RECENT DECISIONS

Civil Procedure—*Should compulsory counterclaims be set up regardless of the amount which otherwise would be barred?*

ALICIA GO ET AL V. ALBERTO GO ET AL.
G.R. No. L-7020, June 30, 1954

Counterclaims [1] are either compulsory or permissive. A counterclaim is termed compulsory when it is barred if not set up, and permissive if it is not barred even if not set up.[2] A counterclaim is barred if not set up when "it arises out of, or is necessarily connected with, the transaction or occurence that is the subject-matter of the opposing party's claim." It is a further requisite that the counterclaim does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. The *Rules of Court* is explicit on these points.[3] Not as explicit, however, is the matter of jurisdictional amounts in counterclaims, especially where the counterclaims consist of several items.

In the case of *Go et al. v. Go et al.*[4] the Supreme Court made a relatively strong pronouncement on the matter of jurisdictional amounts in counterclaims. The facts of the case are as follows: Plaintiffs-appellees, hereinafter called appellees, filed an action of forcible entry and for the recovery of ₱2000 as damages as well as ₱200 as attorney's fees in the municipal court of Manila. In their answer, the defendants-appellants, hereinafter called appellants, sought to recover a counterclaim of ₱2000, the value of furniture and equipment allegedly belonging to them and claimed to have been taken by the appellees from their apartment, the possession of which is in litigation; the sum of ₱1000, the expense allegedly incurred by the appellants as a result of the action brought against them; and the sum of ₱500 as attorney's fees. In the municipal court judgment was rendered ordering appellants to vacate the apartment but did not award the sums sought to be recovered by both parties on the ground that the same are beyond its jurisdiction.[5] The appellants brought

[1] A counterclaim is any claim whether for money or otherwise, which a party may have against the opposing party. (Sec. 1, Rule 10, Rules of Court).

[2] See I MORAN, COMMENTS ON THE RULES OF COURT, 1952 ed., 118-119.

[3] Sec. 6, Rule 10: "A counterclaim not set up shall be barred if it arises out of or is necessarily connected with, the transaction or occurrence that is the subject-matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

[4] G. R. No. L-7020, June 30, 1954.

[5] Sec. 88, Rep. Act No. 296, as amended by Rep. Act No. 644, provides:

"The jurisdiction of justice of the peace and judges of municipal courts of chartered cities shall consist of:

* * * * * *

"(b) Original jurisdiction in civil actions arising in their respective municipalities and cities, and not exclusively cognizable by the Court of First Instance; and

the case on appeal to the Court of First Instance setting up the same counterclaims. Appellees move for dismissal of the counterclaims on the ground that the Court of First Instance has no jurisdiction to try and decide on appeal a counterclaim of ₱3500 which the municipal court had refused to try and decide for lack of jurisdiction.[6] The motion was granted and from the order dismissing the counterclaims, the appellants have appealed. The issues before the Supreme Court were: (1) whether jurisdiction is determined by the amount of several causes of action, and (2) whether, in compulsory counterclaims, the amount is immaterial in the question of jurisdiction.

The majority[7] of the Supreme Court held that the amount of each claim arising from different transactions and not the aggregate amount of the counterclaims is determinative of the jurisdiction of the court. Reliance was placed by the majority on the case of *Soriano and Co. v. Jose*,[8] where it was held that "where several claimants have several and distinct claims against the defendant which may properly be joined in a single suit, the claim cannot be added together to make up the required jurisdictional test." It was further held in the same case that this rule applies to both complaint and counterclaim. The Supreme Court, citing the case of *Villaseñor v. Erlanger and Galinger*,[9] held that the ruling in the *Soriano and Co. v. Jose* case applies to a counterclaim set up by several defendants which have a common counterclaim against the plaintiff divided into several causes of action for the reason that they arise from transactions one different from the other. The Supreme Court, therefore, concluded that the counterclaims of the defendants are within the jurisdiction of the municipal court because the respective amounts, considered separately, do not exceed its jurisdiction, and, hence, cannot be decided upon on appeal.

Another point touched upon by the Supreme Court was whether the counterclaims of the defendants are compulsory or not. Speaking through Justice Bautista Angelo, the Supreme Court stated:

> "Another consideration that should be borne in mind is whether the counterclaim is compulsory or not. If it is, such as if it arises from, or

"In all civil actions * * * arising in his municipality or city, and not exclusively cognizable by the Court of First Ins'ance, the justice of the peace and the judge of a municipal court shall have exclusive original jurisdiction where the value of the subject-matter or amount of the demand does not exceed ₱2000 exclusive of interests and costs."

[6] See Sec. 9, Rule 40, Rules of Court; also *Alcarin et al. v. Navarro*, G. R. No. L-5257, April 14, 1954; *Valdez v. Fariñas and Campos*, G. R. No L-6323, April 29, 1954.

[7] Mr. Justice Padilla, with whom Mr. Justice Labrador concurred, dissented.

[8] G.R. No. L-3211, May 30, 1950, 47 O.G. 156; See also the case of *International Colleges Inc. v. Argonza et al.*, G. R. No. L-3884, November 29, 1951.

[9] 19 Phil. 574 (1911). The Supreme Court, in this case, held that where two separate debts payable on two separate dates, plaintiff may file a single complaint to collect the two sums in the justice of the peace court, notwithstanding the fact that the total of the two sums exceeds the jurisdictional amount of such court, citing 16 C. J. 769.

is necessarily connected with, the facts alleged in the complaint, then that counterclaim should be set up *regardless of its amount.* Failure to do so would render it barred under the rules. In this particular case, while the first cause of action cannot be considered compulsory because it refers to a transaction completely unrelated with the main claim, the second and third belong to this class because they necessarily arise from the institution of the main action, viewed in this light, it can be said that the counterclaim of the defendants should be deemed as coming within the jurisdiction of the municipal court, because the respective amounts, considered separately, do not exceed its jurisdiction."

The statement made by the Supreme Court to the effect that compulsory counterclaims should be set up regardless of the amount, or be barred forever, deserves more than mere passing attention. It is most unfortunate, however, that the Court did not elucidate further nor give its *raison d'etre.* There is no question, though, that the matter has been stressed by the Court, considering the supplied emphasis. For one thing, questions of jurisdiction are delicate matters, jurisdiction being a matter of substantive law.[10] While it is true, as the Supreme Court itself had observed in some cases,[11] that the Rules of Court are liberal in the allowance of counterclaims and even discourages separate actions which make for multiplicity of suits, it cannot be inferred from this fact that jurisdictional questions should be and can be sacrificed. Inferior courts are courts of limited jurisdiction.[12] As pointed out in the case of *Tuason v. Crossfield and Sellner*,[13] "no argument based merely upon convenience, or upon the assumed justice or propriety of the exercise of such jurisdiction in a particular class of cases, can justify the assumption of jurisdiction by those courts (of limited jurisdiction) in the absence of a legislative grant." In the *Tuason* case, the Court referred to a ruling made by the Supreme Court of Missouri [14] to the effect that "the convenience and policy of having all cross-demands settled in the same case, cannot justify the defendant in bringing a cross-demand for settlement in a justice's court which has no jurisdiction of it." In a case [15] similar to that under review, Justice Torres pointed out that the rule requiring the setting up of all compulsory counterclaims cannot be so interpreted that if the defendant does not set up a counterclaim which exceeds the amount within the jurisdiction of the justice of the peace court he will thereby be barred from demanding it in another action. According to the same Jus-

[10] *Mabanag v. Lopez Vito,* 43 O. G. 2079.

[11] *Florendo v. Organo,* G. R. No. L-4037, November 29, 1951; *Ledesma v. Morales,* G. R. No. L-3251, August 24, 1950, 47 O. G. Supp. (12) 382.

[12] MORAN, *op. cit.,* 118-119.

[13] 30 Phil. 543, 546 (1915). See further, *Suanes v. Almeda Lopez,* 1 O. G. 7 (July, 1942) 390; *Paminuan v. Tiglao,* 53 Phil. 1 (1929).

[14] *Emery v. St. Louis, Keokuk & Northwestern Ry. Co.,* 77 Mo. 339; Also cited by the Court were *Maxfield v. Johnson,* 30 Cal. 545; *Malson v. Vaughn,* 23 Cal. 61; *John E. Morrison Co. v. Harrell,* 148 S. W. 1122; *Walter v. Cox,* 36 Mont. 20; and *Martin v. Eastman* 109 Wis. 286.

[15] *Yu Lay v. Galmes,* 40 Phil. 651 (1920), citing *Tuason v. Crossfield and Sellner, supra; Mendoza v. Arellano,* 36 Phil. 59 (1917); 34 Cyc. 646-647.

tice, "such interpretation would be another unfounded supposition compelling the defendant to set up a counterclaim of which the law itself has prohibited a court from taking cognizance, being in excess of its jurisdiction." [16]

It is, therefore, most desirable that the Supreme Court, should a similar or analogous case come before it, clarify or reexamine the problem of whether compulsory counterclaims should be set up regardless of the amount, even when it is beyond the jurisdiction of the court.[17]

Civil Procedure—*Extent of appellate jurisdiction of Courts of First Instance; what constitutes a valid trial upon the merits in inferior courts; nature of a judgment by default.*

ALCARIN ET AL., v. NAVARRO
G.R. L-5257, April 14, 1954

VALDEZ v. FARIÑAS & CAMPOS
G.R. L-6323, April 29, 1954

Generally, the jurisdiction of a Court of First Instance on appeal is to hold trial *de novo*, the perfected appeal operating to vacate the judgment of the inferior court.[1] This situation, however, presupposes that there has been a valid trial upon the merits in the inferior court. If there has been no valid trial upon the merits in the inferior court, and the case has been disposed of therein upon a question of law, the only jurisdiction of the Court of First Instance on appeal is to review the ruling of the inferior court on such question of law and affirm it if correct, or reverse it if erroneous, and in the latter instance, remand the case to the inferior court for further proceedings.[2]

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[16] *Tuason v. Crossfield and Sellner, supra*, at 662.

[17] It is interesting to note that in the case of *Bernardo v. Genato*, 11 Phil. 603 (1908), it was intimated that when a counterclaim is alleged by way of special defense to mitigate plaintiff's cause of action, it can be set up even if such counterclaim is for an amount in excess of the jurisdiction of the court. See I Moran, *op. cit.*, 117-118.

[1] Section 9, Rule 40: "Effect of Appeals—A perfected appeal shall operate to vacate the judgment of the justice of the peace or the municipal court, and the action when duly entered in the Court of First Instance shall stand for trial *de novo* upon its merits in accordance with the regular procedure in that court, as though the same had never been tried before and had been originally there commenced. If the appeal is withdrawn, the judgment shall be deemed revived and shall forthwith be remanded to the justice of the peace or municipal court for execution."

"Trial *de novo*" under this section means that the Court of First Instance shall try the case without regard to the proof presented in the inferior court or to the conclusions reached by the judge thereof." *Lizo v. Carandang*, 73 Phil. 649 (1942); I MORAN, COMMENTS ON THE RULES OF COURT, 1952 Ed., 886.

[2] Section 10, Rule 40: "Where the action had been disposed of by an inferior court upon a question of law and not after a valid trial upon the merits, the Court

Questions, however, arise as to the correct application of the foregoing principles. Thus, what constitutes a "valid trial upon the merits" and when a case is said to have been disposed of by an inferior court upon a question of law are recurring problems. The Supreme Court in the above-mentioned cases had occasion to resolve these questions.

In the case of *Alcarin et al., v. Navarro*,[3] Section 10, Rule 40[4] of the Rules of Court was construed and applied. In that case, the action originated in the Municipal Court of Cavite City where the plaintiffs filed an action against defendants Navarro and Legaspi, to recover from the latter the amount which plaintiffs, as laborers, had earned while working on the construction of the house of defendant Navarro. The other defendant, Legaspi, was the building contractor employed by Navarro. After the plaintiffs had closed their evidence, defendant-appellant Navarro filed a motion to dismiss, claiming that there is no contractual relation between him and the plaintiffs, and that as the plaintiffs have not shown that he had violated the provisions of Act 3959, he is not liable. The municipal court sustained the contention of the defendant-appellant that there is no evidence to prove the facts required in Sections 1 and 2 of Act 3959, because it was not shown that defendant-appellant did not require his co-defendant to furnish the bond in an amount equivalent to the cost of labor, and that defendant-appellant had paid said contractor the entire cost of labor without having been shown the affidavit that the latter had paid the wages of the plaintiffs. On appeal by the plaintiffs to the Court of First Instance, the order of dismissal was reversed and the case was remanded to the municipal court under the authority of Section 10 of Rule 40. Against this order of remand, the defendant has appealed directly to the Supreme Court. The questions before the Court, then, are: (1) Was the action disposed of in the municipal court upon a question of law? and (2) Was there a valid trial upon the merits in the municipal court as defined in Section 10 of Rule 40?

