

CIVIL LAW—

I APPLICATION OF BALLANTYNE SCALE

If a joint and several loan was contracted before the war, and payment was made by one of the solidary debtors during the Japanese occupation in Japanese military notes, should the Ballantyne schedule of values be applied in determining the amount of the reimbursement to be made by the solidary co-debtors after liberation? In *Wilson v. Berkentotter*,¹ this question was raised under the following facts: In 1938, the plaintiff, the defendant, and one Paul Gulick jointly and severally signed a promissory note for ₱90,000.00 in favor of the Chartered Bank of India, Australia & China, payable on demand with interest at 7% per annum payable monthly. The three debtors agreed as among themselves, to pay the obligation in equal portion of ₱30,000.00 each. During the Japanese occupation, the Bank of Taiwan was appointed liquidator of all enemy banks, among which was the Chartered Bank. Defendant, upon demand by the Taiwan Bank, paid the promissory note plus interests, amounting to ₱112,591.22. After liberation, defendant demanded payment from his co-debtors of their corresponding shares. Gulick offered and the defendant accepted payment in the amount of only ₱18,902.00. Plaintiff, on the other hand, refused to pay the full amount of ₱37,530.40 in Philippine currency. Because of the refusal of defendant to receive from the plaintiff the amount of ₱625.51 (Philippine currency) which is the corresponding value as of November, 1944 of ₱37,530.40 in Japanese military notes, plaintiff consigned the said amount with the court.

On the premise that the payment by defendant to the Taiwan Bank of the entire loan extinguished the whole obligation and created a new obligation on the part of his co-debtors to reimburse him, the Supreme Court, through Justice Montemayor, in holding that the Ballantyne scale should be applied because the plaintiff's obligation to the defendant was created during the Japanese occupation, said:

“* * * appellant does not as claimed by his counsel step into the shoes of the Bank. He cannot enforce the original obligation created in 1938. The bank could collect the whole amount of the loan from anyone of the solidary co-debtors, and in fact did from one of them. This the appellant may not do just because he paid the entire loan. According to Article 1145 of the Civil Code,² payment by one of the solidary debtors entitles him to claim from his co-debtors only the share pertaining to each with interest on the amount advanced, and this is what the appellant is doing, only that he wants to collect the whole amount paid by him for Wilson in genuine Philippine currency instead of the equivalent thereof under the Ballantyne schedule. Moreover, on grounds of equity, appellant may not be allowed to collect from the appellees more than the real value of what he paid for him especially when the difference between the military notes and the genuine Philippine currency in November, 1944 was so great.”

¹ G. R. L-4476, April 20, 1953.

² Art. 1217, Civil Code of the Philippines.

Justice Padilla, while concurring in the result, disagreed with the majority ruling that the payment of the entire loan by the defendant to the Taiwan Bank in November, 1944, extinguished the whole obligation. He believed the payment was invalid for the reasons he had set forth in his separate opinion in *Orden de Padres Benedictinos v. Phil. Trust Co.*³

On the other hand, Justice Feria, in a concurring and dissenting opinion, stated that the Ballantyne schedule was applicable not because the obligation of the plaintiff to pay the defendant his share in the obligation was *created* during the Japanese occupation, but because it was *payable* during said occupation.

The conclusion that the obligation of the plaintiff was subject to adjustment under the Ballantyne scale seems patently just. Nevertheless, by reason of the incongruencies of the opinions of the justices in support of a common judgment, a reexamination of the whole question is in order.

After the decision in *Haw Pia v. China Banking Corporation*,⁴ it was firmly settled that payments made with Japanese war notes during the occupation of obligations contracted before the war were valid. This ruling was affirmed in *Orden de Padres Benedictinos v. Phil. Trust Co.*⁵ and other decisions including the recent case of *Piñon v. Yanga*.⁶

In *Hilado v. de la Costa*,⁷ it was held that contracts stipulating for payments presumably in Japanese war notes may be enforced in our courts after liberation, on the basis of the Ballantyne schedule which has been adopted to determine the value of Japanese war notes in terms of Philippine currency.⁸ The Ballantyne schedule was later held likewise applicable to money judgments rendered during the Japanese occupation.⁹ In the absence, therefore, of an aleatory con-

³ 47 O. G. 2894. Justice Padilla, in *Haw Pia v. China Banking Corp.* (45 O. G. Supp. to No. 9, 229) was of the opinion that the sequestration of assets to carry out the liquidation of an enemy bank was nothing but a confiscation prohibited by the Hague Convention of 1907, and that the Imperial Government could not make legal tender its military or war notes because it did not have the reserve to back them up.

