Notes and Comments

The Juristic Philosophy of Justice Victorino Mapa

INTRODUCTION

Man accepts the idea of his mortality as one of the inflexible laws, to which, all persons, from all walks of life, must submit. From the very moment of birth, man drags himself laboriously and painfully into the certainty of death. Beyond that, the lives of men lose their fixity of pattern. By accident of birth or by sheer determination, some men rise into public favor or attain immortality by leaving their imprint on the history or culture of the people, most men die as they have lived, quietly nestled in the obscurity of the majority. It is, therefore, no surprise that the actuations, the views and the philosophy of a man can best be understood by tracing back his life in order to determine with a certain measure of accuracy, the reason and basis of his conduct. It would, therefore, have simplified my work, if a complete biography of the life of Justice Victorino Mapa were available, so that a plausible explanation of his legal views could be gleaned therefrom. However, a dearth of material on the life of Justice Mapa has plagued and hampered my efforts and the little that I have gathered constitute but fragmentary sketches of his life and the scanty account of the various positions that he had occupied in the government. The records show that Justice Victorino Mapa was born in Calivo, Capiz on February 25, 1855. He was appointed by the President of the United States, along with three other eminent Filipino jurists, Cayetano Arellano, Manuel Araullo and Florentino Torres, as Associate Justice of the Supreme Court of the Philippines on June 17, 1901, and served in that capacity until October 30, 1913, when he was appointed Secretary of Finance and Justice. On April 23, 1920, he was appointed Chief Justice, which position he occupied until October 31, 1921, when he resigned on account of ill health. On April 12, 1927, he passed away.

As a consequence of the foregoing, I am constrained to adopt the method of analyzing the decisions of Justice Mapa as they are reported in the Philippine Reports and to deduce therefrom his life and his

juristic philosophy. Thus, this is in the main, a study of the works with a view to understanding the man rather than the study of the man in order to understand his works.

HIS PHILOSOPHY

The Judiciary, by the very nature of our government, becomes a citadel of truth, freedom and justice. From all corners of the land, the people apply to the courts for the vindication of their rights, the redress of their grievances and the settlement of their conflicting interests. When the confidence of the people in constitutional and legal processes is shaken, when their doubts and fears are not resolved by the courts because the judges are inept, corrupt and recreant in the performance of their duty to the people and to the nation, a democracy dies of a violent revolution at the hands of its own people. When the judiciary is strong and vigorous, ever vigilant in its fight against all forms of oppression, iniquities and social disorders, the faith of the people in the supremacy of the law and the authority of the government is upheld and the democracy lives to spread its blessings on its fortunate citizens. It is therefore imperative that the judiciary be composed of upright men whose erudition and impartiality be beyond question. Such a man was Justice Victorino Mapa, whose life and whose works are a distinct credit to the bench and to the nation. His intellectual powers and scholarship was matched only by his integrity and honesty. His writings are a tribute to his sagacity and wisdom. A man of Justice Mapa's stature would do honor to any court in any land. His participation in the deliberations of the highest court of the land, first as Associate Justice and later on, as Chief Justice, on his return to the rostrum from the Secretaryship of Finance and Justice has influenced in no small measure, the decision of the Supreme Court in the cases brought before it and a perusal of the first 26 volumes of the Philippine Reports and Volumes 41 and 42 thereof impresses the reader with Justice Mapa's contribution to law and legal progress.

The cardinal duty of the courts is to hear and settle controversies before it by an application of the law, when the law is clear or by judicial construction and interpretation when the law is shrouded in ambiguities or obscurities. That is the essence of judicial duty and in the performance of that duty, a judge must hand down a decision that clearly adjudicates the issues presented by the contending parties in a manner that forcefully and definitely lays down a rule or a precedent for future cases. Although law is dynamic and responsive to the exigencies of the time, it is at once stable and firm and the courts lay down the rules of law as a guide for future conduct. The people have a right to an assurance that cases of the same nature and class happening under the same conditions will be decided the same way unless some

consideration of public policy rule otherwise. In the performance of this high duty, Justice Victorino Mapa excelled himself. He decided cases with a clear insight into the issues involved and wrote with such clarity of expression and thought that even a layman could understand his views. He wrote with such conciseness and brevity which could only be done by a man with a mastery of the intricacies of the law, who was sure of his ideas and sure of his words to express them. In his expert hand, the law was not a monstrosity, that snared its unsuspecting victims in its web of intricacies and ramifications, but a clear beacon for reason and justice. From the mace of evidence that a case usually partakes, he sorts the facts pertinent to the issue and simply applies the law properly applicable to the situation presented. His brilliant mind, unfettered by prejudice or bias, produced simple and logical solutions out of the confusion of facts and matters that attend every case that reaches the courts for decision.[1]

