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NOTES AND COMMENTS:

Suggested Reforms to Our Law on Adoption

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Adoption is the establishment of the relation of parent and child between persons not so related by nature.[1] The provisions of our law relating to adoption as a status are found in Articles 334 to 348 of the Civil Code. Rule 100 of the Rules of Court governs the proceedings for adoption. A study of said provisions reveal the inadequacy of our law on adoption. It is at once apparent that adoption has not received from the Code Commission and Congress the attention which a subject of such social significance deserves.

In proposing these reforms, it is well to keep in mind the purpose of adoption: to fix the status of an adopted child as near as possible to that of a natural child, and to give it the same position in the family, together with all the rights and privileges of a child of the adoptive parents.[2] The name of the child is changed,[3] its identity is merged into that of the adoptive parents, and it becomes their child in all but blood. That was the same purpose of adoption under

[1] In re Knott, 197 SW 1097, 1098 (1917).
[2] Bray v. Miles, 54 NE 446, 448 (1899).
[3] Art. 336, Civil Code.

the Roman law, the unquestioned source of our adoption statutes today.[4]

The right of inheritance is not a necessary incident to adoption but must be conferred by statute. Our law makes the adopted person a legal heir of the adoptive parents,[5] but does not allow him to inherit through them.[6] In case of the death of the child, his parents and relatives by nature, and not by adoption, shall be his legal heirs, except as to property received or inherited by the adopted child from either of his parents by adoption, which shall become the property of the latter or their legitimate relatives, who shall participate in the order established by the Civil Code for intestate estates.[7]

This failure to allow the adopted person to inherit *through* his adoptive parents was due to the view that the ancestors of the adopter are presumed to know their relatives by blood and to have them in mind in the distribution of their estates, either by will or descent, and that they cannot be expected to keep informed as to adoption proceedings in the courts; and to allow an adopted child to inherit from the ancestors of the adopter would often put property into the hands of unheard-of adopted children, contrary to the wishes and expectations of such ancestors.[8]

This view would not be a logical follow-up of the theory that the artificial relations created by adoption should extend to relations existing by nature. The status of an adopted child is considered by some jurists as a quantitative relation, and anything which takes away from the incidents of the relation those rights which are usually associated with the status thereby creates a different status, one in which the analogy to the natural relation is not carried out to its furthest possible extent.[9]

Many courts have held, under statutes which did not expressly cover the point, that the change in status is effected only between the adoptive parents, the natural parents, and the child.[10] The majority and the better view, however, is that the change is complete so that the adopted child becomes the relation of all the lineal and collateral kindred of the adoptive parents, and ceases to be the relation of his natural lineal and collateral relatives.[11]

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[4] See Bernard, First Year of Roman Law (Sherman tr. 1906) sec. 292. A notable historical example is cited by Napton, J., in Reinders v. Koppelman, 68 Mo., 496, 30 Am. Rep. 802, whereby, Tiberius being the stepson and adopted son of Augustus, his nephew, Germanicus (adopted by Triberius on the command of Augustus Caesar), became the grandson of Augustus himself.

[5] Art. 341, par. 3, Civil Code.

[6] Sec. 5, Rule 100, Rules of Court.

[7] Ibid.

[8] Phillips v. McConica, 51 NE 445, 447. (1898).

[9] See Newbold, *Juridical and Social Aspects of Adoption,* 11 Minn. L. Rev. 605.

[10] Baker v. Clowser, 138 NW 837, 840.

[11] Gilliam v. Guaranty Trust Co., 78 NE 697, 700 (1906).

Our law on adoption was passed not for the benefit of the natural parent, who must give his consent to the adoption [12] and who, from the time of the adoption, is relieved of all parental duties to and responsibility for, the child so adopted,[13] nor for the benefit of the adoptive parent, who may incidentally profit because of the service or society of the adopted child,[14] but for the sole benefit of the adopted child. Congress should be governed primarily by what appears to be his interest. The adopted child should be allowed to inherit *through* his adoptive parents.

The Rules of Court also provide that the adopted child may inherit from both his foster parents and natural parents.[15] That was so in Roman law, where the adopted child retained all of the family rights resulting from his birth, and there was secured to it all of the family rights procured by the adoption.[16] Some courts uphold this view on the ground that the parents cannot take away the right of the child to inherit from his natural parents by contracting, without his consent, to give him to other parents.[17] In the Philippines, the person to be adopted, if fourteen years or over, must consent in writing to his adoption.[18]

To make the adopted child a legal heir of both his adoptive and natural parents would work injustice upon the other children of the natural parents. In most cases, the adopted child is materially benefited by the adoption, being placed in much better surroundings and having more opportunities for proper nurture, education, and training. Besides, his natural parents would not ordinarily consent to his adoption unless they think it to his advantage. Why, then, should the adopted child, already a legal heir of the adoptive parents, remain a legal heir of his parents by nature?

The failure to permit the adoptive parents and adoptive kin to inherit from the child was a manifestation of the law-making body's concern for the protection of the child and a desire to discourage predatory adoption. It is not true, however, that such predatory motives exist to any marked degree. The main motives for adoption are an interest in children, a desire for affectionate response and an insurance against the insecurity of old age.[19] Our courts are vested with discretion to determine proper cases for adoption.[20] It certainly is not in keeping with new viewpoints of human life and human problems if the adoptive parents and adoptive relatives are not allowed to inherit from the adopted child. What the natural parents lose, the adoptive parents may be said to gain. They gain the right to the society of the child, the right to rear it, the right to its custody, to its tutorage, to the shaping of its destiny. In most

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[12] Art. 340, Civil Code.
[13] Art. 341, par. 2, Civil Code.
[14] In Re Harsgord's Estate, 147 NW 378, 379. (1914).
[15] Sec. 5, Rule 100.
[16] See Sander's *Justinian*, 103, 105, 107.
[17] Delano v. Bruerton, 2 LRA 698, 699.
[18] Art. 340, Civil Code.
[19] See Brooks, *Adventuring in Adoption*, p. 183 (1939).
[20] *Supra*, footnote 6.

cases, the adopted child regards his adoptive parents as his own, feeling a strong sense of responsibility to those who took him from a home of poverty or a charitable institution and placed him in an environment tending to his physical, mental and moral uplift. It is his adoptive parents who have given him the opportunities to accumulate any estate. It is unlikely that he would prefer his natural parents to his adoptive parents when it comes to inheriting his property.[21] It is but just that on the question of inheritance, reciprocal rights be granted to the adoptive parents.

In the United States, where the increasing number of adoptions have forced legislative bodies to keep abreast of the latest social developments in that field, twenty-four states have granted reciprocal rights to adoptive parents.[22] In ten states, the source of property is the determining factor on the right of the adoptive parents to inherit.[23] Fifteen jurisdictions expressly deny the right of the natural parents to inherit from the adopted child.[24] Three states allow the natural parents to inherit only in the absence of adoptive kin.[25]

With respect to the right of adoptive relatives to inherit from the adopted child, the trend of legislation in the United States is to grant them this right. Fifteen states permit adoptive kin to inherit from the child,[26] while twelve regard the source of the estate as determinative of their right to inherit.[27]

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[21] See Lockridge, *Adopting A Child*, 152 (1947).

[22] Alaska Comp. Laws Ann. sec. 21-3-21 (1949); Calif. Probate Code, sec. 257 (Deering, 1941); Colo. Stat. Ann., c. 4, sec. 5 (1935); Conn. Gen. Stat. sec. 6869 (1949); D.C. Code secs. 16-205 (1940); Fla. Stat. Ann. sec. 731.30 (1944); Hawaii Rev. Laws sec. 12278 (1945); Iowa Code sec. 63632 (1946); Kan. Gen. Stat. secs. 59-507 (Supp. 1947); Ky Rev. Stat. sec. 391.080 (Baldwin's, 1942); La. Gen. Stat. sec. 9734.6 (Dart, 1939); Mich. Stat. Ann. sec. 27.3178 (164) (1943) (personal property); Minn. Stat. Ann. sec. 259.07 (1947); Mo. Rev., Stat. Ann. sec. 9614 (supp. 1948); Neb. Rev. Stat. secs. 43-110 (1943); Nev. Laws, c. 152, sec. 5 (1941); N.Y. Do. Rel. Law. sec. 115; N.C. Laws, c. 832, sec. 1, c. 879, sec. 1 (1947); Ore. Comp. Laws Ann. secs. 63-407 (a) (Supp. 1947); Pa. Stat. Ann., tit. 20. sec. 1.8 (Burdon Supp. 1948); Texas Stat. Ann art. 46a, sec. 9 (vernon's Civil, 1947); Vt. Stat. sec. 9954 (1947); Wash. Laws of 1943, c. 268, sec. 12; Wis. Stat. sec. 322.07 (1947).

[23] Ariz. Code Ann. secs. 39-103 (1939); Ill. Ann. Stat., c. 3, sec. 165 (Smith-Hurd, 1941); Ind. Stat. Ann. secs. 3-121; Okla. Stat. Ann., tit. 10, sec. 53 (Supp. 1948); Ark. Stat. Ann. secs. 56-109 (b) (1947); Me. Rev. Stat., c. 145, sec. 38 (1944); Mass. Ann. Laws, c. 210, sec. 7 (1933); Mich. Stat. Ann. sec. 27.3178 (156) (1943); N.H. Rev. Laws, c. 345, sec. 5; Va. Code Ann. sec. 5333h (b) (1942).

[24] Alaska, California, Colorado, Connecticut, Florida, Washington D.C., Kansas, New York, Washington, Vermont, Minnesotta, Nebraska, Hawaii, Michigan, Pennsylvania.

[25] Iowa Code sec. 636.43 (1946); Ky Rev. Stat. sec. 391.080 (2) (1942); Wis. Stat. sec. 322.07 (1947).

[26] Colorado, Connecticut, Iowa, Washington, D.C., Michigan, Kentucky, Washington, Oregon, Nevada, Minnesotta, Nebraska, Pennsylvania, Texas, Wisconsin, Alaska.

[27] Arkansas, Massachusetts, New Hampshire, Arizona, Indiana, Oklahoma, Illinois, Delaware, Virginia, West Virginia, New Jersey, Maine.

The essense of parenthood, rather than merely physiological, is also sociological.[28] After adoption, contacts and associations between the natural parents and the child are rare. While social scientists look upon the adopting family as a complete substitute for the natural one, legislators have found difficulty in harmonizing this view with the idea that the child born to its parents is no less their child even though the legislature provides that it may become the child of another by adoption.

The adoption of adults, allowed by our Civil Code,[29] constitutes a sweeping departure from the whole theory of adoption—the theory of giving to the child a home and a parent. In the United States, where most state legislatures also permit the adoption of adults, there has been a wide clamor for the repeal of such statutes. Two illustrative cases carry a note of warning. In Stevens v. Halstead,[30] a married woman, living apart from her husband in adultery with the decedent in order to secure his property, coerced and induced decedent, aged and infirm mentally and physically, to adopt her. In Raymond v. Cooke,[31] at the time of the adoption, the respondent was thirty-one years of age and Mrs. Cooke, seventy-one. In 1908, the respondent entered the Cookes' home as attendant to Mr. Cooke who died in 1909. After Mr. Cooke's death, the respondent continued in the house with Mrs. Cooke, who was infatuated with him; she had been a thrifty woman, but after the respondent came to the house, she gave him costly presents, bought him an automobile, took him with her to Europe. Within two months after her husband's death, a decree of adoption was procured. The respondent stated that he would get Mrs. Cooke "under his thumb." A short time after the adoption, Mrs. Cooke said she had to "adopt him or marry him or he would leave, and I cannot be left alone."

It would seem that the adoption of adults would open a "new field of industry."[32] It would be more in keeping with the purpose of adoption to limit it to children.

The social and economic problems arising from the complexities of modern life have drawn public attention to adoption as a means to strengthen the fabric of our society. The incorporation of these proposals to our law on adoption would be a logical and constructive step towards this end.

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[28] See Brooks, *Adventuring in Adoption*, p. 136.

[29] Art. 337, Civil Code.

[30] 168 N.Y. Supp. 142 (1917).

[31] 115 N.E. 423 (1917).

[32] See Dissenting Opinion, Cullen, J. in Matter of MacRae. 81 NE 956, 957 (1907).

Will Injunction Lie to Restrain the Collection of Taxes?

The government and the citizen have remedies available to them for the enforcement and protection of their rights as collector and taxpayer, respectively. Every taxpayer has a right to a remedy for any actual wrong he may have suffered in the collection of taxes.[1] If the power of taxation is illegally exercised, it is an invasion of private right, and, in the absence of some specific limitation of the remedy imposed by law, the party injured may resort to the courts to vindicate his right against those who attempt such invasion by any form of action which he could use against any wrongdoer with respect to the same class of wrongs.[2] The question posed is whether injunction is available to the individual taxpayer to restrain the collection of taxes.