In holding that the case is not governed by Section 10, Rule 40 the Supreme Court pointed out that what the rule considers as a termination of a case without a valid trial upon the merits is a dismissal without trial and/or determination of any of the issues of fact raised in the pleadings. The Court referred itself to the examples given by Chief Justice Moran in his book[5] of the application of the rule, such as where the hearing is had merely on the lack of jurisdiction or improper venue, without introduction of evidence on the merits,[6] or on the sufficiency of the allegations of the complaint as to

of First Instance shall on appeal review the ruling of the inferior court and may affirm or reverse it, as the case may be. In case of reversal, the case shall be remanded for further proceedings." See MORAN, *op cit.*, 889-890.

[3] G.R. L-5257, prom. April 14, 1954.

[4] See note 2, *supra*.

[5] MORAN, *op. cit.*, 890.

[6] *Lucido v. Vita*, 25 Phil. 414 (1913); *Mirano v. Diaz*, 75 Phil. 275 (1945); *Saavedra v. Pecson*, 76 Phil. 330 (1946).

constitute a cause of action.[7] In these instances, there would not be a valid trial upon the merits. By way of clarification, the Court stated that "the existence of a trial on the merits is the determining factor for the application of the rule," so much so, that "even if the case is decided on a question of law, *e.g.*, lack of jurisdiction, provided that there was a trial, the case may not be remanded to the inferior court." In the instant case, the Court found that there was a trial upon the issue as to whether or not the plaintiffs should be entitled to recover. The fact that the defendants did not present their evidence for the reason that the lower court had found the plaintiffs to have failed to establish a cause of action, does not mean thereby that the case was terminated on a question of law, and that there was no valid trial upon the merits. As the lower court has considered the evidence on the merits of the case, it can be concluded that there was a valid trial on the merits within the meaning of Section 10, Rule 40, and the case may not thus be remanded for trial, the Court added.

In conclusion, the Supreme Court, speaking through Justice Labrador, pointed out the purpose of the rule, to wit:

> "It will be noted that the purpose of Section 10 of Rule 40 is to prohibit the trial of a case originating from an inferior court by the Court of First Instance on appeal, without the said inferior court having previously tried the case on the merits. If there was no such trial on the merits, the trial in the Court of First Instance is premature, because the trial therein on appeal is a trial *de novo*, a new trial. There can not be a new trial unless a trial was already held in the court below. It might happen that after the trial on the merits in the lower court the parties may be satisfied with its judgment. So the evident purpose of the rule is to give the opportunity to the inferior court to try the case first upon the merits, and only thereafter should the Court of First Instance be allowed to re-try the case, or to conduct another trial thereof on the merits."

In the second case under review, *Valdez v. Fariñas and Campos*,[8] the question before the Supreme Court was whether a judgment by default[9] involves a "valid trial upon the merits."

Petitioner Valdez filed an action in the justice of the peace court against respondent Fariñas upon a promissory note. On the date of the hearing, Fariñas did not appear. The court declared him in default, and, after presentation of plaintiffs evidence, rendered judgment in favor of Valdez. Two days later, the court received two motions from Fariñas, one for postponement of the hearing and another for dismissal of the complaint, both with an early date. Ten days after receiving a copy of the judgment against him, Fariñas filed an

[7] *Nolan v. Montelibano and Ramos*, 29 Phil. 236 (1915).

[8] G.R. L-6323, prom. April 29, 1954.

[9] Section 13, Rule 4: "Judgment by default—If the defendant does not appear at the time and place designated in the summons, he may be declared in default, and the court shall thereupon proceed to hear the testimony of the plaintiff and his witnesses, and shall render judgment for the plaintiff in accordance with the facts alleged and proved."

undated motion to lift the order of default and to set aside the judgment. All three motions were denied by the court. Defendant Fariñas then appealed to the Court of First Instance. Subsequently, he presented an *ex parte* motion praying that the ruling of the justice of the peace court be reviewed, and, in the event the same is reversed, the case be remanded to the court of origin. The Court of First Instance held that it was error for the justice of the peace court to have rendered a judgment by default in view of the motion for postponement, stating further that the judgment by default is not a judgment upon the merits of the controversy.

As pointed out above, a perfected appeal operates to vest in the Court of First Instance the jurisdiction to try the case *de novo* upon its merits.[10] The Supreme Court, therefore, considered the procedure adopted by the Court of First Instance in reviewing the ruling of the lower court on the three motions, upon the basis of an *ex parte* motion, as not permitted by the rules. The jurisdiction of the Court of First Instance on appeal may not be limited to a consideration of the errors of law committed by the inferior court. The only instance, the Court pointed out, in which such a review may be allowed is when the conditions specified in Section 10 of Rule 40 are present, *i.e.*, "where the action had been disposed of by an inferior court upon a question of law and not after a valid trial upon the merits." These conditions do not exist in the instant case considering the procedure followed in rendering the judgment by default. The Supreme Court, again speaking through Justice Labrador, held:

> "When an [order of] default is rendered by a justice of the peace court, and, thereafter, pursuant to the rules, plaintiff adduces his evidence in support of the allegations of the complaint, it can not be said that there is no trial upon the merits, and neither can it be said that the case is disposed of on a question of law. In such a case, the court investigates the allegations of the complaint, and renders a judgment on the merits of the case . . ."

Civil Procedure—*Prescription of action; action to enforce judgment can only operate when there is no impediment to its execution.*

DAVID v. THE HON. JUDGE GARLITOS ET AL.,
G. R. No. L-7142, June 30, 1954

Under the Rules of Court,[1] the prevailing party in a civil action is entitled to a writ of execution of the final judgment obtained by him within five years from the date of its entry. After the lapse of

[10] See note 1, *supra*.

[1] Section 6, Rule 39, Rules of Court: "A judgment may be executed on motion within five years from the date of its entry. After the lapse of such time, and before it is barred by the statute of limitations, a judgment may be enforced by action."

this period and before the same shall have been barred by any statute of limitation, the judgment may be enforced by an ordinary action.[2]

In the *David v. Garlitos* [3] case, the principal question raised was whether an order deferring action on a petition for execution of a judgment suspends the running of the prescriptive period. This question arose out of the following operative facts: A domestic corporation was indebted to the Philippine National Bank for which a security by way of mortgage was given. Subsequently, the corporation was adjudged insolvent. Vicente Sotto, predecessor of respondent Sotto, acquired the assets of the corporation, while petitioner David acquired from the Philippine National Bank all the latter's rights and interests on the mortgage. The mortgage was foreclosed on December 5, 1941 against the assignee Sotto. The latter appeared to have made attempts to pay, in 1944, with Japanese war notes, the accumulated balance of the mortgage credit, but David refused to accept payment and instead referred Sotto to Teehankee, David's counsel. Because of this incident, and instead of going to Teehankee, Sotto deposited the amount in court and brought an action against David to compel the latter to accept the tender of payment and to issue a deed of cancellation of mortgage. On August 16, 1945, petitioner David asked for the execution of the foreclosed property. In an order dated October 25, 1945, the lower court deferred action on said petition until the consignation case, which was then pending, shall have been finally decided. On November 3, 1949, the consignation was held invalid. Subsequently, on July 15, 1953, David filed a petition for the sale of the foreclosed property. The Court of First Instance of Nueva Ecija held that the action has prescribed. A petition for certiorari with mandamus was then filed against respondent judge.

Citing the case of *Cia. General de Tabacos v. Martinez* [4] and other Philippine cases [5] decided by the Supreme Court in accordance with that case, the respondents advanced the theory that if an injunction restraining an execution does not suspend the running of the period of prescription, then with more reason the mere filing of a petition for execution and an order merely deferring action on said petition does not suspend the running of the period of prescription.

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[2] *Ibid.; Gutierrez Hnos. v. De la Riva,* 46 Phil. 827 (1924); *Philippine National Bank v. Silo,* G.R. No. L-3498, March 19, 1951; *Ansaldo v. Fidelity & Surety Co.,* G.R. No. L-2378, April 27, 1951; Cf. *De la Costa et al., v. Cleofas,* 67 Phil. 686, (1939).

Article 1144, New Civil Code: "The following actions must be brought within ten years from the time the right of action accrues: (1) * * *; (2) * * *; (3) Upon a judgment."

[3] G.R. No. L-7142, June 30, 1954.

[4] 17 Phil. 160 (1910).

[5] *Paterno v. Aguila,* 22 Phil. 427 (1912); *Compania General de Tabacos v. Nolan,* 29 Phil. 515 (1915). Cf. *Arambulo v. Court of First Instance of Laguna,* 53 Phil. 302 (1929), also decided under the *Martinez* case, where it was held that the mere filing of a motion asking for a writ of execution without taking the necessary steps to obtain such execution does not suspend or interrupt the five-year limitation.

The Supreme Court rejected this theory and pointed out that the ruling in the *Martinez* case has already been qualified by the later case of *Demetrio and Madrid v. Lesaca and Chunaco.*[6] The legal principle announced in the *Demetrio* case is that when a writ of injunction is issued restraining the sale of certain properties of the judgment debtor, without restraining the execution itself on the other properties, the writ of injunction cannot have the effect of suspending the running of the prescriptive period. Applying this legal principle, the Supreme Court agreed with petitioner David that his petition for execution filed on August 16, 1945, and the order of the trial court deferring action upon it until the consignation case has been finally decided, suspended the running of the period of prescription. Speaking through Justice Montemayor, the Supreme Court stated:

> "Prescription can only operate when there is a right that is enforceable; or, in the case of a final judgment, when there is no legal impediment to its execution; but when the enforceability of a final decision is suspended by court order or becomes conditional and uncertain, prescription may not operate."

The Supreme Court, however, felt that it had to explain further the situation of petitioner David, and did so in this wise:

> "although he had a final judgment in his favor, despite his efforts, he failed to secure execution thereof not only because of the refusal of the trial court to grant it, but also because the suit filed by Atty. Vicente Sotto based on his alleged tender of payment and the subsequent consignation rendered the execution of said final judgment conditional and uncertain. If Atty. Sotto in his suit obtained final favorable judgment * * * then the final judgment in favor of David will have been immaterial and of no avail. That was the very reason why the trial court deferred action on David's petition for execution dated August 16, 1945, and surely, failure to execute said judgment may not properly be laid at anyone's door, much less at that of David. It was only after the final judgment in the case of Atty. Sotto against David that the judgment in the foreclosure proceedings regained its finality and executory character."

Chief Justice Moran has aptly stated that "the statute of limitation has been devised to operate primarily against those who sleep on their rights and not against those who wish to act but cannot do so for causes beyond their control." [7]

[6] 63 Phil. 112 (1936). In this case of *Demetrio v. Lesaca*, the Supreme Court observed that the decisions of the states of the Union are conflicting on the effect of a writ of injunction upon the running of the period of prescription of a final judgment. See I MORAN, COMMENTS ON THE RULES OF COURT (1952), pp. 801-805.

[7] I MORAN, *op. cit.*, 804.

Criminal Law—*Conspiracy need not be shown by express agreement to enter into and pursue a common design; its effect.*

PEOPLE V. UNCIANO,
G. R. No. L-6643, April 29, 1954.
PEOPLE V. CALUCER,
G. R. No. L-6460, May 7, 1954.
PEOPLE V. SENDENIO
G. R. No. L-6372, April 29, 1954.
PEOPLE V. LOSEO,
G. R. Nos. L-5508-5509, April 29, 1954.

To establish conspiracy,[1] express agreement to that effect is not necessary.[2] Conspiracy may be inferred from the simultaneous and concerted attack of the accused upon their victim.[3] This was the holding of the Supreme Court in the cases of *People v. Unciano*,[4] *People v. Calucer*,[5] and *People v. Sendenio and Mejenio*.[6]

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[1] "A conspiracy exists when two or more persons come to an agreement concerning the commission of a felony and decide to commit it." Art. 8 ,par. 2 R.P.C.

