

# Malcolm In Private Law

A study of the juristic thought of George A. Malcolm would invariably lead one to the field of political law as a source of abundant material. To the student of law, the name Malcolm is at once linked with Philippine public law, and rightly so, if only for the decisional gems penned by him in the field of Constitutional Law. To the author who had the privilege of meeting and talking with the jurist, Justice Malcolm himself confessed: "Yes . . . Constitutional Law, that is my favorite."

Overshadowed perhaps by his decisions in Political and Constitutional Law, yet forming part of our jurisprudence are his decisions in private law. For during his incumbency in the Supreme Court, Mr. Justice Malcolm penned a number of decisions in the field of private law—more than enough to leave an indelible imprint of his juristic philosophy.

To acquaint oneself however with the Malcolman approach to private law questions involves at the threshold an understanding of his concept of our private law.—"Upon what principles is the present jurisprudence of these islands based?" That was the question posed and answered in *In re Shoop*,<sup>1</sup> a scholarly work which was obviously an exposition of the nature of our private law. He said:

"An analysis will show that a great preponderance of the jurisprudence of this jurisdiction is based upon Anglo-American case law precedents—exclusively, in applying these statutory laws which have been enacted since the change of sovereignty and which conform more or less to American statutes, and—to a large extent in applying and expanding the remnants of the Spanish Codes and written laws."<sup>1(a)</sup>

But in the same work, he was careful not to underestimate the place of the Civil Law and other written laws of Spanish origin in this jurisdiction—"In interpreting and applying the bulk of the written law of this jurisdiction, and in rendering its decisions in cases not covered by the letter of the written law, this Court relies upon the theories and precedents of Anglo-American cases, *subject to the limited exceptions of those instances where the remnants of the Spanish written law present well-defined civil law theories, and of few cases where such precedents are inconsistent with local customs and institutions.*" (Italics ours).

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<sup>1</sup> 41 Phil. 213.

<sup>1</sup> (a) 41 Phil. 225.

<sup>2</sup> 41 Phil. 255.

It is this recognition of a two-fold influence in our private law that should be present in every attempt to understand Mr. Justice Malcolm in private law. If the statute involved was one patterned after Anglo-American legislature, it would be natural for him to draw from Anglo-American cases, construing analogous legislation. If the question presented involved "certain well-defined civil law theories", reliance on the Civil Law would be in order, although as will be pointed out, here, Mr. Justice Malcolm on many an occasion referred to American doctrines on the same subject for the purpose of, to borrow his own words, "showing that Spanish law and the Anglo-American law is the same frequently it is for the purpose of amplifying or extending the Spanish statutes."<sup>3</sup>

A few illustrative cases would bring out this point. In the case of *Higgins v. Sellner*,<sup>4</sup> he said:

"The civil law suretyship is accordingly, nearly synonymous with the common-law guaranty; and the civil law relationship existing between co-debtors liable in solidum is similar to the common-law suretyship."

In *Gutierrez v. Gutierrez*,<sup>5</sup> he said:

"We are here dealing with the civil liability of parties for obligations which arise from fault or negligence. At the same time we believe that, as has been done in other cases, we can take cognizance of the common-law rule on the same subject. In the United States it is uniformly held that the head of a house, the owner of an automobile, who maintains it for the general use of his family, is liable for its negligent operation by one of his children, whom he designates or permits to run it, where the car is occupied and being used at the time of the injury for the pleasure of other members of the owner's family than the child driving it."

In *Gutierrez Repide v. Afzelius*,<sup>6</sup> the subject of specific performance was discussed from the civil and common-law status, the conclusion being that articles 1096-1098, 1124 and 1451 of the Civil Code recognize what in common-law is denominated specific performance.

In the case of *Gercio v. Sun Life Assurance Company*,<sup>7</sup> where the novel question was presented as to whether the husband, who had appointed his wife as beneficiary under a life insurance policy, could change such beneficiary to that of a second wife, after a divorce with the first wife had been obtained, there having been no reservation on the policy as to such right, Mr. Justice Malcolm stated:

<sup>3</sup> 41 Phil. 241.

<sup>4</sup> 41 Phil. 143.

<sup>5</sup> 56 Phil. 178.

<sup>6</sup> 39 Phil. 190.

<sup>7</sup> 48 Phil. 53.

"We must perforce conclude that whether the case be considered as of 1910 or 1914, or 1922, and whether the case be considered in the light of the Code of Commerce, the Civil Code or the Insurance Act, the deficiencies in the law will have to be supplemented by the general principles prevailing on the subject. To that end, we have gathered the rule which follow from the best considered American authorities. In adopting these rule we do so with the purpose of having the Philippine Law of Insurance conform as nearly as possible to the modern law of insurance as found in the United States proper."<sup>8</sup>

But cases did arise where the civil and common-law rules were at odds and because the "civil law theory" was "well-defined", it prevailed over the common-law rule. In his concurring opinion, for example, in *Manzanares v. Moreta*,<sup>9</sup> in the course of a comparative study of the civil and common-law jurisprudence on the question of damages he observed:

"In common-law, no civil action lies for damages caused by the death of a human being by the wrongful or negligent act of another, the maxim being *actio personalis moritur cum persona*."<sup>10</sup>

After observing that a different rule prevails in Spain, Justice Malcolm said:

"Both because of the civil origin of the applicable law in the Philippines, because we are not fettered by the harsh common-law rule on the subject, because it is the modern and more equitable principle, and because reason and natural justice are eloquent advocates, we hold that an action for damages can be maintained in this jurisdiction for the death of a person by wrongful act."<sup>11</sup>

In another case,<sup>12</sup> where the question involved was the validity of provisions in notes authorizing attorneys to appear and confess judg-