The pertinent provision in Philippine law is found in the National Internal Revenue Code,[3] Sec. 305 of which reads as follows: "No court shall have authority to grant an injunction to restrain the collection of any national internal revenue tax, fee, or charge imposed by this Code."[4] Said provision may be interpreted either as an absolute denial of jurisdiction or power on the part of any court to grant an injunction for the purpose mentioned, or as merely declaratory of a general principle governing the issuance of injunction, with special reference to tax collection. Couched in absolute terms, it is clearly mandatory and it is to be doubted, therefore, if Philippine courts will ever grant an injunction to restrain the collection of taxes.

The constitutionality of such a statutory provision has long been upheld in a "vast array of interpretative jurisprudence which culminates in the decision in Churchill and Tait v. Rafferty."[5] In this case,[6] our Supreme Court declared that a law prohibiting the courts from enjoining the collection of a tax does not curtail the jurisdiction of the Philippine Courts as fixed by Sec. 9 of the Organic Act of July 1, 1902: a) Because such jurisdiction was never conferred; and b) because adequate remedy has been provided, that

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[1] Churchill v. Rafferty, 32 Phil., 580; Sarasola v. Trinidad, 40 Phil. 252, 256.

[2] Western Union Telegraph Co. v. Trapp, 186 F. 114, 108 CCA 226.

[3] C. A. No. 466, as amended.

[4] A previous similar provision was Sec. 1578 of the Revised Administrative Code the antecedents of which were the Administrative Code of 1916, the Internal Revenue Law of 1914 (Act No. 2339), and the Internal Revenue Law of 1904 (Act No. 1189). Sec. 1578 of the Revised Administrative Code and its corresponding sections in previous Philippine laws found their particular inspiration in a similar provision in the Act of Congress of March 2, 1867. (14 Stat. at L., 475; Sec. 3224, U.S. Rev. Stat.; Sarasola v. Trinidad, *supra*).

[5] Sarasola v. Trinidad, *supra*, at p. 256.

[6] 32 Phil., 580.

of payment and protest.[7] It is not repugnant to the due process and equal protection clauses of the constitution,[8] and, therefore, will be given effect whenever a case arises involving said provision. Indeed, it is a proper and constitutional exercise of legislative power, on the assumption, at least, that some other adequate remedy is open to the taxpayer.

Public policy and the nature of the power of taxation are the principal reasons behind the prohibition against judicial interference with the collection of taxes through administrative proceedings.[9]

The prompt collection of taxes is a policy deeply intrenched in our tax system.[10] Indeed, the collection of taxes must be prompt and unembarrassed if public affairs are to be successfully carried out. It should take the form of a summary procedure, otherwise "the evidence of government might be put in peril by the delays attending upon formal judicial proceedings." [11] For cogent reasons of public policy, therefore, courts are slow, if ever, to interfere with the orderly and speedy collection of the public revenues, and will not interfere with proceedings to enforce the payment of taxes, except in the clearest cases and for the most imperative reasons.[12]

It is the constant principle in injunction cases that this writ does not lie in the presence of a plain, speedy and adequate remedy in the ordinary course of law. Our law contains such express prohibition presumably because there is some other adequate remedy available to the aggrieved taxpayer. Sec. 306 of our National Internal Revenue Code has provided for such remedy which the courts have pronounced to be exclusive of every other remedy.[13] This pro-

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[7] Act No. 136, Sec. 56, par. 2, 7; Act No. 82, Sec. 84; Act No. 1189, Sec. 52; Act No. 2339, Sec. 139-140.

[8] Churchill v. Rafferty, *supra;* Sarasola v. Trinidad, *supra.*

[9] Sarasola v. Trinidad, *supra* at pp. 262-263; see also Lorenzo v. Posadas, 64 Phil., 353, 371. "It is but a truism to restate that taxation is an attribute of sovereignty. It is the strongest of all the powers of government. * * * Public policy decrees that, since upon the prompt collection of revenue there depends the very existence of government itself, whatever determination shall be arrived at by the Legislature should not be interfered with, unless there is a clear violation of some constitutional inhibition. As said in Dows vs. The City of Chicago, *supra,* 'It is upon taxation that the several states rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.' "

[10] Lorenzo v. Posadas, *supra.*

[11] King v. Mullins, 171 US 404 (18 Sup. Ct. Rep. 925, 935).

[12] Port Angeles Western R. Co. v. Clallam County, Wash., 20 F (2d) 202 204. Nye v. Washburn, 125 F. 817.

[13] Sec. 306 reads: "No suit or proceeding shall be maintained in any court for the recovery of any national internal-revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any

vision embodies the principle of "pay first and litigate afterwards." Strict compliance with the conditions imposed therein for the return of revenue collected is a doctrine consistently applied here and in the United States.[14] If the aggrieved taxpayer desires to contest the legality or correctness of the tax assessed against him, he must first pay the amount demanded of him, and later, maintain an action at law to recover the amount paid, or so much of it as was illegally exacted.[15] This is ordinarily regarded as an adequate, plain and sufficient remedy in law. In such an instance, equity will not take jurisdiction to enjoin the collection of a tax.[16]

Once upon a time the general rule in the United States was that courts of equity would under no circumstances interfere to restrain the collection of a tax by an injunction.[17] But it was not long before this doctrine was repudiated by a majority of the Americân courts. Hence, not withstanding the statutes which inhibit courts of equity from restraining the assessment or collection of taxes, United States courts have invariably issued injunction *pendente lite* to protect the rights of taxpayers.[18] While suits to enjoin the collection of taxes are generally frowned upon by American courts,[19] yet the statutory limitation does not preclude equity from taking jurisdiction in certain cases. The recognized rule in American law presently is that an injunction against the collection of taxes will be issued only in a plain case.[20] This means that the taxpayer seeking injunctive relief must show that his case comes under some acknowledged head of equity jurisdiction.[21] All presumptions are in favor of the tax proceedings, and the burden is on the one attacking the tax.[22]

Inadequacy of legal remedy is admittedly a basic ground for injunction to issue.[23] But since, as shown above, there is a pre-

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manner wrongfully collected, until a claim for refund or credit has been duly filed with the Collector of Internal Revenue, but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. In any case, no such suit or proceeding shall be begun after the expiration of two years from the date of payment of the tax or penalty."

[14] Wee Poco v. Posadas, 64 Phil., 640, cited in Bermejo v. Collector of Internal Revenue, G.R. No. L-3029, July 25, 1950.

[15] Roxas v. Rafferty, 37 Phil., 957.

[16] Churchilll v. Rafferty, *supra*; Sarasola v. Trinidad, *supra*; Sinco, Phil. Political Law, p. 513; Union Pac. R.V. Co. v. Bd. of Com'rs of Weld County, Colo. 247 U.S. 282; Singer Machine Co. of New Jersey v. Benedict, 229 U.S. 481.

[17] Minturn v. Hays, 2 Cal. 590, 56 Am. Dec. 366; Dewitt v. Hays, 2 Cal. 463, 56 Am. Dec. 352; Methodist Protestant Church v. Baltimore, 48 Am. Dec. 540; Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654.

[18] Anno: 108 ALR 201.

[19] Kendrick v. A.Y. and Minnie Mining and Milling Co., 63 Colo. 214, 164 Pac. 1161, 1162.

[20] Camins v. New York and P.R.S.S. Co., 260 Fed. 40.

[21] Cooley on Taxation, Sec. 1641.

[22] P. *ex rel* Stuckart v. Klee, 282 III. 440, 118 NE 754, 755.

[23] Stratton v. St. Louis Southwestern R. Co., 284 U.S. 530 (52 Sup. Ct. Rep. 217, 224); Matthews v. Rodgers, 284 U.S. 521 (52 Sup. Ct. Rep. 223).

sumably adequate remedy at law in our jurisdiction, this ground can not be a circumstance that will warrant the issuance of injunction in the Philippines.

Lack of legal authority to impose the tax is another ground recognized in American law, although the general rule is that injunction will not lie merely because of the illegality or unconstitutionality of a tax. In a number of the American states, a court of equity will enjoin the collection of a tax levied under an unconstitutional statute, or for an unlawful purpose, or of a tax not authorized by statute, without regard to any special ground of equity jurisdiction. This is the more liberal view in regard to enjoining the collection of taxes as opposed to the stricter view adhered to by most American states which require that the case must fall under a recognized head of equity jurisdiction. The basic reason for the former view is the inequality of the position of the taxpayer and the collector who is entrusted with such extensive and drastic governmental powers, and the hardship of making a citizen pay an illegal tax and institute long and expensive litigations as the condiiton of recovering it.[24] Another ground recognized in American law is the exemption from taxation of the property assessed. In many cases the rule has been laid down that injunction is a proper remedy against a tax on property which is by law exempted from taxation.[25]

The danger or imminence of irreparable injury to the taxpayer has long been recognized in American law as a basis for relief in injunction suits generally.[26] This may happen through the enforcement of the penalties and coercive features of an unconstitutional tax statute,[27] especially where the property is peculiarly valuable and its seizure can not be adequately compensated by damages.[28] Irreparable injury may also result when the enforcement of a tax might destroy, for example, a valuable franchise,[29] or irreparably damage the credit of the taxpayer,[30] or interfere with his business,[31] and in other like cases where the recovery of damages would be inadequate redress.[32]

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[24] Davis v. Petrinovich, 36 LRA 615; Seeley v. Wetsport, 36 Am. Rep. 70; Hewin v. Atlanta, 2 Ann Cas 296; Millere v. Cook, 10 LRA 292; Ottawa v. Walker, 74 Am. Dec. 121; Croop v. Walton, 53 ALR 1386.

[25] U.S. v. Rickert, 188 US 432; Tomlinson v. Branch, 21 L Ed 189; Osborn v. Bank of US, 6 L. Ed. 204; Croop v. Walton, 53 ALR 1386.

[26] United Fuel Gas Co. v. Railroad Commission, 278 US 300; Johnson v. Haydel, 278 US 16.

[27] Ohio Tax Case, 232 U.S. 576; Ex parte Young, 209 U.S. 123; Shelton v. Platt, 139 US 591.

[28] Metcalf Co. v. Martin, 127 Am. St. Rep. 149; Odlin v. Woodruff, 22 LRA 699; White v. Stender, 49 Am. Rep. 283.

[29] Osborn v. Bank of U.S., 9 Wheat. (U.S.) 738, 6 L. Ed. 204, 206.

[30] Board of Councilmen, City of Frankfurt v. Fidelity Trust and Safety Vault Co., 23 Ky L Rep. 908, 63 SW 470.

[31] Johnson v. De Bary-Baya Merchants Line, 37 Fla. 499, 37 LRA 518, 526.

[32] Cooley on Taxation, Sec. 1641.

Irreparable injury seems to be the only case where equity will interfere in the Philippines because "equity alone can do complete justice under such circumstances."[33] Where irreparable injury or loss will result from the enforced collection of a tax, it is submitted that the remedy afforded by our law is not adequate and sufficient. An action to recover the tax paid certainly is inadequate redress because the injury has been inflicted, and, it being irreparable, no amount of suit at law, whether for recovery [34] or for damages,[35] will restore the taxpayer to his *status quo* before the tax was levied and collected.

The necessity of granting equitable relief becomes more pressing when the taxpayer is not in a position to pay the tax assessed against his property. He may not have sufficient cash on hand because of the unreasonableness of the amount demanded of him. The remedy afforded by Sec. 306 of the National Internal Revenue Code is, therefore, unavailable—nay, meaningless—in such case, considering that payment of the tax is a prerequisite to bringing an action for recovery. There being no remedy in law, or even if available, it being inadequate, equity should interfere [36] in the form of an injunction.

In the case of Sarasola v. Trinidad, *supra,* it was intimated that injunction may issue in case of irreparable injury. Our Supreme Court, speaking through Justice Malcolm, while adhering to the general rule that a remedy at law for the recovery of taxes illegally collected is adequate, recognized irreparable injury as an exceptional circumstance which serves to take cases out of the general rule. It had in mind a United States Supreme Court decision [37] in which it was remarked that there can be no case of equitable cognizance "where there is a plain and adequate remedy at law. And, *except where the special circumstances which we have mentioned exist,*[38] the party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid." It is submitted, therefore, that notwithstanding Sec. 305 of the National Internal Revenue Code, where the presence of unusual circumstances and entirely extraordinary conditions which cause irreparable harm and injury to a taxpayer justify equitable and injunctive relief, a court ought to interpose its arm to restrain the collection of a tax.[39]

Now, what constitutes irreparable injury in law as a basis for the issuance of the extraordinary writ of injunction? As ordinarily understood, an injury is irreparable, within the law of injunctions,

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[33] Detroit, G.H. & M.R. Co. v. Fuller, 205 Fed. 86.

[34] Sec. 306, Nat. Int. Rev. Code.

[35] Sec. 310, do.

[36] Brinkerhoff—Faris Trust & Savings Co. v. Hill, 281 U.S. 673; Hopkins v. Southern California Telephone Co., 275 U.S. 393; Wilson v. Illinois Southern Rye Co., 263 U.S. 574.

[37] Dows v. The City of Chicago, (1871) 11 Wall 108.

[38] Irreparable injury; italics supplied.