[2] *People v. Mandagay*, 46 Phil. 838 (1923); *People v. Manalo*, 52 Phil. 484 (1928); *People v. Enriquez*, 58 Phil. 536 (1933); *People v. Kalalo*, 59 Phil. 715 (1934); *People v. Bonador*, 63 Phil. 305 (1936); *People v. Diokno*, 63 Phil. 601 (1936); *People v. Macul*, G.R. No. L-2823, May 19, 1950; *People v. San Luis*, G.R. No. L-2365, May 29, 1950; *People v. Licauan*, G.R. No. L-2960, Jan. 9, 1951; *People v. Roque*, G.R. No. L-3513, Sept, 29, 1951; *People v. Canoy*, G.R. No. L-4224, Dec. 28, 1951; *People v. Remalante*, G.R. No. L-3513, Sept. 26, 1952; *People v. Mahlon*, G.R. No. L-5198, April 17, 1953; *People v. Ortega*, G.R. No. L-5512, March 25, 1953.

[3] *U.S. v. Zalsos and Regmac*, 40 Phil. 96 (1919); *People v. Ibañez*, 44 O.G. 30 (1946); *People v. Mendoza*, G.R. Nos. L-4146-4147, March 28, 1952; *People v. Sasota, et al.*, G.R. No. L-3544, April 18, 1952; *People v. Agsalona*, G.R. No. L-3959, Nov. 29, 1952. See also cases cited under footnote 2.

[4] G.R. No. L-6643, April 29, 1954. In this case, two of the accused held the victim while the third accused stabbed him.

[5] G.R. No. L-6460, May 7, 1954. In this case, the Supreme Court dismissed the contention of the two appellants that there was no conspiracy between them and the other two co-accused. Said the Court "The evidence clearly shows that they joined Ponfilo and Ladon in going up the house of Gevaro, joined in pursuing Gevaro as he jumped down from the house and ran away, and actually stabbed and gave blows at Gevaro even when the latter had fallen down already. The existence of conspiracy need not be testified to by witnesses; it may be inferred from simultaneous and concerted acts of assault on a common victim, as in the case at bar."

In both this case and the case of *People v. Unciano, supra*, note 4, the Court quoted *People v. Carbonel*, 48 Phil. 868 (1926), thus—"Direct proof is not essential to show conspiracy. It need not be shown that the parties actually came together and agreed in express terms to enter in and pursue a common design. The existence of the assent of minds which is involvd in conspiracy may be, and from the secrecy of the crime, usually must be inferred from proof the circumstances of which, taken together apparently indicate they are merely parts of some complete whole."

In *People v. Unciano, supra.*, the Court also cited *People v. Manuel, et al.*, G.R. No. L-2823, May 19, 1950 and *People v. Ging Sam, et al.*, G.R. No. L-4287, Dec. 29, 1953.

See also cases cited under footnote 2.

[6] G.R. No. L-6372, April 29, 1954.

In the *Sendenio* case, Sendenio, who was with the deceased on top of a coconut tree, kicked the latter, causing him to fall. Mejenio, who was at the foot of the coconut tree, struck the deceased on the chin with the butt of a home-made gun when he tried to rise. Thereupon, Sendenio, who had meanwhile come down, stabbed the deceased in the throat, causing his death. Mejenio disclaimed conspiracy, but the Supreme Court inferred conspiracy from the following circumstances: 1) his unexplained presence at the foot of the coconut tree;[7] 2) he attacked the deceased as soon as the latter fell; and 3) when his co-accused told the latter's father that "We killed someone," he did not deny it. Instead he confirmed it.[8]

Upon proof of conspiracy, the act of one is the act of all.[9] Thus in the last mentioned case of *People v. Loseo and Ramos*,[10] where the defendants were accused of robbery with rape,[11] the Supreme Court held that it was not necessary for one of the accused to have committed rape personally in order to be responsible for it.[12]

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[7] Unexplained presence of the accused near the scene of the crime was similarly considered in *People v. Camo*, G.R. No. L-4740, Feb. 14, 1952.

[8] Compare this with the manner the malefactors perpetrated the crime in the cases of *People v. Mahlon*, G.R. No. L-5198, April 17, 1953 and *People v. Ortega*, G.R. No. L-5512, March 25, 1953.

[9] *U.S. v. Remigio*, 37 Phil. 599 (1918); *People v. Enriquez*, 58 Phil. 536 (1933); *People v. de la Cruz*, G.R. No. L-3012, Jan. 9, 1951; *People v. Go*, G.R. No. L-1527, Feb. 27, 1951; *People v. Bersamin*, G.R. No. L-3097, March 5, 1951.

[10] G.R. Nos. L-5508-5509, April 29, 1954.

[11] A distinction must be made between the effect of conspiracy in robbery with rape and robbery *in band* with rape.

"Any member of a band who is present at the commission of a robbery by the band, shall be punished as principal of any of the assaults committed by the band, unless it be shown that he attempted to prevent the same." Art. 296, par. 2, R.P.C.

On the other hand, if the felony is not committed in band, the defendants are only liable for what they personally do or commit, unless it be covered by the subject matter of the conspiracy. See PADILLA, CRIMINAL LAW, 1953 ed., p. 911.

[12] If an express conspiracy can be shown, the malefactors may be regarded as principals irrespective of their actual participation in every detail of execution of the crime. See *Criminal Law*—1952, by Rafael K. Hernaez and Ponciano Mathay, XXVIII Phil. Law Journal 41, 44, and cases cited thereunder.

In the case under comment, there were only two malefactors. This eliminates the idea of a band. See Art. 296, par. 1, R.P.C. Each of the co-accused committed a rape. It was the contention of one of the co-accused that he should be responsible only for the rape which he committed, but not for the rape committed by his co-accused. The Supreme Court dismissed the contention, stating: "* * * las pruebas establecen que el habia indicado a Ramos que violase a otra y ademas estaba de guardia cuando Ramos violaba a Amparo. No es necesario que el violado personalmente a Amparo para ser responsable del crimen. Como el habia convenido con Ramos para cometer el delito de robo, el y Ramos son responsables del delito de robo con violacion."

Criminal Procedure—*May an accused person institute mandamus proceedings to compel a fiscal to include a co-perpetrator in the information?*

GUISO V. FIGUEROA,
G. R. No. L-6481, May 17, 1954.

It is the legal duty of a fiscal to file charges against whomsoever the evidence may show to be responsible for an offense.[1] The discretion of a fiscal lies in determining whether the evidence submitted is sufficient to justify a reasonable belief that a person has committed an offense.[2] A fiscal has no discretion in excluding from prosecution persons who appear responsible for a crime; if it becomes necessary to exclude some of them, the procedure provided by law must be followed, for such exclusion is lodged in the sound discretion of the competent court and not in that of the prosecuting officer.[3]

Reaffirming the foregoing principles, the Supreme Court, in the case of *Guiso v. Figueroa*,[4] upheld the decision of the Court of First Instance of Pampanga granting a petition for mandamus directed

[1] The role and principal object of Act No. 2709 is not to restrain and limit the action of the prosecuting officer, but specially to impose specific conditions whereby an accused, already charged in an information, may not be arbitrarily and capriciously excluded therefrom, as must have happened more than once. To remedy the evil consequences of an unreasonable and groundless exclusion which produces real impunity, perhaps of the most guilty and the most responsible criminal, and subjects to prosecution the less wicked who have not found protection in the whims and arbitrariness which have freed those who really deserve a more severe punishment than others who have undergone prosecution. *U.S. v. Enriquez*, 40 Phil. 603 (1919).

It is the duty of the prosecuting officer to exercise his sound discretion in determining what persons "appear" to be responsible for the commission of crimes. *U.S. v. Abanzado*, 37 Phil. 658 (1918).

Sec. 1 of Act No. 2708 does not relieve the fiscal of the duty not to force to trial a person whose guilt he has no sufficient reason to believe he will be able to establish by the production of competent evidence. *U.S. v. Barredo*, 32 Phil. 444 (1915); *U.S. v. Abanzado*, 37 Phil. 658 (1918).

[2] The fiscal acts within his legal authority in dismissing an information against a person when the proofs in his hand convince him that the information is erroneous and canot be sustained. *People v. Agasang*, 60 Phil. 182 (1934).

The promotor fiscal alone represents the people in the prosecution of offenders and it is discretionary with him even in cases instituted on the complaint of the person injured whether or not he will refrain from prosecuting a proceeding, depending upon whether in his opinion there is sufficient evidence to establish the guilt of the accused beyond a reasonable doubt, except when the case is pending in the CFI. *Gonzalez v. CFI*, 63 Phil. 846 (1936).

[3] The object is to prevent unnecessary or arbitrary exclusions from the complaint of persons guilty of the crime charged. *People v. Badilla*, 48 Phil. 718 (1926).

See Rule 115, sec. 9, Rules of Court; *People v. Bautista*, 49 Phil. 389 (1926); *U.S. v. Guzman*, 30 Phil. 416 (1915); *U.S. v. Bonete*, 40 Phil. 958 (1920); *U.S. v. Abanzado*, 37 Phil. 658 (1918).

[4] G.R. No. L-6481, May 17, 1954.

against the fiscal of said province to include in the information two co-conspirators of the petitioner. The Court stated that the petitioner has a right to institute such mandamus proceedings because—

> "Every person accused of a crime has a positive interest in the inclusion of all his co-conspirators; and a right to demand that all of them be accorded equal treatment and be made to suffer the penalties imposed by law . . . The other co-accused have an interest in the inclusion of their two other companions in the commission of the crime, because they are jointly and severally liable with them for the indemnities that may be imposed upon them for the offense they may have committed together." [5]

It is submitted, however, that the rule should be narrowed down or limited to cases where, as in this case,[6] it clearly appears that the persons not included are co-perpetrators. Otherwise the doctrine would be a dangerous one.

Criminal Procedure—*Jeopardy requires a valid complaint or information.*

PEOPLE V. AUSTRIA,
G. R. No. L-6216, April 30, 1954.

In order that there be double jeopardy, it is essential that the former case be based upon a valid complaint or information.[1] The question as to what may be considered a valid complaint or in-

[5] See Art. 110, R.P.C.

[6] In this case, only the petitioner was charged. Two other persons were introduced as state witnesses and it became apparent from their testimony that they were co-perpetrators. Whereupon the court ordered a re-investigation of the case with a view to having them included in the information. Upon amendment of the information, they were still not included, hence the petition.

[1] "When a defendant shall have been convicted or acquitted, or the case against him dismissed or otherwise teminated without the express consent of the defendant, by a court of competent jurisdiction, upon a valid complaint or information or other formal charge sufficient in form and subtance to sustain a conviction, and after the defendant had pleaded to the charge, the conviction or acquittal of the defendant or the dismissal of the case shall be a bar to another prosecution for the offense charged, or for any attempt to commit the same or frustration thereof, or for any offense which necessarily includes or is necessarily included in the offense charged in the former complaint or information." Rule 113, sec. 9, Rules of Court.

Thus a former jeopardy requires, as one of the necessary elements thereof, a valid complaint or information. See *Kepner v. U.S.*, 195 U.S. 100, 11 Phil. 669 (1904); *Julia v. Sotto*, 2 Phil. 247 (1903); *U.S. v. Padilla*, 4 Phil. 511 (1905); *U.S. v. Parcon*, 6 Phil. 632 (1906); *Grafton v. U.S.*, 206 U.S. 333, 11 Phil. 776 (1907); *U.S. v. Macalingag*, 31 Phil. 316 (1915); *Mendoza v. Almeda-Lopez*, 64 Phil. 820 (1937); *People v. Ylagan*, 58 Phil. 830 (1933); *Esguerra v. De la Costa*, 66 Phil. 134 (1938).

formation often arises under such a provision, as it arose in the case of *People v. Austria.*[2]

In that case, the first information, for illegal possession of firearms filed in connection with R. A. No. 482, which exempts from criminal liability persons found in possession of unlicensed firearm unless the firearm is used or carried in the person of the possessor, was dismissed on the ground that it did not allege that the accused was using the unlicensed firearm or carrying it in his person at the time he was caught.[3] Upon the filing of a second information, the accused pleaded double jeopardy.

The Supreme Court did not sustain the plea on the ground that the Rules of Court require "a valid complaint or information or other formal charge sufficient in form and substance to sustain a conviction,"[4] and that, generally, one is not put in jeopardy if the information is entirely void because it charges no offense.[5] The Court, while recognizing the doctrine that a defective information, unless the defect be lack of jurisdiction over the subject matter, may be cured by the presentation of evidence without objection on the part of the defense[6] (in this case the prosecution presented evidence tending to prove that the firearm was used in killing, which was not objected

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[2] G.R. No. L-6216, April 30, 1954.

[3] See *People v. Lopez*, G.R. No. L-1603, Nov. 29, 1947.

