PHILIPPINE LAW JOURNAL

Published monthly, July to March inclusive, during the academic year, by the College of Law, University of the Philippines.

Subscription ₱8.00 per year. Single number 60 centavos

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NOTES *and* COMMENT

Piecemeal Legislation

The bill before the legislature amending Article 1387 of the Civil Code so as to do away with the husband's consent to any alienation, incumbrance or mortgage of the wife's paraphernal property should be carefully studied by the law-makers before it is finally approved.* The question involved is not whether a married woman is sufficiently intelligent to dispose of her paraphernal property. Every one must admit that the Filipino woman is mentally capable of appraising the consequences of her contracts.

Neither is there any question about the equality of rights between husband and wife for there can be no such equality so long as we have the conjugal partnership system. The proposed law is in my opinion objectionable on the following grounds:

First. That it is a piecemeal legislation which causes confusion in the present regime of conjugal partnership in Philippine law.

Second. That it is likely to cause prejudice to third persons dealing with the husband as administrator of the conjugal partnership.

In regard to the first point, every lawyer knows that the conjugal partnership is administered by the husband. Such partnership is made up of the fruits and profits of the separate property of each spouse and of the earnings of the husband and wife. The purpose of the conjugal partnership is to create a mass of property with which to meet the obligations

* The bill referred to was passed by the Philippine Legislature and approved by the Governor-General on September 12, 1932—Ed.

of the family. The fruits and rents of the wife's paraphernal property are a part of the conjugal partnership. So long as the husband under our laws is the administrator of the conjugal partnership it is essential that his consent should be obtained when the wife sells or mortgages her paraphernal property. As the great Spanish jurist, Manresa, says, the act of the wife of disposing of her paraphernal property "is of far-reaching significance which involves the fruits and affects the conjugal partnership." Or as the Supreme Court of Spain has held (resolution of January 24, 1898) the husband's consent is necessary in order to "avoid losses and damages which might be caused to the conjugal partnership."

Therefore, unless the legislature is ready to abolish the conjugal partnership system in the Philippines, the bill in question should not be passed.

The second objection can be inferred from the above observations. It is very clear that third persons dealing with the conjugal partnership through the husband have a right to demand that the husband as the administrator of the partnership shall have a voice in regard to the disposal of the paraphernal property whose rents and fruits constitute a part of the partnership. Otherwise, such third persons would have no assurance as to the financial responsibility of the partnership. Furthermore, creditors of the conjugal partnership might be defrauded through a conspiracy between husband and wife, the latter alienating her paraphernal property and the husband pretending ignorance or objection, in which case the creditor of the partnership would be utterly helpless.

Under the present law a married woman has an adequate remedy in case the husband refuses without valid reason to give consent to the wife's alienation of her paraphernal property. According to Manresa, in such case the courts will authorize the wife to dispose of her paraphernal property (see Manresa's comment on Art. 1387, Civil Code). This being so, the wife is fully protected under the present system.

In conclusion, if the law-makers believe that the time has come for a radical reform of the property relations between husband and wife in the Philippines, it should study the present system as a whole. In this way the entire question of whether the conjugal partnership regime is best suited to our present social conditions could be discussed, and we could then consider whether the time has come to provide for a complete separation of property between husband and wife, as in the

United States and England. But to make a change that confuses the conjugal partnership and causes prejudice to third persons, is not only contrary to public policy but is inimical to a sound development of Philippine jurisprudence.

JORGE BOCOBO

Is Sec. 928 of the Philippine Revised Administrative Code Constitutional?

The Organic Act of the Philippine Islands, Act of Congress of August 29, 1916, Sec. 3, in part provides:

> "That no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed; and no religious test shall be required for the exercise of civil or political rights. No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefits, or support of any sect, church, denomination, sectarian institution, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary as such."

The Revised Administrative Code of 1917, Sec. 928, proing for religious instruction by local priest or minister, reads:

> "It shall be lawful, however, for the priest or minister of any church established in the town where a public school is situated, either in person or by a designated teacher of religion, to teach religion for one-half hour three times a week, in the school building, to those public school pupils whose parents or guardians desire it and express their desire therefor in writing filed with the principal teacher of the school, to be forwarded to the division superintendent, who shall fix the hours and rooms for such teaching. But no public school teachers shall either conduct religious exercises or teach religion or act as a designated religious teacher in the school building under the foregoing authority, and no pupil shall be required by any public school teacher to attend and receive the religious instruction herein permitted. Should the opportunity thus given to teach religion be used by the priest, minister or religious teacher for the purpose of arousing disloyalty to the United States, or of discouraging the attendance of pupils at such public school, or creating a disturbance of public order, or of interfering with the discipline of the school, the division superintendent, sub-

ject to the approval of the Director of Education, may, after due investigation and hearing, forbid such offending priest, minister, or religious teacher from entering the public school building thereafter."

The question involved is whether this statutory provision authorizing the teaching of religion in any public school by the local priest or minister under certain conditions violates any of the constitutional inhibitions respecting religion as set forth in the Organic Act, Sec. 3, first quoted above.