[39] See Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229.

where it is of such a character that a fair and reasonable redress may not be had in a court of law so that to refuse the injunction would be a denial of justice.[40] It is an injury irreparable by the ordinary process of courts of law, as in the case where damages at law can afford no adequate compensation.[41] To be irreparable, the injury need not be beyond the possibility of repair, or beyond possible compensation in damages,[42] nor need it be very great.[43] The term "irreparable damage" does not have reference to the amount of damage caused, but rather to the difficulty of measuring the the amount of damage inflicted [44] because there exists no certain pecuniary standard therefor.[45]

In this connection, the case of Sarasola v. Trinidad, *supra,* is authority for the proposition that the mere suspension of the taxpayer's business through enforcement of the tax because it is more than what he can afford to pay, does not constitute irreparable injury and, therefore, is not a sufficient reason for the court to intervene, through injunction, in the administrative collection of the tax. The simple reason for this ruling, as pointed out by Judge Cooley, whose treatise was cited by our Supreme Court,[46] is that in ordinary actions to recover on a promissory note, it is no valid ground to restrain by injunction such recovery on the plea that the enforcement of the note would break up the business of the debtor. Neither is the alleged illegality or unconstitutionality of a tax law sufficient to make the collection of a tax an irreparable injury.[47]

Acts that will cause the destruction of complainant's property do an irreparable injury. It is elementary law that the right to conduct one's business without the wrongful and injurious interference by others is a valuable property right which a court of equity will not hesitate to protect by injunction. Hence, the enforcement or forced collection of a tax which will not only suspend but destroy or liquidate the taxpayer's business will result in irreparable injury.[48]

Not infrequently, mention has been made above of the terms "equity" and "equitable remedy." Indeed, injunction is properly

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[40] Thompson v. Smith, 154 SE 579, 71 ALR 604, 615.

[41] High on Injunctions, p. 906; also Bonaparte v. Camden, etc. R. Co., 3 F Cas 1617, note 34 (b).

[42] First National Bank v. Tyson, 59 LRA 399, 91 AM ST Rep. 46; Field v. Barling, 37 NE 850, 41 Am St Rep 311; High on Injunctions, p. 906; Gilchrist v. Cuddy, 29 Phil., 542; Ollendorf v. Abrahamson, 38 Phil. 585.

[43] Field v. Barling, *supra;* Com. v. Pittsburgh & C. Rr. Co., 24 Pa 159, 62 Am Dec 372; High on Injunctions, *supra*; Gilchrist v. Cuddy, *supra;* Ollendorf v. Abrahamson, *supra.*

[44] Crouch v. Central Labor Council, 83 ALR 193, 198.

[45] Luckenbach S.S. Co. v. Norton, D.C. Pa., 21 F. Supp. 707, 709.

[46] At page 258.

[47] Snyder v. Marks, 109 U.S. 189; Churchill v. Rafferty, *supra*; Sarasola v. Trinidad, *supra.* and Mertens, Law of Federal Income Taxation, Vol. 9, pp. 148-150.

[48] Maffet v. Quine, 93 Fed. 347; Clapp v. Spokane, 53 Fed. 515, Smyth v. Ames, 169 U.S. 466 (18 Sup. Ct. Rep. 418, 426).

and distinctly an equitable remedy, the power to grant which stands forth as a distinct head of equitable jurisprudence. It is frequently termed the "strong arm of equity," or a "transcendent or extraordinary remedy," and is a remedy which should not be lightly indulged in but should be used sparingly and only in a clear and plain case. Its object is to preserve and keep things in the same state or condition, and to restrain acts, actual or threatened, which would be contrary to equity and good conscience, and which would presumably give a cause of action to the injured party, for which the law affords no complete or adequate relief.[49] Suits to enjoin the collecting of a tax are, therefore, equitable in nature.[50]

The remedy of injunction is generally not looked upon with favor by the courts. The power to grant injunctive relief, therefore, will be cautiously exercised, not unreasonably,[51] and only when intervention is essential to protect property effectually or other rights of which equity will take cognizance against irreparable injuries. The very function of an injunction is to furnish preventive relief against irreparable mischief or injury.[52] Being an action in equity, its issuance or denial rests upon the sound discretion of the court and upon the existence or absence of adequate remedies. Among the circumstances that the court may take into consideration is the effect of the issuance of an injunction on the public interest.[53]

Unquestionably, interference with the collection of taxes by executive or administrative officers may cause serious injury to the public interest, and may result in the inability of the government to perform its functions and to render essential services to the public. It is thus that even in the absence of a statutory inhibition, courts have consistently refused to entertain any suit to enjoin the collection of taxes on account of the great disparity between the conflicting claims of the general public, on the one hand, and the right of the individual taxpayer on the other.

Weighing these considerations, one against the other, the courts have decided in favor of the greater public interest and against the possible mere inconvenience that might be suffered by the individual taxpayer by payment of a wrongful and excessive tax. It is, therefore, only upon a clear showing of great and irreparable loss or injury that courts have agreed to grant the remedy of injunction to restrain the collection of a tax.

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[49] Seaton Mt. Electric Light, Heat & P. Co. v. Idaho Springs Invest. Co., 111 p. 834, 33 LRA (NS) 1078; Pensacola & G.R. Co. v. Spratt, 12 Fla. 26, 91 Am Dec 747.

[50] Connecting Gas Co. v. Imes, 11 F (2d) 191, 194; State v. Superior Court, 93 Wash. 433.

[51] Walsh v. Sprankle, 121 P. 951; Delaware, L & N.R. Co. v. Luzerne County Com'rs., 91 A. 889, 245 Pa. 515; Town of Bow v. Farrand, 92 A. 926, 77 N.H. 451.

[52] Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 63 P (2d) 397, 405.

[53] Sy Yam Bio v. Barrios and Buyson Lampa, 63 Phil., 206.

As a safe conclusion to this inquiry, suffice it to say that while our law clearly forbids the issuance of the writ of injunction to restrain the collection of taxes, an exception thereto may be allowed where there are special circumstances, that is, the existence of consequent irreparable injury. If the forced collection of a tax will destroy the subject of taxation, there ought to be no impediment prohibiting the courts to interfere by enjoining the collection; otherwise, the government will be killing the proverbial goose.

BARTOLOME C. FERNANDEZ, JR.

Classification and Preference of Credits in Insolvency

The law on the classification and preference of credits demonstrates, to a remarkable degree, the civilian's passion for neat categories and intellectual symmetries. Manresa's commentaries on the subject,[1] for example, replete with refined distinctions, read like a book of scholastic logic. And since classification implies underlying criteria, an indication is had of the hierarchy of values in the civil law. This note is not, however, concerned with either aspect; rather, it will confine itself to the classification and preference of credits in insolvency proceedings attempting to determine the effects of the new Civil Code [2] on this branch of the law. A chronological approach is employed to trace the evolution of the present status of the law from its beginnings in the Spanish civil law.

An obvious question is—why should there be any classification and priority at all among credits? The law on obligations and contracts rests on the basic assumption that the obligor must comply with his obligations exactly as they are constituted. Noncompliance will ordinarily generate a right to indemnity or reparation in favor of the obligee,[3] a right to which the property of the defaulting obligor must respond. Since the total pecuniary equivalent of the debtor's obligations may exceed the value of all his property not exempt from execution, essentially the condition of insolvency, of necessity some obligations will remain unfulfilled in whole or in part. It is to minimize the resulting clash of rights among the several creditors that the law established the rules on classification and priority.[4] Theoretically, all debts are equal, at least in the sense that all validly constituted obligations are equally enforcible, the juridical tie equally insistent and binding. It would seem that equity requires all debts to be treated alike, that pro rata payment be the rule,[5] rather than an elaborate scheme of preference. This is where values over and above abstract equality intervene, values ranging from the desira-

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[1] 12 Manresa (3rd ed.) 661 et seq.

[2] Title 19 of Book IV, articles 2236 to 2251.

[3] Chap. 2, Title 1, Book IV Civil Code.

[4] 12 Manresa 661.

[5] 12 Manresa 689—"En el terreno puramente especulativo, y atendiendo únicamente a razones de mera equidad, se ha dicho que, con arreglo a los buenos principios, todos los créditos deben ser iguales y merecer la misma consideración para el cobro, porque todos los acreedores pueden invocar el mismo derecho para que se les haga effectivo aquello se les aduede;—se indica que quizás seria el criterio mas equitativo para resolver el problema de la concurrencia de creditos—la distribución a pro rata de dichos bienes entre sus acreedores, cualquiera que fuese la naturaleza o el carácter de las duedas del mismo."

bility of maintaining established juridical forms,[6] to those derived from notions of public policy and social justice.[7]

1. BEFORE THE SPANISH CIVIL CODE

Prior to the promulgation of the Spanish Civil Code, the law on insolvency as to merchants was found in the Cade of Commerce of Spain,[8] and the Ley de Enjuiciamiento Civil.[9] Fragmentary rules on the classification and prefernce of creditors are also found in the older laws, as in the Fuero Real,[10] the Partidas,[11] the Novisima Recopilación,[12] the Ley Hipotecaria,[13] and the Ley de Contabilidad de la Hacienda Publica of June 25, 1870.[14]

The scheme of classification and preference contained in the Code of Commerce is very elaborate one. First, certain classes of property "the ownership of which may not have been transferred to the bankrupt legally and irrevocably" are segregated from the total assets found in the possession of the bankrupt and placed at the disposal of the legitimate owners.[15] It will be noticed that this particular feature the Spanish law was retained, with very slight modifications, in the present Insolvency law.[16] After this deduction, a dichotomous classification is drawn: first, credits to be paid from the bankrupt's personal property; and second, those to be paid from proceeds of the real property,[17] with each class having a separate order of preference.[18] The creditors in each division of the separate orders of priority were paid pro rata, except mortgage creditors and those whose credits appeared in public or commercial instruments, showing the paramount position of these last two kinds of creditors.[19]

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[6] In the case for example, of pledge and mortgage credits (arts. 2241 no. 4 and 2242 no. 5); see 12 Manresa 696.

[7] As in the case of credits for laborers' wages, for seeds and expenses for cultivation, for compensation due to laborers and those arising from contracts of tenancy (art. 2241 nos. 6 and 11, and art. 2244 nos. 4 and 8); see 12 Manresa 699; Report of the Code Commission (1948) p. 164.

[8] Book IV, Title 1, arts. 870 to 941.

[9] Book II, Title 12, art. 1130 et seq.

[10] Book III, Title 20.

[11] Fifth Partida, Titles 13 and 14.

[12] Book X, Titles 11 and 14.

[13] Art. 168.

[14] See 12 Manresa 690.

[15] Arts. 908, 909, 910 Code of Commerce.

[16] Section 48, Act No. 1956,

[17] Art. 912 Code of Commerce.

[18] Art. 913 and 914.

[19] Art. 916. This paramountcy was retained in the Spanish Civil Code with respect to determinate personal property (art. 1926) and modified as to determinate real property (Art. 1927). The new Civil Code appears to have abrogated the special position of pledge and mortgage creditors. (Arts. 2247 and 2249).

The classification provided in the Ley de Enjuiciamiento Civil is much more simple though less comprehensive.[20]

2. THE SPANISH CIVIL CODE

The Spanish Civil Code collected and systematized all the previous rules on classification and priorities into a compact body to clarify and harmonize the various laws existing at the time of its promulgation. Its provisions on the subject were intended primarily to establish the basis of the distribution of the debtor's property *in insolvency proceedings*.[21] A perusal of articles 1912 to 1920 will show that the subsequent articles on classification and preference were meant to be part of the Spanish law on insolvency. The schemata adopted by this Code seems to be more logical and adequate than the previous classifications, being based on the determinate or indeterminate character of the property concerned. On this basis, four general classes of credits were provided: 1. those preferred with respect to determinate personal property (art. 1922) 2. those preferred with respect to determinate real property and real rights (art. 1923) 3. those preferred with respect to other property, real and personal (art. 1924) 4. common or ordinary credits without any preference whatsoever (art. 1925). Each of the classes of preferred credits had a corresponding order of priority. Credits of the first two classes were specially privileged; so that while credits of the third kind enjoyed preference among themselves, they had none over the specially privileged credits, being subordinated to the latter.[22]

3. THE CODE OF CIVIL PROCEDURE

With the advent of American sovereignty came the Code of Civil Procedure, which, in sweeping terms, repealed "all existing laws and orders relating to bankruptcy and proceedings therein," and prohited the institution of bankruptcy proceedings "until a new bankruptcy law shall come into force in the Islands."[23] With one stroke, the Philippines was left without an insolvency law. It seemed to follow logically that the Civil Code provisions on the classification and preference of credits were also swept away. But the Supreme Court, reluctant to do so, continued to apply these provisions, though of course not in insolvency proceedings. A convenient distinction was drawn between the several cases where these provisions were at all applicable: (1) in bankruptcy proceedings, where the Code of

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[20] 1. los acreedores por trabajo personal y alimentos.

2. los acreedores hipotecarios, comprendiendo también en ellos que estuvieren garantidos con prenda.

3. los escriturarios.

4. los simplemente quirografarios. (12 Manresa 690).