<sup>8</sup> In this connection, see *Wing Kee v. The Bank of Monongahela*, 44 Phil. 465, where Justice Malcolm pointed out the similarity between the civil law and common-law in cases where agents buy in their own names, but really for the account of the principal as to the right of action of the seller; *Cortes v. Castillo*, 41 Phil. 466, on the similarity of civil and common-law rules on the discretion of courts on matters involving custody of minors; *Labayan v. Talisay-Silay Milling Co.*, 52 Phil. 440 on the effect of an impossible condition on the party obliged in the civil and the common-law; *Jo Chung Chang v. Pacific Commercial Company*, 45 Phil. 144, where Justice Malcolm stated: "The civil and the common-law point to a difference between the rights of the parties who have failed to comply with the law (as to organization of partnership) and the rights of third persons who have dealt with the partnership;" *Po Sun Tun v. Provincial Government of Leyte*, 54 Phil. 193, on similarity of civil and common-law meaning of the phrase "to register real property"; also *Philippine Refining Co. v. Jarque*, 51 Phil. 229, which states that vessels are considered personal property under the civil law and the common-law.

<sup>9</sup> 38 Phil. 825.

<sup>10</sup> 38 Phil. 825.

<sup>11</sup> 38 Phil. 829.

<sup>12</sup> *National Bank v. Manila Oil Refining Co.*, 43 Phil. 445.

ments against the makers, and after citing American decisions which recognize said provisions, Mr. Justice Malcolm in concluding that they should not be considered valid here in the absence of express legislative sanction said:

"With reference to the conclusiveness of the decisions here mentioned, it may be said that they are based on the practice of the English-American common-law, and that the doctrines of the common-law are binding upon Philippine Courts in so far as they are founded on sound principles, applicable to local conditions."

In still another case,<sup>13</sup> Mr. Justice Malcolm, speaking for the majority deviated from the prevailing rule in the United States which excludes admissions by third parties in prosecutions against the accused. He pointed out the injustice that may result from the American rule. For if a man deliberately acknowledge himself to be the perpetrator of a crime, (and no sane man will be presumed to tell a falsehood to his own detriment) and exonerates the person charged with the crime and there is other evidence indicative of the truthfulness of the statement, the accused should not be permitted to go to prison or the electric chair to expiate a crime he never committed.

But it is not enough to state that Justice Malcolm, in construing modern legislation and likewise in extending "statutes of Spanish origin," drew from Anglo-American rules and precedents. Obviously, such a statement when confronted by the mass of precedents would demand a qualification as to the type of precedents, as to the process of legal reasoning adhered to. The task is not an easy one, for the venture consists in singling out threads of common fabric from the products of a prolific mind. Added to this, is the fact that private law is such a wide field even for the most conscientious student. But the enthusiasm to understand a great legal mind, the desire to add to one's stock of knowledge, lightens what otherwise might be an arduous work. From June 13, 1917 to January 20, 1936. Mr. Justice Malcolm was an organ of judicial thought, the mouth-piece of judicial temper and after a reading of his decisions in twenty-six volumes covering almost nineteen years, one recalls a passage in *In Spencer's Appeal*,<sup>14</sup> which runs—

"When expressed by words, the force of an expression may depend less upon the words used than upon the connection in which they were used or the manner in which they were uttered . . . The precise words which were employed have generally faded from the memory. The impression which they gave may remain, and it is the impression justly to be derived from them which is material."

<sup>13</sup> *People v. Toledo*, 51 Phil. 839.

<sup>14</sup> 77 Conn. 743, 60 Atl. 291.

The impression derived from Justice Malcolm's work in private law is that he was a sociological jurist. One discerns a bent towards what "will be for the best interests of the entire Philippines." In unequivocal terms, he expressed this philosophy thus—"Surely, the members of the judiciary are not expected to live apart from active life, in monastic seclusion amidst dusty tomes and ancient records, but as keen spectators of passing events and alive to the dictates of the general—the national—welfare, can incline the scales of their decisions in favor of that solution which will most effectively promote the public policy."<sup>15</sup>

How faithfully he adhered to this philosophy may only be judged by a careful reading of his decisions; and at this juncture, we feel safe to assert that this philosophy was his beacon light when it came to the application of the Usury Law, to the construction of the Workmen's Compensation Act and also of the Corporation Law.

In *U.S. v. Constantino*,<sup>16</sup> he remarked:

"The money lenders did not alone pursue their calling in Old Judea. The Shylocks have not merely strutted or skulked on the Shakesperian stage. The Philippines abound with such who exact their pound of flesh—and for these the law was intended and for these shall be enforced."

His fight, while in the Supreme Court against usury finds expression in his dissenting opinion in *Go Chioco v. Martinez*,<sup>17</sup> 45 Phil. 785, wherein he maintained—

"x x the heinous contract is voided and that the lender cannot be permitted to maintain an action in the courts to enforce his usurious contract. Such natural construction of the law will be for the best interest of the entire Philippines."<sup>18</sup>

In the field labor-management relation, he must have foreseen that a liberal construction of the Workmen's Compensation Act was for the best interests of the Philippines. In *Caunan v. Compañia General de Tabacos*,<sup>19</sup> the majority after denying compensation to the mother of a deceased employee because with the exercise of ordinary care he could have avoided the fatal step that cost him his life, Mr. Justice Malcolm posed this vigorous dissent:

<sup>15</sup> *Smith Bell v. Natividad*, 40 Phil. 136.

<sup>16</sup> 39 Phil. 552.

<sup>17</sup> 45 Phil. 785.