The constitutional prohibitions referred to are couched in language so plain, so precise, and so emphatic that there can be no doubt as to their purpose and meaning. Like similar provisions found in the federal and state constitutions in the United States, their aim obviously is to preserve, perpetuate, protect, and defend religious liberty and equality. To insure this ends, the constitutional provision above quoted not only declares as unlawful any statute respecting an establishment of religion or restraining the free exercise thereof, but goes further and in clear terms prohibits the *appropriation, application, donation, or use, directly or indirectly, of public money or property, for the use, benefit or support of any sect, church, denomination, sectarian institution, or system of religion, or for the use, benefit or support of any priest, preacher, minister, or other religious teacher or dignitary.* The statutory provision contained in Sec. 928, Revised Administrative Code, permitting the priest or minister of any church established in the town where a public school is situated to teach religion three times a week "in the school building" to those public school pupils whose parents or guardians have made written requests therefor, necessarily involves the use of public property for the use or benefit of the priest, minister or religious teacher and of the particular sect, church or denomination which he represents. It also involves the indirect application or appropriation of public money for sectarian purposes inasmuch as public school buildings are constructed, repaired, and maintained with funds raised by taxation. For these reasons, the statutory provision in question manifestly comes within the prohibition of the Philippine Organic Act and, hence, is unconstitutional and void.

This conclusion, it is believed, finds support in a number of decisions by courts in the United States upon the question of appropriation or use of public money or public schoolhouses for sectarian purposes.

In Spencer v. School District, 15 Kan. 259, 22 Am. Rep. 268, it was held that the use of a public schoolhouse for even one religious or political gathering is illegal. The court said:

> "* * * The public schoolhouse cannot be used for any private purposes. The argument is a short one. Taxation is invoked to raise funds to erect the building; but taxation is illegitimate to provide for any private purpose. Taxation will not lie to raise funds to build a place for religious society, a political society, or a social club. What cannot be done directly cannot be done indirectly. * * * Nor is it an answer to say that its use for school purposes is not interfered with, and that the use for the other purposes works little, perhaps not immediately perceptible, injury to the building, and results in the receipt of immediate pecuniary benefit. The extent of the injury or benefit is something into which courts will not inquire. The character of the use is the only legitimate question."

In Bender v. Strealich, 17 Pa. Co. Ct. 609, aff'd in 182 Pa. 251, 37 Atl. 853, it was held that the prohibition by the State Constitution of the appropriation of money raised for the support of public schools to sectarian schools, includes the use of the public school buildings erected by such money for any sectarian purpose, such as the holding of Sunday School and church therein, outside of school hours, by permission of the school directors.

In People ex rel. Ring v. Board of Education, 245 Ill. 334, 92 N. E. 251, 29 L. R. A. (N. S.) 442, the Illinois court, among other things, said:

> "* * * The public school is supported by the taxes which each citizen, regardless of his religion or his lack of it, is compelled to pay. The school, like the government is simply a civil institution. It is secular, and not religious in its purposes. * * *
>
> "The constitution and the law do not interfere with such religious teaching, but they do banish theological polemics from the schools. * * * This is done, not from any hostility to religion, but because it is no part of the duty of the state to teach religion—to take the money of all, and apply it to teaching the children of all the religion of a part only."

In Dakota Synod v. State, 2 S. D. 366, 50 N. W. 632, 14 L. R. A. 418, it was held that the prohibition in the South Dakota Constitution against the appropriation of any money or other property "to aid" any sectarian school applies to all appropriations to such schools whether made as donation or in payment of services rendered the state by such school.

J. R. BALONKITA

Digest of
RECENT DECISIONS
of the Philippine Supreme Court

[In this column is presented a digest of current cases of general interest to practitioners. These decisions have not yet been published in the Official Gazette, and many of them, especially those rendered *in division*, will not so appear because not selected for official report.]

P. P. I. vs. Sabas Baleroso, Tomas Punzalan et al. Tomas Punzalan, G. R. No. 36645, August 3, 1932.

Facts: The defendants were charged with the crime of theft of large cattle. During the trial, the lower court admitted as evidence, over the objection of the appellant, the confessions which his co-defendants made incriminating him. The witnesses presented by the prosecution made conflicting testimonies. The defendant on the other hand alleged alibi and this fact was corroborated by his witnesses. *Held*: The admission as evidence of confession of co-defendants incriminating another co-defendant over the objection of the latter is a plain error and highly prejudicial against the interest of said co-defendant. Confessions of this nature should affect only and solely the persons making them and not third persons. Where evidence of that nature is admitted and as a consequence thereof the person incriminated is convicted, the Supreme Court is justified in setting aside the legal presumption that the proceedings in the court below was regular and in examining the record *de novo* to determine whether the appellant has been proven to be guilty beyong reasonable doubt. The theory of the prosecution that the defendant could very well slip away from the meeting at the beginning or during the meeting and arrive just at the time the measure was approved wherein the signatures of those present appeared including that of the defendant, is far fetched and unbelievable. Reasonable doubt exists as to the guilt of the accused and he was acquitted. (In division. Per Butte, J., Malcolm, Villamor, Ostrand, and Abad Santos, JJ., concurring.) *Briefed by* B. GOZON.