[21] See Tolentino, Commentaries and Jurisprudence on the Civil Code, Vol. II, p. 1086; also 12 Manresa 690 et seq.

[22] National Bank v. Viuda de Angel Jesus 63 Phil. 814 at 822.

[23] Sec. 524 Act No. 190; Bonaplata v. Ambler 2 Phil. 392 at 396; Pena v. Mitchell 9 Phil. 587 at 591. See also Willard, Notes on the Spanish Civil Code, p. 93.

Civil Procedure was too clear to be avoided;[24] (2) in the settlement of the estates of deceased persons;[25] (3) and in a suit involving two or more creditors as to their rights or preference in the distribution of the proceeds of the sale of specific piece of property,[26] or wherever by intervention or otherwise, a judgment creditor is a proper party to proceedings for the distribution of the funds or estate of a judgment debtor and duly asserts his right as a preferred creditor,[27] proceedings known in the Spanish law of civil procedure as "terceria de mejor derecho",[28] where the Code provisions remained applicable. In this wise, those provisions were saved from the dust heap of discarded statutes. The articles were wrenched from their original setting as an integral part of the Spanish law on bankruptcy and applied in a very different context, that of the law on civil procedure. At the same time, the basis for much of the subsequent confusion on this branch of the law was laid; for as will be seen later, the Court, as it were, by some sort of legal legerdemain, would arrive at the conclusion that, in substantial effect, even as to insolvency proceedings those Civil Code provisions had not been totally abrogated. And so the case of Martinez v. Holliday, Wise and Co.[29] inaugurated a long line of cases, both prior and subsequent to the enactment of the Insolvency Law, where the Supreme Court applied and enforced those provisions where the statutory preferences were asserted in "judicial proceedings other than formal bankruptcy pro-

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[24] Pena v. Mitchell, supra, at 591—"the language of this section of Act No. 190 is so sweeping in its terms that it leaves no room for doubt as to its meaning, or its effect wherever a question arises as to its application."

[25] It was suggested, in Peterson v. Newberry 6 Phil. 260 at 262, that art. 1924 had been repealed by sec. 735 Act. No. 190 with regard to the settlement of decedents' estates, since said section provided for an order of payment if the estate is insolvent. However, the Court, in Smith, Bell & Co., Ltd. v. Maronilla, 41 Phil. 557 at 563, said "the classification and order of payment set out in sec. 735 was intended to include merely debts against the estate not otherwise secured and not to include debts otherwise secured, except perhaps in so far as the security proves to be insufficient to secure payment in full; and that it was not the legislative intent to prescribe that the death of a debtor will deprive his creditor of any existing security he may have had by way of lien or preference." At 564, "Mortgage liens and the like and the statutory preferences which have attached to the specific property of a debtor at the time of his death are in no wise affected by the classification in sec. 735—and may be asserted and enforced without reference to that classification." However, they are "subordinated in the order of classification for payment to the preferences established in subdivisions 1, 2, 3, 4, and 5 of sec. 735—." Sec. 735, Act. No. 190 was substantially reenacted in sec. 7 of Rule 89, Rules of Court.

[26] Olivares v. Hoskyn and Co. 2 Phil. 689 at 692 (1903). The Court relied on the decisions of the Supreme Court of Spain dated Oct. 6, 1886 and Jan. 4, 1894. See also Gochuico v. Ocampo 7 Phil. 15 at 19 (1906) and Soler v. Alzona 8 Phil. 539, at 543 (1907).

[27] Peterson v. Newberry, supra, at 262 (1906).

[28] Rubert and Guamis v. Luengo and Martinez 8 Phil. 554 at 556 (1907).

[29] 1 Phil. 194 at 199 (1902).

ceedings,"[30] such that soon the doctrine was solemnly announced as "substantially a rule of property in these Islands not subject to change except by legislative enactment."[31]

4. THE INSOLVENCY LAW

On May 20, 1909 the Insolvency Law was enacted. The system of classification and preference under this statute has a few important features. First, the statute, as has been mentioned before, preserved the Spanish feature of separating certain kinds of property whose ownership had not vested absolutely in the insolvent debtor. The "lawful" owners of those properties maybe considered as specially privileged creditors, since the segregation of their property is the first step in the distribution of the insolvent's estate. Next, there is a short list of preferred creditors, originally comprising only four kinds of debts,[32] closing with the provision that "all other creditors shall be paid pro rata." Finally, there is section 59 which enumerates the alternative courses open to special creditors, i. e. mortgagees, pledgees, lien holders, and attachment or execution creditors.

Now then, what precisely was the effect of the system contained in the Insolvency Law on the Civil Code articles? There had been no question as to the effect the Code of Civil Procedure had on those articles in so far as they pertained to bankruptcy proceedings—they had been repealed by section 524. If that was so, then the Insolvency Law had no effect whatsoever on those same articles, since they were already inexistent as far as the law on bankruptcy was concerned. The only reasonable justification which the Supreme Court had in continuing to apply the said articles, part of the old Spanish bankruptcy law, after the express repeal of section 524 was the fact that the repealing statute had provided no substitute scheme in its place, and the two aforementioned decisions of the Spanish Supreme Court,[33] which perhaps should not have been followed so readily. Since the Insolvency Law contained its own classification and order or priority, it seemed rather apparent that the new law removed the said justification. If there had been any real reason for applying the provisions of the old Spanish bankruptcy law to proceedings other than bankruptcy cases, that is "tercerias" and analogous proceedings,[34] then that reason could apply with at least equally compelling force in the case of the new Insolvency Law. There was nothing to prevent the application of Chapter VI of the Insolvency

[30] Tec Bi. v. Chartered Bank of India, Australia, and China 41 Phil. 819 at 824 (1917).

[31] Alzoua and Arnalot v. Johnson 21 Phil. 308 at 356.

[32] Sec. 50, Act No. 1956, amended by Act No. 3962 to add one more. The list of priorities under the U. S. Bankruptcy Act of July, 1898, sec. 64 b, par. 4 et seq. (11 U.S.C.A. Sec. 104 b., pars. 5-7) is even shorter. Contrast these two with the complex schemes of classification and orders of preference under the Spanish codes and our Civil Code.

[33] See footnote 26.

[34] Intervention, under Rule 13, Rules of Court; interpleader, under Rule 14; third party claims, under sec. 15 Rule 39 or sec. 14 Rule 59.

Law in those non-bankruptcy cases where the Supreme Court had heretofore been applying the Civil Code articles. In any case, the provisions of the two laws on insolvency, the old Spanish and the new American, "seemed to be in direct conflict and therefore cannot coexist under any theory of construction."[35]

But the Supreme Court refused to strike down the old articles. It must be admitted that the scheme provided in the Insolvency Law seems pale and inadequate when juxtaposed with the elegantly symmetrical civilian classification. Such considerations are, however, legally irrelevant. The Court seized upon section 59 of the Insolvency Law in the effort to keep alive the Civil Code provisions. The term "lien" as used in section 59 was construed to include the statutory preferences enumerated in the Civil Code if and when they are duly asserted in the course of bankruptcy proceedings.[36] For good measure, an appeal to "strong and compelling reasons of public policy" was made, ending with confident statements on that esoteric thing—the legislative intent.[37] An examination of the extent to which the sweeping identification of lien and statutory preference is valid will afford a clearer perspective on this problem.

Perusal of the disputed articles will show that there are two general kinds of preferred credits: those preferred with respect to determinate property, and those preferred with respect to other property, or the unassorted mass of the debtor's estate. Justice Moreland drew an important, and until then apparently overlooked, distinction between these two classes.[38] Those of the first kind are a charge upon specified property, real or personal, clearly described and identified in the instrument creating the credit, and expressly charged therein with an encumbrance to secure the payment of the credit. The second type does not affect any property at all, the instrument creating the obligation not even referring to property of any kind, and does not expressly or impliedly charge or encumber property; only a personal obligation is constituted. Perhaps Justice Moreland's distinction is not absolutely accurate. In both kinds of credits, there may be a total absence of written instruments; and in the first kind, the resulting encumbrance or lien may be a tacit one,

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[35] Concurring and dissenting opinion of Justice Moreland in Kuenzle and Streiff, Ltd. v. Villanueva 41 Phil. 611, especially the footnote at 660 et seq.

[36] Tec. Bi. v. Chartered Bank of India, Australia, and China, supra, at 825.

[37] *Ibid.*, at 827—"The security in such cases, furnished under statutory authority in the United States in the form of liens on the property of the debtor, was not affected, nor intended to be affected, by the enactment of the American prototypes of the provisions of our Insolvency Law and our Code of Civil Procedure; we are satisfied that it was not the intent of the legislature to destroy, without providing a substitute therefore, the security in the form of statutory preferences furnished in our Civil Code . . ." Quoted with approval in Viegelmann and Co. v. Perez, 37 Phil. 678 at 686.

[38] See his dissenting opinion in Smith, Bell & Co., Ltd. v. Estate of Maronilla, supra, at 569; also his concurring and dissenting opinion in Kuenzle and Streiff, Ltd. v. Villanueva, supra, at 624-625.

impressed by law rather than created by explicit contract.[39] Be that as it may, his observation is essentially sound. It follows that only preferred credits of the first type may properly be considered as liens within the meaning of section 59. Furthermore, it should be noted that the other creditors mentioned by section 59 are creditors with reference to specific property. The second type of preferred credits create no interest whatever in property, but merely a right to share, at a prior time as compared with ordinary creditors, in the distribution of proceeds realized from the sale of the debtor's assets legally subject to be marshalled for that purpose.[40] The distinction[41] was disregarded by the Supreme Court in previous and subsequent cases with lamentable confusion as a result. Sometimes the Court would gravely announce that it did not think that these articles created or were intended to create a lien in favor of the creditor upon the property of the debtor, but that they simply gave a right to be paid first.[42] At other times, the Court assumed that the very same articles did create liens preferred under the Insolvency Law.[43] Ultimately, in the Tec Bi case,[44] the Court, while confessing that the statutory preference did not mean the same thing as a lien, nevertheless held that where the statutory preference was duly asserted in the proper proceedings, e. g. insolvency proceedings,

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[39] For example, in nos. 1, 5, 6, and 7 of art. 1922, and no. 2 of art. 1924. Speaking of No. 7, art. 1922, The Supreme Court, Meyers v. Thein (15 Phil. 303 at 309), said, "the lessor should take proper precautions in order to insure the payment of rent by means of an express lien thereon, since the personality is merely affected by a tacit lien under the circumstances presumed by the law, to wit, that it belongs to the lessor and continues upon the premises and is liable only for the rent of one year."

[40] "A lien may exist against the property of a solvent debtor. A (general) preference cannot exist or operate except where the debtor is unable to pay his debts in full. If property encumbered with a lien is sold, it is sold subject to the lien; whereas with property subject to preferences, a creditor having an inferior credit who levies and sells does not sell subject to the superior preferences. The property sold is sold absolutely free from the superior preference, the only right of the holder (of the latter) being to contest with the person making the sale the distribution of the proceeds. ——the lienor has a right to action against any person who takes the property upon which he has his lien. The taking of the property creates a juridical relation between the lienor and the taker which will support the appropriate action. A preferred creditor has no cause of action against any other creditor; there is no privity between the two." Dissenting and concurring opinion in Kuenzle and Streiff Ltd. v. Villanueva, supra, at 656.

[41] In an earlier case Molina Salvador v. Somes 31 Phil. 76, in a concurring opinion, Justice Moreland had touched on this distinction but did not develop it fully then. At 82—"the right of the plaintiff is not one in the corpus of the property.——His right was simply to have the proceeds applied in a certain way. It was not a lien on property but a preference in application.—"

[42] Peterson v. Newberry, supra, at 263; Rubert and Guamis v. Luengo and Martinez, supra, at 558; Pena v. Mitchell, supra, at 594.

[43] Roman v. Herridge 47 Phil. 98 at 105; Hunter Kerr and Co. v. Murray 48 Phil. 499 at 504; O'Brien v. China Banking Corporation 55 Philp 353 at 356.

[44] Supra, at 825.

the consequences were "closely assimulated to and identical with" those arising from the assertion of a "recorded lien." Perhaps the confusion generated by the failure to consider Justice Moreland's distinction is best illustrated in Kuenzle and Streiff, Ltd. v. Villanueva.[45] There it was held that the levy of an attachment on specific property gives to the attaching creditor a lien, or "a right to a preference in the nature of a lien," with relation to such property, subject to all the statutory preferences by which such property is affected at the time of the levy, but superior to all statutory preferences affecting the property subsequent to the levy. The Court identified lien and statutory preference completely. Yet surely it is harshness bordering on injustice to give, as the Court here gave, a better right to a creditor who had obtained a judgment prior to the date of levy but who failed to take positive steps to enforce his right, as against the attaching creditor whose judgment is of a later date but who had the foresight to sue out an attachment. On the other hand, there is no question that a previous valid mortgage or pledge is superior to an attachment lien. The judgment creditor is not preferred with respect to specific property, while the mortgagee or pledgee is. The Villanueva ruling, while strictly and literally correct, was erroneously applied.

