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NOTE AND COMMENT

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JUDGE CHARLES SUMNER LOBINGIER

In the August issue of the Green Bag appears a short biography, together with a picture as the frontispiece, of one of the foremost Professors of the College of Law, Judge Lobingier. In the belief that it will be of much interest to his old pupils who sincerely regretted his departure, we publish the article in its entirety.

"The United States Court of China has for some time been presided over by Honorable Charles S. Lobingier, lately Judge of the Court of First Instance of Manila. He was the first United States judge to take the oath of judicial office in the Philippine Islands and an interesting ceremony occurred at Manila on February 14, 1914, when the oath was administered by Hon. Cayetano S. Arellano, Chief Justice of the Philippine Supreme Court, and the Bar of Manila assembled to felicitate the new Judge of the United States District Court of China. In a personal letter the Chief Justice expresses himself as follows:

Manila, February 14, 1914.

My dear Judge:

'While on the one hand I regret that you are severing your connection with the Judiciary of the Philippines, yet on the other it can only be a matter for congratulation that you have merited at the hands of the President of the United States an appointment

conferring so much honor as that to the bench at Shanghai. It is a great pleasure to me to tell you how estimable and commendable are the qualities of zeal, intelligence and rectitude which you have brought to the exercise of your judicial functions, and of the reputation you enjoy as a jurist by reason of your legal works. I trust they will prove to be a happy augury of still greater successes in your new position.

Sincerely yours,

CAYETANO S. ARELLANO,
 'Chief Justice.'

"A banquet was tendered Judge Lobingier on the evening of February 13, by the Manila Bar, which drew up suitable resolutions that bore witness to the 'conspicuous ability and enlarged spirit of an upright judge inspired by an innate sense of justice and enlightened by extensive learning.'

"Charles Sumner Lobingier was born at Lanark, Illinois, April 30, 1866, and is therefore 48 years old. His education was obtained at the University of Nebraska, where he received the degrees of A. B. (1888), A. M. (1892), and LL. M. (1894). His home is in Omaha where he practised law from 1892 to 1902. Before entering on the practice of law he had served as Asst. State Librarian and Reporter of the Supreme Court of Nebraska. From 1900 to 1903 he was Professor of Law in the University of Nebraska which conferred on him the degree of Ph. D. in 1903. He was a member of the Nebraska Supreme Court Commission in 1902-1903, becoming Judge of the Court of First Instance of the Philippine Islands in 1904. He married Ellen Ballou Hunker November 31, 1898.

"While in the Philippine Islands Judge Lobingier was Chairman of the Commission to codify the laws of the Islands in 1907, and was also a member of the law faculty of the University of the Philippines. He is the author of the following works: Stocks and Stockholders (1892), Constitutional Law (1898), Equity (1899), Foreclosure (1900), Insurance (1901), Evidence (1903), Philippine Practice, second edition (1907), the People's Law (1909), and Territories (1910). He has also contributed numerous articles to legal encyclopedias and law journals. Judge Lobingier is a member of the National Conference on Uniform State Laws, the editorial staff of the Comparative Law Bureau, and the General Council of the National Economic League. He lectured on civil law in American Universities last year."

IS THE JUDICIARY REORGANIZATION ACT INVALID?

This startling question has been submitted to our Supreme Court in the case of *Eustaquio Conchada v. The Director of Prisons* for habeas corpus by attorneys Reyes & Miller and Mariano Albert. It will recall the point in *United States v. Beecham* contended for by the late Judge Waite

that the Insular courts were not constitutionally organized. The argument in the able brief of counsel in the Conchada case is: 1. That the Philippine Legislature has no power to limit the jurisdictions of the courts constitutionally created by the Organic Law, much less to abolish, extinguish or destroy those courts. 2. That the Philippine Legislature has no power to remove the judges appointed, under the Organic Law, to preside over the courts created by the same law, without abolishing the courts of which they were judges. 3. That the Philippine Legislature, by Act No. 2347, has provided for the complete extinction, abolition or destruction of the constitutional courts created by the Organic Law, and substituted for them other courts of its exclusive creation. 4. That the removal of judges, together with all the officers and employees of the old courts, and the limitation of their jurisdiction to specified pending causes, necessarily imply the destruction or abolition of those courts. 5. That the courts "organized" by Act No. 2347 are not legally constituted, and the judges appointed by virtue of said law have no jurisdiction to try and sentence the petitioner.

