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NOTES and COMMENTS

SUFFICIENCY OF THE TESTIMONY OF AN ACCUSED ON HIS MINORITY IN CRIMINAL CASES

In the case of *People of the Philippines v. Russin Talok, Kadil Jamas, and Alian Jakaria* (G. R. No. 45611, June 21, 1938), the defendants were found guilty of the crime of murder in the lower court. The defendant Russin Talok declared at the trial court that he was not more than 17 years in age. Kadil Jamas and Alian Jakaria also declared that they were 16 and 22 years, respectively. Although the parties did not submit to the court the question of the ages of the defendants Russin Talok and Kadil Jamas, the trial judge refused to give credit to the testimonies of the said defendants and found them both above 18 years of age when they committed the crime. The reasons of the lower court in so holding were: (1) That upon being questioned as to the source of their information regarding their age they answered that their fathers had told them "a long time ago". (2) That they did not state when and under what circumstances their fathers told them so. (3) That it is possible that their fathers had told them their ages, three, four or five years before the trial. On appeal, the Supreme Court found the defendants guilty of the crimes charged; and said Court ruled that since the trial judge actually viewed the defendants when they testified and was thus in a better position than the appellate court to determine the ages of the persons accused, from their appearance and from other circumstances, the finding of the lower court that they were above 18 years should be upheld.

The holding of the Supreme Court in this case giving preference to the finding of the judge of the trial court that the accused was above 18 years in age as against the claim of minority of the accused—in a criminal case—seems to conflict with the holdings of the same Court in the cases of U. S. v. Bergantino, 3 Phil. Rep. 118 (1903), U. S. v. Estavillo and Perez, 10 Of. Gaz. 1984, and U. S. v. Agadas and Sabachan 36 Phil. Rep. 246 (1917).

That a witness may be permitted to state his or her own age subject to cross-examination as to the sources of his or her own information, is the settled practice. State v. Cougat. 121 Mo. 458. 26 NW. 566 and all authorities cited therein; 16 Cyc. Sec. 1225—Note No. 92; 22 C. J. Sec. 897, Note No. 62. Even if such witness does not actually have personal knowledge as to when he was born, he may testify to the same as he had learned it from the family circle. Although admittedly hearsay, his testimony is competent and admissible under one of the classes of evidence excepted from the hearsay rule—namely that of hearsay evidence on questions of pedigree. Sec. 281 and 298 Code of Civil Procedure; 1 Greenleaf on Evidence Sec. 114; State v. Marshall, 137 Mo. 463, 36 SW. 619. These statements would be assertions of the family tradition. Hart v. Stickney, 41 Sis. 630. One has the right to testify to his own age in spite of the fact that his parents are still living. Bain v. State, 61 Ala. 75.

That the body of a person is real evidence and that the age of such a person may be determined from his personal appearance is also established in this jurisdiction. Tan Beko v. Col. of Cus. 26 Phil. Rep. 254; De la Cruz v. Col. of Cus. 26 Phil. Rep. 270; Ex Parte Chooey Dee Ying, 214 Fed, 873; Leong Guen v. Col, of Cus. 31 Phil. Rep. 417 Guevara v. Col. of Cus. 34 Phil. Rep. 394; U. S. v. Hing Chang, Circuit Court of Appeals Reports, 19; Braca v. Col. of Cus. 36 Phil. Rep. 929; Lim Cheng v. Col. of Cus. 42 Phil. Rep. 876.

As a general rule the appellate court always refuses to interfere with the findings of the trial court on such subjects as preponderance of evidence and credibility of witnesses. U. S. v. Rice, 27 Phil. Rep. 641 (1913); Melliza v. Towle and Mueller 34 Phil. Rep. 345 (1916). The reason assigned is that the trial judge is in a better position than the appellate court to pass judgment on such questions, he being in direct contact with the witnesses. U. S. v. Remigio 37 Phil. 599 (1918). But the

Supreme Court has taken a different stand on the subject of the age of a defendant in criminal cases. In this class of cases, when there is doubt as regards the minority of an accused due to a conflict between the findings of the trial court from an examination of said accused and the testimony of the latter—such a doubt is resolved in favor of minority. U. S. v. Bergantino (Supra), U. S. v. Estavillo and Perez (Supra), U. S. v. Agadas and Sabachan (Supra). The Supreme Court justifies this departure from the general rule with the argument that the age of minority means a great mitigation of the liability of the accused, and since there exists a reasonable doubt, such must be taken in his favor, to the end that a lesser penalty may be imposed.

It would seem, therefore, that upon a claim by the accused of the mitigating circumstance of minority by testifying that he was a minor, it becomes incumbent upon the prosecution to prove his age to be above 18 years—beyond reasonable doubt.

But the holding in the instant case does not follow this doctrine.

And neither is this difference founded on any material discrepancy between the facts of the cited cases of Bergantino, Estabillo, and Agadas—and the instant case. Here we have the testimony of the accused clearly classed as hearsay evidence—the two defendants Talok and Jamas stating that they believed their ages to be as they had already declared (17 and 16 respectively) because their fathers had told them so "a long time ago". In the Bergantino case, the husband of the accused gave the age of his wife as 15 in accordance with what "They" had told him. In the case of Agadas and Sabachan, the accused testified, "I cannot tell exactly because I do not remember when I was born, but 17 years is my guess". In the case of Estavillo and Perez, Estavillo testified that he was only 16 years old. But in the present case, the Supreme Court has refused to give credit to the testimony of the accused.

The ruling in the present case can neither be considered a reiteration of the doctrine established in the Collector of Customs cases (Supra). While it is true that in those cases, the Supreme Court upheld the findings of the Board of Special Inquiry of the Bureau of Customs with respect to the age of the witness before the said board, as against the testimony of the witness himself, yet these cases may be distinguished from the cases of Bergantino, Estavillo, and Agadas in the following manner:

1. In the former cases, the original proceedings were extra-judicial investigations for the determination of the right of certain persons to enter the Philippines, conducted by an administrative tribunal—and as such not subject to the ordinary rules of evidence. Wigmore, On Evidence, Vol. 1. Sec. 4 c, p. 36.

In the latter cases, the original proceedings were judicial prosecutions for crimes—trials before courts subject to the rule that all doubts must be resolved in favor of the accused, and that the prosecution must prove beyond reasonable doubt each circumstance constituting the link of events that should preclude any reasonable hypothesis consistent with the innocence of the accused.

2. In the first line of cases, the original proceedings were brought to the cognizance of the judicial tribunals upon a petition for a writ of habeas corpus on the ground that the Boards of Special Inquiry of the Bureau of Customs had acted arbitrarily and capriciously and with abuse of discretion when such board found the petitioner to be more than 18 years of age. The question before the Court in those cases was therefore not on the proper weight to be given to the testimony of the witness nor on the finding of the board, but rather as to whether such findings of the board had any basis no matter how slim. If there were some reasons for the findings, no matter how slight, the exercise of the discretion of the board in the particular manner objected to is justified.

On the other hand, in the second line of cases, the question squarely set before the appellate court is, which of the two groups of contradictory facts is to be believed; the testimony of the witness or the finding of the trial court?