Narcisa Parungao et al. vs. Guillerma Lopez et al., G. R. No. 36151, August 31, 1932.—This is an action for the recovery of the possession of a piece of land alleged to be unlawfully possessed by the defendants. The evidence produced by the parties was conflicting, the plaintiffs maintaining prior possession while the defendants maintaining a likewise prior possession over the same land. The plaintiffs tried to prove their right of possession by the additional facts that they had a contract of lease with one of the defendants but which fact was denied by the supposed lessor, and that both the plaintiffs and defendants had their lands in the vicinity surveyed for purposes of registration and the plan of the defendants excluded the parcel in question but this fact was not clear nor were the registration proceedings began by them. Both the Justice of the Peace and Judge of the Court of First Instance entered judgment in favor of the defendants.

Held: In cases involving the right to possession of property, where oral testimony is conflicting, and the case comes to the Supreme Court after having been tried before a Justice of the Peace and Judge of the First Instance, the Supreme Court is bound to concede considerable weight to their concurrent find-

ings. In view of the fact that it was not clear that the possessory action was brought within one year after the defendant had acquired possession, the right to institute a revindicatory action is reserved in case the plaintiffs choose to file one.

(In division. Per Street, J., Villa-Real, Hull, Vickers and Imperial, JJ., Concurring.) *Briefed by* B. GOZON.

Heirs of Damaso Velez et al. vs. Municipality of Daet and Provincial Government of Camarines Norte. G. R. No. 36411, August 8, 1932.—The municipal government of Daet opened a road passing through a piece of land belonging to the plaintiffs. The administrator of the land entered into an agreement with the municipal authorities whereby the strip of land in question was donated to the municipality upon payment of ₱55 for the fruit-trees destroyed. Later the same road was converted into a provincial road by virtue of an Executive Order of the Governor General. The complaint was later amended making the provincial government a party-defendant. The lower court rendered judgment against the provincial government for ₱100. *Held*: Where a municipal road was subsequently converted into a provincial road by virtue of an Executive Order of the Governor General, said order has only the force and effect of changing the technical status of the same and making the provincial government liable for its future upkeep. It cannot be said that said order will be given a retroactive effect as to make the provincial government liable in lieu of the municipality which was the entity solely responsible for the acts of appropriation. A person should not be held liable for the acts of another unless he voluntarily assumes the responsibilities therefor or in any way connected with the acts producing the responsibility. Judgment reversed. (In division. Per Street, J., Villa-Real, Hull, Vickers, and Imperial, J.J., concurring.) *Briefed by* B. GOZON.

P. P. I. vs. Pedro Garcia, G. R. No. 35895. August 8, 1932.—The defendant was charged with the crime of *abusos deshonestos*. It was proved that one afternoon, the defendant, a rejected lover of the offended party, entered the *tienda* of the latter and conversed with her, after which she called the accused "manibalang", meaning "tonto". Enraged by this remark, he embraced the woman, kissed her and fondled her breast. Loosing from his embrace, she fell on the ground whereupon the accused kissed her again. *Held*: The fact that a man embraced a woman, caught her breast, and at the same time kissed her against her will, and in the presence of witnesses, presents the characteristics of the crime of abuses against chastity, punished under article 439 of the Penal Code. (Decisions of the Supreme Court of Spain of October 7, 1890 and July 7, 1892; U. S. vs. Basilio, 9 Phil. 16; People vs. Teodoro, G. R. No. 27765, cited.) (In division. Per Hull, J., Street, Villa-Real, Vickers, and Imperial, JJ., conurring.) *Briefed by* B. GOZON.

LIFE INSURANCE POLICY—LIABILITY THEREON FOR ACTS OF AN AGENT.—*West Coast Life Insurance Company vs. Julio Valmonte, G. R. No. 35767, Aug. 9, 1932.*—Action to recover the amount of a promissory note for ₱1,426.40 with interest, as the first annual payment of the defendant on the life insurance policy for ₱20,000 issued in his favor. Defendant admits having signed the note, but contends

that he agreed to take a policy for only ₱5,000 on the condition that he would receive credit for the premium he had paid on a policy in 1911 which was allowed to lapse; that he signed the application for the insurance and the promissory note in blank; and that he was led to believe by the plaintiff's agent Concepcion that the application would not be binding but that it would serve merely as an inducement for other persons who might be interested in insuring their lives. Evidence shows that a contract of life insurance was made between the defendant and the plaintiff thru the latter's agent Concepcion.

