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SOME OF THE SALIENT FEATURES OF THE PROPOSED CORRECTIONAL CODE

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CHAPTER I.

DEFINITIONS AND DISTINCTIONS.

In the perusal of the proposed Correctional Code, one's attention is at once attracted to the use of such terms as "correction" and "correctional" instead of the classical terms, "punishment" and "penal;" to "infraction" and "infractor" or "transgressor" in preference to the words "crime" and "criminal." All violations of the law are termed "infraction," no distinction being thus made between what we call "crime" and "misdemeanor." It behooves us therefore, at the outset of this brief study, to define and distinguish these different terminologies with a view to clarifying possible ambiguities, and to authors of this proposed Correctional Code, in so prefering the use of these terms to the classical terminologies of the present Penal Code.

The name, Correctional Code, itself, reveals the view of its codifiers, namely that punishment, instead of an act retribution for the civil commited, is a moral instrument, a means of regeneration for the individual, as well as protection to society.

It considers all delinquents as "more or less diseased persons, who have their reasoning power perturbed in a more or less degree, and when they commit felony, it is because, at that moment, they are victims of said abnormality in such a way that they do not know what they are doing in the precise moment of committing the felonious Act."(1) It considers a criminal "rather as a being worthy of commiseration and pity, and seeks therefore for his reform and correction, not his degradation or ignominy, through penalty and punishment which are usually asked by that entity known as the 'disturbed social order.'"(2)

"Correction" has thus a social end, reformation, directed to the future; while "punishment," the equation of guilt and suffering, the infliction of pain and loss upon a wrongdoer on

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(1) Villamor, Crime and Moral Education, pg. 263.
(2) Guevara Penal Code, Annotated, Preface, pg. viii.

the ground of the satisfaction of an abstract justice, is the necessary consequence of a past act.

Why have the authors of the proposed Correctional Code preferred the use of "infraction" and "infractor" or "transgressor" to the words "crime" and "criminal"? To answer this question, it would be necessary to indulge in a thorough discussion of what is a crime, and what is a criminal.

What is a crime? and what is a criminal? The Cyclopedia of Law (1) defines a crime as an act or omission which is prohibited by law, as injurious to the public, and punished by the state in a proceeding in its own name or in the name of the people or sovereign. Blackstone says, "A crime or misdemeanor is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors; which, properly speaking, are synonimous terms; though in common usage, the word 'crime' is made to denote such offenses as are of a deeper or more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of 'misdemeanor' only." (2) Dr. Wines defines crime as a wrongful action, a violation of the rights of other men, an injury done to individual or to society, against which there is a legal prohibition enforced by some appropriate legal penalty. (3) The one important fact to remember is that no act is a crime which the law does not so regard and punish. The view that "Nullum crimen sine lege" is the corner-stone of criminal law. Saint Paul, who was as learned in the law as he was assiduous in his missionary zeal, has graphically expressed this truth in saying to the Romans, "Without the law, sin is dead. For I was alive without the law once; but when the commandment came, sin revived, and I died." Crime, therefore, is, as Carrara said, a fact dependent upon the law, an infraction rather than an action. It is the product of the aggregate social condition and tendencies of a people at a given moment in its history. Actions which in one age are regarded as heroic, and which have elevated their authors to the rank of gods, in another bring the same bold spirit to the dungeon or the scaffold. A changing world has shown us how the most shocking crimes punished by the severest penalties have been taken from record and no longer bear the suspicion of wrong. As Dr. Wines says, "Religious differences, witchcraft and

(1) 12 Cyc., 129.
(2) 4 Bl. Comm., 5.
(3) Wines, Punishment and Reformation, pg. 11.

with new ideals, new movements and conditions. Not only are criminal statutes always dying by repeal or repeated violation, but every time a legislature meets, it changes penalties for existing crimes and makes criminal, certain acts that were not forbidden before. The largest portion of our criminal code deals with crimes against property; yet nearly all of this is of comparatively recent growth. A new emotion (such as the present communistic movements) may take possession of man which will result in the repeal of many if not all these statutes, and place some other consideration above property, which seems to be the controlling emotion of today."(1)

Crime, therefore, is not a character which attaches to an individual. It is not a simple phenomenon of ethical aberration from a standard type. It is rather a complex relation, a variable quantity, which the law creates between itself and the law-breaker.

It is perhaps because of these considerations, together with the moral stigma that attaches to the words, "crime" and "criminal," that the framers of the proposed Correctional Code, with an eye to the social rehabilitation of the wrongdoer, have abstained from their use, and have preferred the use of the terms "infraction" and "infractor" or "transgressor" to signify a violation of existing laws, and the law-breaker.

