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APPELLATE REVIEW ON DISSENT OF ASSESSORS

(*Is Section 161 of the Code of Civil Procedure [Re Dissent of Assessors] Still in Force?*)

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I. HISTORICAL BACKGROUND

An assessor, in Civil Law, is defined as "a person who sat with the judge or magistrate for the purpose of assisting him with advice." (Kinney, Law Dictionary)

As early as the epoch of the Roman Empire, assessors were recognized as a necessity for the proper administration of Roman justice. Assessors were so called from the Latin word "ad-sidere," which signifies to be seated with the judge. They were lawyers appointed to assist with their advice the Roman magistrate who were generally ignorant of the law, being mere military men.

Escriche (Derecho Civil) speaks of a Spanish *asesor* as "el letrado que asiste el juez lego para darle consejo en lo perteneciente la administración de justicia." There were two classes of Spanish *asesores*, viz: the *asesor necesario*, named by the King; and the *asesor voluntario*, named by the judge. The judge who has an *asesor* named by the King, "debe seguir su parecer en los providencias y sentencias que diere, sin que pueda valerse de otro distinto, bien que el asesor es el responsable de los resultados, pero si en algun caso creyese el juez tener razones para no conformarse en el dictamen del asesor puede suspender el acuerdo ó sentencia y consultar a la superioridad a la expediente. El juez que nombra su asesor, tampoco es responsable de los autos que diere sino solo el asesor, a no probarse que en el nombramiento ó acuerdo hubo colusión ó fraude."

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1. IN THE PHILIPPINES

A. *Spanish Period*

By a royal cedula dated August 9, 1585, the Audiencia of Manila was abolished. To carry out the orders contained in the royal cedula, Licentiate Herver del Coral was sent from Mexico to Manila where he arrived in May, 1590. The audiencia of three magistrates and a fiscal was replaced by a Governor who was both Captain-General and sole judge. He was assisted in the latter capacity by a *teniente and asesór*, a lawyer who advised him in legal affairs and prepared his legal decisions for him. Pedro de Rojas was made the first *teniente* and assessor to the Governor. (The Audiencia in the Spanish Colonies, pp. 72-73, Cunningham) Later, Governors, Captains-General, and Viceroyes were assisted by *asesores* and legal advisers who gave their opinion on all matters of law that came up for solution. The necessity for this office developed through the fact that as most governors were soldiers, they were incapable of rendering judgments on legal questions and administrative proceedings. (A shade of the idea of Roman assessors based on the same necessity.) As counselor to the Governor this official bore the same relation to the executive as the fiscal bore to the audiencia; for all decisions rendered by the Governor in matters of justice and governmental affairs the Governor and the assessor were jointly responsible. Frequently the assessor was able to block completely the work of the audiencia and his opinion nullified the judgments of the magistrates who were as learned in the law, as well qualified, if not better than he. (Id. pp. 209 footnote) However, the Governor enforces his own opinion on his assessor, who has often obtained his position through favoritism and is not a lawyer, and decides questions according to the will of the Governor. This was the later trend of the nature of the office and later it was totally abolished.

B. *American Regime*

The advent of the American era revived the office of assessor which was provided for in Act number 190 otherwise known as the Code of Civil Procedure. Commissioner Ide, in charge and chairman of the committee which prepared the said act, thought it wise to include the office of assessors in the provisions of the code, for justice of the peace as well as in Courts of First Instance. The office was intended to be a substitute for the jury system and through it a specie of jury trial was provided

for in criminal as well as in civil cases, in the absence and difficulty of extending to the Islands that much vaunted Anglo-Saxon safeguard of trial by his peers. (*Berbari vs. Concepcion*, 40 Phil. 320.) Assessors were provided for as a matter of right. Different acts were passed by the Philippine Commission and the Philippine Legislature providing for assessors in courts of justice in the different portions of the archipelago. The present laws on assessors are embodied in the following acts:

1. Sections 57 to 62 of Act 190 providing for the calling of assessors in justice of the peace courts;
2. Sections 153 to 161 of Act 190 providing for the calling of assessors in Courts of First Instance;
3. Section 44a of Act 267 and section 2477 of Act 2711 providing for the calling of assessors in the City of Manila;
4. Section 2 of Act 2369 providing for the calling of assessors in criminal case;

Act number 2520 providing for the calling of assessors for Mindanao and Sulu.