Like other great men, Justice Mapa belonged to "that type of men of concentrated intellectuality, who live much within themselves." [2] He was a quiet man who shunned social activity and felt much better off, left to himself and his profound thoughts. This characteristic of Justice Mapa enabled him to develop to a marked degree, "the unalterable serenity of a good judge, which, at all times, enabled him to scrutinize without obfuscation, the whys and wherefores of things and the motives of human actions".[3] This great asset of Justice Mapa, his very strength, was also the source of his weakness, which is easily discernible in some of the opinions he rendered in the field of Criminal Law, with special reference to what constitutes self defense. It is my belief that in deciding cases of this nature, when a judge has to determine whether the acts of the accused are justified as a measure of self defense and the means he employs are reasonably necessary to repel the aggression on the part of the deceased, a study of human nature and the reaction of the average individual to the situation presented is of great importance. The judge has to project himself in the place of the defendant and determine whether it would be a perfectly natural reaction on his part to do the act done by the accused on the occasion; if it were so, then the defense was justified; if not, then the crime was in fact committed and the claim of self defense must be denied. Justice Mapa's approach to the subject was always logical and reasonable, that I have to concede. I agree with him that as a general rule, "the mere attitude of attack does not itself constitute a real attack, that conclusive and positive aggression which justifies the defense of one's person".[4] It is equally true that when the deceased, having wounded the

[1] In Memoriam, Juan Sumulong, 49 Phil. xx.
[2] In memoriam, Juan Sumulong, 49 Phil. xx.
[3] In memoriam, Juan Sumulong, 49 Phil. xx.
[4] U. S. vs. Ferrer, 1 Phil. 57, 60.

defendant and his wife with a bolo and having unsuccessfully attempted to rape the defendant's wife and having continued the aggression up to the point of engaging the defendant in hand to hand combat, the defendant acted in self defense when he killed the aggressor with the same bolo with which he had been attacked and wounded, because you cannot require a man who finds himself so forcibly and persistently attacked as was the accused to retain the presence of mind necessary to pick up and choose and to employ some other less violent means, especially when we bear in mind the natural rapidity with which the defense must be made if it is to succeed in repelling the aggression.[5] It is also clear that a person is entitled to the claim of self defense when he was pursued by the deceased with a knife after having beaten him with impunity because the accused has a right to believe that his life was in immediate peril and that he had no choice but to kill or be killed by the deceased with the deadly weapon with which he was being attacked and pursued. The knife was the only weapon used during the struggle and it necessarily had to be either in his possession or in that of the deceased. If through a fortunate accident he came into the possession of the knife, he could have lost control of it through a similar accident and then found himself at the mercy of his assailant. Therefore no recourse was left to the accused but to render his assailant powerless in order to nullify the aggression and save himself.[6] In all these cases, the reason for the conduct of the accused is so patent, the principle involved so elementary that it admits of no conclusion other than that the acts were done in self defense.

By reason of Justice Mapa's mild temperament and his calm judicious manner he considers a man, quarreling with another, unjustified in using his dagger upon the deceased, who attacked him from behind with a piece of bamboo because in so doing, he exceeded the limits of the necessity of the defense due to the fact that the weapon was insufficient to put defendant's life in eminent peril, more especially because of the insignificance of the attack itself, for the blow rendered the defendant did not even bruise him.[7] Perhaps the view held by Justice Mapa is motivated by impelling moral reasons that look with disfavor on any attempt by a person to take away the life of another and would only grant the benefit of the justifying circumstance of self defense where the defendant is clearly within the provisions of the law. But again, that would be begging the very question at issue because the defendant is entitled to the plea of self defense when he has shown the reasonable necessity of the means he employed to repel the aggression. What means are reasonably necessary in order to ward off the aggres-

[5] U. S. vs. Juan Salandanan, 1 Phil. 478, 479.
[6] U. S. vs. Patala, 2 Phil. 752.
[7] U. S. vs. Juan de Castro, 2 Phil. 67, 70.

sion? This is a question of fact to be decided, taking into consideration, the circumstances under which the attack was made, the natural excitement that usually attends a quarrel, the position of the combatants and the danger which the situation presents to the defendant. If we were to look at the case from the disparity between the deadliness of the weapon employed by the deceased and the weapon used by the defendant, together with the resultant effects of their deeds on their persons, then the opinion of Justice Mapa could clearly be sustained. However, we cannot be oblivious to the fact that other factors are at play in a situation of this character. At the time that the defendant was attacked by the deceased, he was busy fighting another adversary and his mind and his sensibilities were naturally clouded by passion. The deceased struck him from behind with an admittedly minor weapon, a piece of bamboo. Was not the accused, under the circumstances, entitled to a belief that his life was endangered by the attack waged from behind? Did the accused not act upon an impulse so strong and irresistible that we cannot reasonably expect him to shelve his knife in order to find a weapon less deadly? To ask these questions is to answer them. The suddenness of the attack and the tension of the fight would not permit the accused to discern that the weapon with which he was attacked was not a lethal weapon and since he was already under pressure from his first opponent, he had a clear right to eliminate either of his antagonists and thus reduce the odds against him. In another case, when the defendant armed with a club and a knife clubbed the aggressor causing his death, after the latter had taken him by the neck, after having beaten and kicked him, Justice Mapa justified the defense because the accused only used the club and not the knife on the ground that with the natural excitement which such unexpected assault produces, he could not defend himself otherwise than as he did and added further that if he had intended to do something more than repel the aggression, he would have used the knife instead of the club.[8] The implication given in this case is that if the defendant had employed the knife, it would no longer be a justified case of self defense. This reasoning gives rise to many interesting propositions. Suppose the accused was right-handed, as is usually the case, and he held the knife with the right hand and the club with the left hand, at the moment that he is being held by the neck after having been beaten and kicked, would be not, in the normal course of events ward of the attack of his aggressor by slashing with the knife on his right hand, the hand that he more often than not and most conveniently uses? I believe that he would and would still be acting in self defense. Aside from the fact that he would instinctively use his right hand and would not and could not exchange weapons from one hand to the other, even granting that the thought could have entered his mind