But, after all, what is there important or noteworthy in a name, aside from the association to the particular act or object which it represents? The moment that such deeds as were committed by Andres Fuentes, Pastor Cantada, Santiago Ronquillo, and their kind, begin to be called "infractions," and these wicked perpetrators, as mere "infractors" or "transgressors," just as soon will the public begin to regard with the same prejudice and contempt these newfangled words.

Then shall we realize the wisdom of reverting to the classical terminologies of "crime" and "criminal"; and the advantage of separating and distinguishing the more atrocious "crime" from the lesser fault of "misdemeanor."

CHAPTER II.

THE OBJECT OF PUNISHMENT

The proposed Correctional Code gives, as the object of punishment, the defense of society to be accomplished through (1) the correction of the transgressors, and (2) the reparation of the damage caused. It provides:

SEC. 3. *Rule of construction.*—The provisions of this Code shall be construed in such a manner as to ac-

1) Wines, Punishment and Reformation, pg. 13.

complish the ends of social defense by means of the correction of the transgressor and the reparation of the damage caused.

The question that arises is, how can that social defense be accomplished? The proposed Correctional Code provides two means, namely, the correction of the transgressor, and the reparation of the damage caused.

The correctionalist doctrine, as is being put forward by the proposed Correctional Code, is a radical departure from the time-honored view of punishment, as found in the present Penal Code. For, while in the present Penal Code, the theory of expiation is paramount, and punishment is appraised and described in terms of the crime committed without reference to future issues, in the proposed Correctional Code, the purpose of punishment is to be taken into account. Such purpose is not the infliction of punishment for what has been done, as if in satisfaction of a sentiment of individual or collective vengeance, but to bring about a certain result, namely, the reformation of the criminal. "What is dangerous in the criminal and makes him a menace to society is not the crime once committed, but the criminal himself—his personality, his temperament, leading to future crimes; the latent fundamental impulses which, when acted upon by circumstances, may break into murder, theft, or offenses against morality. How is society affected by the punishment of the crime or the failure to punish it? The evil done belongs to the past. Nothing remains but to repair the injury inflicted if this be possible. The great concern is to prevent crime in the future, and for this, the criminal instinct must be checked or suppressed."(1) The supreme function of criminal justice is, according to Wines, the protection of life, property and social order by the redemption of the offender, rather than by his destruction.

The question might be asked, what constitutes a reformation of a criminal? This may be answered in the words of Mr. Burt, chaplain of Pentonville Prison, who said, "The result aimed at by a penal code is attained when, by whatever motive, the criminal is induced to restrain his vicioius propensities within the limits which the law prescribes. It may be one effect of religious conversion; it may arise from a general amelioration of the moral character; or it may be the result of prudential consideration, of intimidation, or of forethought. It is not often, I apprehend, that actual reformation can exclusively be referred to any one of these causes. The several

(1) Saleilles, The Individualization of Punishment, pg. 117.

influences usually cooperate, and one passes insensibly into sorcery have probably more severe punishments than other acts; yet a change of habit and custom and belief has long since abolished all such crimes. So, too, crimes come and go another, though in different cases, different motives predominate." He adds, "In the reformed criminal, it would be unreasonable to expect impeccable piety or stoical fortitude; enough will have been effected to merit the title of reformation, when the once habitual offender exhibits an average standard of virtue under an average pressure of temptation."(1)

For the purpose of government, a criminal is reformed, who does not require to be rearrested, retried, and again incarcerated for some new violation of the criminal law. The agencies by which this result is attained are three, namely, labor, education and religion; and they correspond to the analysis of human nature as physical, intellectual and moral.(2)

So much for the theoretical side of the Correctionalist doctrine. The following questions, however, may be formulated:

What percentage of habitual criminal are susceptible to reformation?

By what means should this reformation be accomplished?

How far could this theory be applicable in the Philippine Islands at present?

As Baron Raffaele Garofalo pertinently remarked, "Indeed, it seems clear that education is an influence which, acts only upon infancy and early youth, an influence which like heredity and tradition, contributes to the formation of character. Once fixed, the characters, like the physiognomy, undergoes no further change during life. And, even in the period of early childhood, it is doubtful whether education can create a wanting moral instinct.

"Despite proposes for criminals a palliative and curative moral treatment, the leading features of which he summarizes as follows: All communications between persons, morally imperfect is to be prevented. Such persons, however, are not to be left in solitude, for their own conscience afford no means of reformation. It is to be arranged that they should be constantly in contact with moral persons, fitted to keep them under observation and to study their instincive nature, persons who

(1) Wines, Punishment and Reformation, pg. 202.
(2) Wines, Punishment and Reformation, pg. 202.

are capable of impressing this nature and giving to their thoughts the right direction by inspiring them with the ideas of order and imbuing them with the liking for work and the habit of working. It is then for the State to undertake this unremitting and assiduous care of the prisoners, to keep watch over them and their progress in the manner of a schoolmaster, and to endeavor by their examples, experiments and direct teaching, to mitigage their characters and render them affectionate, honest, charitable, and zealous.