At this juncture, it will be helpful to indicate very briefly what a lien, in American law,[46] generally means. A lien, in its widest significance, is a charge upon property for the payment or discharge of a debt or duty [47] and is best translated into Spanish by the term "gravamen" rather than by "derecho de retencion",[48] or by "derecho preferente",[49] At times it is called a qualified right or proprietary interest enforceable over the property of another,[50] though it vests no general right of property or title upon the lienholder since it assumes the title to be in some other person.[51] Generally speaking, the lien attaches to property subject to it and follows it in its transmission to other persons.[52] This quality of attaching to and follow-

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[45] Supra, at 617.

[46] It is interesting to note that common law liens were "derived from the Civil Law—." White v. Smith 43 Am. Rep. 347 at 347.

[47] Nicolas v. Orr 63 Colo. 333, 2 ALR 449, 166 Pac. 561 at 562; Case v. Texas Co. 115 Fla. 668, 156 So. 137 at 144; Young v. Construction Co. 94 Fla. 11, 55 ALR 662, 113, So. 565 at 566; Philipps v. Atwell 76 Fla 480, 80 So. 180 at 180 quoting with approval 17 R.C.L. 596 and 1 Jones on Liens Secs. 2-3.

[48] Grano v. Paredes 50 Phil. 61 at 63. "A common law lien on personal porperty usually imports a right of the lienholder, having possession, to retain possession until his lien is satisfied; but when used with reference to a charge on real property, the word does not necessarily import a right of retention."

[49] Javellana v. Mirasol and Nunez, 40 Phil. 761 at 773.

[50] Sanford v. McClelland, 121 Fla. 253, 163 So. 513 at 514.

[51] Fallon v. Worthington 13 Colo. 559, 6 LRA 708, 22 Pac. 960 at 962, quoting with approval 1 Jones on Liens, Sec. 10 and 27.

[52] Advance Thresher Co. v. Beck, 21 N. D. 55, 128 NW 315 at 316.

ing the subject property is generally, though not always,[53] an attribute of credits preferred with respect to specific property. For example, the unpaid vendor's right of preference in the personal property sold and in the possession of the vendee attaches to the property, and is not lost by the conversion of the personal into real property by destination provided its form and substance are not changed nor its identity lost, nor even by the sale of the converted real property for a lump sum where the vendor did not request its separation before the sale.[54]

Quite enough has been said to show that the validity of the Tec Bi doctrine was subject to an important limitation based on a fine but fundamental distinction. The doctrine did not develop unchallenged. Besides Justice Moreland, Justice Malcolm repeatedly voiced his disapproval [55] and attempted to arrest its continued application, unsuccessfully until 1933, 16 years after the first definitive enunciation of the doctrine. Justice Johnson in 1922 clearly revoked the doctrine, in Ingersoll v. Philippine National Bank;[56] but this was probably regarded as obiter, since two years later, the Court in Roman v. Herridge, *supra,* reapplied the same doctrine without even mentioning the Ingersoll case.

In 1933, Justice Malcolm apparently succeeded in finally overthrowing the doctrine so long applied and followed that it had acquired "an incubus of precedent." [57] Briefly put, his threefold argument was: first, that the legislative purpose to repeal the Civil Code articles had been twice manifested in the provisions of the Code of Civil Procedure and of the Insolvency Law; second, that

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[53] The preferred credits for board and lodging, or for rent, subsist only while the property of the debtor remains inside the inn or leased premises; similarly, the unpaid vendor's preferred right exists only while the property is in the possession of the vendee. (See Tolentino, op. cit., Vol. II, p. 1089). In Credits for transportation of goods, the preference lasts up to 30 days after delivery.

[54] Unson v. Urquijo, Zuloaga and Escubi, 50 Phil. 160 at 168 quoting with approval Troplong, "Droit Civil Explique-Privileges et Hypotheques" par. 113 p. 125. Also Baldwin v. Young, 47 La. Ann. 1466, 17 So. 883 at 883; Walbum-Swenson Co. v. Darrell, 49 La. Ann. 1044, 22 So. 310 at 311; Hall v. Hawley, 49 La. Ann. 1046, 22 So. 205 at 206; Monroe Bldg. and Loan Assn. v. Johnston, 51 La. Ann. 470, 25 So. 383 at 383.

[55] See his concurring opinion in Roman v. Herridge, *supra,* at 106; his dissenting opinion in Unson v. Urquijo, Zuloaga and Escubi, *supra,* at 176; his dissenting opinion in O'Brien v. China Banking Corp., *supra,* at 358; Voluntary Insolvency of Rafael Rebullida (Dec. 12, 1927) unpublished.

[56] 43 Phil. 308 at 313.

[57] Phil. Trust Co. and Smith, Bell and Co., Ltd. v. Mitchell, 59 Phil. 30 at 36—"Stability in the law, particularly in the business field, is desirable. But idolatrous reverence for precedent, simply as precedent, no longer rules. More important than anything else is that the Court should be right. And particularly is it (not) wise to subordinate legal reason to case law and by so doing perpetuate error when it is brought to mind that the views now expressed conform in principle to the original decision and that since the first decision to the contrary was sent forth, there has existed a respectable opinion of non-conformity in the Court . . ."

the Insolvency Law was complete in itself so that claims not preferred under it could not at all be preferred; third, that the old doctrine was an "impractical" attempt to fuse elements of the Insolvency Law inspired by modern commercial practice with parts of the Civil Code originally intended to harmonize with Spanish laws. Strange to say that the decision, even under the old doctrine properly qualified by the Moreland distinction, was correct, since the case dealt with credits evidenced by public instruments not preferred with respect to specific property. To my mind, Justice Malcolm did not completely succeed in his avowed purpose, since only the first reason was of any cogency. He made no attempt to analyze the internal validity of the Tec Bi doctrine. The revised doctrine would not necessarily disrupt the system of preference under the Insolvency Law; it merely defined the scope of the term lien used in section 59 which section is not even part of Chapter VI, the chapter on classification and preference of creditors. As to the third reason, is not the whole complex of Philippine law a peculiar blend of Spanish Civil law and American Common law? In any case, the matter had reached a point where only a legislative pronouncement could induce any further change.[58]

5. The Civil Code of the Philippines

The legislative pronouncement came with the enactment of the new Civil Code. It repudiated Justice Malcolm's position in the Mitchell case, and revived the Tec Bi doctrine, this time carefully qualified, adopting the distinction drawn by Justice Moreland.[59] Of this there seems to be no doubt. Perhaps a more difficult question is the precise effect of the new Code, which retains the basic scheme of classification formulated in the Spanish Civil Code, on Chapter VI of the Insolvency Law. Article 2243, considered in isolation, would seem to give the impression that Chapter VI has not been affected at all, since said article refers to section 59 which, as has been observed before, forms no part of Chapter VI. But there are at least two things that indicate that Title XIX on the Concurrence and Preference of Credits was meant to supplant in entirety Chapter VI of the Insolvency Law. First, is the fact that the Insolvency Law is expressly subordinated to the new Code.[60] Second, is the further fact that the Code expressly and repeatedly mentions "the

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[58] The dissenting justices, Imperial, Avanceña, and Villareal, raised an interesting point: at 41—"The legislature has had occasion to review our rulings in the cases above cited, and it could have readily amended the law had it been of the opinion that said policy was unsound or inadvisable." Though legislative inaction is hardly a reliable guide to legislative intent, the dissenters were to be proved substantially correct, 17 years later.

[59] Art. 2243. "The question as to whether the Civil Code and the Insolvency Law can be harmonized is settled by this article. The preferences named in Arts. 2241 and 2242 are to be enforced in accordance with the Insolvency Law." Report of the Code Commission (1948), p. 164.

[60] Art. 2237.

insolvent" and "insolvency proceedings" in article 2244, which contains all the credits listed as preferred in section 50 of the Insolvency Law.[61] Now putting articles 2243 and 2244 together, a complete system is had: the former preserving the several alternative remedies open to mortgagees, pledgees, and lienholders, the latter providing for preference among creditors other than mortgagees, pledgees, and lienholders.

With regard to priority among credits preferred with respect to specific property, the Code simply has not established any order of priority; they are to be satisfied pro rata when they concur in the same property.[62] In effect, they have all been reduced to the same level, whether they are duly registered mortgages or merely tacit liens. The wisdom of this is not quite apparent, though admittedly it simplifies matters a good deal, perhaps too much, and is more "equitable",[63] theoretically at least.

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[61] ". . . the Insolvency Law in Sec. 50 enumerates seven preferred claims, in the order named, as to the free property of the insolvent. It is proposed that these preferred claims be increased to 14 (Art. 2244)." Report of the Code Commission, p. 164.

[62] Arts. 2247 and 2249.

[63] Report of the Code Commission, p. 165.

Risks Incident to a Fire Insurance Policy

By NICANOR JACINTO, JR.

IN GENERAL:

Fire as an insurable risk includes all fire of a hostile character,[1] however originating, and all damages of whatever nature resulting therefrom. And the policy is not avoided merely because the fire was caused by or attended with the negligence of the insured, so long as such negligence is not of so gross a character that it amounts to a fraudulent purpose of design.[2] It is commonly admitted that most fires, big and small, would not have occured if only more care had been observed. But it is precisely because people are aware of their shortcomings that insurance becomes a matter of almost absolute necessity. This feeling of insecurity gave rise to the theory that the risk should be distributed among many, rather than be shouldered by a single person. People felt that the feared calamities were certain to happen, although they could not be sure as to whom they would befall. Thus, a burning candle carelessly left, or allowing children to play with match-sticks, are not sufficient in themselves to deprive the insured of his right to recover for any loss resulting to him through such carelessness. But if the insured should discover a part of his house on fire and should make no attempt to extinguish the same, his act would be tantamount to fraud. "Fraudulent losses are necessarily excepted from a fire policy upon principles of general policy and morals; for no man can be permitted in a court of justice, to allege his own turpitude as a ground of recovery in a suit."[3]

It is however possible that the thing insured, without actually being consumed by fire, is nevertheless lost or destroyed on the occasion thereof. In such a case, the theory of proximate cause embodied in Sec. 77 of Act 2427 becomes the test of lisbility.[4] In order to determine whether a cause is proximate or remote, these questions must always be asked: "Is there an unbroken connection

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[1] "Fire may be either 'friendly' or 'hostile.' Fire in its proper place is highly useful, and is known as a 'friendly' fire. Fire not so confined is dangerous and destructive and is known as a 'hostile' fire. Fire in a stove is 'friendly' and should property or other valuables accidentally fall into it, the loss is not covered by the policy. But if the fire from the stove should escape into a nearby rug, its character is changed into that of 'hostile' and the loss is covered." (Mowbray, Insurance, p. 92).

[2] Sec. 80 of Act 2427: "An insurer is not liable for loss caused by the willful act or through the connivance of the insured; but he is not exonerated by the negligence of the insured or of his agents or others." P.M. Bennett, Inc. v. Union Ins., C.A.—G.R. No. 44577.

[3] Columbia Ins. Co. v. Lawrence, 10 Pet. 507; 9 L. Ed. 512a & 517.

[4] Sec. 77 of Act 2427: "An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause."

between the wrongful act and the injury? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"[5] And for fire to be considered as the proximate cause, it is not necessary for any part of the insured property should be actually ignited or consumed by fire. Thus, a fire which caused the walls of the building on fire to fall on the building insured is the proximate cause of the damage done on the insured building even if no part of it is actually burned.[6] Three adjacent buildings, A, B, and C were insured against fire. The first was burned, and the fire spread to the building B and there stopped. A week later, a strong wind caused a high wall of the B building which also burned, to fall upon building C, destroying it The court held that this loss was caused by the fire which was the proximate cause of the loss and for which the insurance is liable.[7]

By virtue of Sec. 788, damage to goods trampled upon in the efforts to put out the fire are covered by the policy of fire insurance.[8] Destruction of goods by water in an effort to halt or prevent the spread of fire is covered by the policy. The same is true in case the goods should be stolen during the fire, unless the policy should contain a stipulation expressly excepting such loss. In the case of Teofila Caceras v. New India Ass.,[11] the insurer, New India Ass., was relieved only because it was expressly agreed that the policy does not cover theft during the progress of a fire. Without a stipulation of such a specific character, even a provision that the insurer will not be liable "for any loss or damage to goods contained in the show window when the loss or damage caused by the light in window, nor shall the company be liable for the loss by theft," applies to theft from the show windows, and not to theft committed in the necessary removal of goods to save them from impending conflagration.[12] The

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[5] Vance on Insurance, Second Edition, p. 752.

[6] Ermentraut v. Girard Fire & Marine Ins. Co., 65 N.W., 635-636.

[7] Russel v. German Fire Ins. Co., (Min. 1907) 11 N.W., 400.

[8] Sec. 78: "An insurer is liable where the thing insured is rescued from a peril insured against, that would otherwise have caused a loss, if in the course of such rescue the thing is exposed to a peril not insured against, which permanently deprives the insured of its possession, in whole or in part; or where a loss is caused by efforts to rescue the thing insured from a peril insured against."

[9] Cohn v. Nat. Ins. Co., 70 S.W. 259, 261.