But these distinctions do not render these two groups of cases incompatible with each other. On the contrary, they direct us to the conclusion that they cover different fields. In both instances there is admittedly some doubt as regards the actual age of the witness due to the lack of positive evidence. But in the criminal cases, the doubt is resolved to mitigate the liability of the accused. And in the Collector of Customs cases, the doubt is settled in favor of the right of an administrative tribunal to use discretion with relatively greater freedom from the technicalities of the law with a view to expediting the work of such tribunal.

F. E. MARCOS

Recent Decisions of the Philippine Supreme Court

REPORTED IN FULL

THE PEOPLE OF THE PHILIPPINE ISLANDS, Plaintiff-Appellant, vs. CHONG HONG, TING YUEN, WONG KONG, LEE PAT, LEE KIM alias CHIQUITO, LONG HING WEI and LEE YAM, Defendant-Appellees, G. R. No. 45363, June 13, 1938.

LAUREL, J.:

The seven defendants in this case were convicted in the Justice of the Peace Court of Davao, Davao, of violation of Ordinance No. 394 of said municipality. On appeal, the court of First Instance of Davao ordered the dismissal of the case on the ground that the ordinance aforementioned is null and void. The prosecution appeals from and challenges this order of dismissal of the court below.

The ordinance in question reads as follows:

"Ordinance No. 394

"Ordinance Prohibiting the Playing of Jueteng

"By authority of law, the Municipal Council of Davao, Province of Davao, hereby decrees as follows:

"Section 1. Any person who in any manner shall directly or indirectly take part in the game generally known as jueteng, or knowingly and without lawful purpose has in his possession any list, paper or other matter containing letters, figures or symbols which pertain to, or are in any manner used in, the game of jueteng or any similar game which has taken place or is about to take place, shall be punished as follows:

"(1) Imprisonment of not less than one month nor more than two months, and a fine of not less than ₱50 nor more than ₱100, if a PLAYER:

"(2) Imprisonment of not less than two months nor more than four months, and a fine of not less than ₱75 nor more than ₱150, if a COLLECTOR:

"(3) Imprisonment of not less than three months nor more than six months, and a fine of not less than ₱100 nor more than ₱200, if a MASTER OF BANKER.

"Sec. 2. For purposes of this ordinance, a *player* is any person who participates in the game by betting, wagering or staking money or anything of value: *collector* is any person who collects money for betting on the game, prepares, carries, or in which possession is found any list, paper, or any matter pertaining to, or in any manner used, in the game: *master* is any person who keeps, maintains, has charge or possession, or controls the house where the game is played, or who knowingly permits any property, owned by him, to be used for playing the game: *banker* is any person who directly makes the play, receives lists, papers or matters pertaining to, or is in any manner used in, the game.

"Sec. 3. All ordinances or parts thereof which are inconsistent with or repugnant to the provisions hereof are hereby repealed.

"Sec. 4. This ordinance shall take effect on its approval.

"Approved unanimously.

"Davao, Davao, February 12, 1936."

The municipal council of Davao is empowered by law to enact the ordinance just quoted. By section

2625 (hh) of the Revised Administrative Code, municipal councils are expressly authorized, by ordinance, "To prevent and suppress * * * gambling * * *" and "to make and enforce all necessary police ordinances, with a view to the confinement and reformation of * * * gamblers * * *" The authority may also be made to rest on the general-welfare clause found in section 2625 (jj) of the Revised Administrative Code. The suppression of gambling is within the police power of a municipal corporation and "Ordinances aimed in a reasonable way at the accomplishment of this purpose are undoubtedly valid." (U. S. v. Salaveria, 39 Phil. 102, 108.) The various penalties imposed for the violation of the ordinance in question come within the limits of paragraph (ii) of the same section of the same Code.

It is admitted that *jueteng* is already prohibited and penalized in article 195 of the Revised Penal Code. But the fact that an act is already prohibited and penalized by a general law does not preclude the enactment of a municipal ordinance covering the same matter. The rule is well-settled that the same act may constitute an offense against both the state and a political subdivision thereof and both jurisdictions may punish the act, without infringing any constitutional principle. (See United States v. Pacis, 31 Phil. 524.) Indeed, this principle is impliedly accepted in our Constitution by the limitation provided that "If an act is punished by a law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act." (Art. III, sec. 1, par. 20.)

The court below, however, lays emphasis on the claim that the ordinance before us is in conflict with law. Conformity with law is one of the essential requisites for the validity of a municipal ordinance. But fatal inconsistency is not disclosed by an examination of the law and ordinance involved. Both article 195 of the Revised Administrative Code * and Municipal Ordinance No. 394 prohibit and penalize the playing of *jueteng*. The difference lies in the details and the penalties imposed. The ordinance distinguishes between a "player", a "collector" and a "master or banker" and prescribes a different penalty for each class. The law, upon the other hand, prescribes a penalty common to all classes. This distinction apparently was made necessary by the peculiar conditions of the locality. At any rate, the enlargement upon the provisions of a statute of the state, as by the imposition of additional penalties, does not result in inconsistency. "As a general rule, additional regulation to that of the state law does not constitute a conflict therewith. The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirement for all cases to its own prescription." (43 C. J., 219-220. See Rossberg v. State, 111 Md. 394 and *In re* Hoffman, 155 Cal. 114.) The fact that the ordinance does not speak of recidivism, which the general law treats of with more severity, is not indicative of inconsistency. There can be no inconsistency "if either is silent where the other speaks." (43 C. J., 218-219.)

We have not overlooked the observation of the lower court that if a recidivist *jueteng* gambler is prosecuted under the ordinance, he could not be dealt with more severely as

* The Court must have meant the Revised Penal Code.

such recidivist as the ordinance fails to meet such a situation. This is true and, we may add that under the aforementioned provision of our Constitution, his conviction or acquittal under the ordinance is a bar to a subsequent prosecution under the Revised Penal Code. The defect pointed out cannot, however, be corrected by judicial interpretation.

As Ordinance No. 394 of the Municipality of Davao is valid, the court below erred in dismissing the case against the appellees herein. The order appealed from is, therefore, reversed and the case should be, as it is hereby, remanded to the court of origin for trial on the merits and decision in accordance with law. Costs against the appellees.

So ordered.

CONDENSED

CONSTITUTIONAL LAW — POLICE POWER — POWER OF MUNICIPAL CORPORATION TO REGULATE SALE OF THEATER TICKETS.

THE PEOPLE OF THE PHILIPPINES, plaintiff and appellant vs. REMIGIO B. CHAN, defendant and appellee, G. R. No. 45435, June 17, 1938.

CONCEPCION, J.:

The legal question involved in this appeal is, whether a municipal ordinance prohibiting first-run theaters from selling tickets in excess of their seating capacity, is discriminatory, and therefore, unconstitutional.

The accused, as manager of the Capitol Theatre, a first class movie house situated at the Escolta, Manila, was convicted in the Municipal Court of Manila to pay a fine for having sold to the public, tickets exceeding the seating capacity of the said theater. He appealed from that sentence to the Court of First Instance which dismissed the complaint on the ground that said ordinance is unconstitutional for being discriminatory. The fiscal appealed.