Held: No rule is better settled, or founded upon stronger reasons, than that which affirms the liability of one intrusting his name in blank to another, to the full extent to which such other may see fit to bind him, when the paper is taken in good faith and without notice, actual or implied, that the authority given had been exceeded, or the confidence reposed had been abused. It has the effect of a general letter of credit; and the rule is founded, not only upon that principle of general jurisprudence which casts the loss, when one of two equally innocent persons must suffer, upon him who has put it in the power of another to do the injury, but also upon that rule of the law of agency, which makes the principal liable for the acts of his agent, notwithstanding his private instructions have been disregarded, when he has held the agent out as possessing a more enlarged authority. (Fullerton v. Sturgess, 4 Oh. St. 529-534.) If a party signs a blank paper on which a note is to be drawn, and intrusts it to another, he thereby confers an implied authority upon the latter to fill it up at his discretion, not only with the amount, date, and time of payment, but with the names of any additional obligors, or other parties. And the party signing the blank instrument will be bound upon it, when completed, in the hands of the holder, whatever may have been his agreement with the person so trusted, and to whatever extent the latter may have violated the agreement, or have exceeded his implied authority, provided the holder had not notice either of the agreement or of its breach. (Jones v. Shelbyville, F., etc., Inc. Co., I Metc. (Ey. 58, 62; 8 C. J. 191, Note 20.) There is no suggestion of any collusion between Concepcion and the plaintiff, even if it were true that the defendant was deceived by Concepcion, and the defendant has been insured for ₱20,000 for a year. The defendant having signed the application for insurance and the promisory note, it was his duty to return the temporary policy at once, if the amount stated therein was not correct, and notify the plaintiff of his agreement with the agent. The defendant could not retain the temporary policy and notify the plaintiff three months later of the alleged fraud, without making himself liable for the legal effects of the document signed by him. (Vide Hill v. Veloso, 31 Phil. 160; Acuña v. Veloso, et al., 50 Phil. 241.) (First Division, Per Ostrand, J.; Concurring Malcolm, Villamor, Santos, Butte, JJ.) *Briefed by* DOMINADOR P. PADILLA.

SHERIFF'S SALE — LIABILITY THEREON—*Ambrosio A. Calleja vs. Mariano A. Locsin et al, G. R. No. 36121, Aug. 30, 1932.* Action against the sheriff and deputy sheriff of Albay, to obtain a declaration to the effect that the plaintiff was the best bidder at a certain sheriff's sale wherein Matias' property was exposed to sale

for the purpose of realizing the amount of a judgment which had been recovered against Matias in behalf of Echaverria, and to require the defendants to issue tne corresponding certificate of sale. Lower court for defendants. Hence this appeal.

Plaintiff rendered professional services to Echaverria, whereby the latter obtained a judgment from Matias. About the same time, the creditor of Echaverria, was taking steps to levy on Echaverria's property; so, to protect his interest and claim against his client, the plaintiff appeared as bidder in an execution sale of the property of Matias to satisfy the judgment in favor of Echaverria. Plaintiff tendered as payment a receipted bill against Echaverria, which was rejected by the sheriffs, defendants herein. *Held*: There is nothing that justifies a sheriff in receiving anything but money upon a sheriff's sale made pursuant to the judgment of a court, the sole exception being where the judgment creditor is himself the bidder. In this case, the plaintiff who had been attorney of the judgment creditor, put in his bid, in his own right, and the sheriff would not have been justified in accepting anything in payment but money. It is true that the plaintiff had a lien for his services which lien might have been made effective on the judgment, but the proper steps were not taken to that end. The claim of the plaintiff that he had a right to pay his bid by making out a receipt in favor of his own debtor for the amount bid is untenable. (Per Street, J.; Division of Five—Villa-Real, Hull, Vickers, and Imperial, JJ. concurring.) *Briefed by* DOMINADOR P. PADILLA.

WILLS AND ADMINISTRATION—LIABILITY OF PROPERTY OF MINORS FOR THE OBLIGATIONS OF THEIR GUARDIAN.—*The Director of Lands, Applicant, v. Faustino Abadezco, Andrada and Lira, G. R. 36417, Aug. 19, 1932.*—In a cadastral proceedings by the Director of Lands, Lot No. 190, having an area of 96,560 sq. meters, was claimed by Lira on the one hand, and by the Andrada minors on the other. Lower court adjudicated lot to Lira; hence this appeal, assigning among other things the following errors, viz, that the court erred in finding that Villagracia sent the money which she borrowed from Lira to Pablo Andrada in the United States; that the court erred in finding that the heir Pablo Andrada assumed the debts of said Villagracia; and that the lower court erred in adjudicating the lot to Lira. The land in question originally belonged to the parents of claimants Andrada and coheirs, but which was partitioned judicially and placed under the administration of Villagracia, the heirs being minors then. Without judicial authorization, Villagracia contracted a debt from Lira, for the satisfaction of which the land here in question was claimed by the creditor Lira. An execution was issued, and the land was delivered by sheriff to Lira. The ground of the claim of Lira was that the minors ratified and assumed the debts of their mother Villagracia, and further that at the time of the termination of Villagracia's guardianship, there was an amount of ₱2,336.74 in favor of the guardian.

Held: There being no judicial authority for the acts of the guardian in contracting the debt from Lira, and there being no evidence of the assumption of said debt by the Andradas, the minors could not be held liable, and the judgment rendered against Villagracia could not be legally satisfied

out of the property of the minors. The mere fact that the minors were indebted to their guardian did not, of course, make the guardian the owner of the property of the minors.

JUDGMENT REVERSED

(Per Vickers, J.; second Division, with Street, Villa-Real, Hull and Imperial, JJ., concurring.)

Briefed by DOMINADOR P. PADILLA.