[10] 36 (C.A.) O.G. 3114. "Under the terms of the contract, the goods thus found to have been soaked in or damaged with water a sa result of efforts to save them from hostile fire are losses covered by the policy . . . The goods, however, which were stolen during the progress of the fire constitute a loss not falling within because expressly excepted by the policy. Ordinarily a loss through theft consequent upon confusion attending a fire is considered as a direct consequence of the fire and is therefore covered by the policy. But where, as in the instant case, a stipulation is contained expressly excepting a risk of that character, the insurer is relieved from the liability which would otherwise rest upon it to pay for property stolen during the progress of the fire."

[11] Leiber v. Liverpool Ins. Co., 99 *Am. Dec.* 695.

[12] Ins. Co. of North America v. Leader, 48 S.E. 972, 975.

insurer is likewise liable for loss caused by preparing goods for removal from the premises, although they are not actually carried out, if at the time the work of removal is begun the property is in such danger of fire that a reasonably prudent man would attempt to protect it.[13]

EXCEPTED RISKS:

In a contract of insurance, the rights and liabilities of the insurer and the insured are to be governed by the terms thereof.[14] The tendency is towards a liberal construction in favor of the insured. But this applies only in cases where there is doubt or ambiguity, and not where the intention of the parties is clear. Where the language is sufficiently clear to convey the meaning of the parties, they shall be enforced in the precise terms in which they are expressed and nothing ought to be imported into the contract, by construction, contrary thereto.[15] At present, all fire insurance policies

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[13] Sec. 79: "Where a peril is specifically excepted in a contract of insurance, a loss, which would not have occured but for such peril, is thereby excepted; although the immediate cause of the loss was a peril which was not excepted." See also; Young v. Midland Tex. Ins. Co., 30 Phil. 617.

[14] San Francisco v. Glen Falls, 40 O.G. No. 24, 4628; Teofila Caceres v. New India Assurance Co., (C.A.) 36 O.G. 3114.

[15] Standard conditions in a fire insurance policy:

4. If the whole or any part of any Building hereby insured or containing property hereby insured or the whole or any part of any Building of which it is part shall fall or become displaced, all Insurance by this Policy on it or its contents shall cease unless the Insured shall prove that the fall or displacement was caused by fire.

5. The Insurance does not under any circumstances cover

(a) Loss by theft during or after the occurence of a fire.

(b) Loss or damage to property occasioned by its own fermentation, natural heating or spontaneous combustion (except as may be provided in accordance with Condition 7f), or by its undergoing any heating or drying process.

(c) Loss or damage occasioned by or through or in consequence of

(1) The burning of property by order of any public authority.

(2) Subterranean Fire.

6. The Insurance does not cover loss or damage occasioned by or through or in consequence of

(a) Earthquake, hurricane, volcanic eruption, or other convulsion of nature.

The onus proof that the loss or damage was not occasioned by or through or in consequence of any of the excepted occurences must in all cases be thrown upon the insured.

(b) Invasion, act of foreign enemy, riot, civil commotion, rebellion, insurrection, military or usurped power or martial law.

7. Unless otherwise expressly stated in the Policy the Insurance does not cover

(g) Explosives.

contain specific provisions exempting the insurer from liability for losses arising out of any of the causes therein mentioned.[16]

Loss or destruction of property through a lightning stroke is covered by a fire policy only when the lighting is followed by ignition or combustion. Fire includes lightning if there be any mark of fire, but not otherwise.[17] The standard policy of fire insurance, however, expressly includes within the policy loss due to lightning. And the liability of the insurer in such a case extends not only to those damages through the burning of buildings immediately caused by lightning,[18] but also to injuries to property by the throwing down of the walls of the building by a lightning stroke.[19]

Under an agreement that the policy shall not include destruction through explosion of any kind (clause 7h), a loss resulting from explosion but which caused by a fire, is covered by a fire insurance policy. The fire can be considered as the proximate cause of such loss. There would have been no explosion and no resulting loss were it not for the fire.[20] Therefore, there can be no recovery in case of damage by fire following, but caused by, an explosion.[21]

But wherein an adjoining building which is burning an explosion occurs which results in the falling down of the walls of the insured building, the loss is not covered by policy.[22] Here, although it was the fire that preceded the explosion, the loss is not covered by the policy as no fire occured in the insured building. It seems therefore, that in order that there may be recovery for a loss attended by an explosion occuring in an adjoining building, two requisites are necessary: (1) the fire must precede the explosion resulting in the loss and (2) the fire must occur within the insured building. There would have been recovery if the explosion which followed the fire in the adjoining building caused another fire in the insured building. On the other hand, in a case where an explosion occurs in an adjoining building causing a fire in said building, which fire extends

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(h) Loss or damage occasioned by explosion; but loss or damage by explosion of gas used for illuminating or domestic purposes in a Building in which gas is not generated and which does not form part of any gas works, will be deemed to be loss by fire within the meaning of this Policy.

(i) Loss or damage occasioned by or through or in consequence of the burning, whether accidental or otherwise, of forests, bush, prairie, pampas, or jungle, and the clearing of lands by fire.

[16] Scripture v. Lowell Mut. Fire Ins. Co., 57 *Am. Dec.* 111.

[17] Hopeman v. Citizens' Mut. Fire Ins. Co., 85 N.W. 454, 455.

[18] Cummins v. Penn. Fire Ins. Co., 134 N.W. 79, 83.

[19] German Am. Ins. Co. v. Hyman, 16 L.R.A. (N.S.) 77, 83.

[20] Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. 44; 19 L. Ed. 65.

[21] Hustace v. Phoenix Ins. Co., 62 L.R.A. 651, 175 N.Y. 292, 67 N.E. 592.—It may be observed that in the Ermentraut case, there was no explosion at all, and therefore, the fact that no fire occured in the insured building was considered immaterial and did not prevent recovery.

[22] Williamsburg City Fire Ins. Co. v. Williard, 164 Fed. 404.

to the insured building, there can be no recovery, because it was the fire that followed the explosion.

In case of falling of walls, the standard policy approved by the Insurance Commissioner declares that a fall or displacement of a substantial part of the building will cause the insurance to cease, if it shall in any way materially increase the risk. But if fall or displacement is caused by fire, then the loss or damage would be covered by the policy. (Clause 4).

A provision exempting the insurer from liability for damage caused by an earthquake (clause 6a) will bar a recovery, even though the earthquake results in a fire.[23] But even with such a provision, the insurer will still be liable if it can be shown that the earthquake is not the proximate cause of the loss. Accordingly, where an earthquake breaks water mains whereby it is impossible to check a fire, the fire is the proximate cause of the loss and the insurer is not relieved from liability.[24]

It being specially provided that the policy shall not cover losses arising directly or indirectly from riots, no recovery lies if property should be set afire by a mob during a riot or public disorder. Riot as thus used signifies a large body of men committing an unlawful act, although the same be directed against a particular individual and not against society in general.[25] The same holds true in case of invasion, insurrection, civil war or when affairs are such that the lawfully constituted authorities are unable to preserve order. (Clause 6b).

Another class of risk not generally covered by fire insurance is that which arises by order of the civil authorities for the purpose of removing a public menace (clause 5c) when the property insured has become a liability or danger to the community. Thus, infected premises may be burned by order of the health authorities. From this rule, however, is excepted the case where property is intentionally burned for the sole purpose of preventing the spread of fire. In the latter case, the insurer is liable for the property sacrificed.

Even in the absence of a warranty, it is understood that the insured will not do any act which will increase the risk beyond that contemplated by the parties in the policy, such as storing of hazardous goods within the premises of the insured property. The only

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[23] 14 R.C.L. 1220.

[24] Spring Garden Ins. Co. v. Imp. Tobacco Co., 20 L.R.A. (N.S.) 277, 279-281.

[25] Young v. Midland Textile Co., 30 Phil., 617; "The appellant argues, however, that in view of the fact that the 'storing' of the fireworks on the premises of the insured did not contribute in any way to the damage occasioned by the fire, he should be permitted to recover—that the 'storing' of the 'hazardous goods' in no way caused injury to the defendant company. That argument, however, is beside the question, if the 'storing' was a violation of the terms of the contract. The violation of the terms of the contract, by virtue of the provisions of the policy itself, terminated, at the election of either party, the contractual relations."

difference in effect is that, while in the absence of a warranty, the storing avoids the policy only when the storing contributed to or was the cause of the loss, in the presence of a warranty, the policy is avoided from the moment of violation, and the injured cannot recover for a subsequent loss, even if the storing did not contribute to the cause thereof.[26] The scope of the warranty has however been reduced so as to exclude from its operation hazardous goods kept or used in small quantities for daily use,[27] or for purpose incidental to the insured's business.[28] Hence, though the keeping of benzine on the insured premises is expressly prohibited, benzine kept by a furniture factory for wood processing,[29] for used for cleaning machinery,[30] does not fall within the warranty nor preclude recovery.

BURDEN OF PROOF:

In all the above cases though, the insured may present evidence that his loss was due to some independent cause other than the excepted risk. The burden is on the plaintiff to prove that the loss or injury sued for was due to a risk or cause which was insured against. (Clause 62, par. 5). But where plaintiff makes out a *prima facie* case of loss or injury within the terms of the policy, it is incumbent upon the defendant to rebut such case. If the defendant contends that the loss was caused by negligence or other wrong on the part of the insured, it has the burden of proving the fact. In most jurisdictions, the burden is on the defendant to show that the loss or injury was from an excepted risk or cause, and it has been held that the burden of proof in this respect will not be shifted to plaintiff by the fact that he introduces in evidence proofs of loss or injury which tend to show that the loss or injury was caused by an excepted risk. But if defendant introduces evidence which is *prima facie* sufficient to bring the case within one of the

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[26] *Ibid*; "The author of the Century Dictionary defines the word 'store' to be a deposit in a store or warehouse for preservation or safe keeping; to put away for future use, especially for future consumption; to place in a warehouse or other place of deposit for safe keeping. Said definitions of course, do not include a deposit in a store, in small quantities, for daily use. Nearly all of the cases cited by the lower court are cases where the article was being put to some reasonable and actual use, which might easily have been permitted by the terms of the policy, and within the intention of the parties, and excepted from the operation of the warranty, like the present. Said decisions are upon cases like:

1. Where merchants have had or keep the hazardous articles in small quantities, and for actual daily use, for sale, such as gasoline, gunpowder, etc.;

2. Where such articles have been brought on the premises for actual use thereon, and in small quantities, such as oil, paints, etc.; and

3. Where such articles or goods were used for lighting purposes, and in small quantities."

[27] Bachrach v. British-American Ins. Co., 17 Phil. 555, 560.

[28] Davis v. Pioneer Furniture Co. 78 N.W. 596, 597; Faust v. American Fire Insurance Co., 64 N.W. 883, 884.

[29] Mears v. Humboldt Ins. Co., 37 Am. Rep. 647, 649.

[30] 33 C. J. 111, 112.

exceptions of the policy, it then becomes incumbent upon plaintiff to disprove such facts or to prove additional facts taking the case out of the exception.[31]

Where a fire insurance company issued a policy insuring certain property against loss by fire with provision that the policy did not cover loss from explosion, and the insured property was destroyed by fire during the life of the policy, and the company contended that the fire was the result of an explosion, which was the primary cause of the fire, the burden of proof of that fact is on the company, and for want of such proof, the company is liable.[32]

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[31] Paris-Manila Perfume Co. v. Phoenix Assurance Co., 49 Phil. 753 758-759.

On the Right of Repurchase Acquired During Marriage and Exercised After Dissolution

By TEODORO PADILLA

In the case of Alfonso v. Natividad,[1] Mr. Justice Willard made the following statements:

> "The facts in reference to the tract of land claimed by Silvestre Flores are as follows: The land belonged to the conjugal partnership. Before the death of the husband, the husband and wife had sold it to Alejandro Teodoro for 300 pesos with the right of repurchase. Pedro Angeles died without having exercised this right. After his death his widow, Tomasa, with money of her own, repurchased the land from Teodoro, avowedly in her own interest, and not in the interest of the dissolved partnership. She after wards sold it to Silvestre Flores, the defendant.
>
> "This repurchase of the land by her after the death of her husband gave her the sole ownership thereof, and the heirs of her husband acquired no rights therein by her repurchase."[2]

In the case of Santos v. Bartolome,[3] the property involved was the separate property of the wife, sold by her prior to the marriage with a right to repurchase. Mr. Justice Street, speaking for the Court said:

> "It is undeniable that when the property to which reference is here made was redeemed during the marriage, it remained as it had been before, the particular property of Marcela Tizon, for if the right of redemption pertained to her, so also must the property belong to her after redemption (Civil Code arts. 1337-2; 1396-3). And of course where community assets have been used to effect the redemption, the community estate becomes creditor to the extent of the amount thus expended. It follows that, in the liquidation of the community property, account should be taken of this obligation (arts. 1404, 1419, Civil Code)."[4]

It will readily be observed that the doctrines in these two cases are not in harmony. If the *Santos v. Bartolome* case were to be consistent with the earlier case of *Alfonso v. Natividad,* the conjugal partnership would become the owner of the property originally the wife's, if redeemed with conjugal partnership funds, and not a mere creditor of the wife's estate. And if the *Alfonso v. Natividad* case were to be harmonized with the ruling in *Santos v. Bartolome,* the surviving wife, who redeemed the property, originally of the conjugal partnership, would not be the owner thereof but only a creditor,

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[1] 6 Phil. 240.

