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NOTES AND COMMENTS:

ON VICARIOUS LIABILITY OF THE EMPLOYER

"Normally and naturally," so says Salmond,[1] the person who is liable for a wrong is he who commits it. Responsibility and consequent liability attach to the doer of the injurious act, and fault is a condition precedent for the generation of liability, criminal and civil. These are legal platitudes, banalities almost, so firmly settled and so widely accepted are they in the legal systems of civilized nations.

It was not always thus, however. In biblical antiquity, for example, the tendency to extend vicariously the incidence of liability was very marked. It was considered quite a natural thing to make a man answerable for those who were kin to him; indeed, it was deemed a piece of Divine Justice,[2] a sanction frequently threatened and applied.[3] It was thus necessary for the Mosaic legislation

[1] *Jurisprudence*, 10 ed. (1947), p. 412.

[2] Exodus XX.5. I am the Lord thy God, mighty jealous, visiting the iniquity of the fathers upon the children, unto the third and fourth generation of them that hate me.

[3] Deuteronmy XXIII 2. A mamzer, that is to say, one born of a prostitute, shall not enter into the church of the Lord, until the tenth generation.

Leviticus XXVI 39. And if of them also some remain, they shall pine away in their iniquities, in the land of their enemies, and they shall be afflicted for the sins of their fathers, and their own. Also Numbers XIV.18; Deuteronomy V.9.

to expressly establish the principle of individual responsibility as a part of the Hebraic law.[4] Vicarious criminal liability in the sense of collective responsibility seems to have been rather widely accepted in the primitive systems of law; at least, so it was in China, Korea, Japan, Persia, and in many states of Medieval Europe. In fact, it was only the decay of the patriarchal family system and the rise of the free individual as the basis of the modern state that definitely did away with the principle in the sphere of criminal law.[5] The long tenure of the principle may perhaps be explained by referring to the then predominant theory of punishment as retribution, or expiation, or vindication;[6] the Christian theological doctrine of the Redemption illustrates the intimate relation between vicarious liabilty and expiative penalty.

Today, vicarious criminal liability is unthinkable.[7] The received maxim is *Actus non facit reum nisi mens sit rea,*[8] a maxim whose venerable age[9] indicates the exceptional character of the vicarious

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[4] Deuteronomy XXIV.16. The fathers shall not be put to death for the children, nor the children for the fathers but every one shall die for his own sin. Also 4 Kings XIV.6; 2 Paralipomenon XXV.4; Ezechiel XVIII.2, 20; Jeremias XXXI.29. All citations are from the Douay Version. The statement of Cherry, Richard R. ("Lectures, Growth of Criminal Law in Ancient Communities," in *Primitive and Ancient Legal Institutions,* 2 Evolution of Law Series, compiled by Kocourek, Albert and Wigmore, John H., at p. 144) that the introduction of individual liability was "part of the ethical revolution introduced by the later prophets" does not seem accurate, since the principle had been enunciated as early as the time of Moses. Sutherland, in *Origin and Growth of the Moral Instinct,* p. 168, records a precept of the law of the Visigoths, strikingly similar to Deut. XXIV. 16. "Let not father for son, nor son for father, nor brother for brother, fear any accusation, but he alone shall be indicted as culpable who shall have committed the fault." It is most probable that this rule represented the end product of a long process of ethical and legal evolution.

[5] Cherry, *op. cit., at* 144. Cherry observes that for political offenses, the parents and children might be punished under French law down to the time of the Revolution. See also Lea, *Superstition and Force* (4 ed.), p. 13-20.

[6] Salmond, *op. cit.,* at 412-413: ". . . so long as punishment is conceived rather as expiative, retributive, and vindictive, than as deterrent and reformative, there seems no reason why the incidence of liability should not be determined by consent, and therefore why a guilty man should not provide a substitute to bear his penalty, and to provide the needful satisfaction to the law. Guilt must be wiped out by punishment, but there is no reason why the victim should be one person rather than another."

[7] Except, perhaps, in English law, where in very special circumstances, and in certain of its less serious forms, it seems to be admitted. See Chisolm v. Doulton, 22 Q.B.D. 736; Parker v. Alder 1 Q.B. 20, cited in Salmond, *op. cit.,* at 412. And see note 46, *infra.*

[8] U.S. v. Catolico, 18 Phil. 504; People v. Pacana, 47 Phil. 48; People v. Tanco, 58 Phil. 255; Art. 12, Revised Penal Code.

[9] According to Pollock and Maitland (2 *History of English Law,* 2 ed., p. 476 n. 5) the original source is St. Augustine (38 *Augustini Episcopi,* Tom. Q., Migne ed., 973). This is the view adhered to by Sayre in *"Mens Rea"* 45 Harv. L. Rev.

extension of liability to those not privy to the fault or guilt, and suggests that, even in early systems the principle did not enjoy undisputed sway. As to civil liability, the development of the law is less clearly delineated. It is not necessary, nor is it feasible here, to trace in detail the direction which the development took. The barest outline will suffice for our present purpose.

It seems that in the early law, liability attached directly to the person or thing, animate or inanimate, that was the immediate cause of the injury, and that the master or owner or father escaped liability by surrendering the slave or thing or child to the injured person. So it was in the Hebrew,[10] Greek,[11] and early Roman [12] law. Under the Lex Aquilia, masters became personally liable for certain wrongs committed by their slaves with their knowledge,[13] and still later, shipowners and innkeepers were made liable for injurious acts of their employees on board ship or in the tavern though done without their knowledge.[14] This appears to be the first instance of masters being made unconditionally liable for their servant's wrongs. A less stringent form of vicarious liability, the unconditional type being apparently exceptional, was also provided for in the Digest; [15] this, through the intervening media of the Partidas [16] and Spanish Civil Code,[17] has been transmitted to us in our new Civil Code.[18] The primitive Teutonic customary law seems to have passed a similar course of development.[19] Speaking of the subsequent growth of the Common Law, Holmes said that the law began with liability based on fault, and tended, as it grew, to formulate external standards which might subject an individual member of society to liability though there was no fault in him.[20] This view is directly opposed to that held by the majority of legal writers and researchers to the effect that the law began with making a man act at his own peril and gradually became moralized until the liability became connected with and pre-

974, 983, n. 30. It seems however that Seneca (3 *Epistles,* Loeb ed., 92, 1.57) had stated it much earlier as "Actio recta non erit, nisi recta fuerit voluntas"; so that it would seem Seneca could lay better claim to the famous formula, although there is no doubt that St. Augustine was the point of dissemination in the Middle Ages. There are some passages in the Bible which suggest the substance of the axiom: Mark VII. 5-7, 18-23; Isaiah XXIX. 13. See Hall, Jerome, *General Principles of Criminal Law* (1947) at p. 142.

[10] Exodus XXI. 28-36.

[11] Plato, *Laws* (Bohn's Translation), pp. 378, 379, 397, 495, 388.

[12] XII Tables, VIII. 6; Institutes of Justinian 4.8-9; D. 9.1.1.; D. 9.4.2, § 1.

[13] D. 9.4.2, § 1.

[14] D. 4.9.1, § 1; *Id.* 7, § 4.

[15] D. 9.3.2.6.; *Id.* 39.4.5.1.

[16] 7th Partida, Title 13, law 4 and Title 15, law 5.

[17] Art. 1903, 1905, 1910; see 12 Manresa (2d ed.), 632.

[18] Art. 2180, 2183, 2193.

[19] Holmes, O.W., *The Common Law* (1946 pr.), p. 17-34.

[20] *Op. cit.*, p. 4, 162.

mised on fault.[21] A reconciliation of the two divergent views has been attempted, how successful we need not now determine.[22]

Basis of vicarious liability.

Before proceeding to discuss briefly the basis or bases of vicarious liability suggested by different writers, it seems best to call attention to an elementary distinction. Vicarious liability is not coextensive with liability without fault or absolute liability, as it is sometimes called.[23] Vicarious liability, strictly speaking, is liability for the harmful acts of others. The doer must have acted with fault;[24] but fault may or may not be imputable, factually or legally, to the person held vicariously liable. Absolute liability is simply liability inspite of the absence of fault in either the actor or the person held liable.

Many and novel are the theories submitted to justify the imposition of vicarious liability. This indicates that such liability is generally regarded as an abnormal deviation from a consistently moral theory of liability, from justice as a strictly ethical concept, as a distortion of the symmetry of the law, disturbing yet found necessary. Of course labored explanations will be unnecessary should we sever the traditional link of liability with fault. But no one has yet succeeded in constructing a completely satisfactory substitute for the

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[21] Ames, James Barr, *Law and Morals,* 22 Harv. L. Rev. 97, 99: "the early law asked simply, 'Did the defendant do the physical act which damaged the plaintiff?' The law of today, except in certain cases based upon public policy, asks the further question, 'Was the act blameworthy?' The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril." Also Smith, Jeremiah, *Liability for Damages to Land by Blasting,* 33 Harv. L. Rev. 542, 550; Wigmore, John H., *Responsibility for Tortious Acts: Its History,* 7 Harv. L. Rev. 315, 383, 441; Smith, Jeremiah, *Tort and Absolute Liability—Suggested Changes in Classification,* 30 Harv. L. Rev. 241, 248; Thayer, Ezra Ripley, *Liability Without Fault,* 29 Harv. L. Rev. 801, 815; I Austin, *Jurisprudence* (3rd) chap. 24-26; Kenny, *Cases on Torts,* p. 146 note on Stanley v. Powell (1 Q.B. 86); Whittier, Clarke B., *Mistake in the Law of Torts,* 15 Harv. L. Rev. 335, 336; Wigmore, John H., *Justice Holmes and the Law of Torts,* 29 Harv. L. Rev. 601, 607; Smith, Jeremiah, *Sequel to Workman's Compensation Acts,* 27 Harv. L. Rev. 235, 239.

[22] Isaacs, Nathan, *Fault and Liability,* 31 Harv. L. Rev. 954 at 966. "It seems that the history of tort law records lapses from the moral fault basis and returns to it, rather than a single movement in any one direction. There is in fact an alternation between periods of the tendency that Justice Holmes described when cases of acting at one's peril multiply in the law and periods of the kind Ames and Wigmore describe, when morals are reinfused into the law. This alternation is entirely consistent with what we know of other branches of the law.—The completest coincidence of individual fault and liability occurs in periods when legal development is by means of Equity, and that *jus strictum* brings with it a standardization of types of culpable conduct."

[23] Smith, in 30 Harv. L. Rev. 241 at 325, classifies absolute liability into three categories: liability for non-culpable mistake, liability for non-culpable accident, and vicarious liability for wrongful acts of others; this scheme was taken from Salmond, *Torts* (4 ed.) p. 15.