MORTGAGE OF UNREGISTERED HOUSE BUILT ON LAND REGISTERED UNDER TORRENS SYSTEM—EFFECT AGAINST THIRD PERSON.—*Maria Araneta de Segovia vs. Hilaria Quimcong, R. G. 35386, July 23, 1932.*—A lot was registered under the Torrens system in the name of Juliana Abatay without improvements and free of all encumbrances. Lorenzo Gison built a house on said lot subsequent to the issuance of the certificate of title of the lot. The house was not registered in the registry of property nor annotated on the certificate of title as an encumbrance on the land. Juliana Abatay and Nazario Gizon, and Lorenzo Gison and Ines Juison jointly by an instrument obligated themselves to Maria Araneta, Juliana Abatay and Nazario Gison constituting a mortgage over the lot, and Lorenzo Gison and Ines Juison constituting a mortgage over the house, to secure the payment of money lent to them by Maria Araneta. The instrument of mortgage was registered in the registry of titles and annotated on the back of the original certificate of title of the lot. Later the house was sold at public auction to satisfy the judgment in a suit brought by Bachrach Motor Co. against Lorenzo Gison, Hilaria Quimcong finally acquiring the rights and interests on the house. Maria Araneta obtained judgment in a foreclosure suit she instituted against Juliana Abatay, Nazario Gison, Lorenzo Gison and Ines Juison. Question—Whether the mortgage constituted on land registered under the Torrens system in the name of one person and of a house in the name of another person constructed on the land subsequent to the registration of the land, the house not being registered in the registry of property nor annotated on the back of the certificate of title of land as an encumbrance thereon, is valid as regards the house against the claim of a third person. *Held:*—(1) The mortgage constituted over a house of one person, built on land registered under the Torrens system in the name of another after the issuance of a certificate of title to the land, on which the rights of the owner of the house has not been registered does not affect the rights of third persons even if the instrument of mortgage of both the house and lot has been registered and annotated on the back of the certificate of title of the lot; (2) That the creditor, by virtue of a judgment attaching the property mortgage but which mortgage does not affect third persons for want of proper registration, has preferential right over the property and in purchasing the property from public sale acquires all the rights and interests of the judgment debtor over said property. (In Division of Five. Per Villa-Real, J., Street, Hull, Vickers, Imperial, JJ., Concurring). *Briefed by* HECTOR BISNAR..

RIGHT OF PARTY PREJUDICED TO INTERPOSE AN APPEAL IN CRIMINAL CASE.—*P. P. I. plaintiff and appellee; Isidoro and Teodorica Ruiz offended parties and appellants vs. Vicenta Guido and Honorata Agvierre defendants and appellees. R. G. No. 37320, August 15, 1932.* The

appeal in this proceeding, as an incident to a criminal case, is taken against the ruling of the court ordering the return to the owner of jewelry stolen without providing indemnity to the owners of pawnshops where the jewels were pawned. Sec. 44 of General Orders No. 58 as amended by Sec. 4, Act No. 2886 provides: Either party may appeal from a final judgment or from an order made after judgment affecting the substantial rights of the appellant. The people of the Philippine Islands may also appeal from a judgment for the defendant rendered on a demurrer to an information or complaint, and from an order dismissing a complaint or information. Question—Whether the appellants have a right to interpose an appeal from the ruling of the court. *Held*—The word "party" as used in the law should be understood to refer not only to the Government or the accused but also to other persons who may be prejudiced by the judgment or order in a criminal case. The appellants, being prejudiced by the ruling of the court, have a right to interpose an appeal. It is immaterial that the appellants have another remedy by a civil action. If the law grants the appellants two remedies, they should not be required to take that which they have not chosen in the absence of a prohibition against the selection. (In Banc. Per Villamor, J., Street, Malcolm, Ostrand, Butte, Santos, Imperial, JJ., Concurring; Hull, Villa-Real, JJ., Concur in the result; Vickers, J., did not take part; Avanceña, C. J., dissents in a separate opinion.) *Briefed by* HECTOR BISNAR.

GUARDIAN AND MINORS—NECESSITY OF DESCRIPTION OF LAND IN WRIT OF EXECUTION.—*The Director of Lands vs. Faustino Abadezco et al, G. R. No. 36417, August 19, 1932.*—In the judicial settlement of the estate of Jose Andrada, certain lands were adjudicated to his minor heirs, appellants herein, of which lands their mother was appointed guardian. The mother contracted debts without judicial authorization, and in the action brought by the creditors for the recovery of the debts, judgment was rendered for the plaintiff and a writ of execution was issued thereon upon the lands of the minor heirs. *Held*: The minors are not liable for the debts contracted by their mother, and the judgment rendered against her cannot be satisfied out of their property. The fact that the minors were indebted to their guardian did not make the guardian the owner of the property of the minors. With respect to the writ of execution, it should be observed that there is no description of the land in said decision or anything to justify the order of execution in the form in which it was issued; and furthermore when the execution was issued on April 17, 1929, more than five years had elapsed since the judgment was entered, and no execution could be lawfully issued thereon. (In division, per Vickers, J.; Street, Villa-Real, Hull, and Imperial, JJ., concurring.) *Briefed by* Q. MAKALINTAL.

