco.

El tratamiento de José Dy de cerca de tres años no se había hecho exclusivamente por el Dr. Chikiamco, porque había estado fuera de Filipinas por seis meses y la Dra. Carmen Chikiamco, de la misma clínica, trató al paciente en lugar de aquél. Es extraño que el testimonio de ella — que hubiera sido una excelente corroboración — no se haya presentado ante el juzgado sin explicar la razón.

El Dr. Chikiamco, según él, fué honrado con un *lauriat* por José Dy, su paciente, en 26 de diciembre de 1950; pero existe prueba en autos de que Dee Se estaba en Dagupan en dicho día y salió para Manila el 27 después de las fiestas de Dagupan.

La declaración del Dr. Benigno Parayno, médico residente del Hospital Provincial de Pangasinán, de que la enfermedad de Dee Se, (cáncer en la región nasofaríngea) debía haber existido entre cuatro y seis meses antes de su muerte en 22 de junio de 1951 apoya las opiniones de los cuatro doctores de las casas aseguradoras.

Las opiniones de estos cuatro doctores, las de dos directores médicos de las mismas casas de seguros, las de los Drs. Lee, Sevilla, Peñas y Parayno, son de más peso, a nuestro juicio, que la declaración no corroborada del Dr. Chikiamco.

Los cuatro médicos de las casas aseguradoras son los que debían tener interés en saber el verdadero estado de salud del solicitante, y si expidieron certificados de buena salud será porque estaban convencidos de la verdad de lo que certificaban. No hay el menor indicio de que ellos hayan obrado de mala fe. No existe en autos ninguna prueba de que Dee Se haya engañado a las casas aseguradoras haciendo creer que él gozaba de buena salud cuando en realidad estaba enfermo de cáncer. La mala fe debe probarse.

Creemos que el juzgado inferior no erró al concluir que Dee Se y José Dy no eran una misma persona y que Dee Se gozaba de buena salud al solicitar su seguro. Como no existe prueba de que Dee Se había empleado fraude y engaño para obtener las dos pólizas de seguro, fuerza es concluir que el juez *a quo* no cometió el tercer error atribuido a él.

En cuanto al cuarto error, el nuevo Código Civil dispone que "In the absence of stipulation, attorney's fees and expenses of litigation, other than judicial costs, cannot be recovered, except: x x x (5) Where the defendant acted in gross and evident bad faith in refusing to satisfy the plaintiff's plainly valid, just and demandable claim;" (Art. 2208, Código Civil de Filipinas.)

En el caso presente, creemos que la demandada no obró con manifiesta y evidente mala fe al no pagar el importe de las dos pólizas. El trámite de siete meses demuestra la precaución que ha tenido en cerciorarse de si Dee Se era el mismo José Dy que había sido tratado por el Dr. Chikiamco por cerca de tres años. Teniendo a la vista la información del Dr. Chikiamco, cualquiera que estuviese en lugar de la Philamlife hubiera hecho lo mismo. Si, después de una vista larga en que declararon varios doctores, el Juzgado ha llegado a la conclusión de que Dee Se no era el mismo José Dy, paciente por tres años del Dr. Chikiamco, no se debe deducir necesariamente que la demandada ha obrado con abierta y evidente mala fe. Creemos que la decisión del tribunal inferior, condenando a la demandada a pagar ₱10,000 para honorarios de abogado, no está justificada: el demandante es quien debe pagarlos a su abogado.

Se revoca la sentencia apelada en cuanto condena a la demandada a pagar ₱10,000 como honorarios de abogado, y se confirma en todo lo demás.

*Paras, C.J., Bengzon, Montemayor, Reyes; Jugo; Bautista Angelo; Labrador y Concepción, J.J.*, conformes.

*Padilla, J.*, took no part.

*Eugene Arthur Perkins, Plaintiff-Appellee, vs. Benguet Consolidated Mining Company, et al., Defendants; Benguet Consolidated Mining Company, Defendant-Appellant, Nos. L-1981, L-1982, May 28, 1954, Pablo, J.*

1. DECISIONS; EFFECT OF DECISION OF A FOREIGN COURT AGAINST A DECISION OF A COURT IN THE PHILIPPINES. — The doctrine of Coke (Coke on Littleton, 3255) "that where there are two conflicting judgments on a claim or demand . . . The two judgments neutralize each other and both parties may assert their claims anew," is not applicable in the present case. The litigants, whether they are citizens or foreigners, should respect the decisions of Philippine Courts; but if they choose to resort to a foreign court, asking for a remedy that is incompatible with the execution of a decision obtained in the Philippines and obtain a decision that is adverse, they should not be permitted to repudiate the decision of the foreign court and to ask the enforcement of the decision of the Philippine court which they have abandoned. To permit them to litigate in that manner is contrary to the order and public interest in the Philippines because it disturbs the orderly administration of law.

2. ID.; COMMENCEMENT OF A NEW CASE ABROAD, ABANDONING THE DECISION OF A PHILIPPINE COURT. — "One who subjects himself to the jurisdiction of a Court, even where he would not otherwise be subject to suit, becomes subject to any valid claim asserted against him directly relating to the subject matter of his voluntarily initiated proceeding."

3. ID.; ID.; THE CASE OF QUERUBIN VS. QUERUBIN NOT APPLICABLE. — The case of Querubin versus Querubin (L-3692, July 19, 1950), is not applicable in the present case. In the present case the decision of the New York court was not obtained by Mrs. Perkins behind the back of the plaintiff; on the contrary, that decision was rendered by virtue of the complaint filed by Mr. Perkins, he was the plaintiff, the initiator of the case in which was discussed for the second time the owner of the 24,000 shares and, abandoning the decision of the court of Manila, he asked that said shares be declared his exclusive property. After the trial in which the parties had ample opportunity to be heard, decision was rendered declaring Mrs. Perkins owner of the shares. This decision is final between the two of them. The plaintiff has no right to impugn said decision rendered in a case commenced by him before a Court in New York where plaintiff and defendant are citizens.

4. ID.; ID.; DISTINCTION BETWEEN EXECUTION OF FOREIGN DECISION AND TRANSPOSING OF THE SAME AS RES JUDICATA. — There exists a difference between asking for the enforcement of foreign judgment in the Philippines and that of preventing the defense of *res judicata*. To order the enforcement of a foreign decision implies a direct act of sovereignty; to recognize the defense of a judicial cause only the spirit of justice enters; hence Sections 14 and 48-a of Rule 39. do not require that there be a special reason in order that the defense of *res judicata* may be accepted as required in Sec. 47 which we abolished by the resolution of August 9, 1946. The reason is simple; the execution of *res judicata* is not asked for as the enforcement of a foreign decision is asked; it is solely presented as a defense against an action.

*Claro M. Recto & Perkins, Ponce Enrile, Contreras & Gomez* for the plaintiff-appellee.

*Ross, Selph, Carrascoso & Janda* for the appellant.

RESOLUCION

PABLO, *M.*:

El demandante pide la reconsideración de la decisión sosteniendo que no abandonó la sentencia que él había obtenido en la causa tramitada en los Tribunales de Manila, porque él había acudido a los de Nueva York para pedir precisamente que se ejecutase dicha sentencia. La moción de reconsideración dice:

"The only purpose of his New York action was to enforce his final Philippine judgment. x x x (pág. 12.)

x x x x x x

"All that plaintiff sought by his complaint in the New York suit was to enforce the final judgment of the Philippine courts, by securing the return of the certificates, the ownership of which had already been determined by the said judgment, x x x.

"Plaintiff, in pursuing the New York suit, far from having the intention of abandoning the rights granted him under the Philippine judgments, sought to enforce them, x x x." (págs. 13-14.)

La demanda enmendada que se presentó en Nueva York habla por sí misma. Contiende dos causas de acción: en la primera, el demandante alega hechos que dieron lugar a que se dictase una decisión en su favor por los tribunales de Filipinas en que se declaraba que las 24,000 acciones de la Benguet Consolidated Mining Company eran bienes gananciales del demandante y su esposa, y no propiedad exclusiva de Mrs. Perkins; en que se la ordenaba que rindiera cuenta de los bienes gananciales que estaban en su poder y que los entregase al demandante; y que, en vez de cumplir dicha sentencia, ella huyó de Filipinas y depositó las acciones en poder de la Guaranty Trust Company of New York. Como segunda cause de acción, el demandante alega hechos que tienden a establecer que las 24,000 acciones de la Benguet Consolidated Mining Company son de su exclusiva propiedad y pedía lo siguiente:

"Wherefore, this plaintiff demands judgment against the defendants:

"1. Adjudging and declaring the plaintiff herein to be the true and lawful owner of said certificates numbered 1484, 1595, 2176, 2238, 2773, 2780 and 2781 of stock of said Benguet Consolidated Mining Company.

"2. Permanently enjoining and restraining the said defendants, and each of them, from delivering, assigning or transferring said twenty-four thousand (24,000) shares of Benguet Consolidated Mining Company stock to any other person except to the plaintiff herein.

"3. Directing the said defendants, and each of them, to deliver to the plaintiff herein the said twenty-four thousand (24,000) shares of Benguet Consolidated Mining Company stock.

"4. Requiring the said defendants, and each of them, to account to the plaintiff herein and to pay over to said plaintiff any and all dividends which have been or may be received by either of them upon said twenty-four thousand (24,000) shares of Benguet Consolidated Mining Company stock, and for the costs and disbursements of this action, together with any other and further relief as to the Court may seem just and proper." (Exhibit A-64, págs. 20-21.)

Como se ve, el demandante no pidió la entrega a él, como marido o administrador de los bienes gananciales, de las 24,000 acciones; no pidió que se condenase a Mrs. Perkins y la Guaranty Trust Co. a entregarle las acciones en cumplimiento de la sentencia del Tribunal de Manila: lo que pidió fué (1) que fuese declarado dueño legal de las 24,000 acciones de la Benguet Consolidated Mining Company; (2) que se prohibiese a los demandados a entregarlas o trasferirlas a cualquiera persona; (3) que las mismas acciones fuesen entregadas a él (como dueño indudablemente y no como administrador); y (4) que los demandados rindiesen cuenta de los dividendos de dichas acciones.

De acuerdo con la primera causa de acción y la decisión obtenida por el demandante en Manila, él era solamente condueño de las 24,000 acciones, o propietario de la mitad de las mismas, con derecho a poseer todas ellas como administrador de los bienes gananciales. Cuando pidió en su demanda enmendada que fuese declarado dueño de las 24,000 acciones, abandonó necesariamente la sentencia que declaraba que dichas acciones eran bienes gananciales; al pedir que fuese declarado dueño legal de las acciones, abrió de nuevo el pleito sobre la propiedad de dichas acciones, considerando inútil y de

ningún valor la decisión de los tribunales de Manila. Que él abandonó dicha decisión es evidente; él pidió que fuese declarado dueño de las 24,000 acciones; en vez de pedir que se ordenase por el Tribunal de Nueva York el cumplimiento y ejecución de la sentencia que él había obtenido en Filipinas. El mismo, con su demanda enmendada suscitando de nuevo la propiedad de las acciones; deshizo dicha decisión, implícitamente pidió su revocación para que pudiese obtener del Tribunal de Nueva York una decisión declarandole dueño legal de las acciones. O estas acciones son gananciales, o son de la exclusiva propiedad del demandante: no pueden ser gananciales y, al mismo tiempo, de la propiedad exclusiva del demandante. Si son gananciales, no pueden ser del demandante, y si son de su exclusiva propiedad, entonces rechazaba, o por lo menos negaba la validez de la decisión de los tribunales de Filipinas: sostenía entonces que él era el único dueño de las 24,000 acciones. Si el objeto del demandante al acudir a los tribunales de Nueva York era solamente conseguir la posesión de las acciones, "the ownership of which had already been determined by said judgment" (de Filipinas), ¿por qué no lo pidió así en su demanda enmendada en vez de pedir que sea declarado dueño de las mismas? Si en su demanda enmendada en Nueva York no hubiera el demandante pedido más que el cumplimiento de la decisión del Tribunal de Manila, sin suscitar de nuevo la cuestión de la propiedad de las acciones y el Tribunal de Nueva York hubiese dictado una decisión contraria a la del Tribunal de Filipinas, esté Tribunal probablemente no titubearía en no honrar esa nueva decisión y haría cumplir la primera. Y así la Sra. de Perkins, a espaldas de sumarido, reclamando la propiedad de las acciones en Nueva York, hubiera obtenido sentencia a su favor, este Tribunal indudablemente no tendría ningún reparo en ignorar tal decisión y, a petición de parte, haría cumplir la decisión dictada por el Tribunal Filipinas.

Bueno es hacer constar que la demanda enmendada no fué firmada por el demandante ni por sus abogados en Filipinas, sino por sus abogados en América, Sres. Platt, Taylor & Walker, pero la actuación de éstos le obliga.

Se invoca una decisión de esto Tribunal que, en parte, dice así:

"x x x Creemos que este Tribunal no debe hacer cumplir un decreto dictado por un tribunal extranjero, que contravenga nuestras leyes y los sanos principios de moralidad que informan nuestra estructura social sobre relaciones familiares.

x x x x x x

"Las sentencias de tribunales extranjeros no pueden ponerse en vigor en Filipinas si son contrarias a las leyes, costumbres y orden público. Si dichas decisiones, por la simple teoría de reciprocidad, cortesía judicial y urbanidad internacional son base suficiente para que nuestros tribunales decidan a tenor de las mismas, entonces nuestros juzgados estarían en la pobre tesitura de tener que dictar sentencias contrarias a nuestras leyes, costumbres y orden público. Esto es absurdo." (Querubín contra Querubín, 47 O. G. (Supp. 12) 315.)

Por esta doctrina el demandante sostiene que la decisión de Nueva York no debe ser reconocida en Filipinas.

Hay confusión en cuanto a la semejanza de las dos causas. En el asunto de Querubín ocurrieron los siguientes hechos: Silvestre Querubín, filipino, y Margaret Querubín, americana, se casaron en América y tuvieron una hija llamada Querubina; porque la esposa cometió adulterio, el marido pidio divorcio; se le adjudicó el decreto correspondiente, encomendándole la custodia de la menor. Posteriormente la esposa se casó con el hombre con quien había cometido adulterio, tuvieron una hija y después acogieron a una como protegida, y alegando que tenía bastantes recursos para mantener a la hija legal y a la protegida, la esposa pidió la custodia de su hija Querubina cuando Querubín y su hija ya no estaban en Los Angeles porque ya habían venido a Filipinas; el Tribunal Supremo de Los Angeles, California, se la concedió, ordenando al padre que pase una pensión mensual de $30 a Querubina. La esposa presentó en Vigan, Ilocos Sur, un recurso de *habeas corpus* pidiendo la custodia de la menor, fundando su reclamación en el segundo decreto del Tribunal de California en que se le había concedido la custodia de la menor. Este Tribunal no reconoció el decreto porque era contrario a la moral y a la ley; porque "la menor estaría bajo el cuidado de su madre que fué declarada judicialmente culpable de infidelidad conyugal; viviría bajo un techo juntamente con el hombre que deshonór a su madre y ofendió a su padre."

La custodia de hijos menores en Filipinas se encomienda al cónyuge inocente; por esta razón, este Tribunal, al decidir el recurso de habeas corpus en apelación, desatendió el decreto del Tribunal de California.

En el caso presente, la decisión del Tribunal de Nueva York no ha sido obtenida por la Sra. de Perkins a espaldas del demandante; al contrario, esa decisión fué dictada en virtud de la demanda entablada por el Sr. Perkins; él fué el actor, el iniciador de la causa en que se discutió por segunda vez la propiedad de las 24.000 acciones y, abandonando la decisión del Tribunal de Manila, pidió que dichas acciones fuesen declaradas de su exclusiva propiedad. Después de una vista en que las partes habían tenido amplia oportunidad de ser oídas, se dictó sentencia declarando a la Sra. de Perkins dueña de las acciones. Esta sentencia es final entre los dos. El demandante no tiene derecho a impugnar dicha decisión dictada en un asunto iniciado por él ante el Tribunal de Nueva York en que ellos, demandante y demandada, son ciudadanos. Es inaplicable la doctrina de Querubín contra Querubín en la presente causa.

Suponiendo que el Tribunal de Nueva York hubiera decidido que las 24,000 acciones eran de la exclusiva propiedad del demandante, y la Sra. de Perkins hubiera venido a Filipinas para pedir judicialmente la partición de dichas 24,000 acciones que son bienes gananciales, se habría allanado el demandante a tal demanda de partición? Indudablemente que no; él habría alegado como defensa de *res judicata* la decisión del Tribunal de Nueva York en que se le declaraba dueño exclusivo de las 24,000 acciones; habría alegado que el Tribunal de Nueva York tenía jurisdicción sobre la cosa litigiosa no habría permitido que la decisión del Tribunal de Manila fuese reconocida. Precisamente pidió que fuese declarado dueño de las 24.000 acciones porque no estaba conforme en que dichas acciones fuesen solamente gananciales: su interés entonces era obtener una sentencia incompatible con la del Tribunal de Filipinas. Y ahora que la decisión no favorece al demandante pero sí a la Sra. de Perkins, ¿por que esa decisión no constituye *res judicata* y tiene que ser nula, por qué el Tribunal de Nueva York no tiene jurisdicción sobre la materia litigiosa, y por qué la decisión del Tribunal de Nueva York no debe tener ningún valor en Filipinas? Para el demandante el Tribunal de Nueva York tiene jurisdicción si la sentencia le es favorable, pero no si le es contraria. Es inconsistente la teoría del demandante y, por inconsistente, insostenible.

"One who subjects himself to the jurisdiction of a Court, even where he would not otherwise be subject to suit, becomes subject to any valid claim asserted against him directly relating to the subject matter of his voluntarily initiated proceeding." (Hoxsey vs. Hoffpauir, 180 F.2d 84.)

"It does not lie in the mouth of one who has affirmed the jurisdiction of a court in a particular matter, to accomplish a purpose to afterward deny such jurisdiction to escape a penalty." (Littleton v. Burgess, 16 L.R.A. [N.S.] 49, 16 Wyo. 58, 91 Pac. 832.)

"To permit one to invoke the exercise of a jurisdiction within the general powers of a court and then to reverse its order upon the ground that it had no jurisdiction would be to allow one to trifle with the courts. The principle is one of estoppel in the interest of a sound administration of the laws x x x closes the mouth of the complainant." (Spence et ux. v. State Nat. Bank of El Paso et al., 5 S. W. (2d), 754.) (Commission of Appeals of Texas, Sec. B, May 2, 1928.)

El demandante contiende que la decisión del Tribunal de Nueva York no tiene efecto como *res judicata* en Filipinas, porque Manresa dice que "En cuanto a las sentencias extranjeras, de mayor importancia cada día, deberá atenderse a las reglas que sobre su ejecución, con la cual se relaciona su firmeza, contiene la lay Procesal, dis-

tinguiendo según los varios casos que ésta regula, y no atribuyendo efecto de cosa juzgada a la sentencia mientras no se haya autorizado su ejecución." (Manresa, 531.)

La ley de enjuiciamiento civil española no está en vigor en Filipinas. En su lugar está la Regla 39, artículo 44, que dispone lo siguiente:

> "El efecto de una sentencia u orden finales dictadas por un tribunal o juez de Filipinas o de los Estados Unidos, o de cualquier estado o territorio de los Estados Unidos, que tenga jurisdicción para dictar dicha sentencia u orden, pueden ser el siguiente: x x x (b) En los demás casos, *la sentencia así dictada es*, respecto de la materia sobre la cual recayó, *concluyente entre las partes y sus derecholabientes por título subsiguiente al comienzo de la acción o actuación especial, que litiguen sobre la misma cosa, bajo el mismo título y en la misma capacidad.*"

Y el artículo 48 (a) trata del efecto de las sentencias dictadas en el extranjero, dice:

> "Si la sentencia fuere sobre una cosa determinada, será concluyente en cuanto al título de la misma;"

No es preciso, según estos artículos, que para que la excepción de cosa juzgada, consistente en una decisión extranjera, pueda ponerse con exito en Filipinas, haya mediado un juicio admitiendo dicha decisión.

No debe confundirse la ejecución de una sentencia extranjera con la excepción de *res judicata*. Existe diferencia entre pedir en Filipinas el cumplimiento de una decisión extranjera (enforcement of foreign judgment) y presentar la defensa de *res judicata*. Ordenar el cumplimiento de una sentencia extranjera implica acto directo de soberanía; reconocer la excepción de cosa juzgada solamente interviene el sentido de justicia; de ahí que el artículo 44, de la Regla 39, no dispone que haya mediado actuación especial para que la excepción de *res judicata* fuese aceptada como se exige en el artículo 47.

El procedimiento para pedir el cumplimiento de una decisión extranjera no es igual en las siguiente naciones:

En Filipinas, antes de la derogación por este Tribunal en su resolución de 9 de agosto de 1946, del artículo 47 de la Regla 39, era el siguiente:

> "El efecto de un expediente judicial de un tribunal de los Estados Unidos, o de unc de sus Estados o territorios, es en las Islas Filipinas el mismo que en los Estados Unidos o en el Estado o territorio en donde se tramitó, sólo que, para que tenga vigor aquí, es menester que haya mediade un juicio o actuación especial al efecto." (Art. 47, Regla 39.)

A falta de procedimiento previamente establecido, creemos que para que se pueda pedir cumplimiento de una decisión extranjera en Filipinas, deberá presentarse una acción fundada en ella.

En Italia: "Of all the foreign countries enforcing foreign judgments as such, Italy has had the distinction for many years of having adopted the most liberal policy. According to this system the *status* of the foreign judgment is fixed once for all. The review of the judgment relates only to certain points which have no reference to the correctness of the decision. Before the foreign judgment is enforced a preliminary proceeding takes place (Guidizio di delibazione) whose object it is to ascertain whether the judgment was rendered by a court of competent jurisdiction, whether the defendant had due notice of the original proceeding, whether he appeared or was duly defaulted, and whether the enforcement of the foreign judgment would be contrary to the public policy of Italy. If the judgment satisfies these requirements, the justice or injustice of the plaintiff's claim will not be reviewed. The above system is derived from the principle of the equality of all states, and rests upon the fundamental assumption that the judgments of other states are entitled to full trust and confidence. As in the case of domestic judgments, a foreign judgment so far as its merits are concerned, imports absolute verity — an irrebuttable presumption being created in favor of its fairness and inherent justice."

En Francia: "Under the ordinance of 1629 the French courts would enforce foreign judgments obtained by Frenchmen without a review of the merits. No effect would be given, however, to foreign judgments against a Frenchman. As against them a new suit would have to be brought on the original cause of action. According to Maleville the law was not changed by the Code Napoleon, but this view is now generally abandoned. The system actually prevailing is one which reviews the merits of the case (révision au fond). It does not content itself with inquiring into the jurisdiction of the foreign court, the regularity of the service of the summons, appearance or default, and the public policy of the state in which the proceeding for the enforcement of the foreign judgment is brought; but examines the merits of the decision itself. The French doctrine rests upon an assumption diametrically opposed to that underlying the Italian system, and emphasizes the fact that while the different states of the civilized world are in theory equal and entitled to the same respect, their courts do not actually inspire the same degree of confidence in regard to their decisions. It takes notice of the fact that the judges of certain countries are less competent than those of others and are sometimes not free from bias against defendants belonging to a foreign country. Under these circumstances it is felt to be the duty of a state, before allowing the execution of foreign judgments within its territory, to ascertain whether the foreign judgment was fair and just."

En Inglaterra: "The English law by requiring a suit on the foreign judgment differs from the other foreign systems in the mode of enforcing judgments for the payment of money. It differs from them also in that it regards foreign judgments as enforceable in principle and imposes upon the defendant the burden of establishing the defenses recognized by law. As regards the conclusive effect of foreign judgments the English law stands between the French and Italian systems. Originally foreign judgments were regarded as being only prima facie evidence of the justice of plaintiff's claim, but since the case of Godard v. Gray they are ordinarily conclusive. In this respect the English law has abandoned the viewpoint of the French law and accepted that of Italy (before the decree of July 30, 1919). It does not go so far, however, as does the former Italian law, for in exceptional cases it will try the merits of the case over again. The law appears to be established in England that foreign judgments may be impeached if procured by false and fraudulent representations and testimony of the plaintiff, even if the same question of fraud was presented to and decided by the foreign court. Such fraud may be shown although it cannot be done without a retrial of the case. The object of such retrial is not, however, to show that the foreign court came to a wrong conclusion. Courts of equity may enjoin the enforcement of judgments, domestic or foreign, if they have been procured through fraud, accident, mistake or surprise." (29 Yale Law Journal 194-199.)

En cuanto al reconocimiento de decisiones extranjeras como res judicata, varios autores sostienen que, siguiendo la teoría del derecho romano, una sentencia tiene la naturaleza de un contrato o cuasicontrato y que la obligación que emana de dicha sentencia cuando se presenta como defensa de *res judicata*, debe considerarse como cualquiera otra obligación. "By submitting the case to the foreign court, the parties are deemed, according to this view, to have made an implied agreement that they will abide by the decision of the court. The obligation arising from the judgment is referred, therefore, to the will of the parties rather than being derived directly from the sovereign power of the foreign state." (29 Yale Law Journal 190.)

En Filipinas no es necesario teorizar porque los artículos 44 y 48 (a) de la Regla 39 son claros: no exigen que haya mediado actuación especial sobre la decisión extranjera para que ella surta efecto como defensa de cosa juzgada. La razón es sencilla: no se pide la ejecución de la *res judicata* como se pide al cumplimiento de una decisión extranjera; solamente se presenta contra una acción como defensa. Ahora bien, si se pidiese por la Sra. de Perkins

el pago en Filipinas de los dividendos de las 24 000 acciones de la Benguet Consolidated Mining Co., entonces ya no es suficiente la simple exhibición de la decisión del Tribunal de Nueva York; es indispensable que ella entable la acción correspondiente en el juzgado competente para pedir una sentencia fundada en la del Tribunal de Nueva York. Hemos estudiado detenidamente las decisiones extranjeras y nacionales que tienen relación con la presente causa, y no hemos encontrado ninguna razón por qué la decisión del Tribunal de Nueva York no debe tener efecto como *res judicata* entre las partes litigantes.

Si el demandante hubiera obtenido sentencia a su favor en su demanda pidiendo que fuese declarado dueño absoluto de las 24 000 acciones, él habría sostenido en América, en Filipinas y en todas partes que dicha decisión era válida; pero como la fué adversa, arguye hoy en la presente causa que dichá decisión es nula y de ningún valor y que no tiene efecto de cosa juzgada. Los litigantes, ya sean naturales; ya extranjeros, deben respetar las decisiones de los tribunales de Filipinas; pero si optaran por acudir a un tribunal extranjero, pidiendo un remedio incompatible con la disposición de la sentencia obtenida en Filipinas y obtuviesen una decisión adversa, no se les debería permitir que repudiaran luego la del tribunal extranjero y pidieran el cumplimiento de la decisión del tribunal de Filipinas que ellos habían abandonado. Permitirles litigar de esa manera es contrario al orden e interés público en Filipinas porque perturba la ordenada administración de la ley.