[8] U. S. vs. Sosa, 4 Phil. 104, 105.

at the precise moment of attack for the simple reason that he could not take the risk of affording his enemy a chance to wrest the weapons away from him in so doing and thus expose his person to a further and more serious assault. Independent of these considerations, I believe that it was reasonable for the accused to conclude that the dogged and persistent attack of the deceased would not terminate until the latter succeeded in killing him, after the mauling that he received without let up and the accused had to defend himself in the best possible manner. A man, who acts in his defense naturally choses the course that would successfully prevent or repel the attack against him. A person in danger does not err on the side of conservatism. If he struck the deceased with the club held by his left hand, he had no assurance that he could render a blow that would insure the neutralization of the aggressor's attack against him. Justice Mapa had a very clear mind, that worked efficiently, even under the stress of sudden and violent emotions, a mind that was calm and searching, accounting for his inability to justify the conduct of other man less gifted. His standard of conduct determinative of the cases brought before him was influenced unconsciously by his own reactions to the same attending circumstances, which was far from being the reaction of the average individual.

There were instances when Justice Mapa was prone to adopt too rigid and literal an interpretation of laws and contracts. The contract is the law between the contracting parties and the parties must abide by the terms of their agreement because the contract is presumed to contain the purposes and intentions of the parties. However, a strict and literal interpretation of the contract and a rigid adherence thereto is not at all times productive of good results and does not necessarily reflect the true intentions of the parties. In a case,[9] Justice Mapa ruled that when the defendant employed the plaintiff to sell his goods at public auction to the highest bidder on a commission basis on all goods sold therein, the fact that the defendant authorized an agent to buy at such auction in order to boost the prices of the goods by inducing the other buyers to increase their bids and to facilitate sales, does not affect the right of the plaintiff auctioneer to exact a commission on the goods bought by said agent. He reasoned out that the fact that the agent was the successful bidder does not affect the right of the plaintiff, because under their contract, the work of the plaintiff was fully accomplished upon the sale of said goods being made, whoever the successful bidder may have been. True, the auctioneer's right to a commission accrues once a sale has been made but in declaring that the auctioneer had earned the commission from the time that the sale was made to the agent, Justice Mapa assumed the very fact at issue. Under the law, the auctioneer could not have earned his commission because in truth and in

[9] Teran vs. Seldner, 10 Phil. 726, 728.

fact no sale was made by the auctioneer in the instant case. Under art. 1455 of the Civil Code, "By the contract of purchase and sale one of the contracting parties binds himself to deliver a determinate thing and the other to pay a certain price therefor in money or in something representing the same." The law contemplates of two parties to the contract, the vendor and the vendee. Under the facts, the defendant is the vendor and the auctioneer only acts as his agent in the sale of his property. If we consider the sale to the agent, who buys upon the express authority of his principal, who is at once the vendor as valid and subsisting in order that the auctioneer's right to a commission would be established, we would have the anomalous situation of a principal selling to himself. A sale to one's self is not only void—it is "inexistente" The incongruity is so obvious as to require no further elucidation. Therefore, since no sale to the agent was in fact consummated, no right to a commission accrues to the auctioneer. The facts of the case as reported in the decision do not show whether the auctioneer had any previous knowledge of the authority given by the principal vendor to the agent for the purpose of buying at the said public auction. I think that his knowledge of the agency is material to the question because if he knew that such an agency existed, and that the purpose was to encourage bidding and to boost the prices, the effect of which would be to proportionately increase his commission on the goods sold to the buyers influenced thereby, he cannot be heard to say that such a transaction was a valid sale that would entitle him to a commission. However, if it is established that he had no prior knowledge, is there anything under the law that would bar the defendant to introduce evidence, that no sale was validly made? I think none. Of course, the argument can be raised that if we allow the principal-vendor to introduce evidence of such an agency, it would open the door to collusion between the vendor and the buyer in order to deprive the auctioneer of his justly earned commission. We cannot premise our arguments on an abuse. In such an eventuality, the auctioneer has the right to prove the non-existence of the agency and to show that it is but a fraudulent scheme to escape the obligation of paying him the commission for the services he has rendered. Until he succeeds, the agency as established by the principal-vendor and the agent-buyer should stand and the alleged sale considered as not existing.