A uniform method of appointing assessors is made possible by reference to the basic sections in the Code of Civil Procedure.

II. GENERAL STATEMENT OF THE QUESTION

Assessors as provided for are not lawyers but laymen. They may be appointed upon petition. Either or both parties may exercise the right to have assessors appointed. Request for their appointment must be made at the earliest convenient time to avoid delay, but the provisions concerning the right are mandatory. (*Berbari vs. Concepción*, 40 Phil. 320.)

Assessors for inferior courts (justice of the peace and municipal courts) advise the justice in the determination of all questions of law or fact involved in the case, but the final responsibility for the decision shall rest with the justice. In courts of general jurisdiction, however, their duties are to sit with the judge upon the trial of an action and to advise him in the determination of all questions of fact only involved therein; but the final responsibility for the decision shall rest with the judge.

In both cases the judge is made ultimately liable for the decision unlike the Spanish judge who could shift the responsibility to his assessor the Spanish colonial Governor who is made jointly responsible with the assessor, in governmental affairs.

Assessors in inferior courts may dissent from the decision of the justice and the appellate court shall give to the dissent such

weight as in his opinion, it is entitled to. The appellate court shall always have the right to try questions of fact and law coming from the justice or municipal courts irrespective of any dissent of assessors because the trial upon appeal from decision rendered by inferior courts are always trial *de novo*.

Assessors in courts of general jurisdiction (Courts of First Instance) although with less powers, have greater opportunities to assert their personalities. Section 161 of the Code of Civil Procedure grants any two of the assessors the right to dissent and have their dissent considered if properly filed, by the Supreme Court. "In case such dissent is filed, the Supreme Court, on appeal may review the facts upon the evidence adduced in the Court of First Instance, and shall give to the dissent aforesaid such weight as in the opinion of the judges of the Supreme Court it is entitled to; and upon such review shall render such judgment as they find just." (Sec. 161, C. C. P.) In another section of the said Code of Civil Procedure (sec. 497) in connection with section 146 of the same code, it is expressly provided that the "Supreme Court shall not review the evidence taken in the court below, nor retry the questions of fact except as in this section hereinafter provided." And the section as amended provides "that the Supreme Court shall not review the evidence taken in the court below except, first, when a motion for a new trial is submitted to the Supreme Court on the ground of newly discovered evidence, or, second, where a motion is submitted to the Court of First Instance for a new trial on the ground that the evidence was insufficient to justify the decision." (Roque *vs.* Navarro, 9 Phil. 421.)

The present question is concerned with the enforceability of section 161 mentioned above in connection with section 497 of the same Code of Civil Procedure, as amended; or is section 161 of the Code of Civil Procedure (re dissent of assessors) repealed by section 497 of the same code?

III. DISCUSSION

In the historical treatment of the subject under consideration, no attempt was made to limit the scope and effect of the sections of the Code of Civil Procedure primarily mentioned as the basic factors in the proper solution of the question. Limitation

is therefore in order. In doing so, however, we could do no better and with greater accuracy than to cite the words of the Supreme Court:

“In the exercise of its appellate jurisdiction, this court considers three classes of cases, namely appeals in criminal cases, appeals in special proceedings, and bills of exceptions.

In a proceeding for a public offense it considers upon an appeal all the evidence adduced in the court below, besides both questions of law and fact and forms its opinion as to the guilt or innocence of the accused. The practice has not changed in this respect from that which existed during the Spanish domination. In criminal cases of this character, it is necessary that all the evidence be returned to this court. (In criminal cases tried and decided by the Courts of First Instance with the aid of assessors, the Supreme Court passing upon them on appeal, has the power to review all the evidence in the case whether the assessors agreed or not with the judgment of the court below. U. S. *vs. Trinidad*, 7 Phil. 327)

“In special proceedings this court has also by the provision of the Code of Civil Procedure now in force, has the power to pass upon all questions of fact and law. (Act 498, Secs. 779, 781, and 782, C. C. P.)

But in ordinary civil actions the power of this court on appeals has been limited and its practice radically changed. It has become for such cases only a court for the correction of errors of law, and no longer except in the three cases (before the section 497 was amended by Act No. 1596) mentioned in section 497, has the power to pass upon questions of fact raised by the testimony. The article says: The Supreme Court shall not review the evidence taken in the court below, nor retry the questions of fact.”