<sup>18</sup> See also his dissenting opinion in *Lopez and Javelona v. El Hogar Filipino*, 47 Phil. 316, however in the case of *Sejo v. Gustilo*, 48 Phil. 451, he said: "The Usury Law, as construed by this court permits the creditor to recover the principal but not the stipulated usurious interest. This could well be taken to mean a forfeiture of the right to any interest so as not to arrive at a contradiction in terms. Nevertheless, the court has fallen into the habit in cases of this character of allowing the creditor the legal rate of interest on the judgment from the date of the filing of the complaint." (48 Phil. 462)

<sup>19</sup> 56 Phil. 545.

"It is all very well of this later date to tell what the workmen should have done, but if such extraordinary care was always used, there would be few accidents to be compensated by the Workman's Compensation Act. Without permitting a refinement of definitions to obstruct the enforcement of the spirit of the law, it may be safely asserted that when the laborer fell from the roof, there was an "accident" and that because he happened to use rubbed soled shoes, which was customary, and inadvertently stepped on a piece of galvanized iron which the elements had made slippery, he did not disclose thereby "notorious negligence" x x x After all, the attitude of the judiciary towards the Workmen's Compensation Act is decisive. x x x The courts look to the purpose sought to be accomplished, and are inclined to a fair, indeed, a liberal construction of the law in favor of the employee."<sup>20</sup>

This attitude was reaffirmed in *Vergara v. Pampanga Bus Company*,<sup>21</sup> in the following words:

"We have heretofore given repeated evidence of our desire to see a spirit of liberality characterize the construction of the Workmen's Compensation Act. We have endeavored to interpret the act to promote its purposes. We have even gone so far as to interpret it fairly in favor of the employer."

In this later case, however, to show that courts of justice have to look at both sides of the issue, he said:

"But we cannot reconstruct the Act to fit particular cases, and in this particular case neither the facts nor the law are demonstrative of a meritorious claim on the part of the employer coming within the purview of the Workmen's Compensation Act."

The employee, trying to recover, was disable because of a pre-existing heart disease not because of an illness directly caused by the employment or the result of the nature of the employment nor from an accident or injury in the course of employment. Mr. Justice Malcolm observed:

"To call the sequent heart disease of the plaintiff an accidental injury would be to distort the fair meaning of the statute and the underlying principle of compensation cases."<sup>22</sup>

The decision penned by Mr. Justice Malcolm in the case of *Marshall Wells Co. v. Elser*,<sup>23</sup> is another demonstration of how the judicial arm can help promote the "best interest of the entire Philippines",

<sup>20</sup> 56 Phil. 548.

<sup>21</sup> 62 Phil. 820.

<sup>22</sup> 62 Phil. 823.

<sup>23</sup> 46 Phil. 70.

this time in trade and investment. The case involved the construction of this particular section of the Corporation Law.

"Sec. 69. No foreign corporation or corporation formed, organized or existing under any laws other than those of the Philippine Islands shall be permitted to transact business in the Philippine Islands or maintain by itself or assignee any suit for the recovery of any debt, claim or demand whatever, unless it shall have the license prescribed in the section immediately preceding. x x x"

A cursory reading of this section would show that the terms thereof expressly provide that before any action may be maintained in the Philippine Courts by a foreign corporation, it must have obtained the license prescribed for such corporation. In fact, that was the contention of the defendant in the case. Justice Malcolm was of a different opinion. The words employed are the clearest reflection of his mental process. We cannot but quote—

"Confronted with the option of giving to the corporation law a harsh interpretation which would disastrously embarrass trade, or of giving to the law a reasonable interpretation which would markedly help in the development of trade; confronted with the option of barring from the courts foreign litigants with good causes of action or of assuming jurisdiction of their cases; confronted with the option of construing the law to mean that any corporation in the United States, which might want to sell to a person in the Philippines must send some representative to the Islands before the sale, and go through the complicated formulae provided by the corporation law with regard to the obtaining of the license, before the sale was made, in order to avoid being swindled by Philippine citizens, or of construing the law to mean that no foreign corporation doing business in the Philippines can maintain any suit until it shall possess the necessary license—confronted with these options, can anyone doubt what our decisions will be? The law simply means that no foreign corporation shall be permitted "to transact business in the Philippine Islands" as this phrase is known in Corporation Law, unless it shall have the license required by law and until it complies with the law, shall not be permitted to maintain any suit in the local Courts. A contrary holding would bring the law to the verge of unconstitutionality, a result which should be and can be easily avoided."<sup>21</sup>

A reading of these lines, the reference to the attitude of the courts towards the Workmen's Compensation Act as "decisive", brings to mind the process which Justice Holmes, "in one of his flashing epigrams" to paraphrase Justice Cardozo, calls "legislating interstitially".

<sup>21</sup> 46 Phil. 76.

It was also Justice Cardozo who said "I do not mean that judges are commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance." This process he calls the "method of sociology". To quote further from Justice Cardozo, "But the truth is that there is no branch where the method (of sociology) is not fruitful. Even when it does not seem to dominate, it is always in reserve. It is the arbiter between other methods, determining in the last analysis the choice of each, weighing their competing claims, setting bounds to their pretensions, balancing and moderating and harmonizing them all."

And this "method of sociology" is prominent in Justice Malcolm's decisions.