"In the first place, the idea of applying such a moral therapy to many thousands of crminals is plainly Utopian. It would require that to every inmate there be assigned, so to speak, a guardian angel. Such an employment would demand persons endowed with the noblest and rarest qualities of manhood, patience, vigilance, and just severity. To an intimate knowledge of human nature, they would need to unite education and devotion. Where are we to find a sufficient number of these soul-physicians? And what of the expense of such an undertaking? But, assuming for a moment that the practical difficulties are not insurmountable, what would be its effect?

"The offender, separated from his former surroundings and removed from the continual temptations to which he was thus exposed, would undoubtedly no longer think of commiting crime, inasmuch as both the occasion and possibility would have become non-existent. But, in spite of all teachings, the criminal germ, in a latent stage, would continue to reside in his being, ready to make itself manifest with the return to his former environmental conditions. Therefore, even if the reformation were not feigned it could never be more than apparent."(1)

On the whole, the correctionalist doctrine is beautiful in theory but impracticable in its application. Especially is this true in the Philippines, particularly as regards to our provincial and municipal jails, for neither the provinces nor the municipalities have superabundance of funds to hire the services of expert criminologist to carry on the work of reforming the criminals.

Indeed, we may say with Ferri, that just as an imperfect code with good judges succeeds better than a monumental code with foolish judges, so a prison system, however ingenious and symmetrical, is worthless without a staff and needed finance to correspond.

(1) Garofalo, Crimonology, pg. 255.

CHAPTER III.

RECIDIVISM AND ITS EFFECTS.

A recidivist is variously defined as a habitual criminal; one who makes a trade of crime; an incorrigible criminal. Bouvier says that reformation in such cases is rare. Such criminal generally succumbs to tuberculosis or heart disease in prison or end in an assylum. Our Penal Code defines a recidivist as "one who, at the time of the rendition of the judgement against him for one crime, shall have been convicted by final judgement of another crime embraced in the same title of the penal code."(1)

The Penal Code however, in addition, recognizes two other aggravating circumstances which, for want of better terminology, we might term "quasi-recidivism." The first is when the offender has been previously punished for an offense to which the law attaches an equal or greater penalty, or for two or more crimes to which it attaches a lighter penalty.(2) This aggravating circumstance, however, shall be taken into-consideration only when the crime at which the offender is actually accused shows an increase of perversity, as compared to those for which he has been previously punished. In other words, if the offender, in committing the crime at the second instance, does not show that the same was committed with greater perversity then his previous punishment should not be taken into account to aggravate his liability.(3)

The second instance if quasi-recidivism is when a person, after having been convicted by final judgment, but before beginning to serve sentence, or while serving the same, commits another crime, in which case he shall be punished with the maximum degree of the penalty prescribed by law for the new felony or misdemeanor committed.(4)

Recidivism is also an aggravating circumstances in some offense punishable by an Act of the Philippine Legislature.(5) Thus, the fact that a defendant has been previously convicted of a violation of the old Opium Law (Act No. 1761) may be taken into consideration for the imposition of a penalty somewhat more severe in a subsequent prosecution under the provisions of the new Opium Law (Act No. 2381), although such former conviction can not be made a ground for imposition of the penalty of deportation provided for in the latter Act.(6)

(1) Art. 10. No. 18.
(2) Art. 10. No. 17.
(3) 1 Viada, 310.
(4) Art. 129, Penal Code.
(5) Albert, Law on Crimes, pg. 95.
(6) U. S. v. Aztigarraga, 36 Phil. 886.

If recidivism is duly proven, the penalty of deportation is discretionary upon the trial court.(1)

The proposed Correctional Code defines recidivism as follows:

> SEC. 19. In what *recidivism consists.*—A recidivist is he who commits an offense corrected:
>
> FIRST. By deprivation of life or *reclusion,* if he has previously served sentence for another offense corrected by deprivation of life, *reclusión or prisión,* or for three or more offenses corrected by *arresto.*
>
> SECOND. *By prision,* if he has previously served sentence for another offense corrected by deprivation of life or *reclusión;* or for two or more offenses all corrected by *prision;* more by *arresto;* or for four or more offenses corrected by *arresto;* or
>
> THIRD. By deprivation of life, *reclusion,* or *prision* in case of his being under sentence for another offense whatsoever.

It can thus be seen from the above provisions of the proposed Correctional Code, that the state of recidivism is confined to the commision of subsequent offenses, only when these offenses are punishable with either deprivation of life, *reclusion,* or *prision.* A man may therefore commit any number of offenses correctible by *arresto* without being considered a recidivist at all. And, as the status of recidivism is mostly encountered in the commission of minor infractions only, hence the adoption of this section of the proposed code, withut further ammendment so as to include infractions punishable with *arresto,* would leave a gap in our criminal law, as it would tend to encourage and perpetuate habituality in the commission of minor offenses.