[24] On the question of extending vicarious liability to cover cases where the actor was without fault, see Smith in 22 Harv. L. Rev. 235, 236, 251, 254-256.

moral basis. So we content ourselves with chipping off exceptions, invoking social expediency, real or imagined.[25]

The explanations offered by many of the civilians display a deep reluctance to divorce fault from liability and an attempt to maintain elegantia juris. Giorgi, Mosca, Sechi and the majority of the Italian commentators base the vicarious responsibility of the master and principal in an absolute presumption of negligence, either *in eligiendo* or *in vigilando* or both, the basis of the presumption being liberty of choice or possibility of supervision.[26] Others like Gabba, Orlando, Prazantaro, Glük, and Barasi, postulate the existence of liability *sin culpa objetiva*. They do not repudiate fault or culpa as the ordinary basis of liability, but accept the special character of vicarious liability as *extraculpable*. This approach begs the question and explains nothing.[27] The French jurists Theilhard, Bertrand de Greville, and Tarrible, who took an important part in the framing of the Code Napoleon, accepted the same fiction of negligence unconditionally imputed by law to the master or employer that the majority of the Italian writers used.[28] But is this presumption of negligence warranted in fact? Is it not in conflict with what is generally observed in daily life? Instead of careless abandon in the choice or negligence in the supervision of his servants, a master's personal interest impels him, as a general rule, to employ only the most apt and inclines him to strict supervision over the servant chosen. "Fictitious or presumed negligence is generally an injustice while responsibility without negligence may, on the contrary, appear most just." [29] Accordingly, Lessona, Sainctelette [30] and Saleilles [31] admitted the fact of inculpable liability imposed for reasons of "social order and public interest."

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[25] Isaacs, in 31 Harv. L. Rev. 954 at 978: "Yet we firmly criticize these temporary expedients even while we use them. Those of us who seek to justify them at all, refer to 'public policy' or 'social justice,' or try to demonstrate that in the long run, or in the average case, the burden imposed on a man or on an enterprise for the benefit of society will be shifted to society. But nobody preaches that a low morality is essential or desirable in law."

[26] Velez v. Llavina, 18 P.R. 634; 12 Manresa (2d ed), 626.

[27] 12 Manresa (2d ed.), 626.

[28] *Ibid.*, quoting Theilhard commenting on Art. 1384 of the Napoleonic Code: "Regulada de esta forma, la responsabilidad parece justa en todas sus partes. Aquellos á quienes incumbe deben imputársela á si mismos: unos por su debilidad, otros por su mala elección, todos por su negligencia"; quoting de Greville, "Los amos y los comitentes no pueden, en ningún caso, deducir argumento alguno favorable de la imposibilidad en que pretenden haber estado para impedir el daño causado por sus servidores o comisionados en las funciones que le fueron confiados, y por eso el Proyecto (del Codigo Napoleón) les sujeta á entera é inequivoca responsibilidad. No es el servicio de que se aprovecha el amo lo que ha producido el mal que viene obligado á reparar? No debe por tanto, reprocharse á si mismo el haber otorgado su confianza á personas ignorantes, imprudentes ó ineptas?. . ."

[29] *Ibid.*, at 627, quoting Lessona.

[30] *De la Resp. et de la Gar.*, p. 124, cited in 12 Manresa (2d ed.), 628.

[31] *Essai d'une Theorie General de l'Obligat*, p. 376, cited in 12 Manresa (2d. ed.), 628.

Domat too accepted inculpable responsibility, but framed a theory of representation or agency, that is, persons were held vicariously liable because they were the representatives of the actual doers, the *preposez.*[32] Toullier, Borsari, Meucci, and Chironi[33] adhered to this theory and took refuge in the maxim, *"qui facit per alium facit per se."*[34] The very fact of substitution renders liable the substituted employer to third persons, by *culpa contractual* if the substitution takes place respecting the compliance with an obligation derived from contract, by *culpa extracontractual* in the absence of an antecedent contractual obligation of the substituted employer. The term substitution is given a much wider scope than that generally accepted for agency. The defect of this theory of representation is that the servant or employee does not represent the master or employer in a juridical sense; there is a legally significant distinction between a servant and an agent.

Interest or benefit has also been offered to explain vicarious liability. The maxim is *"Cujus comoda ejus est incomoda,"* or as phrased by Manresa, *"Quien obra por propio interés obra á propio riesgo."* The "incomoda" or "riesgo," said Danni, is part of the effects of a determinate activity on him who gave it impulse and motion. Bolaffio drew a fine distinction between interest and representation: the servant acts for the interest but not in representation of the master.[35]

Other explanations offered impress one as academic curiosities.[36] Gierke bases vicarious liability on "authority or seniority" in the economic sphere; Aubri, Rau, and Sourdat base it on control or direction exercised by the master; Venezian satisfies himself with an ontological reason, causality, that is, the injury causes the liability; Leoning and Unger invoke the danger attendant in an industrialized society; Barassi rests on the principle of *"interés lucrativo,"* while Prazantaro offers the maxim *"Unicuique suum tribuere neminem laedare."* Still other reasons have been put forward by Gabba, Coviello, Bennardo, Merkel, and Ferrini; but enough have been men-

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[32] *Loix Civille,* lib. 2, p. 132, cited in 12 Manresa (2d ed.), p. 628.

[33] 12 Manresa (2d ed.) 629, quoting Chironi: "Los lineas genericas de la representación en general, se advierten en el hecho de que al sustituerse por otro en el cumplimiento de un acto que se quiere efectuar en el propio interés, ó en el disfrute de un derecho estipulado para sí, pero con el cual va unida la observancia de determinadas obligaciones, es sustituido, sin poner en juego con el sustituto una verdadera y propia relación de representación, ó aun sin querer tal cosa, *hace juridicamente por sí lo que hace por medio de otro.*" (Italics supplied).

[34] Cf. Wigmore in 7 Harv. L. Rev. 383 at 398: "But very often the juridical mind gave up the troublesome task of accurately expressing a reason, and quite content with the policy of the rule, took refuge, when it came to naming a reason, in a fiction or other form of words. . . . The favorite expressions of this sort however were 'The act of the servants is the act of the master,' when done in the execution of authority . . ., and 'qui facit per alium facit per se' . . ., and perhaps 'respondeat superior' has often been used thus to evade giving a clear reason."

[35] 12 Manresa (2d ed.), 630.

[36] The following writers and their respective theories are all enumerated in 12 Manresa (2d ed.), 628-629.

tioned to show the bewildering confusion, which Baty called the "hopeless groping," [37] for a basis, realistic and adequate.

One cannot escape the impression that all the above reasons were thought of after the fact. Perhaps the true historical basis of vicarious liability, whatever it was, is not, or is no longer, significant for us today. If the rule finds present justification in some ground of policy, in some real need of our society, set as it is in a particularized environment, an elaborate, artificial, quasi-philosophical basis need not be formulated. And vicarious liability does find present justification on definite grounds of policy.[38]

Vicarious liability of the employer in Philippine Law.

The New Civil Code, reluctant to accept a utilitarian basis, still rests the vicarious liability of the employer on a rebuttable presumption of negligence on the part of the employer either in the selection or in the supervision of the employee, or both. It is the negligence of the employer himself that is the significant fact, the nonfulfillment of those duties of precaution and prudence established by the special relations of authority or superiority that adhere in the employer-employee relationship. The liability ceases upon proof that those vicariously liable exercised the diligence of a good father

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[37] Baty, T. in his book *Vicarious Liability* (1916) in p. 148 gives the following tabulation: (those in italics have been added by the writer; see note 36, *supra*).

1. Control—Raymond, Grove (?), Erskine (?), Gierke, Dalloz, Sourdat, Brougham, *Aubri, Rau, Seavey* (see 56 Harv. L. Rev. 72 at 78).
2. Profit (or interest)—Raymond, Gibbs, Best, Bruns, Wright, *Danni, Bolaffio, Barassi.*
3. Revenge—Holmes, Lowell, Bramwell.
4. Carefulness and Choice—Pothier, Robertson, Laurent, Demolombe.
5. Identification (or representation)—Wigmore (?) Blackburn, Glenlee, *Domat, Toullier, Borsari, Meucci, Chironi.*
6. Evidence (or evidential difficulties)—Eyre, Cranworth, *Salmond* (Jurisprudence, 10 ed., p. 414).
7. Indulgence—Bacon.
8. Danger—Pollock, Leoning, *Unger.*
9. Satisfaction—Maitland (?), *Salmond, Baty* ("In hard fact, the real reason for the employer's liability is the ninth; the damages are taken from a deep pocket.")

[38] Ames, James Barr in 22 Harv. L. Rev. 97 at 110: "On grounds of public policy, there are and always will be many cases in which persons damaged may recover compensation from others whose conduct was morally blameless. . . . the results in these cases are much less disturbing to one's sense of fairness than in those in which the innocent victim of the unrighteous are allowed no redress. The law is utilitarian. It exists for the realization of the reasonable needs of the community. If the interest of an individual runs counter to the chief object of the law, it must be sacrified." Laski, H. *The Basis of Vicarious Liability,* 26 Yale L.J. 105 at 106: "The age has passed when each man might bear untroubled the burden of his own life; today the complexities of social organization seem, too often, to have cast us, like some Old Man of the Sea, upon the shoulders of our fellows. . . ." quoted in Smith, Y.B., in 23 Col. L. Rev. 446, 457.

of a family.[39] While the new Code has extended the scope of the employers' liability, to include employers not engaged in any business or industry,[40] the retention of fault as a prerequisite of the vicarious liability of the employer is a serious limitation of the social utility of our tort law. The available defense of a good father of a family will, in practical effect, leave the plaintiff without effective redress in almost all cases. The standard of diligence is easily satisfied. Thus, choosing workmen from a "standard garage," who are licensed by the government, and "apparently thoroughly competent" is sufficient compliance with *diligencia in eligiendo;* while the issuance of "suitable rules, regulations, and instructions" for the information and guidance of the employees satisfies *diligencia in vigilando.*[41] The need of proving fault often defeats the just purpose of the law in granting the plaintiff his right of action. No employer would deliberately employ one notoriously unfit or leave his employees to shift for themselves. It may be impracticable to require a higher degree of diligence; but that is no adequate answer to the plaintiff who is compelled to shoulder the loss, for in most if not all cases, the negligent servant is financially irresponsible, incapable of the burden of civil liability.[42]

In the law of contracts, it is firmly settled that the exercise of the diligence of a good father of a family is no defense to an action on breach of contract, where the breach is attributable to the defendant's employee acting in the course of his employment.[43] The reasons advanced for this rule,—that a contrary ruling would give rise to the "anomalous result" that persons acting through the medium of agents or servants in the performance of their contracts

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[39] Art. 2180, par. 8, Civil Code; 12 Manresa (2d ed.) 630; Bahia v. Litonjua & Leynes, 30 Phil. 624, 627; Cuison v. Norton & Harrison Co., 55 Phil. 18, 23; Walter A. Smith & Co. v. Cadwallader Gibson Lumber Co., 55 Phil. 517, 524-526; Maxion v. Manila Railroad, 44 Phil. 597, 606; Cangco v. Manila Railroad Co., 38 Phil. 768, 775; Barredo v. Garcia and Almario, 73 Phil. 607, 613, quoting with approval 4 Amandi 429, 430.

[40] Art. 2180, par. 5.