CERTIORARI, COURTS, CONTEMPT; LEGAL ETHICS.—*Guillermo Lualhati, Petitioner, vs. Hon. Mariano A. Albert, as Judge of the Court of First Instance of Manila, Respondent, No. 37430, August 22, 1932.*—Where a motion seeking the disqualification of the Judge who originally tried the case to preside at a new trial, on a ground not provided for by law is submitted to the Judge, a motion for the same purpose having previously been denied by the appellate Court which

granted the new trial, and having been previousy denied by the same trial Judge, and where the third motion is construed by the trial Judge as misbehaviour intended to make the public believe that he is not capable of administering justice to the accused, it is held that the trial Judge did not act without or in excess of jurisdiction and did not abuse his discretion when he found the attorney who had presented the motion in contempt of court, and that accordingly certiorari will not be granted. The attorney owes entire devotion to the client, but at the same time the duty of the attorney to the court is no less sacred and can only be maintained by rendering no service involving any disrespect to the judicial office which he is bound to uphold. Per Malcolm, J,; Avanceña, Street, Ostrand, Villa-Real, Hull, Vickers, Imperial, JJ. concurring; Butte and Villamor, JJ., dissenting.—*Briefed by* Q. MAKALINTAL.

MITIGATING CIRCUMSTANCE OF PLEA OF GUILTY UNDER THE REVISED PENAL CODE CONSIDERED IN HABEAS CORPUS PROCEEDING.—*Manuel Rodriguez, petitioner vs. The Director of Prisons, respondent, R. G. No. 37914, August 29, 1932.* Habeas Corpus. The petitioner previously pleaded guilty to the charge of estafa in the Court of First Instance. The court in the absence of aggravating or mitigating circumstances imposed as penalty the minimum period which is one year, eight months and twenty-one days of the medium degree of presidio correccional in its minimum and medium grades. The penalty provided for the offense charged under the old Penal Code which is presidio correccional in its minimum and medium grades ranges from six months and one day to four years and two months. The penalty prescribed for the same offense under the Revised Penal Code is more favorable to the accused being arresto mayor in its maximum grade to prison correccional in its minimum grade which ranges from four months and one day to two years and four months. The plea of guilty is established for the first time as a mitigating circumstance in Art. 13, number 7, of the Revised Penal Code. The petitioner alleges that he is illegally detained having served more than the penalty he has to comply under the Revised Penal Code. Question—Whether the mitigating circumstance of plea of guilty established for the first time by the Revised Penal Code can be considered in a habeas corpus proceeding. *Held*—When a judgment of conviction is based on a plea of guilty such plea of guilty will be taken into account in a habeas corpus proceeding so as to give effect to Art. 22 of the Revised Penal Code which provides that "Penal laws shall have a retroactive effect in so far as they favor the person guilty of a felony, who is not a habitual criminal as this term is defined in rule 5 of Art. 62 of this Code, altho at the time of the publication of such laws a final sentence has been pronounced and the convict is serving the same." The accused not being a habitual criminal and there being no aggravating circumstance to counterbalance the mitigating circumstance of plea of guilty, the minimum penalty under the new Penal Code is to be imposed which is four months and one day of arresto mayor. The petitioner having served already seven months and twenty-nine days of imprisonment, is illegally detained and should therefore be liberated. (In Division of Seven or More Per Villa-Real, J., Avanceña, C. J. Villamor, Santos, Imperial, Butte

JJ., Concurring. Malcolm, J. dissents in a separate opinion with whom Street, Ostrand, Hull, Vickers, JJ., concur.). *Briefed by* HECTOR BISNAR.

PROMISSORY NOTE—SUFFICIENT CONSIDERATION.—*B. A. Sison vs. Jose Alindogan et al., G. R. No. 36442, Aug. 4, 1932.*—The defendant placed his promissory note in the hands of Bass to be negotiated. Bass misappropriated the whole proceeds. The purchaser of the note brought an action to recover on the note, but that action was dropped when plaintiff advanced the money and took another note from the defendant. Action by plaintiff on the note. The defense was lack of consideration. *Held*: The dismissal of the action on the first note and the value advanced by the plaintiff to accomplish that step supplied the detriment to the plaintiff which constitutes the consideration for this contract. It is not necessary that person obliging himself by contract should get any benefit from the making of the agreement. It is enough that the promisee suffers a detriment. (In Division; Per Street, J.; Villa-Real, Hull, Vickers, and Imperial, JJ., Concur.) *Abridged by* P. M. KATIGBAK.

FICTITIOUS CONVEYANCES—FIDUCIARY RELATIONSHIP.—*Benigna Peneyra et al., Plaintiff and appellants, vs. Jose Tongson et al., Defendants and Appellee. G. R. No. 35699, Aug. 20, 1932. Facts*: Action by administratrix to annul instruments conveying lands to defendants. Plaintiff's intestate executed the instruments while he was consumptive and living with the defendant, his older brother. The facts proved showed a relation of confidence between them. The defendant alleged that he purchased the land as evidenced by a recital in the instruments. Actual payment was not proved. *Held*: "The general doctrine is that a fiduciary relation exists in every case in which there is confidence reposed on one side and resulting superiority and influence on the other. The relation and duties involved in it need not be legal; they may be moral, social, domestic, or merely personal. And when the existence of such relation between the parties to a transaction is proved, a presumption of influence arises which imposes upon the one receiving the benefit, the burden of proving an absence of undue influence by showing that the other party acted upon the competent and independent advice of another or such facts as will satisfy the court that the dealing was at arm's length, or that the transaction was had in the most perfect good faith on his part and was equitable and just." Judged by this criterion the defendant has not met the requirements of the law. Instruments annulled. (In Division Per Street, J., Villa-Real, Hull, Vickers, Imperial, JJ., concur.) *Abridged by* P. M. KATIGBAK.