We believe therefore, that the statute of recidivism should be applied to the commission of second and subsequent infractions, irrespective of their severity, whenever the offense of which the transgressor is actually accused shows a continuance or an increase of the offender's perversity as compared with those for which he has been previously punished. Thus alone could we justify the imposition of heavier penalties either on the theory of retribution, reformation, or social defense as the legitimate purpose of punishment.

The proposed Correctional Code would punish recidivism as follows:

(1) U. S. v. Ong Yee So, 31 Phil. 202.

SEC. 20. *Reduplication of the correctional liability recidivists.*—The corrections should be applied:

FIRST. For a term double that applicable according to the act and the circumstances, although the limit of the respective degree may thereby be exceeded, if the guilty of recidivism for the first time before the expiration of five years counted from the day on which he completed service of his last sentence;

SECOND. For a term three times that applicable if the accused commits an offense corrected by deprivation of life, *reclusion, or prision,* before the expiration of ten years after the completion of service of a sentence as recidivist; and

THIRD. For a term four times that applicable, if is guilty of an offense likewise corrected by deprivation of life, *reclusion,* or *prision,* within fifteen years from and after the expiration of the last increased sentence imposed upon him in his aforesaid character as second or subsequent recidivist.

The corrections by *prision* or *reclusion* shall in no case exceed sixty years.

We believe that these provisions, as a whole, are timely and ought to fill the breach in our present criminal law. That the provisions of the Penal Code which merely consider recidivism as an aggravating circumstance and provide for a slight increase in penalty irrespective of the number of times an offender has commited the same crime, do not satisfy present day conditions, is shown by the unanimous clamor of the bench and bar, police and prison authorities, and the public in general, for a more stringent recidivist legislation.

The adoption, therefore, of this provision of the proposed Correctional Code would supply the existing deficiency in our penal laws and could not but have a salutary effect on recidivism. We, may, however, repeat the remarks we have made above that in order to effectively control the activities of habitual criminals, some provisions must be made for the increased punishment of subsequent violations of the law in case of minor offenses corrected by *arresto.*

Lastly, we would like to quote with approval the pertinent words of Garofalo when he said, "Finally it is laid down by the jurists that legal recidivism exist only when the second offense occurs within a fixed period of time after conviction. For, as has been said, the fact of good behaviour for many years makes evident the efficacy of repression. We

have here one of the legal fictions which always have been the subject of deplorable abuse. It is supposed that the offense which have been brought to light and whose perpetrators have undergone trial and conviction, are the only offenses which have been committed whereas the fact is that they constitute but a slender part of the whole number. Take the case of a sharper who has already one conviction to his score and yet cannot be legally declared a recidivist, because of the lapse of five years since its date. Who can tell us how many crimes of fraud are actually to be laid to the charge of this man?

"Suppose however, we lend credence to this fiction. Suppose that the offender's behaviour has in fact been good for five or ten years. If, then, after such an interval, the same individual relapses into crime of the same description, does not this fact furnish strong indication of firmly rooted criminal institute which, it may be, are rarely manifested, and yet await but a favorable occasion to come to light? The evil tendency suddenly reappears when all might think that it has disappeared forever. Must we then render thanks to the offender from refraining from crime during these years? Must we, by way of recompense for this boon, ignore the existence of the element of criminality found in the previous life of the offender, notwithstanding the powerful aid which it affords in determining the repressive measures which his case most requires?" (1)

(1) Garofalo, Crimonology, pg. 326.

A CRITICAL STUDY OF THE LAW ON PERCENTAGE TAX ON MERCHANT'S SALES
(Continued)

CHAPTER III.
Persons and Transactions Subject to the Merchants' Sales Tax

SEC. 26. *General Statement.*—Having stated the law, discussed its nature, established its constitutionality and relation to other laws, we shall now proceed to determine the persons and transactions subject to the merchants' sales tax.

SEC. 27. *Who are the persons subject to the merchants' sales tax?*—According to section 1459 of the Administrative Code, they are: (a) *Merchants,* (b) *Manufacturers,* and (c) *Commission merchants.*

SEC. 28. *Terms "merchants," " manufacturers," and "commission merchants," defined.*—A "merchant," as used in the Internal Revenue Law, is a person engaged in the sale, barter, or exchange of personal property of whatever character. A merchant in order to be subject to internal revenue tax must be "engaged in the sale, barter, or exchange of personal property." To be "engaged," a person must be occupied or employed in the sale, barter, or exchange of personal property. A person is not necessarily occupied or employed, as those words are used, in the sale, barter, or exchange of personal property, when he has made one purchase and sale only. (Sec. 1459 of Act No. 2711; Whitaker vs. Rafferty, 38 Phil., 508.)