A discussion of the principles involved in the case of U.S. vs. Navarro [10] is at presently purely academic because the law on illegal detention under which the accused was charged has already been abolished from the Revised Penal Code, as amended by Republic Act No. 18. However, I will endeavor to analyze the dissenting opinion of Justice Mapa in the said case with a view to showing his dexterity and mastery of the science of the law, his scholarly treatment of the subject matter

[10] U. S. vs. Navarro, 3 Phil. 143, 166.

and the stand he has taken on the subject. The decision of the Supreme Court in the case was promulgated on January 11, 1904. Those early days of the American regime were trying and exacting days for the said body. It was their difficult task to decide the cases under our old legal system in the light of American democratic principles which were transplanted here by the advent of American Sovereignty. The provision of law disputed in the case was the second paragraph of Article 483 of the Penal Code which provided that one who illegally detains another and fails to give information concerning his whereabouts or does not prove that he set him at liberty, shall be punished with cadena temporal in its maximum degree to life imprisonment. In other words, the policy of the law is to mete out a heavier penalty to the accused in cases wherein he fails to give information concerning the detained person's whereabouts or does not prove that he set him at liberty. The majority of the court ruled and rightly I believe, that the effect of the said provision of law was to compel the accused to testify against himself and that under enlightened principles of American law carried into the Philippines by the Act of Congress of July 1, 1902, no presumption of guilt should attach from the defendant's failure to testify.

In a masterful dissertation, Justice Mapa dissented from the ruling of the majority and tried to defend the law and partly the judicial system and procedure existing previous to the American regime. By his superb technique he tried to reconcile even the fundamental differences between the two legal systems but his failure to convince the other members of the court only goes to prove that legal niceties and the vastness of legal knowledge cannot overcome fundamental principles presented by the issues. Justice Mapa was trained under the Spanish background accounting for his attachment to the system in which he had acquired such a proficiency and versatility that was undisputed by both members of the bench and the bar. He wrote, "But it is said that if the accused does not give information of the whereabouts of the person detained, or does not prove that he set him at liberty, he becomes subject to the penalty of par. 2 of Art. 483, which is much heavier than that prescribed by Arts. 481 and 482, to which he would be subject in the contrary case. x x x what is therein punished is the disappearance of the person detained. This is it which constitutes the crime defined in that article, and this it is which must be proven by the prosecution. If the prosecution does not prove the detention of the supposed victim, and does not moreover prove his disappearance, no matter how complete the silence of the accused or how obstinate his refusal to give information as to the whereabouts or liberty of the person detained, there can be no possibility of his conviction under the article in question. This conclusively shows that the ground of the conviction would not be the silence of the accused but the proof offered by the prosecution upon the

two facts abovementioned, which are, as we have stated, essential elements of the crime." He believes that the testimony of the accused is voluntary and optional and that the law merely gives him this means of defense. In other words, if the accused believes that he cannot avoid conviction because the evidence of the prosecution is overwhelming, he may avail himself of the benefit and elect to suffer the lesser penalty. His ideas are plausible and his reasoning convincing, but when we look at it from a more practical aspect, we can discern its weakest point. Under our procedural law, the complaint or information must contain all the essential elements or ingredients of the offense. Thus if a man is prosecuted for homicide and in the trial that follows it is established that the crime which was in fact committed was murder because of the qualifying circumstances established during the trial, he cannot be convicted of murder but of the crime originally charged and for which the man was tried. Following the same line of reasoning, if the prosecution desires to prosecute the accused for illegal detention and the fact of the victim's disappearance has not been explained, the complaint necessarily will have to charge the commission of the offense defined by par. 2 of Art. 483. What is the effect of such a complaint or information. If the accused keeps his silence during the trial and the state proves that he was responsible for the illegal detention and the defense fails to produce the victim at the trial or give information as to his whereabouts or that he was set at liberty, the fact of the illegal detention and the consequent disappearance of the victim, the essential elements of the offense are deemed proven and the accused is guilty of the crime. Therefore, the accused is compelled to divulge information regarding the whereabouts of the person detained or prove that he set him free. The reasoning advanced by Justice Mapa that it is a defense available at the option of the accused when he finds that the evidence for the prosecution show clearly the fact of illegal detention so that he may volunteer the information and elect the lighter penalty is not sound. If the fact of the illegal detention is not conclusively shown by the evidence of the prosecution, the accused does not go scot free in spite of his silence and refusal to testify. He is acquitted because no crime was in fact committed. When the government cannot even establish a prima facie case of illegal detention, no defense is actually necessary and the refusal to testify does not work to the prejudice of the accused. It is when illegal detention has been committed when Art. 483 works to the prejudice of the accused and compels him to testify and admit his guilt as to the illegal detention in order to secure a lighter penalty. The choice as to him becomes a choice between two evils.