Los errores atribuídos a Tribunal del Nueva York hubieran sido resueltos por el Tribunal Supremo de los Estados Unidos si el demandante no hubiese abandonado su apelación.

El demandante pide que se aplique la siguiente doctrina de Coke: "That where there are two conflicting judgments on a claim or demand, there is an estoppel against an estoppel which 'setteth the matter at large'. Coke on Littleton, 3250. The two judgments neutralize each other and both parties may assert their claims anew." Sin decidir si esta doctrina debe adoptarse o no en esta jurisdicción, se puede decir que la misma no es aplicable al caso presente. La parte petitoria de la demanda enmendada es del tenor siguiente:

"WHEREFORE, it is respectfully prayed that judgment be entered in favor of the plaintiff and against the defendants Benguet Consolidated Mining Company for the sum of P71 379.90, consisting of the dividends which have been declared and made payable on the said 52,874 shares in defendant Benguet Consolidated Mining Company registered in plaintiff's name which remain unpaid, as hereinbefore alleged, together with interest thereon at the rate of six per cent (6%) per annum from the date of filing of the original complaint herein until paid; that the defendant Benguet Consolidated Mining Company be ordered to pay to plaintiff all dividends declared in the future on the said shares, so long as they stand in plaintiff's name, whenever said dividends are made payable; that defendant Benguet Consolidated Mining Company be required and ordered to recognize the right of the plaintiff to the control and disposal of said shares, so standing in his name, to the exclusion of all others; that the additional defendants Idonah Slade Perkins and George H. Engelhard be each held to have no interest or claim in the subject matter of the controversy between plaintiff and defendant, Benguet Consolidated Mining Company, or in or under the judgment to be rendered herein and that by the said judgment they, and each of them, be excluded therefrom; and that the plaintiff be awarded the costs of this suit and general relief."

El demandante no pide ser declarado dueño de las 24,000 acciones; sólo pide al pago por la Benguet Consolidated Mining Company de los dividendos vencidos y no pagados y los dividendos que vayan venciendo, y no expresa en qué concepto ha de recibir los dividendos: si como administrador de los bienes gananciales o como dueño absoluto. Los dividendos son accesorios de las acciones, como el interés sigue al capital. El dueño de las acciones es el dueño de los dividendos y es el que debe recibirles, a menos que disponga otra cosa. Como la propiedad de las 24.000 acciones ha sido debidamente decidida ya por el Tribunal de Nueva York, a instancia precisamente del demandante, sus dividendos deben ser pagados a las dueña declarada. Los dividendos vencidos de dichas acciones, que ascienden a P1,019,245.92, ya habían sido satisfechos, por ejecución; en California, y no por acto voluntario de la demanda. Los mismos dividendos no deben pagarse o otra persona, especialmente al demandante que fué vencido en la cuestión sobre la propiedad. El sobreseimiento de la demanda está bien fundado.

Se deniega la moción de reconsideración.

*Paras, C.J., Bengzon, Padilla, Jugo; Bautista Angelo; Labrador* and *Concepcion, J.J.*, conformes.

## VI

*Joseph Feldman, Petitioner, vs. Hon. Demetrio B. Encarnacion, as Judge of the Court of First Instance of Rizal, Victorio Lachenal, Alfonso Lachenal and Jose Villaflor, Respondents, No. L-7021, July* 31, 1954, *Padilla, J.*

EXECUTION PENDING APPEAL; APPEALS; EFFECT OF PERFECTED APPEAL ON JURISDICTION OF TRIAL COURT: EXCEPTIONS; MATTERS INVOLVED AND LITIGATED IN APPEAL. — In a judgment rendered on the counterclaim by the defendants, the Court of First Instance ordered the plaintiff to vacate and surrender to the defendants the property in question and to pay the rentals up to the date the possession of the entire property shall have been received by them. Plaintiff appealed from this judgment to the Court of Appeals. After the approval of the record on appeal, defendants filed in the Court of First Instance a motion, praying that the plaintiff be ordered to deposit with the clerk of the trial court the accumulated rentals plus interest and the monthly rental until the decision appealed from shall have been finally disposed of by the appellate court. The trial court granted the motion. Plaintiff seeks by certiorari to annual the order of the trial court. Plaintiff contends that upon the approval of the record on appeal, the trial court losses its jurisdiction over the case and, consequently, the order complained of was entered without jurisdiction. On the other hand, defendants claim that despite the appeal, the trial court retains the power "to issue orders for the protection and preservation of the rights of the parties which do not involve any matter litigated by the appeal." In support of their pretense, they cite the assignment of errors made by the plaintiff that the lower court erred in holding (1) that the consent of plaintiff to the waiver of his rights over the leased property was voluntary and for good consideration and not under duress; (2) that plaintiff had not exercised the option granted by the original lease; and (3) that plaintiff was a possessor in bad faith and the defendants in good faith. *Held*: It would seem that the defendants' theory is that taking into consideration the assignment of errors of the plaintiff, the directive to the latter to deposit with the clerk of court the accumulated unpaid rentals including interest thereon and the future rentals until the appeal is finally decided, does not involve a matter litigated in the appeal of the plaintiff in the original motion. The contention is not well taken, because if the consent of the plaintiff to the waiver was not voluntary and for good consideration but under duress, he might be entitled to exercise the option granted in the lease; because if plaintiff had exercised the option granted, he would be entitled to continue in possession of the leased premises, and because if he was a possessor in good faith, then the judgment of the trial court directing the plaintiff to vacate the premises and to pay the rentals would have been to be reversed. The accumulated unpaid rentals and interest thereon and the future rentals of the leased premises are then matters involved and litigated in the appeal. To order the deposit thereof with the clerk of court is virtually, if not actually, an execution of the judgment which the trial court cannot direct but for good reasons to be stated in a special order and to be set forth in the record on appeal.

*Juan T. Chuidian* and *Jose S. Zafra* for the petitioner.

*Sixto de la Costa, Benjamin C. Alonzo* and *Protacio Amonoy* for the respondents.

## DECISION

PADILLA, *J.*:

The petition seeks to annul the order of the respondent court entered on 30 June 1953, the dispositive part of which reads as follows:

> IN VIEW OF THE FOREGOING, the second motion of the defendants in the opinion of this Court is in order, and the plaintiff is hereby ordered to deposit with the Clerk of Court of this Court the accumulated unpaid rentals including interest thereon in the total amount of ₱119,700.00 and the corresponding rental on the said property every month from May 1, 1953 until the appeal is finally decided; x x x

for lack of jurisdiction of the respondent court to enter it.

The petitioner and the respondents are agreed that in civil case No. 7799 of the Court of First Instance of Rizal entitled Joseph Feldman, plaintiff; Mercedes H. Vda. de Hidalgo, intervenor, as party-plaintiff; Hon. Herbert Brownell, Jr., Attorney General of the United States in lieu of the Philippine Alien Property Administrator of the United States, intervenor *-versus-* Ramon L. Corpus, etc., defendants: Victorio Lachenal, Ildefonso Lachenal, and José Villaflor, joinders, as parties-defendant, judgment was rendered on the counterclaim of the defendants, the pertinent dispositive part of which reads as follows:

> x x x. On the counterclaim of the defendants, the plaintiffs and his business partners, Henry File and George Feldman, are hereby ordered to vacate and to surrender to the defendants the property formerly known as Varadero de Navotas x x x and to pay the defendants, by way of rentals on the shipyard the amount of ₱1,000.00 a month from and beginning June 1, 1946, up to the date the physical possession of the entire property or shipyard with all its accessories and improvements thereon shall have been actually returned to and duly received by the defendants, the registered owners thereof, with legal interest thereon from the date of the filing of the counterclaims;

that from such judgment a notice of appeal, an appeal bond and a record on appeal were filed on 30 October 1950; that on 10 March 1952 the trial court issued an order which reads as follows:

> There being no opposition to the amended record on appeal, dated March 10, 1952, filed by counsel for the plaintiff, which is also adopted by the above-named intervenor, and finding the name to be correct and in order, the said amended record on appeal is hereby approved.
>
> The Clerk of Court is hereby directed to certify and elevate the same to the Court of Appeals, together with all the exhibits adduced during the trial, oral and documentary, within the period prescribed by the Rules of Court;

that the record on appeal was forwarded to and docketed in the Court of Appeals as CA-GR No. 9375-R; that on 3 August 1953 the case was forwarded to this Court by the Court of Appeals; that on 14 May 1953, the respondents Victorio Lachenal, Alfonso Lachenal and José Villaflor, defendants therein, filed in the respondent court a supplemental motion, the prayer of which reads as follows:

> 1. That the plaintiff (now petitioner) be ordered to deposit with the Clerk of this Court (Court of First Instance of Rizal) the accumulated rentals plus interest in the total amount of ₱119,700.00 and the monthly rental of ₱1,000.00 every month beginning June 1, 1953, until the decision appealed from shall have been finally considered and disposed of by the appellate court;
>
> 2. That the plaintiff and his business partners be ordered and enjoined not to sell, encumber, remove, dismantle, or otherwise dispose of any of the installation, equipments, machineries and motor vehicles listed in the Annex "B" hereto attached, without the consent and approval by this Honorable Court:

that on 30 June 1953 the respondent court granted the motion in an order the dispositive part of which is quoted at the beginning of this opinion; and that a motion for reconsideration of the order just referred to on the ground of lack of jurisdiction of the trial (respondent) court was denied.

It is the contention of the petitioner that upon approval or allowance of the record on appeal the respondent court lost its jurisdiction over the case and, consequently, the order of 30 June 1953 complained of was entered without jurisdiction.

On the other hand, the respondents claim that despite the appeal the respondent court retains the power "to issue orders for the protection and preservation of the rights of the parties which do not involve any matter litigated by the appeal," pursuant to section 9, Rule 41. In support of their pretense they cite the assignment of errors made by the petitioner, appellant therein, to wit:

> 1. The lower court erred in holding that the consent of appellant to the waiver of his rights over the *varadero* on May 5, 1943 (Exhibit G-1) was voluntary and for good consideration and not under duress;
>
> 2. The lower court erred in holding that the appellant had not exercised the option granted by the original lease, Exhibit "A";
>
> 3. The lower court erred in finding that the appellant was a possessor in bad faith, and the appellees in good faith, for purposes of article 361 of the Civil Code. (pp. 10-11, appellant's brief, CA-GR No. 9375-R, now SC-GR No. L-7195.)

It would seem that the respondents' theory is that taking into consideration the assignment of errors of the petitioner, appellant therein, the directive to the petitioner to deposit with the clerk of court the accumulated unpaid rentals including interest thereon amounting to ₱119,700 and the corresponding rental of the property every month from 1 May 1953 until the appeal is finally decided, does not involve a matter litigated in the appeal of the petitioner in the original action. This contention is not well taken, because if the consent of the petitioner, appellant therein, to the waiver was not voluntary and for good consideration but under duress as he contends, he might be entitled to exercise the option granted in the lease; because if the petitioner, appellant therein, had exercised the option granted as he contends, he would be entitled to continue in possession of the leased premises; and because if he was a possessor in good faith, as he contends, then the judgment of the trial court, which unfortunately has not been brought to us by the parties but only the pertinent dispositive part directing the petitioner, appellant therein, to vacate the leased premises and to pay the rentals would have to be reversed. The accumulated unpaid rentals and interest thereon and the future rentals of the leased premises are then matters involved and litigated in the appeal. To order the depcsit thereof with the clerk of court is virtually, if not actually, an execution of the judgment which the respondent court cannot direct but for good reasons to be stated in a special order and to be set forth in the record on appeal. (1) The good reasons do not appear. The order complained of is not the one contemplated in the rule just referred to because it was issued not while the case was still within the jurisdiction of the respondent court. If it be true as contended by the respondents, appellees therein, that the order of the respondent court complained of was just to supplement the writ of execution issued against Mercedes H. Vda. de Hidalgo, intervenor and party-plaintiff therein, who has not appealed from the judgment rendered against her, then it would be pertinent to ask why the liability under the judgment of the intervenor and party-plaintiff who has not appealed by making the petitioner, appellant therein, responsible for her obligation or liability

(1) Section 2, Rule 39.

under the judgment? Are they severally (*solidariamente*) responsible?

That part of the order which enjoins and prohibits the petitioner, appellant therein, "to sell, encumber, remove, dismantle or otherwise dispose of any of the installation, equipments, machineries and motor vehicles as listed aforesaid, without the consent and approval of this Court," is not being questioned by the petitioner. It need not be passed upon.

The order in so far as it directs the petitioner, appellant therein, to deposit with the clerk of court the accumulated unpaid rentals including interest thereon in the total amount of ₱119,700 and the corresponding rental of the property every month from 1 May 1953 until the appeal is finally decided, is annulled and set aside for lack of jurisdiction of the respondent court to enter it, without pronouncement as to costs.

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

## VII

*Domingo de la Cruz, Plaintiff-Appellant, vs. Northern Theatrical Enterprises Inc., et al., Defendants and Apellees, No. L-7089, August 31, 1954, Montemayor, J.*

1. EMPLOYER AND EMPLOYEE; DAMAGES CAUSED TO EMPLOYEE BY A STRANGER CAN NOT BE RECOVERED FROM EMPLOYERS; GIVING LEGAL ASSISTANCE TO EMPLOYEE IS NOT A LEGAL BUT A MORAL OBLIGATION.— A claim of an employee against his employer for damages caused to the former by a stranger or outsider while said employee was in the performance of his duties, presents a novel question which under present legislation can not be decided in favor of the employee. While it is to the interest of the employer to give legal help to, and defend, its employee charged criminally in court, in order to show that he was not guilty of any crime either deliberately or through negligence, because should the employee be finally held criminally liable and he is found to be insolvent, the employer would be subsidiarily liable, such legal assistance might be regarded as a moral obligation but it does not at present count with the sanction of man-made laws. If the employer is not legally obliged to give legal assistance to its employee and provide him with a lawyer, naturally said employee may not recover from his employer the amount he may have paid a lawyer hired by him.

2. ID.; ID.; PARTIES WHO MAY BE HELD RESPONSIBLE FOR DAMAGES. — If despite the absence of any criminal responsibility on the part of the employee he was accused of homicide, the responsibility for the improper accusation may be laid at the door of the heirs of the deceased at whose instance the action was filed by the State through the Fiscal. This responsibility can not be transferred to his employer, who in no way intervened, much less initiated the criminal proceedings and whose only connection or relation to the whole affair was that it employed plaintiff to perform a specific duty or task, which was performed lawfully and without negligence.

*Conrado Rubio* for plaintiff and appellant.

*Ruiz, Ruiz, Ruiz, Ruiz* and *Benjamin Guerrero* for defendants and appellees.

### DECISION

MONTEMAYOR, *J.*:

The facts in this case based on an agreed statement of facts are simple. In the year 1941 the Northern Theatrical Enterprises Inc., a domestic corporation operated a movie house in Laoag, Ilocos Norte, and among the persons employed by it was the plaintiff DOMINGO DE LA CRUZ, hired as a special guard whose duties were to guard the main entrance of the cine, to maintain peace and order and to prevent the commission of disorders within the premises. As such guard he carried a revolver. In the afternoon of July 4, 1941, one Benjamin Martin wanted to crash the gate or entrance of the movie house. Infuriated by the refusal of plaintiff De la Cruz to let him in without first providing himself with a ticket, Martin attacked him with a bolo. De la Cruz defended himself as best he could until he was cornered, at which moment, to save himself, he shot the gate crasher, resulting in the latter's death.

For the killing, De la Cruz was charged with homicide in Criminal Case No. 8449 of the Court of First Instance of Ilocos Norte. After a re-investigation conducted by the Provincial Fiscal the latter filed a motion to dismiss the complaint, which was granted by the court in January 1948. On July 8, 1947, De la Cruz was again accused of the same crime of homicide, in Criminal Case No. 431 of the same Court. After trial, he was finally acquitted of the charge on January 31, 1948. In both criminal cases De la Cruz employed a lawyer to defend him. He demanded from his former employer reimbursement of his expenses but was refused, after which he filed the present action against the movie corporation and the three members of its board of directors, to recover not only the amounts he had paid his lawyer but also moral damages said to have been suffered, due to his worry, his neglect of his interests and his family as well as the supervision of the cultivation of his land, a total of ₱15,000.00. On the basis of the complaint and the answer filed by defendants wherein they asked for the dismissal of the complaint, as well as the agreed statement of facts, the Court of First Instance of Ilocos Norte after rejecting the theory of the plaintiff that he was an agent of the defendants and that as such agent he was entitled to reimbursement of the expenses incurred by him in connection with the agency (Arts. 1709-1729 of the old Civil Code), found that plaintiff had no cause of action and dismissed the complaint without costs. De la Cruz appealed directly to this Tribunal for the reason that only questions of law are involved in the appeal.

We agree with the trial court that the relationship between the movie corporation and the plaintiff was not that of principal and agent because the principle of representation was in no way involved. Plaintiff was not employed to represent the defendant corporation in its dealings with third parties. He was a mere employee hired to perform a certain specific duty or task, that of acting as special guard and staying at the main entrance of the movie house to stop gate crashers and to maintain peace and order within the premises. The question posed by this appeal is whether an employee or servant who in line of duty and while in the performance of the task assigned to him, performs an act which eventually results in his incurring in expenses, caused not directly by his master or employer or his fellow servants or by reason of his performance of his duty, but rather by a third party or stranger not in the employ of his employer, may recover said damages against his employer.

The learned trial court in the last paragraph of its decision dismissing the complaint said that "after studying many laws or provisions of law to find out what law is applicable to the facts submitted and admitted by the parties, has found none and it has no other alternative than to dismiss the complaint." The trial court is right. We confess that we are not aware of any law or judicial authority that is directly applicable to the present case, and realizing the importance and far-reaching effect of a ruling on the subject-matter we have searched, though vainly, for judicial authorities and enlightenment. All the laws and principles of law we have found, as regards master and servant, or employer and employee, refer to cases of physical injuries, light or serious, resulting in loss of a member of the body or of any one of the senses, or permanent physical disability or even death, suffered in line of duty and in the course of the performance of the duties assigned to the servant or employee, and these cases are mainly governed by the Employers' Liability Act and the Workmen's Compensation Act. But a case involving damages caused to an employee by a stranger or outsider while said employee was in the performance of his duties, presents a novel question which under present legislation we are neither able nor prepared to decide in favor of the employee.

In a case like the present or a similar case of say a driver employed by a transportation company, who while in the course of employment runs over and inflicts physical injuries on or causes the death of a pedestrian, and such driver is later charged criminally in court, one can imagine that it would be to the interest of the employer to give legal help to and defend its employee in order show that the latter was not guilty of any crime either deliberately or through negligence, because should the employee be final'y held criminally liable and he is found to be insolvent, the employer would be subsidiarily liable. That is why, we repeat, it is to the interest of the employer to render legal assistance to its employee. But we are not prepared to say and to hold that the giving of said legal assistance to its employees is a legal obligation. While it might yet and possibly be regarded as a moral obligation, it does not at present count with the sanction of man-made laws.

If the employer is not legally obliged to give legal assistance to its employee and provide him with a lawyer, naturally said employee may not recover the amount he may have paid a lawyer hired by him.

Viewed from another angle it may be said that the damage suffered by the plaintiff by reason of the expenses incurred by him in remunerating his lawyer, is not caused by his act of shooting to death the gate crasher but rather by the filing of the charge of homicide which made it necessary for him to defend himself with the aid of counsel. Had no criminal charge been filed against him, there would have been no expenses incurred or damage suffered. So, the damage suffered by plaintiff was caused rather by the improper filing of the criminal charge, possibly at the instance of the heirs of the deceased gate crasher and by the State through the Fiscal. We say improper filing, judging by the results of the court proceedings, namely, acquittal. In other words, the p'aintiff was innocent and blameless. If despite his innocence and despite the absence of any criminal responsibility on his part he was accused of homicide, then the responsibility for the improper accusation may be laid at the door of the heirs of the deceased and the State, and so theoretically, they are the parties that may be held responsible civilly for damages and if this is so, we fail to see how this responsibility can be transferred to the employer who in no way intervened, much less initiated the criminal proceedings and whose only connection or relation to the whole affair was that he employed plaintiff to perform a specific duty or task, which task or duty was performed lawfully and without negligence.

Still another point of view is that the damages incurred here consisting of the payment of the lawyer's fee did not flow directly from the performance of his duties but only indirectly because there was an efficient, intervening cause, namely, the filing of the criminal charges. In other words, the shooting to death of the deceased by the plaintiff was not the proximate cause of the damages suffered but may be regarded as only a remote cause, because from the shooting to the damages suffered there was not that natural and continuous sequence required to fix civil responsibility.

In view of the foregoing, the judgment of the lower court is affirmed. No costs.

*Paras, C.J.*, reserved his vote

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

*Jugo* and *Pablo, J.J.*, took no part.

## VIII

*Macario Enriquez, et al., Petitioners, vs. Honorable Alejandro Panlilio, in his capacity as the presiding Judge of Branch A, Court of First Instance of Manila; the Sheriff of Manila; Dee C. Chuan Co., Inc. and Standard Vacuum Oil Co., Respondents, G. R. No. L-7325, July 16, 1954, Montemayor, J.*

1. EMINENT DOMAIN; SUSPENSION OF EJECTMENT PROCEEDINGS, WHEN PROPER; PURPOSE OF COMMONWEALTH ACT NO. 538. — Commonwealth Act No. 538 contemplates the expropriation of lands lawfully occupied, where said occupancy is known and permitted by the owner under an agreement, express or implied, of tenancy, and where the tenants and occupants are observing the terms of the agreement by paying the rentals agreed upon, or, a reasonable amount ascertained by the court for the use and occupation of the premises. The purpose of the law is to aid and benefit the lawful occupants and tenants, by making their occupancy permanent and giving them an opportunity to become owners of their holdings.

2. ID.; ID.; ID.; OCCUPANTS WHO CAN NOT INVOKE THE LAW. — Where petitioners entered the land in question without the knowledge and consent of the owner and lessee thereof, the relationship of landlord and tenant has not been established. Hence, they can not invoke the benefits of Commonwealth Act No. 538.

*Castaño, Ampil, and Pronove* for petitioner.

*Ross, Selph, Carrascoso and Janda* for respondent Standard-Vacuum Oil Company.

*Quisumbing, Sycip, Quisumbing and Salazar* for other respondents.

### DECISION

MONTEMAYOR, *J.*:

This is a petition for certiorari with preliminary injunction. From the allegations of said petition and its annexes as well as of the answer filed by respondents, we gather the following:

Respondent Dee C. Chuan Co. (to be later referred to as Chuan Co.) is the owner of quite a large parcel of land situated in the City of Manila and adjoining the Juan Luna sub-division and the North Bay Boulevard. A portion of the same of about 1,000 sq. m. was leased to respondent Standard Vacuum Oil Co. (to be later referred to as Oil Co.). Sometime prior to 1947, without the knowledge and consent of Chuan Co. (owner) and the Oil Co. (lessee), a number of people including the petitioners entered the parcel, particularly that portion under lease, and erected thereon temporary houses (barong-barong), and thereafter refused to leave the same despite repeated demands made upon them by the owner and lessee. The oil company filed a suit in ejectment in the Municipal Court of Manila against the petitioners and obtained a favorable judgment ordering petitioners to vacate the portion occupied by them and denying their counterclaim. Petitioners as defendants appealed to the Court of First Instance of Manila which rendered judgment against them on December 27, 1949. For purposes of reference particularly as to the facts of the case, we are reproducing said decisions, to wit:

> "This is an ejectment case appealed from the Municipal Court. The lower court in its decision ordered the defendants to vacate the premises in question and denied defendants' counterclaim. Hence the appeal of the Defendants to this Court. While the case was pending trial, Dee C. Chuan prays the defendants be ejected from the premises and to pay jointly and severally a monthly rental of ₱90.00 from May 5, 1947 to October, 1949. Subsequently, counsel for the defendants filed a motion asking for the suspension of the trial of the case on the ground that the government was negotiating for the purchase of the land in question from the plaintiff-intervenor, Dee C. Chuan & Sons, Inc. Because the hearing of the case had been postponed already several times on the same ground, without any positive results having come out from said supposed negotiations, the petition was denied, and trial was then commenced. After the plaintiff has presented their evidence, counsel for the defendants asked for postponement alleging, as their reason, that not all the defendants were present in Court. To give the defendants their day in court, the case was then postponed to an agreed date among the parties. But on the said date, counsel for the defendants failed to appear on the unverified ground that he was indisposed. Further postpone-

ment of the case was objected to by the other parties, and the case was then submitted for decision.

"It appears that the plaintiff is the lessee of a parcel of land, as evidenced by a contract of lease (Exh. "A") between plaintiff and the owner, who is the plaintiff-intervenor herein; that the defendants, prior to February, 1947, without the knowledge and consent of the owner or plaintiff-intervenor, illegally entered and occupied the premises in question and erected barong-barong therein; that, in spite of repeated demands of the plaintiff-intervenor, as well as the plaintiff (Exhs. B, B-1, B-2, C, C-1 to C-5), the defendants refused to vacate the property.

"WHEREFORE, in view of the foregoing, judgment is hereby rendered ordering all the defendants to vacate the premises in question, and each of them to pay the plaintiff-intervenor a monthly rental of ₱5.00 from May 1947 to October 1949. Defendants are further ordered to pay the costs in both instances.

"SO ORDERED."

The judgment above reproduced apparently became final and executory. Why it was not then executed, the record does not show. In July, 1950, the Republic of the Philippines instituted expropriation proceedings, Civil Case No. 11525, concerning a portion of the parcel belonging to Chuan Co., including that portion leased to the Oil Company, under the provisions of Commonwealth Act No. 538. By reason of said expropriation proceedings, the Court of First Instance of Manila, deciding the ejectment case against petitioners, suspended execution of its judgment by order dated April 17, 1951. Early in 1953, Chuan Co. moved to lift the order staying execution. We quote the order dated February 21, 1953 granting the motion.

"After a careful consideration of the grounds advanced by Counsel for Intervenor Dee C. Chuan & Sons, Inc., in support of the motion to lift order staying execution, the Court has reached the conclusion that said motion is well taken and meritorious, and hereby grants same.