The term "merchant" includes manufacturers who sell articles of their own production. (Sec. 1459, Act 2711.) A manufacturer has been defined in the Internal Revenue Law of 1904 as every person who by physical or chemical process alters the exterior texture or form or inner substance of any raw material or manufactured or partially manufactured product in such a manner as to prepare it for a special use or uses to which it could not have been put in its original condition, or who by any such process alters the quality of any such raw material or manufactured or partially manufactured product so as to reduce it to marketable shape or prepare it for any of the uses of industry, or who by any such process combines any such raw material or manufactured or partially manufactured products with other materials or product of the same or of different kinds and in such manner that the finished product of such process of manufacture can be put to a special use or uses to which such raw material or products in their original condition could not have been put, and who in addition alters such raw materials or

products, or combines the same to produce such finished products for the purpose of their sale or distribution to others and not for his own use or consumption. * * * (Sec. 141, Act 1189.)

A "commission merchant" is a person who has an establishment of his own for the keeping and disposal of goods, and engages in the sale, barter, or exchange of personal property of whatever character for a commission. (Sec. 1459 of Act No. 2711; B. I. R. Circular Letter No. 527.)

SEC. 29. *Commission merchants and commercial brokers, distinguished.*—The term "commission merchant" is not defined in the Internal Revenue Law, but it is provided in section 1459 of the Administrative Code that the term "merchant" shall include commission merchants having establishments of their own for the keeping and disposal of goods of which sales or exchanges are effected, but does not include merchandise brokers. Briefly stated, then, a commission merchant under the Internal Revenue Law is one who has an establishment of his own for the keeping and disposal of goods and engages in the sale, barter or exchange of personal property of whatever character for a commission; and the term "commercial broker" includes all persons other than *commission merchants* and *salaried employees*, whose business it is to bring about sales or purchases of merchandise for other persons, or to bring proposed buyers and sellers together, or to negotiate freights or other business for the owners of vessels, or for the shippers or consignors or consignees of freight carried by vessels, for a compensation. (Sec. 1465 of Act No. 2711 as amended by Act 2835.) It is the nature of the duties assumed or the manner the transactions are made and not the appellation by which an agent may style himself that determines into which class the agency falls.

The term *"commission merchant"* is synonymous with that of *"factor."* The former is more commonly used in the language of commerce; the latter, in the language of the law. *Commission merchant* is defined by Bouvier, "as one who receives goods, chattels, or merchandise for sale, exchange or other disposition and who is to receive a compensation for his services to be paid by the owner or derived from the sale of the goods." "Factor," is defined by the same author, "as an agent employed to sell goods or merchandise consigned or delivered to him, by or for his principal, for a compensation called factorage or commission."

The features which mainly distinguish a factor from a broker are that the former is entrusted with the possession,

disposal, and control of the property, and may sell it in his own name, binding the principal, and the latter does not usually have possession, disposal, and control, and should sell in the name of his principal.

Commercial brokers and commission merchants, or factors are in many respects governed by the principles of the law of agency, but the position of one is essentially different from that of the other. The function of a broker is the negotiation of contracts in behalf of others, and the duties of his position require him to deal merely with the contracting parties rather than with the property to which the contract relates; a factor, however, does not merely negotiate the contract of purchase and sale, but is entrusted with the possession of the property and is in duty bound to carry the contract through to performance in behalf of his principal. This necessitates his dealing not only with the vendor and the purchaser, but also with the subject matter of the contract. To enable him to discharge the duties of his position, he is given either the actual or constructive possession of his principal's goods, and he frequently has a special property in the goods and a general lien thereon as security for moneys advanced by him. But as the performance of a broker's duties does not necessitate it, he is not usually entrusted with the possession of the property relative to which he negotiates.

The difference between these two classes of agents is as marked as that between the functions they are designed to discharge, a broker being a mere intermediary between his principal and the other contracting party for the purpose of effecting a contract, whereas a factor not only effects the contract, but has possession and certain control of his principal's goods and carries the contract to completion in behalf of his principal. (Decision of Court of First Instance of Manila, Civil Case No. 12925; Circular Letter No. 527, B. I. R.)

A commission merchant is further distinguished from a merchandise broker by the fact that the former either has possession of the goods sold or bought and is responsible for their quality, or collects the selling price of such goods or pays their purchase price if he is acting for the purchaser, or both; while the latter acts only as a go-between to bring purchaser and seller together and handles neither goods nor money. (Precedent r, Fourth Supplement to the Internal Revenue Manual, p. 20.) The fact that a commission merchant discloses the name of his principal in disposing of the goods does not alter his status from that of a commission merchant to that of a commercial

broker, for the reason that the former possesses authority to contract either in his own name without disclosing that of his principal, or in the name of the latter. (4 Ruling Case Law, 244; Tiffany on Agency, pp. 222-224.)