“Outside of the three cases (now two) excepted as mentioned in article 497, our power in cases like this, is limited to a consideration of error of law committed by the court below.”

(*Thunga Chui vs. Que Bentec*, 1 Phil. 355)

As is shown above, our subject is limited to ordinary civil actions and does not comprise criminal cases and special proceedings because in those latter two, the Supreme Court has the

power to review the questions of law or fact irrespective of whether assessors sat and dissented to the decision of the trial judge or not. Even in civil actions, the power is limited in those cases expressly mentioned in section 497 of the Code of Civil Procedure.

1. Before the enactment of Act No. 1596, the original section 497 reads as follows:

HEARINGS CONFINED TO MATTERS OF LAW WITH
CERTAIN EXCEPTIONS:

In hearings upon bills of exceptions in civil actions and special proceedings, the Supreme Court shall not review the evidence taken in the court below, and affirm, reverse, or modify the judgment there rendered as justice requires in the following cases:

1. If assessors sat with the judge in the hearing in the court below, and both the assessors were of the opinion that the findings of fact and judgment in the action are wrong and have certified in writing their dissent, therefrom, and their reasons for such dissent, the Supreme Court may, in connection with the hearing on the bill of exceptions, review the facts upon the evidence adduced in the court below, and shall give to the dissent aforesaid such weight as in the opinion of the judges of the Supreme Court it is entitled to, and upon such review shall render such judgment as is found just;

2. If before the final determination of an action pending in the Supreme Court on bills of exceptions, new and material evidence be discovered by either party, which could not have been discovered before the trial in the court below, by the exercise of due diligence and which is of such a character as probably to change the result, the Supreme Court may receive and consider such a new evidence, together with that adduced on the trial below, and may grant or refuse a new trial, or render such other judgment as ought, in view of the whole case, to be rendered, upon such terms as it may deem just. The party seeking a new trial, or a reversal of the judgment on the ground of newly discovered evidence may petition the Supreme Court for such new trial, and shall attach to the petition affidavits showing the facts entitling him to a new trial and the newly discovered evi-

dence. Upon the filing of such petition in the Supreme Court, the court shall, on notice to both parties, make such order as to taking further testimony by each party, upon the petition either orally in court or by depositions, upon notice as it may deem just. The petition with the evidence, shall be heard at the same time as the bill of exceptions;

3. If the excepting party filed a motion in the Court of First Instance for a new trial, upon the ground that the findings of fact were plainly and manifestly against the weight of evidence, and the judge overruled said motion, and due exception was taken to his overruling the same, the Supreme Court may review the evidence and make such findings upon the facts, and render such final judgment as justice and equity requires. But if the Supreme Court be of the opinion that the exception is frivolous and not made in good faith it may impose double, or treble additional costs upon the excepting party, and may order them to be paid by counsel prosecuting the bill of exceptions, if in its opinion justice so requires."

On February 25, 1907, however, the president of the Philippine Commission presented for the consideration of that body a bill entitled:

"An act amending Act No. 190 entitled 'An Act Providing A Code of Procedure In Civil Actions And Special Proceedings, In The Philippine Islands;' by providing that where a motion for a new trial is made on the ground that the evidence is insufficient to justify the decision an exception may be taken to the order of the trial court overruling such motion, and providing that in the hearing of a bill of exceptions based thereon the Supreme Court may review the evidence adduced at the trial and affirm, reverse, or modify by a preponderance of the evidence the judgment of the court below."

The act as passed became Act number 1596 and provided as follows:

HEARINGS CONFINED TO MATTERS OF LAW WITH
CERTAIN EXCEPTIONS

In hearing upon bills of exceptions in civil actions and special proceedings, the Supreme Court shall not review the evidence taken in the court below, nor retry the questions of fact except as in this section hereinafter provided; but shall determine only questions of law raised by the bill of

exceptions. But the Supreme Court may review the evidence taken in the court below and, after giving due weight to the fact that the judge who tried the case saw the witnesses when they testified, affirm or reverse by a preponderance of the evidence, or modify by such preponderance, the judgment there rendered, as justice may require, in the the following cases:

1. If before the final determination of an action pending in the Supreme Court on bill of exceptions, new and material evidence be discovered by either party, which could not have been discovered before the trial in the court below, by the exercise of due diligence, and which is of such a character as probably to change the result, the Supreme Court may review and consider such a new evidence, together with that adduced on the trial below, and may grant or refuse a new trial, or render such other judgment as ought, in view of the whole case, to be rendered, upon such terms as it may deem just. The party seeking a new trial, or a reversal of the judgment on the ground of newly discovered evidence, may petition the Supreme Court for such new trial, and shall attach to the petition affidavits showing the facts entitling him to a new trial and the newly discovered evidence. Upon the filing of such petition in the Supreme Court, the court shall, on notice to both parties, make such order as to taking further testimony by each party, upon the petition, either orally in court, or by depositions upon notice, as it may deem just. The petition with the evidence, shall be heard at the same time as the bill of exceptions;

2. If the excepting party filed a motion in the Court of First Instance for a new trial, upon the ground that the evidence was insufficient to justify the decision, and the judge overruled said motion, and due exception was taken to his overruling the same, the Supreme Court may review the evidence and make such findings upon the facts by a preponderance of the evidence, and render such final judgment, as justice and equity may require. But, if the Supreme Court be of the opinion that this exception is frivolous and not made in good faith, it may impose double or treble additional costs upon the excepting party, and may order them to be paid by counsel prosecuting the bill of exceptions if in its opinion justice so requires."

Section 146, C. C. P. is also amended by the same act and reads as follows:

METHOD OF PROCEDURE IN APPLICATION FOR NEW TRIAL

The application shall be made by motion in writing, stating the ground therefor, of which the adverse party shall have such reasonable notice as the judge may direct. When the application is made for a cause mentioned in the first or second subdivisions of the last section, it must be made upon affidavits, and counter affidavits from the adverse party may likewise be received.

The overruling or granting of a motion for a new trial shall not be a ground for exception, but shall be deemed to have been an act of discretion on the part of the judge, within the meaning of the second sentence of section 141. If, however, the motion for a new trial was made on the ground that the evidence was insufficient to justify the decision, an exception may be taken to the order overruling such motion, and such exception may be reviewed by the Supreme Court as in other cases."

As the act stands it omitted paragraph 1 of sec. 497 which concerns the review of the evidence in case two assessors dissented from the decision of the trial judge.

Nothing in the records of the Philippine Commission, was said as to the motive which impelled that body to change the provision of the sections mentioned, though the body admitted that the immediate passage of the Act was a necessity and therefore desirable. (Executive Minutes of the Philippine Commission, vol. IV, pp. 401-402. 1907) The *eighth annual report of the Philippine commission to the Secretary of War (1907)* has nothing to say as to the motive for the change save that "a review of the evidence by seven judges of the Supreme Court would better protect the interest of justice than to continue the practice which made the determination of a single trial judge who sees the witnesses, hears them testify, and notes their manner on the stand * * *" (p. 53) As have been shown previously, assessors in justice of the peace courts differ in function and importance than assessors in Courts of First Instance. In the former, they advise the justice of the peace in the determination of both questions of fact and law, while in the latter their function is limited to giving advice to questions of fact. This is so because ordinarily, justices of the peace are generally not lawyers and con-

sequently not equally well versed in law. They are inferior officers, often with but scant knowledge of law and procedure. Judges of the Courts of First Instance are well versed and experienced in law and procedure, competent in most lines affecting the administration of justice. Generally, findings of fact made by a judge of the Court of First Instance are left untouched by the Supreme Court, the presumption being that they were properly taken and considered. This efficiency of said judges renders to a minimum the importance of assessors in Courts of First Instance, first, because Judges of those courts are well grounded in the law; second, they have the necessary experience to distinguish between a fact material and relevant to the point at issue and a mere misleading fact; and third, their sense of responsibility to higher superiors and to the public prevents them from exercising bias and partiality. On the other hand, assessors are free from any consideration of this circumstances. They are laymen and inexperienced in law and procedure, hence, in the proper evaluation of what fact is material or otherwise in a given case. They are not imbued with any feeling of responsibility arising from any sense of nobility or public esteem, unlike a judge who would always strive for the maintenance of his dignity and honor.

These considerations must have impelled the Philippine Commission in making the change.