"The defendants, not being bona-fide tenants or occupants of the land in question, and having failed, on the other hand, to pay to the landowner, or to deposit in Court, the current reasonable rental for the land they illegally occupy, can not avail themselves of the provision of Commonwealth Act No. 538.

"Accordingly, the Order of April 17, 1951, suspending the execution of the Judgment rendered in the case, is hereby lifted and set aside.

"SO ORDERED.

Manila, Philippines, February 21, 1953.

(Sgd.) Alejandro J. Panlilio
Judge"

A copy of said order was duly served on counsel for the defendants in said Civil Case No. 5654 (now petitioners herein). It was only on November 23, 1953, that defendants-petitioners filed a motion for reconsideration of the order of February 21, 1953, which was denied by order dated November 28, 1953. Claiming that in issuing the orders of February 21, 1953 and November 28, 1953, the trial court acted with grave abuse of discretion, amounting to excess of jurisdiction, petitioners have filed its present petition for certiorari with preliminary injunction.

We are reproducing section 1 of Commonwealth Act No. 538 by virtue of which the expropriation proceedings, as already stated, was initiated by the Government.

"Sec. 1. When the Government seeks to acquire through purchase or expropriation proceedings, lands belonging to any estate or chaplaincy (capellana), any action for ejectment against the tenants occupying said lands shall be automatically suspended, for such time as may be required by the expropriation proceedings or the necessary negotiations for the purchase of the lands, in which latter case, the period of suspension shall not exceed one year.

"To avail himself of the benefits of the suspension, the tenant shall pay to the landowner the current rents as they become due or deposit the same with the court where the action for ejectment has been instituted."

We agree with the trial court and the herein respondents that petitioners are in no position to invoke the benefits of Commonwealth Act No. 538, particularly section 1 thereof. As found by the trial court in the ejectment case, they are not bona-fide occupants or tenants because they entered the land without the knowledge and consent of the owner and lessee thereof. The relationship of landlord and tenant has not been established; on the contrary, as soon as their illegal occupation of the land was noted the owner and lessee made demands upon them to vacate the premises, which demands were ignored. Petitioners have not paid anything for their occupation. Even after judgment was rendered by the Court of First Instance against them ordering them to vacate the land illegally occupied by them and ordering them to pay a reasonable amount for their occupation, fixed by the Court, up to this time they have paid nothing. Commonwealth Act No. 538 contemplates the expropriation of lands lawfully occupied, where said occupancy is known and permitted by the owner under an agreement, express or implied, of tenancy, and where the tenants and occupants are observing the terms of the agreement by paying the rentals agreed upon, or, a reasonable amount ascertained by the court for the use and occupation of the premises. The purpose of the law is to aid and benefit the lawful occupants and tenants, by making their occupancy permanent and giving them an opportunity to become owners of their holdings. This is not the case with respect to petitioners.

Petitioners annexed to their petition a copy of an alleged agreement (Exhibit "E") between Chuan Co., the Oil Co., and the Rural Progress Administration to the effect that the land subject of expropriation would be leased to the owners of the houses standing thereon on a monthly rental not to exceed 1% of the assessed value of the land for the current year. Respondents in their answer explained that this agreement was made the basis of the motion for dismissal of the expropriation case, resulting in the dismissal of the same. However, with the abolition of the Rural Progress Administration and the taking over of its functions by the Bureau of Lands, the latter upon the instigation of the petitioners themselves, impugned the validity of the agreement, thus resulting in the lifting of the order of dismissal in the expropriation case. Moreover, the agreement itself excludes from its operation a portion of about 920 sq. m. which is apparently the portion involved in the ejectment (now occupied by the petitioners), the agreement providing for the removal from said portion of the houses and other improvements made by the petitioners.

In conclusion, we find that the respondent court did not commit any abuse of discretion, much less did exceed its jurisdiction in issuing its order of February 21, 1953 and in denying the motion for its reconsideration. The present petition for certiorari with preliminary injunction is hereby denied, with costs against petitioners. The writ of preliminary injunction heretofore issued, is hereby dissolved.

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

## IX

*Alicia Go, et al., Plaintiffs-Appellees, vs. Alberto Go, et al., Defendants-Appellants, G. R. No. L-7020, June 30, 1954, Bautista Angelo, J.*

1. PLEADING AND PRACTICE; JOINDER OF PARTIES, APPLICABLE TO BOTH COMPLAINT AND COUNTERCLAIM. —The rule permitting the joinder of parties applies with equal

force to a counterclaim in view of the similarity of rules applicable to both complaint and counterclaim.

2. ID.; COUNTERCLAIM; TEST TO DETERMINE JURISDICTION OF JUSTICE OF THE PEACE COURT.—If the claim is composed of several accounts each distinct from the other or arising from different transaction, they may be joined in a single action even if the total exceeds the jurisdiction of the justice of the peace court. Each account furnishes the test. But if the claim is composed of several accounts which arise out of the same transaction and can not be divided, the same should be stated in one cause of action and cannot be divided for the purpose of bringing the case within the jurisdiction of the justice of the peace court.

3. ID.; ID.; CLAIM COMPOSED OF SEVERAL ACCOUNTING EACH DISTINCT FROM THE OTHER CAN NOT BE JOINED IN ONE SINGLE CLAIM.—Where the first claim refers to the recovery of an amount arising from the alleged unlawful taking by the plaintiffs of certain furniture and equipment belonging to the defendants while the second and third causes of action arose, not from the illegal taking of the property, but from the alleged unlawful institution by the plaintiffs of the action of ejectment in the Municipal Court, the claims can not be joined in one single claim because they arise from different sets of facts.

4. ID.; ID.; COMPULSORY COUNTERCLAIM TO BE SET UP REGARDLESS OF AMOUNT; CLAIM BARRED IF NOT SET UP.—If a counterclaim arises from, or is necessarily connected with, the facts alleged in the complaint, then that counterclaim should be set up *regardless of its amount*. Failure to do so would render it barred under the rules.

5. ID.; ID.; ID.; COMPULSORY COUNTERCLAIM SET UP, COGNIZABLE BY COURT OF FIRST INSTANCE.—The second and third claims of defendants being compulsory, and the respective amounts, considered separately, are within the jurisdiction of the municipal court, the Court of First Instance can not act on them in the exercise of its appellate jurisdiction.

*Emmanuel T. Jacinto* for plaintiffs and appellees.

*Enrique V. Filamor and Nicolas Belmonte* for defendants-appellants.

## DECISION

BAUTISTA ANGELO, *J.*:

On December 18, 1951, plaintiffs brought an action in the Municipal Court of Manila to recover from defendants the possession of a house situated at 921 Dagupan St., Manila, and the sums of ₱2,000 as damages and ₱200.00 as attorney's fees.

Defendants in their answer set up several special defenses and a counterclaim. The counterclaim was divided into three causes of action as follows: the first is for ₱2,000 representing the value of certain furniture and equipment belonging to defendants and which are claimed to have been taken away by plaintiffs from the house in litigation; the second is for ₱1,000 representing expenses incurred by defendants arising from the falsity of the facts alleged in the complaint; and the third is for ₱500.00 as attorney's fees arising from the institution of the present action.

The court found for the plaintiffs, after due hearing, ordering defendants to vacate the house in litigation and to pay the costs, but denied the claim for damages both of plaintiffs and defendants on the ground that their amounts are beyond its jurisdiction. The defendants, in due time, perfected their appeal to the Court of First Instance, and after the latter had filed their answer as required by the rules, plaintiffs filed an amended complaint wherein they reiterated their original allegations with some slight modifications. To this amended complaint, defendants filed an amended answer reiterating the counterclaim they had alleged in their original answer which, as previously stated, has been divided into three causes of action involving an aggregate amount of ₱3,500.

Claiming that the amount involved in the counterclaim is beyond the jurisdiction of the Municipal Court, and, therefore, the Court of First Instance cannot act on it in the exercise of its appellate jurisdiction, plaintiffs filed a motion to dismiss under Rule 8, Section 1 (a), of the Rules of Court. This motion was resisted by defendants, but the court, in its order issued on March 30, 1953, overruled the opposition and granted the motion to dismiss. Hence, this appeal.

Appellants, in their brief, present the question for determination in this appeal in the following wise:

> "The issue involved in this appeal is purely a question of law: whether or not the counterclaim was within the jurisdiction of the Municipal Court, and, hence, whether or not the Court of First Instance has appellate jurisdiction thereon. We respectfully submit that the legal points involved are of paramount importance, as a definition is sought of the rule which should control, not only in the case at bar, but also in other cases, in the determination of the jurisdictional amount in case there are several causes of action: *whether the jurisdiction is determined by the amount of each cause of action, or by the aggregate amount of the several causes of action;* and whether in compulsory counterclaims the amount thereof is immaterial in the question of jurisdiction." (Underscoring supplied)

A case that may throw light on the issue before us is A. Soriano & Co. vs. Gonzalo M. Jose, et al., 47 O.G., 156, decided on May 30, 1950, where various employees brought a joint complaint against their employer in the municipal court to collect a month salary each in lieu of 30 days' notice. The question there decided was whether the jurisdiction of the municipal court is governed by the amount of each claim or by the aggregate sum of all the claims when there are several plaintiffs suing jointly but have independent causes of action. In that case, we held that "where several claimants have separate and distinct demands against a defendant or defendants, which may be properly joined in a single suit, the claims cannot be added together to make up the required jurisdictional amount; each separate claim furnishes the jurisdictional test." The purpose of the rule permitting the joining of parties is to save unnecessary work, trouble, and expense, consistent with the liberal spirit of the new rules. This ruling, no doubt, applies with equal force to a counterclaim in view of the similarity of rules applicable to both complaint and counterclaim.

The question that now rises is: Can this ruling be applied when there is only one plaintiff or one defendant, or several plaintiffs or defendants but with a common claim, divided into several causes of action involving transactions different one from the other? Stated in another way, does this ruling apply to a counterclaim set up by several defendants which have a common claim against the plaintiff divided into several causes of action for the reason that they arise from transactions one different from the other?

A case which may be considered on all fours with the present case is that of Villaseñor v. Erlanger & Galinger, 19 Phil., 574, wherein this Court, in discussing the test to be considered in determining the jurisdiction of a justice of the peace, laid down the following rule: "When a separate due is due, it is demandable in a separate action. Therefore, neither a debtor nor a third party may plead lack of jurisdiction because the sum of two separate debts exceeds the amount for which action may be brought in a court of a justice of the peace. On the other hand, if a debt is single a creditor may not divide it for the purpose of bringing the case within the jurisdiction of a justice of the peace." This case is authority for the statement that if a claim is composed of several accounts each distinct from the other or arising from different transactions they may be joined in a single action even if the total exceeds the jurisdiction of a justice of the peace. Each account furnishes the test. But if the claim is composed of several accounts which arise out of the same transaction and cannot be divided, the same

should be stated in one cause of action and cannot be divided for the purpose of bringing the case within the jurisdiction of the justice of the peace.

The same rule obtains in the American jurisdiction. Thus, it has been generally held that "In order that two or more claims may be united to make the jurisdictional amount, they must belong to a class that under the statute will permit them to be properly joined in one suit, and not such as should be made the subject of independent suits; and where two or more causes of action are improperly united in one suit the amounts involved in the different causes cannot be added together so as to make an amount in controversy sufficient to confer jurisdiction on the court in which the suit is brought x x x." But, "in so far as causes of action which may be properly joined are concerned, and which concern all the parties litigants, there is, however, a lack of harmony on the question of whether or not their various amounts should be aggregated in order to determine the amount in controversy for jurisdiction purposes." (21 C. J., pp. 76-78.)

In the last analysis, therefore, the question to be determined is whether the three causes of action into which the counterclaim of the defendants has been divided refer to transactions which should be stated separately, or transactions which have a common origin and should be joined in one cause of action for jurisdictional purposes. An analysis of the facts reveal that the three causes of action of the counterclaim are different one from the other, or at least the first is completely different and arises from a set of facts different from those which gave rise to the other two. The first refers to the recovery of the amount of ₱2,000 arising from the alleged unlawful taking by the plaintiffs of certain furniture and equipment belonging to the defendants; while the second and third causes of action arose, not from the illegal taking of property, but from the alleged unlawful institution by the plaintiffs of the action of ejectment in the Municipal Court. From this it can be seen that the first cause of action cannot be joined with the other two in one single claim because they arise from different sets of facts.

Another consideration that should be borne in mind is whether the counterclaim is compulsory or not. If it is, such as if it arises from, or is necessarily connected with, the facts alleged in the complaint, then that counterclaim should be set up *regardless of its amount*. Failure to do so would render it barred under the rules. In this particular case, while the first cause of action cannot be considered compulsory because it refers to a transaction completely unrelated with the main claim, the second and the third belong to this class because they necessarily arise from the institution of the main action. Viewed in this light, it can be said that the counterclaim of the defendants should be deemed as coming within the jurisdiction of the municipal court because the respective amounts, considered separately, do not exceed its jurisdiction. From all angles we view the order appealed from it would appear that it is unwarranted and has no legal basis.

Wherefore, the order appealed from is hereby set aside, without pronouncement as to costs.

*Paras, C.J., Bengzon, Reyes, Jugo* and *Concepcion, J.J.*, concur. *Pablo, Jr.*, took no part.

PADILLA, *J.*, dissenting:

This is an action of forcible entry and for recovery of ₱2,000 as damages, and ₱200 as attorney's fees. In their answer the defendants sought to recover a counterclaim of ₱2,000, the value of the furniture and equipment allegedly belonging to them and claimed to have been taken by the plaintiffs from the apartment (*accesoria*), the possession of which is sought to be recovered in the action; the sum of ₱1,000, the expense allegedly incurred by the defendants as a result of the action brought against them; and ₱500 as attorney's fees.

The municipal court of Manila rendered judgment ordering the defendants to vacate the apartment but did not award the sums sought to be recovered by both parties on the ground that the same are beyond its jurisdiction. The defendants appealed to the Court of First Instance setting up the same counterclaim they had sought to recover in the municipal court. Plaintiffs moved for the dismissal of the counterclaim on the ground that the Court of First Instance has no jurisdiction to try and decide on appeal a counterclaim involving ₱3,500 set up by the defendants in the municipal court and repeated on appeal in the Court of First Instance which the municipal court had refused to try and decide for lack of jurisdiction. The motion was granted and from the order dismissing the counterclaim the defendants have appealed.

In the first place, the defendants should not have been allowed to appeal from the order of dismissal of their counterclaim but should have waited until after final jurgment shall have been rendered by the Court of First Instance in the forcible entry action. (1) By allowing this appeal the case may be submitted twice to an appellate court when all the issues joined and questions incident thereto raised by the parties should be passed upon and decided in one appeal. Granting, nevertheless, that the defendants may appeal from an order of dismissal of a counterclaim, I disagree with the majority that the amount of each claim arising from different transactions and not the aggregate amount of the counterclaim is determinative of the jurisdiction of the Court.

Section 86, Republic Act No. 296, as amended by Republic Act No. 644, provides:

> The jurisdiction of justices of the peace and judges of municipal courts of chartered cities shall consist of:
>
> x x x
>
> (b) Original jurisdiction in civil actions arising in their respective municipalities and cities, and not exclusively cognizable by the Courts of First Instance; and
>
> x x x

Section 88, Republic Act No. 296, as amended by Republic Act No. 644, provides:

> In all civil actions x x x arising in his municipality or city, and not exclusively cognizable by the Court of First Instance, the justice of the peace and the judge of a municipal court shall have exclusive original jurisdiction where the value of the subject-matter or amount of the demand does not exceed two thousand pesos, exclusive of interest and costs. x x x

The first claim for ₱2,000 which represents the value of certain furniture and equipment allegedly belonging to the defendants and claimed to have been taken by the plaintiffs from the apartment (*accesoria*), the possession of which is sought to be recovered from the defendants who, plaintiffs claim, forcibly entered upon the same and deprived them of the possession thereof, is not an independent transaction or claim because it arose from the alleged unlawful entry upon the premises by the defendants. Hence, the three items of the counterclaim arose from the alleged unlawful entry by the defendants upon the premises, the possession of which the plaintiffs seek to recover. The aggregate amount being beyond the jurisdiction of the municipal court to hear, try and decide, the order of the Court of First Instance of Manila to which the case was appealed is in accordance with law.

The jurisdiction of the municipal court is limited whereas that of the Court of First Instance is general. The limited jurisdiction of the former should not be enlarged or stretched at the expense of that of the latter. Enlarging the jurisdiction of the municipal court would be illegal.

The case of A. Soriano y Cia. vs. José, 47 Off. Gaz. Supp. No. 12, 156, cited by the majority is not in point. There several employees having each a cause of action against the employer were allowed to join in one suit brought in the municipal court of Manila, although the aggregate amount of the several causes of action

(1) Section 2, Rule 41.

constituting the demand was beyond the jurisdiction of the municipal court, because the amount of each cause of action which is less than ₱2,000 determines the jurisdiction of the court, and the joinder of such parties is permitted by section 6, Rule 3. In other words, if the several employees having a claim against the employer were not permitted to join in one suit by the above mentioned rule, each would have to bring a separate action and the action of each would be within the jurisdiction of the municipal court because the amount claimed by each plaintiff would not exceed ₱2,000 exclusive of interest and costs.

The rule in the case of Villaseñor vs. Erlanger & Galinger, 19 Phil. 574, invoked by the majority does not support its opinion. There the action was one of interpleading brought by the sheriff of Tayabas for determination as to who among the defendants were entitled to the funds he had in his possession. The question of jurisdiction of the justice of the peace court of Manila was not the *lis mota* but rather the question of preference of credits. There were two actions brought by Ruiz y Rementeria against Manuel Abraham and two judgments rendered by the justice of the peace court of Manila in favor of Ruiz y Rementeria — one for ₱572.91 and the other for ₱304.73 — both amounts being within the concurrent jurisdiction of the justice of the peace court and the Court of First Instance of Manila. This Court in reversing the judgment of the trial court, which disallowed the two credits of Ruiz y Rementeria ordered by the justice of the peace court of Manila in two judgments to be paid to Ruiz y Rementeria correctly ruled that such credits were allowable.

For these reasons, the order appealed from should be affirmed, with costs against the appellants.

*Labrador, J.*, concurs.

## X

*Marta Banclos de Esparagoza et al., Petitioners, vs. Benjamin A. Tan, etc. et al., Respondents, G. R. No. L-6525, April 12, 1954; Bautista Angelo, J.*

CERTIORARI; DENIAL OF DUE PROCESS CONSTITUTES ABUSE OF DISCRETION. — Where a written charge for contempt was filed against petitioners, but no copy thereof has been served on them, and their plea to be given an opportunity to answer the charge before any action is taken against them was disregarded, this action is tantamount to a denial of due process which may be considered as a grave abuse of discretion.

*Pio L. Pestano* for petitioners.

*Ricardo N. Agbunag* for respondent Angela Fernandez.

### DECISION

BAUTISTA ANGELO, *J.*:

This is a petition for certiorari with preliminary injunction seeking to set aside certain orders of respondent Judge which direct the immediate arrest of petitioners for their failure to appear to show cause why they should not be punished for contempt, and to set aside the decision rendered by the Court of Appeals dated November 17, 1952, sustaining and giving effect to the aforesaid orders.

The orders herein referred to had arisen in a case instituted in the Court of First Instance of Rizal by the Judge Advocate General of the Armed Forces of the Philippines against Marta Banclos de Esparagoza, et al., in connection with the disposition of the amount of $1,190.83 accruing to one Aniceto Esparagoza, deceased, as pay in arrears due the said deceased (Civil Case No. 877). The case was instituted in order that it may be determined who among the different claimants as heirs of the deceased is entitled to the amount in question. After due hearing, the court found that Marta Banclos, the widow, is the only person entitled to receive the benefits of the estate, and, accordingly, it ordered that the amount of $1,190.83 be paid to her. However, as the widow, and her lawyer, in a gesture of nobility, agreed to give one-half of said amount to the four illegitimate children of the deceased, the court also included in the decision an injunction that the widow deposit with the Philippine National Bank said one-half, or the sum of $595.41, in the name of the four minor children, in equal shares, to be disposed of in accordance with law.

Two months after the money was received by the widow as directed in the decision, Angela Fernandez, mother of the four minor children demanded that the money be given to her instead of being deposited in the bank alleging as reason that if it be so deposited, she would encounter difficulties in withdrawing the money for the benefit of the children. The widow refused to agree to the request unless the mother secure from the court an order authorizing her to receive the money in line with her request. The mother failed to do so, nor was she able to disclose the whereabouts of the children, and instead the widow came to know that the children were no longer living with their mother but had been given away to well-to-do couples who promised to bring them up and take care of them, and so, upon advice of Atty. Pio L. Pestaño, her counsel. the widow declined to give the money either to the mother or to the children. The result was that, on March 28, 1952, Angela Fernandez, the mother, instituted contempt proceedings against the herein petitioners in view of their failure to deliver the money as ordered by the court in its decision in Civil Case No. 877.

The petition for contempt was set for hearing, and after the widow and her counsel were duly heard, the court found the petition without merit, and denied the same. Six months thereafter, a similar petition for contempt was filed by Angela Fernandez wherein she reiterated the same act of dereliction of duty on the part of herein petitioners, copy of which was never served on the petitioners. However, the same was acted upon *ex parte* by the court who, on October 18, 1952, issued an order directing them to appear and show cause why they should not be punished for contempt for having disobeyed the order of the court. Copy of this order was served on petitioner Pestaño on October 22, 1952, and on October 25, the latter submitted to the court a written statement explaining the circumstances why he could not show cause as directed among which was the failure of the movant to serve on him a copy of the petition containing the charges for contempt. In said written manifestation, petitioner Pestaño made the special request that the order requiring his appearance be held in abeyance until after he shall have been served with copy of the petition for contempt as required by the rules, and that no action thereon be taken until after he shall have been given an opportunity to answer said motion. Instead of acceding to this request, the court, on October 25, 1952, issued an order directing his immediate arrest and that of his client Marta Banclos de Esparagoza. They sought to set aside said order by bringing the matter to the Court of Appeals by way of certiorari, but their petition was dismissed for lack of merit.

The only issue to be determined is whether respondent Judge has exceeded his jurisdiction or acted with grave abuse of discretion in issuing his order of October 25, 1952, directing the immediate arrest of petitioners herein in view of their failure to appear and show cause why they should not be punished for contempt for having disobeyed the order of the court. The determination of this would depend upon an examination of the facts leading to the issuance of the disputed order.

It should be recalled that because of the refusal of Marta Banclos de Esparagoza, following the advice of her counsel and co-petitioner, Pio L. Pestaño, to deposit the money belonging to the four minor children with the Philippine National Bank, or to deliver it to their mother, Angela Fernandez, as demanded by the latter, Angela Fernandez filed a petition for contempt in the main case praying that the two be ordered to show cause why they should not be punished for contempt for their failure to obey the decision of the court. This petition was acted upon by the court *ex parte*,

and because petitioners herein never received copy of the petition for contempt, they submitted a written manifestation to the court praying that action thereon be held in abeyance and that they be not required to appear until after they shall have been given an opportunity to answer as required by the Rules of Court. This special request was disregarded by the court and considering their failure to appear as a defiance, the court ordered their immediate arrest. Is this attitude of the court justifiable under the rules?

Section 3, Rule 64, of the Rules of Court provides:

"SEC. 3. *Contempt punished after charged and hearing.*— After charge in writing has been filed and an opportunity given to the accused to be heard by himself or counsel, a person guilty of any of the following act may be punished for contempt:

"x x x x x x x x x x

"(b) Disobedience of or resistance to a lawful writ, process, or order, judgment, or command of a court, or injunction granted by a court or judge;

"x x x x x x x x x x

"But nothing in this section shall be so construed as to prevent the court from issuing process to bring the accused party into court, or from holding him in custody pending such proceedings."

As may be seen, a contempt proceeding as a rule is initiated by filing a charge in writing with the court, and after the charge is filed, an opportunity should be given the accused to be heard, by himself or counsel, before action could be taken against him. Here, it is true, a written charge was filed against petitioners, but no copy thereof has been served on them, nor have they been given an opportunity to be heard. The petitioners asked for this opportunity, but it was denied them. Instead, their arrest was immediately ordered. It is true that, under the same rule, "nothing x x shall be so construed as to prevent the court from issuing process to bring the accused party into court, or from holding him in custody pending such proceedings", but such drastic step can only be taken if good reasons exist justifying it. Apparently, this reason does not exist. Petitioners not having received copy of the written charge, they asked that they be given one. They also asked that they be given an opportunity to answer said charge before action is taken against them. Both pleas were disregarded. Such action, in our opinion, is tantamount to a denial of due process, which may be considered as a grave abuse of discretion. As this court has aptly said: "Courts should be slow in jailing people for non-compliance with their orders. Only in cases of clear and contumacious refusal to obey should the power be exercised. A *bona fide* misunderstanding of the terms of the order or of the procedural rules should not immediately cause the institution of contempt proceedings." (Gamboa v. Tesodoro, L-4893, May 13, 1952.)

Wherefore, the orders of respondent Judge dated October 18, 1952 and October 25, 1952, are hereby set aside and it is hereby ordered that before action be taken on the motion for contempt, petitioners herein be given an opportunity to answer said motion as prayed for in their written explanation dated October 24, 1952, without costs.

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

## XI

*Leopoldo R. Jalandoni, Protestant and Appellee, vs. Demetrio N. Sarcon, Protestee and Appellant, G. R. No. L-6496, January 27, 1954, Bautista Angelo, J.*

1. ELECTIONS; MOTION OF PROTEST, SUFFICIENCY OF. —Where a motion of protest contains allegations that the protestant is a qualified elector and one of the registered candidates voted for in the general elections held on November 13, 1951, these allegations substantially comply with the law and are sufficient to confer upon courts of first instance the requisite jurisdiction.
2. ID.; ID.; CERTIFICATE OF CANDIDACY. — A motion of protest need not in so many words state that the protestant has presented his certificate of candidacy or that he is a candidate for the office of mayor because all these allegations may be clearly inferred or deduced from the facts expressly alleged therein for it cannot be denied that one cannot be a registered candidate unless he has duly filed the required certificate of candidacy for the office he seeks to be a candidate.

*Emigdio V. Nietes* for protestee and appellant.

*Sixto Brillantes, Primitivo Buagas* and *Melquiades Sucaldito* for protestant and appellee.

### DECISION

BAUTISTA ANGELO, *J.*:

Demetrio N. Sarcon and Leopoldo R. Jalandoni were candidates for the office of Mayor of Midsayap, province of Cotabato, and had been voted for as such in the elections held on November 13, 1951. In the canvass made by the Municipal Board of Canvassers, Sarcon obtained 3,181 votes and Jalandoni 3,088 votes, and as a result the former was proclaimed elected. In due time, the latter filed an election protest in the Court of First Instance of Cotabato.