In his brief, counsel for the accused avers that the discriminatory character of the ordinance is very obvious, for there is no reasonable or natural basis to impose a restriction on cinematographs of first showing, while excepting those theaters which are not so classified. This defense carries with it its own refutation. If it is admitted that the restriction of the number of tickets is imposed only on movie houses of first showing and excepts those not so classified, we do not see any discrimination.

It must be noted at the beginning that it is beyond question that the City of Manila exercises the police power by delegation from the State, and in the exercise of such power, it can pass ordinances to regulate the management of the theaters and cinematographs. Art. 2444 (e) and (ee), Revised Administrative Code; U. S. v. Gomez Jesus, 31 Phil. 229; U. S. v. Pompeya, 31 Phil. 236.

On April 17, 1936 Ordinance No. 2347 was approved, which requires all theaters and cinematographs to register in the Office of the Treasurer their seating capacity, and prohibits the sale of tickets in the said theaters or cinematographs in excess of their capacity.

Before the approval of the said ordinance, Ordinance No. 2188, approved on July 22, 1933, classified cinematographs into three classes: first, second, and third. The first class includes those theaters situat-

ed in certain specified streets, like Rosario and Escolta, and which ordinarily exhibit films for the first time. Of the second class, are those not being situated in those specified streets, exhibit also films for the first time, and those located in those mentioned streets which exhibit regularly pictures for the second time or have the exclusive privilege to show second-run films. The third class includes all others not embraced in the first and second class.

It should be added, and this is of common knowledge, that films which are shown for the first time attract more patrons, and the theater or cinematograph, whether of the first or second class, where the films are exhibited for the first time, will have a full house to the point of suffocation, if there is no limitation in the number of tickets. This is the reason for the prohibition of the sale of tickets in excess of their seating capacity. This prohibition is applied equally to all cinematographs where films are being shown for the first time, whether such cinematographs be of the first or second class.

"Class legislation discriminating against some and favoring others is prohibited. But classification on a reasonable basis, and not made arbitrarily or capriciously, is permitted. The rules governing classification are briefly as follows: *The classification must be based on substantial distinctions which make real differences;* it must be germane to the purpose of the law; it must not be limited to existing conditions only; and must apply equally to each member of the class." Malcolm, Philippine Constitutional Law, 2nd ed., p. 343. (The italics is ours.)

A case very much similar to the present, is that of People v. Gabriel, 43 Phil. 641, in which this Tribunal declared:

"Section 749 of the Revised Ordinances of the city of Manila as amended by ordinance No. 938, *which is intended to prohibit a crier or the use of a bell or other means of attracting bidders* by noise or show within *certain hours and on certain streets in the city*, is a valid exercise of the police power, is not discriminatory or class legislation and is not unconstitutional." (The italics is ours.)

We have another case in that of Rubi v. Provincial Board of Mindoro, 39 Phil. 675. It was decreed that the Mangyans settle in a reservation created for that purpose and they are to be educated under certain methods. The Mangyans are a non-Christian tribe of a very low civilization. A petition for *habeas corpus* was presented in behalf of Rubi and other Mangyans of the province, alleging that by virtue of the resolution of the provincial board of Mindoro creating the reservation, they were deprived illegally of their liberty. This Tribunal decided that the said resolution was not a discriminatory legislation, holding that:

"Further, one can not hold that the liberty of the citizen is unduly interfered with when the degree of civilization of the Manguianes is considered. They are restrained for their own good and the general good of the Philippines. Nor can one say that due process of law has not been followed. To go back to our definition of due process of law and equal protection of laws, there exists a law; the law seems to be reasonable, it is enforced according to the regular methods of procedure prescribed, and it applies alike to all of a class." (Id. p. 718.)

In view of the foregoing, the decree appealed from is revoked without pronouncement as to costs.

(Avanceña C. J.; Villa-Real, Abad Santos, Imperial, Diaz, and Laurel J.J., concurring.) *Condensed by* FELIX V. MAKASIAR.

DIGEST OF DECISIONS

CIVIL PROCEDURE—COURT'S JURISDICTION OVER REPORT OF COMMITTEE ON CLAIMS.—*Laureano Embudo, Filomeno Embudo, Roman Delgado, Matias Ronquillo, Gregorio Salaria, and Ildefonso Relente, petitioners v. Hon. Juan G. Lesaca, Judge of the Court of First Instance of Albay, respondent, G. R. No. 45712, June 27, 1938.*—This petition for a writ of *certiorari* is brought by the creditors, whose claims against the estate of the deceased Lucas Embudo were approved by the committee on claims, in order to have declared null the orders of the court on July 22, 1936, disapproving the report and ordering the presentation of another, that on March 16, 1937, where same order was reiterated, and that on August 21, 1937, denying the reconsideration of the previous orders. The report of the commissioners approving the claims of the creditors was sent to the court on January 3, 1936. An opposition to this report was filed by the heirs of the deceased on March 12, 1936. The question is whether the court had jurisdiction to declare null the report of the committee. *Held:* It did not have such jurisdiction. The report approving the claims could have been appealed within 25 days, and this period had already elapsed when the heirs filed their opposition. When on July 22, 1936 the court disapproved the report, this had already the character of finality, the court no longer having jurisdiction over it. (Concepcion v. Tambunting and Tambunting, 46 Phil. 457). Writ granted and orders of the court complained of are declared null and void. (Per Avanceña, C. J., Villa-Real, Abad Santos, Imperial, Diaz, Laurel, and Concepcion, JJ., concurring.) *Briefed by* RENATO D. TAYAG.

CIVIL PROCEDURE—INTEREST OF PARTY ELIMINATED BY AMENDED COMPLAINT.—*Manila Electric Company, plaintiff-appellee v. Ramon Roces, defendant-appellant, G. R. No. 45856, June 27, 1938.*—The plaintiff brought a civil action against Ramon Roces, praying that the latter be prohibited from using a certain subterranean electric cable crossing Calle Calero. Roces answered that he was not the proper party but Ramon Roces Publications, Inc. The plaintiff amended the complaint and the court admitted it. Roces objected, contending that an amendment could not be admitted when it consisted in the elimination of the only party defendant. Roces, having appealed from the decision of the court admitting the amended complaint, presented his bill of exceptions, which the court denied, on the ground that, having been eliminated in the new complaint, he had lost interest in the case and therefore had no right to appeal. The question is whether Roces had lost interest in the case. *Held:* Although his name has been eliminated, Roces should continue being a party in this case until the resolution admitting the amended complaint shall have a final character, which it has not now, for the reason that it has been appealed. The denial of Roces' bill of exceptions is therefore erroneous and the lower court is hereby ordered to admit it. Reversed. (Per

Avanceña, C. J., Villa-Real, Abad Santos, Imperial, Diaz, Laurel, and Concepcion, JJ., concurring.) *Briefed by* RENATO D. TAYAG.