[41] Bahia v. Litonjua & Leynes, *supra,* at 627; also Marquez v. Castillo, 40 O.G. No. 5 (2S), 204; Negros Transportation Co. v. Jayme, 72 Phil. 73, 75.

[42] Salmond, *Jurisprudence,* 10 ed. at 414: "It is felt probably with justice that a man who is able to make compensation for the hurtful results of his activities should not be enabled to escape from the duty of doing so by delegating the exercise of these activities to servants or agents from whom no redress can be obtained. Such delegation . . . disturbs the correspondence which would otherwise exist between the capacity of doing harm and the capacity of paying for it. It is requisite for the efficacy of civil justice that this delegation of powers and functions should be permitted only on condition that he who delegates them shall remain answerable for the acts of his servants, as he would for his own."

[43] Cangco v. Manila Railroad Co., *supra,* at 775; Del Prado v. Manila Electric Co., 52 Phil. 900, 904-905; Manila Railroad Co. v. Cia. Transatlantica, 38 Phil. 875, 887; De Guia v. Manila Electric Co., 40 Phil. 706, 710; Rakes v. Atlantic Gulf and Pacific Co., 7 Phil. 359; Baer Senior and Co. v. Cia. Maritima, 6 Phil. 215; N.T. Hashim & So. v. Rocha & Co., 18 Phil. 315; Tan Chiong San v. Inchausti & Co., 22 Phil. 152.

would be in a better position than those acting in person, and that juridical persons would otherwise enjoy practically complete immunity from damages for breach of contract [44]—are equally valid in the realm of quasi delict; and yet, the rule in tort law is different. It is not to be admitted that contractual obligations are, in some recondite way, "more binding" than extra contractual ones; all obligations are equally enforcible, all are ultimately derived from law.[45] Is there a valid reason, juridical or sociologic, for this difference in doctrine? Our judicial literature is significantly silent. It is submitted that there is none.

Under the Revised Penal Code,[46] the subsidiary civil liability of persons engaged in industry for felonies committed by their servants and employees in the discharge of their duties cannot be escaped by pleading due diligence.[47] Once the employee is convicted, and shown to be insolvent, the subsidiary civil liability follows as a matter of course.[48] A single negligent act productive of injury may be considered either as a tort or as a crime.[49] The injured person may himself bring a civil action for damages directly against the employer,[50] or wait for the criminal prosecution and conviction of the servant and then proceed against the employer to enforce the latter's subsidiary civil liability. Neither of these two recourses can be termed adequate. If the plaintiff sues on tort, the defense of a good father of a family will in all probability preclude recovery. On the other hand, criminal proceedings require a greater quantum

[44] Cangco v. Manila Railroad Co., *supra*, at 775.

[45] Corbin in 21 Yale L.J. 552 says: "All enforcible obligations are created by the law." Langdell, C.C., *A Brief Survey of Equity Jurisdiction*, 1 Harv. L. Rev. 55, 56 note I—"Strictly, every obligation is created by the law. When it is said that a contract creates an obligation, it is only meant that the law annexes an obligation to every contract. A contract may be well enough defined as an agreement to which the law annexes an obligation."

[46] Art. 103. It is worthy of note that the proposed Code of Crimes (art. 178), following the Italian Penal Code (art. 189), extends the subsidiary civil liability of employers to the payment of fines imposed for crimes committed by their employees, in spite of the fact that fine is one of the principal repressions (penalties) prescribed for crimes (art. 386). Report of the Code Commission (1950) at p. 28: "This subsidiary liability is intended to compel employers to exercise the utmost diligence in controlling and supervising their employees in the discharge of the latter's duties. Morever, the employer is benefited by the work of the employee, and if in the course thereof, some criminal offense is committed, it is but equitable that the employer should be subsidiarily liable for the payment of the fine."

[47] Arambulo v. Manila Electric Co., 55 Phil. 75, 79; City of Manila v. Manila Electric Co., 52 Phil. 586, 590, 597; Yumul v. Juliano and Pambusco, 72 Phil. 94, 97; Telleria v. Garcia, 40 O.G. (12S) No. 18, p. 115.

[48] 2 Viada (5ed.) pp. 487-495; 1 Hidalgo, pp. 331-334; 1 Groizard, pp. 736-738; decisions of the Supreme Court of Spain dated October 10, 1884; January 3, 1887; June 15, 1889; March 6, 1897; December 14, 1894; February 19, 1902; 22 Revista de Legislacion y Jurisprudencia, p. 412; Martinez v. Barredo, G.R. 49308 (May 13, 1948).

[49] Arts. 3 and 365, Rev. Penal Code; Art. 2176, Civil Code.

[50] Art. 31, Civil Code; Barredo v. Garcia and Almario, 73 Phil. 607, 610, 614.

of proof and generally are protracted. Their institution is dependent on the fiscal's discretion. Meanwhile the injured person, who may have been incapacitated for work, may be starving quietly. The law draws a distinction between tortious liability and civil liability arising from a crime, between a quasi offense and a quasi delict, between criminal and civil negligence,[51] a purely historical distinction perhaps more shadowy than substantial. Despite its dual aspect, the harmful act is one and the same, integral in fact if not in law. Besides, civil liability arising from a crime is itself premised on the private aspect of a public offense. The separate civil action granted by the new Civil Code may well fail in its avowed purpose of fostering "individual self reliance and inititative" in the enforcement of personal rights of action regardless of the action of the State attorney,[52] if the defense of a good pater familias is allowed to remain available.

To many the proposal to adopt the rule of respondeat superior, for the denial of the defense of a good pater familias will amount to that, will savor of legal heresy. But clinging to legal orthodoxy is not so important as making the law serve better the needs of the people whose lives it regulates. Respondeat superior, or vicarious liability even without fault of the master, should be viewed as a technique of administering losses which are more or less inevitable consequences of activity in human society, a method characterized by the wide distribution of the loss. "This distribution," according to Professors Shulman and Fleming, "by itself confers some benefits on society and is one among a number of possible objectives which may be pursued in shaping the development of tort liability." [53] Distribution, in practice, will mean the shifting of the loss to the party who has available the means of distributing it, generally the employer. Until the rise of large corporate enterprises, few of the

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[51] Art. 2177, 1161, 1162, *id.*, Almeida Chantangco & Lete v. Albaroa, 218 U.S. 476, 40 Phil. 1056, 1064; Francisco v. Onrubia, 46 Phil. 327, 336; Report of the Code Commission (1948), p. 162; see especially Barredo v. Garcia and Almario, *supra*, at 611.

[52] Report of the Code Commission (1948) at p. 46: "It is not conducive to civic spirit and to individual self reliance and initiative to habituate the citizens to depend upon the government for the vindication of their own private rights. It is true that in many of the cases referred to in the provisions cited, a criminal prosecution is proper, but it should be remembered that while the state is the complainant in the criminal case, the injured individual is the most concerned because it is he who has suffered directly. He should be permitted to demand reparation for the wrong which peculiarly affects him.

In England and the U.S. the individual may bring an action in tort for assault and battery, false imprisonment. * * * This independent civil action is in keeping with the spirit of individual initiative and intense awareness of one's individual rights in those countries.

Something of that same sense of self reliance in the enforcement of one's rights is sought to be nurtured by the Project of the Civil Code. Freedom and civic courage thrive best in such an atmosphere, rather than under a paternalistic system of law."

[53] Shulman, Harry, and Fleming, James, Jr., *Cases and Materials on the Law of Torts* (1942) at p. 71.

possible defendants besides governmental units were equipped with those means. The development of liability insurance has greatly increased and facilitated the distribution of losses by even the small single proprietor. Where the defendant is engaged in industry, the distribution may be made directly by charging the loss as part of the cost of production and passing it to the consumer in the form of higher prices. This seems to have been the underlying principle of the Workmen's Conpensation Act (Act No. 3428) [54] which constitutes perhaps the most important exception to the general rule requiring fault for the imposition of liability.[55] If it is socially expedient to spread and distribute throughout the community the inevitable losses occasioned by injuries to employees engaged in industry, is it not equally socially expedient to spread and distribute the losses due to injuries to third persons which are just as inevitable?[56] Vicarious liability without fault of the employer can achieve in the latter case what Workmen's Compensation statutes have accom-

[54] Seager, *Principles of Economics*, at p. 601: "The justification of policy is that the loss to wage earners resulting from the accidents of industry should be regarded as an expense of production which the employer should bear as he bears the other expenses of production and which, since the burden falls on all employers alike, he will be able normally to recover in the somewhat higher prices he will obtain for his goods."

Ives v. South Buffalo Ry. Co. 201 N.Y. 271: "There can be no doubt as to the theory of this law. It is based upon the proposition that the inherent risks of an employment should in justice be placed upon the shoulders of the employer, who can protect himself against loss by insurance and by such an addition to the price of his wares as to cast the burden ultimately upon the consumer, that indemnity to an injured employee should be as much a charge upon the business as the cost of replacing disabled or defective machinery, appliances or tools . . ." Also, Abueg v. San Diego, 44 O. G. 80. The limitation of the unconditional though subsidiary civil liability of the employer under the Revised Penal Code to cases where the employer was engaged in an industry (Clemente v. Foreign Mission Sisters, 38 O.G. 1594; Steinmetz v. Valdez, 72 Phil. 92, 93; Telleria v. Garcia, *supra*) indicates that similar considerations can serve as present justification for the imposition of a liability that has existed as far back as the Spanish Penal Code of 1870 (art. 20), before any Compensation Act came into being.

[55] Murillo v. Mendoza, 66 Phil. 689, at 699-700, quoting with approval Mobile & O.R. Co. v. Industrial Commission of Illinois, 28 F. 2ed) 228, 229: "Under such an Act, injuries to workmen and employees are to be considered no longer as the results of fault or negligence . . . The law substitutes for liability for negligence an entirely new conception; that is, that under the doctrine of man's humanity to man, the cost of compensation must be one of the elements to be liquidated and balanced in the course of consumption." See also Cohen, Morris R., in 22 Col. L. Rev. 775.

[56] Laski, H., in 26 Yale L.J. 105 at 112: "If that employer is compelled to bear the burden of his servant's torts even when he is himself personally without fault, it is because in a social distribution of profit and loss, the balance of least disturbance seems thereby best to be obtained." See also Smith, Young, B., *Frolic and Detour*, 23 Col. L. Rev. 446, 456-457. As Judge Swayze in 25 Yale L.J. 5 observes, legal liability without fault is even more extensive under the Compensation Acts than under *respondeat superior*, since the the latter was qualified by the fellow servant rule and the theory of assumption of risk.

plished in the former. It is not just a matter of shifting a loss from the innocent plaintiff to the innocent defendant, nor a retrogression to the rules of a primitive era of less refined notions of justice, a sort of legal atavism. It is the transfer of the loss to the party who can best absorb the economic shock of the injury, who can dissipate such shock to the point of negligibility by spreading it thin. It is a necessity of our society which today seeks in intensified industrialization the solution to its economic ills.[57] Industrialization generally carries with it a wider incidence of injuries.