The trial court, upon petition of protestant, directed the National Bureau of Investigation to examine all the ballots contained in the white boxes as well as the stubs contained in the boxes for spoiled ballots, the corresponding voters affidavits and lists of voters, and all the pads containing the stubs of ballots used, of precincts Nos. 19 and 34 of Midsayap, to determine if the ballots cast in said precincts were genuine, or were cast by persons other than the legitimate voters. Angel H. Gaffud, examiner of said Bureau, made the examination as directed and submitted his report to the court.

During the trial, the protestant, through counsel, introduced as part of his evidence the certificate of candidacy he had filed as required by law but its admission was objected to on the ground that his motion of protest does not contain any allegation that he has filed any certificate, but the objection was overruled and the certificate was admitted in evidence. Upon the conclusion of the trial, the court rendered judgment nullifying 226 ballots cast for the protestee and declaring the protestant as the mayor elect with a majority of 133 votes.

The case was orginally taken to the Court of Appeals, but, as appellant has raised as one of the errors that the lower court had no jurisdiction to try the case because the motion of protest does not allege sufficient jurisdictional facts, it was later certified to this Court.

Appellant contends that the motion of protest does not contain jurisdictional facts because it fails to state that the protestant is a candidate voted for in the elections held on November 13, 1951 and that he has presented the required certificate of candidacy. He claims that these allegations are essential and the failure to include them in the motion of protest operates to divest the court of its jurisdiction over the case.

We agree with counsel that court of first instance, when taking cognizance of election protests, act as courts of special jurisdiction. In this sense they have a limited jurisdiction. They can only act when the pleadings aver jurisdictional facts. As this Court aptly said: "The Court of First Instance has no jurisdiction over an election protest until the special facts upon which it may take jurisdiction are expressly shown in the motion of protest. There is no presumption in favor of the jurisdiction of a court of limited or special jurisdiction. x x x Such court cannot, by any supposed analogy to ordinary proceedings, exercise any power beyond that which the legislature has given." (Tengco v. Jocson, 43 Phil. 715.) But we disagree with counsel that the motion of protest in the

present case does not allege facts sufficient to confer jurisdiction upon the lower court.

Among the important allegations appearing in the motion of protest are that protestant is a qualified elector and one of the registered candidates voted for in the general elections held on November 13, 1951, that, in accordance with the certificate of canvass of the Municipal Board of Canvassers, the protestee received 3,181 votes and the protestant 3,088 votes, and on December 3, 1951, the protestee was declared elected to the office of Mayor of Midsayap. In our opinion, these allegations substantially comply with the law and are sufficient to confer upon the court the requisite jurisdiction. It is true that the motion of protest does not in so many words state that protestant has presented his certificate of candidacy, or that he is a candidate for the office of Mayor of Midsayap, but all these allegations are clearly inferred or deducible from the facts expressly alleged therein for it cannot be denied that one cannot be a registered candidates unless he has duly filed the required certificate of candidacy for the office he seeks to be a candidate. This is a requirement which must needs be met before a person can be eligible or be voted for (Section 31, Revised Election Code). This is also the interpretation placed by the Senate Electoral Tribunal on the words "registered candidate" in a case involving a similar issue (Sanidad v. Vera, et al., Case No. 1, Senate Electoral Tribunal). Indeed, to countenance the plea of appellant would be to defeat an otherwise good case through a mere technical objection, which is the duty of the courts to prevent, for "It has been frequently decided, and it may be stated as a general rule recognized by all the court, that statutes providing for election contest are to be liberally construed, to the end that the will of the people in the choice of public officers may not be defeated by merely technical objections. To that end immaterial defects in pleadings should be disregarded and necessary and proper amendments should be allowed as promptly as possible." (Heyfrom v. Mahoney, 18 Am. St. Rep., 757, 763; McCrary on Elections, 3rd Ed., sec. 396; Galang v. Miranda, 35 Phil., 269.) As a corollary, it should be stated that the lower court did right in allowing the presentation in evidence of the certificate of candidacy of protestant which is necessary to establish a material jurisdictional fact.

Let us now come to the merits of the case. Note that the ballots disputed by appellant are those cast in precincts Nos. 19 and 34, and that these were all examined as ordered by the court by Angel H. Gaffud, a handwriting expert of the National Bureau of Investigation. The ballots disputed among those cast in precinct No. 19 amount to 306 of which 226 were found to be spurious. And among those cast in precinct No. 34 those disputed amount to 200 ballots and of these 53 were found also to be spurious. The handwriting expert classified the first batch into 14 groups, and basing his opinion on the striking similarities of the handwriting found in each group, he gave the opinion that the 226 ballots had been written by one and the same hand. The second batch was classified into 10 groups and following the same process he reached the same conclusion. The lower court concurred in this opinion as regards the 226 ballots but disagreed with regard to the 53. It found that these 53 ballots were all written in Moro characters, and considering that these characters were not known to the handwriting expert, it entertained doubt as to the veracity of his findings. This doubt the court resolved in favor of the protestee and counted them in his favor.

Counsel for appellant disagrees with these findings concerning the 226 ballots and, pointing out the individual characteristics of the writer of each ballot shown by his habit of writing, "such as his slant, the proportional heights of his one spaced to his two spaced letter, or to one another; the pressure of writing, the spacing, the penlift of the writer, the crossing of his 't's', the dotting of his 'i's', his habitual initial and terminal strokes, whether they are blunt or flying, the loops of his letters, his speed in writing, and the use of capital letters", he now vehemently contends that the ballots in question cannot be considered as having been written by one and the same hand. And to make his opinion more impressive and factual he made his own grouping of the ballots and proceeded to compare one with the other pointing out certain differences which in his opinion tend to destroy the findings of the handwriting expert and of the trial court. In view of these conflicting opinions, and in order to reach a conclusion as close as may be possible to the truth, we have examined these ballots one by one and have found that, with the exception of 15 ballots which appear to have been written by different persons, the findings of the handwriting expert are correct and should be sustained. For the purpose of this decision, and in order that the characteristics of the writing may be better appreciated, we have placed the ballots in small groups within the classification made by the handwriting expert and the following are the reasons supporting our conclusion:

## GROUP I

45 ballots (Exhs. A; A-1; A-4; A-10; A-14; A-25; A-36; A-42; A-62; A-63; A-9; A-12; A-30; A-34; A-35; A-37; A-46; A-49; A-50; A-52; A-53; A-66; A-67; A-72; A-74; A-81; A-85; A-86; A-90; A-91; A-94; A-96; A-97; A-100; A-102; A-103; A-107; A-109; A-110; A-2; A-3; A-15; A-93; A-45 and A-101) were undoubtedly written by only one person. While there is an attempt to disguise the handwriting by using different writing instruments, as indelible pencil, lead pencil and blue-colored pencil, and by varying the slant of the writing, pen pressure and spelling of the words, the general characteristics of the writer as to form, formation of letters and habits are clearly noticeable. In all these ballots, except one or two, one cannot help but notice the peculiar form of the capital letter T in "Tadio" and "Tan". Except the first ballot, the M in "Mantel" has four "legs". The capital letter C in "Cambronero" and "Carlos" has a peculiar formation, that is, the initial stroke begins from below, has a loop on top and is brought down with the usual curve. The capital F in "Flores", the capital S in "Sarcon", and the capital R in "Roganton" are similar in practically all these ballots as "Suluezeta", or "Suluezta", or "Suluezela" having forgotten to place the cross-bar in the t, "Suluezat", and the terminal "a" is separate from the "t", a practice habitual to the writer.

12 ballots (Exhs. A-6; A-8; A-16; A-39; A-40; A-43; A-51; A-54; A-58; A-61; A-70; and A-73). These were clearly written by same person who wrote the above 45 ballots. The characteristic formations of the capital letter M in "Martel", C in "Cambronero" and "Carlos", T in "Tan" and "Tadio" and R in "Roganton" in the above 45 ballots are all found in these 12 ballots. In all these ballots the name Zulueta begins with capital Z in printed form. The terminal letter "a" is separate from the "t" just like the 45 ballots above.

14 ballots (Exhs. A-13; A-19; A-20; A-21; A-22; A-26; A-29; A-41; A-44; A-55; A-57; A-75; A-76; and A-87). In all these ballots one hand wrote the votes for Senators with indelible pencil, without any attempt to disguise the penmanship. Another hand, which is the same one that wrote the above-mentioned 45 ballots, wrote in lead pencil the votes for the provincial and municipal officials, with the usual characteristic formation of the capital letters M in "Mantel", C in "Cambronero" and "Carlos", R in "Roganton" and T in "Tadio" and "Tan".

11 ballots (Exhs. A-5; A-7; A-32; A-38; A-60; A-69; A-71; A-77; A-78; A-80; and A-106). One hand wrote the votes for Senators in all these 11 ballots, but different from the hand that the above 14 ballots. This writer is a more accomplished writer. He tried to disguise his writing in 3 of these ballots (Exhs. A-5, A-78 and A-80) by making his letters smaller, but this betrayed by his usual formation of the capital letter Z in "Zulueta" which is the same in all the ballots. He also wrote in the last 2 ballots the votes for members of the Provincial Board. The rest of the votes in these 11 ballots was written by another hand, the same that wrote the 45 ballots, *supra*, as shown by the capital letters M in "Mantel", C in "Cambronero" and "Carlos", T in "Tadio" and "Tan", R in 'Roganton", B in "Bangas" and Y in "Yerno". He tried to disguise his handwriting in the last ballot by changing his slant.

3 ballots (Exhs. A-27; A-31 and A-84). These were pre-

pared by the same person who wrote the 45 ballots, *supra*, with an indelible pencil. The usual characteristics of his writing as already described are present, like the C in "Cambronero" and "Carlos", F in "Flores", R in "Roganton" and others.

6 ballots (Exhs. A-68; A-79; A-99; A-33 and A-56). The first four ballots were each prepared by different voters and could have been regular were it not for the insertion of the name of candidate Carlos Tan in the space for special election by the same guilty hand that invalidated all the ballots discussed. But this cannot invalidate them. In the last two ballots, "Sarcon", and "Yerno" in the spaces for Mayor and Vice-Mayor, respectively, were written by the same guilty hand as shown by the capital letter C in "Carlos", T in "Tan" and Y in "Yerno". These two ballots are, therefore, invalid.

5 ballots (Exhs. A-23; A-59; A-64; A-89 and A-105). The voter in the first ballot voted only for "Borra" and "Cambronero"; in the second, the voter voted only for "Quirino" and "Roganton", in the third the voter voted for "Sarcon", "Yerno" and four councilors; in the fourth the voter voted for "Zuelueta", "Borra" and "Cambronero", and in the last voted for seven councilors from line 2 to 8. With the exception of the third ballot, the name "Sarcon" was written by the same guilty hand and should therefore be declared invalid. Only the third is valid.

3 ballots (Exhs. A-11; A-24 and A-83). Similarly, those three ballots were tampered by the same guilty hand. The first 2 ballots were voted in Arabics while the third voted only for "Kimpo" in blue pencil. The guilty hand wrote "Carlos Tan" and the other writing as can be seen by his characteristic capital letters "C" and "T".

2 ballots ( Exhs. A-98 and A-48). These were each prepared by two hands. "Zulueta" in both ballots were written by one hand, the same person who wrote this word in the 11 ballots, *supra*. This hand wrote also the rest, written in blue-colored pencil, in the second ballot. The rest of the writing in the first ballot was written by the same guilty hand that prepared the 45 ballots, *supra*.

2 ballots (Exhs. A-17 and A-47). These two ballots were each prepared by 2 hands. "Carlos Tan" was written in both ballots by the same guilty person in the 45 ballots, *supra*, but the name "Sarcon" was written by the same hand in the two ballots.

4 ballots (Exhs. A-82; A-95; A-104 and A-108). These were prepared by the same guilty hand that prepared the 45 ballots, *supra*. He tried to disguise his writing but he could not escape judgment by one who has become used to his letter formation.

3 ballots (Exhs. A-18; A-65 and A-88). A careful scrutiny of these ballots shows that nothing in them indicates that they have been tampered with. They are valid.

*GROUP II*

30 ballots (Exhs. B to B-30, inclusive, with the exception of B-28). They were all prepared by only one individual, the same person who wrote the votes for Senators in the group of 11 ballots, *supra*, of Group I. The writer made an attempt to disguise his handwriting which may be classified into *three groups*, as follows: first group, Exhs. B; B-1; B-7; B-8; B-10; B-12; B-15; B-16; B-17; B-18; B-22; B-25; B-24; B-26 and B-27; second group, Exhs. B-2; B-3; B-4; B-5; B-9; B-13; B-19; and B-21, and third group, Exhs. B-6; B-11; B-14; B-20; B-23; B-29 and B-30. The first group may be described as the writer's ordinary handwriting with his usual slant; in the second group, he changed his slant making it a little bit vertical; and in the third group, he made his letters smaller but in his usual slant. The writer is an accomplished one. He comouflaged his handwriting by using lead, indelible and blue-colored pencils, but this did not vitally change his habitual form. His formation of capital Y in "Yerno" in all the ballots, except a few, is eye-catching, in that, it starts with a flourish from below. This is also true in his capital V in "Villareal". One can easily notice his formation of Z in "Zulueta", K in "Kimpo", M in "Mantel", C in Cambronero" and T in "Tadio" and "Tan". They are all alike in all the ballots.

1 ballot (Exhs. B-20). This is void because the writings there in were written by three different hands. This is apparent by a mere examination of the ballot.

GROUP III

17 ballots (Exhs. C to C-16, inclusive). They were all written by one and the same person. The general appearance of the handwriting in all the ballots shows that the writings therein were made hurriedly, but the writer did not attempt to disguise his penmanship. The ballots may be grouped into three: first group, Exhs. C; C-1; C-2; C-3; C-6; C-9; C-10 C-11; C-12 and C-14 were all written in lead pencil; second group, Exhs. C-4; C-5; C-7; C-8; C-13 and C-15, all written in blue-colored pencil; and the last group, Exhs. C-16, written in indelible pencil.

*GROUP IV*

9 ballots (Exhs. D to D-8, inclusive). They were all written by one hand with apparently the same indelible pencil. No attempt was made to disguise the handwriting. The most distinguishing characteristic of the handwriting is the upward flourish in all terminal letters of the name of the candidates, especially the terminal letter "o" in "Yerno", "Carbronero" and "Kimpo".

*GROUP V*

8 ballots (Exhs. E-1; E-4; E-5; E-6; E-11; E-12; E-13 and E-16). They were all written by one hand. The similar formation of the following capital letters betray the fraud committed: S in "Sarcon", Y in "Yerno"; B in "Bengzon" and "Borra", R in "Ragonton" and "Randing"; F in "Flores" and V in "Villareal". In all the ballots, the capital letter C in "Cuenco" and "Cambronero" were written like a small letter c.

4 ballots (Exhs. E-9; E-18; E-21 and E). They were written by the same person who wrote the 8 ballots in the preceding paragraph. The writing was disguised by the writer changing his slant, making it vertical and using different pencils. But the characteristic formation of his capital letters Y in "Yerno", F in "Flores", V in "Villareal", R in "Ragonton" and "Randing" are unmistakably present.

4 ballots (Exhs. E-10; E-17; E-19 and E-20). They were all written by one hand using a blue-colored pencil. The writing in all the ballots is very similar with the same light pen pressure. The heavier downward stroke in the terminal "l" in "Laurel", "Mantel" and "Villareal" is glaringly noticeable.

3 ballots (Exhs. E-3; E-7 and E-14). They were written by the same hand that wrote the 8 ballots, *supra*. The writing in these ballots was disguised by making the letters a little bigger than the group referred to. But the same letter formation can be found in these ballots.

2 ballots (Exhs. E-2 and E-15). They were written by one person. This is apparent by a mere examination of the ballots. His letter formation and slant are alike in both ballots.

3 ballots (Exhs. E-8; and E-22 and E-23). Nothing in these ballots shows that they were tampered with. They were each written by different voters. They are valid.

*GROUP VI*

4 ballots (Exhs. F to F-3). They were all written by one and the same person, the first ballot, in indelible pencil, and the last three in blue-colored pencil. The handwriting in these 4 ballots is very much alike. Even the spelling of the senators voted for in these 4 ballots is the same. "Laurel" for Laurel, "Zulueta" for Zulueta, and "Locsin" for Locsin.

*GROUP VII*

2 ballots (Exhs. G and G-1). They were each written by

two hands. One hand wrote the name "Sarcon" in both ballots, while the Arabic votes each ballot were written by two different persons. This is apparent by a mere examination of the ballots. These ballots are, therefore, void.

*GROUP VIII*

8 ballots (Exhs. H to H-7, inclusive). They were all written by one person using a blue-colored pencil. The handwriting in these ballots is all identical, the writer having made no attempt to disguise his penmanship. This is apparent by a mere examination of the ballots.

*GROUP IX*

7 ballots (Exhs. I-1 to I-7, inclusive). They were all written by only one individual who tried to disguise his handwriting by using indelible, lead and blue-colored pencils. But his attempt is belied by his identical formation of the four-legged capital M in "Mantel", the capital letter D in "D. Sarcon" and "Q. Mantel" in 4 of the ballots, capital letter Z in "Zulueta" and L in "Locsing" and "Laurel". His attempt is further exposed by his wrong spelling of Zulueta as "Zuleta" and Locsin as "Locsing" which are found in all the ballots.

1 ballot (Exhs. I-8). This was written by at least two hands. One hand wrote the names "Sarcon" and "Yermo" in the spaces for Mayor and Vice-Maor, respectively. One can immediately detect that the writer of these names is more accomplished than the hand that wrote the votes for senators, members of provincial board and councilors.

1 ballot (Exhs. I). This appears to be good. There is nothing to indicate that it was tempered with.

*GROUP X*

2 ballots (Exhs. J and J-2). They were written by one individual. The handwriting in both ballots is identical in all respects. The name of Carlos Tan was written in both ballots as one word.

1 ballot (Exh. J-1). The handwriting in this ballot appears to be different from that in the other ballots and there is nothing to indicate that it was tampered with.

*GROUP XI*

2 ballots (Exhs. K and K-1). They were written by one hand. No attempt to disguise the writing was made and the similarity of the penmanship in both ballots is very apparent. These two are void.

*GROUP XII*

2 ballots (Exhs. L and L-1). These two ballots were written by two different persons. The disimilarities between the handwriting in both ballots are more striking than any similarity that can be seen. The slant, letter distances, stroke, penlift and pen pressure are different. These two ballots are, therefore valid.

*GROUP XIII*

1 ballot (Exh. M). This was written by two persons. One hand wrote the senatorial candidates from line 3 to 7, while the rest was written by another. The first hand is the same one that wrote the senatorial candidates in the group of 14 ballots, *supra*, under Group I. The slant, pen pressure and terminal strokes are different from the second hand.

1 ballot (Exh. M-1). This was written by the same person who wrote the votes for provincial and municipal officials in the ballot discussed in the preceding paragraph. The letter formation, slant and the penlift in "Yerno" are identical.

*GROUP XIV*

2 ballots (Exhs. N and N-1). They were written by one and the same person. No attempt to disguise the writing was made. The sizes of the letters, spacing, alignment and letter formations in both ballots are identical. These two ballots are, therefore, void.

In *resumé*, we find that of the 226 ballots declared spurious by the lower court, 15 are legitimate and should be cast in favor of the protestee. These ballots are Exhibits A-68; A-79; A-92; A-99; A-64; A-18; A-65; A-88; E-8; E-22; E-23; I; J-1; L and L-1. The findings of the lower court as to the balance of 211 ballots should be sustained. Deducting this number from the votes awarded to the protestee by the Board of Canvassers, we have that the protestant has won the election with a majority of 118 votes.

Wherefore, with the above modification, we hereby affirm the decision appealed from, without pronouncement as to costs.

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

## XII

*Marc Donnelly & Associates, Inc., Petitioner, vs. Manuel Agregado, Auditor General; Cornelio Balmaceda, Secretary of Commerce and Industry; and Ramon L. Paguia, Chief of the Sugar Quota Office, Respondents, No. L-4510, May 31, 1954, Bautista Angelo, J.*

1. CONSTITUTIONAL LAW; DELEGATION OF LEGISLATIVE POWERS; POWERS MAY BE DELEGATED IF AUTHORIZED BY THE CONSTITUTION; ACT OF CABINET IS ACT OF PRESIDENT.—On July 10, 1946, the President, acting upon the authority vested in him by Commonwealth Act No. 728, making it unlawful to export agricultural or industrial products without a permit from the President, prohibited the exportation of certain materials but allowed the exportation of other merchandise, like scrap metals, provided an export license is first obtained from the Philippine Sugar Administration. The Cabinet, upon recommendation of the National Development Company, approved a resolution fixing the schedule of royalty rates to be charged on metal exports and authorized their collection. Petitioner exported large amounts of scrap metals for which it paid by way of royalty fees the total amount of P54,862.84. Petitioner now seeks the refund of said royalty fees, contending that the aforesaid resolution constitutes an undue delegation of legislative powers because, in substance, it creates and imposes an *ad valorem tax*. *Held*: The resolution approved by the Cabinet is perfectly legal because it was done by authority of Commonwealth Act No. 728 and in pursuance of an express provision of the Constitution that Congress may by law authorize the President, subject to certain limitations, to fix, within specified limits, tariff rates, import or export quotas, and tonnage and wharfage dues. The fact that the resolution was approved by the Cabinet and the collection of the royalty fees was not decreed by virtue of an order issued by the President himself does not invalidate said resolution because it cannot be disputed that the Act of the Cabinet is deemed to be, and essentially is, the act of the President.

2. ID.; ID.; RULE FORBIDDING DELEGATION OF LEGISLATIVE POWERS, NOT ABSOLUTE; EXCEPTIONS.—The rule which forbids delegation of legislative power is not absolute. It admits of exceptions as when the Constitution itself authorizes such delegation.

3. ID.; PROPERTY RIGHTS; EXPORTATION OF SCRAP METALS NOT A RIGHT BUT A PRIVILEGE; AUTHORITY OF PRESIDENT TO REGULATE EXPORTATION INCLUDES AUTHORITY TO IMPOSE CONDITIONS AND LIMITATIONS FOR THE EXERCISE OF PRIVILEGE.—Commonwealth Act No. 728 expressly authorizes the President not merely to regulate but to prohibit altogether the exportation of scrap metals. Hence, there is no absolute right on the part of any person or entity to export such materials. If, however, the President chooses to grant the privilege, he can impose conditions and limitations he may deem proper, one of them being

the payment of royalties for permissive or lawful use of property right.

4. ROYALTY RATES, MAY TAKE THE FORM OF TARIFF RATES; IMPOSITION THEREOF CAN BE DELEGATED TO THE PRESIDENT.—Royalty rates may take form of tariff rates, the imposition of which can be delegated to the President by Congress in pursuance of an express provision of the Constitution.

5. ID.; ROYALTIES NOT IMPOSITION; PAYMENT OF ROYALTY IS THE CONSIDERATION FOR THE EXERCISE OF THE PRIVILEGE; EXPORTER WHO PAYS, GUILTY OF ESTOPPEL.—The payment of royalty rates cannot be considered as an imposition or one exacted under duress, for the exporter who wants to avail of this privilege is free to act on the matter as his interest might dictate. The payment of royalty can be considered as the consideration for the exercise of the privilege and one who avails of that privilege and pays the consideration is guilty of estoppel.

*Arturo Agustines* for the petitioner.

*Solicitor General Pompeyo Diaz, Assistant Solicitor General Francisco Carreon,* and *Solicitor Augusto M. Luciano* for the respondents.

## D E C I S I O N

BAUTISTA ANGELO, *J.*:

This is a petition for review of a decision of the Auditor General denying the claim of petitioner for the refund of the export fees paid by it to the Sugar Quota Office in the amount of P54,862.84

On July 2, 1946, Congress enacted Commonwealth Act No. 728, making it unlawful for any person, association or corporation to export agricultural or industrial products, merchandise, articles, materials, and supplies without a permit from the President of the Philippines. This Act confers upon the President authority to "regulate, curtail, control, and prohibit the exportation of materials abroad and *to issue such rules and regulations as may be necessary* to carry out the provisions of this Act, through such department or office as he may designate."

On July 10, 1946, the President, acting upon the authority vested in him by Commonwealth Act No. 728, promulgated Executive Order No. 3, prohibiting the exportation of certain materials therein enumerated but allowing the exportation of other merchandise, like scrap metals, provided an export license is first obtained from the Philippine Sugar Administration.

On April 24, 1947, the Chief of the Executive Office, by authority of the President, sent a communication to the Philippine Sugar Administration authorizing the exportation of scrap metals upon payment by the applicants of a fee of P10.00 per ton of the metals to be exported. Subsequently, the Cabinet, upon recommendation of the National Development Company, approved a resolution fixing the schedule of royalty rates to be charge on metal exports.

Petitioner herein exported large amounts of scrap iron, brass, copper, and aluminum during the period from December, 1947 to September, 1948, for which it paid by way of royalty fees the total amount of P54,862.84. This amount was collected by the Sugar Quota Office under the authority granted by the Chief of the Executive Office and the resolution of the Cabinet above mentioned. The case is now before us by way of appeal from the decision of the Auditor General who denied the request for refund of said royalty fees.

Petitioner contends that the resolution of the Cabinet of October 24, 1947, fixing the schedule of royalty rates on metal exports and providing for their collection constitutes an undue delegation of legislative powers because, in substance, it creates and imposes an *ad valorem* tax.

Article VI, Section 22 (2), of the Constitution provides:

> "The Congress may by law authorize the President, subject to such limitations and restrictions, as it may impose, to fix, within specified limits, tariff rates, import or export quotas, and tonnage and wharfage dues."

It is clear from the above that Congress may by law authorize the President, subject to certain limitations, to fix, within specified limits, *tariff rates*, import or export quotas, and tonnage and wharfage dues. And pursuant to this constitutional provision, Congress approved Commonwealth Act No. 728 conferring upon the President authority to regulate, curtail, control, and prohibit the exports of scrap metals and to issue such rules and regulations as may be necessary to carry out its provisions. And implementing this broad authority, the Cabinet approved the resolution now in question authorizing the levy and collection of certain royalty fees as a condition for the exportation of scrap metals and other merchandise.