PUBLIC SERVICE LAW—REGULATIONS BY PUBLIC SERVICE COMPANY. —*Sio Chu Tian vs. Manila Electric Co., G. R. No. 45353, June 27, 1938.* —Appeal by the Manila Electric Co. from the decision of the Public Service Commission ordering the appellant to reestablish the electric light service at the residence of the appellee. One of the regulations of the Manila Electric Co. provides that all service entrances must be installed in either B-X flexible cable, service entrance cable or rigid conduit. This regulation has not been approved by the Public Service Commission. Appellee refused to use the B-X flexible cable because there was already installed at his house the so-called open installation approved by the Chief Electrician of the City. Said Electrician declared that the use of such wires is not required by the regulations of his office and that open installations as the appellee has is sufficient to protect life and property. The object of the appellant in requiring the use of such cables is to protect itself against the theft of electric fluid by consumers. The installation of B-X flexible cable is more expensive than the ordinary open installation. *Held:* The open installation which the appellee has being sufficient for the security of life and property of electric consumers, and the use of B-X flexible cable not being necessary, the Manila Electric Co. can not demand its use nor can the said company cut the service of a consumer who refuses to use such wires. If the company desires the use of B-X flexible cable to protect its interests, it must install them at its own expense and without any cost to the consumer. Judgment affirmed. (Per Concepcion, J.; Avanceña, C. J., Villa-Real, Santos, Imperial, Diaz, and Concepcion, JJ., concurring.) *Briefed by* JOSE C. CASTRO.

PUBLIC SERVICE LAW—PRIORITY OF APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE.—*Pasay Transportation Co. vs. Manila Electric Co., G. R. Nos. 45234 and 45235, June 28, 1938.*—Petition by the Pasay Transportation Co. for review of the decision rendered by the Public Service Commission granting the Manila Electric Co. authority to re-route its Mandaluyong and San Juan lines, by passing through the new Sevilla Bridge to connect its street railway system at Rotonda, Manila. Petitioner objects to the grant to the applicant; first, because it was the first to apply for permission; and secondly, because the new bridge is within the territory served by it and the grant of the same right to the applicant would result in duplication of service. *Held:* As to the first ground, the priority which the law protects does not consist in the date of the filing of the application but that of the issuance of the certificate of public convenience, and in any event, that on which a public service begins to operate. (Tan Sima v. Hacbang 320.G.595.) Priority in filing of petition is not controlling. (De los Santos v. Pasay Transportation Co. 54 Phil. 357.) As to the second ground, the mere fact that the established operation covers a given territory does not necessarily give rise to any preferential right over a bridge later constructed within the locality. While duplication of service is a factor to be taken into account, the determination of that question is a proposition whol-

ly within the jurisdiction of the Public Service Commission. The Public Service Commission found it to the convenience of passengers, composed mostly of employees, students, laborers, and laundrymen, to be carried over the new Sevilla Bridge instead of by a circuitous route over the San Juan Bridge. The petition for review is dismissed. (Per Laurel, J.; Avanceña, C. J., Villa-Real, Santos, Imperial, Diaz, and Concepcion, JJ., concurring.) *Briefed by* JOSE C. CASTRO.

BILL OF RIGHTS—RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES—WAVER.—*Leona Pasion Vda. de Garcia, Petitioner v. Locsin, Judge of the Court of First Instance of Tarlac, et al., Respondents, G. R. No. 45950, June 20, 1938.*—Mandamus to secure annulment of a search warrant and for the restoration of certain documents illegally seized. Petitioner's documents, alleged to have been used by her in her activities as usurer, were seized by an agent of the Anti-Usury Board under a search warrant issued by a Justice of the Peace solely on the strength of an affidavit signed by said agent. The Justice of the Peace did not examine the applicant and his witnesses but accepted as true the affidavit as to the existence of the probable cause. The documents seized were not delivered to the court which issued the warrant but were retained by the Fiscal for a considerable length of time notwithstanding repeated demands by petitioner for their return. *Held:* Search warrant is null and void for the following reasons: (1) the probable cause was not determined by the judge himself but by the applicant; (2) in the determination of the probable cause, the judge did not examine under oath or affirmation the applicant or his witnesses, (Par. 3 Sec. 1, Bill of Rights); (3) the documents seized were not delivered to the court issuing the warrant, (Sec. 104, Code of Crim. Procedure). As to waiver of constitutional immunity, *Held:* Although such immunity is subject to waiver, no express waiver has been made in the instant case and the failure of the petitioner to object to legality of the search at the time it was made does not constitute an implied waiver because such failure was due to the fact that she was sick and absent at the time of the search. Writ granted. (Per Laurel, J.; Avanceña, C. J., Villa-Real, Abad Santos, Imperial, Diaz, Concepcion, JJ. Concur.) *Briefed by* ANICETO D. YAP.

CONDITIONAL PARDON.—LIABILITY FOR THE UNEXPIRED TERM FOR VIOLATIONS THEREOF.—*People of the Philippines v. Remigio Pontillas, G. R. No. 45267, June 15, 1938.*—Defendant was sentenced on February 14, 1921, to imprisonment of 6 years and 1 day of *prison mayor* for bigamy. Conditional pardon was granted on September 8, 1922, the condition being that he must not commit any infraction against the penal laws of the country. On December 24, 1935, he committed damage to property through reckless imprudence and was convicted. Defendant contends that the second offense does not constitute a violation of the pardon because it was committed long after the penalty from which he was pardoned had expired. *Held:* Defendant could be required to serve the rest of the penalty from which he was conditionally pardoned for violating the condition thereof even long after said penalty has expired but before it has prescribed. From the date when the first penalty was imposed to the date of the second offense,

only 14 years 10 months and 10 days had elapsed and since the penalty of *prision mayor* prescribes only after 15 years, it is clear that the defendant violated the terms of the pardon before said penalty has prescribed. Since the condition of the pardon is against any violation of the penal laws of the Philippines, and the crime of damage to property through reckless imprudence being expressly punished under Art. 365 in connection with Art. 3 of the Revised Penal Code, the contention of the defendant that said offense does not involve moral turpitude is immaterial. (Per Diaz, J.; Avanceña, C. J., Villa-Real, Abad Santos, Imperial, Laurel, Concepcion, JJ., Concur.) *Briefed by* ANICETO D. YAP.

