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NOTES and COMMENTS

MEMBERSHIP IN THE ELECTORAL COMMISSION NINE OR SIX?

NINE

OPINION OF THE SECRETARY OF JUSTICE

OPINION No. 17
Series 1939
February 1, 1938

February 1, 1939

The Honorable
The Speaker
National Assembly
(Thru the Honorable
The Secretary to the President)
Manila:

Sir:

I have the honor to acknowledge the receipt of your letter of January 24, 1939, thru the office of His Excellency, the President, in which you request my opinion as "to the proper interpretation of the following provision of Section (4) of Article VI of the Philippine Constitution":

> "There shall be an Electoral Commission composed of three Justices of the Supreme Court designated by the Chief Justice, and of six Members chosen by the National Assembly, three of whom shall be nominated by the party

having the largest number of votes, and three by the party having the second largest number of votes therein."

You state that "as all the members of the present National Assembly belong to the Nacionalista Party, it is impossible to comply with the last part of the provision which requires that three members shall be nominated by the party having the second largest number of votes in the Assembly."

The main features of the constitutional provision in question are: (1) that there shall be an Electoral Commission composed of three Justices of the Supreme Court designated by the Chief Justice, and of *six members* chosen by the National Assembly; and that (2) of the six members to be chosen by the National Assembly, three shall be nominated by the party having the largest number of votes and three by the party having the second largest number of votes.

Examining the history of the constitutional provision, I find that in the first two drafts it was provided that the Electoral Commission shall be composed of "three members *elected* by the members of the party having the largest number of votes, three *elected* by the members of the party having the second largest number of votes, and three justices of the Supreme Court * * *" (Aruego, The Framing of the Phil. Const., pp. 260-261). But as finally adopted by the Convention, the Constitution explicitly states that there shall be "*six members chosen by the National Assembly,* three of whom shall be nominated by the party having the largest number of votes, and three by the party having the second largest number of votes". (Aruego, The Framing of the Phil. Const., pp. 271-272).

From the foregoing changes in the phraseology of the provision, it is evident that the intention of the framers of our Constitution was that there should invariably be six members from the National Assembly. It was also intended to create a non-partisan body to decide any partisan contest that may be brought before the Commission. The primary object was to avoid decisions based chiefly if not exclusively on partisan considerations.

The procedure or manner of nomination cannot possibly affect the constitutional mandate that the Assembly is entitled to six members in the Electoral Commission. When for lack of a minority representation in the Assembly the power to nominate three minority members cannot be exercised, it logically follows that the only party in the Assembly may nominate three others,

otherwise the explicit mandate of the Constitution that there shall be six members from the National Assembly would be nullified.

In other words, fluctuations in the total membership of the Commission were not and could not have been intended. We can not say that the Commission should have nine members during one legislative term and six members during the next. Constitutional provisions must always have a consistent application. The membership of the Commission is intended to be fixed and not variable and is not dependent upon the existence or non-existence of one or more parties in the Assembly.

> "A cardinal rule in dealing with Constitutions is that they should receive a consistent and uniform interpretation, so that they shall not be taken to mean one thing at one time and another thing at another time, even though the circumstances may have so changed as to make a different rule seem desirable" (11 Am. Jur. 639).

It is undisputed of course that the primary purpose of the Convention in giving representation to the minority party in the Electoral Commission was to safeguard the rights of the minority party and to protect their interests, especially when the election of any member of the minority party is protested. The basic philosophy behind the constitutional provision was to enable the minority party to act as a check on the majority in the Electoral Commission, with the members of the Supreme Court as the balancing factor. Inasmuch however as there is no minority party represented in the Assembly, the necessity for such a check by the minority party disappears. It is a function that is expected to be exercised by the three Justices of the Supreme Court.

To summarize, considering the plain terms of the constitutional provision in question, the changes that it has undergone since it was first introduced until finally adopted by the Convention, as well as the considerations that must have inspired the Constitutional Convention in adopting it as it is, I have come to the conclusion that the Electoral Commission should be composed of nine members, three from the Supreme Court and six chosen by the National Assembly to be nominated by the party in power, there being no other party entitled to such nomination.