ATTORNEYS—CONTEMPT OF COURT. —*Apolonia Francisco v. El Alcalde Provincial de Capiz, G. R. No. 37127, Aug. 16, 1932.*—Habeas Corpus. Petitioner was committed to jail by the Court of First Instance of Capiz on two grounds: (1) In connection with a civil case before that court, petitioner presented an insulting motion and on her refusal to amend it, was committed for contempt. Subsequently she applied to the Supreme Court for habeas corpus but the petition was denied. Petitioner then presented a motion before the Court of First Instance of Capiz withdrawing her first motion and asking for her release. The Judge denied the motion and

ordered her appearance in court. In open court petitioner reiterated her desire to withdraw her first motion and amend it if the Judge should indicate the parts that required amendment. Considering her conduct as still contumacious, the Judge recommitted petitioner to jail. (2) In a registration case before the same court, petitioner entered her appearance as counsel for the applicant. On the day set for trial, petitioner failed to appear but her client came to court accompanied by another lawyer. The hearing of the case was postponed for two successive days, the petitioner each time failing to appear. The Court then fined petitioner ₱30 with imprisonment in case of insolvency. *Held*: (1). Petitioner's first motion was clearly lacking in respect. However, her subsequent motion withdrawing the first was a sufficient compliance with the court's order demanding its amendment. (2) The mere failure of petitioner to appear in the registration case on the day set for hearing does not constitute direct contempt as contemplated by Sec. 231, C. C. P.

APPELLATE PRACTICE—WHEN MAY IMPORTANT EVIDENCE BE PRESENTED FOR THE FIRST TIME IN SUPREME COURT.—*Ciriaco Parco v. Juan Espine, G. R. No. 35669, Aug. 12, 1932.*—Revindicatory action. It is admitted by the plaintiff that the admission of Exhibit "2" would be decisive of the case. This exhibit was not produced in the trial court, although the attorney for the appellee (defendant) requested leave to produce it later. On appeal, the Supreme Court, over plaintiff's objection, required the defendant to incorporate said exhibit in the record. *Held*: "We are of the opinion that this court was justified in calling for the exhibit, not only because the true determination of the cause depended thereon but because there was oral proof in the record as to the nature of said exhibit against which proof no exception had been taken." Judgment Affirmed but without costs against the appellant. (In Division of Five, per Street, J.; Villa-Real, Hull, Vickers and Imperial, JJ., concurring.) *Briefed by* F. C.

CRIMINAL PROCEDURE—WHO MAY APPEAL IN CRIMINAL CASES.—*P. I. v. Vicenta Guido, G. R. No. 37320, Aug. 15, 1932.*—Motion to dismiss an appeal taken by two pawnbrokers to whom certain jewelry stolen by the accused were pawned. The trial court convicted the defendants of theft and ordered the jewels to be returned to the owner, without making any findings as to the indemnity to which appellants claim to be entitled. *Held*: The words "Either party" used in Sec. 44, G. O. No. 58, wherein are named the persons who may appeal from a judgment in criminal cases, refer not only to the accused and the government but also to the other persons who may be affected by the judgment, such as bondsmen. Whether the appeal is meritorious is not decided here but only that the appellants, since they are persons who might be prejudiced in their substantial rights by the judgment, have the right to intervene and appeal therefrom. Motion denied. (In banc, per Villamor, J.; Street, Malcolm, Ostrand, Butte, Abad Santos, and Imperial, JJ., concur; Villa-Real and Hull, JJ., concur in the result.) *Briefed by* F. C.

PUBLIC SERVICE COMMISSION—FINDINGS OF FACTS NOT NECESSARY IN DECISION.—*Visayan Rapid Transit Co., Petitioner and Appellant vs. Viajante-Interino Co., Respondent and Appellee. G. R. No. 36262, Aug-*

ust 22, 1932.—The appellant assigns as error the failure of the Commission to recite in the decision the facts upon which its conclusion is based. *Held*: While it is customary to speak of the orders of the commissions, both as decisions and as orders, it is to be noted that in the basic act, creating the commissions. the word, *decision*, apparently does not appear, but the act uses consistently, the word, *order*. Furthermore, Section 23 of Act 3108 provides: "All hearings and investigations before the Commission shall be governed by rules adopted by the Commission, and in the conduct thereof the Commission shall not be bound by the technical rules of legal evidence." Hence statement of facts is unnecessary in a decision of the Commission. (Per Hull, J.; In Division of Five, Street, Villa-Real, Vickers, Imperial, JJ., concur.) *Briefed by* J. P. DE LEON.