CERTIORARI—CONTINUANCE—ABUSE OF DISCRETION.—*Jose Sanz y Agramonte and Teresa Sanz y Perez, petitioners vs. Monte de Piedad y Caja de Ahorros de Manila, Jose Dans, as Director of Lands, and Hon. Jose Gutierrez David, as Judge of the Court of First Instance of Romblon, respondents, G. R. No. 45941, June 28, 1938.*— Petition for a writ of *certiorari*. It appears that on December 22, 1935, Monte de Piedad y Caja de Ahorros de Manila, filed a complaint in the Court of First Instance of Romblon against the petitioners herein, to foreclose a mortgage executed by the latter to guaranty the payment of a loan. The Director of Lands, filed a complaint in intervention, alleging that the lands which were the object of the foreclosure suit were public and owned by the Commonwealth. After several postponements and continuances, the trial court issued an order definitely setting a particular day for the trial of the case. At this juncture, the defendants presented a demurrer to the plaintiff's complaint, alleging a defect in the parties defendant, as the Roman Catholic Bishop of Jaro was not included and presented a motion that the same be made party defendant. The motion to this effect was denied. On the same day when this motion was denied, the defendants, with the assent of the intervenor, petitioned the court to appoint an arbitrator and to receive the evidence of the intervenor. This petition was granted on the same day. Hence, this petition for certiorari premised primarily upon the fact that whereas in the morning of March 10, 1937, a motion for continuance was denied, in the afternoon of the same day, another motion to the same effect was granted, without lifting the first order. Abuse of discretion is imputed to such denial. *Held:* No abuse of discretion. When leave was granted to the Director of Lands to intervene in the foreclosure suit, two questions arose, one referring to the controversy between the plaintiff and the defendants and the other referring to the claim of the intervenor, which the plaintiff offered to resist together with the defendants. The trial court did not believe it proper, under the circumstances to delay further the solution of the first question and it was precisely for this reason that the motion for its continuance was denied in the morning of March 10, 1937. It was, however, proper and just that the plaintiff, who had offered to help the defendants resist the intervenor's claim, said defendants having confessed inability to do so alone, should be given time to prepare his evidence, and for this reason, the court in the exercise of its sound discretion, allowed continuance in the afternoon of the same day. Likewise the court did not abuse its discretion when it declined to accede to the inclusion of the Roman

Catholic Bishop of Jaro as party defendant in the foreclosure suit, it appearing that the Bishop had actually no interest in the properties mortgaged by the petitioners. (Per Laurel, J.; Avanceña, C. J., Villareal, Santos, Imperial, Diaz, and Concepcion, J. J., concurring). *Briefed by* ANTONIO H. NOBLEJAS.

GUARDIANSHIP—NOTICE AND HEARING UNDER SECTION 562 OF THE CODE OF CIVIL PROCEDURE—CERTIORARI.—*Jesus Crisostomo, petitioner vs. The Hon. Pastor M. Endencia, and Ramon Crisostomo, respondents. G. R. No. 45623, June 30, 1938.*—Petition for a writ of *certiorari*. On February 29, 1936, petitioner as guardian of the person and property of the incapacitated Petrona Crisostomo obtained from the Court of First Instance of Bulacan an order declaring the recovery of competency by the incapacitated, the cancellation of petitioner's bond, and the termination of the guardianship. On November 9, 1936, respondent Ramon Crisostomo, filed a motion for the setting aside of the order of February 9, 1936, on the ground that no notice of the hearing was given him. Petitioner herein opposed the motion claiming that the order has become final and therefore the court has lost jurisdiction over it. Nevertheless on December 18, 1936, the court set it aside. *Held:* There is no doubt that the court has full jurisdiction under sections 559, 562 and 575 of the Code of Civil Procedure to grant the order of recovery of competency. Section 562 and not section 575 as alleged by petitioner is applicable to special proceedings of this nature. Said section 562 requires that notification of the hearing be given the guardian and the insane or incompetent. Notice to other persons is not required. In the case at bar the above requisite has been substantially complied with inasmuch as the petition for an order of recovery of competency was made by the guardian himself, accompanied by an affidavit of the incapacitated. It is true that under said section 562 the respondent Ramon Crisostomo has the right to appear in the hearing and to oppose the petition, but this does not entitle him to a right to be notified personally. His situation is that of a person in a civil case, who, while not a defendant, but having a direct interest in the matter under litigation, learns of the existence of the case. There is no doubt that said person can intervene as a third party, but he can not ask for the annulment of the order on the ground that he has a right to be notified and to be present in the hearing. The order annulling the order of February 29, 1936 is illegal and null because the court no longer possesses jurisdiction over the same after the accounts of the guardian has been approved, his bond cancelled, and the proceedings closed. When Ramon Crisostomo presented his motion for annulment of the order of February 29, 1936, the same has become final. Before the Court the guardianship has ceased. Judgment reversed. Order of Dec. 19, 1936 declared of no effect. (Per Imperial, J.; Avanceña, C. J., Villa-Real, Abad-Santos, Diaz, Laurel and Concepcion, JJ., concurring.) *Briefed by* WILLIAM E. DY-LIACCO.

MUNICIPAL CORPORATIONS — CONSTITUTIONALITY OF MUNICIPAL ORDINANCE—POLICE POWER.—*P. P. I. vs. Maria Vda. de Sabarre, Pedro Goy, and Tomas Basista, G. R. No. 45522, June 20, 1938.*—The defendants were found guilty of selling meat outside of the public market, in violation of a municipal ordinance. Hence this

appeal. The defendants allege that said ordinance is unconstitutional and void because: (1) The prohibition contained in article 1 of the ordinance does not appear in the title of the said ordinance. (2) It is discriminatory. Discriminatory, because the ordinance operates exclusively against the defendants in that while article 1 prohibits meat vendors to sell their meat anywhere except in the public market, article 2 permits fish vendors to sell their fish everywhere except in public streets. *Held*: (1) An ordinance is not a general law but a mere regulation of a local nature and is valid if it is in accordance ance with the general laws in force in the Islands. It is not indispensable that its subject should appear in the title, for the provision of Article V of the Act of Congress of 1902 refers to general laws. (U. S. vs. Espiritusanto, 23 Phil. 610; Posadas vs. Warner Barnes & Co. Ltd. 279 U. S. 340; 73 L. ed.; 729; 49 Phil. 333; People vs. Buenviaje, 47 Phil. 564; Vidal de Roces vs. Posadas, 58 Phil. 116.) And the same provision has been substantially embodied in Title VI, Article 12, paragraph 1 of the Commonwealth Constitution. (2) Municipal corporations may prohibit by ordinance the sale of marketable articles within certain limits and during certain hours outside of an established market. Under a general power to regulate and *control markets*, restrictive regulations as to selling outside the market limits may be made and they are not unreasonable or in restraint of trade, although the rule is otherwise where market facilities are not furnished. (People vs. Montil, 53 Phil. 580) As between selling meat and selling fish there exist a real and substantial difference especially when we consider their relative susceptibility to deterioration, and above all, when, as in the present case, ice is not used for their conservation. And inasmuch as Article 1 applies to all meat vendors alike and article 2 applies to all fish vendors alike without any distinction, the ordinance does not discriminate. Affirmed. (Per Villa-Real, J.; Avanceña, C. J., Santos, Imperial, Laurel, and Concepcion, JJ., concurring. Diaz did not take part.) *Briefed by* RUPERTO T. ESTANISLAO.