Very respectfully,

JOSE A. SANTOS
Secretary of Justice

SIX

In view of the fact that all the members of the new National Assembly belong to the same party, how should the composition of the Electoral Commission be determined? Should there be nine members or should there be only six? This question was referred to the Department of Justice for solution and has been temporarily solved with the choice of the first alternative. It is the purpose of this article to point out why the contrary view seems to be more reasonable.

Section 4 of Article VI of the Constitution reads as follows: "There shall be an Electoral Commission composed of three Justices of the Supreme Court designated by the Chief Justice, and of six Members chosen by the National Assembly, three of whom shall be nominated by the party having the largest number of votes, and three by the party having the second largest number of votes. * * *" To arrive at the real meaning of this provision, we shall equip and aid ourselves with some of the well-known principles of construction and interpretation.

The fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent of the framers and of the people who adopted it. The object sought to be accomplished by its adoption, and the evils, if any, sought to be remedied or prevented should constantly be kept in mind.[1] A doubtful provision will be examined in the light of prior and contemporaneous history, and of the conditions and circumstances under which the constitution was framed. We should look to the history of the times, and examine the state of things existing when the constitution was framed and adopted, with a view to ascertaining its objects and purposes. We should consider, for example, the former law, the mischief and the remedy intended to be provided. In such cases the relation of a doubtful provision to known political truths and to political institutions will be considered; and previous legislation and the usages of the government will also be given weight.[2]

It is not only helpful but proper, therefore, to delve a bit into the history of the constitutional provision in question, study how it came about and scrutinize what evils and deficiencies there were in our former laws that called for a curative device.

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[1] Sec. 43, 12 Corpus Juris, pages 700-701.

[2] Sec. 63, 12 Corpus Juris, pages 710-711.

The Electoral Commission, a new thing under the American flag, was the happy result of the non-partisan deliberations of the Constitutional Convention. The novelty was struck upon by the framers of the Constitution in their efforts to look for a new procedure to replace the one in our previous organic laws with which they felt dissatisfied.

The framers had in mind that in the Philippine Bill of 1902 the Assembly was the judge of the elections, returns and qualifications of its members, and that the Philippine Autonomy Act of 1916 (the Jones Law) had a provision making the senate and the house of representatives, respectively, the sole judges of the elections, returns and qualifications of their elective members. This procedure followed by the old legislatures proved to be unsatisfactory. There was a manifest lack of political justice in the determination of election contests, for, often, decisions were dictated and controlled by party interests. There even arose, as a result, a camp of thought which believed that election contests should be decided by the courts as is done in some countries, notably England and Canada.[3]

In the light of history, it is submitted that the Electoral Commission should be composed of six Members instead of nine, three Justices from the Supreme Court and three Members from the National Assembly. To maintain the contrary view would be to revert to the old iniquitous system which the framers meant to do away with, for it requires no great knowledge of arithmetic to make the finding that six Members of the Electoral Commission affiliated with the party in power will always outvote the three Justices in resolving the questions brought before that body. In fact, even were the Assembly represented by only three Members, it would still be highly doubtful that political justice would be meted out, for it is obvious in this latter case that the three party men, united, can always effect a deadlock, and with that as capital to begin with it should be easy to attain victory by winning the sympathy of one of the three Justices. In a one-party National Assembly, indeed, the defeated oppositionist seeking to unseat his victorious opponent would thus labor at a disadvantage whether there be nine or six Members in the Electoral Commission. One half at least of the Members may in either case be presumed to be against him from the start. But between the greater evil of an Electoral

[3] Aruego, The Framing of the Philippine Constitution, Ch. XXII, Vol. I, pages 257-258.

Commission where the party in power is represented by six Members and the lesser evil where the party men are only three, we should decide in favor of the latter. This decision would be the nearest approach possible under the circumstances to give effect to the intent and purpose of the framers, the nearest constitutional means at hand in eradicating an evil which they meant to cure and remedy.

Hitherto we have used construction and have gone beyond the words of the constitutional provision in question in ascertaining the real intent of the framers. It would not even be necessary, I think, to use other aids than just the interpretation of the text in arriving at the conclusion we have already reached.