In our opinion, this resolution is perfectly legal because it was done by authority of Commonwealth Act No. 728 and in pursuance of an express provision of our Constitution. The fact that the resolution was approved by the Cabinet and the collection of the royalty fees was not decreed by virtue of an order issued by the President himself does not, in our opinion, invalidate said resolution because it cannot be disputed that the act of the Cabinet is deemed to be, and essentially is, the act of the President. And this is so because, as this Court has aptly said, the secretaries of departments are mere assistants of the Chief Executive and "the multifarious executive and administrative functions of the Chief Executive are performed by and through the executive departments, *and the acts of the secretaries of such departments, performed and promulgated in the regular course of business, are, unless disapproved or reprobated by the Chief Executive, presumptively the acts of the Chief Executive.*" (Villena v. The Secretary of Interior, 67 Phil., 451.) To hold otherwise would be to entertain technicality over substance. And with regard to the acts of the Cabinet, this conclusion acquires added force because, unless shown otherwise, the Cabinet is deemed to be presided over always by the President himself.

It is contended that the royalty rates prescribed in the Cabinet resolution are not fees but in effect partake of the nature of an *ad valorem* tax the imposition of which cannot be delegated to the President by Congress. The rule which forbids delegation of legislative power is not absolute. It admits of exceptions as when the Constitution itself authorizes such delegation (Constitution of the Philippines by Tañada and Fernando, p. 449). In the present case, our Constitution expressly authorizes such delegation. [Article VI, Section 22 (2).] This is so because the royalty rates may take the form of tariff rates. At any rate, Commonwealth Act No. 728 confers upon the President authority to regulate, curtail, control, and prohibit the exportation of scrap metals, and in this authority is deemed included the power to exact royalties for permissive or lawful use of property right. (Raytheon Mfg. Co. v. Radio Corporation of America, 190 N. E. 1, 5, 286 Mass. 34, cited in Words and Phrases, Vol. 37, p. 810)

One point that should be considered is the distinction between the business of exporting scrap metals, on one hand, and other merchandise on the other. As a rule, common trades or industries, for the exportation of merchandise in general, cannot be prohibited, but may only be regulated in the exercise of the police power of the States; not so with regards to scrap metals whose exportation may be completely banned. This is the core of Commonwealth Act No. 728. It authorizes the President not merely to regulate but to prohibit altogether the exportation of certain articles, among them scrap metals. Hence, there is no absolute right on the part of any person or entity to export such materials. But the President, acting under the authority granted by said Act, did not, in promulgating Executive Order No. 3, choose to place a complete ban on the exportation of scrap metals, but permitted such exportation upon payment of certain royalty. If the President can prohibit altogether such exportation, *a fortiori* he can, as he did, impose conditions and limitations he may deem proper in granting the privileges, one of them being the payment of royalties similar to the one subject of the present litigation.

The payment of these royalties cannot be considered, as contended by petitioner, as an imposition or one exacted under duress, for the exporter who wants to avail of this privilege is free to act on the matter as his interest might dictate. Compliance with the resolution was optional. It was left entirely to his discretion. If with full knowledge of the condition imposed by the resolution the exporter of the prohibited article deems it convenient to traffic on it because of the profit he expects to derive from the transaction, he cannot later be heard to complain of what the Government has exacted because of the presumption that, in spite of that charge, the transaction would still bring him a substantial profit. The payment of the royalty can be considered as the consideration for the exercise of the privilege and one who avails of that privilege and pays the consideration is guilty of estoppel. This is the predicament of petitioner.

Wherefore, petition is dismissed, without pronouncement as to costs.

*Paras, C.J., Labrador, Montemayor* and *Jugo, J.J.*; concur in the result.

PABLO, *M*, concurrente:

La recurrente pide la devolución de la cantidad de ₱54,968.41 que había pagado a la Sugar Quota Office por el permiso que obtuvo para exportar desperdicios de metal, "scrap metals." Cuando la recurrente pidió permiso estaba enterada de que la Ley del Commonwealth No. 728 declaraba ilegal, sin permiso del Presidente de Filipinas, la exportación de productos, mercancías, artículos, materiales y efectos agrícolas e industriales. En su artículo 2. dicha ley autoriza al Presidente a regular, restringir, controlar y prohibir dicha exportación y dictar los reglamentos necesarios para llevar a efecto las disposiciones de dicha ley. En 10 de julio de 1946, ejerciendo los poderes que le confería dicha ley, el Presidente promulgó la orden ejecutiva No. 8 que prohibía la exportación de los materiales enumerados en el artículo 1.o; pero permitía la exportación de otras mercancías como los desperdicios de metal con la condición de que se obtuvierantes licencia de la Philippine Sugar Administration.

En 24 de octubre de 1947 el Gabinete, por recomendación del Administrador de la National Development Company, aprobó una resolución estableciendo un "schedule of royalty rates on metal exports."

La recurrente contiende que la cantidad que pagó de acuerdo con dicha tarifa (schedule) y que hoy reclama fué un impuesto sobre las cantidades de desperdicios de hierro, latón, bronce y aluminio que había exportado desde diciembre de 1947 hasta septiembre de 1948.

En 2 de diciembre de 1947 la recurrente, acogiéndose a las disposiciones de la ley del Commonwealth No. 327, presentó su reclamación al Auditor General, alegando que el impuesto era anticonstitucional, porque el Gabinete no tenía autoridad para adoptar dicho impuesto y que solamente el Congreso es el que esta autorizado para aprobar ley sobre impuestos. En su decisión de 8 de noviembre de 1950 el Auditor denegó el reembolso, y contra ella la recurrente apeló en 25 de enero de 1951.

Los artículos 1 y 2 de la Ley del Commonwealth No. 327, en que se funda se reclamación, dicen así:

"SECTION 1. In all cases involving the settlement of accounts or claims, other than those of accountable officers, the Auditor General shall act and decide the same within sixty days, exclusive of Sundays and holidays, after their presentation. If said accounts or claims need reference to other persons, office or offices, or to a party interested, the period aforesaid shall be counted from the time the last comment necessary to a proper decision is received by him. With respect to the accounts of accountable officers, the Auditor General shall act on the same within one hundred days after their submission, Sundays and holidays excepted.

"In case of accounts or claims already submitted to but still pending decision by the Auditor General or before the approval of this Act, the periods provided in this section shall commence from the date of such approval.

"SEC. 2. The party aggrieved by the final decision of the Auditor General in the settlement of an account or claim may, within thirty days from receipt of the decision, take an appeal in writing:

"(a) To the President of the United States, pending the final and complete withdrawal of her sovereignty over the Philippines, or

"(b) To the President of the Philippines, or

"(c) To the Supreme Court of the Philippines if the appellant is a private person or entity.

"If there are more than one appellant, all appeals shall be taken to the same authority resorted to by the first appellant.

"From a decision adversely affecting the interests of the Government, the appeal may be taken by the proper head of the department or in case of local governments by the head of the office or branch of the Government immediately concerned.

"The appeal shall specifically set forth the particular action of the Auditor General to which exception is taken with reasons and authorities relied on for reversing such decision."

Toda reclamación, al parecer, está incluída en la palabra "claims" porque su significado es amplio; pero no está incluída la reclamación que pide el reembolso de una contribución indebidamente cobrada, porque el Código Administrativo de 1916, el Código Administrativo Revisado de 1917, la Ley No. 3685 y el Código Nacional de Rentas Internas disponen específicamente ante qué autoridad deben presentarse reclamaciones de reembolso de impuestos ilegalmente cobrados.

Si el Auditor General tiene facultad o jurisdicción para resolver asuntos como el presente, entonces una reclamación presentada antes de la proclamación de la independencia sería apelable al Presidente de los Estados Unidos. No creemos que la Legislatura haya intentado, ni en sueños, que el Presidente de Estados Unidos y el de Filipinas se entretuviesen en asuntos de tal naturaleza. Si se tratase, por ejemplo, de recobrar un impuesto ilegalmente cobrado por poseer licencia de armas de fuego, ¿apelaría el interesado al Presidente de Estados Unidos si no estuviese satisfecho de la decisión del Auditor? La palabra "claims" de que habla el artículo 1.o de la Ley del Commonwealth No. 327 que se aprobó en 18 de junio de 1938 no debe referirse a reclamaciones de reintegro de impuestos indebidamente cobrados, porque la resolución de las mismas ya estaba encomendada expresamente al Administrador de Rentas Internas y a los tribunales de justicia por el Código Administrativo Revisado de 1917, tal como fué enmendado por la Ley No. 3685.

El artículo 1721 del Código Administrativo de 1916, el artículo 1579 del Código Administrativo Revisado de 1917 y el artículo 1579 del último código, tal como fué enmendado por la Ley No. 3685, dicen textualmente: "When the *validity of any tax is questioned*, or its amount disputed, or other question raised as to liability therefor, the person against whom or against whose property the same is sought to be enforced shall pay the tax under instant protest, or upon protest within thirty days, (10 días en el Cód. Adm. de 1916 y Cód. Adm. de 1917) and shall thereupon request the decision of the Collector of Internal Revenue. If the decision of the Collector of Internal Revenue is adverse, or if no decision is made by him within six months from the date when his decision was requested, the taxpayer may proceed, at any time within two years after the payment of the tax to bring an action against the Collector of Internal Revenue for the recovery x x x." (Art. 1579, Cód. Adm. Rev., tal como fué enmendado por la Ley No. 3685.)

En las palabras "any tax" empleados en los tres códigos están incluídas todas las reclamaciones sobre *cualquier* impuesto inde-

bidamente cobrado: no se refieren a impuestos de rentas internas solamente.

La disposición específica del Código Administrativo Revisado, tal como fué enmendado, debe prevalecer sobre la disposición de carácter general de la Ley del Commonwealth No. 327: así lo exige la hermenéutica legal.

El asunto citado por la mayoría de la Manila Electric Company contra la Auditor General y Comisión de Servicios Públicos, 73 Phil., 128, no puede servir de precedente; no se percataron el Auditor y este Tribunal del artículo 1579 del Código Administrativo Revisado, tal como fué enmendado, de que el asunto era de la incumbencia del Administrador de Rentas Internas y del Juzgado de Primera Instancia.

El artículo 584 del Código Administrativo Revisado dice así: "The authority and powers of the Bureau of Audits extend to and comprehend all matters relating to accounting procedure, including the keeping of the accounts of the Government, the preservation of vouchers, the methods of accounting, the examination and inspection of the books, records, and papers relating to such accounts, and to the audit and settlement of the accounts of all persons respecting funds or property received or held by them in an accountable capacity, as well as to the examination and audit of all debts and claims of any sort due from or owing to the Government of the Philippine Islands in any of its branches. x x x" Esta disposición no incluye la reclamación de impuestos indebidamente cobrados. Darle al Auditor facultad para resolver semejante reclamación es concederle función judicial.

El Código Nacional de Rentas Internas (en sustitución del Código Administrativo Revisado y otras leyes enmendatorias) en vigor cuando la recurrente presentó su reclamación dispone lo siguiente:

> "SEC. 306. RECOVERY OF TAX ERRONEOUSLY OR ILLEGALLY COLLECTED. — No suit of proceeding shall be maintained in any court for the recovery of any national internal-revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Collector of Internal Revenue; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. In any case, no such suit or proceeding shall be begun after the expiration of two years from the date of payment of the tax or penalty."

La cantidad que reclama la recurrente está incluída en las siguientes palabras: "of any sum alleged to have been excessive or in any manner wrongfully collected", que equivalen a *any tax* empleadas por los códigos anteriores.

No es de la incumbencia del Auditor General decidir la reclamación sobre la devolución de impuestos ilegalmente cobrados o declarar que una ley, orden o resolución que dispone el cobre de un impuesto, sea a no anticonstitucional. Son dos questiones que deben resolver las tribunales de justicia, porque son asuntos esencialmente judiciales y no administrativos. La recurrente, por tanto, debió de haber planteado la devolución del impuesto anticonstitucionalmente cobrado ante el Administrador de Rentas Internas primero o la Philippine Sugar Administration, y si denegara o no se resolviera su reclamación, presentar demanda ante el Juzgado de Primera Instancia dentro de dos años después de pagados los impuestos. (Art. 306, Cód. Nac. de Rentas Internas.)

Podría arguir la recurrente que el impuesto hoy discutido no es de rentas internas sino de exportación y, por lo tanto, no debiera plantearse ante el Administrador de Rentas Internas ni en el Juzgado de Primera Instancia. Tal contención sería insostenible, porque en Visayan Electric, S.A. contra Saturnino David, etc., G.R. No. L-5157, abril 27, 1953; Philippine Railway Co. vs. Collector of Internal Revenue, G.R. No. L-3859, marzo 25, 1952; y Manila Railroad Co. contra Rafferty, 40 Jur. Fil., 237, se trataba de un indebido aumento de impuesto sobre franquicia, y la cuestión se planteó ante el Administrador de Rentas Internas y luego ante el Juzgado de Primera Instancia.

El Auditor General no tiene jurisdicción para resolver la reclamación fundada en la anticonstitucionalidad del impuesto cobrado; tampoco este Tribunal adquiere jurisdicción apelada.

Por estas razones, concurro con el sobreseimiente de la causa.

Creo, con el Magistrado Pablo, que el Auditor General carece de autoridad para determinar la validez de los derechos o "royalties" envueltos en la presente causa.

(*Fdo.*) *Roberto Concepcion*

BENGZON, *J. dissenting*:

With due deference to the majority opinion, my vote is for the petitioner.

On several occasions, between December 1947 and September 1948, the domestic corporation Marc Donnelly and Associates Inc. exported considerable quantities of scrap iron, brass, copper and aluminum, for which it paid under protest to the Sugar Quota Office as "Royalties" the total amount of ₱54,862.84. Such royalties were admittedly demanded "under the authority granted to it (Sugar Quota Office) by the resolution of the Cabinet of October 24, 1947", which reads as follows:

"Upon recommendation of the General Manager of the National Development Company, the Cabinet approved the following schedule of royalty rates on metal exports:

| | |
|---|---|
| Scrap copper ..... | ₱50.00 per metric ton |
| Scrap brass ..... | 50.00 per metric ton |
| Scrap aluminum ..... | 20.00 per metric ton |
| Scrap lead ..... | 40.00 per metric ton |
| Scrap cast iron ..... | 5.00 per metric ton |
| Scrap steel ..... | 2.00 per metric ton |
| other than burnt copper wire ..... | 5.00 per metric ton |

Contending that the Cabinet's resolution was invalid, and that the payments were involuntary, Marc Donnelly and Associates Inc. submitted to the Auditor General, in September 1950, a formal claim for refund, which was denied with the explanation:

> "The collection of the royalties in question is based on the resolution of the Cabinet, dated October 24, 1947, which is assailed by you as unconstitutional. Inasmuch as this Office has no power to pass upon the constitutionality or validity of said resolution and the fact that the resolution is presumed to be constitutional unless declared by a competent court to be otherwise, the request for refund of royalties collected by virtue of said resolution is hereby denied."

Reversal of the Auditor's decision is now requested under the provisions of Com. Act No. 327 and Rule 45 of the Rules of Court. In Manila Electric v. Auditor General, 73 Phil. 128, we entertained a similar petition.

It is urged that the execution is illegal, the Cabinet having no lawful power to require the collection of "royalty" fee on metal exports.

As the Auditor General Disapproved the refund solely upon the ground that the Cabinet's resolution "should be presumed to be constitutional unless declared by a competent court to be otherwise", the question is the Cabinet's authority to direct the collection of the aforesaid royalties.

No statute has been quoted authorizing the Cabinet to levy the assessment. Observe that "the taxing power of the State is

exclusively a legislative function, and taxes can be imposed only in pursuance of legislative authority" (61 C.J. p. 81).

However, seeking to justify the collection, the respondents have formulated these propositions:

1. Commonwealth Act No. 728, July 1946, made it unlawful to export agricultural or industrial products, materials or supplies, without a permit from the President. It authorized the President to regulate, control or prohibit exportation of materials and to issue rules and regulations in connection therewith.

2. In the exercise of such authority, the President promulgated Executive Order No. 3 prohibiting the exportation of scrap metal unless an export license was first obtained from the Philippine Sugar Administration. Subsequently the Cabinet at its 132nd meeting of October 24, 1947 approved the resolution in question.

3. And the President authorized the collection by the indorsement of the Chief of the Executive Office dated April 24, 1947 which reads as follows:

> "Respectfully referred to the Philippine Sugar Administration, Manila, hereby authorizing the exportation of scrap brass and scrap metals representing only the balance of the expert permits issued before November 1, 1946, upon payment by the applicants concerned of a fee of ₱10.00 per ton of scrap brass and scrap metals to be exported."

4. The President was validly authorized by Congress (delegation of legislative power) (Art. VI Sec. 22 (2) Constitution) to regulate, control and prohibit the exportation of metals.

5. "When the Cabinet, the highest advisory-body to the President approved the resolution in question and the President himself authorized the Sugar Quota Office to levy and collect royalties as fixed in said resolution, this was done by authority of Com. Act No. 728."

6. The authority to regulate included the authority to exact royalties or export dues.

To repeat, the respondents' defense is founded on the above propositions which for convenience, have been numbered in six separate paragraphs to facilitate examination or analysis.

The first two paragraphs are undeniable. The third is incorrect insofar as it asserts that these royalties were demanded pursuant to the indorsement of April 24, 1947. The Auditor-General expressly found they were demanded by virtue of the resolution of the Cabinet —not by the indorsement— and this involves a question of fact, the indorsement referring specifically to exports "representing only the balance etc." which did not evidently cover herein petitioner's consignments abroad.

The fourth proposition is correct.

Inasmuch as the indorsement of the Executive office is inapplicable, the fifth proposition poses the crucial question whether the Cabinet approved the resolution by authority of Com. Act No. 728. The authority to regulate —and to require payment of fees on — exports was entrusted to the President. That power was not expressly delegated by the President to the Cabinet. (It is doubtful whether he could validly do so.) And the Cabinet is not the President. True, the President presides Cabinet meetings, but his voice is only one, convincing though it may be. Furthermore, the Cabinet may meet without the presence of the President. The conclusions of the Cabinet and its resolutions are not necessarily the President's. We may not, therefore, hold that, in the eyes of the law, the Cabinet's resolution of October 24, 1947 was the act of the President. It was the act of the Cabinet, that had *no statutory authority* to require payment of royalties or export fees. Our ruling in the Villena case[3] followed by the majority, applies only to *executive* powers of the President — not to legislative powers delegated to him. *Delegata potestas delegari non potest.*

As a suppletory proposition, the respondents claim the entire transaction "might be regarded as a contract between the government, the latter conceded to the exporters the privilege of exporting certain goods the export of which could otherwise have been prohibited. The government, therefore, collected the royalty, not by virtue of its taxing power, but in the exercise of a contractual right."

But the comparison is unacceptable, because the exporter was not *on equal footing* with the government; it was virtually under duress. The officers said, "pay, otherwise your metals will not be exported." And the exporter had to disgorge, under protest; otherwise his goods would rust and rot. And then, accepting the comparison for the sake of argument, I think "the Government"(x) means the appropriate governmental agency, which in this instance should be the Legislature or the President (at most). Surely not the Cabinet.

Supposing however that the resolution of the Cabinet might be regarded as a Presidential directive, the question remains whether the President himself had power to exact the "royalty". In my opinion he had not. Under Com. Act 728 he could, at most, require a license fee; but a "royalty" is not a fee. It connotes some kind of ownership[4], far different from that power of regulation justifying the exaction of license fees. Yet even supposing the royalty had been labeled "export fees", it would undoubtedly be also unauthorized, because, virtually, it was a *tax*, for it ended to produce revenue — *ad valorem* charges. It was not collected merely as compensation for services rendered, in the interest of necessary regulations. This difference between fees and taxes is well-known in this jurisdiction[5]. the one implying the exercise of police power, and the other the taxing power. And authority to collect fees, does not ordinarily embrace the power to impose taxes[6].

In this regard it is noteworthy that, doubting the validity of these exactions, the House approved in 1950 a bill (H. Bill No. 511) validating the Cabinet action re royalties on metal exports. Such bill, however, failed to pass the Senate, because there were objections to its retroactive operations.

It is said that, because the President had the power to regulate and prohibit exportation of metals, he could permit exportation thereof upon payment of taxes. This is a tantamount to saying, as the Secretary of Education has the power to regulate the establishment and operation of schools, he may, instead of regulating, just require the schools to pay taxes — without supervision, inspection, etc. And because the City of Baguio has authority to control or prohibit the establishment of gambling houses, and houses of ill fame (Sec. 2553 (u) Rev. Adm. Code), it may permit their operation upon payment of taxes. Extreme examples indeed: but they illustrate the idea that the police power to *prohibit*, or regulate, does not include the power to permit upon payment of taxes.

The power of regulation and prohibition in the case of schools or gambling houses is founded upon the same principles as the power to prohibit exportation of metals: *pro bono publico*. Police power. Such regulation of prohibition cannot be bartered away in exchange for thousands of pesos.

It is also said that the matter was not within the jurisdiction

(3) Villena v. Secretary of the Interior 67 Phil. 451

(x) The question is not whether the **Government** may tax metal exports

(4) Apparently such was the Cabinet's view. It approved the resolution induced by a memorandum of the General Manager, National Development Co. saying: "However, it is an indisputable fact that the scrap iron, scrap metals, scrap brass, etc. that were lying in any public places and waters, especially sunken ships and barges, belong to our government and we would, therefore, recommend that the parties who were issued licenses be required to pay our government a royalty of a minimum of $5.00 or ₱10.00 per ton or scrap iron, scrap metals, scrap brass, etc. that may be exported." But this "ownership" was not pressed here. Obviously, collection in this case was a mistaken application of the Cabinet's resolution, as the metals exported were not shown to be "lying in public places and waters especially sunken ships and barges."

(5) Manila Electric C. v. Auditor General, 78 Phil. 128; Co Unjieng v. Falstone, 42 Phil. 418; Phil. Transit v. Treasurer' L-1274 May 27, 1949.

(6) cf. Cooley on Taxation (1924) Vol. 4 pp. 3531-3534; Kiowa County v. Dunn, 21 Colo. 185, 40 Pac. 357; Jackson v. Newman, 59 Miss. 358; Western U. Tel. Co. v. City Council 56 Fed. 419.

of the Auditor General's Office. It was a "claim x x x due from x x x the government of the Philippine Islands" within the meaning of Art. 584 of the Revised Administrative Code. It was also a claim within the scope of C.A. 327. The fact that appeal to the President of the U.S. is no longer feasible, does not have, in my opinion, the effect of annulling the whole law (C.A. No. 327).

Granted that the Auditor General had no authority to annul the Cabinet's resolution, still it does not follow that the Auditor had no power to take cognizance of the monetary claim against the Government. Before him were two questions: Was the tax collected in accordance with the Cabinet's resolution? Was this resolution valid or constitutional? He answered the first in the affirmative. As to the second he said he must hold it valid because he had no power to annul it. He thought prudently; but he acted on the claim. And we now *have appellate* jurisdiction. Had he decided both questions in the negative, appeal could still be made to this Court.

Let us remember that this being a government of laws, its officers may only exercise those powers expressly or implied by them without authority are void, confer no rights, afford no protection. Royalties in taxes demanded without lawful authority and paid under protest, should be returned[7] no matter the consequent loss of revenue. The citizens will thus be imbued with the fullest respect, the utmost loyalty to constituted authority and republican government.

*A. Reyes, J.*, concur in this dissent.

(7) Zaragoza v. Alfonso, 46 Phil. 159

## XIII

*Ignacio Arnido, Plaintiff-Appellee, vs. Alfonso Francisco, Defendant-Appellant, G. R. No. L-6764, June 30, 1954, Labrador, J.*

1. PUBLIC LAND; MERE OCCUPATION AND PLANTING DOES NOT CONVERT IT INTO PRIVATE LAND; ACQUISITION IN ACCORDANCE WITH PUBLIC LAND LAW. — The mere occupation of public land by the applicant and the planting thereon of improvements do not convert it into a private land, and it may, therefore, be acquired only in accordance with the public land law.

2. ID.; JUDGMENT BASED ON ADMISSION, NOT BINDING ON DEFENDANT WHO IS NOT PARTY TO THE ACTION. — A judgment based on an admission contained in a compromise agreement between the parties can not bind the defendant who was not a party to the action, especially where there is no showing that he has acquired his right fraudulently.

*Jose M. Angustia* for plaintiff and appellee.

*Jose L. Almario* for defendant and appellant.

### DECISION

LABRADOR, *J.*:

This is an action to recover the title to and possession of a certain parcel of land in the barrio of Kabangkalan, Placer, Masbate, designated as Lot 1 in sketch plan attached to Exhibit A, together with damages. The case was presented for decision upon an agreed statement of facts, the most pertinent of which are as follows: The land forms part of the homestead application of one Albaro Vergara, H. A. No. 123545, which was presented in July, 1926 (Exhibit A). The application was approved on June 2, 1931, and given Entry No. 83952. On October 17, 1941, Albaro Vergara sold the land applied for to defendant Alfonso Francisco for ₱370 (Exhibit C), and on August 10, 1948, Vergara assigned his homestead rights thereto (Exhibit B), and after proper investigation and report by a land officer (Exhibits E and E-1), the assignment was recommended for approval. Thereupon, Alfonso Francisco filed his own homestead application for the land (Exhibit D).

It also appears from the agreed statement of facts that in an action of forcible entry and detainer filed by Arnido against Vergara, which was appealed to the Court of First Instance, it was found by that court that on July 13, 1939, one Joaquin Ferrer sold a land, eleven hectares in area to Arnido, and in the same deed of sale, Vergara sold the coconuts and bamboos on the land purchased; that the land had been the object of controversy between the said Ferrer and Vergara before the Bureau of Lands, and that the latter had adjudicated it to Vergara; that Ferrer could not have sold the land, because it was not his, and that Vergara had a better right thereto. The court absolved the defendant from the action (Exhibit F).

It further appears that in September, 1940, Arnido presented an action to recover the title to the property against Albaro Vergara, Civil Case No. 989-R (Exhibit G). The records of the case were destroyed during the last war, and after its reconstitution in November, 1948, Vergara recognized Arnido's title to the property in a compromise (Exhibit H-1), as a result of which judgment was entered in favor of Arnido (Exhibit H). The agreed statement is to the effect that the lands officer who investigated the transfer of homestead rights in favor of Francisco was not aware of this case or of the compromise and judgment. The judgment entered upon the compromise is dated November 27, 1948, and was executed by the sheriff, but defendant herein refused to deliver the property to plaintiff (Exhibits I & I-1).

The trial court held that the land is private land, solely on the alleged ground that it was improved. The alleged improvements consist of some 15- to 35-year old coconut trees and tanznas existing thereon even before Vergara applied for it as homestead in the year 1926, but which are admitted to belong to Vergara. Some of the trees must have been planted on the land before Vergara applied for it in 1926. No evidence, however, has been presented that the land was owned by any one prior to Vergara's occupation. But mere occupation of public land and the planting thereon of improvements do not convert it into private land. The mere fact that Vergara applied for it as homestead shows that he occupied it as public land. His admission in the compromise agreement that it belonged to Arnido, which is contrary to his conduct in applying for the land as homestead, is no evidence that the land is private land. The agreed statement also expressly concedes that it is part of H. A. No. 123545 The conclusion of the trial court that it is private land is, therefore, without any foundation in law or fact. We find that the land is not private but public land, and as such it is subject to acquisition in accordance with the public land law.