[3] 44 Phil. 76

[2] Ibid, at 245.

[4] 44 Phil. 76, 80.

to the extent of the value paid to redeem the property, of those who would receive the assets of the conjugal partnership.

In the case of *Guinto v. Lim Bonfing and Abendan*,[5] the facts, in brief, were: Before his marriage with Camilia Abendan, Mariano Guinto had acquired the lot. It was therefore his separate property. During the marriage with Abendan, the two spouses united in the execution of a document whereby they sold this land, with its improvements, to a third person, with a right of repurchase reserved for a period of two years. Guinto died before the redemption period had expired; and as the period of redemption was about to expire, the widow repurchased the lot with money borrowed from one Bonfing. On the same day, presumably in order to secure the rights of Bonfing, a deed was executed whereby the widow, as owner, sold the property to Bonfing with right of redemption reserved for 18 months. This last period having expired without the right being exercised, Bonfing claimed full ownership of the lot.

The Court held otherwise. Mr. Justice Street, again, speaking for the Court said:

> "What rights did Bonfing acquire by the document in which Camilia Abendan sold the property to him on November 9, 1915? The answer to this is of course that he acquired only such rights as Camilia Abendan possessed and was able to convey. In this connection it will be borne in mind that she obtained the money from Bonfing by which the property was redeemed from the prior contract of sale made by herself and husband under the former sale to Labucay. The redemption of this property by her had the effect of revesting the property in the vendor, or vendors; but as Mariano Guinto was then dead the title reverted to the persons in whom the reversionary interest was then vested, namely, the heirs of Mariano Guinto, since the property belonged to him exclusively and was not a part of the conjugal estate."[6]

The widow was conceded, as a result of her repurchase, only a lien upon the redeemed property to the extent necessary to reimburse her for the outlay. And the Court furthermore held that it was only this (lien) and her usufructuary rights[7] as a widow that she could convey to Bonfing, her creditor.

It is submitted that the ruling laid down in the case of Alfonso Natividad is not correct. And this, notwithstanding the fact that, in the case of Guinto v. Lim Bonfing, the Court sought to distinguish the two cases by saying that the property in the Alfonso case pertained to the conjugal partnership, whereas the property in the Guinto case was the separate property of the husband. The distinction

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[5] 48 Phil. 884.

[6] 48 Phil. 884, 887-888.

[7] Under the new civil code this usufructuary right of the surviving spouse no longer evists. She is given full ownership of her share, equivalent to the share of each legitimate child, if she survives with two or more legitimate children.

is not on principle and immaterial. The correct and logical test as to who should own the property redeemed seems to be: who was the original owner of the property and hence, the owner of the right to redeem? Of course, this test is based on the assumption that the repurchase is effected within the period of redemption originally granted. In *Santos v. Bartolome,* the property was originally the separate property of the wife and, assuming that she sold the same with right to redeem not before the marriage (as was the case), but during the marriage, still upon redemption, ownership reverted to her, of course, with an obligation to reimburse the conjugal partnership, as the latter advanced the redemption money. In *Guinto v. Lim Bonfing,* the property was originally the husband's seaprate property; it was sold during the marriage with the right to redeem reserved. The husband died; but the widow before the redemption period expired, repurchased the property with borrowed money. The Court correctly held that the ownership reverted to the heirs of the original owner, making the widow only a preferred creditor for the value she paid to effect the redemption. In *Alfonso v. Natividad,* the property sold with right of redemption was originally of the conjugal partnership. The redemption was effected after the death of the husband by the wife with her own money. The property should revert technically to the conjugal partnership; but because the latter has been dissolved, the ownership should vest on those who are entitled to the distribution of the conjugal partnership property, subject only to reimbursing the widow for the money advanced to effect redemption.

Such a modification of the Alfonso decision would be in consonance with justice. And the provisions of law would sustain it. Among the properties that belong to the conjugal partnership are:

> 1. That which is acquired by onerous title during the marriage at the expense of the common fund, whether the acquisition be for the partnership, or for only one of the spouses;
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> 2. * * * *.
>
> 3. The fruits, rents, or interest received or due during the marriage, coming from the common property or from the exclusive property of each spouse.[8]

It is undeniable that in the Alfonso case, the right of redemption was acquired during the marriage by onerous title at the expense of the common fund. It was part of the consideration that passed to the conjugal partnership in return for the property sold.

Alternatively, we may also consider the right of redemption as "an interest received during the marriage, coming from the common property."

Under either classification the right to redeem is a property right belonging to the conjugal partnership.

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[8] Art. 153, Civil Code.

It may be argued however that upon the death of the husband (or the wife), the conjugal partnership is dissolved [9] and therefore, the conjugal partnership can no longer redeem. This argument assumes that upon the dissolution of the conjugal partnership, in any case, property rights and other effects resulting therefrom are also terminated. This is not true for the law itself provides for a situation where the effects of the conjugal partnership may be waived *after* the marriage has been dissolved or annulled.[10] This renunciation or waiver, according to Manresa, "is not a renunciation of the conjugal partnership which no longer exists after judicial separation, or the annulment or dissolution of the marriage; it is renunciation of the effects of such partnership or of the common properties acquired as a result of the partnership which has been dissolved.[11]

At the time the Alfonso case was decided, the provisions of the Civil Code then applicable were not different from the existing civil code provisions herein cited to sustain that the right of repurchase involved in said case should have been awarded to the conjugal partnership. For Art. 153 which enumerates the conjugal partnership property, and with which may be included the right of repurchase, is a reproduction of Art. 1401 of the old Code. And Art. 146 which allows a waiver of the effects of the conjugal partnership after dissolution is taken substantially from Art. 1394 of the old Code. No express provision of the Code then, nor of the present Civil Code, declared that the right of repurchase, such as that involved in the Alfonso case, should belong exclusively to the redeeming spouse and not to the conjugal partnership.

Moreover, the rules on the settlement of estates of deceased persons seem to support the theory here advanced that property acquired thru the exercise of the right of repurchase which accrued during the marriage should remain the property of the partnership or of its distributees. And these rules on settlement, now embodied in our Rules of Court, were substantially taken from the Code of Civil Procedure, already in force at the time the Alfonso case was decided. When the marriage is dissolved by the death of the husband or wife, the community property shall be inventoried, administered and liquidated, and the debts thereof paid, in the testate or intestate proceedings of the deceased spouse. If both spouses have died, the conjugal partnership shall be liquidated in the testate or intestate proceedings of either.[12] During the process of administration and liquidation provided for in the Rules of Court, the executor or administrator of the deceased spouse may redeem the property sold during the marriage. For the property involved is one where the estate has at least an interest of one-half.[13] And the property thus redeemed shall be considered in the liquidation of the partnership.

But the partnership (in liquidation) may have no money to effect a repurchase while the surviving spouse may have. In such

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[9] Art. 175, Civil Code.

[10] See Art. 146, Civil Code.

[11] Manresa, 550-551.

[12] Rule 75, Sec. 2, Rules of Court; Sec. 685, C.C.P.

[13] See Rule 82, Sec. 1(a); Sec. 643, C.C.P.

a case, consistent with the Santos and Guinto cases, the heirs themselves (in the distribution of the conjugal partnership) should be allowed to reimburse the redeeming spouse (who incidentally, is also an heir)[14] and cause the property to be distributed as one belonging to the conjugal partnership.

Another case may arise. If the right of repurchase is assigned to any of the distributees as his share in the estate of the deceased spouse, an estate in turn derived from the conjugal partnership, there seems to be no difficulty. But the estate may be settled, and thru oversight or inadvertence and even through fraud, the right of redemption may not be assigned to any distributee. Furthermore, it may happen that the original period of repurchase has not expired. In such a case, should the surviving spouse redeem the property, the distributees of the conjugal partnership should still share in the property upon reimbursing the redeeming spouse. This, as a corollary to the rule that after the settlement of an estate, the distributees are still liable for any debts of the estate that remain unsatisfied.[15] And more particularly, to the rule that claims, contingent when presented which have become absolute, may still be recovered from the distributees thru a proper action, even if the assets that were originally reserved for them have already been distributed and the statutory period for their payment has already passed.[16]

The surviving spouse should not profit alone by the repurchase, depriving the other heirs of the deceased spouse of the share which by law would be theirs if the redemption were effected during the existence of the conjugal partnership. The presumed and natural intention of the spouses is to distribute the common property to the beneficiaries of the marriage. Death should not alter that intention. The property could not be reacquired were it not for the right of repurchase, and the factual and juridical source of the latter is the conjugal partnership (represented by its distributees) and not the surviving spouse alone.

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[14] Arts. 887 (3), 995 *et seq.*

[15] See Rule 74, secs. 3 & 4, Rule 91, sec. 1; Secs. 753, 754, 782, C.C.P.

[16] See Sec. 5, Rule 89; Secs. 748, 749, C.C.P.

Should an Instrument Evidencing a Donation Mortis Causa be Probated?

PRELIMINARY

Article 728, Civil Code. Donations which are to take effect upon the death of the donor partake of the nature of testamentary provisions, and shall be governed by the rules established in the Title on Succession.

This article is an express recognition of what is known in civil law as a donation *mortis causa*. Anent this provision, the Supreme Court has consistently held that the documents in which such donations appear must observe the formalities prescribed for wills and testaments.[1] Manresa entertains the same view.[2] The question arises, however, as to whether an instrument solemnized as in the case of wills and containing only this peculiar form of donation should be probated. Is the provision of article 838 of the *Civil Code* to the effect that no will shall pass either real or personal property unless it is proved and allowed in accordance with the Rules of Court[3] applicable to such instruments? On this point the Supreme Court has made no pronouncement. In the case of David v. Sison,[4] it classified and accepted as a donation *mortis causa* the donation involved therein although it did not appear whether or not the donation was evidenced by a will which had been admitted to probate. However, since the validity of the donation was not in issue it would not be proper to consider as binding any inference which may be deduced from the opinion.

LITERAL INTERPRETATION

The aforequoted article 728 categorically subjects donations *mortis causa* to the rules on succession. Such rules provide among other things that a will be made with the formalities therein prescribed and that it be probated to be affective.[5] To hold that a donation *mortis causa* be solemnized as in the case of a will and in the same breath to deny the necessity of probate would not only be inconsistent but would do violence to the literal sense of article 728. Article 838 is broad enough to cover all wills whatever their purpose or nature. Where the law has made no distinctions, it is not permissible to read any into it.

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[1] Zapanta v. Posadas, Jr., 52 Phil. 557; Laureta v. Mata and Magno, 44 Phil. 668; Tuason and Tuason v. Posadas, 54 Phil. 289; Cariño v. Abaya, 40 O. G. No. 12, p. 19; Reyes v. Reyes, 45 O. G. 1836 (CA).

[2] *Commentaries*, Vol. 5, p. 93, 5th Ed.—"Para disponer de los bienes para despues de la muerte, aunque se hable de donacion, la forma es el testamento."

[3] The *Rules of Court* contains a similar provision in Rule 76, section 1: *Allowance necessary. Conclusive as to execution.*—No will shall pass either real or personal estate unless it is proved and allowed in the proper court. Subject to the right to appeal, such allowance of the will shall be conclusive as to its due execution.

[4] G. R. No. 49108, March 28, 1946.

[5] Article 783 and 838, *Civil Code*.

THE POLICY BEHIND THE LAW

For a better understanding of the problem presented an inquiry into the nature of donations *mortis causa* is in order.

Donations mortis causa *at common law*

Gifts *donatio mortis causa* had their origin in the civil law, and were adopted with slight modification into the common law.[6] A gift *causa mortis* is there understood to be a gift of personal property[7] made by a person in expectation of death then imminent.[8] The possession of the thing must be absolutely delivered to the donee before the death of the donor and the donee[9] precisely as required in the case of gifts *intervivos,* subject to be divested by the happening of any of the conditions subsequent, that is, upon actual revocation by the donor, or by the donor's surviving the apprehended peril, or outliving the donee, or by the occurrence of a deficiency of assets necessary to pay the debts of the deceased donor.[10] A written instrument is not necessary. It may be, and usually is, made by parol[11] the actual delivery of the property being taken as evidence of the donor's intention in lieu of an instrument in writing.[12]

Even with these substantial departures from the civil law concept of donations *mortis causa* the common law recognizes the close affinity between this form of gift and testamentary dispositions or legacies. A gift *causa mortis* resembles a legacy in that it is made in contemplation of death, is ambulatory, incomplete and revocable at the option of the donor at any time during his life.[13] It is distinguished from a gift by will in the following particulars: (a) A gift *causa mortis* may be made by parol. An instrument in writing is ordinarily required in the case of a will. (b) A gift *causa mortis* must be made under apprehension of impending death. A will is commonly made in view of the fact of death but not because of its immediate proximity. (c) Delivery is essential to the validity of a gift *causa mortis* and the donee acquires title directly from the donor. No delivery is ever had of property which is the subject of gift by will until after the death of the testator, and the legatee's

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[6] Noble v. Garden, 79 P. 883; Leyson v. Davis, 42 Pac. 775; Keepers v. Fidelity Title, etc., Co., 28 Atl. 585; Apache State Bank v. Daniels, 121 Pac. 237.