Let us examine again Section 4 of Article VI: "There shall be an Electoral Commission composed of three Justices of the Supreme Court designated by the Chief Justice, and of six Members chosen by the National Assembly, three of whom shall be nominated by the party having the largest number of votes, and three by the party having the second largest number of votes. * * *"

What is the precise meaning of the phrase "six Members chosen by the National Assembly"? The parties in the National Assembly shall nominate and then the National Assembly shall choose. The verb "to choose" means to take by preference, to select as most desirable one or a number from among so many. The meaning of the word therefore involves a certain discretion on the part of the person or body exercising the power of choice. Is this the meaning of the word as used in Section 4 of Article VI? We shall find out.

In the process of forming the Electoral Commission, how should the Assembly "choose" from among those nominated by the parties? Let us take the case of the minority party, assuming that there are two parties in the Assembly, and examine the different situations possible.

Situation 1. Suppose that the minority party nominates more than three Members for the Electoral Commission, say five. Here it is easy to see that the National Assembly will select three out of the five nominees. *The National Assembly here exercises its power of choice.*

Situation 2. Suppose the minority party nominates only three Members for the Electoral Commission, will the National Assembly still choose? It will not. One, obviously, cannot

choose three from three. *The Assembly here does not exercise its power of choice.* We may add in this connection that if we may refer to the three Members as the Assembly's choices it shall only be in the sense that they are the choices of a portion of it, the minority party that nominated and designated them.

Situation 3. Suppose the party nominates less than three Members for the Electoral Commission, let us say two, can the Assembly choose? It is clear that it cannot for the reasons that we have noted down in Situation 2. It is impossible to choose three out of two. But can the Assembly select the third Member whom the minority party has failed to nominate? The answer should be in the negative. The National Assembly is given the power to choose from among those nominated but not to designate any Member of its own accord.

Situation 4. Suppose the party fails to nominate Members for the Electoral Commission because it refuses, let us take for granted, to nominate any. What then? Shall and should the National Assembly arrogate unto itself the power which properly belongs to the minority party by the mandate of the Constitution? The answer should also be in the negative.

Situation 5. Suppose no other party save one is represented in the National Assembly, as is the case at present. There is no party "having the second largest number of votes". This situation is for our purpose the same as Situation 4, and from it we shall draw the same conclusion: That the National Assembly should not itself do the nominating but should leave the posts of the three minority Members vacant.

The words "six Members chosen by the National Assembly" should thus be given a limited meaning, not a literal signification. The six Members of the Electoral Commission should only be understood as the choices of the National Assembly in the sense that they are the choices of the component parts of it, that is, the parties having the first and second largest number of votes in the Assembly. The words should be so circumscribed because that is the intent, and the intent should prevail over the literal meaning. And the intent must be deduced by considering the provision as a whole. If a literal interpretation of the language used in a constitutional provision would give it an effect in contravention of the real purpose and intent as deduced from a consideration of all its parts, such intent must prevail over the literal meaning. Thus, the meaning of general

words will be restricted where this is found necessary to carry out the intention ascertained from a consideration of the instrument as a whole.[4]

It is not to be supposed that the framers of the Constitution had intended to stifle further into inarticulateness the already feeble voice of the opposition. Rather it is the fairer conclusion that they envisioned a form of government wherein the people's interest in public affairs is kept constantly alive—and consequently wherein the party in power is prodded on to greater achievement—because of the existence of at least one opposition party which is ever on the alert, focussing its spotlight on the delinquencies and mismanagements of those who hold the reins of government in their hands. This is as it should be in a republican democracy like ours—a system where there are at least two major parties, one acting as a healthy check upon the other, each trying to display its utmost best to win the electorate's, the master's favor.

R. D. TAYAG

[4] Sec. 44, 12 Corpus Juris, page 702.

THE MANNER OF PLEADING HABITUAL DELINQUENCY

1. *Introduction.*—Considering the unusual number of habitual delinquents that escaped the imposition of stiff penalties due to the technicality that the circumstance of habitual delinquency had not been properly alleged in the complaint or information, it becomes important to know the proper manner of alleging it. The stringent rules relative to the manner of alleging habitual delinquency is another of those instances which show the solicitousness of the law or court for the rights of the accused.