One of the most interesting cases decided by Justice Mapa deals with the right of an administrator to lease the property under his administration. The case was one of many cases of the same nature

that arose out of contracts of lease executed by the administrator of the San Lazaro Hospital, without any special authority to do so.[11] In this particular case, the administrator, without any special power, leased the property under his administration for a term of ten years. Since the power to lease the property under his care, without special power, could only be exercised by him for a period not exceeding six years under the law, the contract in question was disputed and in deciding the case, Justice Mapa declared that since the power of the administrator to lease for a period not exceeding six years is authorized by law, to that extent, the lease was valid and that in so far as the lease was in excess of that period, the lease was void. He laid as the foundation of his reasoning, the fact that the contract of lease is capable of partial fulfillment. Such a conclusion by the court finds no support in law as I will presently point out. The fact that the administrator had authority to lease the property for a period not exceeding six years is not determinative of the issue and is not worthy of consideration because the administrator did not chose to contract within the scope of such authority. The issue squarely presented is whether or not the contract of lease executed between the parties for a term of ten years is valid or not. And on this issue I believe that the conclusion is irresistible that the contract in its entirety must be declared valid or void as the case may be. The parties contracted for ten years; if such a contract is unauthorized then the whole contract is void. Because the administrator could have validly leased the property for six years is no reason why it should be declared partly valid for that length of time and void as to the remaining excess. If we construe it to mean that it is valid for six years, what would be the basis of the lease? The mere authority of the administrator to execute the lease does not by itself operate to give life to the lease. The contract of lease executed by the parties cannot justify its validity because the contract is an unauthorized contract done in excess of the authority of the administrator. In so contracting for a term of ten years, the duration of the lease may be one of the principal inducements to enter into the contract considered in the light of its other terms and conditions. Even the rental stipulated may have been calculated by the parties at that basis. Common business practice will show that the rental charged for a period of a few months are generally higher than rentals stipulated for a long period of time. If the contract was not for ten years, in all likelihood, one of the contracting parties would have desisted from entering into such a contract. This discussion points to only one conclusion: that since the contract executed was not within the scope of the authority of the administrator, it was void in its entirety until ratified by the principal or a person duly authorized by him, and since there was no ratification, the contract remains void.

[11] Tipton vs. Cenjor y Cano, 6 Phil. 64, 65.

To this day, the cases decided by Justice Mapa on easements remain as the most exhaustive and erudite exposition on the subject.[12] He was not a prolific writer. He, comparatively speaking, penned very few decisions, only about three hundred cases for the considerable length of time he spent in the judiciary. His works were generally brief but in deciding the said cases he dwelt at length probably because of a consciousness of the importance of the subject or his desire to settle the question once and for all. In the writing of this decisions, I consider Justice Mapa to have been at his best, and that he made use of his great talent in treating this difficult subject. His logic is irrefutable when he argues that the easement of lights in the case of windows opened in one's own wall is of a negative character because the owner of the servient estate subject to such an easement is under no obligation to allow anything to be done his tenement, nor to do anything thereon which may tend to cut off the light from the dominant estate, which he could have legally done, were it not for the existence of the easement. He clearly stated that in the easement of light from windows opened in one's own wall, the acts of the owner of the dominant estate are simply acts of ownership because the easement is negative in character and that therefore, such an easement cannot be acquired by prescription except by commencing the time of possession from the date, when the owner of the dominant estate, by a formal and unequivocal act prohibits the owner of the servient estate to do something, which would otherwise have been lawful for him to do, were it not for the easement.[13]

Justice Victorino Mapa has long since died, but his spirit and his philosophy lives and defies the onslaughts of time, and the shocks of modern changes that seek to efface them. The laws that he applied may have fallen into disuse, or have been repealed, the facts and the circumstances which motivated him to decide a case one way or another may have vastly changed, for nothing in this life is static; because the whole world is in a constant state of flux and change, but Justice Mapa's principles and philosophy, perpetuated in our Philippine Reports will enjoys the authority and the respect which wisdom and reason deserves and demands. When Justice Mapa died, the people of the Philippines did not only lose a judge but a protector and benefactor, who upheld the cause of justice and at the same time exercised his judicial discretion to temper the rigor of the law and to facilitate, rather than to hamper and obstruct the defense of the accused[14] so that in the ultimate analysis justice is done, not to one, but to all.

● ANTONIO M. MEER

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[12] Cortes vs. Yu-Tibo, 2 Phil. 24, 28; Fabie vs. Lichauco, 11 Phil. 14.
[13] Cortes vs. Yu-Tibo, 2 Phil. 24, 28.
[14] U. S. vs. Paquit, 5 Phil. 635.

The Attestation Clause A-Superfluity

Definition—

Attestation consists in witnessing the execution of the will by the testator in order to see and take note mentally that those things are done which the statute requires for the execution of a will, that the signature of the testator exists as a fact.[1] Moreover, "attestation is the act not of the testator but of the witnesses".[2]

An attestation clause has been defined as that clause wherein witnesses certify that the instrument has been executed before them and to the manner of execution of the same.[3]

Law re attestation clause—

Old law—Code of Civil Procedure, sec. 618: No will except as provided in the preceding section shall be valid and pass any estate real or personal, nor change nor affect the same, unless it be written in a language or dialect known by the testator and signed by him or by the testator's name written by some other person in his presence by his express direction and attested and subscribed by three or more credible witnesses in the presence of the testator and of each other. The testator or person requested by him to write his name. .

The attestation clause shall state the number of sheets or pages used, upon which the will is written, and the fact that the testator signed the will and every page thereof or caused some other person to write his name under his express direction in the presence of three witnesses and the latter witnessed and signed the will and all pages thereof in the presence of the testator and of each other.