In the absence of any definite reasons for the act of the Philippine Commission as to the motive for the change we must be forced to resort to accepted maxims of statutory constructions to arrive at a definite conclusion. In the first place we must take into consideration the fact that legislators are presumed to know existing laws. (Smith Bell and Co. *vs.* Estate of Maronilla, 41 Phil. 557). In the second place the ordinary course of things are factors to be likewise considered. It being presumed that legislators know existing laws, the intentional omission of a definite portion of a statute is voluntary renunciation of the principle comprised within it. What is omitted is excluded. Ordinarily, leaving out of one thing and providing for the rest is tantamount to total discarding of what is left out. *Inclusio unius, est exclusio alterius*. Here, it is clearly seen that the particular subdivision devoted to the section on assessors was intentionally left out. Surely the legislators did not intend to leave out the interpretation of the law to the different notions

of individuals. The omission was a positive proof that the same is no longer to be admitted and therefor repealed by implication.

2. Under statutory construction, the Supreme Court has expressed in numerous decisions that repeal by implication are not favored. In *Smith Bell and Co. vs. Estate of Maronilla*, 41 Phil. 557, the court held: Repeal of statutes by implication are not favored. There is a presumption of knowledge by legislators of existing laws. In passing a statute the legislator did not intend to interfere with or abrogate any forum law on the same matter unless repugnant and irreconcilable; or unless the latter embraces the subject matter of the earlier.

Repeals by implication are not favored. Where two statutes cover the same matter, in whole or in part, the court should if possible give effect to both. (*Lichauco and Co. vs. Apostol and Corpus*, 44 Phil. 138)

In another case the court held: Before a statute can be held to have repealed a former one by implication; it must appear, first, that the two statutes touch the same matter, and second, that the later statute is repugnant to the earlier, (*Calderon vs. Provincia del Santisimo Rosario*, 28 Phil. 164)

In the case of *Garcia Valdez vs. Soteraña Tuazon*, 40 Phil. 945, the Supreme Court in a carefully penned decision sustained the implied repeal of that specie of divorce consisting of judicial separation without the dissolution of the bonds of matrimony, and in its place was substituted the absolute divorce *ex vinculis matrimonii* and held:

"We are not oblivious of the well-known rule of law that repeals by implication are not favored. Nevertheless when there is a plain, unavoidable, and irreconcilable repugnancy between two laws the later expression of the Legislative will must be given effect. It is axiomatic in the science of jurisprudence that two inconsistent statutes can not co-exist in one jurisprudence with reference to the same subject matter.

"The most powerful repeal by implication noted by legal commentators is that which arises when the later of the two laws is expressed in the form of a universal negative. The repugnance of two statutes is more readily seen when the later act is in the form of a negative proposition than when both laws are stated in the affirmative. (Citing *Sutherland, Statutory Construction*, 2nd ed. sec. 248) There is a clear distinction between affirmative statutes and negative ones in regard

to their repealing effects upon prior legislation which may be expressed by saying that while an affirmative statute does not repeal impliedly the prior law unless an intention to effect the repeal is manifest, a negative statute repeals all conflicting provisions unless the contrary intention is disclosed. (Citing *State vs. Commissioner of Wahoe County*, 22 Nev. 203, 210.)

"One affirmative statute will not repeal another, unless there is an absolute conflict between them, or it can be ascertained in some manner that a repeal was intended. But where the later act is expressed in negative terms the principle is different. Negative statutes are mandatory and must be presumed to have been intended as a repeal of all conflicting provisions, unless the contrary can be clearly seen."

Jones sums up the principles of repeal by implication beautifully in the following words:

REPEALS BY IMPLICATION

Many states place little importance on repealing clauses. In some they occur only sporadically and even then only in general terms or in the body of the bill apparently at the point where the draftsmen first became aware of the existence of the conflict. Under these practices reliance must be had on repeal by implication which will abrogate statutes to the extent of actual repugnancy. This principle, it is evident, is back of all express repeals and operate to bring them up to its standard and minimum. But the courts do not favor implied repeals. The presumption to often contrary to fact, as our statutes show,—is that the legislature acts with knowledge of all previous legislation and that if any change was intended it would be expressed.