The other conclusions of the trial court, especially those based on its findings that the land in question is private land, are also incorrect. The judgment in Civil Case No. 989-H, based on an admission contained in a compromise agreement between the parties dated November 27, 1948, can not bind the defendant Francisco, who was not a party to the action. When Vergara made the compromise, he was no longer in possession of the land, as he had sold his rights thereto to Francisco in October, 1941, and executed the deed of assignment of his homestead rights in favor of Alfonso Francisco also on August 10, 1948 (Exhibits C and B); all his acts prejudicial to Francisco's rights can not be binding or effective against the latter. Franciscos' purchase of Vergara's rights can not be said to be fraudulent. There is no evidence to prove bad faith, and good faith is presumed.

It is unnecessary to consider the other conclusions of the trial court, such as the applicability of Article 1473 of the Spanish Civil Code and the fraudulent acts of Francisco's transferor, as these are not material to the decision of the case. If Vergara has been guilty of fraud perpetrated on Arnido, let him be made to account therefor to the latter, but in no case may Francisco, a third party, be made to suffer from the effects of his double-dealing.

The judgment entered in the case is hereby reversed, and the action dismissed, and the defendant-appellant Alfonso Fran-

cisco absolved from the complaint, with costs against the plaintiff-appellee.

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

XIV

*Damaso Cabuyao, Plaintiff-Appellant, vs. Domingo Caagbay, el at., Defendants-Appellees, G. R. No. L-6636, August 2, 1954, Concepcion, J.*

1. EXTRAJUDICIAL PARTITION; AFFIDAVIT OF EXTRAJUDICIAL AJUDICATION; REQUISITES.—An affidavit of extrajudicial adjudication suffices to settle the entire estate of the decedent if the following conditions are present, namely: (a) that the decedent left no debts; and (b) that the heirs and legatees are all of age, or the minors are represented by their judicial guardian.

2. ID.; ID.; JUDICIAL DECLARATION TO SUCCEED DECEASED, NOT NECESSARY TO ASSERT A CAUSE OF ACTION AS AN HEIR.—Where the pleadings in question alleged, and it was not denied, (1) that plaintiff was the sole heir of the decedent, (2) that he was of age, and (3) that the decedent left no debts — he has a right to assert a cause of action as an alleged heir without judicial declaration to that effect.

*Jose L. Desvarro* for the plaintiff and appellant.

*Ed. Espinosa Antona* for the defendants and appellees.

D E C I S I O N

CONCEPCION, *J.*:

This is an appeal from as order of the Court of First Instance of Quezon dismissing civil case No. 5308 of said court.

It appears that said case was instituted on April 9, 1952. In the original complaint, plaintiff-appellant Damaso Cabuyao alleged that he is the "lone compulsary heir" of the spouses Prudencio Cabuyao and Dominga Caagbay, who died leaving the eleven (11) parcels of land therein described, and that, although plaintiff had adjudicated said properties to himself, pursuant to section 1 of Rule 74 of the Rules of Court, the corresponding transfer certificates of title could not be issued in his name because the original owner's duplicate certificates were being witheld by the defendants, Domingo Caagbay and Eugenio Caagbay, who had also taken possession of said parcels of land, and would continue unlawfully using the same and committing acts of dispossession thereof, unless enjoined by the court. Hence, he prayed that a writ of preliminary injunction be issued against the defendants and that, thereafter, judgment be rendered; (a) sentencing them to vacate said lands, to turn them over to the plaintiff, and to indemnify him in the sum of P4,000.00; (b) "removing clouds and quieting title of the plaintiff" over said properties; and (c) ordering the defendants to surrender to him or to the Register of Deeds the aforesaid owner's duplicate certificates of title and, should they fail to do so, to order the cancellation thereof and the issuance of the corresponding transfer certificates of title in favor of the plaintiff.

On April 21, 1952, defendants filed a motion to dismiss for lack of "jurisdiction over the subject-matter", the original complaint being entitled "Unlawful Entry and Detainer". By an order, dated April 29, 1952, plaintiff was required to file an amended complaint, stating therein the date on which the defendants had seized the properties in dispute and their grounds therefor.

On April 30, 1952, plaintiff moved for the admission of an amended complaint, which excluded Eugenio Caagbay as party defendant, and included, as such, Vicente, Irineo, Antonio, Emilio, Aurea and Felisa, all surnamed Caagbay. Stating that plaintiff's counsel was "converting this simple case into a complicated one", the court, by an order dated June, 4, 1952, granted plaintiff another five (5) days within which "to file an amended complaint, in accordance with section 3, Rule 17 of the Rules of Court," setting forth the data required in the order of April 29, 1952. In compliance therewith, plaintiff filed, on June 12, 1952, an amended ocmplaint, which the defendants sought to be dismissed upon the ground that "plaintiff has no legal capacity to sue," there being no allegation that "plaintiff had been judicially declared lone compulsory heir" of the deceased spouses Prudencio Cabuyao and Dominga Caagbay. On motion of the defendants, dated July 5, 1952, the court issued, on July 22. 1952, an order dismissing the case, with costs against the plaintiff, for the reason that, "under the facts and circumstances of this case, as disclosed by the pleadings, no action can be maintained until a judicial declaration of heirship has been legally secured."

Soon later, or on August 1, 1952, plaintiff moved for the reconsideration of said order of July 22, 1952, and for the admission of another amended complaint thereto attached. In this pleading, plaintiff alleged that he owns the parcels of land above-mentioned, having acquired the same by inheritance from his parents, Prudencio Cabuyao and Dominga Caagbay, who died on April 8, 1919 and August 14, 1944, respectively; that despite the above mentioned extrajudicial adjudication of said properties made by plaintiff in his favor, as the "only issue and/or successor" of his aforementioned parents, pursuant to section 1 of Rule 74 of the Rules of Court, the corresponding transfer certificates of title could not be issued in his name, the owner's duplicate of the original certificates of title having been taken by the defendants, who are nephews and nieces of the deceased Dominga Caagbay, except defendant Domingo Caagbay. who is her brother; that, upon the death of Dominga Caagbay on August 14. 1944, the defendants took possession of the lands in dispute and have continuously enjoyed the fruits and rents thereof, aggregating P4,000; and that the defendants will continue unlawfully exercising and/or claiming ownership over said properties and violating plaintff's dominical rights, unless a writ of injunction be issued against them. The prayer in the last amended complaint reads·

> "WHEREFORE, it is hereby respectfully asked that a preliminary injunction be issued against the defendants, their representatives, tenants, or any other person receiving instructions from them or acting in their behalf prohibiting them from re-entering the lands above-described or collecting the fruits thereof, for which purpose plaintiff is willing and ready to file corresponding bond, and, after due hearing, judgment be rendered:
>
> (a) removing clouds and quieting the title of the plaintiff over the properties in question and ordering the defendants to vacate and restitute sold properties to the herein plaintiff;
>
> (b) ordering said defendants, jointly and severally to pay the herein plaintiff the amount of Four Thousand Pesos (P4,000.00) as damages;
>
> (c) ordering the defendarts to surrender to the Register of Deeds of the Province, or to herein plaintiff the titles of the lands above-described and, in case of failure to do so to order the cancellation of said titles and to issue corresponding duplicates in the name of the herein plaintiff, upon payment of the corresponding fees; and to pay costs of this suit.
>
> PLAINTIFF, prays for any other relief or remedy just and equitable in the premises."

Attached to said pleading was plaintiff's affidavit of extrajudicial adjudication (Exhibit A), as well as the documents appended thereto, namely: the death certificate of Prudencio Cabuyao (Annex A); the certificate of burial of Dominga Caagbay (Annex B); and the baptismal certificate of plaintiff Damaso Cabuyao (Annex C). In said Exhibit A, plaintiff declared that he was born in Tayabas on December 13, 1925, "the only child or heir of the espouses Prudencio Cabuyao and Dominga Caagbay," both in question, and left no debts whatsoever, and prayed that the corresponding transfer certificates of title be issued in his name. It appears from Annex A, that Prudencio Cabuyao, married to Dominga Caagbay, died on April 8, 1919 and was burried in Tayabas, Quezon, the next day. Annex B shows that Dominga Caagbay, widow of Prudencio Cabuyao, was buried in Tayabas, Quezon, on

August 5, 1944. Annex C, states that Damaso Cabuyao, the legitimate son of Prudencio Cabuyao and Dominga Caagbay, who were lawfully married, was born on December 10, 1896, was christened by the parish priest of San Miguel Arcangel, Tayabas, province of Quezon, on December 13, 1896.

Defendants objected to said motion for reconsideration and to the admission of the amended complaint and, on August 6, 1952, the court issued the following:

ORDER

"AFTER considering plaintiffs motion for the reconsideration of the order of July 22, 1952, and the admission of the amended complaint thereto attached and defendant's opposition thereto, this Court has arrived at the conclusion that said motion should be, as it is hereby, DENIED for lack of merit. As stated in the order of the reconsideration of which is prayed, it is impossible for plaintiff to maintain the action in this case because he and the party defendants alleged to be the heir of the same decedents and there has been no showing that they have been judicially declared as heir of the deceased. Once the question of who are the heirs is determined, it may not be necessary for the plaintiff to file the complaint in this case." (Amended Record on Appeal, pp. 49-50)

Plaintiff has appealed to this Court, and now he contends:

"I. That the court below erred in sustaining the motion to dismiss dated July 15, 1952.

II. That the court below erred in holding that 'in this case no action can be maintained until a judicial declaration of heirship has been legally secured'.

III. That the court below erred in denying the motion for reconsideration dated July 21, 1952, and in not giving due course to the second amended complaint." (Brief for Appellant, p. 3)

In the pleadings in question, it is alleged and, in the orders and briefs before us, it is not denied, that the lands in dispute belonged originally to the espouses Prudencio Cabuyao and Dominga Caagbay, who were legally married; that plaintiff Damaso Cabuyao is their "lone" legitimate child; and that the defendants are nephews and nieces of Dominga Caagbay, except of defendant Domingo Caagbay, who is her brother. The only question for determination before us is whether, under the foregoing facts, which, for purpose of this appeal, must be assumed to be true, plaintiff has a cause of action to recover the properties in dispute and to quiet his alleged title thereto. The defendants maintain, and the lower court held, that plaintiff's alleged right to succeed the deceased must be settled by a judicial declaration to such effect before said cause of action could be asserted in his favor. This view is, however, in conflict with the law and with a rule well established in our jurisprudence. Section 1, of Rule 74 of the Rules of Court reads:

"If the decedent left no debts and the heirs and legatees are all of age, or the minors are represented by their judicial guardians, the parties may, without securing letters of administration, divide the estate among themselves as they see fit by means of a public instrument filed in the office of the register of deeds, and should they disagree, they may do so in an ordinary action of partition. *If there is only one heir or one legatee, he may adjudicate to himself the entire estate by means of an affidavit filed in the office of the register of deeds.* It shall be presumed that the decedent left no debts if no creditor files a petition for letters of administration within two years after the death of the decedent." (Underscoring supplied.)

Pursuant thereto, plaintiff's affidavit of extrajudicial adjudication in his favor sufficed to settle the estate in question, if the following conditions are present, namely: (a) that the decedents left no debts and (b) that the heirs and legatees are all of age, or the minors are represented by their judicial guardians. The presence of the first requirement is presumed, no creditor having filed a petition for letters of administration within two (2) years after the death of the decedents. The allegations of the original and the amended complaints — which, for the purpose of this appeal, should be regarded as true — show that plaintiff is the sole heir of the decedent, that he is of age, and that the second requirement is, likewise, present. Hence, plaintiff can not be denied the full force and effect of the provision above quoted.

Moreover, the Spanish Civil Code, which was in force when the events material to the issue before us took place, provided:

"Art. 657. The rights to the succession of a person are transmitted *from the moment of his death.*

Art. 661. Heirs succeed to all the rights and obligations of the decedent *by the mere fact of his death.*"

Thus, as early as 1904, this Court entertained, in the case of Mijares v. Nery (3 Phil. 195), the action of an acknowledged natural child to recover property belonging to his deceased father — who had not been survived by any legitimate decedent — notwithstanding the absence of a previous declaration of heirship in favor of the plaintiff, although the latter's claim did not prosper for it was predicated upon the theory that the defendant — as illegitimate children of the deceased pursuant to the laws of Toro, which were in force at the time of their birth — had no right to succeed their common father, and such pretense was not sustained, the latter having died after the promulgation of the Civil Code of Spain, under the provisions of which said defendants were, likewise, acknowledged natural children, and, as such, had the same rights as the plaintiff.

The right to assert a cause of action as an alleged heir, although he has not been judicially declared to be so, has been acknowledged in a number of subsequent cases.

"The property of the deceased, both real and personal, became the *property of the heir by the mere fact of death of* his predecessor in interest, and he could deal with it in precisely the same way in which the deceased could have dealt with it, subject only to the limitations which by law or by contract were imposed upon the deceased himself. x x x" (Suiliong & Co. vs. Marine Insurance Co., Ltd. et al., 12 Phil. 13, 19.)

"Claro Quison died in 1902. It was proven at the trial that the present plaintiffs are the next of kin and heirs, but it is said by the appellant that they are not entitled to maintain this action because there is no evidence that any proceedings have been taken in court for the settlement of the estate of Claro Quison, and that, without such settlement, the heirs can not maintain this action. There is nothing in this point. As well by the Civil Code as by the Code of Procedure, the title to property owned by a person who dies intestate passes at once to his heirs. Such transmission is, under the present law, subject to the claim of administration and the property may be taken from the heirs for the purposes of paying debts and expenses, but *this does not prevent the immediate passage of the title,* upon the death of the intestate, from himself to his heirs. Without some showing that a judicial administrator had been appointed in proceedings to settle the estate of Claro Quison, the right of the plaintiffs to maintain this action is established." (Quison vs. Salud, 12 Phil. 109, 113-114)

"It is alleged in the complaint that the plaintiff, Silvestre Lubrico, is an only child, and therefore the sole general heir of the original owners of the property, and no proof was offered at the trial to show that there was any other descendant entitled to succeed besides the plaintiff, who, on her part, has shown herself to be the legitimate daughter of the late Guillermo Lubrico and Venancia Jaro.

If heirs succeed the deceased by their own right and operation of law in all his rights and obligation by the mere fact of his death, it is unquestionable that the plaintiff, in fact and in law, succeeded her parents and *acquired the ownership of the land* referred to in the said title, *by the mere fact of their death.* (Arts. 440, 657, 658, 659, and 661, Civil Code.)

*Even in the event that there should be a coheir or a coowner of the parcel of land is question, once the right of the plain-*

(Continued on page 571)

# DECISION OF THE COURT OF INDUSTRIAL RELATIONS

*Hotel & Restaurant Free Workers (FFW), Complainant vs. Kim San Cafe & Restaurant et al., Respondents, Case No. 159-ULP, Lanting, J.*

1. COURT OF INDUSTRIAL RELATIONS; UNFAIR LABOR PRACTICES; REMEDIES AND PENALTIES. — In the event of a finding by the Court in an unfair labor practice case initiated under section 5, Republic Act No. 875, that any person has engaged or is engaging in unfair labor practice, only the remedies provided in said section may be granted. In such case, the Court should not and cannot at the same time impose the penalties prescribed in section 25, Republic Act No. 875. On the other hand, in case the imposition of the penalties prescribed in section 25 is sought, a criminal complaint or informaiton must be filed and the requirements of due process as to procedure and evidence in ordinary criminal cases must be observed.

2. ID.; ID.; CHARGE OF UNFAIR LABOR PRACTICE NOT A CRIMINAL COMPLAINT. — The charge filed by the complainant union cannot in any way be considered as a criminal complaint or information which could serve as the basis of a criminal proceeding. Moreover, the absence of an arraignment and plea which, among others, are fundamental requirements of due process in criminal cases, is sufficient to cause the setting aside of the imposition of a fine in such case.

3. ID.; ID.; PROCEDURE TO BE FOLLOWED IN UNFAIR LABOR PRACTICE CASES. — In a case initiated under Section 5 of Republic Act No. 875, this Court cannot in the same proceeding consider both the unfair labor practice aspect and the criminal aspect. The procedure to be followed in unfair labor practice cases is prescribed in said section and it is certainly very lax and liberal as compared to the procedure followed in criminal cases. The imposition of a fine or imprisonment pursuant to Section 25 in an unfair labor practice case initiated under Section 5 would result in the criminal conviction of a person in violation of due process. Furthermore, there is marked incompatibility between the two proceedings as regards the sufficiency of evidence. In an unfair labor practice case, only substantial evidence is required to sustain a finding that unfair labor practice has been committed; on the other hand, to justify a judgment of conviction in a criminal case, there must be proof beyond reasonable doubt.

4 ID.; ID.; IMPOSITION OF A FINE; WHEN PROPER. — Imposition of a fine under the first paragraph of section 25, Republic Act No. 875, can only be done in case there is an express finding that a person has violated section 3 of that Act. On the other hand, to justify the imposition of the fine under the second paragraph of section 25, there must be an express finding that a person has committed a violation of Republic Act No. 875, which is declared unlawful. Where there had been no such findings but only the imposition of the fine, the requirement of section 2 of Rule 116 of the Rules of Court that a judgment of conviction shall state "the legal qualification of the offense constituted by the acts committed by the defendant" had not been complied with.

5. ID.; ID.; INITIAL STEPS IN UNFAIR LABOR PRACTICE PROCEEDINGS. — Under the provision of section 5 (b) of Republic Act No. 875, there are three initial steps which must be followed in unfair labor practice proceedings, namely:

(1) The filing of a charge by the offended party or his representative that a person has engaged or is engaging in unfair labor practice;

(2) The investigation of such charge by this Court or any agency or agent designated by it;

(3) The issuance and service by this Court or its designated agency or agent of a complaint upon the person charged with committing unfair labor practice. The above steps, among others, are indispensable requirements of due process in unfair labor practice proceedings and not mere technicalities of law and procedure.

6 ID.; ID.; FUNCTION OF A CHARGE. — The function of a charge is merely that of putting the machinery of the Board in motion. A charge may, by limited analogy, be compared with an 'information' in criminal procedure. A charge, like an information, is neither a pleading nor proof, but is merely a verified notification to an appropriate government agency of the commission by a designated person of a specific violation of the law over which such agency has jurisdiction. At this point the similarity between a charge and an information ends. In the case of an information, if the information complies with the requirements of the law, appropriate process may issue forthwith to bring the offender into court. However, in the case of the charge filed with the Board, such is not the procedure. In proceedings before the Board the mere filing of the charge, no matter how grave the alleged offense nor how adequately the offense may be recited, does not in and of itself sanction and precipitate issuance of summoning process. With the filing of the charge, it devolves upon the Board's General Director, but subject to review and final decision by the Board's General Counsel, to conduct the preliminary investigation to determine the necessity for the issuance of and, if required by the facts, to issue the complaint.

7. ID.; ID.; INDISPENSABILITY OF A PRELIMINARY INVESTIGATION. — Under the original Act it was held that once a charge was filed it was incumbent upon the Board to investigate the matter. While in evaluating the results of the investigation the Board enjoyed broad discretion and the right

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SUPREME COURT DECISION *(Continued)*

*tiff, and consequently her personality, has been proven the defendant has no right to dispute them.* x x x." (Lubrico vs. Arbado, 12 Phil. 591, 596-597)

"There is no legal precept or established rule which imposes the necessity of a previous legal declaration regarding their status on heirs to an intestate estate on these who, being of age and with legal capacity, consider themselves the legal heirs of a person, in order that they may maintain an action arising out of a right which belonged to their ancestor." (Hernandez vs. Padua, syllabus, 14 Phil. 194.)

See, also, Inocencio v. Gat-Panden, 14 Phil. 491; Sy Joe Lieng vs. Sy Quia, 16 Phil. 137; Alnea v. Alcantara, 16 Phil. 439; Irlando v. Pitargas, 28 Phil. 383; Castillo v. Castillo, 23 Phil. 364; Noble Jose v. Uson, 27 Phil. 73; Beltran v. Soriano, 32 Phil. 66; Bona v. Briones, 38 Phil. 276; Uy Coque v. Navas L. Sioca, 45 Phil. 430; Fule v. Fule, 46 Phil. 317; Orozco v. Garcia, 50 Phil. 149; Gibbs v. Gov't of the P.I., 59 Phil. 293; Mendoza Vda. de Bonnevie v. Cecilio Vda. de Pardo, 59 Phil. 456; Lorenzo v. Posadas, 64 Phil. 363; Gov't v. Serafica, 32 Off. Caz. 334; De Vera vs. Galauran, 67 Phil. 213; and Cuevas v. Abesamis, 71 Phil. 147.

In view of the foregoing, the order appealed from is hereby reversed, and let the record of this case be, as it is hereby remanded to the court of origin for further proceedings not inconsistent with this decision, with costs against the defendants-appellees.

It is so ordered.

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

Order appealed from, reversed

of decision, the duty of making the preliminary examination itself was a mandatory duty. Although the amended Act prescribes that the Board's General Counsel 'shall have final authority, on the Board's behalf, in respect of the investigation of charges and issuance of complaints under Section 10 . . .,' it is doubtful whether this provision effects any change in regard to the basic duty of conducting a preliminary investigation. While this provision of the amended Act manifestly has the effect of shifting the right of decision in evaluating the results of the investigation, it is not likely that it will be construed as making the task of conducting an investigation a matter of option and prerogative in the Board's General Counsel.

8. ID.; ID.; NATURE OF A COMPLAINT. — Where it is properly determined from the preliminary investigation that there is necessity and justification therefor, the Board has the power to issue a 'complaint'. While the Board has no right to initiate complaint proceedings by filing a charge itself, and, therefore, must await the filing of a charge by an interested party before it may act, once a charge is properly filed and there follows an investigation which discloses the necessity or propriety of issuing a 'complaint,' the Board, through its Regional Director and subject to the final decision of the Board's General Counsel on the question of necessity or propriety, then has the right to issue the 'complaint'. However, it should be noted that although the Regional Director for the Board, has the right to issue a 'complaint,' he may not be compelled to do so by order of any court, agency or person other than the Board or its General Counsel since this function is one in which the Board, and ultimately, its General Counsel, alone may exercise their own discretion.

9. ID.; ID.; DIFFERENCE BETWEEN THE "CHARGE" AND THE "COMPLAINT". — The difference between the 'charge' and the 'complaint' is basic and fundamental. While the charge, as we have previously seen, is a prime condition to the initiation of complaint proceedings and is, so to speak, the trigger to the action, the filing of a charge does not make the person or the organization filing the charge the 'actor' in the premises; nor is the mere filing of the charge the commencement of the proceedings proper. Treating the term 'proceedings' as the equivalent of 'litigation', the proceedings commence only with the issuance by the Board of a complaint, from which time forward the Board's judicial functions come into play. Its prior acceptance of the charge and the resultant investigation are purely of an administrative character.

*Eduardo D. Rivera* for the complainant.
*Crisanto T. Blaquera* for the respondents.

RESOLUTION

In the first paragraph of the dispositive portion of the order sought to be reconsidered, respondents Tan Guan and Sy Teh were "ordered to pay a fine of five hundred (₱500.00) pesos, pursuant to Section 25, Republic Act No. 875." We are of the opinion that this should be set aside. In the order of the undersigned dated October 3, 1953 in Case No. 4-ULP entitled "La Mallorca Local 101 vs. La Mallorca Taxi" the following pronouncement was made:

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

When the case was elevated to the Court in banc, said Order was affirmed in whole by four judges of this Court and the Judge who penned the Order sought to be reconsidered in the instant case concurred in the result.

We have examined carefully the record and we find that the instant case was initiated by the filing of a "charge for Unfair Labor Practice" by the complainant union. After an Answer to said charge was filed by "Counsel for the Respondent-Emilia Go and new management", a hearing on the merits was held by the trial Court after which the Order in question was issued. We need not stress the fact that no criminal information has been filed in the case at bar. The charge filed by the complainant union cannot in any way be considered as a criminal complaint or information which could serve as the basis of a criminal proceeding. Moreover, the absence of an arraignment and plea which, among others, are fundamental requirements of due process in criminal cases, is sufficient to cause the setting aside of the imposition of a fine in this case.

In a case initiated under Section 5 of Republic Act No. 875, this Court cannot in the same proceeding consider both the unfair labor practice aspect and the criminal aspect. The procedure to be followed in unfair labor practice cases is prescribed in said section and it is certainly very lax and liberal as compared to the procedure followed in criminal cases. The imposition of a fine or imprisonment pursuant to Section 25 in an unfair labor practice case initiated under Section 5 would result in the criminal conviction of a person in violation of due process. Furthermore, there is marked incompatibility between the two proceedings as regards the sufficiency of evidence. In an unfair labor practice case, only substantial evidence is required to sustain a finding that unfair labor practice has been committed; on the other hand, to justify a judgment of conviction in a criminal case, there must be proof beyond reasonable doubt.

There are still other considerations which militate against the imposition of fine in this case. It is not clear whether the fine of ₱500.00 is being imposed pursuant to the first or second paragraph of Section 25 of Republic Act No. 875. If the fine is imposed under the first paragraph then the order in question is fatally defective because this can only be done in case there is an express finding that a person has violated Section 3 of the Act. No such finding, however, was made by the trial Court. On the other hand, to justify the imposition of a fine under the second paragraph of Section 25, there must be an express finding that a person has committed a violation of Republic Act No. 875 which is declared unlawful. Again, no such finding has been made. Thus, the requirement of Section 2 of Rule 116 of the Rules of Court that a judgment of conviction shall state "the legal qualification of the offense constituted by the acts committed by the defendant" has not been complied with.

The second paragraph of the dispositive portion of the order of the trial Court reads as follows:

> "Respondents Tan Guan, Emilia Go and Sy Teh are also ordered to offer reinstatement to Pedro Vinluan with back pay from December 10, 1953, until the date of his actual readmission. Said respondents are also directed to cease and desist from discouraging their employees from becoming members of a labor organization, and from interferring in any other manner with their employees in the exercise of their rights to self-organization, or to join labor organization, or bargain collectively, through representatives of their own choosing."