[4] See Rule 113, sec. 9, Rules of Court, *supra.*

[5] "An examination of the record in this case will show not only a discrepancy between the complaint and the result of the evidence, but that an error was committed in charging the proper offense, even after it had been corrected or amended. This error was sustained in the appealed judgment, but as this court reviews the evidence of the offense of which the accused is charged we can not approve the denomination given the offense in question, nor can we sentence the defendant for a crime which he has not really committed. A new trial should be had upon the filing of a new complaint for estafa. The former proceedings are wholly null and void in all parts subsequent to the complaint * * *." *U.S. v. Balmori*, 1 Phil. 660 (1903).

The first complaint filed against the defendant was signed and sworn to by the chief of police of Dumaguete. As it was not the complaint of the offended party, it was not a valid complaint in accordance with law. The judgment of the court was therefore void for lack of jurisdiction over the subject matter, and the defendant was never in jeopardy. (Syl.) *People v. Manaba*, 58 Phil. 665 (1933).

The Court cited in support of the same point *U.S. v. Balmori*, I Phil. 660 (1903); *U.S. v. Montiel*, 7 Phil. 272 (1907); *People v. Margatan*, 48 Phil. 470 (1925); *People v. Mirasol.* 43 Phil. 860 (1922); *Hopt v. Utah*, 104 U.S. 631 (1882); *Murphy v. Mass.*, 177 U.S. 155 (1900).

See *U.S. v. Ball*, 163 U S. 662, cited with approval in *Sena v. Mortiga*, 204 U.S. 470, 11 Phil. 762, 768 (1907), where acquittal on a defective indictment was held a bar. See also *Mendoza v. Almeda-Lopez*, 64 Phil. 820 (1937), where the complaint did not designate the correct name of the offended party, and the complaint was dismissed. Jeopardy was held to have attached.

[6] Where a complaint is fatally defective, either in form or substance, and no objection is taken at the trial but is raised for the first time on appeal, it is not error for this court to refuse to sustain such objection when the fatal defects are supplied by competent proofs. (Syl.) *U.S. vs. Estraña*, 16 Phil. 520 (1910), citing *Sena v. Mortiga*, 204 U.S. 470, 11 Phil. 762.

to), nevertheless declined to apply the same on the ground that the information in the present case was not merely defective but void and legally non-existent. The Court drew a parallel between this holding and the ruling that when the offense proved is greater than the offense charged, the accused may be convicted of the latter but not of the former,[7] and the ruling that qualifying circumstances must be alleged, otherwise they are only considered as generic aggravating circumstances if proved;[8] all of which, according to the Court, are based on the philosophy that the accused cannot be convicted of a charge of which he has not been informed.

Chief Justice Paras dissented from the majority opinion, arguing that the information was cured by the evidence, and that, therefore, the case of *U. S. v. Extraña*[9] should have been followed. This view was concurred in by Justices Montemayor and Labrador, the latter stating that the majority opinion is too technical to subserve the ends of justice.

Election Law—*Appreciation of ballots in judicial election contests.*

CARAECLE v. COURT OF APPEALS and DEL CASTILLO
DEL CASTILLO v. COURT OF APPEALS and CARAECLE
G. R. Nos. L-6589 and L-6655, January 25, 1954

The ballots cast are said to be indicative of the will of the voters.[1] The presumption, therefore, is in favor of the validity of the ballots, and when contested, those who are to pass upon them are warned that unless clear and sufficient reasons justify their rejection, the ballots should be admitted.[2] This is so, because in elections the will of the electorate should be respected if it is possible to effectuate it.[3] The Revised Election Code prescribes twenty-one

Where the complaint was directed amended to conform with the evidence, it was held that there was no double jeopardy. *People v. Mirasol*, 43 Phil. 860 (1922).

Where the complaint was fatally defective, and proof was presented without objection, the defect was cured. *U.S. v. Destrito*, 23 Phil. 28 (1912).

Any defect in the accusation other than that lack of jurisdiction over the subject matter may be cured by good and sufficient evidence introduced by the prosecution, and admitted by the trial court, without any objection on the part of the defense, and the accused may be legally convicted of the crime or offense intended to be charged and so established by the evidence. *People v. Abad Santos, et al.*, 76 Phil. 744 (1946).

Objections to the complaint based upon insufficient statement of the facts constituting the offense will not be considered by the Supreme Court when they are not presented to the court below. (Syl.) *U.S. v. Lampano*, 13 Phil. 409 (1908).

[7] *U.S. v. de Guzman*, 8 Phil. 21 (1907).

[8] *U.S. v. Campo*, 23 Phil. 368 (1912).

[9] 16 Phil. 520 (1910).

[1] *Mandac v. Samonte*, 49 Phil. 284, 301 (1926).

[2] *Sarenas v. Generoso*, 61 Phil. 549, 553 (1935).

[3] *Yra v. Abaño*, 52 Phil. 380, 385 (1928).

rules to be observed in the reading and appreciation of ballots.[4] These rules are mostly restatements of doctrines enunciated by the Supreme Court in several election cases.

The instant interrelated cases gave the Supreme Court another occasion to clarify and expand the existing *doctrinnaire* and statutory rules on the appreciation of ballots. This was a protest of one Felix del Castillo against the election of his rival candidate, Eligio Caraecle, to the office of mayor of the municipality of Malangas, province of Zamboanga, in the general elections held on November 13, 1951. The trial court declared the protestant elected mayor; the Court of Appeals affirmed the decision with certain modifications. Unsatisfied, the opposing parties brought the case to the Supreme Court by certiorari for review. Several ballots were disputed, for and against both petitioners.[5]

The Supreme Court had occasion to apply again the *idem sonans* rule on one of the ballots in question. The law provides that "a name or surname incorrectly written which, when read, has a sound equal or similar to that of the real name or surname of a candidate shall be counted in his favor."[6] As explained by the Court itself in the early case of *Mandac v. Samonte:*

> "The *idem sonans* rule does not require exactitude nor perfection in the spelling of names; it means only that if the name as spelled in the ballot, although different from its orthographically correct spelling, sounds practically the same when pronounced, according to our methods of pronounciation, it is a sufficient designation of the individual to whom it refers, and the error of the writer must not be taken into account. The question whether or not a name sounds the same as another is not one of spelling but of pronunciation."[7]

In the present case, the name written on the line for mayor which read "Cebarle" was counted in favor of candidate Caraecle, since the former, when read orally, has the same sound as the latter. The *idem sonans* rule may be considered as one of the enlightened provisions of our law on elections. On several occasions in the past,[8]

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[4] Sec. 149, Rep. Act No. 180 (June 21, 1947) as amended by Rep. Act No. 599 (March 28, 1951).

[5] For purposes of this discussion, the specific number of votes involved, the serial numbers of the disputed ballots, the particular precincts where said ballots were cast, as well as the definite plurality adjudicated in favor of del Castillo who was finally declared the elected mayor in this case are deemed immaterial.

[6] Sec. 149, par. 2, Rep. Act No. 180.

[7] 49 Phil. 284, 300-1 (1926).

[8] In the following illustrative cases, the misspelled names written in the ballots involved were considered *idem sonans* to the true names of the respective candidates:

Names written as "Galicano Apacible," "G. Alacible," and "Calicano Pasible" were, according to the Supreme Court, similar in sound to Galicano Afable, saying further that the surname Afable came from the same root as "Apacible." *Carandang v. Afable,* 53 Phil. 110 (1929).

Ballots bearing "Aslaben Ahanla," "Sitiban Jaladu," and "Baslian Jalandoni" were counted in favor of protestee in *Ditching v. Jalandoni,* 52 Phil. 796 (1929).

the Supreme Court, as a general rule, adhered to a liberal construction of the ballots cast, because, in the words of the highest tribunal itself, "the intendments should be in favor of a reading and construction which will render the ballot effective, rather than in favor of a conclusion which will, on some technical grounds, render it ineffective." [9]

Another ballot involved in this case showed the following words or names: "Governor Adaza" on the fifth space for senators; the word "Mayor" on the third space for councilors; and the name "F. del Castillo" on the fourth space for councilors. The situation is not specifically covered by any of the rules set forth by the Revised Election Code, but this did not prevent the Court, as it had done in earlier cases,[10] from holding that—

> "* * * There being no person voted for mayor on the space for councilors and the name 'F. del Castillo' on the fourth space for councilors written by the voter sufficiently indicate his intention to vote in favor of F. del Castillo for mayor of the municipality. * * *"

Such mistakes in names as "Palucisco Valon," "Franco Palon," "Francu Palon," "Francisco Balun," and "Francisco Banglon" should be admitted in the ballots under the *idem sonans* rule. *Balon v. Moreno,* 57 Phil. 60 (1932).

A ballot for "A. Ceillo" was admitted in favor of candidate Aurelio Cecillo; another ballot marked "A. Vilio" was counted for Aurelio Cecilio; and the names "Juse Tomaros" and "Cacinto Tomacruz" were held *idem sonans* to Jacinto Tomacruz. *Cecilio v. Tomacruz,* 62 Phil. 689 (1935); and

"Binti (or) Bintu Kris (or) Kais" was held to have a similar sound as Benito Cruz. *Illescas v. Court of Appeals,* G. R. No. L-6853, December 29, 1953.

The following were, however, held to be of dissimilar sounds:

"Jusi Atinza" could not be taken for Felix Atienza. *Yalung v. Atienza,* 52 Phil. 781 (1928):

"D. Midosa" did not stand for Godofredo Mendoza in *Mendoza v. Mendiola,* 53 Phil. 267 (1929);

Nor "Sariko Abs" for candidate Ciriaco Alvarez. *Villaviray v. Alvarez,* 61 Phil. 42 (1934);

"Tome" and "Toma" are not *idem sonans* to the contraction of the surname Tomacruz, so as to permit ballots voted therefor to be counted for candidate Tomacruz. *Cecilio v. Tomacruz,* 62 Phil. 689 (1935); and

"Hayier," "Haber," "Jvier," and "Vgim" are not similar in sound to Villavert, the candidate's surname. *Villavert v. Lim,* 62 Phil. 178 (1935).

[9] *Mandac v. Samonte, supra,* note 7.

[10] See *Cecilio v. Tomacruz,* 62 Phil. 689 (1935), where a ballot was counted for a candidate for governor, notwithstanding the fact that his name was written in the line for represenatative, since the ballot indicated by arrows the desire of the voter to cast a vote for the candidate whose name had been written by him.

Although the name of a candidate was not written on the line corresponding to the office for which he was a candidate, as the name of the candidate was prefixed with the office for which he was a candidate and for which the elector voted, the ballot was held valid in the case of *Coscolluela v. Gaston,* 63 Phil. 41 (1936).

But see: *Villaviray v. Alvarez,* 61 Phil. 42 (1934), where the Supreme Court held that a ballot was correctly rejected because the name of the candidate was placed on the line intended for votes for members of the provincial board and not on the line for municipal president.

The Supreme Court also came across several ballots that were marked. Experience has shown that it is difficult to lay down any absolute rule as to what constitutes cause for rejecting a ballot as marked.[11] Each case must be decided according to the particular circumstances of the case.[12] Courts are prone to exercise great care in rejecting ballots on this ground. For a ballot to be considered marked, in the sense necessary to invalidate it, it must appear that the voter has designedly placed some superfluous sign or mark on the ballot which serves to identify it thereafter. No ballot should be discarded as a marked ballot unless its character as such is unmistakable.[13]

One of the ballots in the case under discussion showed that while the names of the other candidates voted for were written in Roman characters, that of Eligio Caraecle was in Arabic. In rejecting the ballot as marked, the Court ruled that there was no explanation or reason for the voter to write in Arabic the name of the candidate and to write in Roman characters the names of the other candidates. The character of the ballot was thus "unmistakable."[14] Another ballot was rejected because the writing of the letters "MBDC" on the third space for senators was clearly for identification purposes.

The last set of contested ballots carried impertinent and irrelevant expressions and terms. The first was marked "Daguit" (meaning "to swoop"); the second had on the second space for councilors the words "wala na cag walo rine" (meaning "you have lost eight here" or "you do not have eight here"); in the third, the words "Datu Bulac" (meaning "blind datu" or "Datu, the blind") were written on the first space for councilors; in the fourth, the words "Castillo wala mapatay" ("Castillo was not killed") appeared;

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[11] *Sarenas v. Generoso,* 61 Phil. 549 (1935). Even Sec. 146 of the Revised Election Code which treats of the disposition of marked ballots by the board of election inspectors does not define just what marked ballots are. At any rate, paragraph 18 of Sec. 149 which provides that "Unless it should clearly appear that they have been deliberately put by the voter to serve as identificatoin marks, commas, dots, lines, or hyphens between the name and surname of a candidate, or in other parts of the ballot, traces of the letters 't,' 'j,' and other similar ones, the first letters or syllables of names which the voter does not continue, the use of two or more kinds of writing, and unintentional or accidental flourishes, strokes, or strains, shall be considered innocent and shall not invalidate the ballot," indicates to some extent the nature of a marked ballot.