In *Adong v. Cheong Seng Gee*,<sup>26</sup> the question presented was the validity of a Mohammedan marriage between a Moro and a Chinese. The marriage in accordance with Mohammedan rites was proved and Justice Malcolm weighed the consequences of whatever action the court would take as follows:

"And here the consequences entailed in holding that the marriage, in conformity with the Mohammedan religion and Moro customs, was void, would be far reaching in disastrous result. The last census shows that there are at least 150,000 Moros who have been married according to local customs. We then have it within our power, either to nullify or to validate all of these marriages; either to make all of the children born of these union bastards or to make them legitimate; either to proclaim immorality, or to sanction morality; either to block or to advance a settled governmental policy. Our duty is as obvious as the law is plain".<sup>26</sup>

This was the same process followed in *Marshall Wells v. Elser*, supra. It predominated his dissenting opinion in *Government v. El Hogar Filipino*.<sup>27</sup> After admitting the infractions committed by the Corporation were not trivial or isolated infractions of the law to be brushed away with a wave of the hand because they disclosed that the corporation was an "octopus whose tentacles have reached out to embrace and strife vital public interests", still Mr. Justice Malcolm would temper judicial sanction in the light of what the corporation could do for the community. He said:

<sup>25</sup> 43 Phil. 43.

<sup>26</sup> 43 Phil. 57.

<sup>27</sup> 50 Phil. 477.

"El Hogar Filipino is the possessor of important property rights which should not be disastrously disturbed. It must also be said that a mutual loan and building association properly conducted is an institution which should be encouraged in the community. The result therefore, should be to confine El Hogar to its legitimate purposes and to force it to eliminate its illegitimate purposes. The Government has made out its case but the defendant should be permitted a reasonable time to fulfill the conditions laid down in the decision."

His reasoning in a concurring opinion in the case of *Manzanares v. Moreta*, *supra*, follows the same pattern. Starting from the premise, that the established rule in civil and common law countries is that damages, to be allowed, must be established by satisfactory proof, the Court was here confronted by a peculiar case where such damages were certainly hard to prove, for the victim of the accident was a child of eight to nine years old. Mr. Justice Malcolm appraised the situation in the following manner:

"On one hand, the obvious conclusion would be that inasmuch as the plaintiff has failed to prove her pecuniary loss, she can not recover, or for the same reason, to return the case to the lower court for further evidence. This is the obvious way. To one trained in the common-law, and inculcated with all the doctrines of the American law of damages, it is the logical way".<sup>28</sup>

On the other hand, "is it the just and natural way?" asked Justice Malcolm.

The answer was:

"To ask the plaintiff to prove her loss exactly would be to ask the impossible—would be in effect to return to the old common-law rule which prohibits a recovery".<sup>29</sup>

Rather it would be "within the ken of human wisdom" to presume a loss because of the impossibility of exact proof and computation in respect to the amount of the loss sustained. And to borrow his own words, "the difficulty of estimating in money the worth of a life should not keep a court from judicially compensating the injured party as nearly as may be possible for the wrong. True, man is incapable of measuring exactly in the delicate scales of justice the value of a human life. True, the feelings of a mother on seeing her little son torn and mangled—expiring—dead—could never be assuaged with money. True, all the treasure in nature's vaults could not begin to compensate a parent for the loss of a beloved child. Nevertheless, within the bounds of human powers, the negligent should make reparation for the loss."<sup>30</sup>

<sup>28</sup> 38 Phil. 839.

<sup>29</sup> 38 Phil. 840.

<sup>30</sup> 38 Phil. 831.

In the case of *National Bank v. Manila Oil Refining Company*, supra, the judgment outlawing provisions on notes admitting judgments by confessions was the result of the judicial process of weighing the advantages and disadvantages of such provisions. Mr. Justice Malcolm observed:

"Judgments by confession as appeared at common-law were considered an amicable, easy and cheap way to settle and secure debts. They are a quick remedy and serve to save the court's time. They also save the time and money of the litigants and the government the expenses that a long litigation entails. In one sense, instruments of this character may be considered as special agreements, with power to enter up judgments on them, binding the parties to the result as they themselves viewed it.

"On the other hand, are disadvantages to the commercial world, which outweigh the considerations just mentioned. Such warrants of attorney are void as against public policy, because they enlarge the field for fraud, because under these instruments the promissor bargains away his right to a day in court, and because the effect of the instrument is to strike down the right of appeal accorded by statute. The recognition of such a form of obligation would bring about a complete reorganization of commercial customs and practices, with reference to short term obligations. It can readily be seen that judgment notes, instead of resulting to the advantage of commercial life in the Philippines might be the source of abuse and oppression, and make the courts involuntary parties thereto. If the bank has a meritorious case".<sup>31</sup>

A discussion of this "method of sociology" in Justice Malcolm's works in *Private Law* would not be complete, however, if we were to overlook the case of *Philippine Trust Company v. Mitchell*.<sup>32</sup>

On the controversial question of preference of credits, Mr. Justice Malcolm, speaking for the majority, departed from the "settled" rule that preference under the civil code are recognized as "liens" under the *Insolvency Law*. He said:

"Freeing ourselves from the incubus of precedent, we have to look to legislative intention. The legislative purpose was as plainly indicated as words may convey it by the express repeal in the *Code of Civil Procedure* of all existing laws relating to bankruptcy. The legislative purpose was a second time evidenced by the passage of the *Insolvency Law*. The law was carefully framed with the purpose of covering the entire subject of bankruptcy. In all material respects the law was meant to be and is complete in itself."<sup>33</sup>

<sup>31</sup> 43 Phil. 467.

<sup>32</sup> 59 Phil. 30.

<sup>33</sup> 59 Phil. 37.