⁴ 45 O. G. supp. to No. 9, 229.

⁵ 47 O. G. 2894.

⁶ G. R. L-5532, prom. May 13, 1953.

⁷ 46 O. G. 5472.

⁸ *Ibid.* at p. 5482:

"Contracts stipulating for payments presumably in Japanese war notes may be enforced in our courts after the liberation to the extent of the just obligation of the contracting parties and, as said notes have become worthless, in order that justice may be done, and the party entitled to be paid can recover their actual value in Philippine currency, what the debtor or defendant should return or pay is the value of the Japanese military notes in relation to the peso in Philippine currency obtaining on the date when and at the place where the obligation was incurred unless the parties had agreed otherwise. In the absence of evidence of the value of the Japanese war notes in terms of Philippine currency and for the purpose of this decision, we may adopt the Ballantyne schedule of values for the Commonwealth (now Republic) peso in terms of the peso in Japanese war notes during the occupation."

⁹ *Soriano v. Abalos*, 47 O. G. 148: "Petitioner is not liable to pay now in Philippine currency the same number of pesos in Japanese war notes to which he was sen-

tract expressly waiving the benefits of a post-war arrangement like the *Ballantyne scale of values*,¹⁰ or impliedly speculating on the date of the termination of the war,¹¹ the Ballantyne schedule is applicable.¹²

The foregoing rules may be simple enough, but the separate opinion of Justice Feria in *Gomez v. Tabia*,¹³ seems to have engendered doubts as to their interpretation. Justice Feria laid down certain rules "for the guidance of practising attorneys and inferior courts," which can be summarized thus: An obligation (a) incurred or payable during the occupation, or (b) payable within a certain period the whole or part of which coincides with the Japanese occupation, or (c) payable after a period which expired during the Japanese occupation, is to be revalued according to the Ballantyne sliding scale of values. The reason assigned is that the debtor, for delay in making payment, should not be made to pay as damages the difference in value between the Japanese military notes at the time the obligation was incurred and the Philippine currency at the time of payment. Moreover, with respect to case (c), the implied agreement that the payment should be in legal tender supports the application of the Ballantyne schedule. If, however, there is express agreement that (a) the obligation shall be paid in "Philippine currency," or (b) in the currency which is legal tender at the time it becomes payable, after the liberation, or (c) if the parties simply agreed that the obligation shall be payable after liberation, or after a certain period which elapsed after liberation, the Ballantyne schedule will not be applied. In the first case, non-application is the rule because of the freedom of contracts; in the second case, because of Section 1612 of the Revised Administrative Code which prescribes what should be legal tender; and in the third case, because of the implied agreement of the parties, in accordance with law, that the obligation should be paid in legal tender at the time it becomes payable.¹⁴

tenced in December, 1944. He is liable to pay the equivalent which may be determined by means of the Ballantyne schedule of values, as held in *Hilado v. de la Costa*."

¹⁰ *Roño v. Gomez*, 46 O. G. supp. 11, p. 339.

¹¹ *Gomez v. Tabia*, 47 O. G. 641.

¹² See also *In re Intestate Estate of Peregrina*, G. R. No. L-4871, prom. January 26, 1953; also *De Asis v. Agdamag*, G. R. No. L-3709, prom. October 25, 1951.

¹³ *Supra*, note 11.