It must be admitted that where the defendant is not engaged in industry, that is, in the case of domestic servants, there is less justification for vicarious liability without fault of the master. However, the greater number of servants at present are not domestics but are engaged in industry. Furthermore, most of the cases of injuries to third persons are caused by servants engaged in business or industry. Practically the only type of domestic servant who injures others with any degree of frequency is the family chauffeur, and here the imposition of liability on the owner is not as harsh as it may seem. The availability of liability and accident insurance should result in spreading such losses among the group of car owners: the proportionate part that a particular employer bears (the insurance premium) is relatively small.[58] The bond required by the new Code [59] from car owners to answer for injuries to third persons is an inadequate, and so far a dead measure, for recovery on the bond is naturally contingent on the attachment of liability which can be easily defeated. The presumptions of negligence on the part of the driver [60] mitigate but do not solve the problem at all.

Vicarious liability of the employer without fault is not as alien to our new Civil Code as might be supposed. The Code makes the distributive principle of the Workmen's Compensation Act applicable to all "owners of enterprises and other employers." [61] This has the effect of abrogating the Employer's Liability Act (Act No. 1874) which had been applicable to small industrial establishments whose gross receipts for the year preceeding that of the injury did not exceed ₱20,000, the Workmen's Compensation Act being applicable to

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[57] See the *Proposed Program for Industrial Rehabilitation and Development of the Republic of the Philippines* (Beyster Report of 1947); and the *Report to the President of the United States by the Economic Survey Mission to the Philippines*. October 9, 1950. Wigmore in 7 Harv. L. Rev. 315, 383 at 392 points out that the extension of the doctrine of *respondeat superior* was occasioned by the changed industrial and commercial conditions in England during the Age of Anne. See also Thayer in 29 Harv. L. Rev. 801 at 814.

[58] See Smith, Y.B., in 23 Col. L. Rev. 446 at 459.

[59] Art. 2186. This article attempts to insure a financially responsible defendant without first providing for the imposition of liability. The two must go hand in hand. See Clark & Shulman, *A Study of Law Administration in Connecticut* (1932) p. 166; on financial responsibility statutes, see *Problems Relating to Bill of Rights and General Welfare* (1938), New York Constitutional Convention Committee, p. 599 *et seq.*

[60] Arts. 2184-2185.

[61] Art. 1711.

industries grossing more than ₱20,000.[62] Under Act No. 1874 the small employer was liable only when he or certain of his employees had been negligent;[63] now all employers, big or small, are liable for compensation, regardless of their own lack of negligence, for the death or injuries to their servants arising out of and in the course of the employment. The liability attaches "even though the event may have been purely accidental or entirely due to a fortuitous cause."

It may be objected that it is unwise to saddle small or infant industries with the burden of responding unconditionally for the injuries of the employees, that it will inhibit the establishment of such industries. The answer to this is that such an expense is as much a part of production outlay as the cost of raw materials or the wages of laborers; it simply must be reckoned with by those contemplating the founding of industrial establishments. An enterprise that is unable to meet the cost of production has no right to continue in operation. Its inability to meet such basic costs may only be a reflection on the managerial ability of the entrepreneur, a fact that cannot be allowed to affect the employee's rightful claim to compensation. Where the small or infant industry is especially affected with a public character, or where its products are vitally necessary to the national security, the needs of the nation may counter-balance the interests of a limited group of workers. The social value of article 1711 is however vitiated by two things. Firstly, the contributory negligence of the worker, where his negligence is less than the notorious kind which precludes compensation altogether, is permitted to mitigate recovery;[64] secondly, article 1712 provides that if a fellow worker's intentional or malicious act is the only cause of the death or injury, the employer is not answerable if he exercised due diligence in the selection and supervision of the fellow worker. Under Section 6 of the Compensation Act, the plaintiff could proceed either against his employer or the fellow servant. Now, recovery against either is very problematical; the due diligence required from the employer is easily fulfilled, while the fellow servant is generally irresponsible financially.[65]

The new codal provisions on carriers also display a tendency to increase the number of instances of vicarious liability without fault on the part of the employer. Thus article 1759 makes carriers liable

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[62] Sec. 42, Act No. 3428 as amended by Act No. 3812.

[63] Sec. 1, Act No. 1874; Cerezo v. Atlantic Gulf & Pacific Co., 33 Phil. 425; Act No. 2473 however established a presumption of negligence on the part of the employer. Cuevo v. Barredo, 65 Phil. 290.

[64] Chan, Manuel O., *The New Civil Code Provisions on Work and Labor*, 2 The Law Rev. 11 at 20: "Now, because of some contributory negligence * * * the employer can wrangle with the injured or sick employee or his dependents for the reduction of either the amounts of compensation or the periods thereof. The employee who does not agree to the reduction will be forced to go to the courts, suffer the long delay, and perhaps starve in the process. As it was before, because employers know that the employees' claim could be defeated only by proof of the most notorious kind of negligence on the part of the employee, most claims were paid without much ado."

[65] *Ibid.*, at p. 21.

for the death of or injuries to passengers through the negligence or wilful acts of his employees, although such employees may have acted beyond the scope of their authority or even in violation of the orders of the employer. It may be objected that this liability is not really new but rather based on the contract of carriage. If it were so, then it would have been superfluous for the Code to expressly provide that due diligence of the employer is no defense. The Code further makes the carrier an insurer against injuries to passengers due to wilful acts or negligence of other passengers or strangers which could have been prevented by the carrier's servants using due diligence.[66] The proper defense in this case is not lack of negligence of the employer, but lack of negligence of the servants. Likewise, the carrier is an insurer against acts committed by thieves or robbers not acting with grave or irresistible threat, violence, or force,[67] a liability also imposed on hotel and innkeepers.[68]

"Extraordinary diligence" is thus required from carriers for reasons of public policy [69] for the benefit of passengers and owners of goods transported. But what about the pedestrian? Is he on a lesser position in law than the passenger or freight owner? The common practice of land transportation companies and "jeepney" operators is to make the wages of drivers and conductors, over and above a small basic salary, depend on the number of passengers transported. The result is fierce competition even among employees of the same employer, profitable perhaps to the carrier but extremely hazardous and dangerous to pedestrians. The latter sorely need the protection that the imposition of vicarious liability without fault of the employer can give them.

An interesting instance of vicarious liability of municipal corporations remains to be noticed. The new Code makes cities and municipalities subsidiarily liable for damages when a member of its police force refuses or fails to render aid to a person in case of danger to life or property.[70] It is abundantly clear that to allow the defense of due diligence will render this provision meaningless. For the law lays down detailed rules on the selection and supervision of municipal policemen,[71] compliance with which surely satisfies the re-

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[66] Art. 1763.

[67] Art. 1745 (6).

[68] Arts. 2000-2001. Also, Art. 102, Rev. Penal Code.

[69] Art. 1733; Report of the Code Commission (1948), p. 66-67. Cf. Thayer in 29 Harv. L. Rev. 801 at 805: The futility of degrees of care in general has long been recognized; but in the case of public service companies, the habit of talking as if the carrier owed some special degree of care other than that of the ordinary prudent man has persisted and is common today. Clear-headed judges, however, have pointed out that the distinction is illusory. The ordinary prudent man would never take human beings into his keeping under conditions where they trusted utterly in him, and where life and limb was the stake, without qualifying himself in advance in all practicable ways for so dangerous a business and without using all available precautions in carrying it on. In such a business, the highest care is thus nothing more than ordinary care under the circumstances."

[70] Art. 34.

[71] Secs. 2259-2272, Rev. Administrative Code.

quirement of due diligence. The plaintiff faces well-nigh insuperable evidential difficulties in overcoming the presumption of the due performance of official duty. It should also be mentioned that municipal corporations are liable for deaths or personal injuries due to the defective condition of the roads, bridges, buildings and other public works under their control and supervision.[72] This liability may be unconnected with fault where the defective condition is attributable to lack of the necessary funds to pay for the needful repairs. The fault, if any, hardly pertains to the officers charged with the duty of keeping the streets in good condition. Of course so far as artificial persons are concerned, all liability is vicarious and absolute; the tax payers ultimately bear the burden.

It is submitted that our present system of limiting the liability of the employer (with the exceptions mentioned above) to cases where fault is attributable to him no longer subserves enlightened policy, which under prevailing conditions, should regard the fact of injury and not the question of fault as the test of the plaintiff's right and the employer's liability. It is true that the suggestion violates presently accepted concepts of legal justice. But ethical norms have changed in the past and will doubtless continue to change in the future. The suggestion is merely a different way, to some a more intelligent way,[73] of dealing with a social problem.

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[72] Art. 2189, Civil Code; but see Sec. 4 of Republic Act No. 409.

[73] Smith in 23 Col. L. Rev. 446 at 454. Pound in *The End of Law as Developed in Legal Rules and Doctrines*, 27 Harv. L. Rev. 195 at 233 admits that "there is a *strong and growing tendency* where there is no blame on either side to ask in view of the exigencies of social justice who can best bear the loss and hence to shift the loss by creating liability where there has been no fault." (Italics supplied).

ON THE POWER OF THE COMMISSION ON ELECTIONS TO ANNUL ILLEGAL REGISTRATION OF VOTERS

I. *Introductory.*

Dissatisfaction with the manner in which elections were conducted prompted the establishment of the Commission on Elections in 1940 by an amendment to the Constitution.[1] The event was a landmark in Philippine political history. The proposition was to entrust the conduct of our elections to an independent entity whose sole work is to administer and enforce the laws on elections, protect the purity of the ballot and safeguard the free exercise of the right of suffrage.[2] The Commission on Elections was really existing before 1940 as a creation of a statute passed by the National Assembly;[3] but it necessitated a constitutional amendment to place it outside the influence of political parties and the control of the legislative, executive and judicial departments of the government.[4] It was

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[1] See Hayden, J. R., *The Philippines—A Study in National Development*, pp. 454-455.

[2] "The article on suffrage (Article V of the Constitution) is sought to be preserved intact, as are the present regulations on the registration of voters, the casting of ballots and the counting of votes, which the proposed amendment does not touch upon. What is desired is not so much to change the Election Law as the agency by which the constitutional mandate is carried into effect and existing rules on the conduct of elections enforced." Laurel, J. P., "Observations on the Philippine Constitutional Amendments" (June 13, 1940), published in *The Commercial and Industrial Manual of the Philippines, 1940-1941*, pp. 93-96.

The Commission, by constitutional mandate, has "exclusive charge of the enforcement and administration of all laws relative to the conduct of elections . . ." Sec. 2, Art. X, Constitution of the Philippines.

[3] Commonwealth Act No. 607, approved on August 22, 1940. Commonwealth Act No. 657 was later enacted to reorganize the Commission.

[4] Supervision of elections was previously exercised by the Department of Interior pursuant to Sec. 2, Commonwealth Act No. 357 of the First National Assembly. The proposal to amend the Constitution was embodied in Resolution No. 73, Art. III, of the Second National Assembly, adopted on April 11, 1940 and later approved on December 2, 1940 as the present Art. X of the Constitution. See 38 O.G., No. 62, pp. 1281, 1284.