2. *Requisites for alleging habitual delinquency.*—The Supreme Court had laid down repeatedly in several recent cases the rules to be followed in alleging habitual delinquency in the complaint or information. A general averment of habitual delinquency is not sufficient. The allegation of habitual delinquency, to be sufficient, must contain the following: 1st, that the accused is a habitual delinquent under the terms and provisions of the last paragraph of subdivision 5 of article 62 of the Revised Penal Code. People v. Nayco, 45 Phil. 167; 2nd, the previous crimes committed (which may be *robo, hurto, estafa* or *falsificación*); 3rd, the dates of—(a) the commission of the previous crimes; (b) previous convictions; (c) last conviction; and (d) release from imprisonment; and 4th, periods of sentence. P. v. Venus, 35 O. G. 927; P. v. Topel, R. G. No. 45220, 16 P. L. J. 216; P. v. Añago, R. G. No. 45311, 16 P. L. J. 331, V Lawyers' Journal, 29; P. v. Topel, R. G. No. 45220, 16 P. L. J. 216. The case of P. v. Pedrosa, R. G. No. 45708, 17 P. L. J. 390 illustrates the foregoing rules. The following allegation of habitual delinquency in the information filed in the Pedrosa case was deemed sufficient to justify the imposition of the additional penalty on the accused for being a habitual delinquent: "That the said accused has heretofore been convicted once of estafa and once of theft by virtue of final judgments rendered by competent courts, as follows:

DATE OF COMMISSION	DATE OF SENTENCE	CRIME	SENTENCE	DATE OF RELEASE
	Oct. 13, 1930	Estafa M.C.D. F-23315	1 mo. and 1 day	Nov. 13, 1930
Oct. 20, 1930	Oct. 21, 1933	Theft M.C.D. F-99736	2 mos. and 1 day	Dec. 31, 1933

and is therefore a habitual delinquent under the provisions of article 62, a paragraph 5 of the Revised Penal Code, the date of his release from confinement in connection with his last offense being Dec. 21, 1933." But see P. v. Dural, R. G. No. 45422, 16 P. L. J. 376.

3. *Reasons for the foregoing requirements.*—The reasons or justification for requiring a detailed allegation of the circumstances constituting habitual delinquency are the following: (1) When the statute imposes a higher penalty upon a 2nd and 3rd conviction, respectively, it makes a prior conviction for a similar offense a part of the description and character of the offense intended to be punished; and therefore the fact of such prior conviction must be charged as well as proved. It is essential to an indictment that the facts constituting the offense intended to be punished should be averred. Clark's Criminal Procedure, p. 204, cited in P. v. Nayco, supra. (2) It is possible that the previous convictions took place on the same day or during days so proximate with another that there can be no habitual delinquency. Galang v. People, R. G. No. 45698, 17 P.L.J. 319; P. v. Venus, supra; and (3) The bare statement of habitual delinquency is a mere conclusion of law. P. v. Morales, 33 O.G. 1210; Nipales v. People, 17 P.L.J. 324.

4. *Effect of defective allegation.*—Where the allegation of habitual delinquency is defective because the circumstances constituting it are not set forth, it is not taken into consideration in imposing the corresponding penalty on the accused. Thus in the following cases, the court did not consider the circumstance of habitual delinquency for the reason that it was defectively alleged. P. v. Morales, supra; P. v. Guevarra, R. G. No. 44223, 15 P.L.J. 367; P. v. Venus, supra; P. v. Venus, R. G. No. 45142, 16 P.L.J. 215; P. v. Flores, 35 O. G. 1695; P. v. Topel, supra; P. v. Ocbias, R. G. No. 45176, 16 P.L.J. 214; P. v. Masonson,

R. G. No. 44527; P. v. Santos, R. G. No. 45150, 16 P.L.J. 268; P. v. Yulo, R. G. No. 45296, 16 P.L.J. 329; P. v. Añago, supra; P. v. Matibay, R. G. No. 43249, 16 P. L. J. 334; P. v. Sin, R. G. No. 45367, 16 P.L.J. 381; P. v. Ilanan, 34 O. G. 1238 (Court of Appeals), P. v. Masonson, R. G. No. 45249, V Lawyers' Journal, p. 28; P. v. De La Rama, R. G. No. 43744; P. v. Lozada, R. G. No. 43901; P. v. De la Cruz, G. R. No. 33786; P. v. Acosta (CA, No. 577), 37 O. G. No. 562; P. v. Siojo, 57 Phil. 1005.