New Civil Code, Art. 806: Every will other than a holographic will must be subscribed at the end thereof by the testator himself or by the testator's name written by some other person in his presence and by his express directions and attested and subscribed by three or more credible witnesses in the presence of the testator and of one another.

The testator or the person requested by him to write his name and the instrumental witnesses of the will shall also sign as aforesaid, each and every page thereof, except the last one on the left margin, and all the pages shall be numbered correlatively in letters placed on the upper part of each page.

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[1] *Wood v. Davies* 131 S. E. 885; *Howard v. Daniel* 8 A. L. R. 1073.
[2] Re Chambers 187 Wash 417.
[3] Bouvier's Law Dictionary, p. 281.

The attestation shall state the number of pages used upon which the will is written and the fact that the testator signed the will and every page thereof or caused some other person to write his name, under his express direction, in the presence of the instrumental witnesses, and that the latter witnessed and signed the will and all the pages thereof in the presence of the testator and of one another.

If the attestation clause is in a language not known to the witness, it shall be interpreted to them.

In both the old and new laws, there is a necessity of the attestation clause for the validity of a will and the two laws substantially require that the attestation clause shall state two things:

1. the number of pages used
2. that the testator and the instrumental witnesses signed the will and all the pages thereof in the presence of the testator and of one another.

"The requirement of an attestation clause which sets forth the aforementioned statements are mandatory in character and necessary for the validity of the instrument alleging to be the last will and testament of the deceased person. Failure to comply with the requirement is fatal";[4] and "such effect annuls the will".[5]

Purpose of the requirements.—

In providing for such a requirement, the purpose is "to preserve in permanent form, a record of the facts attending the execution of the will so that in case of failure of the memory of the attesting witnesses or other casualty, they may still be proved",[6] to surround the due execution of a will with strong legal guaranties and to insure its authenticity.[7] Its use is "to make a prima facie case that the acts recited therein have all been properly done" [8] and be available proof of the compliance with statutory requirements for the execution of a will.[9] It serves as a certification that "the instrument is the exact paper that the testator signed and not a fraud" [10] and that "the testator is placed at the time of executing the will in the presence of disinterested witnesses so that he is entirely free from solicitation of interested parties".[11]

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[4] Rodriguez v. Alcala, 55 Phil. 150.
[5] Gamban v. Gorecho, 50 Phil. 30; Saño v. Quintana, 48 Phil. 506.
[6] Leynes v. Leynes, 40 O.G. 3rd S. No. 7, p. 5.
[7] Echavarria v. Sarmiento, 38 O.G. 2632.
[8] Monroc v. Huddart, 113 V.W. 149; Brown v. Avery, 58 So. 34; Berberet v. Berberet, 33 S.W. 34; Hayden v. Hayden, 186 NE 972; Lacey v. Dobbs, 55 LRA 580.
[9] Ibid.
[10] Orth v. Orth, 42 NE 277; Baldwin v. Baldwin, 151 SW 686.
[11] Re Moro 183 Cal. 29.

Such a requirement in the old law is reasonable, it being the only safeguard against fraud and a guaranty of the authenticity of the document purporting to be the last will and testament of a deceased person.

New Civil Code—Added requirement as guarantee.—

However, in the new Civil Code, we find the additional requirement in art. 806, to wit: "Every will must be acknowledged before a notary public by the testator and the witnesses. The notary public shall not be required to retain a copy of the will, or file another with the office of the clerk of court."

Acknowledgment or notarization is "the act of one who has executed a deed in going before some competent court or officer and declaring it to be his act or deed. The acknowledgment is certified by the officer or court. The function of an acknowledgment is two fold:

1. to authorize the deed to be given in evidence without further proof of its execution.
2. to entitle it to be recorded." [12]

It is the "request made by a testator to a notary public or other officer authorized to administer oaths, to take and certify to the testator; acknowledgment of a will is deemed equivalent of request to witness the will".[13] Therefore, since the acknowledgment takes the place of an attestation clause, the latter is unnecessary and superfluous.

Attestation Clause not a necessity for validity.—

Granting without conceding that an acknowledgment cannot be equivalent to an attestation clause, the latter in itself is not necessary. Under the common law, "It is not indispensable that the witnesses should subscribe any formal clause of attestation" [14] and is not of itself necessary to the validity of a will".[15]

1. Subscription is equivalent to attestation—The subscription to the will is symbol of the annotation and no attestation clause is necessary. Thus in a case where two wills were signed by three witnesses and there was an imperfect attestation clause, the court held that the will was valid and waived the attestation clause aside in the following words: "By these signifying they have attested the will, what do the subscribers affirm? The answer to that question would best be borrowed from Munn v. Ebbert, 106 NE 163., where it is said that to attest means to bear witness. When the statute requires that the witnesses shall attest,

[12] Bouvier's Law Dict. p. 281.
[13] Tilson v. Daniels, 8 ALR 1073.
[14] Berberet v. Berberet, supra; Robinson v. Robinson, supra.
[15] Wilharies v. Miles, supra; Dame, Probate and Administration, sec. 27.

what is it that they are to bear witness to? Plainly to these facts to which they have to testify when put on the stand as attesting witnesses; namely, that those things existed and were done which the statute requires must exist, and be done to make the writing a valid will.