In this connection we find that the procedure prescribed by Sec. 5(b) of Rep. Act No. 875 was not followed. Said section provides:

> "(b) The Court shall observe the following procedure without resort to mediation and conciliation as provided in section four of Commonwealth Act Numbered One hundred and three, as amended, or to any pre-trial procedure. Whenever it is charged by an offended party or his representative that any person has engaged or is engaging in any such unfair labor practice, the Court or any agency or agent designated by the Court must investigate such charge and shall have the power to issue and cause to be served upon such person a complaint stating the charges in that respect and containing a notice of hearing before the Court or a member thereof, or before a designated Hearing Examiner at the time and place fixed therein not less than five nor more than ten days after serving the

said complaint. The person complained of shall have the right to file an answer or otherwise (but if the Court shall so request, the appearance shall be personal) and give testimony at the place and time fixed in the complaint..."

Under the foregoing provision there are three initial steps which must be followed in unfair labor practice proceedings, namely:

(1) The filing of a charge by the offended party or his representative that a person has engaged or is engaging in unfair labor practice;

(2) The investigation of such charge by this Court or any agency or agent designated by it;

(3) The issuance and service by this Court or its designated agency or agent of a complaint upon the person charged with committing unfair labor practice. We can say that the above steps, among others, are indispensable requirements of due process in unfair labor practice proceedings and not mere technicalities of law and procedure. The function of a charge under the American law after which our law was patterned is best explained by I. Herbert Rothenberg in his "Rothenberg on Labor Relations" as follows:

"The function of a charge is merely that of putting the machinery of the Board in motion. A charge may, by limited analogy, be compared with an 'information' in criminal procedure. A charge, like an information, is neither a pleading nor proof, but is merely a verified notification to an appropriate government agency of the commission by a designated person of a specific violation of law over which such agency has jurisdiction. At this point the similarity between a charge and an information ends. In the case of an information, if the information complies with the requirements of the law, appropriate process may issue forthwith to bring the offender into court. However, in the case of the charge filed with the Board, such is not the procedure. In proceedings before the Board the mere filing of the charge, no matter how grave the alleged offense nor how adequately the offense may be recited, does not in and of itself sanction and precipitate issuance of summoning process. With the filing of a charge, it devolves upon the Board's General Director, but subject to review and final decision by the Board's General Counsel, to conduct a preliminary investigation to determine the necessity for the issuance of and, if required by the facts, to issue the complaint." (pp. 596-597)

The indispensability of the second step, that is, the preliminary investigation of the charge, is discussed by the same author in this wise:

"Under the original Act it was held that once a charge was filed it was incumbent upon the Board to investigate the matter. While, in evaluating the results of the investigation the Board enjoyed broad discretion and the right of decision, the duty of making the preliminary examination itself was a mandatory duty.

"Although the amended Act prescribes that the Board's General Counsel 'shall have final authority, on the Board's behalf, in respect of the investigation of charges and issuance of complaints under Section 10. . .,' it is doubtful whether this provision effects any change in regard to the basic duty of conducting a preliminary investigation. While this provision of the amended Act manifestly has the effect of shifting the right of decision in evaluating the results of the investigation, it is not likely that it will be construed as making the task of conducting an investigation a matter of option and prerogative in the Board's General Counsel". (pp. 598-599)

As to the nature of a complaint and its basic difference from a charge we again quote from the same author:

"Where it is properly determined from the preliminary investigation that there is necessity and justification therefore, the Board has the power to issue a 'complaint.' While the Board has no right to initiate complaint proceedings by filing a charge itself, and, therefore, must await the filing of a charge by an interested party before it may act, once a charge is properly filed and there follows an investigation which discloses the necessity or propriety of issuing a 'complaint,' the Board, through its Regional Director and subject to the final decision of the Board's General Counsel on the question of necessity or propriety, then has the right to issue the 'complaint'. However, it should be noted that although the Regional Director, for the Board, has the right to issue a 'complaint,' he may not be compelled to do so by order of any court, agency or person other than the Board or its General Counsel since this function is one in which the Board, and ultimately, its General Counsel, alone may exercise their own discretion.

"From the foregoing it may be gathered that the difference between the 'charge' and the 'complaint' is basic and fundamental. While the charge, as we have previously seen, is a prime condition to the initiation of complaint proceedings and is, so to speak, the trigger to the action, the filing of a charge does not make the person or the organization filing the charge the 'actor' in the premises; nor is the mere filing of the charge the commencement of the proceedings proper. Treating the term 'proceedings' as the equivalent of 'litigation,' the proceedings commence only with the issuance by the Board of a complaint, from which time forward the Board's judicial functions come into play. Its prior acceptance of the charge and the resultant investigation are purely of an administrative character." (pp. 599-600)

In the instant case, while it is true that a charge of unfair labor practice was filed by the union, still the record discloses that there has been no preliminary investigation of such charge nor is there a valid complaint issued and served by this Court upon the respondents herein. Instead, the trial Court immediately conducted a hearing solely on the basis of the charge filed, and it is our opinion that in so doing it committed a grievous and fatal error.

We must confess that we are at a loss to understand the trial Court's stand as regards respondent Emilia Go. Both witnesses for the complainant testified that at the time of Pedro Vinluan's dismissal only Tan Guan and Sy Teh were the co-owners of the Kim San Cafe and Restaurant. There is no evidence whatsoever that at that time Emilia Go was in one way or another connected with said restaurant. Since this is so then obviously she could not have committed any act of unfair labor practice against the complainant. On the other hand, Emilia Go testified that she bought the share of Tan Guan in the restaurant on Jan. 1, 1954. The trial Court seems to be of the opinion that the sale of Tan Guan's interest to Emilia Go was simulated and fictitious. If this is so, then Emilia Go never became a co-owner of the establishment and hence incurred no liability under the Act. On the other hand, if the sale is considered bona-fide, then Emilia Go became a co-owner only after the discharge of Pedro Vinluan took place and, therefore, no cease and desist order nor any affirmative order may be issued by this Court against her. We therefore conclude that as far as Emilia Go is concerned, the trial Court's Order has no justification.

IN VIEW OF THE FOREGOING, let the order of the trial Court, dated March 19, 1954, be, as it is hereby, set aside.

SO ORDERED.

(SGD.) ARSENIO C. ROLDAN
Presiding Judge

(SGD.) JUAN L. LANTING
Associate Judge

(SGD.) V. JIMENEZ YANSON
Associate Judge

BAUTISTA, J.: dissenting —

I beg to differ with the opinion of this Court expressed in its Resolution of June 25, 1954, setting aside the Order of the trial Court of March 19, 1954. The stand of the Court en banc in its majority opinion can be stated briefly, and I quote:

"While it is true that a charge of unfair labor practice was filed by the union, still the record discloses that there has (had) been no preliminary investigation of such charge nor is (was) there a valid complaint issued and served by this Court

upon the respondents herein. Instead the trial Court immediately conducted a hearing solely on the basis of the charge filed, and it is our opinion that in so doing, it committed a grievious and fatal error."

It is obvious that said opinion was based on American rulings and interpretations. While it is to be admitted that our law on the matter, Rep. Act No. 875, was "patterned" after the American law, it does not necessarily follow that both laws are exactly the same. Even a cursory reading of both laws will bare basic differences of policy and procedure. While the American law expressly provides for a "preliminary investigation" and the machinery therefor, Rep. Act No. 875 is not as insistent on the same. On the other hand, Rep. Act No. 875 contains provisions which are not present in the American law.

Further difficulty lies in the failure of this Court to promulgate its own Rules and Regulations regarding unfair labor practices similar to the Rules and Regulations of the National Labor Relations Board of the United States. Nevertheless, in the absence of such definite rules, this Court cannot legislate for itself and read into our law provisions of the American law which our Congress deliberately left out.

I disagree with the opinion that without such "preliminary investigation", the respondents were deprived of "due process". For "due process" is a matter of substance and not merely of form. The respondent in this case were not deprived of their right to due process. There was a fair and impartial hearing after they were served copies of the charge and summons. They were represented throughout the proceedings by an attorney of their own choice. There was honest evaluation of the evidence presented and no objection to the conduct of the hearing was made by respondents or their attorney.

The Court is presently over-burdened with work and its limited personnel cannot cope with the myriad details of the administration of justice. If we apply the system in the National Labor Relations Board to this jurisdiction (granting that such procedure is provided for in Rep. Act No. 875), this Court will be placed in the anomalous and manifold role of "accuser, prosecutor, judge and executioner" and the functions and burdens as well will become more multiple and varied. In effect, this Court will not only receive and investigate the charges, but also act as an investigatory agent, lodge the complaint, act as accuser and in the conduct of the hearing, act as both the prosecutor and trier of the facts and thereafter as the "executioner".

That is too much to expect of the Court, and it is our opinion that such a procedure is contrary to the policies of Rep. No. 875. To expect the trial Court to go through the whole proceeding *twice* is, in the light of the express provisions of Rep. Act No. 875, not only unreasonable but violative of the statute.

Another difference between the American law and Rep. Act No. 875 is that, while the latter provides for penalties for violation of Section 3 thereof, the former does not contain any like provision. In addition therefore to the remedies provided in Section 5 of Rep. Act No. 875, the Court can impose at the same time the penalties prescribed in Section 25. It is also our opinion that a person who violates Section 4 (a) (1) automatically violates Section 3.

Section 3 states: "Employees shall have the right to self-organization and to form, join or assist labor organizations of their own choosing for the purpose of collective bargaining through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining and other mutual aid or protection. Individuals employed as supervisors shall not be eligible for membership in a labor organization of employees under their supervision but may form separate organization of their own."

Section 4 (a) (1) makes, any interference with, restraint or coercion of employees in the exercise of their right guaranteed in Section 3 an "unfair labor practice" for an employer. A violation therefore of Section 4 (a) (1) is also a violation of Section 3. Otherwise, there can be no violation of Section 3 and consequently, there cannot be any application of the first paragraph of Section 25. In the United States, this is also the case. A violation of any of the four subdivisions of section 8 (a) is regarded in addition as a violation of subdivision (1) which in turn is considered a violation of Section 7.

It is quite clear from the Order of the Court dated March 19 that respondents Tan Guan and Sy Teh were guilty of violating Section 3 of the Act by incriminating and dismissing from employment one Pedro Vinluan, an employee in the Kim San Cafe & Restaurant by reason of his union activities. Respondent Emilia Go was included in the "cease and desist" order because the Court found that she was at least an "agent" of Tan Guan and Sy Teh, contemplated in Rep. Act No. 875.

The undersigned could not understand why the Resolution setting aside the Order of the trial Court did not mention a word about the dismissal of Pedro Vinluan. Based on the evidence introduced at the hearing of this case and on the undersigned's personal observation, there can be no doubt as to the fact that Pedro Vinluan was dismissed only because of his union activities. The trial Court therefore ordered the respondents to offer reinstatement with backpay to Pedro Vinluan from the time of his dismissal up to the date of his actual reinstatement. Was the procedure of the trial Court so "fatal" as to render both the complainant Union and Pedro Vinluan helpless?

I ask the other members of this Court: Will the law that complainants now invoke for the protection of the rights guaranteed thereunder be the very instrument of their destruction?

And now, I wish to make of record the following:

On or about April 21, 1954, this Court adopted a Resolution denying the motion for reconsideration of the Order of March 19, 1954, filed by the Repsondents. Said Resolution was issued by the undersigned, with the concurrence of Judges Castillo and Yanson. A photostatic copy of said Resolution is hereto attached and marked as "Annex A".

After the lapse of two months, that is, on June 25, 1954, Judge Lanting rendered his dissenting vote, which was concurred with by Presiding Judge Roldan. A photostatic copy of said dissenting vote is hereto attached and marked as "Annex B".

On July 14, 1954, a second Resolution was prepared, bearing the date of June 25, 1954, setting aside and reversing said Order of March 19, 1954, which order was affirmed by the first Resolution of April 21, 1954. This second Resolution was issued by Judge Lanting and concurred with by Judges Roldan and Yanson. A photostatic copy of this second Resolution is hereto attached and marked as "Annex C". Judge Yanson changed his vote and signed the second Resolution after having written in front of his signature in the first Resolution, the following: "Concurro con Judge Lanting". Obviously, this annotation could not have been made before Judge Lanting's vote was rendered on June 25, 1954. There was yet no dissenting opinion to concur with.

There being the requisite number of judges necessary to render a decision, on April 21, 1954, the Court pronounced its judgment, and since then, said first Resolution became the lawful decision of the Court.

Of course, Judge Lanting may render his opinion and Judge Yanson change his vote, at any time, even perhaps two months after the adoption of the first Resolution. Their conduct does not concern us. It makes no difference whether their actuation is proper or not. The thing that matters is that such anomaly exists and that in order to place the Court above suspicion, something should be done to stop such practice.

Manila, July 22, 1954.

(*Continued on page 575*)

PROPERTY; POSSESSION; PRESUMPTION IN FAVOR OF ACTUAL POSSESSOR. — When a party is admittedly in the actual possession of the disputed land, all presumptions are, and all doubts must be resolved, in his favor, it being a rule of law that the present possessor is to be preferred should a question arise regarding the fact of possession (Art. 530, new Civil Code; Art. 445, old). *Victorina Culasito and Francisco Sical, plaintiffs and appellants, vs. Teodoro Clidoro, defendant and appellee, C.A. No.* 10111-*R, November* 7, 1953, *Reyes, J.B.L., J.*

EVIDENCE; INTRODUCTION OF ADDITIONAL EVIDENCE AFTER PARTY HAS RESTED HIS CASE; COURT'S DISCRETION. — It is discretionary with the trial court to admit further evidence after the party offering it has rested, which discretion will not be reviewed except in clear cases of abuse (Lopez vs. Libor, 46 Off. Gaz., (Supp. to No. 1, 211); and this discretion can be said to have been abused only if the additional evidence rejected by the court below would have altered or changed the result of the case. *Ibid, Ibid.*

CRIMINAL LAW; EVIDENCE; WITNESS; TESTIMONY; UNCONSCIOUS PARTNERSHIP. — It has been said that "Perhaps the most subtle and prolific of all the fallacies of testimony arises out of unconscious partisanship. Upon the happening of an accident the occasional passengers on board of a streetcar are very apt to side with the employees in charge of the car," (Wellman, The Art of Cross-examination, 161, 614 and 165). *The People of the Philippines, plaintiff and appellee, vs. Antonio Reyes, defendant and appellant, C. A. No.* 10277-*R, November* 11, 1953, *Dizon, J.*

ID.; DAMAGE TO PROPERTY THROUGH RECKLESS IMPRUDENCE; INDEMNITY; PAYMENT OF DAMAGES BY INSURANCE COMPANY DOES NOT RELIEVE ACCUSED OF HIS OBLIGATION TO REPAIR DAMAGES CAUSED THROUGH HIS NEGLIGENCE; CASE AT BAR. — Accused contends that inasmuch as the owner of the Ford car has already been paid his damages by an insurance company, the lower court erred in sentencing him to pay damages. It should be taken into account, in this connection, that the payment made by the insurance company was made pursuant to its contract with the owner of the Ford car and was clearly not made on behalf of accused. It cannot be said, therefore that the payment had relieved the accused of his obligation to repair the damages caused through his negligence. The insurance company, however, must be deemed to have been subrogated to the rights of the offended party as far as the damages awarded are concerned. *Ibid, Ibid.*

CRIMINAL LAW; EVIDENCE; RULE OF "RES INTER ALIOS ACTA"; CONFESSION OF CONSPIRATOR; ADMISSIBILITY.— The rule of *res inter alios acta* is well established and consistently adhered to in this jurisdiction. "The rights of a party cannot be prejudiced by the act, declaration or omission of another and proceedings against one cannot affect another x x x" (section 10, Rule 123, Rules of Court). Only the confession of a conspirator, made during the existence of the conspiracy, is admissible against his co-conspirator. Again a confession is admissible against a co-accused when it is adopted by the latter or, when given within his hearing, he kept silent about it. *People of the Philippines, plaintiff and appellee, vs. Pedro Obejera, Lupo Fortus and Gregorio Calibara, defendants and appellants, C.A. No.* 10052-*R, November* 13, 1953, *Martinez, J.*

CRIMINAL LAW AND PROCEDURE; SEPARATE TRIAL; USE OF CO-DEFENDANT AS PROSECUTION WITNESS AGAINST HIS CO-DEFENDANT; SECTION 9, RULE 115, RULES OF COURT. — It is well-settled that the granting of a separate trial when two or more defendants are jointly tried with an offense is discretionary with the trial court (section 8, Rule 115, Rules of Court; People vs. Go, L-1527, February 27, 1951); and, that when two or more persons are jointly prosecuted for the same crime, but separately tried, either of the said defendants is competent as a witness against the other, although the case against the witness himself is still pending (People vs. Parcon, 55 Phil., 970; People vs. Trazo, 58 Phil., 258). While section 9, Rule 115, of the Rules of Court, limits the exercise of the discretion of the court in discharging an accused person who is to be used as a witness, it does not prohibit the use of one co-defendant as a witness for the prosecution, when such co-defendant voluntarily takes the witness stand to testify against a co-defendant (People vs. Trazo, (Supra); People vs. Badilla, 48 Phil., 718; and U.S. vs. Remigio, 37 Phil., 599). *People of the Philippines, plaintiff and appellee, vs. Regalado Magsino et al., defendants and appellants, C.A. No.* 8073-*R, November* 16, 1953, *De Leon,J.*

LAND REGISTRATION; EVIDENCE; PRESUMPTION, "JURIS ET DE JURE" OF COMPLIANCE WITH NECESSARY CONDITION FOR GRANT BY THE STATE. — When the possession of lands by the common predecessors-in-interest of the claimants has been, at least, prior to July 26, 1894 and this possession has been passed on to the claimants and the evidence shows that it has been continuous, uninterrupted, open, adverse and in the concept of owner, there is a presumption *juris et de jure* that all the necessary conditions for a grant by the State have been complied with. Pursuant to the provisions of section 48 (b) of Commonwealth Act No. 141, said claimants are entitled to the registration of their title to the lands applied for (Pamintuan vs. Insular Government, 8 Phil., 485; Susi vs. Razon, 48, Phil., 424; Government of P.I. vs. Adelantar, 55 Phil., 793; Gov't of P.I. vs. Abad 56 Phil., 75). *Director of Lands, petitioner and appellee, vs. Rufina Rendon, movant and appellant, Eugenio Z. Rendon, opposito r and appellee, C. A. No.* 8463-*R, November* 20, 1953, *Ocampo, J.*

ID.; DECREE OF REGISTRATION MUST BE DEFINITE AND SPECIFIC IN ACCORDANCE WITH SURVEY PLAN AND TECHNICAL DESCRIPTION. — In a land registration proceeding the decree of registration must be definite and specific and in accordance with a plan and technical description of the property claimed as prepared by a competent surveyor who has surveyed the property, othewise the court cannot order the issuance of the corresponding decrees of registration of the respective titles of the petitioners. *Ibid, Ibid.*

DONATION; DONATION MORTIS CAUSA NOT EXECUTED WITH THE FORMALITIES OF A WILL, INVALID. — According to our jurisprudence, a donation *mortis causa* which has not been executed with the formalities of a will is of no force and effect. *Fidela Arceo, plaintiff and appellant, vs. Gerardo Arceo, Guillermo Arceo, Francisco Arceo and Raymundo Plata, defendants and appellees, C.A. No.* 9620-*R, November* 25, 1953, *Felix, J.*

LAND REGISTRATION; REGISTER OF DEEDS; ERRONEOUS ANNOTATION ON CERTIFICATE OF TITLE; CASE AT BAR. — The annotation of the affidavit at the back of the new transfer certificate of title (Exhibit A) which did have for the purpose to inscribe any lien or encumbrance on the pro-

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DECISION OF THE COURT OF INDUSTRIAL RELATIONS (*Continued*)

CASTILLO, J., concurring and dissenting.

I concur only insofar as the Resolution eliminates or nullifies the imposition upon the respondents of a fine of five hundred pesos (₱500.00). But as regards the reinstatement with back pay of Pedro Vinluan and the requirement that the respondents cease and desist from committing unfair labor practices, it appearing that they are supported by substantial evidence, the order sought to be reconsidered, I think, should not be disturbed.

Accordingly, the Order of March 19, 1954 issued by the trial court is hereby modified.

Manila, Philippines, August 7, 1954.

perty in question but to nullify the effect of the issuance of the new title and the transfer of the property as a consequence of the sale, for it aimed at the destruction of both these acts by claiming the right of ownership over the very land by virtue of a previous deed of donation made to affiants by their father, was erroneously made by the Register of Deeds. Such annotation, as a conveyance of registered land, falls short of its purpose, for according to section 50 of Act 496, it is necessary to use the required form "sufficient in law for the purpose intended," and the annotation of the affidavit cannot be considered to be the "operative act to convey and affect the land." (Philippine National Bank vs. Tan Ong Tse, 51 Phil., 317; Director of Land vs. Addison, 49 Phil., 19). *Ibid, Ibid.*

CERTIORARI; WHEN CERTIORARI MAY BE GRANTED NOTWITHSTANDING AVAILABILITY OF APPEAL. — Certiorari may be granted, notwithstanding the existence of an appeal or the availability of another adequate remedy for the correction of the alleged error, when the appeal is not an adequate remedy, such as where the order is of such nature as to call for prompt relief from its injurious effects (Silvestre vs. Torres and Oben, 57 Phil., 885; Alafriz vs. Nable, 72 Phil., 278.) *Gregorio Gelera and Francisco Gelera, petitioners, vs. Hon. Antonio G. Lucero, Judge of the Court of First Instance of Cavite, and Felicisima Aranzazu in her own behalf and as guardian ad-litem for her minor children Eduardo, Leticia and Herminio, all surnamed Gelera, respondents, C.A. No. 11578-R, November 25, 1953, Natividad, J.*

ID.; ID.; ACTS NOT CONSTITUTING GRAVE ABUSE OF DISCRETION. — The hearing of an action in case the defendant fails to appear for no known reason at the time set thereafter does not constitute such "grave abuse of discretion" as to warrant the issuance of a writ of certiorari. (Go Chanjo vs. Sy-Chanjo, 18 Phil., 405; Cababan vs. Weissenhagen, 38 Phil., 804.) *Ibid, Ibid.*

ATTORNEY AT LAW; HIS DUTIES; LAWYER'S ACTS CONSTITUTING NON-EXCUSABLE NEGLIGENCE. -- An attorney must always be ready to comply with the order of notification of the court and to protect the interest of his client." (Guieb vs. Valdez and Cardenas, CA-G. G. No. 4829-R, June 15, 1950.) Once informed that the case had been set for trial it is the duty of the attorney to ascertain by reliable means the exact date of such hearing. If he fails to do this, and instead relies, as counsel in the instant case did, on information received from non-official sources, he is guilty of non-excusable negligence. Appeal, not certiorari, is the proper remedy for correcting an error in denying a motion to set aside a judgment (Rios vs. Ros, 45 Off. Gaz., 1265), or in allowing an attorney to withdraw his appearance and proceeding with the trial in the absence of his client (Federal Films, Inc. vs. Pecson, 46 Off. Gaz., 1265). *Ibid, Ibid.*

PLEADING AND PRACTICE; AMENDED COMPLAINT, ADMISSIBILITY OF; WHEN PROPER. — An amended complaint which does not allege a new cause of action, or change the nature of the action, but merely amplifies certain allegations in the original complaint may be admitted before the presentation of evidence by either party (49 C.J., 495). *Ibid, Ibid.*

CRIMINAL LAW; SERIOUS PHYSICAL INJURIES; INDEMNITY. — Where aggrieved party has not as yet paid for the medical services of the physician who treated his injuries, the accused cannot be sentenced to pay indemnity for actually aggrieved party had not spent it. Action is, however, reserved to him to recover it from appellants as soon as he shall have paid it to the physician in payment of the medical treatment given to him by the Doctor for the injuries he had sustained. *People of the Philippines, plaintiff and appellee, vs. Igmidio Granale and Pedro Cerda, defendants and appellants, C. A. No. 8833-R, November 27, 1953, Martinez, J.*

ILLEGAL ENTRY AND DETAINER; APPEAL; APPEAL BOND UNNECESSARY WHEN SUPERSEDEAS BOND TO STAY EXECUTION IS GIVEN. — The Rules of Court, in section 5 of Rule 41, provide that the appeal bond shall be in the amount of ₱60, unless a different amount is fixed by the court or a supersedeas bond has been filed. In the case of Contreras vs. Dinglasan, 45 Off. Gaz. (No. 1) 257, the Supreme Court held that since the purpose of the appeal bond is to answer for the costs that may be adjudged against the appellant in the appellate court, it becomes unnecessary when a supersedeas bond to stay execution of the judgment is given, which has in part the same purpose. *Gregorio Salceda, petitioner, vs. Hon. Jose T. Surtida, Judge of the Court of First Instance of Camarines Sur. and Zoilo Balmaceda, respondents, C.A. No. 8949-R, November 28, 1953, Diaz, Pres. J.*

ID.; ID.; WHEN SUPERSEDEAS BOND NEED NOT BE GIVEN; RULE APPLICABLE TO APPEAL FROM COURT OF FIRST INSTANCE TO COURT OF APPEALS. — According to leading cases, notably, Mitschiener vs. Barrios, 42 Off. Gaz., 1901, Sogueco vs. Natividad, 45 Off. Gaz., Supp. (No. 9) 449, Aylon vs. Jugo, 45 Off. Gaz., (No. 1) 188, Hilado vs. Tan, L-1964, August 23, 1950, a supersedeas bond is unnecessary when the defendant has deposited in court the amount of all back rents declared by final judgment of the justice of the peace or municipal court to be due the plaintiff from him and an appeal bond has been filed to answer for costs; the reason being that such bond answers only for rents or damages up to the time the appeal is perfected from the judgment of the justice of the peace or municipal court and not for rents or damages accruing while the appeal is pending which are guaranteed by future deposits or payments to be made by the defendant. Following this reasoning a step farther, when, as in this case, the deposits already made by the defendant do not fully cover the amount fixed in the judgment appealed from and the supersedeas bond is made to answer for costs as well in the absence of a regular appeal bond, a supersedeas bond which covers the balance of such back rents and the probable amount of costs should be considered good and sufficient. Finally, there appears to be no reason why the propositions just set forth which, in the cases already cited, were applied to appeals from municipal courts to courts of first instance, should not apply with equal force to appeals from courts of first instance to higher courts where a supersedeas bond is filed for the first time on appeal from a court of first instance. *Ibid, Ibid.*

APPEAL; PAUPER'S APPEAL; MANDAMUS MAY ISSUE TO COMPEL GRANTING OF PAUPER'S APPEAL. — While, contrary to the respondents' contention, there is authority to the effect that mandamus may issue compelling a lower court to grant a meritorious petition to appeal as pauper which it has improperly denied (Comia vs. Castillo, 75 Phil., 526), it does not appear that the petition in this case is one which ought to have been granted. *Ibid, Ibid.*