5. *Effect of plea of guilty.*—The defective allegation of habitual delinquency is not cured by the plea of guilty because such a plea is not an admission of habitual delinquency. P. v. Topel, supra; P. v. Morales, supra; P. v. Acosta, supra. In other words, even if it is formally or generally averred that the accused is a habitual delinquent, but such averment does not set forth in detail all the circumstances constituting the habitual delinquency, a plea of guilty will not cure the deficiency of the allegation. Where the accused pleaded guilty, the court could not take into account more facts than are alleged in the information. Galang v. People, supra.

6. *Effect of plea of not guilty.*—Where, however, the accused pleaded not guilty to an information not containing a sufficient allegation of habitual delinquency, and during the trial the prosecution proved the circumstances constituting the accused's habitual delinquency, the insufficiency of the allegation is thereby cured. Galang v. People, supra.

7. *Effect of failure to allege that accused is habitual delinquent.*—And, where the accused pleaded not guilty to an information which did not state all the circumstances constituting habitual delinquency and that the accused is a habitual delinquent, but said accused did not object to the evidence of the prosecution supplying these deficiencies of the information, and failed even to raise the question in the trial court or in the Court of Appeals, he is estopped to question the validity of the penalty imposed on him as a habitual delinquent. Nipales v. People, supra.

(Note—P.L.J. refers to the Philippine Law Journal.)

RAMON C. AQUINO

THE MATUTE VS. HERNANDEZ CASE

The decision of the Supreme Court in the case of Matute vs. Hernandez, G. R. No. 46028, Aug. 8, 1938 (18 Phil. Law Journal 168) is noteworthy in two respects: (1) It has laid down an interpretation of the powers of the Auditor General under Section 2 Article 10 of the Constitution, which is sweeping in character, extensive in scope, and absolute in nature. (2) It has likewise enlarged the powers of the President to issue Executive orders, by affirming the validity of Executive order No. 16 as amended by Executive order No. 98.

The facts of the case as found by the Court itself are the following: "The purchasing agent with the consent and approval of the Secretary of Finance entered into a contract with the petitioner (Matute) for the supply of meat to the Government for a fixed price. Subsequently, (when slaughter house fees were raised by a Municipal ordinance), the petitioner requested an increase in the stipulated price. The petition was granted by the acting purchasing agent and approved by the Under Secretary of Finance. When the corresponding check was issued in payment of the meat supplied in accordance with the contract, the Auditor General (Hernandez) refused to countersign the check and ordered its return for cancellation." From the above facts the Court held: "(1) The refusal of the Auditor General to sign the check is not a simple exercise of a ministerial duty, but a discretionary power whereby he is authorized to determine whether the disbursement in question is illegal, unnecessary, excessive or extravagant, under Section 2; Art. 10; of the Constitution. (2) The increase in the stipulated price was a novation of the contract made in violation of the requirement of Executive order No. 16 and therefore the disbursement for which the check in question was issued could not be validly authorized."

Executive orders Nos. 16 and 98.

Executive Order No. 16, prohibits the "automatic renewal of contracts' and provides that * * * I, Manuel L. Quezon, President of the Philippines by virtue of the powers in me *vested by law,* hereby direct no contract for public service * * * entered into by the Philippine Government * * * shall be renewed with-

out public bidding except for very extraordinary reasons and then only after the Auditor General, the Secretary of Justice and the Secretary of the Department concerned have been consulted and my approval * * * secured before hand. * * *" Executive order No. 98 is similarly worded and amends the first by extending its prohibition to contracts for 'furnishing of supplies, materials and equipment to the Government,' (Italics ours).