Reliance upon implied repeal alone is a slipshod method of legislation at best. It is made least objectionable when, as in many states, the repeal or amendment, which latter is usually a form of repeal, repeats the entire section of law which is to be changed. The act to be substituted declares that the section in question is "amended" or "repealed and re-enacted so as to read as follows." This expedient makes clear the portions of the previous act left out, but of course leaves uncertain what other sections of law are intended to be affected by the new law. That is, the new law may reach beyond the provision of the law expressly supplanted so that it involves an implied repeal as

well as expressed. As in other repeals the later law on its going into effect annuls all contradictory provisions of the previous ones. Contradictions cannot stand together, not only from theory but also from the nature of the case.

The rules as to implied repeals are thus summarized:

(1) That the law does not favor the repeal of an older statute by a later one by mere implication.

(2) The implication, in order to be operative, must be necessary, and if it arises out of repugnancy between the two acts, the later abrogates the former only to the extent that it is inconsistent and irreconcilable with it. A later and an older statute, if it is possible and reasonable to do so, will always be construed together, so as to give effect not only to the distinct parts or provisions of the latter, not inconsistent with the new law, but to give effect to the older law as a whole, subject only to restrictions or modifications of its meaning, when such seems to have been the legislative purpose. A law will not be deemed repealed because some of its provisions are repeated in a subsequent statute, except in so far as the latter plainly appears to have been intended by the legislature as a substitute.

(3) Where the later or revising statute clearly covers the whole subject-matter of antecedent acts, and it plainly appears to have been the purpose of the legislature to give expression in it to the whole law on the subject, the latter is held to be repealed by necessary implication.

Where reliance is had on repeals by implication a negative construction of language is to be preferred. Affirmative statutes have just as great repealing force to the extent that the repugnancy to former statutes is evident, but the contradiction when affirmative language is used is often not plain. *Negative language is considered exclusive, prohibitory and mandatory.* Thus a law declaring "no price fight shall take place" abrogates all previous licences on conditions and an act that "no beer shall be sold" revokes all previous acts permitting it.

The same exclusive character is found in many affirmative laws. To follow the above examples, laws providing that "all price fights are prohibited" or "any selling of beer shall be punished," are as wide in extent as laws with negative language, but affirmative provisions do not necessarily deny affirmative provisions on the same subjects

in other statutes. If the intent is clear to limit the action altogether or to a certain manner the affirmative language is held to embrace an exclusive negative intent, but there is no presumption of a negative intent raised by affirmative laws. A statute without negative words, it is generally accepted, will not repeal existing statutes unless there be unavoidable repugnancy. In a statute with negative words those words themselves tend to establish the repugnancy. Thus the law may provide that the hunting season for certain sorts of game shall be from November first to January first,—a rule which would not necessarily be in conflict with a prior law establishing a spring hunting season. On the other hand if the law declares that no hunting shall be lawful except during a specified season the language admits of only an exclusive construction. (*Chester Lloyd Jones on "Statute Law Making,"* p. 152)

Under the doctrine of the above mentioned case which contained the more conclusive principles, we could bring out the following precepts in repeals by implication by statutory construction:

1. That the two statutes refer to the same subject matter;
2. That they are repugnant to each other; and
3. That the latter is expressed in the form of a universal negative.

The writer proposes to show under the principles enunciated, that the section which is the subject of the question is impliedly repealed.

(a) Section 161 of the Code of Civil Procedure treats of the action the Supreme Court may take in case two of the assessors dissent to the decision rendered by the judge of the court of First Instance. "In case such dissent is filled, the Supreme Court, on appeal, may *review the facts upon the evidence adduced in the Court of First Instance.*" There is no escaping the conclusion that the section is primarily enacted to show that the Supreme Court may do and that is "may review the facts." Section 497 of the same Code provides that *the Supreme Court shall not review the evidence taken in the court below, nor retry the questions of fact* except as in the section provided. The section deals also on the power of the Court to review the evidence and the facts. There is no doubt that under the showing above, the two sections cover the same subject matter, that is the review of the evidence and the facts.

Where the later statute clearly covers the old subject-matter of antecedent acts, and it plainly appears to have been the purpose of the Legislature to give expression in it to the whole law on the subject, previous laws are held to be repealed by necessary implication. (*People vs. Perfecto*, 43 Phil. 387)

Under the doctrine of the above case, the Court held that Act No. 277, sec. 1, repealed by implication article 256 of the Old Penal Code. Said section 1 of Act 277 provides in part: "Libel is any malicious defamation expressed either in writing, printing, or by signs or pictures, or the like * * *." Article 256 of the old Penal Code provides in part, "Any person who by, * * * writing, shall defame, abuse, or insult any Minister of the Crown or other person inauthority * * *." A comparison of the case treated and the provisions of the Code now under discussion, reveals a striking similarity which appeals to the naked eye.