[12] *Cacho v. Abad,* 62 Phil. 564, 566 (1935). Thus, no ballot should be considered to be marked because of the fact that it contains flourishes, touches, or marks innocently or unconsciously placed by the voter upon the ballot in the course of preparaing the same. *Manalo v. Sevilla,* 24 Phil. 609 (1913); *Lucero v. De Guzman,* 45 Phil. 852 (1925).

[13] *Valenzuela v. Carlos,* 42 Phil. 428 (1921).

[14] In *Yalung v. Atienza,* 52 Phil. 781 (1929), it was held that when the name of one candidate was written in capital letters, whereas the other names were in ordinary writing, this meant nothing else than that the voter intended to identify his ballot, and therefore, the ballot was not accepted.

in the fifth, the voter wrote "Datu bilat" ("bilat" meaning in the Visayan dialect the genitals of a woman); and in the sixth, the words "And Carlos Virgo 17 Lt Inf" were written on the eight space for senators.

These votes were considered valid by the Court of Appeals by invoking the rule laid down in the case of *Cailles v. Gomez.*[15] But that rule, according to the Supreme Court, has long been abandoned in subsequent cases.[16] Accordingly, the rule that the writing of impertinent expressions in the ballot invalidates it was reiterated by the Supreme Court.

Election Law—*Sufficiency of cause of action in municipal election contests by quo warranto on the ground of ineligibility of contestee.*

Questions of law arising from Court of First Instance decisions in cases involving contests over elective municipal offices appealable to the Supreme Court.

CALANO V. CRUZ
G. R. No. L-6404, January 12, 1954

Under the Revised Election Code,[1] there are two kinds of election contests: first, those which pertain to the eligibility of candidates; and, second, those which pertain to the casting and counting

[15] "(k) Writing in a particular space the name of a person who is not a candidate for said position, or failing to fill blank spaces, will not be considered as distinguishing or identification marks. Neither is it considered as distinguishing or identification mark if upon the ballot appear the name of a woman, names with pet names, nicknames, names of councillors with the same surnames, or different surnames with the same name, names with surnames of Chinese origin, names of priests, or contemptuous or exclamatory names." 42 Phil. 496, 534 (1921).

[16] Thus, a ballot upon which the voter appeared to have intentionally written an irrelevant or impertinent phrase was properly rejected as marked ballot in *Lucero v. de Guzman*, 45 Phil. 852, 875 (1924). In that case, the following phrases were written on the ballots involved: "curang ni Agustin," "bizcochos," and "no more, no more, no more."

In *Fausto v. Villarta*, 53 Phil. 166, 168 (1929), the ballot bearing the irrelevant expression "para cocinero" was considered a marked ballot.

Similarly, a ballot having the words "pari pari" (fake priest) was rejected as bearing distinguishing marks which were unnecessary. *Villavert v. Lim*, 62 Phil. 178, 194-5 (1935).

And in the case of *Cecilio v. Tomacruz*, 62 Phil. 689, 710 (1935), a ballot was rejected as marked for having the indecent expression "mautog."

It may be noted that none of the rules set forth in Sec. 149 of the Revised Election Code squarely applies to these situations.

[1] Rep. Act No. 180, June 21, 1947.

of the ballots.[2] Where the eligibility[3] of the candidate-elect is contested, the attack on his incumbency is by *quo warranto*.[4] The Code provides:

> "*Procedure against an ineligible person.*—When a person who is not eligible is elected to a provincial or municipal office, his right to the office may be contested by any registered candidate for the same office before the Court of First Instance of the province, within one week after the proclamation of his election, by filing a petition for *quo warranto*. The case shall be conducted in accordance with the usual procedure and shall be decided within thirty days from the filing of the complaint. A copy of the decision shall be furnished the Commission on Elections."[5]

Petitioner-appellant Pedro Calano, defeated candidate in the 1951 elections in Orion, Bataan, filed his first complaint for *quo warranto* contesting the election of Pedro Cruz on the ground that Cruz was not eligible for the office of municipal councilor. Calano asked, among other things, that, after annulling the proclamation of the municipal board of convassers to the effect that Cruz was councilor-elect, he instead be declared the elected councilor. The lower court dismissed the petition, upon Cruz's motion, on the grounds that the complaint was filed out of the reglamentary one-week period as fixed by the law and that the petitioner, as contended by repondent Cruz,

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[2] Secs. 173 and 174, respectively.

[3] The case of *Topacio v. Paredes*, 23 Phil. 238, 248 (1912), defines the word "ineligible" as follows: "Legally or otherwise disqualified for office. Not eligible. Disqualified to be elected to an office; also disqualified to hold an office, if elected or appointed to it." The Revised Election Code, in its various sections, prescribes the grounds for disqualifications and grounds for ineligibility of electoral candidates. See in particular Art. II, Secs. 26-38.

[4] That the ineligibility of a candidate cannot be tried in an election conest was the holding of the Supreme Court in the case of *De la Rosa v. Yonson*, 52 Phil. 446 (1928). At p. 449 the Court said: "It is true that Courts of First Instance have jurisdiction to consider an election contest * * *, and also to entertain a complaint in the nature of a *quo warranto* * * *; but it is likewise true that the two procedures are very different and are governed by different legal provisions; and that the court's jurisdiction cannot be exercised jointly and in the same proceding." To the same effect, see *Yra v. Abaño*, 52 Phil. 380 (1928) and *Avellanosa v. Veroy*, 53 Phil. 611 (1929).

[5] Sec. 173. This election contest by *quo warranto* should be distinguished from the *quo warranto* proceedings under Rule 68 of the Rules of Court. The distinction is summarized in the case of *Nuval v. Guray*, 52 Phil. 645, 654 (1928): "In *quo warranto* proceedings referring to offices filled by election, what is to be determined is the eligibility of the candidate elect, while in *quo warranto* proceedings referring to offices filled by appointment, what is determined is the legality of the appointment. In the first case, when the person elected is ineligible, the court cannot declare that the candidate occupying the second place has been elected, even if he were eligible, since the law only authorizes a declaration of election in favor of the person who has obtained a plurality of votes, and has presented his certificate of candidacy. In the second case, the court determines who has been legally appointed and can and ought to declare who is entitled to occupy the office."

had no legal capacity to sue. Upon appeal, the Supreme Court remanded the case to the court *a quo,* holding that the petition was filed within the period fixed. The Court made the observation that the complaint or petition of Calano was somewhat defective for failure to state a sufficient cause of action.[6]

Upon return of the case to the lower court, the respondent, presumably relying upon the observation of the Supreme Court as abovementioned, moved again for the dismissal of the case, claiming that the petition failed to state a sufficient cause of action. The trial court sustained this second motion to dismiss. Petitioner Calano, therefore, appealed to the Supreme Court.

Cruz contended that the appeal should not have been given due course by the appellate court because under Section 178 of the Revised Election Code there is no appeal from a decision of a Court of First Instance in protests against the eligibility or election of a municipal councilor. Said section provides that—

> "From any final decision rendered by the Court of First Instance in protests against the eligibility or the election of provincial governors, members of the provincial board, city councilors, and mayors, the aggrieved party may appeal to the Court of Appeals or to the Supreme Court, as the case may be, within five days after being notified of the decision, for its revision, correction, annulment or confirmation, and the appeal shall proceed as in a criminal case. Such appeal shall be decided within three months after the filing of the case in the office of the clerk of the court to which the appeal has been taken."

The Supreme Court, through Justice Montemayor, dismissed this contention, and it reiterated the rule enunciated in the case of *Marquez v. Prodigalidad.*[7] Said the Court:

> "In the past we had occasion to rule upon a similar point of law. * * * we held that Section 178 * * * limiting appeals from decisions of Courts of First Instance in election contests over the offices of Provincial Governor, Members of the Provincial Board, City

[6] G. R. No. L-5514, May 7, 1952. Further elaborating on its observation that the petition did not state a sufficient cause of action, the Supreme Court said that paragraphs 3 and 8 of the petition which read thus—

"3. *Que el recurrente era candidato a concejal del municipio de Orion, Bataan con el Certificado de candidatura debidamente presentado, y registrado asi como tambien fue votado y elegido para dicho cargo, en la eleccion del 13 de Noviembre de 1951.*

"8. *Que el recurrente tenia y tiene derecho a ocupar el cargo de concejal de Orion, Bataan, si no habia sido proclamado electo concejal de Orion, Bataan, al aqui recurrido.*"

were conclusions of law and not statement of facts.

[7] 46 O. G. Supp. No. 11, 264 (1949). Justice Pablo in this case said: "*Creemos, por tanto, que el articulo 178 del Codigo Electoral Revisado, al disponer expresamente que son apelables las decisiones de los Juzgados de Primera Instancia 'sobre protestas contra la eligibilidad ó la elección de gobernadores provinciales, vocales de*

> Councilors and City Mayors, did not intend to prohibit or prevent the appeal to the Supreme Court in protests involving purely questions of law, that is to say, that protests involving other offices such as municipal councilor may be appealed provided that only legal questions are involved in the appeal.* * *"

The question of law which the Court considered appealable was that raised by appellant Calano to the effect that the lower court erred in declaring that the complaint failed to state a sufficient cause of action. The Supreme Court said that the observation it made in disposing of the first appeal was "neither meant nor intended as a rule or doctrine," as to serve the basis for the repondent's second motion to dismiss and the consequent action of the lower court in granting the dismissal. In the words of the Supreme Court:

> "* * * We were merely considering the main prayer contained in appellant's petition, namely, that he be declared councilor-elect in the place of the respondent-appellee. In other words, we only observed that petitioner could not properly ask for his proclamation as councilor-elect without alleging and stating not mere conclusions of law but facts showing that he had the right and was entitled to the granting of his main prayer."[8]

The precise question before the Court therefore was: In a petition for *quo warranto* on the ground that contestee is ineligible, does Section 173 require that the contestant claim that he is entitled to the office? The Supreme Court answered in the negative, be-

la junta provincial, concejales de ciudad y alcaldes,' no ha tenido el propósito de vedar en otras protestas la apelacion al Tribunal Supremo sobre cuestiones puramente de derecho, particularmente sobre cuestiones de jurisdicción, ó de constitucionalidad de alguna ley, ordenanza, tratado u orden ejecutiva." (At p. 269).

Under the Constitution (Art. VII, Sec. 2, par. 5), the Supreme Court has exclusive appellate jurisdiction when only errors or questions of law are involved. See also Sec. 17, Rep. Act No. 296 (June 17, 1948).

It would seem, therefore, that under the *Marquez* and *Calano* cases, the previous ruling of the Supreme Court in *Bustos v. Moir*, 35 Phil. 415, 418 (1916) and in *De la Cruz v. Revilla*, 40 Phil. 234, 236 (1919) to the effect that the Supreme Court has no authority under the Election Law to touch in any way the merits of an election contest with respect to municipal offices, because the judgment thereon of the Court of First Instance is final and conclusive and that therefore it is of no consequence to the Supreme Court how wrong it may think the decision of the lower court to be in such case, is no longer controlling.