"The administrative control of elections now exercised by the Secretary of the Interior is what is sought to be transferred to the Commission on Elections by the proposed constitutional amendment now under discussion. The courts and the existing Electoral Commission (electoral tribunal) retain their original powers over contested elections. So is the right to vote still left to final judicial cognizance. . . .

"If the Commission on Elections were constituted by legislative enactment rather than by constitutional provision, it would lose that independence which is the principal justification for its creation. An extremely partisan Assembly may hedge it with restriction in the exercise of its functions and practically nullify the purposes for which it was created. . . . Constitutional amendment is required in order to preserve the independence of the Commission and secure for its members freedom of action and liberty of judgment so that they may be able to cast off the baneful influence of partisan

intended to be an independent administrative tribunal, co-equal with the other departments of the government in respect to the powers vested in it.[5]

The Commission on Elections has no counterpart in other countries. It is evidently a "novel electoral device" designed to have entire charge of the electoral process of the nation.[6] In the United States, Congress retains general supervisory power over elections. The common practice there is to have the conduct of both the registration and the elections in the hands of a precinct election board.[7] In England, the Ministry of Health has general supervision over the conduct of registration, with power to issue orders, rules, regulations, and instructions, to prescribe forms, and to approve or disapprove the appointment of deputy registration officers in the boroughs and counties.[8] In the Canadian provinces, a similar power is exercised by a deputy provincial secretary.[9]

II. *Power to annul registration judicially recognized.*

The matter suggested for discussion in this paper revolves around the question as to whether or not the Commission on Elections has the power or authority to annul fraudulent and illegal registration of voters and consequently to authorize new registration pursuant to the provisions of Section 9 of the Revised Election Code.[10]

The Supreme Court had occasion lately to resolve the question presented. A complaint had been addressed to the Commission re-

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politics. Constitutional sanction is likewise necessary to clothe the Commission with a certain degree of permanence and stability and to arm it with no mean powers so that it may not wilt into impotence or lapse into futility." Laurel, *op. cit.*

[5] Cf. Sinco, V. G., *Philippine Political Law,* 2d Rev. Ed., p. 351; see Sumulong v. Commission on Elections, 73 Phil. 288 and Nacionalista Party v. Bautista, 47 O.G. 2356.

[6] "The Philippines is breaking new ground in the establishment of its constitutionally created Commission on Elections. The Commission is almost a fourth department of the government and its creation is evidence of the determination of the Commonwealth Government to keep pure the electoral process, the fountainhead of democracy." Hayden, *op. cit.,* at p. 456.

[7] U.S. v. Gale, 109 U.S. 65; *Ex parte* Siebold, 100 U.S. 371; In re Appointment of Supervisors, 52 Fed. 254; *Ex parte* Geissler, 4 Fed. 188; U.S. v. Crosby, 25 Fed. Cas. No. 14893; *Ex parte* Clarke, 100 U.S. 399; see also Ferguson, J. H. and McHenry, D. E., *The American Federal Government,* p. 226.

[8] Harris, J. P., *Registration of Voters in the United States,* p. 120, citing A. O. Hobbs and F. J. Ogden, *Guide to the Representation of the People Act, 1918,* J. Renwick Seager, *Registration of Voters Under the Reform Act, 1918,* and G. P. Warner Terry, *The Representation of the People Act, 1918.*

[9] Harris, *op. cit.,* at p. 120.

[10] Sec. 9, Rep. Act No. 180 (Revised Election Code): "If, on account of insurmountable difficulties, . . . the registration of voters should not be effected in any place on the dates herein fixed, the Commission on Elections may, with the approval of the President, fix another date so that the omission may be remedied and such place may not be deprived of the right of suffrage."

questing annulment by that body of the registration of voters conducted in a certain Cavite precinct in collection with the elections held on November 13, 1951 on the ground that said registration was made through the use of force, threats and violence upon the members of the board of election inspectors and upon the voters who registered themselves. The Commission readily gave due course to the petition and, by unanimous vote, granted the relief prayed for.[11] Respondents therein, by certiorari petition in the Supreme Court, sought review of this decision.

In a curt one-sentence resolution, the Court outright dismissed the petition for certiorari without elaborating on the question involved and without benefit of oral hearing.[12] Lack of merit was the sole ground for the dismissal. The Court's resolution, although not clear-cut and definitive, in effect upheld the Commission regarding its power to annul illegal registration of voters. Thus, with one stroke, the Supreme Court has paved the way for broader powers in the Commission. And considering that the question raised in the certiorari petition involves a fundamental issue affecting no less than the Constitution, it is not unreasonable to hope for an extended and clear-cut opinion by the Court.

Such judicial recognition of a new-found power in the Commission on Elections is of first impression in this jurisdiction and is of peculiar significance to Philippine politics, especially considering that the Commission is not an all-powerful body. Primarily an administrative office, it is subject to certain constitutional limitations in the discharge of its functions and the performance of its duties. For example, its law enforcing authority applies only to rules and regulations relative to the conduct of elections which is limited to the subject of how elections should be held and how election officials should perform their duties under the law. Its adjudications may not go beyond administrative questions. It may not, therefore, hear and determine questions affecting non-administrative matters.[13]

It is feared especially that the exercise of such power by the Commission may be violative of the Constitution which removes from its jurisdiction questions involving the right to vote.[14] The question presents itself: Does the annulment of fraudulent or illegal registration of voters involve the right to vote? An analysis of the nature and object of registration and its effect on the right to vote is in order.

III. *Observations.*

Registration has since been required of voters "to facilitate and secure this most precious right (of suffrage) to those who are by

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[11] Decision, Commission on Elections, In re Petition of Angel Genuino vs. Remigio Prudente, *et al.*, Case No. 196, promulgated October 28, 1951.

[12] The resolution reads: "The petition filed in G.R. No. L-5222, Remigio Prudente, *et al.* vs. Angel Genuino, *et al.*, to review on certiorari the decision of the Commission on Elections, is dismissed for lack of merit."

[13] See Sinco, *op. cit.* at p. 355; Sec. 2, Art. X, Constitution of the Philippines.

[14] Sec. 2, Art. X, *ibid.*

the constitution entitled to enjoy it." American courts have time and again held that registration "can not be justly regarded as adding a new qualification to those prescribed by the constitution, but as a reasonable and convenient regulation of the mode of exercising the right of voting";[15] that statutory requirement of registration can not impair the right, though it may regulate its exercise;[16] and that registration is required as a prelude and preparation for the election and a part of its machinery, even though some days intervene between the close of registration and the actual opening of the polls.[17] Indeed, registration is only a step towards the exercise of the right to vote. Rather, it is a statutory pre-requisite for the exercise of said right.[18] The purpose really is to regulate, not to qualify, the exercise of the right of suffrage;[19] otherwise, the statute providing for registration is unconstitutional and void.[20] Registration is only required to enable a constitutionally qualified voter to exercise his right to vote.[21] This is borne out by the fact that under our Election Law only qualified voters are entitled to register.[22] It is, therefore, clear that registration can only involve or affect the exercise of the right to vote and not the right itself. Hence, with or without it, the right to vote, being substantial in nature as established by the fundamental law, exists.[23]

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[15] Capen v. Foster, 12 Pick (Mass) 485, 491; Dells v. Kennedy, 6 NW 246, 381; see also Kinneen v. Wells, 11 NE 916, Daggett v. Hudson, 3 NE 538, Minges v. Merced Bd. of Trustees, 148 P 816; Madison v. Wade, 16 SE 21; Wilson v. Bartlett, 62 P 416; State v. Butts, 2 P 618; and State v. Weaver, 122 SW 465.

[16] State v. Baker, 38 Wis 71, 86.

[17] Weil v. Calhoun, 25 Fed 865, 871.

[18] Sec. 96, Revised Election Code: "In order that a qualified voter may vote in any regular or special election, he must be registered in the permanent list of voters for the municipality in which he resides."

[19] Piuser v. Sioux City, 262 NW 551; Dysart v. St. Louis, 11 SW (2d) 1045.

[20] Mills v. Green, 67 Fed 818.

[21] U.S. v. Estavillo, 19 Phil. 478, 493, cited in U.S. v. Javier, 19 Phil 499, 501. One may be a qualified voter without exercising the right to vote. Registering does not confer the right; it is but a condition precedent to the exercise of the right. Registration regulates the right of suffrage; it is not a qualification of the right. Yra v. Abaño, 52 Phil. 380, 383-384; Vivero v. Murillo, 52 Phil. 694, 698; Larena v. Teves, 61 Phil. 36, 39.

[22] Sec. 96, Rev. Election Code, *supra*.

Sec. 97, Rev. Election Code: "All persons having complied with the requisites herein prescribed for the registration of voters shall be registered in the list, provided they possess the qualifications prescribed for a voter and they are not of those disqualified. . . ."

Sec. 98, Rev. Election Code: "Every citizen of the Philippines, whether male or female, twenty-one years of age or over, able to read and write, who has been a resident of the Philippines for one year and of the municipality in which he has registered during the six months immediately preceding, who is not otherwise disqualified, may vote in the said precinct at any election."

See also Art. V, Suffrage, Constitution of the Philippines.

[23] Suffrage is ordinarily a privilege; but as established and guaranteed by no less than the Constitution, it becomes more than just a privilege and borders on being a

It has been the view of American courts that the primary purpose of registration laws is to prevent the perpetration of fraud at elections by providing in advance thereof an authentic list of the qualified electors, and that they must be so construed as to give the fullest opportunity to voters to procure the entry of their names upon the register that is consistent with reasonable precautions against fraudulent registration.[24] This being so no clean and honest voting on election day can be expected if the registration was itself fraudulent and was not effectively remedied. Such an anomaly is for an independent entity like the Commission on Elections to cure—fearlessly and honestly.

Registration will naturally be vitiated by irregularities which are so numerous that they must be attributed to fraud rather than honest mistake. Once registration is tainted and vitiated by wholesale fraud and terrorism perpetrated in utter disregard of the law, it is as if no registration was held at all—certainly not the registration contemplated and provided for by statute.[25] Such registration then becomes a "farce and an empty show." Being void *ab initio,* it is non-existent. It is for the Commission—and the Commission alone—to declare that it is so. And only by ordering its annulment can the Commission effectively so declare. The Commission will thus be carrying out faithfully the constitutional and statutory guarantees for the purity of the ballot.

The Commission on Elections was created primarily to safeguard the purity of the polls. A necessary concomitant of this function is its duty to prevent and eliminate fraud and irregularity in any and all forms that may taint the electoral process. Pursuant to its authority to enforce and administer the laws relative to the conduct of elections,[26] it is for the Commission to see to it that the

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right, and in fact becomes one of the important political rights appertaining to citizenship. See Art. V, Constitution; see also Santos v. Paredes, SC-G.R. No. 45906; State v. Staten, 6 Coldw (Tenn) 233, 243; State v. Phelps, 144 Wis 1, 11; and In re Holman, 104 A 212, 213; cf. People v. Corral, 62 Phil. 945 and Moya v. del Fierro, 69 Phil. 199.