¹⁴ *Ibid*, at pp. 645-646: "Unless the parties had agreed otherwise, all obligations incurred during the period of the Japanese invasion or occupation by contracts stipulating for, or executory judgment of the courts ordering, payment of money presumably in Japanese war or military notes, including payment of repurchase price in pacto de retro sales, shall be paid or satisfied after the liberation of the Philippines in accordance with the following rules:

(a) An obligation incurred or payable during the occupation shall be revalued on the basis of the relative value of the Japanese military notes in Philippine currency at the date the obligation was payable, according to Ballantyne sliding scale of value in the absence of evidence to the contrary. Because to compel the debtor to pay his obligation in Philippine currency at the rate of one Philippine peso for each peso due in Japanese military notes would be to make him pay, as damages or penalty, for the delay in making the payment the difference in value between the Japanese military notes

The above rules are concededly technically correct. But a less technical approach might be suggested: that the basic consideration in the application of the Ballantyne schedule of values should be that no one should get more than the value he has given. Stated in other words, the submission means that the determination of the applicability of the Ballantyne schedule should not depend on whether the obligation was incurred or payable during the Japanese occupation or within a period which partly falls within the said period. It is far less conceptualistic simply to decree that he who has parted with Japanese military notes should get back their value in terms of Philippine currency after liberation. It should not matter that the obligation became payable during the occupation or could have been paid during that period. What is more important is that the debtor has to pay in Philippine currency an amount he received in Japanese military notes, and the gross discrepancy in value is what is sought to be remedied by the Ballantyne scale. To foreclose charges of violating freedom of contract,¹⁵ it is not proposed to override the stipulations or the clear intention of the parties. With this exception, the rule should be that he who dispenses with valuable consideration should be repaid its value in terms of the prevailing legal tender at

at the time the obligation was incurred and the Philippine currency at the time of the payment.

"(b) Had the parties expressly agreed that an obligation shall be paid in Philippine currency, or merely in the currency that is the legal tender at the time it becomes payable, after the liberation, the obligation shall be paid in Philippine currency at par value or the rate of one peso in Philippine currency for one peso in Japanese war notes, because the contracting parties may establish any pacts, clauses and conditions they may deem advisable, provided they are not contrary to law, morals or public order." (Art. 1255, C. C.)

"(c) The same rule (b) is applicable had the parties simply agreed that an obligation shall be payable after the liberation of the Philippines, because then the law applicable is section 1612 of the Rev. Adm. Code, which provides that "The Philippine silver peso and half peso, and gold coins of the U.S. at the rate of \$1 for ₱2 shall be the legal tender for all debts, public and private, unless otherwise specifically provided by contract."

"(d) If the parties had stipulated that the obligation shall be payable within a certain period of time, that is, at any time within that period, and the whole or a part of the period coincides with the Japanese occupation, and, therefore, the debtor might have paid his obligation in Japanese war notes during the occupation, the above-stated rule (a) shall be applied; because the debtor had the right to pay his obligation in Japanese war notes at the time it became payable, and his mere failure to pay it would not, as above stated, make him liable to pay as damages or penalty, the difference between the value payable and of the Philippine currency at the date of the payment.

"(e) Had the parties stipulated that the debt shall be paid after a certain period of time had elapsed and not earlier, if the period had expired during the Japanese occupation the preceding rule (d), and therefore (a), should be applied; but if it had elapsed after the liberation of the Philippines, rule (c) and therefore (b) should be applicable; because in such case, the implied agreement of the parties in accordance with law, would be that the obligation shall be paid in legal tender at the time it becomes payable, i.e., in Japanese military notes if during the occupation, and in Philippine currency, if after the liberation."

¹⁵ Art. 1306, Civil Code of the Philippines.

the time of payment. The controlling consideration would be equity.¹⁶

II. REMEDIES AGAINST DISSIPATION OF CONJUGAL ASSETS

*Cabahug-Mendoza v. Varela*¹⁷ decided a question of procedural law, but is significant from the standpoint of civil law because it discusses the rights of an innocent wife against a philandering husband under the Civil Code of the Philippines. The facts are simple: Pending a criminal prosecution for concubinage, petitioner-wife filed a civil complaint for separation of property and administration by her of the conjugal assets, with allegations that the husband had maintained illicit relations with another woman, and in so doing had been wasting the conjugal partnership properties under his management. The husband moved to dismiss the complaint on the ground that it demanded legal separation based upon supposed unfaithfulness, and therefore should not be entertained until the criminal action for concubinage shall have terminated.¹⁸ The lower court denied the motion, explaining that the prayer in the complaint asked for "separation of property" and not "separation of parties;" but upon reconsideration, observed that the allegations of the complaint advertent to the concubinage, might, if proved, entitle her to legal separation too. Consequently, the suspension of the civil proceedings was ordered.