SEC. 30. *Transactions subject to the merchant's sales tax.*— The transactions which, under the Internal Revenue Law, are subject to the merchants' sales tax are: (a) *Sale,* (b) *Exchange or barter,* and (c) *Consignment abroad or exports.*

SEC. 31. *Terms defined.*—A *sale* is a contract whereby, for a consideration, one transfers to another, property or interest therein. (Yick Sung vs. Herman, 83 Pac. 1089-90.) A sale is a contract by which property is transferred from the seller to the buyer for a fixed price in money paid or agreed to be paid by the buyer. (De Bary vs. Dunne, 172 Fed. 940.) A *sale* may also be defined as a contract founded on a money consideration by which the absolute or general property in the subject of the sale is transferred from the seller to the buyer. (Koehler vs. St. Mary's Brewering Co., 139 Am. St. Rep. 1024). Finally, a sale has been defined as a transmutation of property from one man to another in consideration of some price. (Dunn vs. Mayo Mills, 134 Fed. 804, 810) (4 Words and Phrases Judicially Defined, 436-437).

By the contract of purchase and sale one of the contracting parties binds himself to deliver a specified thing, and the other to pay a certain price therefor in money or in something representing the same. (Art. 1445, Civil Code.)

"Barter" or "exchange" is a transaction where one commodity is exchanged for another of the same or different kind, without agreement as to price or reference to money payment. (State vs. Brown, 102 S. W. 394-5) (1 Words and Phrases, 406). An exchange is a contract by which the parties mutually give, or agree to give, one thing for another; neither thing, or both things, being money only. (Steere and Ballah vs. Gingery, 110 N. W. 774) (2 Words and Phrases, 370).

Barter is a control by which each of the contracting parties binds himself to give one thing in order to receive another. (Art. 1538, Civil Code.)

The term "exports" includes "goods and merchandise sent from one country to another." (2 M. & G. 155) (Bouvier's Law Dictionary, Vol. 1, p. 1161.)

"Exportation" is defined to be the act of carrying or sending merchandise abroad." (Thompson vs. U. S., 142 U. S. 471; 2 Words and Phrases Judicially defined, 404.)

SEC. 32. *When certain merchants' transactions should be declared for taxation.*—When a merchant delivers goods to another merchant for sale, the former retaining the title to such goods, will he be required to enter in his record of sales the money value of the goods at the time of delivery or at the time when he ascertains that the goods have been really sold?

Section 1459 of Act No. 2711 provides as follows:

> *"Percentage on merchants' sales.*—All merchants * * * shall pay a tax of one per centum on the gross value in money of the commodities, goods, wares and merchandise sold, bartered, exchanged or consigned abroad by them, such tax to be based on the actual selling price or value of the things in question at the time they are disposed of or consigned * * *."

It is seen, therefore, that the existence of an actual sale, barter, exchange, or consignment of goods is an essential element for the legal imposition of the percentage tax. A mere delivery of goods by one merchant to another does not constitute sale unless it involves a transfer of ownership in the thing delivered to the buyer for a fixed price paid or agreed to be paid by him at a later time, nor does non-delivery of the goods indicate the non-existence of sale when the title to such goods for a consideration has been transferred to the buyer. It follows from these considerations that the money value of goods delivered under the circumstances cited above must not be entered in the record of sales or declared for taxation until such time as title to the goods actually passes from their owners to the purchasers. In other words, the percentage tax should be paid only when an actual sale is made, whether absolutely or conditionally. (B. I. R. General Circular No. 34.)

SEC. 33. *That the act of purchase or sale must not be a mere incident to the conduct or exercise of another business already taxed.*—In the case of Behn Meyer & Co., vs. Nolting, 14 Off. Gaz., 2222, the Supreme Court of these Islands says:

> "* * * but the business was to purchase and sell agricultural products, and that the taking of said mortgages was a mere incident to their principal business. It could hardly be held that a man who is engaged in the hardware and plumbing business, for example, who took a mortgage upon a residence in which he had placed extensive plumbing and sanitary apparatus, in order to secure the price of his labor and material, was engaged as a real estate broker."

Again the Code of Commerce defines "merchants" to be "those who having legal capacity to trade, customarily devote themselves thereto." (Art. 1.)

In line with the foregoing principles, it has been held that banks are exempt from the payment of the merchants' tax on the sale of goods which come into their possession by virtue or as a result of banking transactions, inasmuch as they pay special taxes as banks under the Internal Revenue Law. However, if such sales are effected for the banks by a subsidiary corporation different and distinct from those operating said banks, the corresponding tax should be paid by such subsidiary corporation, the kind of tax depending upon the manner in which it effects its sales. If the company takes the goods in its possession and sells them for a commission, it will have to pay the merchants' tax. Otherwise the company will be subject to tax as commercial broker. Sales of goods acquired by banks not in pursuance or as a result of ordinary banking operations are subject to the merchants' tax. The same rules may also be invoked with respect to insurance companies. (B. I. R. Ruling No. 12, 22 Off. Gaz. 46.)