It is contended that the Philippine Bill, if it did not create, undoubtedly gave constitutional existence to the courts organized under Act No. 136 and it has been held by our Supreme Court that the Philippine Legislature can not diminish the jurisdiction of those courts, though it may increase their jurisdiction. Consequently the Legislature has no power to abolish those courts entirely. It is further contended that the power to appoint and remove judges does not belong to the legislature, but was conferred by the Organic Law on the Governor-General with the consent and approval of the Philippine Commission. Section 24 of Act No. 2347 supports the third proposition, since it provides for the transfer of jurisdiction to the courts newly created. To give effect to this law means, according to counsel for petitioner to place the Judiciary under the control of the Legislature who may at any time remove a judge at its pleasure. The court, as a judicial body, is constituted by the judge with its jurisdiction, and the officers required to certify his acts and to carry out his judicial determination, all of which were abolished by Act No. 2347. The Legislature would not have created the new courts, had they known that they had no power to abolish the old courts. Hence if the Act is null and void as regards the latter, it must also be unconstitutional as to the former.

The reply of the Attorney-General and the decision by the Supreme Court will be awaited with interest.

GEMS OF ORATORY AND SELECTIONS FOR PRACTICE
IN ELOCUTION, *Wright*

The author is Wallace L. Wright, formerly Instructor in Public Speaking in Valparaiso University and in the University of the Philip-

pires, now head of the Wright School of Oratory, Manila. According to the preface, the book is designed especially as a collection for class drill, and practice exercises for students of elocution and oratory. It should prove of value to students and lawyers.

RECENT CASES

DECIDED BY THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

NEGLIGENCE; ORDINARY CARE; INTOXICATION.—Mere intoxication is not negligence, nor does the mere fact of intoxication establish a want of ordinary care. It is but a circumstance to be considered with the other evidence tending to prove negligence. It is the general rule that it is immaterial whether a man is drunk or sober, if no want of ordinary care or prudence can be imputed to him, and no greater degree of care is required to be exercised by an intoxicated man for his protection than by a sober one. (85 Wisc. 601; 61 Tex. 613; 3 Allen 402; 93 Ca. 488; 115 Mass. 239; 40 Mo. 151; 33 Ill. App. 114) *E. M. Wright v. Manila Electric R. R. & Light Co.* R. G. 7760. Justice Carson dissented on the ground that the trial Judge found that had the plaintiff been sober, the accident would not have happened, which according to him is a finding of the fact of negligence, the evidentiary facts not being required to be stated.

EVIDENCE; JUDGMENT, WHEN RESERVED.—The majority opinion in the case of *The Municipality of Masingal v. The R. C. Bishop of Nueva Segovia*, R. G. 9117 held that it is a settled doctrine that the findings of facts of the trial judge must be sustained and the judgment affirmed if, upon review, they are found not to be plainly and manifestly against the weight of evidence. (*Riobo v. Hontiveros* 21 Phil. 31; *Villagracia v. Ulibare* 24 Phil. 371) Moreland, J. with whom Carson, J. concurred held that the settled doctrine of the adjudicated cases is that the Supreme Court will reverse the decisions of the lower court if not supported by a preponderance of evidence.

WILLS; LEGACY TO PRIESTS.—Article 752 of the Civil Code has not been repealed by Section 622 of the Code of Civil Procedure. The sections deal with different matters and are not inconsistent with each other, both of which elements must concur in order to repeal a law by implication. Consequently a legacy in favor of a corporation to which the priest who confessed the testator in his last illness belongs is null and void. Nor is the plaintiff estopped from contesting its validity by the fact that he consented to the distribution of the property according to the will, it having been proved that he was a minor at the time and was not represented by

any person in the trial. (*Jose Calderon v. La Provincia del Santisimo Rosario de PP. Dominicos en Filipinas*, R. G. 9475).