On appeal, the Supreme Court held that since the wife did not ask for legal separation although she could have done so, the complaint's reference to the husband's infidelity was merely evidentiary or corroborative of the allegation of wasteful living.¹⁹ Accordingly, it decided that the civil action should not be stayed because it was not founded on the same matter which was the subject of the criminal proceeding. The Supreme Court went further:

"The innocent spouse of a philandering husband has, at least three remedies under the New Civil Code: (a) legal separation, (b) separation

¹⁶ Justice Perfecto, dissenting in *Gomez v. Tabia*, *supra*, said: "To compel defendant to pay P5000 for what is undisputably found to be worth only P790.20 is shocking to the conscience."

Justice Paras, dissenting in *Roño v. Gomez*, *supra*, condemning the aleatory contract stipulating for payment of the loan in the currency that will be prevailing at the end of the stipulated period, as contrary to morals, said: "Roño should not be altogether released from his obligation under the promissory note, for that would also be unconscionable; but he should be freed from the burden of returning the full P4,000 in actual Philippine currency."

Justice Montemayor who penned the decision in the instant case, also said: "Moreover, on grounds of equity, appellant may not be allowed to collect from the appellee more than the real value of what he paid for him specially when the difference between the military notes and the genuine Philippine currency in November 1944 was so great."

¹⁷ G. R. L-5099, prom. April 29, 1953.

¹⁸ See section 1 (c), Rule 107 of the Rules of Court.

¹⁹ In this case, the Supreme Court also held that the concubinage becomes incidental considering that the wife may not obtain separation of property by proving concubinage and eschewing legal separation, with this footnote: "Under articles 97

of properties, (c) administration by her of the conjugal assets.

"The first may be asked for 'concubinage on the part of the husband as defined in the Penal Code' (Art. 91) and as one of its effects 'the conjugal partnership * * * shall be dissolved and liquidated, but the offending spouse shall have no right to any share of the profits earned by the partnership. * * *'"

"The 2nd and 3rd are provided in Article 167 which says that 'In case of abuse of powers of administration of the conjugal partnership property by the husband, the courts, on petition of the wife, may provide for a receivership or administration by the wife or separation of property.' (Art. 167)

"These remedies are granted only upon her petition or request. She may ask for one or the other, depending upon her choice. Now, although a decree of legal separation entails the separation of property, it also involves other consequences, for instance, 'the spouses shall be entitled to live separately from each other.' (Art. 106)

"So, when the husband has a paramour and lavishes the family fortune on her, the aggrieved wife to stop him may ask for administration of conjugal property, or if she is more liberal in the matter of property interests (and is willing to allow her husband to spend his own money) she might plead only for separation of property. She might not be willing to request also for legal separation if she did not allow her husband to live separately from her. She is at liberty to ask or not to ask for legal separation. The courts will not foist it upon her."

The reasoning is, to put it conservatively, commendable. Any other conclusion would be improper. The case emphasizes the freedom of the innocent wife to choose from among the remedies which the law grants her against a philandering husband. Considering the unpopularity of any form of divorce in Philippine society, and the law's own reluctance in granting legal separation,²⁰ the courts should refrain from implying an action for legal separation where the complaint does not expressly seek the remedy.

III. APPLICATION OF TRANSITIONAL PROVISIONS

The promulgation of the Civil Code of the Philippines necessitated special provisions for rights and duties to be affected by the transition from the Spanish Civil Code. Thus the new Code ends up with a series of "Transitional Provisions."²¹ The Code Commission admits that the question of how far the new Civil Code should

and 101 of the new Civil Code, after conviction of the husband of concubinage, the wife may ask for legal separation. If she does not get the first, the second does not accrue even after conviction."

²⁰ Under Article 103, Civil Code, an action for legal separation shall in no case be tried before six months shall have elapsed since the filing of the petition; under Article 101, *id.*, no decree of legal separation shall be promulgated upon a stipulation of facts or by confession of judgment; and under Article 98, *id.*, in every case the court must take steps before granting the legal separation, toward the reconciliation of the spouses, and must be fully satisfied that such reconciliation is highly improbable.