[24] State v. Butts, 31 Kan 537, 550: "It is evident that a proper enforcement of this statute, in securing ten days before every election a full registry of all persons entitled to vote, furnishes a very efficient check against fraudulent voting. At any election in which much interest is felt, and where the opposing parties are supposed to be nearly equal in number, most careful scrutiny will be made of these registry lists, every voter's name and residence taken, and his right to vote verified by examination. The matter will not be left to the pressure and excitement of election day, but will all be ascertained and determined prior thereto. The value of such a registry for the preservation of the purity of the ballot-box can not be too highly estimated." Also Welch v. Wms., 31 P 222; Fish v. Kugel, 165 P 249; Gillesby v. Canyon County, 107 P 71.

[25] Analogous to this observation is the view that a fraudulently conducted election the correct results of which can not be possibly ascertained is practically no election at all. See In re West Mahony Tp's Contested Election, 101 A 946.

[26] The Commission has itself decided that it has "exclusive charge of enforcement and administration of all laws relative thereto." See Decision, Commission on Elections, October 7, 1940.

entire registration process and the preparation of the registry lists of voters as a whole are accomplished in accordance with the existing laws. If it be conceded, therefore, that the Commission is thus enjoined by law, it is difficult to perceive why, upon principle, or as a question of power, it can not order the annulment of illegal registration of voters because of fraud or other gross irregularities affecting the orderly and honest conduct of the elections. It seems self-evident that the grant of such power to the Commission would only make more complete and effective its authority to enforce and administer the election laws, especially if the power be considered as an incident to such express authority.

Registration, as was seen above, is a part of the electoral machinery. Flagrant anomalies attending it can not and should not be allowed to pass unchallenged, lest Philippine polls be turned "permanently into a mockery." Indeed, the exercise of the voting privilege, if not the privilege itself, that is based on a farcical show as only a fraudulent registration can be, becomes itself a farce.

In annulling an illegal registration by cancelling the registry list of voters, the Commission on Elections is not touching upon the right to vote or any question involving the same.[27] Such nullification can and does affect only the registration of the voter and, therefore, the exercise of his right to vote but not the right itself which remains preserved. By consequently authorizing new registration days pursuant to Section 9 of the Revised Election Code,[28] the Commission serves its avowed purpose of protecting and safeguarding the right of suffrage and securing the exercise thereof.

A serious objection to the grant of such power lies in the claim that it does not have any authority in law, the Revised Election Code being silent on the matter. This claim is nullified by the view that the laws regulating the manner of how registration shall be conducted are laws relative to the conduct of elections and, therefore, are within the exclusive competence of the Commission to enforce and administer.

It is further argued that the law instead provides for a judicial remedy in the form of exclusion from the registration list of the names of voters improperly or illegally included therein, and that this is within the exclusive jurisdiction of the courts of justice.[29] But what is sought in the exercise of the power under discussion is the annulment of the entire registration which necessarily includes the cancellation of the registry list. It is submitted that there is a great difference between annulment of registration and the mere exclusion of voters from the list, both in respect to their scope and effect.

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[27] See discussion on nature of registration, *supra*, p. 3.

[28] Sec. 9, Rev. Election Code, *supra*.

[29] The Revised Election Code does not grant the Commission any jurisdiction on the matter of inclusion and exclusion of voters. This comes under the jurisdiction of the Court of First Instance, Justice of the Peace of provincial capitals and the circuit Justices of the peace. (Secs. 5, 118 and 121, Rev. Election Code).

Annulment is more than mere exclusion of voters. It involves not only a cancellation of the registry list in its entirety but also a nullification of all proceedings in connection with the process of registration—such as the preparation of voters' affidavits,[30] distribution of registration forms and other paraphernalia, taking of voter's oath before the registration officials and the subscription thereof, and identification of registering voters [31]—which proceedings are tainted with fraud and illegality as having been conducted in disregard of existing requirements of the law. In other words, the list is sought to be cancelled—and not merely corrected or altered by the exclusion of some names alleged to have been illegally included therein—because fraud and terrorism attended the preparation thereof. To exclude voters from the list does not cancel the latter, much less nullify the entire registration proceedings. The list on the whole and the process of registration although conducted fraudulently and illegally remain unaffected by the mere exclusion of the names of voters. The frauds committed in the registration process are not entirely erased by such mere exclusion of voters. Annulment on the other hand not only nullifies the unholy effects of such frauds but also serves as a deterrent to future frauds. To annul fraudulent registration is, indeed, to prevent fraudulent voting.[32] It is thus readily seen that the remedy of exclusion does not serve the purpose for which annulment is resorted to.

The serious problem confronting the Commission on Elections—or any other governmental entity for that matter—in coping with pre-electoral acts of violence and terrorism such as are prepetrated on registration days is the time element. The period between the registration and elections in this country is relatively brief, and only such as is proper for making out and putting in proper shape the registration papers.[33] The necessity of prompt relief is self-evident. Ordinary court exclusion of "flying voters" [34] and names that padded registry lists will be too slow a process to undertake.[35] That being the case it is this writer's belief that prompt relief can most effectively be furnished by resort to annulment. And it seems that the

[30] Sec. 109, Rev. Election Code.

[31] Sec. 110, *ibid.*

[32] Cf. Nacionalista Party vs. Commission on Elections, 47 O.G. 2851, where the Supreme Court opined that the power of the Commission to enforce and administer election laws and to insure free, orderly and honest elections is "preventive only and not curative also."

[33] Secs. 100-101, Rev. Election Code.

[34] This is the term coined to refer to those voters who register in more than one precinct, or in a municipality other than their legal residence.

[35] The remedy of exclusion as prescribed by law is available only in individual elector's cases. The procedure is somewhat cumbersome. Each application for exclusion shall refer to only one voter. The number of applications must, therefore, correspond to the number of voters sought to be excluded from the list. Each application has to be sworn to. Each of the challenged voters has to be served with notice of the application. See Sec. 123, Rev. Election Code.

combined laws of reason and logic sanction, if not demand, the exercise of such power by the Commission on Elections.[36]

IV. *Conclusions*

In the nature of things the Commission on Elections has the power or authority to annul registration, set aside fraudulent voters' lists and order new registration in places where the registration was not conducted in accordance with the requirements of the Election Law. While the Revised Election Code may be silent on the matter, yet, in this writer's judgment, "sound sense and a due regard to the true interests of the state" favor the grant of such power to the Commission.

A perusal of Article X of the Constitution and the Revised Election Code yields the observation that these have not in definite and express terms defined the specific duties, except in very few particular instances, of the Commission on Elections.[37] And the Supreme Court has already pointed out that "Its functions and powers are limited by law. It has no legislative power to change or modify the law. * * * "[38] Yet, in another case, the Supreme Court intimated that the Commission is clothed with broad discretion in the discharge of its duties and functions.[39] As correctly viewed by a cer-

[36] The Commission on Elections being an administrative tribunal, it necessarily enjoys the advantages usually pertaining to administrative procedure and regulation, such as providing "for action that will be prompt and preventive, rather than merely remedial, and will be based on technical knowledge which would not be available if it were taken through the ordinary courts of law," especially considering that the "preventive relief which a court can give is artificially limited," and that delay is usually "incidental to the procedure of a body organized, as is a court, primarily to hear and determine controversies." This is especially true if it is to be admitted that the rules prescribed by Sec. 123 of the Revised Election Code to govern judicial proceedings in the matter of inclusion, exclusion and correction of names of voters are peculiar to such proceedings and may not apply to annulment proceedings. So also, administrative procedure "insures that the action taken will have regard for the interests of the general public in a way not possible if it were only the outcome of a controversy between private parties to a lawsuit." See Dickinson, *Administrative Justice and the Supremacy of Law*, p. 12, *et seq.*

[37] Although the Constitution grants the Commission full supervisory powers over elections, the Election Law fails to fully implement the constitutional powers of the Commission.

[38] Cortez v. Commission on Elections, G.R. No. L-1679, Oct. 16, 1947.

[39] Sumulong v. Commission on Elections, 40 O.G., No. 18, pp. 3663, 3667-3669: "The Commission on Elections is a constitutional body. It is intended to play a distinct and important part in our scheme of government. In the discharge of its functions, it should not be hampered with restrictions that would be fully warranted in the case of a less responsible organization. The Commission may err, so may this court also. It should be allowed considerable latitude in devising means and methods that will insure the accomplishment of the great objective for which it was created—free, orderly and honest elections. *We may not agree fully with its choice of means, but unless these are clearly illegal or constitute gross abuse of discretion, this court should not interfere.* Politics is a practical matter, and political questions must be dealt with realistically—not from the standpoint of pure theory. . . ." . . .

tain section of the local press, "only by enabling it (the Commission) to perform its duties with a free hand, by interpreting its powers liberally, and by continuing to afford all the necessary facilities—only thus can the Commission achieve the aims for which it was created. More, not less, power should be the watchword for it." [40]

In the face of flagrant anomalies and shocking irregularities perpetrated on registration day and calculated to disrupt a vital function in the electoral machinery, the power of annulment can not be "clearly illegal"; nor can there be "gross abuse of discretion on the part of the Commission on Elections.[41] This seemingly drastic remedy, although judicially recognized, may at the most be branded an extra-legal measure. Granting this, then does the question become a matter for favorable legislation [42] with the admonition

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". . . Due regard to the independent character of the Commission, as ordained in the Constitution, requires that the power of this court to review the acts of that body should as a general proposition be used sparingly, but firmly in appropriate cases. . . ." (Emphasis supplied).

[40] See *The Daily Mirror,* Editorials, October 29, 1951.

Sumulong v. Commission on Elections, *supra:* ". . . The Commission on Elections, because of its fact-finding facilities, its contacts with political strategists, and its knowledge derived from actual experience in dealing with political controversies, is in a peculiarly advantageous position to decide complex political questions.

". . .

"There are no ready-made formulas for solving public problems. Time and experience are necessary to evolve patterns that will serve the ends of good government. In the matter of the administration of the laws relative to the conduct of elections, . . ., we must not by any excessive zeal take away from the Commission on Elections the initiative which by constitutional and legal mandates properly belongs to it. . . ."

Cf. "That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration. If this government is anything more than a mere aggregation of delegated agents of other states and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption. If it has not this power, it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption. . . ." Miller, J. in Ex parte Yarbrough, 110 US 651, 657 in speaking of the general power of Congress to enact laws for the regulation of federal elections.

[41] See footnote 39, *supra.*

". . . a solicitous regard and a proper respect for the fundamental right of suffrage should inspire the officers called upon to administer the law to effect prompt relief. . . ." Laurel, *op. cit.*

[42] Cf. "Needless to say, . . ., the members of the Commission will undoubtedly find means for the improvement of present methods and forms, and thus pave the way for the amendment of our Election Code looking towards more satisfactory conduct of elections. Many criticisms have been launched against the provisions of our present election law, and the Commission on Elections is expected to correct or suggest a remedy for those obvious defects which have resulted in isolated cases of disenfran-

that the power thus granted be exercised with the greatest care and only under circumstances which demonstrate beyond all reasonable doubt either that the disregard of the law has been so fundamental or so persistent and continuous that it is impossible to distinguish what names are correctly and legally included in the lists and what are not, and thus eliminate only the latter; or that the great body of the qualified electors have been prevented by violence, intimidation and threats from registering on registration day.