CRIMINAL LAW—MURDER—ALEVOSIA.—*The People of the Philippines, plaintiff-appellee, v. Mariano Cusi and Andres Wagan, defendants and appellants. G. R. No. 45925, promulgated on June 8, 1938.*—From a conviction for murder, the defendants appealed. While the deceased Gelasio Dimatatac was leaving the stairs of the house of Juan Wagan after a disagreeable conversation therein, Andres Wagan shot him in the breast thru an open window of the store below the house of Juan. As Dimatatac went staggering to the kitchen of the store, Andres Wagan, shifting his position to the entrance of the store, fired at him another shot, which was followed by a third shot from the outside thru the western part of the kitchen by the other defendant Mariano Cusi. The ballistic expert found in the right hand of each of them traces of powder one day after the crime. The defendants are brothers-in-law. Cusi had a grudge against the deceased ever since the latter destroyed the plants in the land under litigation between them. Wagan interposed self-defense, while Cusi presented an alibi. *Held:* Since the shots fired by Wagan were unexpected and made without risk to himself, there was treachery in his act. (U. S. v. Gil, 13 Phil. 534; U. S. v. Baluyot, 40 Phil. 410.) Cusi acted also with

treachery in shooting at the deceased from the outside of the kitchen behind a thin wall which hid him while the deceased was staggering from the shots of Wagan. Wagan's plea of self-defense is untenable because the deceased was unarmed when he went to the house of Juan. Premeditation and the existence of an alibi were not proved. It is immaterial that the wounds each caused by the defendants could not be determined because according to the doctor they all caused the internal hemorrhage from which the deceased died. Judgment modified. (Per Concepcion, J.; Avanceña, C. J., Villa-real, Abad Santos, Imperial, Diaz, Laurel, J. J., concurring.) *Briefed by* RAMON C. AQUINO.

CRIMINAL LAW — DERELICTION OF DUTY—CRIMINAL PROCEDURE—WITHDRAWAL OF PLEA OF GUILTY—NEW TRIAL—DISCHARGE OF ACCUSED.—*The People of the Philippines, plaintiff-appellee, v. Nicolas L. Mina, defendant-appellant, G. R. No. 45312, June 13, 1938*—The defendant was accused of dereliction of duty defined and penalized under article 208 of the Revised Penal Code for his failure to prosecute a person he had caught in possession of *jueteng* paraphernalia. He renounced preliminary investigation. On arraignment, he pleaded not guilty. The lower court granted twice his requests for postponement of trial. On August 27, 1936, the date finally set for the trial, the court granted the request of the defendant, who was accompanied by a lawyer, to substitute a plea of guilty in lieu of the former plea of not guilty. The corresponding sentence of conviction was then rendered. On September 3, 1936, the defendant, thru another lawyer, filed a motion for reconsideration and new trial and to substitute a plea of not guilty in place of his second plea of guilty, which motion was denied. Defendant contends that it was error to deny his motion. *Held:* Under section 27 of General Orders No. 58, it is discretionary upon the court after the rendition of the judgment to allow substitution of a plea of not guilty in lieu of a plea of guilty. (U. S. v. Neri, 8 Phil. 680). Before the rendition of the judgment, the substitution, although discretionary upon the court, is generally allowed. (Sec. 25, G. O. No. 58; U. S. v. Patala, 2 Phil. 782; U. S. v. Molo, 5 Phil. 432; U. S. v. Neri, supra; U. S. v. Sanchez, 13 Phil. 343; U. S. v. Grant, 18 Phil. 123). In both cases, the court in exercising its discretion considers whether the accused understands the allegations of the complaint, and if the defense invoked, in case of motion for new trial, is meritorious and will alter the result of the case. (U. S. v. Grant, supra.) The records show that the defendant had ample time to prepare his defense. He was informed of the complaint on April 27, 1936. He pleaded guilty on August 27, 1936. No error was committed in denying his motion for reconsideration and new trial inasmuch as the newly discovered evidence, consisting of the sworn declarations of two witnesses which stated that the defendant set free the *jueteng* collector whom he had apprehended in order that the former may aid the defendant in the apprehension of other *jueteng* collectors, will not alter the result of the case nor exonerate him. Only the court under the conditions stated in section 34 of General Orders No. 58, as amended by Act No. 2709, may discharge persons accused of crimes. (Sec. 36 G. O. No. 58). Judgment modified. (Per

Imperial, J., Avanceña, C. J., Villa-real, Abad Santos, Diaz, Laurel, Concepcion, JJ., concurring.) *Briefed by* RAMON C. AQUINO.

DISQUALIFICATION OF JUDGES—REFUSAL TO ISSUE SUBPOENA.—*People of the Philippines, plaintiff and appellee vs. Primitiva B. Acaac, defendant and appellant, G. R. No. 45551, June 15, 1938.*—The defendant was convicted by the trial court of less grave physical injuries. From the said judgment of conviction he appeals and alleges that the trial court erred in not declaring that the justice of the peace who originally tried the case was disqualified to try the case because of certain statements that he had made before the trial, and in not allowing the defendant to prove that the justice of the peace refused to issue subpoena for witnesses for the defendant. *Held:* That the grounds for disqualifying a judge in trying a case are enumerated in section 8 of the Code of Civil Procedure. Said section makes no mention of cases in which the judge had made statements relative to the case before the trial. With respect to the refusal of the justice of the peace who originally tried the case to issue subpoena for defendant's witnesses, such does not involve a question of jurisdiction but merely a question of procedural right which may be corrected on appeal. It does not affect the validity of the judgment rendered in the case. Judgment affirmed. (Per Villa-Real, J.; Avanceña, C. J., Santos, Imperial, Diaz, Laurel, Concepcion, JJ., concurring.) *Briefed by* LINO M. PATAJO.

WRIT OF CARTIORARI—PRELIMINARY INVESTIGATION, ACT 1627 SECTION 37.—*Pedro R. Artache, Petitioner vs. Honorable Alfonso Santos, Judge of Court of First Instance of Samar and Jose Balite, respondents. G. R. No. 43946, June 14, 1938.*—This is a petition for a writ of *certiorari* against the respondent judge of the Court of First Instance with a view to the annulment of an order issued by him in a criminal case. It appears that the complainant in said criminal case, the herein petitioner, asked the respondent judge to authorize the justice of the peace of the provincial capital to conduct the preliminary investigation pursuant to section 37 of Act 1627. The respondent judge issued an order granting the request. The justice of the peace of the provincial capital had already received the depositions of the complaining witness and issued a warrant of arrest of the defendant, when the respondent judge granted a motion filed by the accused praying that the preliminary investigation be conducted instead by the justice of the peace of the municipality where the alleged offense was committed. Issue: Has the respondent judge legal authority to cancel his order authorizing the justice of the peace of the provincial capital to conduct the preliminary investigation and at the same time authorize the justice of the peace of the municipality where the offense was committed to conduct the said investigation? *Held:* Under section 37 of Act 1627 it is undeniable that the respondent judge is authorized to order that the preliminary investigation be conducted by the justice of the peace of the provincial capital. Thereunder also, he could have made the preliminary investigation himself. If, however, before the termination of the investigation, he finds that the interest of justice would be best served by having the preliminary investigation made by the justice of the peace of the municipality where the crime is alleged

to have been committed, there is nothing in the law which prohibits him from cancelling the previous order and referring the case to the justice of the peace of the latter municipality for that purpose. And this is all that was done by the respondent judge in this case, with the conformity of the provincial fiscal. Petition denied. Per Laurel J.; Avanceña C. J., Villa-Real, Santos, Imperial, Diaz, Concepcion, JJ., concurring. *Briefed by* LINO M. PATAJO.