In other words, by subscribing to the will, the attesting witnesses "impliedly" vouch for its due execution as fully or as broadly as they would expressly if there were a complete attestation clause, although perhaps with less force and emphasis".[16]

"The execution of a will is not an adversary transaction. The testator calls in witnesses to vouch for the due execution of a document often of vast importance to him. They are to speak after his death, when he cannot speak for himself. By subscribing his will, either with or without a testamentary clause, they tacitly undertake to do so and signify that the statutory formalities were observed." [17] Attestation is an act of the mind and mental, while subscription is an act of the senses and mechanical.[18] So that while physically subscribing, the witnesses mentally attest the will.

The reason for the implication is that "parties joining in the execution of a will can hardly be said to intentionally omit taking or recording a necessary step and thereby frustrate or imperil the consummation of their common purpose plus the fact that the testator and witnesses execute the will ordinarily and naturally at the same time makes some facts, although not expressed, are presumed to exist. An example of the last statement is when there is an issue as to the testamentary capacity of the deceased, the attestation clause rarely contains a recital concerning the mental condition of the testator and yet it is universally recognized that a subscribing witness by testifying against the will on this point, seriously discredits himself." [19]

2. Validity of will dependent of itself—The validity of a will depends upon its execution in conformity with the statute, that is, on its conforming to law, not on an attestation clause.

It must be conceded to be as perfect and complete under the law before the attestation clause was written as after it was, unless the attestation clause so affects it as to render it invalid in some degree. If the statute is complied with, the will is valid and complete before or after the attestation clause was executed. The latter is an act "immaterial in itself to effectuate or destroy the will.[20] Thus, in a case where the will was in accordance with the requirement, it was allowed although

[16] German Evangelical Biblical Church v. Reith, 29 So. 98.
[17] Wilharies v. Miles, supra; Dame, Probate and Administration, sec. 27.
[18] In re Chambers, supra; Swift v. Wiley, 40 Ky (1 B. Men) 114, 117.
[19] Southworth v. Southworth, 73 SW 133.
[20] In re Kemp's Will, 186, Underhill Wills, sec. 200.

the attestation clause was not executed on the ground that "where everything has been done which the law requires, everything is complete on the face of the will and no presumption arises from the failure to do a wholly vain and unnecessary thing." [21] So that where in a case the formal attestation clause was not signed in the real name of the testatrix and the will was lost, it was held that the subscribing witnesses may testify that the testatrix signed and they witnessed and subscribed in the required manner, without the necessity of proving that there was an attestation clause or establish the contents thereof." [22]

Requirement Source of Many Litigations.—

One may look over the numerous volumes of the Philippine Reports and would find innumerable controversies centered around the attestation clause. In some, the attestation clauses were entirely lacking, in others with defects in spelling, grammar, or even clerical errors. In view of these cases, there has evolved the doctrine of liberal construction in interpreting the legal formalities for the attestation clause.

The old doctrine of strict construction justified by Justice Street [23] when he said, "inferences should not supply what is lacking in the attestation; for if inferences were allowed to supply what is lacking, then an attestation clause stating that the will was signed in the manner prescribed by law would be sufficient", has been relaxed by conceding a liberal interpretation to the provisions requiring such formalities although they demand compliance judged from the imperative language used.

Thus, Justice Malcolm [24] ruled that "precision of language in the drafting of an attestation clause is desirable. However it is not imperative that a parrot-like copy of the words of the statute be made. It is sufficient if from the language employed it can reasonably be deduced that the attestation clause fulfills what the law expects of it." For the validity of the attestation clause it is unnecessary to employ the very words of the statute. It is sufficient if the fact required by the law to be stated are intelligibly set forth. Art. 809 of the New Civil Code regarding the attestation clause indicates the liberal attitude which courts should adopt in construing the rules for the execution of wills. It is analogous to the provision in the original sec. 618 of the code of civil procedure, whose last sentence provided that the absence of an attestation clause in the form required by law "shall not render the

[21] Perkings v. Jones, 4 SE 833.
[22] Wilharies v. Miles, supra.
[23] dissent, Dichoso de Ticson v. de Gorestiza. 57 Phil. 437.
[24] supra, p. 437, 439; Mendoza v. Pilapil, 40 O.G. 1855, 1862.

will invalid if it is proven that the will was in fact signed and attested" as provided by law. An attestation clause has in its favor the presumptions of correctness.[25]

In Villaflor v. Tobias, 53 Phil. 714, the attestation clause was written on a separate page and not on the last page of the document. It appeared from the document itself that if the clause had been written on the said last page, there would not have been sufficient space on that page for the signatures of the witnesses to the clause. It was held that in these circumstances the writing of the attestation clause on a separate page did not invalidate the will.

In De Gala v. Gonzalez and Ona 53 Phil. 104, the attestation clause was assailed because it was not mentioned that the testatrix signed by thumbmark, but the form of the signature was sufficiently described and explained in the last clause of the body of the will. It was held that the probate of the will could not be assailed on that ground.