ADMINISTRATION OF ESTATE; PROPERTY IN POSSESSION OF THIRD PERSON.—There is nothing in section 709 of the Code of Civil Procedure which authorizes the court to take possession of the property, if any should be found in possession of the defendant or of the person cited. If, upon hearing, there was good reason for believing that the person cited has property in his or her possession belonging to the state, then it was the duty of the administrator to proceed by an ordinary action to recover possession of the same. The Supreme Court, however, did not reverse the lower court, ordering the surrender of the property, on account of which Moreland, J. dissented and said "To admit that the trial court committed errors in its decision and then allege that 'they are errors which may be corrected in subsequent proceedings', and, upon this allegation, refuse to correct them when they are the sole reason and basis of this appeal, is to pervert the purpose of appeals, to deny appellant the remedy which the law concedes, and to assume to name the cases in which the law shall apply." (*Prospero K. Alafritz v. Pia Mina*, R. G. 8231.)

ESTAFÁ; VICTIM NOT OWNER.—The crime of estafa is committed, although the victim was not the owner of the property, but the holder or broker simply, when it appears that the real owner was prejudiced by the disappearance of the property. (*United States v. Vicente F. Sotelo*, R. G. 9791.)

DECIDED BY THE SUPREME COURT OF SPAIN.

LEGITIMATION; BY WHOM DISPUTABLE; ADULTEROUS CHILDREN.—Some adulterous children were unduly legitimized by the subsequent marriage of their parents. When the father died, leaving no descendants, he instituted them his exclusive heirs, with the provision that he bequeathed such property to them, even if no blood relation existed. A niece subsequently challenged the legitimacy. The Supreme Court held that she had no right to bring the action, because it only belongs to those who consider their rights impaired or whose rights are actually prejudiced by the legitimation, (*Sentencia de 24 de Diciembre de 1913*). But those children under the Civil Code, can not be legitimized on account of their character of adulterous children. Notwithstanding this fact, the court allowed the matter to stand, there being no remedy or means furnished by law to dispute their legitimacy.

RESCISION OF FRAUDULENT ASSIGNMENT OF CHOSE IN ACTION (SIMULACION DE CREDITO); ACCION PAULIANA.—*Accion pauliana* is a remedy by which strangers to a contract of sale, real third persons, have, nevertheless,

a right to ask for rescision by reason of the damage caused to their rights, as creditors of the vender, and of the fraudulent intent of the latter. (Sanchez Roman Vol. IV, p. 238, second edition). According to article 1294 of the Civil Code it has a subsidiary character. Where a husband sold a claim to the prejudice of his spouse, by reason of his duty to support her during divorce proceedings, the Supreme Court of Spain in a decision handed December 13, 1913 held that the accion puliana though subsidiary in character, can subsist alone and may be availed of in the case at bar, the defendant knowing positively the impossibility of supporting his wife without collecting such claim, and the latter having no other remedy to obtain support.

ALUMNI

(Alumni are requested to contribute to this department.)

JOSE A. ESPIRITU, 1913 Law	<i>Editor</i>
<i>Board of Directors, College of Law Alumni Association</i>	
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AURELIO A. TORRES, 1914 Law	<i>Member</i>
JOSE YULO, 1914 Law	<i>Member</i>

OPENS LAW OFFICE

We clip the following from the *Iloilo Enterprise Press*:

Mr. Jorge B. Vargas, who has been admitted to the bar, recently, has opened a law office at No. 23 Calle Rizal, this city, where he will be at the service of all who desire legal advice.

Mr. Vargas, is one of the few who have been lately examined before the Supreme Court of the Philippines, and we bespeak for him success in his line of work.

NEWS FROM THE CLASSES

1913.

Serafin P. Hilado, has been heard from, at Ann Arbor, Michigan, where he is hustling the West and showing the Michigan law faculty the kind of stuff the Philippines turns out.