CRIMINAL LAW; MOTOR VEHICLE LAW; ACCIDENT RESULTING IN DEATH OR SERIOUS BODILY INJURY; LAW APPLICABLE. — The appellant has been charged and found guilty of a violation of the Motor Vehicle Law (Act No. 3992). According to section 67 (d) thereof, as amended by Republic Act No. 587, if as the result of negligence or reckless or unreasonable fast driving any accident occurs resulting in death or serious bodily injury to any person, the motor vehicle driver at fault, shall upon conviction, be punished under the provisions of the Penal Code. *The People of the Philippines, plaintiff and appellee, vs. Romeo Jose, accused and appellant, C.A. No. 3010-R, November 28, 1953, Ocampo, J.*

COMMERCIAL LAW; COLLISION OF VESSELS; DAMAGES; PROTEST; ARTICLE 835, CODE OF COMMERCE, NOT APPLICABLE TO SMALL BOATS.—A motor launch used in the Manila Bay for carrying back and forth the members of the crew who were off duty cannot be considered as included in the denomination of vessel as specified in article 835 of the Code of Commerce. Therefore, when such a motor launch is sunk,

protest is not a condition precedent, for the recovery of the damages sustained by its owner. *Madrigal Shipping Co., plaintiff and appellant, vs. Santiago Gancayco, defendant and appellee, No.* 8585-*R, November* 11, 1953, *Martinez, J.*

PLEADING AND PRACTICE; MOTION FOR DISMISSAL WITH RESERVATION TO SUBMIT EVIDENCE. — When defendant asked for the dismissal of the case in the court below he reserved his right to submit evidence in defense, should the motion therefor be eventually denied. The opposing party failed to object thereto; thus in furtherance of justice, this case should be remanded to the court below. We do not believe this to be in violation of the ruling in Arroyo vs. Asur, 43 Off. Gaz., 54. *Ibid.*

CRIMINAL LAW; MALVERSATION THROUGH FALSIFICATION OF PUBLIC DOCUMENT; BOND, NOT A NECESSARY ELEMENT; CASE AT BAR.—A bond is not necessary to make one civilly and criminally accountable and liable for government property in his custody. It is enough that he had accepted the responsibility entailed by his position and performed his duties as such custodian. *People vs. Teodoro Estandante, Francisco Viola, Felipe Carasco and Santiago Fajardo, defendants and appellants, No.* 9948-*R, November* 12, 1954, *Peña, J.*

SALE A RETRO; REDEMPTION; RUNNING OF PERIOD OF REDEMPTION PRESUPPOSES FULL PAYMENT OF PURCHASE PRICE. — The running of the period of repurchase in a sale *a retro* presupposes the payment in full of the price agreed upon for the transaction. Since, in the case at bar, the vendee had not completely satisfied to the vendor the purchase price of the properties bought, it is inconceivable that the period for the repurchase of the property could mature upon the lapse of the agreed redemption period and much less that the purchaser could lease the property bought and collect rents from the vendor for its occupation thereof, when the former has not complied with his obligation to the latter of paying in full the consideration of the sale. *Luz Labuga Celiz, as Special Administratrix of the Estate of Bonifacio Celiz, plaintiff and appellee, vs. Eufemia Cuaresma Vda. de Jumawan, as administratrix of the Estate of Sergio Jumawan, defendant and appellant, No.* 9238-*R, December* 19, 1953, *Feliz, J.*

MANDAMUS; CAN NOT BE USED TO CONTROL JUDGE'S DISCRETION. — Mandamus will only lie where the court, officer, board or person concerned unlawfully neglected the performance of an act which the law specifically enjoins as a duty resulting from office, trust, or station, or when such court, officer, board or person has unlawfully excluded a person from the use and enjoyment of a right or office to which he is entitled. The writ is only available to compel an officer to perform a ministerial duty. Hence, it cannot be used to control the discretion of a judge, or to compel him to decide a case or a motion pending before him in a particular way. *Anselmo Quilaneta, petitioner, vs. The Honorable Segundo C. Moscoso, Judge of the Court of First Instance of Leyte and the Provincial Fiscal of Leyte, respondents, No.* 11939, *January* 20, 1954, *Natividad, J.*

PROHIBITION; REMEDY INTENDED TO PREVENT OPPRESSIVE EXERCISE OF LEGAL AUTHORITY; TEST OF ABUSE OF DISCRETION. — The remedy of prohibition is intended to prevent the oppressive exercise of legal authority. Its only basis is lack or excess of jurisdiction or authority on the part of an inferior tribunal, corporation, board or person, as gross abuse of discretion and there is abuse of discretion only where the exercise of judgment is so capricious and whimsical as to be equivalent to lack of jurisdiction. *Ibid.*

MANDAMUS OR PROHIBITION; ACTION OF JUDGE OR FISCAL, NOT CONTROLLABLE BY MANDAMUS OR PROHIBITION. — A judge has discretion to decide a case in accordance with his best judgment; a Fiscal, to prosecute offense committed within his jurisdiction. These duties are imposed by law on both officials, and the performance thereof involves exercise of judgment. Their actions on such matters, therefore, cannot be controlled either by mandamus or by prohibition. *Ibid, Ibid.*

CRIMINAL LAW; ROBBERY; INTENTION TO DEPRIVE ONE OF OWNERSHIP, WITH CHARACTER OF PERMANENCY, IMPORTANT; CASE AT BAR. — Since the accused, though breaking the locks of his father's desk, never had the intention of depriving his father of the ownership of the revolver and ammunitions with any character of permanency, but only to threaten his father into giving him money, and since the other essential element of taking (approderamiento) is not present in the instant case, the accused could not be convicted of robbery. He is, however, guilty of grave threats for having threatened his father. *People of the Philippines, plaintiff and appelles, vs. Agustin Castañeda Kho Choc, defendant and appellent, Nos.* 10231-*R,* 10234-*R, January* 23, 1954, *Felix J.*

BOARD OF MARINE INQUIRTY; ITS FINDINGS, NOT CONCLUSIVE AND BINDING UPON COURT OF FIRST INSTANCE. — An action for damages arising from and caused by the sinking of a vessel falls squarely within the jurisdiction of the Court of First Instance. In the exercise thereof, it is obvious that said court had the right to weigh the evidence presented before it and, on the strength thereof, to determine the question of whether appellee and its agents had been negligent. To hold that the decision rendered by the Board of Marine Inquiry is conclusive upon said court would virtually deprive the latter of the right to use its own discretion and compel it to accept the findings of a body that had conducted an investigation merely to decide whether the marine certificates of certain marine officers should be suspended or cancelled on account of misconduct, intemperate habits or negligence in the performance of their duties. Moreover, it would be obviously unfair to hold such findings as conclusive and binding upon the lower court and determinative of the rights of the herein appellee. *O. B. Ferry Service Co., plaintiff and appellant, vs. P. M. P. Navigation Co., defendant and appellee, No.* 10392-*R, January* 26, 1954, *Dizon, J.*

CONTRACTS; CHARTER PARTY; VAGUENESS OR AMBIGUITY RESOLVED AGAINST THE PARTY WHO PREPARED IT. — When a charter party is prepared under the direction of the owner of the vessel, it goes without saying that whatever vagueness or ambiguity there might be in its provisions must be resolved against it, pursuant to the provisions of article 1288 of the old Civil Code as well as of article 1377 of the new. *ibid.*

CORPORATION LAW; ONLY BOARD OF DIRECTORS HAS AUTHORITY TO BIND CORPORATION. — Under our Corporation Law only the board of directors of a corporation, acting as such, has the authority to bind the corporation. The general rule of law, invoked by the appellant, that if an officer of the corporation employs a person to perform services for the corporation and such services are performed with knowledge of the directors and they receive the benefits thereof without objection, the corporation is liable, only holds true where the statute is not specific. Where, as in this jurisdiction, the law clearly provides that "the expression of the corporate will is vested in the Board of Directors and therefore only the majority of the Board of Directors acting as such has the authority to bind the corporation" such rule does not apply (Superior Gas and Equipment Co. vs. Jurado, supra.) *Esteban Aguilar, plaintiff and appellant, vs. Philippine American Drug Co., (Botica Boie), defendant and appellee, No.* 7129-*R, January* 28, 1954, *Natividad, J.*

EMINENT DOMAIN; EXPROPRIATION; COMMISSIONER'S REPORT; SCOPE OF COURT'S AUTHORITY OVER COMMISSIONER'S REPORT. — The law clearly states that the court, in acting upon the commissioner's report in an expropriation case, may accept it or set it aside, accept it in part or reject it in part, and make such order or judgment "as shall secure

to the plaintiff the property essential to the exercise of his right of condemnation and to the defendant just compensation for the property so taken." (Rule 69, Rules of Court) Such authority, according to the Supreme Court in Manila Railroad Co. vs. Velasquez, 32 Phil., 286, 290, is not limited to accepting or rejecting in full any of the constituent items of the report, but the court may validly increase or diminish any or all of such items. Other cases hold that this authority may be exercised though there is nothing to indicate prejudice or fraud on the part of the commissioners. *The Municipality of San Fernando, Province of Pampanga, plaintiff and appellant, vs. Jose Valencia, Jr., and Jesusa Quiambao, defendants and appellants, No. 8575-R, January 28, 1954, Diaz, Pres. J.*

ID.; ID.; ID.; CRITERIA FOR DETERMINING REASONABLE VALUE OF LAND EXPROPRIATED. — What ought to be reviewed by the court is not so much the act, or the appearance of it, of fixing the value by a seemingly arbitrary standard like "splitting the difference" between values variously fixed by the commissioners, as the evidence that supports or fails to support it. In other words, a court may simply split the difference without elaborating on its reasons for so doing, and yet the value thus fixed may be supported by the preponderance of the evidence. On the other hand, it may choose to fix any of the values variously recommended and still incur in error because the award is not based upon sufficient evidence or upon generally accepted criteria for measuring values. Fair or reasonable market value is defined as that which the property would bring where it is offered for sale by one who desires, but it not obliged to sell it, and is bought by one who is under no necessity of having it. It is well settled that the value of property taken by eminent domain should be fixed as of the date of the proceedings. *Ibid.*

EVIDENCE; WITNESS; TESTIMONY; HOW TO ACCERTAIN TRUE MEANING OF TESTIMONY OF WITNESS. — To ascertain the true meaning of the testimony given by a witness "everything stated by him as well on his cross-examination as on his examination in chief, must be considered. Facts imperfectly stated in answer to one question may be supplied by his answer to another; when from one statement considered by itself an inference may be deduced, that inference may be strengthened or repelled by the facts disclosed in another." "We must not select isolated parts of the testimony; its general hearing must be taken altogether." And where there are apparent inconsistencies in the testimony of a witness, they should be reconciled if possible, for perjury is not to be presumed. (3 Moran, Rules of Court, 601-602, 1952 ed.) *Cipriano P. Ramirez, plaintiff and appellant, vs. Manuel Cinco, defendant and appellee, No. 9899-R, February 2, 1954, Gutierrez David, J.*

CRIMINAL LAW; HOMICIDE; SELF-DEFENSE; REASONABLE NECESSITY OF THE MEANS EMPLOYED TO REPEL AGGRESSION. — In a situation like the one at bar, where the contestants are in the open and the person assaulted can exercise the option of running away, the general rule that such person is not generally justified in taking the life of one who assaults him with his fists only, without the use of a dangerous weapon must be upheld. *People vs. Florencio Nicolas y Flores, defendant and appellant, No. 8826-R, February 5, 1954, De Leon, J.*

CORPORATION LAW; DIRECTOR; COMPENSATION; DIRECTOR NOT ENTITLED TO COMPENSATION IN THE ABSENCE OF EXPRESS PROVISION OR CONTRACT. — It has been held that a director can not recover for his services as president or as secretary or as treasurer in the absence of express provision or contract for such compensation. *Camera Exchange, Inc., plaintiff and appellant, First National Surety and Assurance Co. Inc., Surety-plaintiff and appellant, vs. Jose W. Carameng, defendant and appellee, No. 10093-R, December 9, 1953, Reyes, J.B.L., J.*

ID.; ID.; ID.; ID.; KNOWLEDGE AND CONSENT OF MAJORITY OF DIRECTORS AND OF HOLDERS OF THE CAPITAL STOCK, IMMATERIAL — The view that the knowledge and consent of the majority of the Directors and of the holders of the capital stock validated the payment of salaries of defendant and his wife despite their membership in the board of directors of the plaintiff corporation, is unsound both in law and in fact. In law, because it is held "that mere presumption of an agreement to pay arises from the mere rendition of the services, no matter how valuable they may be, and in the absence of express agreement, it is presumed that services rendered by an officer are performed gratuitously" and "the rule denying officers of corporation compensation is not varied by the fact that they own nearly all of the stock of the corporation" *Ibid.*

ID.; ID.; ID.; ESTOPPEL; ESTOPPEL PRESUPPOSES FULL KNOWLEDGE OF PERTINENT FACTS. — Since the stockholders of the corporation have not been duly informed of the action of defendant and his wife in collecting the questioned salaries and disbursments, and a stockholders' meeting was not held prior to defendants' renouncing his controlling position in the corporate organization, no estoppel applies, since estoppel presupposes full knowledge of all pertinent facts. *Ibid, Ibid.*

ID.; TRUST PROPERTY; OFFICERS AND DIRECTORS OF CORPORATION, THEIR FIDUCIARY RELATION IN RESPECT TO BUSINESS OR PROPERTY OF CORPORATION. — Officers and directors in control of a corporation occupy a fiduciary relation towards the corporation and its stockholders, in respect to the business or property. *Ibid, Ibid, Ibid.*

PARTITION; CONSENT; ERROR; TRANSLATION OF ARTICLE 1081, OLD CIVIL CODE ERRONEOUS. — Where there is conflict between the language of the original text of the Civil Code and of its official translation, the text of the original text should govern. This rule is applicable to Article 1081 of the old Civil Code, the official translation of which is erroneous. *Lucia Gorospe-Sebastian, plaintiff and appellee, vs. Salvador Salazar and Angeles Gorospe-Salazar, defendants and appellants, No. 8008-R, January 26, 1954, Natividad, J.*

ID.; ID.; ID.; ARTICLE 1081, OLD CIVIL CODE CONSTRUED. —Article 1081 of the old Civil Code contemplates a case of error in the status of the person of one of the contracting parties which amounts to error in the consent. Such error may arise from pure mistake or from misrepresentation or fraud. *Ibid.*

CONTRACTS; FAILURE OF CONTRACT TO FULFILL REQUIREMENTS OF ARTICLE 1081 OF THE OLD CIVIL CODE, EFFECT OF. — Contracts of partition which fail to fulfill the requirements of article 1081 of the old Civil Code may be given effect either as donations or quite claims if the intention of the parties to treat them as such is clearly deducible from the deeds and their attendant circumstances. *Ibid, Ibid.*

HUSBAND AND WIFE; OWNERSHIP OF PROPERTY ACQUIRED DURING MARRIAGE; PRESUMPTION IN FAVOR OF THE CONJUGAL PARTNERSHIP. — All acquisitions by onerous title during marriage are presumed to be for the conjugal partnership and at its expense (old Civil Code, article 1401 (1); new Civil Code, article 153 (1). Hence, although the instant *pacto de retro* sale was made to the wife alone, there being no clear and convincing proof that the consideration of the sale paid by both spouses was exclusive money of the wife, said purchase *a retro* vested ownership of the land in the conjugal partnership of the spouses. *Marcelo Patayon, plaintiff and appellee, vs. Anatalia Ortal et al., defendants. Martiniano Dagayday, defendant and appellant No. 1972-R, February 5, 1954, Reyes, J.B.L., J.*

ID.; ID.; ID.; HUSBAND'S RIGHT TO DISPOSE OF THE CONJUGAL PROPERTY. — The husband is the administrator of the conjugal partnership (Civil Code of 1889, article 1412; new Civil Code article 165.) Consequently, a sale by him of conjugal property, in the absence of fraud upon the wife, is valid (old Civil Code Article 1413). On the other hand, if the wife not

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### REPUBLIC ACT NO. 1052

AN ACT TO PROVIDE FOR THE MANNER OF TERMINATING EMPLOYMENT WITHOUT A DEFINITE PERIOD IN A COMMERCIAL, INDUSTRIAL, OR AGRICULTURAL ESTABLISHMENT OR ENTERPRISE.

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

SECTION 1. In cases of employment, without a definite period, in a commercial, industrial, or agricultural establishment or 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.

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

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

Approved, June 12, 1954.

### REPUBLIC ACT NO. 1053

AN ACT TO AMEND REPUBLIC ACT NUMBERED THREE HUNDRED AND EIGHTY-FIVE AUTHORIZING CERTAIN OFFICIALS OF THE GOVERNMENT OF THE UNITED STATES OR ANY AGENCY THEREOF TO ADMINISTER OATHS AND AFFIRMATIONS IN THE PHILIPPINES.

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

SECTION 1. Section one of Republic Act Numbered Three hundred and eighty-five, which authorizes certain officials of the Government of the United States or any agency thereof to administer oaths and affirmations in the Philippines, is hereby amended to read as follows:

"SECTION 1. Any person employed in the Philippines by the Government of the United States, or any agency thereof, to whom authority is delegated by the said Government or agency, to administer oaths and affirmations, to aid claimants for benefits granted by the United States in the preparation and presentation of their claims, and to make investigations and examine witnesses, shall have authority to administer oaths and affirmations during his employment in the Philippines in any investigation or matter connected with the performance of his duties and functions: *Provided, however,* That for any oath or affirmation administered by him, no fee shall be charged or collected."

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

Approved, June 12, 1954.

### REPUBLIC ACT NO. 1057

AN ACT TO AMEND REPUBLIC ACT NUMBERED NINE HUNDRED AND TEN ENTITLED "AN ACT TO PROVIDE FOR THE RETIREMENT OF JUSTICES OF THE SUPREME COURT AND OF THE COURT OF APPEALS, FOR THE ENFORCEMENT OF THE PROVISIONS HEREOF BY THE GOVERNMENT SERVICE SYSTEM, AND TO REPEAL COMMONWEALTH ACT NUMBERED FIVE HUNDRED AND THIRTY-SIX" AND FOR OTHER PURPOSES.

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

SECTION 1. Republic Act Numbered Nine hundred and ten is hereby amended by inserting between its sections two and three a new section which shall be known as section Two-A thereof, and which shall read as follows:

"SEC. 2-A. Any Justice of the Supreme Court or of the Court of Appeals who ceased to hold such position prior to the approval of this amendatory Act, to accept another position in the Government or who resigned or retired from said courts after the effectivity of Commonwealth Act Numbered Five hundred and thirty-six, entitled "An Act authorizing the retirement of Justices of the Supreme Court, and making appropriations for the payment of a retirement gratuity", without enjoying the benefits thereunder, shall be entitled to the benefits under the provisions of this Act: *Provided,* That at the time of his cessation in office or retirement as Justice of the Supreme Court or of the Court of Appeals, he possessed all the requirements prescribed by this Act: *And provided, further,* That the benefits authorized hereunder shall accrue only from the date of the approval of this amendatory Act.

SEC. 2. Republic Act Numbered Nine hundred and ten is hereby further amended by inserting between its sections three and four a new section to be known as section Three-A thereof, and which shall read as follows:

"SEC. 3-A. In case the salary of Justices of the Supreme Court or of the Court of Appeals is increased or decreased such increased or decreased salary shall, for the purposes of this Act, be deemed to be the salary which a Justice who ceased to be such to accept another position in the Government was receiving at the time of his cessation in office: *Provided,* That any benefits that have already accrued prior to such increase or decrease shall not be affected thereby."

SEC. 3. The sum necessary to carry out the purposes of this amendatory Act and Republic Act Numbered Nine hundred and ten, is hereby appropriated out of any funds in the National Treasury not otherwise appropriated.

SEC. 4. This Act shall take effect upon its approval.

Approved, June 12, 1954.

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DIGEST OF DECISIONS OF THE COURT OF APPEALS *(Continued)*

having the representation of the partnership, disposes of the conjugal property without her husband's consent (article 1416, old Civil Code), her act is void. *Ibid.*

ID.; ID.; ID.; NON-JUDICIAL SEPARATION OF SPOUSES, EFFECT UPON POWER OF HUSBAND OVER CONJUGAL PROPERTY. — The fact that spouses are separated without judicial sanction (Civil Code of 1899, article 1432), does not diminish the power of the husband over the conjugal property. *Ibid, Ibid.*

APPEAL; ASSIGNMENT OF ERRORS BY APPELLEE IN CIVIL CASE, WHO HAS NOT APPEALED, NOT COGNIZABLE. — In a civil case, unlike in an election case, the appellee, on appeal, could not assign errors, unless he appealed from the decision of the court *a quo.* Therefore, we cannot take cognizance of his assignment of errors much less his arguments in support thereof. *Marcelo Saltarn, plaintiff and appellee, vs. Pascual Manaoy and Venancia Obdula, defendants and appellants, vs. Nicasio Revistual Morandante et al., third party defendants, No.* 4498-*R, Feb.* 8, 1954; *Peña, J.*

CRIMINAL LAW; AMNESTY PROCLAMATION NO. 76; CRIMES AGAINST CHASTITY NOT COVERED BY AMNESTY. — Supplementing Amnesty Proclamation No. 76, intended for the leaders and members of the association known as Hukbalahap and Pambansang Kapatiran ng Magbubukid (PKM), the then Secretary of Justice issued Circular No. 27 on June 29, 1948, stating that petitioners under the proclamation should be those accused of the crimes of rebellion, sedition, illegal association, assault upon, resistance and disobedience to persons in authority and/or illegal possession of firearms, committed before June 21, 1948, or any other crime that may be shown to have been committed merely as an incident to or in furtherance of the commission of the crimes of rebellion, sedition, illegal associa-

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# TEXAS LAWYER TALKS ON JURY SYSTEM AT FRANCISCO COLLEGE

*Atty. R. Richard Roberts*
*Member, Texas Bar, U.S.A.*

"The system of trial by jury is not a perfect system."

Thus spoke R. Richard Roberts, a member of the Texas and the United States bars and a partner of one of the largest law firms in the United States, Vinsons, Elkins, Weems & Sears, at the symposium on "Trial System in Criminal Cases" held at the Francisco College, Friday, November 19. He was the guest speaker.

The American lawyer stressed that nowhere in the world today can there be found a system of trial that is perfect. He discoursed on the merit of the jury system adopted generally in the United States although such a system, according to him, is not without flaw, especially in the trial of civil cases.

Mr. Roberts disclosed that he has advocated for his native state of Texas the trial of civil cases by a judge with court commissioners or assessors in place of the jury system. He said that at present the jurors who are selected to judge civil cases are invariably those who have "blank minds" on the subject of the suit. Since the subjects of civil suits require in most cases expert knowledge, it would better serve the ends of justice to vest the judge with the power of decision and to appoint court commissioners or assessors to assist him with their expert knowledge, he explained.

Starting his speech, Mr. Roberts outlined the procedure in jury trial from the time the jurors are summoned, impanelled, examined, challenged and sworn in, up to the time they are given the Court's charge or instructions and convened to deliberate on the case and render their verdict. While there are various safeguards provided by the system against bias on the part of the jurors or undue influence exerted upon them by the parties, Mr. Roberts said that it has several loopholes.

Mr. Roberts pointed out some aspects in the practical application of the system of trial by jury which may result in miscarriages of justice. The procedure is such, he said, that a mere technicality may provide sufficient ground for a re-trial, thereby resulting in protracted litigations. To illustrate his point, he recounted some of his personal experiences. He recalled some cases in which re-trial was ordered due to the omission, though inadvertent, of some points in the Court's instructions to the jury. He also mentioned a case he handled wherein the whole jury was changed because the opposing counsel made some remarks in his statement to the jury which tended to anticipate questions on the weight and insufficiency of evidence.

Mr. Roberts has been in the active practice of law for the last nineteen years and is presently in the Philippines as Vice-President of the San Jose Oil Corporation which has recently been granted a concession by the Philippine government to explore 600,000 hectares of public lands for oil.

Mr. Roberts was introduced to the Francisco College faculty and students by Vice-Dean Proceso A. Sebastian of the College of Law. Mr. Sebastian was former Philippine Ambassador to Italy and later, to Indonesia.

The symposium, held under the auspices of the Francisco College Debating and Oratorical Club, was participated in by four speakers representing all the classes in the College of Law. Adjudged the best developed thesis was "Trial in Capital Offenses by a Collegiate Court" delivered by Abraham F. Briones, class '55. Mario Reyes, class '58, with his piece on "Trial by Jury" was declared the evening's best speaker. Ramon Belleza, class '57, was awarded first honorable mention for his thesis on "Trial by a Single Judge." The other speaker was Manuel M. Echanova, class '56, who proposed a system of "Trial by Single Judge with the Aid of Assessors," and to whom second honorable mention was awarded.

All faculty members of the College of Law composed the board of judges.

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## DIGEST OF DECISIONS OF THE COURT OF APPEALS

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tion or assault upon, resistance and disobedience to persons in authority; it being understood, however, that crimes against chastity shall in no case be deemed covered by amnesty. *People of the Philippines, plaintiff and appellee, vs. Eligio Camo, Crispulo Camo and Jose D. Camo, defendants, Jose D. Camo, defendants and appellant, No.* 9558-*R, February* 11, 1954, *Peña, J.*

CRIMINAL LAW; EVIDENCE; POSSESSION AND USE OF FALSIFIED DOCUMENT; PRESUMPTION.—When a person has in his possession a falsified document and makes use of the same, presumption arises that such person is the forger. *People vs. Avelino Z. Dala, defendant and appellant, No.* 10638-*R, February* 20, 1954, *De Leon, J.*

ID.; ID.; PHOTOSTATIC COPIES, ADMISSIBILITY. — The lower court did not err in admitting the photostatic copies of the checks in question as evidence. The production of the orginal checks is not indispensable when it is not disputed that the offended parties did not sign the checks issued in their respective names; when the accused identified his own signatures appearing in the photostats; and there is evidence that the checks in question were correct photostatic copies of the originals. *Ibid.*

CRIMINAL LAW AND PROCEDURE; SPEEDY TRIAL. — The right to a speedy trial is a relative one. A speedy trial is one conducted according to the law of criminal procedure and the rules and regulations which include, among others, the granting of postponements of trial which while viewed with abhorence and granted sparingly by the courts can no less be excluded from our procedural system of dispensing justice than the dust from the air we breathe. *People vs. Florencia Borinaga, defendant and appellant, No.* 9771-*R, February* 27, 1954, *De Leon, J.*

# Lawyer's *Directory*

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