This famous case may well stand as an example of how social interests may weigh in the estimate of Justice, how the concept of "public policy", or "social welfare" may become subjective. But this is not strange at all. For, as Justice Cardozo puts it, "Social welfare is a broad term. \* \* \* It may mean what is commonly spoken of as public policy, the good of the collective body. In such cases, its demands are often those of mere expediency or prudence. It may mean on the other hand the social gain that is wrought by adherence to the standards of right conduct, which find expression in the modes of the community \* \* \*." On one side, the dissenting opinion of Justice Imperial, Avanceña and Villareal, said:

"Merchants, manufacturers, bankers and the public in general have relied upon the uniform decisions and rulings of this Court and they have undoubtedly been guided in their transactions in accordance with what we then said to be the correct construction of the law. Now, without any new and powerful reason we try to substantially modify our previous ruling by declaring that the preferences and priorities above referred to are not recognized by the Insolvency Law. The legislature has had occasion to review our rulings in the cases above cited and it could readily have amended the law had it been of the opinion that said policy was unsound or inadvisable."<sup>34</sup>

On the other hand, Justice Malcolm for the majority stated:

"The rule of stare decisis is entitled to respect. Stability in the law particularly in the business field is desirable. But idolatrous reverence for precedents, simply as precedent, no longer rules. More important than anything else is that the Court should be right."<sup>35</sup>

Continuing, he said:

"Public policy will best be served by accepting the Insolvency Law as it is without a strained effort to join it up with a code which never contemplated the ends which the Insolvency Law was enacted to advance."<sup>36</sup>

From these few cases cited, it is more than apparent that in deciding them, Mr. Justice Malcolm adhered to "public policy" as a standard, at least to what he believed were the demands of public policy. But as pointed out by Justice Cardozo, public policy (in the sense of social welfare) is a very broad term. Naturally, it has its ramifications. It is interesting to observe how Justice Malcolm iden-

<sup>34</sup> 59 Phil. 41.

<sup>35</sup> 59 Phil. 36.

<sup>36</sup> 59 Phil. 37.

tified public policy in his decision. In the case of *Siman v. Leus*,<sup>37</sup> he conceived of public policy in terms of "social order", "sound policy" and "good morals". In holding that the right of action to annul a marriage on the ground of "fraud, force, threats, or intimidation," where the girl is 18 years of age, belongs to the latter and not to her father.

Mr. Justice Malcolm in passing, said:

"It would certainly be a startling proposition to announce that a judgment can be procured dissolving a marriage contract without it being disclosed in the complaint that the alleged injured party is desirous of being released from the bonds of matrimony. Such a rule would permit a parent to invalidate a marriage without the consent or knowledge of a party thereto. *If it were to obtain, it would prove subversive to social order, sound order and good morals.*" (Italics ours).

In *Adong v. Cheong Seng Gee*, *supra*, he linked public policy with stability of our society. He said:

"The basis of human society throughout the civilized world is that of marriage. Marriage in this jurisdiction is not only a civil contract, but is a new relation, an institution in the maintenance of which the public is deeply interested. Consequently, every intendment of the law leans toward legalizing matrimony. Persons dwelling together in apparent matrimony are presumed in the absence of any counter-presumption, or evidence special to the case, to be in fact married. The reason is that such is the common order of society, and if the parties were not what they hold themselves out as being, they would be living in the constant violation of decency and of law.

"Public policy should aid acts intended to validate marriages and should retard acts intended to invalidate marriages. The courts can properly incline the scales of their decisions in favor of that solution which will most effectively promote the public policy."<sup>38</sup>

In *Gutierrez Repide v. Afzelius*, *supra*, public policy was used synonymously with "stability of commercial transactions".<sup>39</sup> So was it used in *National Bank v. Manila Oil Refining Company*, *supra*. In the cases involving the application of the Usury Law, it was another name for "what was for the 'best interests of the Philippines'".<sup>40</sup> In *Caunan v. Compañia General*, *supra*, it was more particularly linked with legislative intent and purpose; in *Hernandez v. Viilanueva*,<sup>41</sup>

<sup>37</sup> 37 Phil. 967.

<sup>38</sup> 43 Phil. 47.

<sup>39</sup> See 39 Phil. 196.

<sup>40</sup> See dissenting opinion in *Go Chioco v. Martinez*, *supra*.

<sup>41</sup> 40 Phil. 775.

with the protection of confidential relations between attorney and client; in *Labayan v. Taisay-Silay Milling Company*,<sup>42</sup> he spoke of public policy as against the performance of a contract undesirable and harmful to the community; in *San Juan de Dios v. Manila Water District*,<sup>43</sup> he termed the encouragement of works of charity as "good public policy"; while in *Philippine Trust Company v. Mitchell*, *supra*, "public policy" stood for public convenience.

In *Tec Bi v. Collector of Internal Revenue*,<sup>44</sup> he spoke of the same term as demanding that those constituting a partnership deal openly and not secretly.

Perhaps, it was also this practice of "inclining the judicial scales in favor of that solution which will most effectively promote the public policy" that prompted Mr. Justice Malcolm, whenever proper to put a speedy end to litigations; to secure parties in their rights. That undoubtedly is one factor towards social order. In *Yangco v. Millan*,<sup>45</sup> in disposing of a case that had lagged unnecessarily for years, he remarked:

"If public policy demands that at the risk of occasional errors judgments shall become final at some definite date fixed by law and if good practice demands that attorneys take an active interest in the advancement of their cases, then surely finis must be written to this case."<sup>46</sup>

And in *Bough v. Cantiveros* <sup>47a</sup> he identified 'public policy' with 'public order' in the Civil Code. The facts of this interesting case showed that the grantor, reposing faith in the integrity of the grantee, and relying on a suggested occurrence which did not in fact take place, was made the dupe of the grantee, and led into an agreement against public policy, the party induced to enter into the contract by means of fraud, asked to be relieved from the agreement. The rights of third parties had not intervened. The court, thru Mr. Justice Malcolm held that while the party induced was in delicto, she was not in *pari delicto* with the other party and that justice would be done if the grantor were placed in the position where she had been before the transaction was entered. In this case we find a full expression of public policy, even at the cost of setting exceptions to the settled rules of *Ex dolo malo non oritur actio* and *In pari delicto potior est conditio defendentis*. Mr. Justice Malcolm said:

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<sup>42</sup> 52 Phil. 440.  
<sup>43</sup> 54 Phil. 174.  
<sup>44</sup> 61 Phil. 351.  
<sup>45</sup> 57 Phil. 763.  
<sup>46</sup> 57 Phil. 676.  
<sup>47a</sup> 40 Phil. 209.