²¹ Articles 2252-2269.

be made applicable to past acts and events is attended with the utmost difficulty.²²

In the case of *Uson v. Del Rosario*,²³ the action was for the recovery of the ownership and possession of five parcels of land, filed by the lawful wife of Faustina Nebraska against his common-law wife and four illegitimate children by the latter. The said lands constituted the estate of the deceased Nebraska whose succession is in question. Nebraska died in 1945 long before the effectivity of the new Civil Code. What are the successional rights of the surviving lawful spouse and the illegitimate children?

Plaintiffs claim, and the court held, that when Nebraska died in 1945, the five parcels of the land he was seized of at the time passed from the moment of his death to his only heir, the widow Maria Uson.²⁴ Relying on *Ilustre v. Alaras Frondosa*,²⁵ the court ruled that the rights of inheritance of Maria Uson over the lands in question became vested when her husband died in 1945.

Defendants contended that while it was true that the four minor defendants are illegitimate children of the late Nebraska, and under the Spanish Civil Code are not entitled to any successional rights, however, under the Civil Code of the Philippines, which went into effect in June, 1950, they are given the status and rights of natural children, and are entitled to the successional rights which the law accords to the latter.²⁶ Because these successional rights are declared for the first time in the new Code, they should, defendants argued, be given retroactive effect even though the event which gave rise to them may have occurred under the prior legislation.²⁷

Justice Bautista Angelo, speaking for the court, said:

"There is no merit in this claim. Art. 2253 above referred to provides indeed that rights which are declared for the first time shall have retroactive effect even though the event which gave rise to them may have occurred under the former legislation, but this is so only when the new rights do not prejudice any vested or acquired right of the same origin. Thus, said article provides that 'if the right should be declared for the first time in this code, it shall be effective at once, even though the act or event which gives rise thereto may have been done or may have occurred under the prior legislation, provided said new right does not prejudice or impair any vested or acquired right of the same origin.' As already stated in the early part of this decision, the right of ownership of Maria Uson over the lands in question became vested in 1945 upon the death of her late husband and this is so because of the imperative provision of law which commands that the rights to succession are transmitted from the moment of death (Art. 657, old Civil Code). The rights recognized by the new Civil Code in favor of the illegitimate children of the

²² Report of the Code Commission, (1948), p. 165.

²³ G. R. No. L-4963, prom. January 29, 1953.

²⁴ See Article 657, Spanish Civil Code.

²⁵ 17 Phil. 321 (1910).

²⁶ Article 2264 and Article 287, Civil Code of the Philippines.

²⁷ Article 2253, *id.*

deceased cannot therefore be asserted to the impairment of the vested right of Maria Uson over the lands in dispute."

For a situation such as this, there are at least four provisions of the Civil Code which deserve attention: Article 2252,²⁸ 2253,²⁹ 2263,³⁰ and 2264.³¹ The first two are general provisions. Article 2263 refers especially to rights of inheritance, and Art. 2264 specifically to the rights of illegitimate children. The codal rules may be summarized thus: A right declared for the first time in the Civil Code of the Philippines shall be effective at once even though the act or event which gave rise thereto may have been done or may have occurred under the prior legislation, provided said new right does not prejudice or impair any vested right; rights to the inheritance of a person who had died with or without a will, before the effectivity of the new Code, shall be governed by the Civil Code of 1899; however, the status and rights of illegitimate children shall also be acquired by children born before the effectivity of this Code.

It is a settled rule of construction that where both a general and a specific provision are applicable to a given situation, the latter should prevail.³² It is submitted that Article 2264 should have been allowed to control the case, if it is to be given effect at all. Suffice it to quote by way of reminder:

"The liberalization of the rights of illegitimate children is but a measure whereby the wrong done to illegitimate children by their parents'

²⁸ Article 2252: "Changes made and new provisions and rules laid down by this Code which may prejudice or impair vested or acquired rights in accordance with the old legislation shall have no retroactive effect.

"For the determination of the applicable law in cases which are not specified elsewhere in this Code, the following articles shall be observed."

²⁹ Article 2253: "The Civil Code of 1889 and other previous laws shall govern rights originating, under said laws, from acts done or events which took place under their regime, even though this Code may regulate them in a different manner, or may not recognize them. But if a right should be declared for the first time in this Code, it shall be effective at once, even though the act or event which gives rise thereto may have been done or may have occurred under the prior legislation, provided said new right does not prejudice or impair any vested or acquired right, of the same origin."