SEC. 34. *Sales for future delivery.*—Sales to customers should be declared for taxation at the time the sale is perfected which would be when the specific goods, wares, or merchandise are thereafter appropriated to the contract. In the absence of a more specific agreement on the subject, this appropriation takes place when the goods as ordered are delivered to the public carriers at the place from which the goods are to be shipped, consigned to the person by whom the order is given, at which time and place, therefore, the sale is perfected. (Administrative Order No. 3, B. I. R., p. 27.)

SEC. 35. *Tax liability of fishermen.*—Owners of fish nets who habitually engage in catching fish and selling them are considered merchants under the Internal Revenue Law. Where, however, they sell their catch at retail in public markets or where the value of the fish caught and sold does not exceed ₱200 a quarter, they are exempt from the merchants' tax by virtue of sections 1457 and 1459 of Act 2711. If the value of the fish caught by each fisherman exceeds ₱200 a quarter and they are sold outside the public markets they should each pay an annual tax of ₱2.00 and the merchants' sales tax upon their gross sales.

SEC. 36. *Sale of artesian or other drinking water.*—The business of selling artesian or other potable water is taxable under the provisions of sections 1457 and 1549 of the Adminis-

trative Code, if the value of sales made exceeds ₱200 a quarter. This conclusion is reached upon considering that the appropriation of artesian water makes the latter one's personal property, the selling of which makes one a merchant as defined in section 1459 of Act No. 2711.

SEC. 37. *Tax liability of auctioneers.*—An auctioneer who sells for a commission automobiles, commodities, goods, wares, merchandise and other personal property in an establishment of his own is subject to the merchants' sales tax on his sales as a commission merchant. When, however, the sale at public auction of the goods, wares and merchandise is made in the establishment of the owner thereof who is himself a merchant, the latter becomes subject to the sales tax; on the contrary case, then the auctioneer, as the person through whose intervention the sale is effected becomes liable to the commercial brokers' tax of ₱80.00 per annum or ₱20.00 a quarter and 4% of his gross compensation in excess of ₱500 a quarter, in accordance with sections 1464 and 1466 of Act No. 2711 as amended.

SEC. 38. *Tax liability of agriculturists furnishing merchandise to their laborers in lieu of wages; of industrial establishments selling goods, and foodstuffs to their employees at cost.*— Where a proprietor of an "hacienda" or any business establishment maintains a store where provisions and general necessities to the workmen or employees are sold at cost, said proprietor or owner of the business establishment is considered as a merchant liable to the payment of the merchants' fixed and percentage taxes. As has already been stated, the test of tax liability does not lie in the profits made or losses sustained but in the fact that one engages in a taxable business. To be exempt from taxation the claimant must show that he falls within the exception allowed by law.

Where it is stipulated, by the contract of employment, that the laborer shall receive a certain sum of money per day, week, or month, and his food, or food and clothing, or food for himself and family, or where said contract provides that he shall receive for his services, with or without a certain sum of money, a certain fixed amount of merchandise of any sort *in kind* irrespective of the market price or money value of such merchandise at the time same is furnished, the employer should not be required to pay the merchants' tax on the value of the merchandise so furnished. But whenever the merchandise furnished to the laborer by his employer for cash or on credit is charged against the former by the latter at its money value, such transaction should

subject the employer to the payment of the merchants' tax. (Internal Revenue Manual, p. 262.)

SEC. 39. *Sale of food products at wholesale subject to tax; sales at wholesale and at retail distinguished.*—Persons engaged in the sale of food products in public market places *at wholesale* are subject to tax for the reason that the exemption provided for in the law exists only in favor of those persons who sell food products in the market *at retail* and other small merchants whose gross quartely sales do not exceed two hundred pesos.

In this connection it is to be borne in mind that a sale of goods and merchandise or food products is wholesale for the purpose of the Internal Revenue Law when it is made in large quantities and to persons who buy to sell the same articles again, while a sale is retail when it is made in small quantities and to consumers directly. (B. I. R. General Circular No. 79.)

It is submitted that persons selling food products in public market places at retail cease to belong to the exempt class once they begin selling at wholesale. The fact that the wholesale transactions of the merchant are made outside, while the retail sales are made within the public market, does not, in our opinion, change his status as one subject to pay the percentage tax on all his sales effected both within and outside the public markets.