"The law will not aid either party to an illegal agreement; it leaves the parties wherever it finds them. Where however, the parties to an illegal contract are not equally guilty, and where public policy is considered as advanced by allowing the more excusable of the two to sue for relief against the transaction, relief is given to him. \* \* \*"<sup>44</sup>

In another case, *Rivero v. Rivero*,<sup>47</sup> while admitting that a judgment when entered into by consent of an attorney without special authority may sometimes be set aside or reopened, yet in a case where the client waited for three years before making any pretense that the agreement confirmed in open court was not in accordance with his wishes, "his right if any, was defeated and destroyed by his own negligence."<sup>48</sup>

In still another case, *Pascual v. Santos*,<sup>49</sup> where the administrator presented his final accounts to the probate court for approval and where, after appeal to the Supreme Court the latter rendered a judgment, said administrator was held bound by the decision of the Court, and he could not alter or present new items in said account. Mr. Justice Malcolm justified the court's stand, thus:

"With judges of first instance occupied with criminal and civil cases and shifted from one district to another, unscrupulous administrators and executors have it within their power, unless the judge is alert to the situation to delay the final disposition of estates for years, in the meantime living off of the estate, at last to hand over a pitiful remnant of the property left by the deceased to his lawful heirs. The policy of the law should be to close an estate as promptly as possible and as economically as possible. It is with this paramount idea to the forefront that we are led to take the stand that the decision of this Court, since relating to the final settlement of the administrator, had the force and effect of a judgment as between the parties thereto, which only needs to be enforced and not reopened in order that the estate may be closed."<sup>50</sup>

The desire to secure certainty of rights must have prompted the doctrine of constructive possession to be laid down in *Ramos v. Director of Lands*.<sup>51</sup> The nature of the doctrine, a fundamental one in property, as laid down by the Court is as follows:

"The general rule is that the possession and cultivation of a portion of a tract under claim of ownership of all is a constructive possession of all, if the remainder is not in the

<sup>44</sup> 40 Phil. 216.

<sup>47</sup> 59 Phil. 15.

<sup>48</sup> 59 Phil. 18.

<sup>49</sup> 62 Phil. 148.

<sup>50</sup> 62 Phil. 152.

<sup>51</sup> 39 Phil. 177.

adverse possession of another. \* \* \* Possession in the eyes of the law does not mean that a man has to have his feet on every square meter of ground before it can be said that he is in possession."<sup>52</sup>

In *Director v. Abada*,<sup>53</sup> he spoke of our Land Registration System as having been established "in order that there may be certainty as to land titles."

The same attitude is palpable in Mr. Justice Malcolm's approach to questions involving contracts entered into by parties. The underlying principle must have been that the parties would never have entered into the contract if they had not intended to be bound thereby. In *Askay v. Cosalan*,<sup>54</sup> in denying an action for rescission of a contract, he said:

"But the fact that the bargain was a hard one, coupled with mere inadequacy of price when both parties are in a position to form an independent judgment concerning the transaction, is not a sufficient ground for the cancellation of a contract."

In *Suñga v. Zaballero*,<sup>55</sup> involving another action for rescission, he said:

"Where the means of knowledge are at hand and equally available to both parties, the buyer will not be heard to say that he has been deceived. And if any act is done by the complaining party after discovering the alleged fraud or mutual mistake toward carrying out the contract, it shows an irrevocable election to abide by the contract."

In *Song Fo v. Hawaiian Philippine Company*,<sup>56</sup> speaking of the effect of the contract on the parties, he said:

"The terms fixed by the parties are controlling. The time of payment stipulated for in the contract should be treated as of the essence of the contract."

And in *Tuason v. Marquez*,<sup>57</sup> the maxim of caveat emptor was recalled to sustain a contract between the parties. Mr. Justice Malcolm speaking for the court said:

"The innocent non-disclosure of a fact does not affect the formation of the contract or operate to discharge the parties from their agreement. The maxim of caveat emptor should be recalled."

<sup>52</sup> 39 Phil. 180.

<sup>53</sup> 41 Phil. 71.

<sup>54</sup> 46 Phil. 180.

<sup>55</sup> 59 Phil. 102.

<sup>56</sup> 47 Phil. 821.

<sup>57</sup> 45 Phil. 381.

This high regard for the contract as the embodiment of the parties' intention, was responsible for the stringent rules laid down before parole evidence could be admitted to reform a written agreement on the ground of mistake. In the case of *Bank v. Fidelity & Surety Co.*,<sup>58</sup> Mr. Justice Malcolm laid them down; 1st, that the mistake should be of a fact 2nd, that the mistake should be proved by clear and convincing evidence; and 3rd, that the mistake should be common to both parties to the instrument.

Indeed, the general rule is that the contract is the law between the parties. But the general rule must sometimes bend under the impact of realities, or at least to the weight of circumstances. It was Mr. Justice Holmes who once said that "General propositions do not decide concrete cases." Mr. Justice Malcolm subscribed to that trend of thought and practice; it was he who said in one case that "each case is after all in great measure a law unto itself."