[8] It is submitted that the respondent should not have been blamed entirely in supposing that the observation was not an *obiter dictum* of the Court. The tribunal's observation was uncalled for, since the ground of respondent's motion to dismiss in the earlier case was, among other things, the petitioner's lack of legal capacity to sue which did not refer to the failure of contestant Calano to state a sufficient cause of action, but rather, according to the Court itself, "to minority, insanity, coverture, lack of juridical personality, or any other disqualification of a party." In other words, the remark of the Court in the first case, misleading as it was, was upon a point not necessarily involved in the determination of the cause.

cause under the law, *any* registered candidate for the same office may contest the right of the elected candidate to the office by filing a petition for *quo warranto*.[9] According to the Court:

> "* * * To legalize the contest, this section * * * does not require that the contestant prove that he is entitled to the office. In the case of *Llamoso v. Ferrer*,[10] * * * wherein petitioner Llamoso who claimed to have received the next highest number of votes for the post of Mayor, contested the right of respondent Ferrer to the office for which he was proclaimed elected on the ground of ineligibility, we held that Section 173 * * * while providing that any registered candidate may contest the right of one elected to any provincial or municipal office on the ground of ineligibility, it does not provide that if the contestee is later declared ineligible, the contestant will be proclaimed elected. * * * we practically declared that under Section 173, any registered candidate may file a petition for *quo warranto* on the ground of ineligibility, and that would constitute a sufficient cause of action. * * *"[11]

The earlier cases decided by the Supreme Court give added support to this conclusion. In the case of *Topacio v. Paredes*,[12] Justice Trent who penned the decision, said that the effect of a decision that a candidate is not entitled to the office because of fraud or irregularities in the election, an apt subject of an ordinary judicial election contest, is quite different from that produced by declaring a person ineligible to hold such an office upon an action for *quo warranto*. In actions for *quo warranto*, according to Justice Trent—

> "* * * no question as to the correctness of the returns or the manner of casting and counting the ballots is before the deciding power, and *generally the only result can be that the election fails entirely.* * * * There is not, strictly speaking, a contest, as *the wreath of victory cannot be transferred from an ineligible candidate to any other candidate when the sole question is the eligibility of the one receiving a plurality of the legally cast ballots.* * * * The question is confined to the personal character and circumstances of a single individual." (Emphasis supplied.)

Justice Villareal, ruling on the motion for reconsideration of the decision of the Supreme Court in the case of *Nuval v. Guray*,[13] declared that in *quo warranto* proceedings referring to offices filled by election, "when the person elected is ineligible, the court cannot declare that the candidate occupying the second place has been elected, even if he were eligible, since the law only authorizes a declaration of election in favor of the person who has obtained a plurality of votes, and has presented his certificate of candidacy."

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[9] See note 5.

[10] 47 O. G. No. 2, 727 (1949).

[11] Accordingly, the Supreme Court disposed of the appeal by reversing the order of dismissal and remanding the case to the trial court for further proceedings.

[12] 23 Phil. 238, 255 (1912).

[13] 52 Phil. 645, 654 (1928).

Similarly, in the case of *Caesar v. Garrido,*[14] the Supreme Court, through Justice Street, stated that "if the person who has received a majority or plurality of votes in any election is found to be ineligible, the result is that the office is declared vacant * * *." Logically, therefore, the sufficiency of contestant's cause of action in a *quo warranto* proceeding on the ground of contestee's ineligibility is not impaired by his failure to allege and prove that he is entitled to the office.

Evidence—*Declaration partakes of the nature of ante-mortem if at the time it was taken the declarant was in a very serious condition.*

PEOPLE V. A. PIAMONTE, ET AL.
G. R. No. L-5775, January 28, 1954

In all criminal prosecutions, the accused shall enjoy the right to meet the witnesses face to face.[1] This is to enable the accused to cross-examine the witnesses against him in order to test their recollection and veracity.[2] To implement this constitutional provision, the Rules of Court provides that "the testimony of witnesses shall be given orally in open court and under oath or affirmation"[3] and that "all witnesses are subject to cross-examination by the adverse party."[4] Hence, courts will not admit the testimony of a witness as to what he has heard other persons say about the facts in dispute,[5] because it would constitute hearsay evidence [6] and would violate the foregoing provisions.[7]

Dying declarations are one of the exceptions to the hearsay rule.[8] According to former Chief Justice Moran, a dying declaration is that made by a person at the point of death, concerning the case and circumstances of the injury from which he thereafter dies.[9] In order that it may be admitted as evidence, the declaration must be made by a dying person under the consciousness of an impending death and only in a criminal case wherein his death is the subject of inquiry, with regard to the cause and surrounding circumstances of such

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[14] 53 Phil. 97, 103 (1929).

[1] Sec. 1 (17), Article III, Constitution.

[2] *Dowdell v. U.S.*, 221 U.S. 325 (1911); *U.S. v. Javier*, 37 Phil. 449 (1918).

[3] Sec. 77, Rule 123.

[4] Sec. 87, Rule 123, Rules of Court.

[5] *Ysmael v. Guanzon*, 2 Phil. 234 (1903); *Pastor v. Gaspar*, 2 Phil. 592 (1903); *Richmond v. Anchelo*, 4 Phil. 596 (1905); *Gonzalez v. Palomo Tan Guinlay*, 12 Phil. 617 (1909); *Aldecoa and Co. v. Warner, Barnes and Co.*, 30 Phil. 153 (1915).

[6] Sec. 27, Rule 123, Rules of Court, provides: "A witness can testify to those facts only which he knows of his own knowledge; that is, which is derived from his own perception, except as otherwise provided."

[7] MORAN, III COMMENTS ON THE RULES OF COURT (1952 Ed.), 298.

[8] *Ibid.*, at 311.

[9] *Ibid.*, at 310.

death.[10] From the above provisions one of the requisites is that the statement must be made under a consciousness of an impending death.[11] It must appear clearly that the statement offered in evidence has been made under a full realization that the solemn hour of death has come.[12]

The somewhat strict rules for the admission of a statement as a dying declaration are justifiable, as this class of evidence forms an exception to the hearsay rule; as there can be no cross-examination of the declarant; as the accused cannot meet his accuser face to face; and as there must of necessity exist a greater danger of abuse.[13] And being pure hearsay and open to all the objections which may be urged against that class of testimony, they must be received with caution, and only where they satisfy certain well-established and universally recognized conditions.[14]

In ascertaining the consciousness of approaching death, recourse should naturally be had to all the attending circumstances.[15] He need not state expressly that he thinks or believes his end is near, or that he is at peace with his God, while making the statement, if the nature of his wounds or his general physical condition and his actions and language are such that the court is reasonably satisfied that he realized that he was about to die and had abandoned all hope of recovery.[16] It is enough if, from the circumstances, it can be inferred with certainty that such must have been his state of mind.[17] What is essential to admissibility of a dying declaration is not the occurrence of death within a brief time after the making of the statement, but the presence in the declarant of such a state of feeling that he believes he will die as a result of his condition.[18]

In the instant case, *People v. Piamonte, et al.*[19], defendants were charged with the crime of robbery with homicide. It was proved

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[10] Sec. 28, Rule 123, Rules of Court.

[11] *U.S. v. Virrey*, 37 Phil. 618 (1918); *People v. Muñoz*, G.R. No. L-3396, April 18, 1951.

[12] WIGMORE ON EVIDENCE, Vol. I, 232, (1940), citing Justice Ray in the case of *Morgan v. State*, 31 Ind. 199 (1869).

[13] *Ibid.*

[14] JONES ON EVIDENCE, Vol. I, 607-608 (1938).

[15] WIGMORE ON EVIDENCE, Vol. V, 235 (1940), UNDERHILL'S CRIMINAL EVIDENCE, (1935 Ed.) 393-394.

[16] UNDERHILL'S CRIMINAL EVIDENCE (1935 Ed.), 394-395.

[17] *People v. Chan Lin Wat*, 50 Phil. 182 (1927); *People v. Ancasan*, 53 Phil. 779 (1929); *People v. Silang Cruz*, 53 Phil. 635 (1929); *People v. Serrano*, 58 Phil. 669 (1933); *People v. Muñoz*, G.R. No. L-3396, April 18, 1951. Where the dying declaration of the deceased was made on the day of his death while suffering from seven serious wounds, two of which were fatal, and the intestines were protruding from one of them, the declaration was admissible though the deceased did not directly or indirectly express any fear of impending death. *People v. Abedosa*, 53 Phil. 788 (1929).

See also the case of *People v. Tacad and Tabaco*, 72 Phil. 157 (1941).

[18] *Cruz v. People*, 71 Phil. 350 (1941).

[19] G.R.No. L-5775, January 28, 1954.

during the trial that in the course of the robbery, the victim was seriously wounded, and was taken to the hospital for treatment. A policeman found the wounded victim groaning due to the serious wounds he had received. Nevertheless, the policeman was able to get some statements from him regarding the robbery which the former transcribed on a typewriter upon his return to his office. The next morning, the Chief of Police and the Justice of the Peace went to the hospital to verify the correctness of the statements attributed to the victim. When they arrived, they found him restless, his face was pale, he was breathing hard, and his body was bandaged. The attending nurse informed the two officials that the medicine being administered to the party was to prolong his life.[20] The Justice of the Peace read the typewritten statements to the victim and after being sure that he understood them he was asked to ratify them. The patient did so under oath.[21]

According to the Court, there was no doubt that said declaration partook of the nature of an *ante mortem* declaration because it had been established that at the time it was taken the victim was in a very serious condition and would have succumbed if it were not for the opportune medical treatment extended him.

The decision in this case is but an affirmation of precedents holding that the seriousness of the wound and the immediately superveing death are evidence of the declarant's state of mind and of his belief in an impending death.[22] It should be distinguished, however, from the case of *People v. Alviar* [23] where the declaration was held inadmissible on the ground that it does not appear that the hope of recovery was extinct. The admissibility of the declaration depends upon the state of mind of the deceased when the declaration was made, and not upon the length of time that elapsed between the infliction of the wound and declarant's death.[24] It is but proper that

[20] A physician may testify to declarant's physical condition. UNDERHILL'S CRIMINAL EVIDENCE, (1935 Ed.), 394.

[21] That an oath may be administered, or that an oath may be made to a justice of the peace, is immaterial upon the question of admitting the statement in evidence. Such circumstances may or may not contribute to the probative weight of the declaration, but in no wise affect its legal competency. *U.S. v. Virrey*, 37 Phil. 618 (1918).

[22] *People v. Aquino*, 46 O.G., No. 8, 3728 (1948), citing *People v. Ancasan*, 53 Phil. 779 (1929); *People v. Abedosa*, 53 Phil. 788 (1929); UNDERHILL'S CRIMINAL EVIDENCE 396 (1935).

[23] 56 Phil. 98 (1931). "It does not appear from said declaration, nor from other proven facts, that the declarant believed at the time that the wounds he had received would result in his death. It merely appears that he was weak, probably a result of loss of blood; and but for the complications which ensued more than two weeks later, the deceased might possibly have recovered and at least he may well have entertained hopes of recovery."

[24] *People v. Lara*, 54 Phil. 96 (1929). When the declaration was made, the deceased was weak, complained of the pain which he was suffering from the wound, although it was admitted the declarant lived for nearly six weeks after the statement was made.

the court should be liberal in the admission of dying declaration [25] in order to prevent the failure of justice.[26] For it often happens that there is no other equally satisfactory proof of the crime.[27] Anyway, its credibility and weight are to be determined by the same rules that are used in testing the weight and credibility of the testimony of a living witness.[28]

Evidence—*Confession of conspirator implicating co-conspirator.*

PEOPLE V. LUMAHANG, ET AL.
G. R. No. L-6357, May 7, 1954

There is no doubt that the act or declaration of a conspirator relating to the conspiracy and during its existence may be given in evidence against the co-conspirator after the conspiracy is shown by evidence other than such act or declaration.[1] A conspiracy exists when two or more persons come to an agreement concerning the commission of a felony and decide to commit it.[2] To show conspiracy direct proof is not essential,[3] and it need not be shown that the parties actually came together and agreed in express terms to enter into and pursue a common design.[4]

Thus, when conspiracy is proved, by evidence other than the declaration or act itself, the said act or declaration relating to the common object and made during the existence of the conspiracy, is admissible in evidence against a co-conspirator.[5] It may be admitted to affect the proof against co-conspirators, on the same conditions as his acts when used to create their legal liability.[6] But it should be received with caution,[7] being a mere exception to the general rule contained in the maxim *"res inter alios acta alteri nocere non debet."*[8]

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[25] However care should be taken to be sure that the declarant should not have been swayed by a spirit of vindictive revenge or heated passion or by a desire to shield himself or others in making *ante mortem* statements. See *U.S. v. Singson,* 41 Phil. 53 (1920); *People v. Almendralejo,* 48 Phil. 268 (1925).

[26] *U.S. v. Virrey,* 37 Phil. 618 (1918).

[27] MORAN, III COMMENTS ON THE RULES OF COURT (1952 Ed.), 310.

[28] *Ibid.* at 321.

[1] Sec. 12, Rule 123, Rules of Court.

[2] Article 8, Revised Penal Code.

[3] *People v. Ora and Santos,* 44 O.G. No. 5, 1515 (1947); *People v. Carbonel et al.,* 48 Phil. 868 (1926): *People v. Unciano,* G.R. No. L-6643, April 29, 1954; *People v. Calucer and Cadare,* G.R. No. L-6460, May 7, 1954.