John C. McMahon, another of the "round the world" tourists, has returned to take up his judicial duties with Justice Moreland.

Quirino Abad Santos reports that, during his first month of practise at San Fernando, Pampanga, he had six cases.

Albino Z. Sy Cip and Francis B. Mahoney, two of the review members of the class, have hung out their shingles in Manila; the first as a member of the firm Williams, Ferrier & SyCip, and the latter as a partner of J. Courtney Hixon.

And just to think, *every* member of this famous class is a full fledged *abogado*.

1914.

Gregorio Córdova—where is Gregorio?

Goyena & Ramos, Attorneys-at-Law, Manila, P. I.

Ricardo C. Lacson is practising with his brother in Manila.

Anatalio Mañalac is associated with Williams, Ferrier & SyCip in the practice of the law.

H. Lawrence Noble has received merited recognition by being called to the Varsity faculty where he is taking over the work formerly handled by Dean Colbert. O! Yes!—I nearly forgot—but H. L. N. has a young Marshall in the family circle.

Jorge B. Vargas is crowding the lawyers of Iloilo.

José Yulo sticks to the old school as librarian of the college.

WRITE THE ALUMNI EDITOR!

COLLEGE NEWS

VICTORIANO YAMZON, Senior

Editor

Student Council

THE DEAN, College of Law,	<i>Chairman ex-officio</i>
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PROCESO SEBASTIAN,	Master Musician, College of Law Musical Club
MARCELIANO MONTEMAYOR, Board of Control, University Athletic Association	

COLLEGE PARTICIPATED IN DEMONSTRATION

On October 11, the students of the College of Law took part in the monster demonstration held in Manila to celebrate the first anniversary of the arrival of Governor-General Francis Burton Harrison in the Philippines. The parade was spoiled in some degree by the rain that fell in the afternoon, but in spite of the shower, there was the necessary contingent of law students to participate in the demonstration. A bouquet was presented to Mrs. Harrison at the Palace, with a letter felicitating her and her husband on the happy anniversary of the first year of their coming to the Islands.

Mrs. Harrison sent a letter the following day, thanking the students of the College for their courtesy.

KALAW LECTURED ON MALOLOS CONSTITUTION

There was a flutter of surprise on the evening of Saturday, October 17th, when Teodoro M. Kalaw, secretary to the Philippine Assembly and former assemblyman from Batangas, came into the Assembly Room of the University Hall, accompanied by such distinguished men as Executive Secretary Ignacio Villamor, Commissioner Rafael Palma, Assemblymen

Ruiz, Platon, and Villanueva, to lecture on the Malolos Constitution. The speaker was introduced by Dean Malcolm, who incorporated in his remarks a short reference to the qualifications of the lecturer, whom he referred to as a professor on constitutional law at the Escuela de Derecho.

Mr. Kalaw entered upon the discussion of his subject with a lucidity that was characteristic of the speaker. Before taking up the constitution proper, he discussed the events that led up to the convention called for the purpose of drafting the document. He then took up the most important articles of the Filipino constitution, discussing them as a whole and contrasting them with the provisions commonly found in the modern constitutions of the world.

Although the lecture was given in Spanish, the students understood every word of what the lecturer said. There was in his delivery such earnestness and conviction that at the end of his address, he was given an ovation seldom heard in University Hall.

THE PHILIPPINENSIAN

The Board of Control of the Philippinensian decided at a recent meeting to levy a contribution of ten pesos on each member of the graduating class of the University. This step has been found necessary in order to enable the Board to publish a good annual, which would be impossible to do under existing conditions if reliance be placed entirely on receipts from the sales of copies and from advertisements. This sum includes a copy of the annual, the cut and the student's picture. Members of the University faculty as well as the members of the Board of Regents have also been requested to contribute, and in no instance has the request been disregarded.

The annual will be published in regular book form, equal in size to the annual of the University of Chicago, but containing only 300 pages. There will be articles by the Chairman of the Board of Regents by the President of the University, as well as special departments for each of the colleges that compose this institution. The departments will appear in the order of their establishment. The Philippinensian will be dedicated to the Filipino People.