One knows that this attitude prevails in *Song Fo v. Hawaiian Philippine Co.*, supra. In this case, he said:

"The general rule is that rescission will not be permitted for a slight or a casual breach of the contract, but only for such breaches as are so substantial and fundamental as to defeat the object of the parties in making the agreement. A delay in payment for a small quantity of molasses for some twenty days is not such a violation of an essential condition of the contract as warrants rescission for non-performance."<sup>59</sup>

The same is true in the case of *Uy Chaco v. The Admiral Lines*.<sup>60</sup> Here the court through Justice Malcolm, accepted as sound principle, that mere delay in the delivery of goods by common carriers, no matter how long continued, is not a conversion thereof, but is only a breach of the contract of carriage. Therefore in a case where there is such a delay, the consignee cannot refuse to accept the goods from the carrier and recover their value, but is compelled to receive them.

But in this particular case where the delay which ensued between the date when the merchandise should have been delivered and the date when it was finally tendered was close to two years and four months, Justice Malcolm observed:

"But our heads should not be so lost in the clouds of abstract theory, even if charmingly advanced by learned counsel, as to cause us to lose sight of the necessity of keeping our feet firmly planted on the mundane earth of actual facts."

<sup>58</sup> 51 Phil. 57.

<sup>59</sup> 47 Phil. 827.

<sup>60</sup> 46 Phil. 418.

And under the "actual facts", defendant carrier was in effect guilty of conversion, and made to respond for the value of the property at the time of conversion.

But this "system of particularity", if we may be allowed to dub this practice of deciding cases on their own facts, was not confined to cases involving contracts. Its influence is felt, if not prominently conspicuous in Mr. Justice Malcolm's decisions in other branches of private law.<sup>61</sup>

In citing a few of them, we come across the case of *Astudillo v. Manila Electric Co.*<sup>62</sup> In establishing the defendant company's negligence, Justice Malcolm proceeded along this line:

"It is well established that the liability of electric companies for damages for personal injuries is governed by the rules of negligence. Such companies, however, are not insurers of the safety of the public. But considering that electricity is an agency, subtle and deadly, the measure of care required of electric companies must be commensurate with or proportionate to the danger. The duty of exercising this high degree of diligence and care extends to every place where persons have a right to be.

And overruling the contention that the death of the victim, of an age less than twenty years was exclusively due to his negligence, the court observed that "he only did the natural thing to be expected of one not familiar with the danger arising from touching an electric wire, and was wholly unconscious of his peril. Had not the wire caused the death of this young man, it would undoubtedly have been a question of time when someone else, like a playful boy, would have been induced to take hold of the wire, with fatal results."<sup>63</sup>

In *Pando v. Lopez Manzano*,<sup>64</sup> the distribution of the estate had been completed, when a person having no claim against the estate and aware of the pendency of the proceedings then yet remained silent, presented the will of the deceased for probate. The court held through Justice Malcolm that such person was without legal right to insist on the probate of the will. But Mr. Justice Malcolm was prompt to add:

"Out of excessive caution let it be understood that this ruling does not have to do with a case where a will is proved during the pendency of intestate proceedings, and does not relate to the case of one with an interest in the estate who offers a will for probate even after the administration has

<sup>61</sup> By the very nature of the controversy, the "system" was indeed proper in determining the compensation to be paid for salvage services—see *Fernandez v. Thompson*, 38 Phil. 690. This is similarly true in litigations over infringement of trade marks and unfair competition—see *Forbes v. Ang San To*, 40 Phil. 272.

<sup>62</sup> 55 Phil. 427.

<sup>63</sup> 55 Phil. 430.

<sup>64</sup> 58 Phil. 436.

been closed and of whom an unconscionable advantage may have been taken through fraud, accident or mistake. These possible cases will be left for decision as they arise."<sup>65</sup>

But it is in the famous case of *Torres and Lopez v. Lopez*,<sup>66</sup> that we find the "system" in full force and effect, that we find a rare specimen of what perhaps Ihering calls the "jurisprudence of actualities."

The testamentary capacity of Tomas Rodriguez was the issue. He was a man of feeble health, of advanced age, under guardianship and suffering from senile dementia. Plaintiffs contended that notwithstanding his physical condition and state of mind, he had the capacity to make a will; the defendants contended otherwise. Justice Malcolm speaking for the majority said:

"Various tests for testamentary capacity have been announced by the courts only later to be rejected as incomplete. Of the specific tests of capacity, neither old age, physical infirmities, feebleness of mind, weakness of the memory, the appointment of a guardian, nor eccentricities are sufficient singly or jointly to show testamentary incapacity. Each case rests on its own facts and must be decided on its own facts.  
x x x"

On the issue of testamentary capacity, the evidence according to Justice Malcolm, should be permitted to take a wide range in order that all facts may be brought out which will assist in determining the question. And after the court scaled "this mountain of evidence more or less relevant and of argument intense and prolific to discover the fertile valleys of fact and principle," the conclusion was:

"x x x. Tomas Rodriguez may have been of advanced years, may have been physically decrepit, may have been weak of intellect, may have been extremely eccentric, but he still possessed that spark of reason and of life, that strength of mind to form a fixed intention and to summon his enfeebled thoughts to enforce that intention which the law terms 'testamentary capacity'".<sup>67</sup>

Many are the cases however, wherein Mr. Justice Malcolm was called upon to apply definite legal rules, more specifically, our civil code provisions.<sup>68</sup> By applying these legal rules to proven facts, he was treading a path different from the sociological, though perhaps leading to the same result.

<sup>65</sup> 48 Phil. 439.

<sup>66</sup> 48 Phil. 772.

<sup>67</sup> See also concurring opinion in *Cuyugan v. Baron*, 62 Phil. 866.