PENAL LAW—RETROACTIVITY—PENALTY.—*People of the Philippine Islands v. Jorge Leyetz, G. R. No. 45364, June 7, 1938.*—Accused was prosecuted and convicted of slight physical injuries with the concurrence of two mitigating circumstances. The lower court imposed a fine, basing its decision on Arts. 64 and 71, Revised Penal Code. Accused appealed on the ground that the penalty imposed should be public censure, the penalty next lower in degree than arresto menor, in accordance with Art. 71, Revised Penal Code as amended by Commonwealth Act No. 217. *Held:* 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, (Art. 22, Revised Penal Code.) Article 71 of the Revised Penal Code, as amended, is more favorable to the accused and should be given retroactive effect. Penalty of public censure is thereby imposed. (Per Diaz, J.; Avanceña, C. J., Villa-Real, Santos, Imperial, Laurel, and Concepcion, JJ.; concur.) *Briefed by* JUVENAL K. GUERRERO.

CRIMINAL LAW—ARSON—DEFENSE OF ALIBI—PENALTY.—*P. P. I. v. Isidro Lomuntad and Jeronimo Moseños, G. R. No. 45693, June 4, 1938.*—Lower court found the defendants guilty of arson and imposed the penalty prescribed under par. 1, Art. 321, Revised Penal Code, and indemnity of ₱200 to the complainant. Defendants appealed on the ground that the judgment was contrary to the evidence and law. Witness for the prosecution, an inmate of the house, testified that upon awakening and discovering the fire, he saw and recognized the defendants hurrying away from the house, and he called to them why they have set the house on fire. Another witness, a friend of both defendants, testified that he saw them immediately before and after the fire. Enmity existed between the defendants and the complainant. The defendants set up the defense of alibi, based on their own testimony, that they were in another place at the time of the commission of the crime. *Held:* Defense cannot be sustained in view of the clear and positive testimony of the witnesses for the prosecution that they saw and recognized the defendants. Although no one saw the defendants in the very act of setting fire to the house, yet the circumstances and facts proved constitute a complete chain of circumstantial evidence which points to no other conclusion than that the defendants were guilty of the crime charged. No evidence having been presented that the defendants know that the house was occupied at the time of the commission of the crime, the imposition of the above penalty is unjustified. Judgment modified and penalty prescribed by par. 2, Art. 321. R. P. C. imposed in its maximum period, the aggravating circumstance of night-time being present with no mitigating circumstance, without prejudice however, to the application of the Indeterminate Sentence Law. (Per Diaz, J.; Avanceña, C. J., Villa-Real, Santos,

Imperial, Laurel, Concepcion, JJ., concurring.) *Briefed by* JUVENAL K. GUERRERO.

CRIMINAL PROCEDURE — JURISDICTION AND VENUE—TRANSITORY OR CONTINUING OFFENSES—REQUISITES OF THEFT.—*People of the Philippines, plaintiff-appellant vs. Francisco Mercado, defendant-appellee, G. R. Nos. 45471 and 45472, June 15, 1938.*—The defendant was accused of theft for having stolen three carabaos in Gapan, Nueva Ecija, which were subsequently taken to Candaba, Pampanga. The Court of First Instance of Pampanga, before whom this prosecution was brought, dismissed the case on the ground that it had no jurisdiction thereon because the crime was committed in Gapan, Nueva Ecija, even though the accused afterwards carried away the stolen animals to Candaba, Pampanga. The prosecution appealed therefrom, insisting that the Court of First Instance of Pampanga had jurisdiction because the crime was commenced in Gapan, Nueva Ecija, and consummated in Candaba, Pampanga. *Held:* That the Court of First Instance of Pampanga can not assume jurisdiction over this case, for the crime took place, and was committed and consummated in Gapan, Nueva Ecija. It is not essential to constitute the crime of theft, unlike "larceny" at common law, that there be a carrying away of the stolen property. It is enough that (1) there is a taking of movable property, (2) belonging to another, (3) without the consent of the owner, (4) with intent to gain, and (5) without violence or intimidation on persons or force upon things. It was not indispensable that the defendant should carry away the stolen carabaos to Candaba, Pampanga, or to any other place; the crime was completed in Gapan, Nueva Ecija, and the Court of First Instance of Nueva Ecija is the proper court to try the case. (Per Diaz, J.; Avanceña, C. J., Villa-Real, Abad Santos, Imperial, and Concepcion, JJ., concurring.) Laurel, J., dissenting: There is no essential distinction between "larceny" at common law and "hurto" under our penal law of Spanish origin; the two are synonymous. The carrying away of the stolen property is as much essential in the one as in the other. The distinction in the majority opinion runs counter to the admitted fact that the stolen animals were carried away by the accused to Candaba, Pampanga, from Gapan, Nueva Ecija. The rule that crimes are territorial is subject to certain exceptions, one being that "where property is stolen in one county, and the thief was found with it in his possession in another county, he can be tried in either," for there is a continuance of the unlawful taking. In the present case, the taking did not end in Gapan, Nueva Ecija; it continued to and in Candaba, Pampanga; so there was as much taking in Candaba as in Gapan. The offended party will not, by this rule, be compelled to follow the offender to the last place of refuge, because the former can prosecute the latter in either place; hence, more conducive to the promotion of the administration of justice. Judgment affirmed. *Briefed by* FELIX V. MAKASIAR.

CIVIL PROCEDURE—RIGHT OF ADMINISTRATOR TO GRANT LEASE.—*Mamerto Ferraris, petitioner, vs. Hon. Sotero Rodas, as Judge of the Court of First Instance of Negros Occ., and Vicente Ferraris, respondents, G. R. No. 46021, June 27, 1938.*—On August 10, 1937, the administratrix of the estate of the deceased

Victorio Ferraris, leased to the petitioner, for a period of three years, the share of the said estate in the Hacienda Talab-an. On November 10, 1937, Vicente Ferraris applied for the lease of the same property, which application was opposed by the administratrix. The Court, without granting the oppositor an opportunity to present proofs in support of her stand, ordered on January 15, 1938 that one-half of the Hacienda Talab-an be granted in lease to Vicente Ferraris. The administratrix, thereupon, filed this petition for a writ of certiorari to annul the said order of the Court for lack of jurisdiction. *Held*: The lease of the properties in question, being a simple act of administration, could be granted by the administratrix alone. The lease, therefore, in favor of the petitioner is legal and valid. Without regard as to whether or not the Court of First Instance had jurisdiction to make the order in question, it is clear that if it did have jurisdiction, the same was abused when the Court acted against the provisions of the valid contract of lease entered into between the administratrix and Mamerto Ferraris. The order of January 15, 1938 is declared null. (Per Avanceña, C. J., Villa-real, Abad Santos, Imperial, Diaz, Laurel, and Concepcion, JJ., concurring.) *Briefed by* RAFAEL C. CLIMACO.