[4] UNDERHILL'S CRIMINAL EVIDENCE, 795 (1935).

[5] MORAN, III COMMENTS ON THE RULES OF COURT (1952 Ed.), 90.

[6] WIGMORE ON EVIDENCE, Vol. IV, 127, (1940).

[7] *People v. Badilla,* 48 Phil. 718 (1926); *U.S. v. Ocampo,* 4 Phil. 400 (1905); *U.S. v. Soriano,* 25 Phil. 624 (1913); *U.S. v. Remegio,* 37 Phil. 599 (1918); *People v. Sarmiento and Jumarang,* 69 Phil. 740 (1940); *People v. Marcos,* 70 Phil. 408 (1940).

[8] Sec. 10, Rule 123, Rules of Court provides: "The rights of a party cannot be prejudiced by the act, declaration or omission of another, and proceedings against one cannot affect another, except as hereinafter provided."

May a confession of a conspirator, therefore, affect his co-conspirator? May a declaration of a conspirator made after the conspiracy has terminated affect a co-conspirator? Notwithstanding decisions to the contrary,[9] the instant case of *People v. Lumahang* [10] provides an answer in the affirmative.

In the *Lumahang* case the Court had occasion to deal with the effect of a conspirator's confession [11] on his co-conspirator.

The charge was murder. The evidence presented by the prosecution showed and it was not denied by the appellant, that on February 26, 1953, at about eight o'clock in the evening, while Victoriano Vicente and his son were walking home together, they were suddenly accosted by Arcadio Lumahang and his sons, who had been lying in wait for them. As a result of the sudden attack Victoriano Vicente was killed.

Three witnesses testified to the presence of Genaro, one of the sons of Arcadio Lumahang, at the scene of the crime and his participation therein. Genaro set up alibi consisting of his own testimony and that of his wife. Convicted in the lower court, Genaro Lumahang appealed.

In dismissing appellant's claim of non-participation, the Supreme Court stated that there was no evidence corroborating Genaro's denial of his participation, that of his wife having no value at all.

Regarding the confession made by Genaro's kin implicating him, the Court stated:

> It is important to note that his father and his brother who made confessions stated therein that Genaro took part in the assault. While confessions of a co-conspirator are not ordinarily admissible as evidence against a co-conspirator,[12] the fact that they implicated the latter and were made soon after the commission of the crime, is circumstantial to show the probability of their co-conspirator having actually participated

[9] *People v. Badilla*, 48 Phil. 718 (1926); *People v. Napkil*, 52 Phil. 985 (1926). A confession made before the formation of the conspiracy or after it had been brought to an end, constitutes evidence only against the one who made it .

Sec. 14, Rule 123, Rules of Court, provides: "The declaration of an accused expressly acknowledging the truth of his guilt as to the offense charged, may be given in evidence against him."

[10] G.R. No. L-6357, May 7, 1954.

[11] A confession may be defined as an express acknowledgment by the accused in a criminal case, of the truth of his guilt as to the crime charged or of some essential thereof. MORAN, *op. cit.*, at 97, citing *U.S. v. Team*, 23 Phil. 64 (1912); UNDERHILL'S CRIMINAL EVIDENCE, 507 (1935).

[12] Because of the rule expressed in the maxim *"res inter alios acta alteri nocere non debet"* which means that a transaction between two parties ought not to operate to the prejudice of a third person. See MORAN, III COMMENTS ON THE RULES OF COURT (1952 Ed.), 84.

therein.[13] Especially is this so in the case at bar, where the co-conspirator implicated is a son or a brother. Besides, if appellant had not actually participated in the assault, he should have called upon his brothers to testify in his favor, which he did not."

It is settled that an extra-judicial confession made by a conspirator implicating a co-conspirator after the termination of the conspiracy is not admissible because it violates hearsay rule[14] and the rule embodied in the maxim *"res inter alios acta alteri nocere non debet"*.[15] The same is not admissible against a conspirator,[16] but only against the declarant himself.[17] It may, however, be used for purposes of comparison.[18]

In the instant case, it appears that the confessions were made after the termination of the conspiracy. Hence, it is against Sec. 27, Rule 123, of the Rules of Court. Definitely, it can not be considered as part of the *res gestae*.[19] The situation would have been different had the same been given directly during the trial.[20]

The decision reached in the instant case is undoubtedly correct as far as its particular facts are concerned. The ruling, however, should not be pushed beyond its import.[21] Since the above ruling can easily be mistaken for what it really stands for, great care should be made in applying it.[22]

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[13] It is very doubtful whether this circumstance, standing alone, meet the requirements of Sec 98. Rule 123, Rules of Court, which provides: "Circumstantial evidence is sufficient for conviction if:

"(a) There is more than one circumstance;

"(b) The facts from which the inferences are derived are proven; and

"(c) The combination of all the circumstances is such as to produce a conviction beyond a reasonable doubt."

[14] Sec. 27, Rule 123, Rules of Court.

[15] *Ibid.*, Sec. 10.

[16] *U.S. v. Empienado et al.*, 9 Phil. 613 (1908).

[17] *People v. Nishishima*, 57 Phil. 26 (1932).

[18] *People v. Napiza*, 44 O.G. No. 10, 3879 (1947).

[19] See Sec. 33, Rule 123, Rules of Court. Also *People v. Linao*, 58 Phil. (1933).

[20] *People v. Del Rosario*, 46 O.G., No. 9, 4332 (1948).

[21] The testimony of one who, by his own admission, was a co-author of the crime in question, must be considered as coming from a polluted source, requiring its scrutiny with much caution, so that unless itself convincing, it could not be the basis of conviction except when sufficiently corroborated, especially in view of the gravity of the offense. *People v. Peralta*, 67 Phil. 293 (1939), citing *U.S. v. Ocampo*, 5 Phil. 339 (1905); *U.S. v. Remegio*, 37 Phil. 599 (1918); *U.S. v. Maharaja Alim*, 38 Phil. 1 (1918); *People v. De Otero*, 51 Phil. 201 (1927); *People v. Baccay and Zipagan*, 58 Phil. 780 (1933); *People v. Bumanlag*, 56 Phil. 10 (1931).

[22] *Ibid.*

Evidence—*Natural inclination given due weight in considering defense of alibi.*

PEOPLE V. FERNANDEZ, ET AL.,
G. R. No. L-8255, February 17, 1954

Alibi is considered one of the weakest defenses that may be resorted to by an accused,[1] because it is so easily manufactured and usually so unreliable that it can rarely be given credence.[2] But alibi as a defense is not entirely impotent.[3]

The theory of alibi is the fact of the presence of an accused elsewhere which is essentially inconsistent with his presence at the place and time alleged, and, therefore, with his personal participation in the act.[4]

Thus, where it was shown that the accused was ill with fever, but was able to walk around and it was not impossible for him to be at the place of the accident, such defense is considered ineffectual.[5] Neither was alibi considered a meritorious defense, even admitting that the accused was plowing during the afternoon, for it does not preclude the possibility of his being at the place where the homicide was committed at about eight o'clock that night, as the field was only about three hundred *brazas* from the scene of the crime.[6] Nor was alibi considered a sufficient defense to overthrow the evidence of the prosecution, taking into account the short distance between the house of the victim and the house in which the accused slept on the night of the incident.[7]

To establish an alibi, it is necessary for a defendant to show not only that he was present at some other place about the time of the alleged crime, but also that he was at such other place, for such length of time that it was impossible for him to have been at the place where the crime was committed, either before or after the time he

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[1] MORAN, III COMMENTS ON THE RULES OF COURT (1952 Ed.), 16, citing the case of *People v. de la Cruz*, 43 O.G. 137 (1936); *People v. Bondoc*, G.R. No. L-2278, Feb. 27, 1950, 47 O.G. No. 8, 4128.

[2] *People v. Badilla*, 48 Phil. 718 (1926); *People v. Morados*, 70 Phil. 558 (1940).

[3] In the case of *People v. De los Santos*, G.R. No. L-4880, May 18, 1953, the Court held that in the face of an air-tight alibi testified to by witnesses whose credibility is apparent and positive, doubt may be engendered to an extent favorable to the accused. See *People v. Gonzalez*, 50 Phil. 9 (1927).

[4] WIGMORE ON EVIDENCE, Vol. 1, 570 (1940).

[5] *People v. Limbo*, 49 Phil. 94 (1926); *U.S. v. Lasada*, 18 Phil. 90 (1910).

[6] *People v. Palamos*, 49 Phil. 601 (1926).

[7] *People v. Resabal*, 50 Phil. 780 (1927). See also the cases of *People v. Sulit*, G.R. No. L-4919, January 21, 1953; *People v. Niem, et al.*, 75 Phil. 668, 670 (1945); *People v. Lopez y Orbino*, G.R. No. L-6588, May 26, 1954; and *People v. Opena*, G.R. No. L-6318-19, May 17, 1954.

was at such other place.[8] But although it is necessary that the defense of alibi be clearly and satisfactorily proven,[9] alibi does not involve absolute impossibility but only high improbability and yet be convincing.[10] This is so because the evidentiary fact is a new affirmative proposition, considered as the *"factum probandum,"* though its logical operation is a negative one.[11] Hence, it is necessary that alibi be proved by probable evidence which reasonably satisfies the court of the truth of such a defense.[12]

The alibi can not be credited, where the accused has been identified by the witnesses for the prosecution by means of clear, explicit and positive testimony.[13] Especially is this true in the absence of any showing that such witnesses had any evil motive to implicate

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[8] *U.S. v. Oxiles*, 29 Phil. 587 (1915); *People v. Palamos*, 49 Phil. 601 (1926); *People v. Resabal*, 50 Phil. 780 (1927); *People v. Samaniego*, G.R. No. L-6085, June 11, 1954; *People v. Ong*. G.R. No. L-6086, June 11, 1954; *People v. Lumahang*, G.R. No. L-6357, May 7, 1954.

In *People v. Suarez et al.*, G.R. No. L-6062, March 20, 1954, appellant set up alibi, stating that he could not have committed the crime of robbery with violence and intimidation attributed to him because at the time of its commission, he was confined at the Boy's Correctional school at Welfareville.

In rejecting this contention, the Court, through Justice Montemayor, said: "According to the record of that institution, appellant was confined in that school from March 13, 1946 to March 18, 1946, while the crime of robbery took place on January 12, 1946, that is to say, about two months before his confinement. From all this, we are convinced that appellant is really guilty of the crime charged against him, and that seeing no other way of saving himself, he thought of this scheme of proving an alibi. Fortunately, however, the records of the Boy's Correctional school are still intact to flatly disprove his false claim."

In *People v. Lumahang*, G.R. No. L-6354, the supposed presence of her husband in their house was before seven o'clock while the evidence showed that the assault took place at eight o'clock in the evening. Considering that the house of appellant was only two hundred meters away from the place of the incident, and his wife went away after supper about seven o'clock, it was evident that her testimony did not preclude the possibility of her husband's presence at the place of the assault.

In *People v. Sedenio and Mejenio*, G.R. No. L-6372, April 29, 1954, appellant set up an alibi that he was confined in the insular penitentiary. But it appeared that he escaped from jail prior to the occurrence. The other appellant asserted that he was in his house. The house was only two kilometers from the scene. Besides, the statement was completely uncorroborated.

[9] *People v. Limbo*, 49 Phil. 94 (1926); *U.S. v. Lasada*, 18 Phil. 90 (1910).

[10] WIGMORE ON EVIDENCE, Vol. I, 571 (1940).

[11] *Ibid.*, at 570-571.

[12] *U.S. v. Oxiles*, 29 Phil. 587 (1915).

[13] *People v. Libria*, G.R. No. L-6585, July 16, 1954; *U.S. v. Garcia*, 26 Phil. 289 (1913); *U.S. v. Hudieres*, 27 Phil. 45 (1913); *U.S. v. Lumanlan*, 31 Phil. 486 (1915); *People v. Cabantug*, 49 Phil. 482 (1926); *People v. Palamos*, 49 Phil. 601 (1915); *People v. Napili*, G.R. No. L-2046, February 22, 1950, 47 O.G. No. 8, 4111, *People v. Dy Too*, G.R. No. L-1807, April 20, 1950, 47 O.G., No. 11, 5682; *People v. Medina*, 71 Phil. 383 (1941); *People v. Niem*, 75 Phil. 668 (1945).

the accused.[14] In the case of *People v. Federico Fader*,[15] the Supreme Court had occasion to hold that appellant's alibi cannot prevail over the positive testimony of the witnesses for the prosecution, who where inmates in the same house where the victims were shot, identifying the accused.