<sup>68</sup> *Manzanares v. Moreta*, 38 Phil. 821

*Cuison v. Norton Harrison Co.*, 55 Phil. 18 . . . . Art. 1902

*Bernal v. House*, 54 Phil. 327

*Hernandez v. Villanueva*, 40 Phil. 775—Art. 1450.

*Sempio v. Del Rosario*, 44 Phil. 1—Art. 1524.

There are times, indeed, many times when a given case could best be solved by "applying the law", to cast a fixed set of facts against a fixed pattern, called the law, or to proceed therefrom by a process of logical deduction, stripped of one's concept of justice, as Kelsen would desire. Especially could one be assured of justice in the end, if we look at the "law" as the embodiment of human experience. But as long as justice remains a passion of the human breast, the quest for it must revolt at the rigidity of such a system. Man's life, complex as it is, cannot be shaped by a mechanical process, by what Frankfurter calls "sterile dogmas and romantic impressionism. Only the methods of reason, unsubordinated by ephemeral, can unite coherence with vitality." Insofar as law is a contributive force towards social happiness, it must guide human conduct, restrict human behaviour, by showing that one course, instead of another, would be socially wrong, or at least detrimental to the welfare of the community of which he is a part.

Typical of this attitude in Mr. Justice Malcolm, of looking at the law more from its function, that from its nature, is the case of *Gutierrez Repide v. Afzelius*, supra. The case could well have been decided by the application of articles 1098, 1124, 1451 for the precise question was whether a vendor could compel a vendee to proceed with the contract of purchase and sale; and the commentaries of Manresa do not in the least attempt to distinguish between one or the other party, the vendor or the vendee, but constantly and without exception, use the word "reciprocamente". Not content however, with the application of these legal precepts under the civil law, Justice Malcolm goes farther and sustains that "the stability of commercial transactions require that the rights of the seller be protected as effectively as the rights of the buyer". In *Hernandez v. Villanueva*, supra, not satisfied with the application of Article 1459 which enum-

Lopez v. Del Rosario, 44 Phil. 98—Art. 1108.

Tabar v. Becaver, 44 Phil. 619—[civil law rule on contracts were applied to donation con causa onerosa.]

Jovellano v. Lualhati, 47 Phil. 371—Arts. 1481 & 1482.

Ramirez v. Redfern, 49 Phil. 849—Art. 1894.

Lima v. Lim Chu Kao, 51 Phil. 476—Arts. 1277, 1305 & 1306.

Fojas v. Velasco, 51 Phil. 520—Arts. 489, 1573.

Mendoza v. De Guzman, 52 Phil. 164—Art. 361, 453 & 454.

Teng Ah Chan v. Kwong Kam Koon, 52 Phil. 180—Arts. 1309, 1311 & 1313.

Labayan v. Talisay-Silay Milling Co., 52 Phil. 440—Arts. 1184 & 1272.

Po Sun Tun v. Prov. Govt. of Leyte, 54 Phil. 193—Art. 1473.

Villarta v. Aliwalas, 54 Phil. 499—Art. 1473 (Law of Toro & Novisima Recopilación)

PNB v. Palma Gil, 55 Phil. 639—Art. 1727.

Davao Saw Mill Co., Inc. v. Castillo, 61 Phil. 709—Art. 334.

Gutierrez v. Afzelius, 39 Phil. 190—Arts. 1124, 1451.

Masongsong v. Ferrer, 57 Phil. 244—Arts. 582 & 584.

Behn Meyer v. Yangco, 58 Phil. 602—Art. 1451.

<sup>60</sup> 39 Phil. 196.

erates the persons disqualified from purchasing property of a specified nature, Mr. Justice Malcolm goes farther and sustains that "all the reason of the case corroborates a rule so amply protective of the confidential relations which must necessarily exist between attorney and client, and of the rights of both. The high trust and confidence which the citizen must repose in the attorney can only be attained if the attorney observes the utmost good faith toward the client. Public policy will be protected by the observance of the Code provision."<sup>70</sup>

Any work on Justice Malcolm will be off the mark if we should not, even in passing, touch on the style by which he expressed his opinions. It was in Constitutional Law again, that many of his words are endlessly uttered on the lips of students. And the pen that wrote those words must remain the same wherever it scribbled. For in private law cases, "many a time, in turning the pages of an opinion devoted to a hunderum theme, some problem perhaps of contract or negligence, I have come across a winged sentence that seemed with its wings to chase obscurity away. Curious, I have gone back to the beginning to find the name of Malcolm."

Nearly fourteen years ago, Mr. Justice George A. Malcolm left the ranks of our Supreme Court. Little did he feel then or perhaps he knew too well that in casting off the judicial robes, he was giving way for those whom he taught in the law. For it is for us a reassurance and for him a pride that men who have at one time or another come under his guidance, today adorn the highest Court of the nation. Illustrious Justices, whom Mr. Justice Malcolm knew and taught in their early twenties are now among the eleven "grand old men of the Court." And at a time which may well be called the formative stage of our Republic, these men have shown a profound analytic power, consummate scholarship and a deep sense of the social welfare. If only for this, and to the extent that these men shape the course of our jurisprudence, rightly may we say that Mr. Justice Malcolm, the teacher, has given the directions of contemporary jurisprudence. And to him can be said what to Justice Holmes was said by Frankfurter: "To him has been granted the crowning gift of witnessing himself, they sway of his mind over men's thought and action. And their response has come as the victories of the mind always come by its inner force and worth. For he has lived his chosen life unflinchingly and without compromises—the life of the thinker under fire, applying the philosopher's temper to the passions of men and the conflicts of society."

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<sup>70</sup> 40 Phil. 778.