³⁰ Article 2263: "Rights to the inheritance of a person who died, with or without a will, before the effectivity of this Code, shall be governed by the Civil Code of 1889, by other previous laws, and by the Rules of Court. The inheritance of those who, with or without a will, die after the beginning of the effectivity of this Code, shall be adjudicated and distributed in accordance with this new body of laws and by the Rules of Court; but the testamentary provisions shall be carried out insofar as they may be permitted by this Code. Therefore, legitimes, betterments, legacies and bequests shall be respected; however, their amount shall be reduced in no other manner can every compulsory heir be given his full share according to this Code.

³¹ Article 2264: "The status and rights of natural children by legal fiction referred to in Article 89 and illegitimate children mentioned in article 287, shall also be acquired by children born before the effectivity of this Code."

³² See *Lichauco v. Apostol* (1922) 44 Phil. 138; *Manila Electric C. v. Public Utilities Employees Assn.* (1949) 45 O. G. 1760.

misdeed is to some extent righted. The reform should be made retroactive so that its benefits may be enjoyed by persons born before the effectivity of the new Code." 83

IV. SUPPORT: OBLIGOR'S RIGHT OF ELECTION.

The Civil Code³⁴ confers a right to elect the manner in which support shall be given upon the person whose duty it is to give such support.³⁵ The option so recognized does not belong to the recipient.³⁶ The option may be waived,³⁷ or restricted,³⁸ when it is in conflict with another preferential right or where there is any justified reason for so doing. The court is thus vested with discretion to withdraw the optional right where "there is a moral or legal obstacle thereto."

In *Villasor v. Villasor*,³⁹ a complaint for support was filed against Agapito Villasor by his acknowledged natural daughter. Pursuant to a stipulation of facts submitted by the parties, wherein the father promised to support the child by depositing with the Clerk of Court ₱45.00 monthly, the court rendered judgment on July 25, 1950 making the agreement binding upon the parties. But on September 25, 1950, defendant filed a motion offering to fulfill his obligation by recognizing and maintaining in his house the minor plaintiff, and alleging among other things, that plaintiff's mother had no means of livelihood and was very fond of gambling besides being addicted to intoxicating drinks.

The trial court denied the motion. The Supreme Court affirmed the order of denial. In its opinion, the Court cited *Estrella v. Court of First Instance of Manila & Batu*⁴⁰ wherein it was held that after the obligor had expressly agreed that the mother should have the custody and care of the minor, voluntarily binding himself to pay the child a monthly allowance, he could not thereafter claim the right to support said child in his own home. The court, citing *Pascual v. Martinez*,⁴¹ declared that "irrespective of any waiver," the optional right provided by Article 149⁴² "may be restricted when it is in conflict with another preferential right or when there is any justified reason for so doing." *U.S. v. Alvir*⁴³ was also cited where it was said that:

³³ Report of the Code Commission (1948), p. 171.

³⁴ Article 299: "The person obliged to give support may, at his option, fulfill his obligation either by paying the allowance fixed, or by receiving and maintaining in his house the person who has a right to receive support. The latter alternative cannot be availed of in case there is a moral or legal obstacle thereto."

³⁵ *Mendoza v. Ibañez* (1905), 4 Phil. 666.

³⁶ I PADILLA, CIVIL CODE ANNOTATED, (1951 ed.) p. 391.

³⁷ *Estrella v. Court of First Instance of Manila & Batu*, (1935) 62 Phil. 429.

³⁸ *Pascual v. Martinez*, 37 O. G. No. 118, p. 2418.

³⁹ G. R. L-4647, prom. April 20, 1953.

⁴⁰ *Supra*, note 37.

⁴¹ *Supra*, note 38.

⁴² Article 299 of the Civil Code of the Philippines.

⁴³ 9 Phil. 576.

"the marriage of the father with his present wife who is not the mother of the minor for whose guardianship this case was instituted, the intention of the father to make illusory the support judicially granted to the minor; the determination of the former to have the latter at his side only when pressed to pay the allowance overdue; and above all, the treatment the father had accorded his child, aside from the existence of a moral cause that would prevent the mother of the minor to visit her child in the house of his father, were factors that would become the cause of disturbance in the said home, and an obstacle to the satisfaction and enjoyment springing from love and affection so necessary for his unhampered development and for the assurance of his future."