Executive orders come under either of the following classes: (a) Those issued by an administrative superior and directed exclusively to his subordinates and (b) those directed not only to the inferior officers but also primarily to private individuals, *fixing the manner by which the terms of a statute* are to be complied with. (Willoughby, The United States Constitution, p. 1635) (Italics ours). The first has for their object simply the efficient and economical administration of the affairs of the department to which or in which they are issued in accordance with the law governing the subject matter. (Olsen v. Kerstein, 32 Phil. 520). They are administrative in their nature and do not pass beyond the limits of the department to which they are directed or in which they are published and therefore, create no rights in third persons; and that they are based on and are the product of a relationship in which power is their source and obedience their object. (idem.) In short, it may be said that executive orders coming under this class partakes of the nature of administrative acts and commands of the President touching the organization or mode of operation of the government, as well as all acts and commands governing the general performance of duties by public employees. (Section 63, Adm. Code of 1917).

The second class of Executive orders on the other hand to be valid should be in *strict conformity with the requirements of the statute granting authority to issue such orders,* otherwise they are defective and null as to private individuals. (Olsen v. Aldanese 43 Phil. 259.) (Italics ours).

Coming back to the Executive orders and determining as to which of these two classes they are to be placed, it is noteworthy to observe that they speak of the power vested in the President by law. No specific law is pointed out as granting the power to issue such orders, and it is believed that the 'law' referred to is none other than the Administrative Code, Section 63. If they are placed under the first class, their force and effect do not pass beyond the limits of the department to which they are directed. (Olsen v. Herstein, *supra*). If on

the other hand they are placed under the second class and no specific law could be pointed out as the source of the delegation of power to issue the same, they must necessarily be null and ineffective, for they would then be suffering from a 'congenital defect' incurable unless a specific law is passed ratifying their issuance. In either case the right of the contractor to recover would be clear. But the Court, however, placed them under the second class considered them valid and then gave an interpretation of the powers of the Auditor General, which brings us to the Constitution.

Article 10, Section 2 of the Constitution.

Article 10 Section 2 of the Constitution provides: "The Auditor General shall examine, audit and settle all accounts pertaining to the revenues and receipts from whatever source, * * * in accordance with law and administrative regulations * * * It shall be the duty of the Auditor General to bring to the attention of the proper administrative officer expenditures of funds or property which, in his opinion, are irregular, unnecessary, excessive or extravagant. He shall also perform such other functions as may be prescribed by law."

This provision is literally taken from the old Organic act provisions on the Insular Auditor (Sec. 24. Jones Law). The records of the Constitutional Convention shows that the intention was not to make any change in the powers of the Auditor. In this connection, it should be borne in mind that a constitutional provision must be presumed to have been framed and adopted in the light and understanding of prior and existing laws and with reference to them. (Gold Creek Mining Corporation vs. Rodriguez, et al. G. R. No. 45859, Sept. 28, 1938; 18 Phil. Law Journal 286). Courts are bound to presume that the people who adopted a constitution are familiar with the previous and existing law upon the subjects to which its provisions relate and upon which they express their judgment and opinion in its adoption. (Barry v. Truax, 13 N. D. 131, 99 N. W. 769, 65 L.R.A. 762, cited in Gold Creek Mining Co. v. Rodriguez, et al., *supra*).

Analyzing the Constitutional provisions above cited, the powers of the Auditor General specified are namely: (1) Examine, settle and adjust accounts. (2) Call the attention of the

proper administrative heads to expenditures which he considers irregular, unnecessary, excessive or extravagant. (3) Such other powers as may be granted by law.

'Audit' means examine and adjust (Ynchausti vs. Wright, 47 Phil. 866). 'Account' means something which must be adjusted and liquidated by arithmetical process; a detailed statement of mutual demands in the matter of debt and credit of the parties arising out of contracts or of some fiduciary relation (*idem.*) and if the case involved was the legality of the claim, it would not be an account within the definition. (*idem.*)

It is also settled that where the auditor is not vested with the administrative discretion to pass upon the merits of the claim for which the warrant is drawn, his only function is to determine whether the warrant is drawn by the proper officer upon the decision of the proper tribunal, and is applicable to an existing appropriation and having been satisfied as to these preliminaries, his duty is purely ministerial. (Wright v. Ynchausti, 272 U. S. 640). Discretion as applied to public functionaries means a power or right conferred upon them by law of acting officially under certain circumstances according to the dictate of their own judgment and uncontrolled by the judgment or conscience of others. (Lamb v. Phipps 22 Phil. 456).