[7] Caylor v. Caylor, 52 N.E. 465; Johnson v. Colley, 445 S.E. 721.

[8] Vosburg v. Mallory, 135 N.W. 577; Caylor v. Caylor, *supra;* Larrabee v. Hascall, 34 Atl. 408; Allen v. Allen, 77 N.W. 567; Winslow v. McHenry, 101 N.W. 799; Varley v. Sims, 111 N.W. 269; O'Neil v. O'Neil, 117 Pac. 889; Walker v. Walker, 31 Atl. 14; Grymes v. Hone, 10 Am. Rep. 313; Ridden v. Thrall, 26 N.E. 627; Kiff v. Weaver, 55 Am. Rep. 601; In re Reardon's Estate, 26 N.Y.S. 2d 203.

[9] Noble v. Garden, *supra;* Johnson v. Grice, 106 So. 671; Pullen v. Placer County Bank, 71 Pac. 83; Vosburg v. Mallory, *supra.*

[10] Basket v. Hassell, 107 U.S. 602; Apache State Bank v. Daniels, *supra.*

[11] Noble v. Garden, *supra;* Johnson v. Grice, *supra.*

[12] Trout v. Farmer's Trust Co. of Newark, 168 A. 208.

[13] Johnson v. Grice, *supra.*

title is derived from the executor.[14] The infallible test which must distinguish it from a testamentary gift is delivery,—change of dominion *in praesenti*; without this there is really nothing to distinguish it from an ordinary testamentary bequest.[15]

Donations mortis causa in civil law

The *Civil Code* defines a donation *mortis causa* as that which is to take effect upon the death of the donor.[16] It differs from a donation *inter vivos* in that it is made as its name implies in consideration of death or mortal peril, without the donor's intention to lose the thing or its free disposal in case of survival.[17] It is the donor's death that determines the acquisition of, or the right to the property, and it is revocable at the will of the donor.[18] If it is a donation *in praesenti* as distinguished from a gift *in futuro* it does not come under the provisions of article 728.[19] As has been stated, gifts *mortis causa* can be made only by last will and testament.[20]

In the light of these principles there seems to be little, if any, distinction between donations *mortis causa* and testamentary dispositions. The only differences between them as pointed out by common law authorities do not exist under the civil law. The donation must be by will, in the same manner as if it were legacy or other disposition by will. As in the case of other testamentary dispositions it is made in consideration of death. Cases decided by the Supreme Court do not lay down as a requirement that death which is the consideration for the donation be impending. Like in case of legacies, no delivery is made till after the death of the donor, differing essentially in this respect from the donation *causa mortis* of the common law. Manresa states that from the moment the death of the donor determines the acquisition or the right to the property, from the moment in which the disposition may be revoked at will, the donation becomes equal to a legacy and more than this a real legacy.[21] The distinction between the two forms of disposition, if any, is shadowy. Because of this similarity which the law expressly recognizes they are governed by the same rules.

Being of essentially of the same nature, the reasons which impelled the legislature to require that the will containing and legacies be probated apply with equal force to a will evidencing a donation *mortis causa*. Such donations must, therefore, be taken in connection with the policy laid down by our law in connection with wills. The law allows the owner of property to declare, in his lifetime,

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[14] Vosburg v. Mallory, *supra*.

[15] Trenholn v. Morgan, 5 S.E. 721.

[16] Article 728.

[17] Balaqui v. Dongso, 53 Phil. 673.

[18] Zapanta v. Posadas, *supra*.

[19] Laureta v. Mata and Magno, *supra*.

[20] Zapanta v. Posadas, Jr., *supra*; Laureta v. Mata and Magno, *supra*; Tuason and Tuason v. Posadas, *supra*; Cariño v. Abaya, *supra*; Reyes v. Reyes, *supra*.

[21] Commentaries, Vol. V, p. 83, 4th Ed.

to whom his property shall go, after his death. Article 805 of the *Civil Code* prescribes in detail the formalities which should attend the making of a will and complementing this provision is the precept contained in article 838 requiring that such will be proved. These requisites were intended as safeguards to protect both the deceased owner of property and his heirs from frudulent claims. There is no reason why the requirement of probate be applied in the one case and not in the other. The evil sought to be avoided exists in both situations.

It is interesting to note that Louisiana Civil Code contains provisions on donations *mortis causa* similar to ours.[22] Decisions of the Louisiana Supreme Court are therefore of great value for whatever light they may shed on a question respecting which our Supreme Court is silent. In at least two cases [23] the court ruled that title to property does not vest in the donee until the will making such donation is probated and executed.

CONCLUSION

The view that an instrument evidencing a donation *mortis causa* should be probated finds support in the letter of the law. Moreover, by adopting such conclusion, public policy would thereby be advanced. Whatever vestige of doubt remains should be erased if the jurisprudence of Louisiana be given due weight. It may be argued in favor of the negative view that it would be unjust to require the recipient of said property of small value by way of donation *mortis causa* to undergo the inconvenience and expense of probate proceedings. Suffice it to say that isolated instances of hardship should not be permitted to outweigh the greater public interest involved. Opportunities for fraud should be minimized as much as possible.

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[22] Sec. 1469.—*Donation mortis causa defined.*—A donation mortis causa (in prospect of death) is an act to take effect when the donor shall no longer exist by which he disposes of the whole or a part of his property, and which is revocable.

Sec. 1570.—*Disposition mortis causa made by last will or testament.*—No disposition mortis causa shall henceforth be made otherwise than by last will or testament. Every other form is abrogated . . .

Sec. 1644.—*Will without effect probated.*—No testament can have effect, unless it has been presented to the judge of the parish in which the succession is opened; the judge shall order the execution of the testament after its being opened and proved, in the cases prescribed by law.

[23] Maddox v. Butchee, 203 La. 299; Succession of Dambly, 186 So. 7. In Maddox V. Butchee the plaintiffs sought to restrain the sale of certain hereditary property relying on a will left by the deceased owner of said property donating it to them. The court denied them relief.

The Need for Implementing Article 89 of the New Civil Code

One of the more significant changes effected in the New Civil Code consists in giving greater rights to illegimate children.[1]

Pursuant to this policy, Article 89 is inserted in the New Civil Code of the first paragraph of which provides: "Children conceived or born of marriages which are void from the beginning shall have the same status, rights, and obligations as acknowledged natural children, and are called natural children by legal fiction."

The article above-quoted presents several problems. The children conceived of an incestuous marriage [2] would, in spite of the lack of legal capacity on the part of the parents to marry, be considered as natural children. Thus, if A and B are brother and sister and marry each other, the child would clearly be conceived under circumstances that would stamp upon it the status of an incestuous child. In considering the latter as an acknowledged natural child, several provisions of the Civil Code itself are disregarded. Articles 276 and 277 provide that only natural children may be acknowledged.

A natural child is one born of parents who, at the time of the conception of the former, were not disqualified by any impediment to marry each other.[3] A void marriage presupposes an impediment. It involves a recognition of the fact that the parties could not marry each other.

It will be noticed, however, that the Code, in using the word "acknowledged natural children" qualifies the use of the term by the phrase "by legal fiction." The codifiers knew that without Article 89 children born of incestuous marriages would be considered spurious.[4] The Code Commission desired to give the incestuous child more rights. But is the child who is given the rights of an acknowledged natural child also given the machinery with which to enforce his rights in a Court of Justice?

We submit that it does not.

If the parents were willing to recognize the child, no problem would arise.[5] But the situation can in no way be limited to this, for if it were so limited, then the "right" conferred by Article 89 would be stripped of all the elements that make up a right, and be reduced to a mere privilege which the recognizing parent may confer or

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[1] Report of the Code Commission, p. 36. "Aside from the reason given elsewhere in this report, it should never be forgotten that these illegimate children are human beings, like the rest of humanity. Before the law, their human personality is just as worthy of respect and protection as others. Why should the law limit its aid to the necessaries of life and education?"

[2] Article 81.

[3] Article 269.

[4] "Spurious children are those who cannot be properly considered as natural." 1, Padilla, Civil Code—Annotated, 19 p. 347.

[5] Recognition of the status is granted by Article 89.

withhold at his pleasure. It thus becomes necessary to consider the question of the enforcement of this right; for only then can we speak of legally significant right.

Article 283 provides for the cases in which the father is obliged to recognize his natural child.[6] It makes no mention of the natural child by legal fiction. Does the phrase "natural child" include natural children by legal fiction? It is believed that the phrase cannot be construed as including natural by legal fiction without doing violence to the rules of statutory construction. It would be injecting into the law matters which the Legislature did not see fit to include. Even a cursory reading of the Civil Code will show that where the Code confers a right on natural children by legal fiction it expressly uses that term. Thus, in Article 291 acknowledged natural children and natural children by legal fiction are treated separately. The same is evident in Articles 891, 895, 897, 898 and others. It is also to be noted that by the provisions of Article 895 the natural child by legal fiction. It would seem, therefore, that if Article 283 acknowledged natural child. Despite this fact, the articles enumerated above still make express mention of the acknowledged natural child by legal fiction. It would seem, therefore, that if Article 283 was meant to include natural children by legal fiction, the codifiers would have explicitly mentioned them, as they did in the articles mentioned. The fact that they did not gives rise to a contrary conclusion.

But if the natural child by legal fiction is given right by Article 89 and Article 283 does not give him the means or machinery by which such right may be enforced, may he not bring an action to establish his status as a natural child by legal fiction?

The Civil Code provides for an action to establish legitimacy.[7] But it does not provide for an action to establish the status and rights of a natural child by legal fiction. The new Civil Code retains substantially the remedies of the Spanish Civil Code in so far as the remedies available to spurious children and natural children are concerned, with the exception that the New Civil Code adds cases where the father and mother may be compelled to recognize the child. We do not believe that Article 268 can be construed to include natural children by legal fiction, for the reason that the action by the latter

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[6] Article 283 provides:

"In any of the following cases, the father is obliged to recognize the child as his natural child;

1. In cases of rape, abduction, or seduction, when the period of the offense coincides more or less with that of the conception;

2. When the child is in continuous possession of the status of a child of the alleged father by the direct acts of the latter or his family.

3. When the child was conceived during the time when the mother cohabitated with supposed father;

4. When the child has in his favor any evidence or proof that the defendant is his father.

[7] Article 268.

would not be based on legitimacy but on the fact that he is entitled to the rights of an acknowledged natural child. The natural child by legal fiction being considered as having the same rights as an acknowledged natural child, there is no occasion to speak of legitimacy.

But if neither Article 283 nor 268 gives the natural child by legal fiction the remedy with which to enforce his right, may not Article 89 itself be made the basis of an action to establish the status of a natural child by legal fiction?

It is doubtful if Article 89 was intended to be made the basis of the right on the one hand, and the remedy with which to establish the status of an acknowledged natural child by legal fiction, on the other. The scheme or arrangement in the Civil Code is as follows: in the case of a legitimate child the Code first gives the definition of a legitimate child or the presumption of legitimacy in Article 255. The persons named therein are entitled to certain rights which they may enforce. The Code then gives them the means or machinery for the enforcement of said rights.[8] In the same manner the Code deals with acknowledged natural children and the means by which to enforce the rights of the latter.[9]

But Article 89 merely states who are to be considered natural children by legal fiction. It limits itself to defining natural children by legal fiction. It does not state whether the right to establish the status of a natural child by legal fiction descends to the heir of the child, and whether it may be brought against the heirs of the parents against whom the recognition is demanded.

Again, if Article 89 were to be considered as providing the remedy itself, an obstacle would have to be encountered which could frustrate the action. There is still the prohibition against an investigation into paternity in Article 280. It is true that the prohibition has been liberalized by increasing the number of cases where a parent may be obliged to recognize a child, but otherwise the rule has not been changed. The wording of Article 280 is substantially the same as that of Article 132 of the Spanish Civil Code.

It would seem, therefore, that the only way in which a child born of a void marirage may enforce his right would be to base his action on Article 89 with the difficulty above-mentioned. Article 89 would have to be construed not only as providing the remedy, but at the same time, as constituting an exception to the prohibition against the investigation of paternity.

A clarification is needed. Or, perhaps, it is an implementation that is called for. If it desired that the child born of a void marriage be given the same rights as an acknowledged natural child, another article might be inserted to provide for the machinery which is lacking and by means of which such right may be enforced.

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[8] Article 268.

[9] Article 283.

It is further suggested that additional provisions could be inserted on the following matters:

1. Whether the child may bring the action at any time or whether he should bring or commence it within a certain number of years after reaching the age of majority;

2. Whether, if the child dies during minority, the heirs may bring the action and if they may, within time.