In one case, mere clerical and grammatical errors were made the basis of opposing the will in the expression "cada uno de nosotros lo firmamos en presencia de otros" (each of us signed in the presence of others), which appears ambiguous on account of the article "los" (the) being lacking before otros, in which case the court held that such error will not vitiate the attestation clause where it is evident that its omission was due to the carelessness of the clerk or lack of mastery of the language, and that what is meant is that the witnesses signed in the presence of each other.[26] In another, an omission in drafting the clause which could be supplied by reason and common sense was insisted upon by the oppositor to invalidate the will in which the court ruled as insufficient to invalidate it.[27]

The requirement that the number of pages should be mentioned in the attestation clause has likewise proved to be a constant source of trouble in the probate of wills. The salutatory purpose of this requirement is found in the fact that the document might easily be so prepared that the testamentary dispositions of the will would be completely changed by the removal of a sheet; in the absence of the statement of the total number of sheets such removal might be effected by taking out the sheets and changing the numbers at the top of the following sheets or pages. If on the other hand the total number of sheets or pages is stated in

[25] In re estate of Nepomuceno, 28 Phil 638, 639
[26] Pecson v. Coronel, 45 Phil. 216.
[27] Alcala v. Villa, 40 O.G. 14 S. 131

the attestation clause the falsification of the document will involve the insertion of new pages and the forging of the signatures of the testator and of the witnesses in the margin, a matter attended with much greater difficulty.[28]

In the cases where the attestation clause failed entirely to state the number of pages on which the will was written, opposition to the probate of such wills prospered where the court ruled that such defect was fatal.[29] However, these rulings might not be good anymore under article 809 of the new civil code. In other cases, the defects were trivial and the wills were not invalidated by such defects; as where a will in which the disposition part consisted of a single sheet which was not signed at the bottom.[30]

Again, the requirement that it must appear in the attestation clause that the testator and the witnesses signed the will and each page thereof in the presence of each other has proved to be a veritable source of litigation, as may be found in the cases of Jocson v. Jocson, 46 Phil. 701; Gernandez v. Vergel de Dios; 46 Phil. 922; Nayve v. Mojal and Aguilar, 47 Phil. 152; Saño v. Quintana, 48 Phil. 536; Gamban v. Gorecho, 50 Phil. 30; Quinto v. Morato, 54 Phil. 485; Rey v. Cartagena, 56 Phil. 282; Rodriguez, v. Alcala, 55 Phil. 150; Dichoso v. de Gorostiza, supra; Sebastian v. Pamatmat, 59 Phil. 653; In re Estate of Ozoa 58 Phil. 928; Mendoza v. Pilapil, 40 O. G. 1855; Martir v. Martir, 40 O. G. 7 S. 215; Leynez v. Leynez, 40 O. G. 3 S. 51; In re Estate of Rallos 44 O. G. 4940; Sabado v. Fernandez, 40 O. G. 1844; Rodriguez v. Yap, 40 O. G. 1 S. 194; Fabella and Garcia v. Javellana et al, C. A. 45 O. G. 40.

These controversies are based on all sorts of defects from grammatical errors in the use of improperly chosen words like employing the words "in the same manner" meaning that the testator and the witnesses signed on the left margin of each sheet of the will;[31] or in the omission of one or more articles like "the"[32] to the absence of the statement that the witnesses signed each page of the will[33] or that the testatrix signed every page of the will in the presence of the attesting witnesses,[34] that the witnesses signed in the presence of the testator and of each other,[35] or that the witnesses signed on the left margin of each page.[36]

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28 Uy Coque v. Sioca, 43 Phil. 405, 409.

29 In re Will of Andrade, 42 Phil. 180; Caraig v. Tatlonghari, G.R. No. 125558, March 29, 1948; In re Will of Saginsin, 41 Phil. 875.

30 Abangan v. Abangan, 40 Phil. 476; Avera v. Rodriguez and Rodriguez, 42 Phil. 145.

31 Pecson v. Coronel, supra; Alcala v. Villa, supra.

32 Alcala v. Villa, supra.

33 Rey v. Cartagena, supra.

34 Dichoso de Ticson v. Gorostiza, supra.

35 Sabado v. Fernandez, supra; Fabella and Garcia v. Javellana, supra; Gumban v. Gorecho, supra; Quinto v. Morata, supra; Rodriguez v. Alcala, supra.

36 Saño v. Quintana, supra.

Conclusion:

There seem to be very good reasons, therefore, why the requirement of an attestation clause under the new civil code is submitted to be a superfluity. The strongest argument is the added requirement of notarization or acknowledgment prescribed in article 806. In fact, acknowledgment not only is an equivalent of attestation but is also a more authentic, formal substitute. Furthermore, there is good authority to show that the attestation clause is not indispensable for validity since subscription achieves the same purpose for which attestation is regarded and besides, the validity of a will is dependent upon its execution in conformity with the statute and not on an attestation clause. The fact that the attestation clause has constantly been a fertile ground for unnecessary judicial litigation, which shows a liberal trend in construing the formal requisite of attestation, is in itself enough argument why the attestation clause is unnecessary or superfluous

● **PRISCILLA SANTOS**
● **LOURDES TAYAO**