BARTOLOME C. FERNANDEZ, JR.

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chisement of qualified electors. . . The Commission on Elections will thus fill a long felt need in the government for an independent, non-partisan and technical body, to make a careful and judicious study of our electoral system with a view to introducing salutary reforms, even to the extent of thoroughly overhauling it, in order to further purify our elections and thus guarantee absolute and untrammeled expression of popular will at the polls." Laurel, *op. cit.*

CAN A CHILD INSURE THE PROPERTY OF HIS PARENTS AND VICE VERSA?

One of the still unsettled problems in property insurance is the question of whether a child can insure the property of his parents, and vice versa. In the case of life insurance, it is already settled by statutory provisions that the child can insure the life of his parents,[1] and that the parents can insure that of their child.[2] The basis of these provisions is the mutual obligation of the child and his parents to support each other.[3] It is further established that an insurance policy taken upon the life of either party by the other is a means toward the realization of that end, or a means of saving the party entitled to support from being the subject of public charity,[4] should the party legally bound to give support be unable to give it because of his premature demise.

In the case of property insurance, however, there are no express legal provisions on the point. Neither are there judicial decisions in this jurisdiction which can shed light on the question. Under these circumstances, an inquiry into the nature and basis of an insurable interest in property is in order.

I.—*Insurable interest in property.*

Our Insurance Law, Act No. 2427, defines insurable interest in property, as "every interest in property whether real or personal, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured." [5] It also provides that an insurable interest in property may consist in the following, namely:

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[1] See Art. 291 of the Civil Code in relation to Sec. 11, Act No. 2427.

[2] Sec. 3, Act No. 2427, provides: ". . . The consent of the husband is not necessary for the validity of an insurance policy taken out *by a married woman on* her life or *that of her children.*" (Italics supplied).

[3] Sec. 11, *do,* provides:

"Every person has an insurable interest in the life and health:

(b) Of any person on whom he depends wholly or in part for education and support."

Art. 291 of the Civil Code provides:

"The following are obliged to support each other to the whole extent set forth in the preceding article:

(1) The spouses;

(2) Legitimate ascendants and descendants;

(3) Parents and acknowledged natural children and the legitimate or illegitimate descendants of the latter;

(4) Parents and natural children by legal fiction and the legitimate or illegitimate descendants of the latter;

(5) Parents and illegitimate children who are not natural . . ."

[4] Lord vs. Dall, 12 Mass. 115, 7 Am. Dec. 38.

[5] Sec. 12, Act No. 2427.

"(a) An existing interest;

(b) An inchoate interest founded on an existing interest; or

(c) An expectancy, coupled with an existing interest in that out of which the expectancy arises." [6]

Section 14 of the same law provides that a carrier or depositary of any kind has an insurable interest in a thing held by him as such, but that such interest is only limited to the extent of his liability, and never to exceed the value thereof.

With the above provisions in our law, it would seem that any person who has an existing interest in any property could take out an insurance policy upon it in order that he may be indemnified against any loss occasioned by the happening of the event or peril insured against. And this existing interest may take any form. It may be simple ownership of the property insured,[7] or it may consist of mere possession thereof.[8] It may also be contractual rights or liens, like those of mortgagee,[9] or mortgagor.[10]

In the same manner, mere relation to the property may support an insurance contract provided that such relation be of such a nature that, should the peril insured against occur, it would result in an immediate and direct pecuniary loss to the person insuring, and not merely producing a remote or consequential effect upon him.[11] Thus, even if a person has neither possession of the property, nor any other legal interest in it, if he stands in such relation with respect to it that he may suffer, from its destruction, loss of a legal right dependent upon its continued existence, he may be said to have an insurable interest sufficient to support the issuance of an insurance policy.[12]

In the case, however, of a mere expectancy or an enchoate interest, a different rule must be observed. A naked expectancy or a bare inchoate interest, is not enough. The law provides for something more. It is necessary that such inchoate interest or expectancy be respectively "founded on," or "coupled with," an existing interest in order that they may form a valid consideration to support an insurance contract.[13] An omission of this requirement is fatal, for in such case, there would be no insurable interest in the property, and its absence will bring about the nullification or avoidance of the contract. Thus, our Insurance Law provides that "a mere contingent or expectant interest in anything, not founded on an actual right to the thing, nor upon any valid contract for it, is not insurable." [14]

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[6] Sec. 13, *Idem.*

[7] See Harding vs. Commercial Union Assurance Co., 38 Phil. 69.

[8] Vance, *Law of Insurance* (1930), p. 124.

[9] San Miguel Brewery vs. Law Union and Rock Insurance Co., 40 Phil. 674.

[10] Templeman, *Marine Insurance* (1934), pp. 49-53.

[11] Re Reynolds, 109 Atl. 60.

[12] Vance, *op. cit.*, at p. 124.

[13] Sec. 13 (pars. [b] and [c]), Act No. 2427.

[14] Sec. 15, *idem.*

It would be seen, therefore, that there are several bases of an insurable interest in property. However, they have one thing in common: the interest must be of such a nature that the occurrence of the contemplated peril would directly damnify the insured.[15]

In brief, the test of an insurable interest in property is whether the insured will be directly affected by the loss of the property.[16] "The shattering of expectations however bright, or the disappointing of hopes however strong, does not constitute such a loss as may be indemnified by insurance." [17]

II.—*Indemnity requirement.*

Because of the necessity of an insurable interest as a condition precedent in an insurance contract, another indispensable element must necessarily follow to make the insurance contract valid. This is the legal requirement that an insurance policy should be issued with but only one purpose or object, namely: the indemnification of the insured.[18] Any insurance contract which is entered into between the parties for any purpose other than that of indemnity will be branded as a wagering agreement and will not be enforced.[19] The reason for the avoidance of a policy which is in the nature of a wager is that it would be against public policy to enforce it.[20]

A necessary corollary to the principle of indemnity is the provision in our law to the effect that the interest insured must not only exist at the time the insurance takes effect, but also at the time when the loss occurs, although it need not exist in the meantime.[21]

Considering, therefore, the nature and bases of an insurable interest in property, and considering also the indispensable requirements of property insurance, could it possibly be advanced as a view that the child has an existing interest in his parent's property? Has he an existing interest, or an inchoate interest founded upon an existing interest, therein, so that the happening of the contemplated peril would directly damnify him?

As our Insurance Law and our courts have not supplied the direct answer, the search for the possible solution may be made somewhere else.

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[15] See Sec. 12, *idem.*

[16] Couch, *Cyclopedia on Insurance*, p. 757.

[17] Vance, *op. cit.*, at p. 136.

[18] See Sec. 17, Act No. 2427.

In the case of Young vs. Midland Textile Insurance Co., 30 Phil. 617, the Supreme Court said: "Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy."

[19] See Sec. 24 in conjunction with Sec. 17, Act No. 2427.

[20] See Gercio vs. Sun Life Assurance Co. of Canada, 48 Phil. 53, citing Connecticut Mutual Life Insurance Co. vs. Schaefer, 94 U.S. 457.

[21] Sec. 18, Act No. 2427.

III.—*Observations on the Civil Code provisions*

In the case of *Enriquez vs. Sun Life Assurance Co.*,[22] the Supreme Court, in passing, said that our law on insurance may be found in the Insurance Law and in the Civil Code. Then in the case of *Musngi vs. West Coast Life Insurance Co.*,[23] the Court consulted the provisions of the Civil Code on matters not expressly provided in the Insurance Act. Later, the new Civil Code took effect. The Code Commission, probably with a view to give affect to the above pronouncements of our Supreme Court, inserted therein a new provision which provides:

> "The contract of insurance is governed by special laws. *Matters not expressly provided for in such special laws shall be regulated by this Code.*" [24]

Thus we have an express statutory provision to the effect that the provisions of the Civil Code will be given suppletory effect in matters not provided for in the Insurance Law.

Turning first to the provisions on legitime, the Civil Code defines legitime as "that portion of the property of the testator which he cannot dispose of by will because the law has reserved it for the compulsory heirs." [25] And among the compulsory heirs enumerated by the law are the children of the testator.[26] The limitations on the parent's power to dispose of that portion of his property which has been reserved by law for his children are so exacting that he cannot even impose conditions, burdens, encumbrances, or any liens thereon.[27] Neither can he charge his children with legacies or devices which would be satisfied from their legitime.[28] Similarly, the law nullifies any renunciation or compromise as regards future legitime between the parent and his children.[29] With these provisions, we may have a situation where the parent cannot dispose of his property the way he wants to because the law imposes upon him some restrictions which he cannot disregard—restrictions which protects the rights of his children in his property. And such restrictions begin from the moment of, or immediately before, the execution of his will;[30] or from the time that he makes a partition of his estate

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[22] 41 Phil. 269.

[23] 61 Phil. 864.

[24] Art. 2011, Civil Code.

[25] Art. 886, Civil Code.

[26] See Art. 887, Civil Code.

[27] See Arts. 904 (par. 2), 872 and 221 (par. 4), Civil Code.

[28] See Art. 925 (par. 2), Civil Code.

[29] See Art. 905, Civil Code.

[30] Art. 783 of the Civil Code provides: "A will is an act whereby a person is permitted, with the formalities prescribed by law, *to control to a certain degree* the disposition of his estate, to take effect after his death." (Italics supplied).

Art. 907, Civil Code: "Testamentary dispositions that impair or diminish the legitime of the compulsory heirs shall be reduced on petition of the same, insofar as they may be inofficious or excessive."

Art. 905, Civil Code: "Every renunciation or compromise as regards a future

by any act *inter vivos* [31]—which acts may take place some time, or years, before his death. From that time the rights of the children to that portion of their parent's property become vested by operation of law that any act on the part of the parent to alienate it in favor of the donees, legatees or devisees may be annulled or avoided at the instance of the children.[32] More than this, the children may demand the value of the property given, from the donee or legatee in case the latter has sold the same.[33] A persual of the provisions of the Civil Code, therefore, will reveal that their object is the safeguarding of the vested rights and interests of the children in their parent's property.

But the question is—Is this interest or right of the children to the legitime insurable?

An affirmative answer may be hazarded. If the law itself grants the children that right of which the parent cannot even deprive them, it is submitted that there can be no other actual and better interest than that which the law grants.

Article 908 of the Civil Code provides, however, that "to determine the legitime, the value of the property left at the death of the testator shall be considered." Notwithstanding this, the view presented is not thereby weakened. While it is true that with Article 908 a doubt may be injected into the foregoing observation, it is submitted that what has been said is still fortified from attack.