One of the rules of interpretation is that "When there are two laws on the same subject, enacted on different dates, and it appears evident by the forms and essence of the later law that it was the intention of the legislator to cover the whole of the subject, and that it is a complete and perfect system, or is in itself a provision, the latest law should be considered as a declaration that all that is comprised therein shall continue in force and that all that is not, be rejected and repealed. (*U. S. vs. Palacio*, 33 Phil. 215) That the section on the review of evidence by the Supreme Court (section 497) covers the whole of the subject and that it is a complete and perfect system can be seen in the wording of the statute which states that the *Supreme Court shall not review the evidence—except as in this section provided.*

(b) Again, under section 161, the Supreme Court *may* review the facts upon the evidence. The section is permissive and not prohibitive of the power of the Supreme Court. On the other hand, section 497 prohibits the Supreme Court to review the questions of fact *except* as in the section provided and in the section no permission exists in the case covered by section 161. In the same jurisprudence no two conflicting and repugnant statutes can remain enforceable at the same time referring to the same subject matter.

It is axiomatic in the science of jurisprudence that two inconsistent statutes can not coexist in one jurisdiction with reference to the same subject matter. (*Garcia Valdez vs. Soteraña Tuazon*, 40 Phil. 945) Therefore the repugnancy in the sections prohibits the enforceability of the former.

(c) The third and last test is as to whether the later statute is expressed in the form of a universal negative. The section reads: In hearing upon bill of exceptions in civil actions and special proceedings, the Supreme Court *shall not* review the evidence taken in the court below nor retry the questions of fact *except* as in this section hereinafter provided; but *shall determine only* questions of law raised by the bill of exceptions. That the section is expressed in the form of a universal negative can be shown by reading the section and by a comparison of the case decided by the Supreme Court. In the case of *Garcia Valdez vs. Soteraña Tuazon* mentioned previously, the Supreme Court held that the sections of Act 2710 known as the Divorce Law were expressed in the form of a universal negative by showing the following:

- Sec. 1—A petition for divorce *can only be filed*—
- Sec. 2—*No person* shall be entitled to a divorce—
- Sec. 3—*The divorce may be claimed only*—
- Sec. 4—An action for divorce *can not be filed except*—
- Sec. 5—An action for divorce *shall in no case*—
- Sec. 6—A divorce *shall not be granted*—

Comparing the sections of Act 2710 with the general provisions of section 497 of the Code of Civil Procedure, there is no room for doubt of their similarity as negative expressions. Hence, we are driven to the inevitable conclusion that the latter repeals section 161 of the same Code. Negative statutes are mandatory and must be presumed to have been intended as a repeal of all conflicting provisions, unless the contrary can be clearly seen.

3. Hitherto, the omission of the paragraph concerning the review of the evidence in case assessors dissented from the decision of the trial judge, have been dealt with in the consideration of the amending statute. Henceforth, the omission in the judicial decisions of the same paragraph will be treated.

The Supreme Court has laid down the procedure to be followed in order that a review of the evidence can be had. In an early case the court held: "As a general rule the Supreme Court sits to correct error of law, unless a case falls within the exceptions established by section 497 of the Code of Civil Procedure, or there has been a motion for a new trial on the ground therein designated, the evidence will not be reviewed by the appellate court or the findings of the trial judge disturbed." (De Leon

vs. Naval, 3 Phil. 258) In this decision the court referred to the provisions of section 497 before the same was amended by Act No. 1596.

In a much earlier case the court spoke of the power to review the evidence, when certain facts concur. It held: "But in ordinary civil actions the power of this court has been limited and its practice radically changed. It has become for such cases only, a court for the correction of errors of law, and no longer, *except* in the three cases mentioned in article 497, has the power to pass upon questions of fact raised by the testimony. The article says: "The Supreme Court shall not review the evidence taken in the court below, nor retry the questions of fact."