The court concluded:

"The same circumstances being present in the case at bar, the defendant may not insist upon bringing up the minor in his and his wife's home against the plaintiff's and her mother's justified objections."

Should the promise to give a monthly allowance bar permanently the exercise of the optional right vested by Article 299 on the ground of waiver? In the *Estrella* case, the obligor expressly agreed that his children "should remain under the care and custody of the mother." In the instant case, the defendant promised to support the child by depositing with the clerk of court the sum of ₱45.00 every month, with the understanding that the plaintiff shall not receive said monthly allowance until after a guardian for the person and property of the plaintiff is appointed in accordance with law. It could not have been intended by the Court in finding a waiver that the option is forever denied to the obligor. It is submitted that, for good reason proved to the satisfaction of the court, the waiver may be disregarded.

Nowwithstanding the absence of a waiver, however, it is clear that the option may be restricted under certain circumstances. In the instant case the defendant had married a woman not the mother of the minor. But defendant-appellant insisted that the minor's mother was very fond of gambling, was addicted to hard liquor, had no means of livelihood, and was still legally married to a man not the father of the minor and who was still living, and that the wife of the defendant had signified her conformity to take care of the minor.⁴⁴ The appellee's opposition only raised the issue that the decision appealed from was not appealable.⁴⁵

The allegations of the defendant-appellant are weighty, but it seems there was a failure of proof.⁴⁶ Besides, the moral fitness or unfitness of the mother to have the custody of the child is perhaps more properly litigated in the guardianship proceedings already pending. Article 299 confers a right on the obligor, and discretion on the court.

In the *Alvir* case, the Supreme Court pointed out a number of circumstances that together constituted an impediment to the exer-

⁴⁴ Brief for the Appellant, pp. 3-7.

⁴⁵ Brief for the Plaintiff-Appellee.

⁴⁶ Decision of the trial court, November 14, 1950.

cise of the option. A similar approach here would have been more convincing than a summary analogy with the cited cases. Or should we take the decision to imply that the obligor's marriage to a woman not the mother of the minor will justify the restriction of the optional right?

MINERVA GONZAGA

CRIMINAL LAW AND PROCEDURE—

I. EVIDENT PREMEDITATION

In *People v. Visagar*,¹ the Supreme Court held that a "brief" period of time intervening between challenge and actual shooting sufficed to preclude the circumstance of evident premeditation in the commission of the crime. The case arose out of a dispute between the accused and the deceased, Pedro Basilio, when the latter fenced his lot, depriving Visagar of a passageway for his jeep. During the ocular inspection of the premises in an attempt at an amicable settlement, Visagar suddenly rushed at Basilio with the apparent intention of attacking him. A spectator stopped him and he was temporarily pacified. As Basilio remained adamant in his decision to close the passageway, Visagar faced him saying, "You Indong, you are always like that, do you want a fight with guns?" And he ran towards the house, got his .45 caliber automatic pistol and went to look for Basilio who was leaning against the kitchen door with his arms akimbo. At a distance of about three meters, and without uttering any word, Visagar fired two shots wounding Basilio mortally.

The general rule is that for evident premeditation to exist there must be a period sufficient in a judicial sense to afford full opportunity for meditation and sufficient to allow the conscience of the actor to overcome the resolution of his will if he desires to hearken to its warnings.² Certain requisites must be established before the court may properly take evident premeditation into account: (a) the time when the offender determined to commit the crime, (b) an act manifestly indicating that the culprit has clung to his determination, (c) a lapse of time between the determination and the execution, sufficient to allow him to reflect upon the consequences of his act.³

In the case at bar there were some facts which tended to show the existence of evident premeditation. At one of their prior attempts to settle the dispute, the wife of the accused was heard to remark, "If that is what you wish something may happen." Visagar who was nearby said, "My wife told me that she is downtrodden, abused * * * I better go to jail, there is no more use, if I cannot let my jeep enter my house and it is prohibited to park the jeep in the street I better go to jail." Such a remark, coupled with his attempt

¹ G. R. No. L-5384, prom. June 12, 1953.

² *U.S. v. Gil* (1909), 13 Phil. 531.

³ *People v. Leano* (C. A.), 36 O. G. No. 53, 1120.