The Insurance Law mentions, among others, "an inchoate interest" as an insurable interest in property.[34] It further provides that an interest in order to be insurable must exist at the time the insurance takes effect and also at the time the loss occurs.[35] Testing the interest of the child in the legitime with the above requirements it would appear that while article 908 makes the amount of that interest inchoate,—the amount thereof being determined at some future date—that inchoate interest is still founded upon an actual right, namely, the right granted by law.[36] Moreover, that interest would be existing at the time of the taking effect of the insurance contract (which may be at any time after the execution of the will or after the partition of the estate by any act *inter vivos*), and also at the time of the loss. And if the loss occurs after the death of the parent, the case would become stronger for by that time the child will already be the owner of the property insured.[37] Similarly the principle of indemnity would be in operation here. The destruction or loss of the legitime occasioned by the happening of the event stipulated in the

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legitime between the person owing it and his compulsory heirs is void . . ."
See also Art. 840, Civil Code.

[31] See Art. 1080, Civil Code.

[32] See Arts. 772 (par. 1), 907, and 911 (par. 1), Civil Code.

[33] Art. 762 (par. 1), Civil Code.

[34] Sec. 13, Act No. 2427.

[35] Sec. 18, *idem.*

[36] See Sec. 15, *idem.*

[37] In the case of Harding vs. Commercial Union Assurance Co., 38 Phil. 69, it was ruled that the owner of the property has an insurable interest therein.

insurance contract would subject him to a direct pecuniary loss. This is because he would be deprived of those benefits which he would otherwise receive from the legitime had that event not taken place.

It may be remarked, however, that the possible basis of the child's claim to an insurable interest in his parent's property is not limited only to his right to the legitime. There are still other provisions of the Civil Code which may support his claim thereto. Among these provisions are those found under the Chapters on Conjugal Partnership Property and Paraphernal Property, and those under the Title on Legal Separation. There are provisions to the effect that the conjugal partnership property is liable for the maintenance, care, and education of the children;[38] and that the husband's capital,—or if it is insufficient, the paraphernal property of the wife,—shall be liable for the children's support if the conjugal partnership property would be exhausted thereby.[39] Under these chapters, it would clearly appear that the children are entitled to claim from such properties the satisfaction of that natural obligation of the parent, should the latter neglect to provide them with it. This right of the children to claim for a provision for their support from the above-mentioned properties is legally recognized.[40] Thus, under the Title on Legal Separation, we have Article 105 which provides:

> "During the pendency of legal separation proceedings, the court shall make provision for the care of the minor children in accordance with the circumstances, and may order the conjugal partnership property * * * to be set aside for their support."

Under the foregoing article, the court may segregate a part of the conjugal asset in order that the children may be better provided with the needs of life undisturbed by the judicial proceedings between their parents.

If the court, therefore, in pursuance of the provisions of Article 105, sets aside the conjugal partnership property, or a specific portion thereof, for the support of the children, it would necessarily follow that such children would have to look up to that property for their support and maintenance. If such be the case, a consequence might be that the children would be so situated with respect to that property that they must of necessity depend upon it. They would be maintaining with it a relation of such a nature that its loss or destruction would bring about not only a direct financial loss to them, but would even endanger their very existence. And the case would still be stronger if that which was set aside for the chidren is the only asset of the conjugal partnership or the only property of the parents. In such event, their relation to the property would not be very different from that which they formerly had with respect to their parents upon whom they were dependent for support.[41]

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[38] See Arts. 161 (par. 5), and 188, Civil Code.

[39] Art. 138, Civil Code.

[40] See also Art. 188 Civil Code in connection with Art. 105 of the same Code.

[41] A child who is dependent upon his parent for support has an insurable interest in the life of the latter under Sec. 11, Act No. 2427.

Then there are other relations which the child may take with respect to his parent's property which may create an insurable interest therein in his favor. Thus, if the child is the mortgagee of his parent's property which is given as a security for the latter's debt, the child is said to have an insurable interest therein sufficient to support the issuance of an insurance policy.[42] Similarly, if the child happens to be builder of his parent's house, and has a lien thereon for the unpaid cost of construction, he may insure it in order to safeguard his interest.[43] Then the child may assume the position of an administrator,[44] a carrier, or a depositary, but in such cases, his interest is limited to the extent of his liability.[45] Also, the Civil Code provides that the unworthy heir who is excluded from the succession has a right to demand indemnity for any expenses incurred by him in the preservation of the hereditary property, and that he may enforce such credits as he may have against the estate.[46] Having a lien in such property, he may, therefore, obtain an insurance policy to the extent of his credit in order to protect himself from any possible loss occasioned by any peril.

In the light of the foregoing observations, it is submitted that the view which may be maintained under the new Civil Code favors the issuance to the child of an insurance policy upon the property of his parent. He has an insurable interest therein to protect, and he must be allowed to insure it.

IV.—*American view*

The contrary view is, however, maintained by the American courts. And their decisions, despite their being relegated to the category of a mere secondary authority, cannot be considered as entitled to a very light weight if the history and source of our Insurance Law is taken into consideration. Our Insurance Law, Act No. 2427, is taken bodily, if not copied verbatim, from the American law, more particularly the law of California.[47] And if the settled cannons of statutory construction are to be given effect, our courts should follow, in fundamental points at least, the construction placed by the American courts on the law from which ours has originated.[48] Thus, in the case of *Gercio vs. Sun Life Assurance Co.*,[49] the Supreme Court, speaking through Mr. Justice Malcolm, said:

> "* * * the deficiencies in the law (Insurance Law) will have to be supplemented by the general principles prevailing on the subject. To that end, we have gathered the rules which fol-

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[42] In the case of San Miguel Brewery vs. Law Union and Rock Insurance Co., 40 Phil. 674, it was held that a mortgagee can insure the property mortgaged to him.

[43] See Lampano vs. Jose, 30 Phil. 537, where it was held that a builder of a house can insure it if he has a lien upon it for the unpaid construction price.

[44] Couch, *op. cit.*, at p. 1160.

[45] Sec. 14, Act No. 2427.

[46] Art. 1037, Civil Code.

[47] Gercio vs. Sun Life Assurance Company of Canada, *supra*.

[48] Ang Giok Chip vs. Springfield Fire and Marine Insurance Co., 56 Phil. 375.

[49] *Supra*.

low from the best considered American authorities. In adapting these rules, we do so with the purpose of having the Philippine Law of Insurance conform as nearly as possible to the modern Law of Insurance as found in the United States proper."

It is worthy to note that in the above cited case, our Supreme Court has freely consulted the rulings laid down not only by the California Supreme Court but also by the courts of Iowa,[50] Louisiana,[51] Kentucky,[52] Ohio,[53] and Illinois,[54] as authorities in support of its decision. In view of this, therefore, a reference to the decisions of said courts as to what they say on the question might be useful.

In the case of *Baldwin vs. State Insurance Company*,[55] one W.E. Baldwin, the son of E.J. Baldwin, insured a building belonging to his father. He took the policy in his own name and paid all the premiums thereon. The building was subsequently burned, and an action for recovery on the policy was instituted. The Supreme Court of Iowa, after carefully analyzing the facts of the case, said:

> "We then come to enquire whether W. E. Baldwin can recover. He certainly cannot recover for his own benefit. It is conceded that he did not suffer by the loss and has no beneficial interest in the policy." [56]

From the court's decision, it clearly appears that the son could not recover on the policy because "he did not suffer by the loss." The court did not, however, elaborate on this point. No authorities were cited in support thereof.

In view of all the above observations, it can be said that we have two conflicting views—one of which is that maintained under the Civil Code; and the other, that which prevails in American jurisdiction. One view gives suppletory effect to the provisions of the Civil Code in pursuance of the provisions of Article 2011 thereof; the other may be adopted in this jurisdiction pursuant to the ruling of our Supreme Court in *Gercio vs. Sun Life Assurance Company*.[57]

V.—*Parents insurable interest in child's property.*

The second part of the problem may also be answered in the light of the provisions of our Civil Code. Under it, the father, or in his absence the mother, is the legal administrator of the property pertaining to the child under parental authority.[58] And when the

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[50] Condon vs. New York Life Insurance Co., 183 Iowa 658.

[51] Lambert vs. Penn Mutual Life Insurance Co., 50 La. Ann. 1027.

[52] Green vs. Green, 147 Ky. 608.

[53] Union Central Life Assurance Co. vs. Buxer, 62 Ohio St. 385.

[54] Begley vs. Miller, 137 Ill. App. 278.

[55] 15 N.W. 300.

[56] The English courts seem to agree with this view. See Justice Lawrence's example in the case of Lucena vs. Crawford, 127 K.B. 630, 643.

[57] *Supra.*

[58] Art. 320, Civil Code.

property is worth more than two thousand pesos, the father or mother shall be considered guardian of said child's property, subject to the duties and obligations of guardians under the Rules of Court.[59] It is also provided that the property or income donated, bequeathed, or devised to the emancipated child for the expenses of his education and instruction shall pertain to him in ownership and usufruct; but that the father or mother shall administer the same, if in the donation or testamentary provision the contrary has not been stated.[60]

Under these provisions, the father, or the mother, as the case may be, can rightfully take an insurance policy on the property subject to his or her administration.[61] His or her possession and control[62] of the child's property may form the legal basis of his or her insurable interest therein. It may also be said that the parent's insurable interest may be based on his subsequent liability to render an accounting to the court as to the result of his guardianship or administration.[63]

So also, Article 321 provides that the property which the unemancipated child has acquired, or may acquire with his work or industry, or by any lucrative title shall pertain *in usufruct* to the father or mother under whom he is under parental authority and in whose company he lives. It is likewise provided that the fruits and interest of the child's property may be applied to the debts of the conjugal partnership which have redounded to the benefit of the family.[64]

Under these codal provisions, it would seem that the parent's interest in the property of his child is not limited merely to the fruits [65] of said property, but also upon that property itself.[66] Consequently, the parent can apply for the issuance of an insurance policy in order that he may be indemnified should he be deprived of its use, or of the fruits that it may yield.

It is to be remembered, however, that the usufruct or administration of the property of the unemancipated child is not always given to his parents.[67] It is equally true that the emancipated child is no longer under their parental authority.[68] These circumstances present another question. Can the parent insure the property of his child who is not subject to his parental authority?

The answer may be found in the same provisions of the Civil Code which give the child an insurable interest in his parent's pro-

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[59] Art. 326, *idem*.

[60] Art. 325, *idem*.

[61] Couch, *op cit.*, at p. 1160.

[62] Fox vs. Queen Insurance Co. of America, 53 S.W. 271.

[63] See Rule 95, Sec. 1, and Rule 97, Sec. 7, of the Rules of Court in relation to Sec. 14, Act No. 2427.

[64] Art. 323, Civil Code.

[65] "Fruits" may fall under Sec. 13 (par. [c]), Act No. 2427.

[66] It may fall under Sec. 13 (par. [a]), *idem*.

[67] See Arts. 321 and 328 (par. 2), Civil Code.

[68] See Art. 327, *idem*.

perty by virtue of his right to the legitime. The parent is one of those enumerated by the code as compulsory heirs,[69] and like the child, his right to legitime on the latter's property is recognized by the Code. Because of such right it would, therefore, follow that he may secure an insurance policy upon said property.

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[69] See Art. 887 (par. [2]), *idem*.