"Outside of the three cases excepted and mentioned in said article 497, our power in cases like the one at bar is limited to a consideration of error of law committed by the court below." (*Thunga Chui vs. Que Bentec*, 1 Phil. 355)

An investigation of the section referred to before it was amended by Act No. 1596, will show that the three grounds for which a review of the evidence and the questions of fact could be had, included a paragraph which concerned the effect of the dissent of assessors from the decision of the trial judge. (Par. 1 of sec. 497 before amendment) Under said paragraph the Supreme Court may review the evidence adduced in the court below as is also the case in section 161 of the same code.

Subsequently the court laid a more elaborate and clear procedure to be followed in a case falling under the same section. "In order that the evidence adduced in the lower court may be reviewed by the Supreme Court, it is necessary that the requirements of section 497 of Act No. 190, the Code of Civil Procedure, as amended by Act No. 1596, be complied with in the first instance. These requirements are: (1) that a motion for a new trial be made; (2) that the said motion be overruled; and (3) that such overruling be excepted to. Unless the above requisites be complied with, the evidence although it may be submitted to this Supreme Court, can not be reviewed, the appeal being limited to determining questions of law raised therein and the congruence between the principles of law and the findings of fact contained in the judgment appealed from." (*De la Rama vs. De la Rama*, 11 Phil. 746.) This case was decided after section 497 was amended by Act No. 1596. The court merely stated that a motion for a new trial be made without specifying the grounds as the basis for said motion in order that a review of the evidence

can be had. In another decision, the court laid down specifically the grounds for which a motion to authorize the Supreme Court to review the evidence can be had. The court held: "We do not think that the foregoing motion for a new trial was submitted in such form as to justify us in reviewing the evidence, under the provision of section 497 of the Code of Civil Procedure, as amended by Act No. 1596. That act provides that the Supreme Court shall not review the evidence taken in the court below except first, when a motion for a new trial was submitted to the Supreme Court on the ground of newly discovered evidence, or, second, where a motion is submitted to the Court of First Instance for a new trial on the ground that the evidence was insufficient to justify the decision." (*Roque vs. Navarro*, 9 Phil. 421.)

As could be seen no mention was made as to the power of the court to review the evidence in case two assessors filed their dissent in writing. The court has constantly limited its power to review to the contingencies appearing in section 497. This is corroborated by another decision of the court saying: "As will be seen, the section quoted places a limitation on the appellate power of the Supreme Court, providing that it shall not review the evidence except when certain facts concur. As a necessary result, when they do not concur the Supreme Court is without power to review the evidence and redetermine questions of fact." (*Buen Camino vs. Soriano*, 29 Phil. 232.)

Having in mind the omission of the paragraph of the section in question, together with the judicial declarations which limits the power of review of the Supreme Court in the cases mentioned in said section, together with the authority contained in section 146 last paragraph, which permits the court to review the evidence when a motion for a new trial was made on the ground that the evidence was insufficient to justify the decision, nothing is left except the conclusion that section 161 of the Code of Civil Procedure was impliedly repealed by section 497 of the same Code as amended. The grounds mentioned in section 145 by which a motion for a new trial can be had, does not authorize the Supreme Court to review the evidence except in the case where the evidence was insufficient to justify the decision.

IV. CONCLUSION

In concluding this short study of the law which ought to prevail as a result of the amendment made upon section 497 of the Code of Civil Procedure, the writer arrived at a conclusion which

calls for the repeal of a section of the same code viz: section 161, by a process of statutory construction. In arriving at the conclusion resort was made upon a study of the cases and mostly upon a study of the law itself. A restatement of the methods which made it possible to arrive at the conclusion advanced is deemed timely:

1. The Legislature with a knowledge of existing law, intentionally omitted paragraph 1 of the original section of Act No. 190 thereby showing that it was discarded as unnecessary;

2. Under statutory construction, said section has been shown to be repealed by implication because it covers the same subject matter as is so covered by section 497, because it is repugnant to the latter, and because section 497 is expressed in the form of a universal negative;

3. Lastly, the Supreme Court confirmed the implied repeal by omitting in its decisions, as ground for a review of the evidence, the omitted paragraph.

Wherefore in view of all the foregoing, the writer concludes that *section 161 of the Code of Civil Procedure (re dissent of assessors) has been impliedly repealed by section 497 of the same code as amended.*