And while it is conceded that mandamus will not lie to compel him to perform a discretionary duty, yet it would if the duty were ministerial (Wright v. Ynchausti, *supra,* Hoey v. Baldwin 1 Phil. 551; Lamb v. Phipps, *supra*; Cia Gral de Tabacos v. French and Unson, *supra;* Zobel v. City of Manila 47 Phil. 169). However, the execution and delivery of a warrant for an admitted indebtedness by the Government does not involve the exercise of discretion. (Cia Gral de Tabacos v. French and Unson, *supra*).

The present case being commented upon is not one to compel the Auditor General to sign a warrant against an unappropriated fund for then there could be no question that the Auditor may refuse (Gotamco v. Wright 46 Phil. 467); nor that the contemplated expenditure is for another and different purpose in which case the Auditor may also refuse (Lung Chea v. Wright 46 Phil. 44); but it is one where the only question to be determined is whether the warrant is drawn by the proper officer and is applicable to an existing appropriation all of which are

admitted, so that if he already had satisfied himself as to these preliminaries his duty become purely ministerial (Wright v. Ynchaustic, *supra*).

That the power of the Auditor General expressed under the second group are purely advisory in character being *limited to the administrative department concerned,* and are not applicable to the case could clearly be gathered from the provision itself.

It is to be observed that the Constitution does not speak of disbursement but of "expenditures". "Disbursement" in its ordinary acceptation means the 'act of paying out as money from a public or private chest' while "expenditures" refer to 'money already expended' (Webster's Dictionary). The first would seem to refer to the *act* of handing over an amount of money in contemplation of the payment of a sum due, while the second has reference to a past disbursement or a past act where a sum of money had already been spent or paid over. That the term expenditure as used in the constitutional provision has the meaning as above defined could be further seen from a reference to the whole context. It says: "* * * to *bring to the attention of the proper administrative officer expenditures* which in his opinion are irregular, unnecessary * * *." In fact this has been construed to be limited to administrative or executive officers, (Riel v. Wright, 49 Phil. 194); and it is submitted that the same has reference only to expenditures already made and not one on contemplation of payment of money.

The powers above described being purely advisory and expressly limited to merely *bringing to the attention* of the proper administrative officers expenditures which are unnecessary and irregular, they may not be invoked as a ground for refusal to countersign a check in contemplation of a payment of an obligation due; otherwise not only would 'expenditures' be given a meaning different from its ordinary acceptation but would unduly extend his advisory powers even to affect and prejudice the rights and interests of private individuals, to whom the constitutional provision does not extend and who may have entered into contracts, otherwise valid, with the Government acting thru the Purchasing Agent, but the warrants issued for the payment of which are in his opinion, extravagant, unnecessary, or excessive.

To thus interpret his powers under the Constitution would be inviting of most absurd results, and would make him the most powerful man in the Commonwealth, in fact even dislodge the

Legislature from its controlling position over the disposition of public funds. In fact the Auditor may even nullify all Government projects by refusing to countersign warrants for their payment, on the ground that they are extravagant, unnecessary or even excessive.

Again, let us assume that in the case under review, the contract was novated thru a public bid. Still, under the ruling enunciated by the court the Auditor General may still refuse to countersign the check issued because it may in his opinion be excessive, extravagant, and unnecessary although not irregular.

Examples of the like nature may further be multiplied and it does not require a greater stretch of the imagination to foresee the eventual refusal of any private individual and entity to deal with the government for fear that in the end, the Auditor General may refuse payment of the Government obligations on any of the grounds above referred to; or it may even be duly extended to government employees who may not receive their salaries at all because in the opinion of the Auditor, their salaries are too high, hence excessive. It is believed that the case did not call for the application of the advisory powers of the Auditor General, and the consequent broad and unprecedented doctrine enunciated may have been avoided by invoking the powers of the Auditor General under the third class; namely, that he shall perform such other functions as may be prescribed by law, and this would necessarily bring us back to where we started, the validity of Executive Order No. 16 in so far as it affects third persons.

MELQUIADES M. VIRATA, Jr.