CRIMINAL LAW—ADULTERY—EFFECT OF PARDON BY OFFENDED HUSBAND AFTER PROSECUTION.—*P. P. I., Plaintiff and Appellee vs. Consolacion Infante et al., Defendants, Consolacion Infante, Defendant and Appellant. G. R. No. 36270, August 31, 1932.*—Pending appeal in the Supreme Court, the appellant (wife) moved for the dismissal of the case on the ground that the offended husband had executed an affidavit pardoning his guilty spouse of her infidelity without extending it to the paramour. *Held*: This attempted pardon cannot prosper for the provision of Art. 344 of the Revised Penal Code means that the pardon afforded the offenders must come before the institution of the criminal prosecution and further, that both the offenders must be pardoned by the offended party. To elucidate further, Article 435 of the old Penal Code granting the husband the right to remit the penalty imposed upon his wife and her paramour has been repealed by Act 1773, section 2. The Revised Penal Code thereafter expressly repealed the Old Penal Code, and in so doing did not have the effect of reviving any of its provisions which were not in force. But with the incorporation of the second paragraph of Art. 344, the pardon given by the offended party again constitutes a bar to the prosecution of adultery. (First Division of Five, Per Malcolm, J.; Villamor, Ostrand, Santos, and Butte, JJ., concur.) *Briefed by* J. P. DE LEON.

EXECUTION SALE—OF WHAT PRICE SHOULD CONSIST.—*Ambrosio Calleja vs. Mariano Locsin et al., G. R. No. 36121, August 30, 1932.*—Action to compel defendant sheriffs to issue to plaintiff a certificate of sale. Plaintiff was declared the highest bidder in an execution sale and in payment for the property he offered a receipted bill against the judgment creditor evidencing his indebtedness to plaintiff herein. Sheriff refused to accept the payment and set aside the sale. *Held*: A sheriff cannot receive anything but money upon a sheriff's sale made pursuant to the judgment of the court, the sole exception being where the judgment creditor is himself the bidder. Affirmed. (In division of five. Per Street, J; Villa-Real, Hull, Vickers, Imperial, JJ, concur.) *Briefed by* E. FERNANDEZ, JR.

HABEAS CORPUS—CUSTODY OF ADULTEROUS CHILDREN.—*Consorcia Ortiz vs. Gonzalo del Villar, R. G. No. 37785, August 1, 1932.*—Petition for the custody of three minor children had by the respondent, a married man, with petitioner's sister, single, and now deceased. Quare: To whom the legal custody of these adulterous children be-

long? *Held*: The respondent, although an adulterous father, due to his legal obligations in favor of these minors, as that of support and defraying expenses of their education to some degree, has a better title to their custody than the petitioner. Writ denied. (In division. Per Avanceña, C. J.; Street, Malcolm, Villamor, Ostrand, Villa-Real, JJ, concur) *Briefed by* E. FERNANDEZ, JR.

PUBLIC SERVICE LAW—MANDAMUS.—*Rural Transit Co., Ltd., Petitioner, vs. The Honorable Anastacio T. Teodoro, Associate Commissioner, Public Service Commission, and Santos-Relucio Soriano, now Leon M. Santos, Respondents. G. R. No.37336. July 27, 1932. Facts:* Petitioner filed complaints before the Public service Commission to cancel respondent's Certificate of Convenience. The complaints were dismissed by the respondent judge and allowed the other respondents to operate a part of their lines. Hence this mandamus. *Held*: Mandamus does not lie because the matter is within the discretion of the Public Service Commission. The proper remedy is a petition for review under Act. No. 2108. (In Banc. Per Butte, J., Avanceña, C. J., Street, Malcolm, Villamor, Ostrand, Villa-Real, Santos, Hull, Vickers, and Imperial, JJ., concur.) *Abridged by* P. M. KATIGBAK.

SALE OF INTEREST IN ESTATE—REFERENCE TO RECORD NUMBER.—*Socorro Declaro vs. Alejandro Liwaja et al, G. R. No. 35592. July 25, 1932.* Plaintiff bought from the purchaser in the execution sale defendant's interest in his father's estate, which was under administration. At the end of the administration defendant sold his interest to interveners. Interveners contest the validity of the execution sale because the land was described only by reference to the number of the expediente of the administration proceedings and because such interest can not be sold while the estate of which it is a part is under administration, being then *in custodia legis*. *Held*: A description of an heir's interest by reference to the *expediente* (record) number of the proceedings is sufficient for the validity of the execution sale. Such interest can be taken on execution subject to the ultimate outcome of the administration. (In Division, Per Street, J., Villa-Real, Hull, Vickers, Imperial, JJ., concur.) *Abridged by* P. M. KATIGBAK.

CHINESE EXCLUSION LAW—DETERMINATION OF MERCHANTS.—*Yu-Quiansay and TayKuy vs. Insular Collector of Customs, G. R. No. 35981. July 27, 1932.*—Petitioner, once a laborer, applied to the Insular Collector for a merchant's return certificate, but went to China before action thereon was taken. His application was denied because his sales tax was below the amount fixed by customs regulations to entitle him to be called a merchant. On his return he was refused admission not having either a laborer's or a merchant's return certificate. *Held*: Petitioner cannot be admitted as laborer without a laborer's return certificate, but he may establish his status as a merchant and can be admitted as such even without having obtained a merchant's return certificate. The Insular Collector abused his discretion in fixing a minimum amount of sales tax to be paid by a Chinaman before he can be called a merchant, such a condition not being required by the act of Congress. (In Division, Per Villa-Real, J., Street, Hull. Vickers, Imperial, J.J., concur.) *Abridged by* P. M. KATIGBAK.