SEC. 40. *Tax liability of hemp planters who buy and sell the strippers' share of the product.*—A propriator of a hemp plantation who sells the hemp bought by him from his strippers and constituting the latter's share of their labor is subject to the payment of the merchants' percentage tax. Of course, the trippers or laborers are exempt from the tax upon the selling price of their share. The exemption provided for in section 1460 of the Administrative Code in favor of a land owner where agricultural products are grown cannot very well be invoked in this case for the reason that the sale contemplated in said section refers to the sale originally made by the producer or owner of the land himself. The share given to strippers by the proprietor constitutes the compensation of the former for services rendered and as such belonged to them. Now, the sale of such share to the proprietor transfers ownership of the hemp to the proprietor again so that upon the proprietor's subsequently selling the hemp bought by him, a mercantile transaction is had between such proprietor and the vendee, a transaction that for all legal purposes is the same as that effected by any ordinary merchant and the vendee. Under this circumstance, to allow exemption

in favor of the proprietor or owner of the land where the hemp is grown simply because he is such owner of the land, would be absolutely unfair both to the Government and to the merchants in general who pay the tax.

SEC. 41. *Are the sales of timber and other forest products removed from the public domain by virtue of license issued by the Bureau of Forestry subject to the merchants' tax?*—The sale of timber or lumber obtained by a forest licensee or a lumber company holding a concession or license from the Bureau of Forestry is subject to the merchants' sales tax. Lumber or timber is not considered an agricultural product. The forest charges imposed in the Internal Revenue Law on forest products removed from the public forests or forests reserves are not taxes but the price which the licensee pays the Government for timber belonging to it. The transaction may be considered one of purchase and sale and not of taxation. When taxes are collected the Government gives the taxpayer a receipt, but not tangible property. When forestry charges are paid, the Government passes to the licensee title to personal property, namely, timber or lumber. Hence, forestry charges do not affect the merchants' tax. (B. I. R. Adm. Order No. 37.)

SEC. 42. *Sale of timber or firewood removed from private woodlands.*—Persons selling timber or firewood removed from their privately-owned woodlands are subject to the merchants' tax and any possible defense of double taxation cannot be properly invoked in this case for the reason that the real estate tax which these persons pay on their property is entirely distinct and separate from the tax imposed on business. Neither can the owners of these private woodlands be considered agriculturists so as thus to be exempt from the said tax under section 1460 of the Administrative Code, as amended by Act No. 3293.

SEC. 43. *Sale of earth, sand and gravel.*—Persons engaged in the sale of earth, sand, rock and gravel removed from the channels or banks of rivers, or the seashore or from their private lands and premises are subject to the merchants' tax if the gross value of their sales exceed ₱200 a quarter.

SEC. 44. *Should the merchants' tax be paid on the value of rice, palay, and corn seized from merchants by the Government by virtue of Act No. 2868 in connection with Executive Order No. 67 1919?*

We submit the answer to this question in the affirmative.

The seizure which form the subject-matter of this inquiry has been made under and by virtue of Executive Order No. 67, authorizing the Secretary of Commerce and Communications, or his agents, to requisition or seize any and all quantities of palay, rice, and corn held by any and all wholesale and retail dealers, producers, millers, etc. The said Executive Order was promulgated on September 19, 1919, by the Governor-General, with the consent of the Council of State pursuant to the authority granted in section 1 of Act 2868, particularly subsection (b) thereof, as follows:

> "The Governor-General is hereby authorized * * * to issue and promulgate, with the consent of the Council of State, temporarily rules and emergency measures * * * to establish and maintain a government control of the distribution or sale of the commodities referred to (palay, rice, and corn) or have such distribution or sale made by the government itself."

Nowhere in the executive orders which have been promulgated then on the rice crisis do we find any reference, direct or indirect, to the collection of the taxes on the sales of the commodities referred to. Section 7, however, of Act 2868, provides in part as follows:

> "At any time that the Governor-General, with the consent of the Council of State, shall consider that the public interest requires the application of the provisions of this Act, he shall so declare by proclamation, and *any provisions of other laws inconsistent herewith* shall from then on be *temporarily suspended.*"

The question which presents itself, therefore, is whether the tax on merchants' sales imposed by section 1459 of the Administrative Code has not been temporarily suspended by the promulgation of Executive Order No. 67 by reason of its inconsistency with the latter.

A close study of Act 2868 and the executive orders promulgated thereunder leading to the final seizure of the rice, palay, and corn in the possession of merchants, has failed to disclose any inconsistency or repugnancy between the imposition of the merchants' percentage tax and the arbitrary seizure of the said commodities. Act 2868 itself, far from prohibiting persons or merchants from engaging in the purchase and sale of rice, specifically recognizes their existence. The only thing, that it has done, and the executive orders promulgated thereunder have done, is to fix the prices at which the said articles may be sold, with a view to rendering impossible unjust profiteering.

(To be concluded)