CRIMINAL LAW—RIGHT OF A FISCAL TO ASK FOR THE DISMISSAL OF A CRIMINAL CASE REMANDED TO THE COURT OF FIRST INSTANCE BY THE JUSTICE OF THE PEACE.—*People of the Philippines, plaintiff and appellant vs. Eligio Ovilla, accused. Petra Flores, offended party and appellant, R. G. No. 45357, June 27, 1938.*—This is an appeal taken by the offended party from the decision of the trial court dismissing the case. The appellant questions the authority of the provincial fiscal to conduct another preliminary investigation and to ask the trial court to dismiss a criminal case remanded to said appellate Court by the Justice of the Peace after the latter shall have conducted a preliminary investigation and found sufficient cause to warrant the prosecution of the offense. *Held:* In the case of U. S. v. Barredo, 32 Phil. 444, the Supreme Court held that a Fiscal is not in duty bound to prosecute an accused of whose innocence he is convinced; and that once criminal proceedings have been commenced, the Fiscal who believes that the accused is innocent or that there is insufficient evidence to convict the latter, cannot himself dismiss the case or enter a *nolle prosequi*, but that he must petition the Court to dismiss the case at its discretion. It is apparent, therefore, that after a criminal case, falling under the jurisdiction of the Court of First Instance, is elevated to said Court of First Instance by the Justice of the Peace, the Provincial Fiscal before presenting the necessary information, has not only the authority but the duty as well to investigate the facts which are the basis of the complaint presented to the Justice of the Peace Court and to examine both the evidence before the said Justice of the Peace Court and other evidence presented by the parties with a view to determining the existence of a prima facie case against the accused. If after this investigation, he comes to the conclusion that the evidence is not adequate to establish prima facie the guilt of the accused, he must ask the Court to dismiss the case. This being the course of action followed by the provincial fiscal of Laguna, and the same being in accordance with Sec. 1687 of the Administrative

Code, the assignment of error is without merit, and the order appealed from is therefore confirmed, with costs against the appellant. (Per Villa-real, J.; Avanceña, C. J., and Abad Santos, Imperial, Diaz, Laurel, and Concepcion, JJ., concurring.) *Briefed by* RAFAEL C. CLIMACO.

THE MINING ACT — SECTION 61 CONSTRUED.—*Damaso P. Perez, et al. v. The Honorable Ceferino Hilario, Judge of the Court of First Instance of Cagayan, et al., G. R. No. 45826, June 27, 1938.*—A civil case, which involves the question of priority in the location of certain mining claims was originally instituted in the Court of First Instance. The present action is for a writ of *certiorari* to annul the proceedings had in said civil case. Basing their action upon Section 61 of Commonwealth Act No. 137, the petitioners allege that the court was without jurisdiction. Said law provides that conflicts and disputes arising out of mining locations may be submitted to the Director of Bureau of Mines, whose decision, however, is appealable to the Secretary of Agriculture and Commerce, and that, in case any one of the interested parties should disagree from the decisions of both, the matter may be taken to the competent court. *Held:* The law does not provide that such disputes *shall*, but rather *may*, be submitted to the Bureau of Mines; and it cannot be interpreted that its purpose is to deprive the court of its general jurisdiction. There is nothing objectionable in originally instituting the case in the court, inasmuch as, in the final step, it may be appealed thereto. On the contrary, it avoids the unnecessary prolongation of the case. (Per Avanceña, C. J.; Villa-Real, Santos, Imperial, Diaz, Laurel, and Concepcion, JJ., concurring.) *Briefed by* ABELARDO SUBIDO.

CIVIL LAW—FREEDOM OF CONTRACT—APPOINTMENT EX-PARTE OF RECEIVERS.—*Maria Diaz together with her husband Juan Pamintuan, petitioners vs. Hon. Pastor Endencia, Judge of Court of First Instance of Bulacan, San Juan de Dios Hospital, and Pablo Villaseñor, respondents. G. R. No. 45951 June 28, 1938.*—In 1928 petitioners became lessees of the lands under litigation. On November 17, 1930, a new contract of lease was entered into, novating the former contract and stipulating among other things that the lessee renounces expressly the benefits provided by law to the right to a tacit renewal of the contract of lease. Petitioner failed to pay the rental corresponding to the year 1935-1936 both within the time stipulated in the contract and within the period of grace granted by the lessor San Juan de Dios Hospital, who thereupon filed an action to recover possession of the lands leased to petitioners, and at the same time petitioned the court to appoint a receiver to preserve the fruits and improvements thereon. On November 17, 1937, the court appointed ex-parte, Gabriel Valero as receiver. Herein petitioners excepted to said order and after a denial of their motion for reconsideration, brings this original action for a writ of *certiorari* to set aside said order, *Held*: The benefits provided for by Art. 1566 of the Civil Code may be renounced in a contract of lease. Such a stipulation is not contrary to public policy. As regards ex-parte appointment of receivers, the same may be made by the trial court in the exercise of its sound judicial discretion on the matter. Sections 173 and 174 of the Code of Civil Procedure grants this wide dis-

cretionary power to the courts. (Per Imperial, J.; Avanceña, C. J., Villa-Real, Abad Santos, Diaz, Laurel, and Concepcion, J. J., concurring.) *Briefed by* DIOSCORO SARILE.

CRIMINAL LAW—ORAL DEFAMATION.—*People of the Philippine Islands, plaintiff-appellant vs. Braulio Raagas, defendant-appellee. G. R. No. 45414 June 13, 1938.*—Plaintiff appeals from an order of the trial court sustaining defendant's demurrer to an information for oral defamation. The information was based on a deposition of the defendant-appellee, which stated among other things: (1) That at one time offended party herein and manager of the company where deponent was employed initiated a voluntary contribution to defray the expenses of a band hired to welcome his daughter, and that after deponent's refusal to contribute anything had come to the knowledge of the said manager, he was dismissed from the employ of the company. (2) That on one occasion while deponent was in the service of his new employment, a certain Inang secretly confided to him that she learned from Tom Chaw (his new employer) that offended party herein told Tom Chaw to dismiss the deponent suggesting that his salary be reduced in order to force him to resign. *Held:* The facts stated in the first part of the deposition do not constitute the crime of oral defamation. The contribution alleged to have been initiated by the offended party being voluntary in character, it is neither censurable nor an act which would impute a vice or defect to offended party, and for that reason would not constitute an attack against the honor or integrity of any one, as the crime of oral defamation is defined by Article 353 in relation to Article 358 of the Revised Penal Code. (2) The allegations contained in the second part of the deposition do not constitute oral defamation either inasmuch as the deponent was merely relating what a third person (Inang) told him on one occasion without himself affirming directly or positively that the offended party influenced Tom Chaw to reduce his salary. In oral defamation the language used should be so clearly defamatory as to leave no doubt that it was directed at a particular person. Although defamation may be direct or indirect or in the form of allusions it has to be, in any case, positive; that is, it has to express the idea or element which the law seeks to punish (36 C. J. 1154, 1158). Order of trial court sustained with costs de officio. (Per Imperial, J.; Avanceña, C. J., Villa-Real, Abad Santos, Diaz, Laurel, J. J., concurring. Concepcion, J., did not take part.) *Briefed by* MELQUIADES M. VIRATA, JR.