Measured against the positive testimony of witnesses for the prosecution, alibi is weak and unavailing.[16] And when it comes from the lips of near relatives of the accused, its value is necessarily reduced to the minimum.[17]

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[14] *People v. Niem, et al., supra*. Conversely, in the case of *People v. Gonzalez*, 50 Phil. 9 (1927), the court held the defense of alibi good, for "while the veracity of the witnesses testifying in behalf of the defendant was far from above suspicion, it is quite possible that they told the truth as to the defendant not being present in the house on the occasion of a gambling game. The Chief of Police, who had a good view of the house, did not see the defendant, and as he had no greater reason to protect the defendant than the other accused, and his affidavit in general bears the impress of truth, the court is inclined to believe that the defendant was not present * * * The improbabilities of the testimony against him, and the tendency to charge innocent members of a family with a crime as a matter of revenge, all lead to a reasonable doubt of guilt. Defendant stands acquitted."

In *People v. Magsino, et al.*, G.R. No. L-3649, January 29, 1954, all the testimonies tallied and harmonized with the main picture of kidnaping for ransom by the eleven persons under detention. These merely denied participation in the criminal enterprise and offered proofs of alibi. The total impression was one of unreliability.

In *People v. Sedenio and Mejenio*, G.R. No. L-6372, April 29, 1954, appellants' alibi could not prevail over the positive testimony of the witnesses for the prosecution. They had no possible motive to falsely incriminate appellants herein.

In *People v. Venegas, et al.*, G.R. No. L-4928, June 1, 1954, the alibi set up by the defendant was untenable. His presence at the scene of the occurrence was established, not only by the testimony of Bernardo Jimenez but also by that of Vicente de los Reyes, a man of 70 years of age, who had no possible motive to commit perjury against said appellant.

[15] G.R. No. L-5732, March 12, 1954. The court also stated that this witness could not have made a mistake in appellant's identity, because the latter was known to the former, he being appellant's tenant, apart from the circumstance that assailants were not disguised. It is significant that, at the time the malefactors entered the house of their victims, there was an oil lamp, and one of the witnesses had the occasion to recognize appellant within close range because appellant pressed his gun against the witness's breast and it was from the witness that the appellant demanded the key as well as the money.

[16] *People v. Escares and Macalalad*, G.R. No. L-5562, April 29, 1954.

[17] *Ibid.* See *People v. Velasco Rodriguez, et al.*, G.R. No. L-3663, May 31, 1954; also *People v. Venegas, et al.*, cited in footnote 14, *supra*. In *People v. Buluran y Yatco*, G.R. No. L-5849, May 24, 1954, the alibi, based solely upon appellant's testimony and that of his wife—who in the evening of September 5, 1948, was in their house in Makati, not in Binañgonan—was far from sufficient to offset the direct and positive evidence for the prosecution on his presence at the scene of the occurrence.

In *People v. Lopez y Orbino*, G.R. No. L-6588, May 26, 1954, the accused, by his testimony, corroborated by his wife, attempted to establish an alibi: he was at home. But this was rightly rejected in the face of the declaration of two other witnesses.

[9] *Ibid.*, at 310.

But, as said at the outset, the defense of alibi is not entirely useless or unavailing. In the instant case of *People v. Juan Fernandez, et al.*,[18] alibi proved instrumental in appellant's acquittal.[19] The prosecution adduced evidence tending to establish that on the morning of March 16, 1949, in the plaza of Tayug, Pangasinan, appellants agreed to rob the uncle of one of them, Alejandro Noble. His house was located in the municipality of Natividad, about eight kilometers from Tayug. Following their plan, they left Tayug at eight o'clock in the evening of the same date. Upon arrival at Natividad, Juan Noble went to his house to get his grease gun, which Noveda and Rodriguez, the other appellants, had given him three nights before. From Juan Noble's house, appellants proceeded to the house of Alejandro Noble, the complainant in the instant case. Fernandez and the rest opened a door and entered the house through it. At the point of a gun, they asked money from the wife of Alejandro who said that they did not have any but told defendants that they could help themselves to any merchandise they wanted from their store. Since defendants did not find anything that they wanted in the store, they ordered Alejandro's wife to give them her earrings worth twenty pesos. But the shouts of Alejandro, who had succeeded in jumping out from the window of his house, while defendants were climbing the stairs, aroused help and the appellants escaped.

According to the Court, if these facts were proven, the accused should be convicted with the maximum penalty.

The defense established that Juan Fernandez, one of the accused, is twenty-one years old, the commandant of the cadet corps of Luna Memorial Institute of Tayug, and that he, in company of two cadets, also students, was an honor guard in a ball given from eight to eleven on the evening of March 16, 1949, the night of the alleged robbery. The defense also established that after the ball, said Juan Fernandez and several companions went to see a *zarzuela* where they stayed until 2 a.m. This was corroborated by other testimony. The other defendants likewise denied that they committed the crime.

In acquitting the accused, the Court, speaking through Justice Pablo, stated:

> "Todos los acusados son jovenes, dos de ellos son estudiantes. Es increíble que Juan Fernandez haya preferido cometer robo en vez de exhibir sus hombreras y su uniforme de comandante de cuerpo re cadetes en un, baile, como tambien es incrible que los otros acusados haya dejado la fiesta a la que acudieron para ir a robar en otro municipio. Eso riñe con la natural inclinacion de todo joven, especialmente de un filipino."
>
> "Las pruebas presentadas por las acusacion no establecen, fuerra de toda duda, la culpabilidad de los acusados. Despues de madura deliberacion, declaramos que la acusacion no pueden justificar la condena de muerte impuesta a los acusados con el infamente estigma de ladron."

[18] G.R. No. L-3255, February 17, 1954.
[19] Justice Labrador dissented. Justice Reyes concurred in the dissent.

Justice Alejo Labrador dissented on the ground that the evidence presented by the accused that they were present elsewhere was not satisfactory.[20] However, the majority harbored some doubt as to the guilt of the accused. With such doubt in mind, the Court merely acted in consonance with the presumption of innocence in favor of the accused.[21]

Labor Law—*"Piece-worker" construed.*

MANUEL LARA, ET AL. V. PETRONILO DEL ROSARIO, JR., G.R. No. L-6339, April 20, 1954

One of the principal aims of the Eight Hour Labor law[1] is to protect the health of the worker by discouraging overtime work and work on Sundays and legal holidays.[2] This is so because unscrupulous employers may demand that the workers stay at their posts for longer periods than their health will permit,[3] or the employees and laborers themselves may desire to work beyond such period if tempted by additional pay that they would get.[4] The evils of such a system lie in the fact that work beyond eight hours a day deprives a worker of rest and relaxation which is adverse to the conservation of his energy resulting in his inattention to his citizenship and cultural needs.[5] Similarly, Sundays are dedicated to worship and legal holidays for rest and it is only during these days that a laborer has opportunity to enjoy the company of his family in the observance of their spiritual and recreational needs.[6]

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[20] See dissenting opinion in the instant case: "The defense is evidently fabricated, false one. Its weakness and falsity tend to enhance the credibility of the testimonies of the witnesses for the prosecution. If the appellant were really at some other place when the crime was committed, better evidence of their presence elsewhere would certainly have been available."

[21] Sec. 95, Rule 123, Rules of Court: "In a criminal case, the defendant is entitled to an acquittal, unless his guilt is shown beyond reasonable doubt."

[1] C.A. 444, approved, June 3, 1939.

[2] "Another reason for the enactment of said law is to remedy unemployment to some extent." (*NLU v. Benguet Consolidated Mines*, C.I.R. No. 70-V, Sept. 21, 1948).

[3] "In his dire need, a laborer may accept any compensation and may agree to render any length of service for his prospective employer because of his innate feeling of survival; and in his depressed situation he is even capable of clinging to a razor's blade if that is the only means of surviving his difficulties." (*NLU v. Gotamco Lumber Company*, C.I.R. No. 104-V, July 9, 1949.)

[4] CARLOS AND FERNANDO, LABOR AND TENANCY LAWS, 195 (1953).

[5] *Mayon Engineering Workers' Union v. Mayon Engineering Co.*, C.I.R. No. 150-V, Oct. 15, 1948.

[6] *Allied Workers' Association of the Phil. v. Central Azucarera de Bais*, C.I.R. No. 135-V, Sept. 7, 1948.

The principal deterrent to overtime work is the provision that the legal working day is not more than eight hours daily,[7] and any laborer or employee working beyond such eight hour period,[8] or on Sundays and legal holidays[9] shall be entitled to receive compensation for the overtime work performed at the same rate as their regular wages or salary, plus at least 25 per cent additional. The propriety of such a rule can hardly be doubted when one considers that an employer is impelled to give such order for overtime work in contemplation of profit, benefit, or advantage, and for which services the employee or laborer should be given his legitimate compensation as a matter of justice and not as a mere consideration.[10]

There are exceptions to this rule, however. Thus, public utilities performing some public service, like providing means of transportation and communication may compel their employees or laborers to render service during Sundays and holidays without additional pay.[11] The very nature of a public utility is the justification for this exception.[12]

Another group of workers deprived of the benefits of the Eight Hour Labor law are those "laborers who prefer to be paid on the

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[7] C.A. 444, Sec. 1: "The legal working day is not more than eight hours daily. However, when work is not continuous, the time during which the laborer is not working and can leave his working place and rest completely is not to be counted."

[8] C.A. 444, Sec. 3: "Work may be performed beyond eight hours in case of actual or impending emergencies caused by serious accidents, fire, flood, typhoon, earthquake, epidemic, or other disaster or calamity in order to prevent loss of life and property or imminent danger to public safety; or in case of urgent work to be performed on the machines, equipment, or installations in order to avoid serious loss which the employer would otherwise suffer, or for some other just cause of a similar nature. In all such cases, however, the laborers and employees shall be entitled to receive compensation for the overtime work performed at the same rate as their regular wages or salary, plus at least twenty-five percentum additional."

[9] C.A. 444, Sec. 4: "A person, firm, or corporation, business establishment or place or center of labor may not compel an employee or laborer to work during Sundays and legal holidays unless he is paid an additional sum of at least twenty-five per cetum of his regular renumeration. From this rule is excepted public utilities performing some public service such as supplying gas, electricity, power, water, or providing means of transportation or communication."

[10] *NLU v. Gotamco Lumber Company*, see note 3, *supra*.

[11] C.A. 444, Sec. 4. see note 9, *supra*.

[12] "Public utilities * * * are required to perform a continuous service including Sundays and legal holidays to the public, since the public good so demands, and are not allowed to collect an extra charge for services performed on those days. It would be unfair for the law to compel public utilities like the appellant to pay an additional or extra compensation to laborers whom they have to compel to work during Sundays and legal holidays, in order to perform a continuous service to the public. To require public utilities performing public services to do so would be tantamount to penalize them for performing public service during said days in compliance with the requirement of the law and public interest." (*Manila Electric Company v. Public Utilities Employees' Association*, 45 O.G. 1760, 1763, Oct. 30, 1947).

piece-work basis."[13] The case of *Manuel Lara, et al. v. Petronilo del Rosario, Jr.*,[14] construes the word "piece-worker" and explains the reason for the deprivation.

Defendant del Rosario operated in 1950 a taxi business under the trade name of "Waval Taxi." Among his employees are the 49 drivers who are the plaintiffs in this case. On September 4, 1950, Del Rosario sold his 25 units to La Mallorca Co. without giving said drivers 30 days' advance notice as required by law. As the La Mallorca did not re-employ the drivers, the latter filed this case in court, claiming: (1) compensation for work on Sundays and legal holidays; (2) compensation for work rendered beyond eight hours; and (3) one month salary or (*mesada*) provided for in Article 302 of the Code of Commerce for failure of the employer to give one month notice.

The trial court dismissed the complaint. An appeal was made to the Court of Appeals. The Court, being of the opinion that only questions of law were involved, certified the case to the Supreme Court.

The Supreme Court disposed of the first demand with the observation that the taxi business is a public utility providing means of transportation, and therefore, falls squarely within the exception provided by Section 4 of the Eight Hour Labor law.[15] However, an excess of eight hours' labor on Sundays and legal holidays, would bring the case within the scope of overtime work.

The second demand required a more extensive discussion by the Court. At the very outset, Justice Montemayor construed the phrase "laborers who prefer to be paid on the piece work basis" to connote that—

> "a laborer or employee with no fixed salary, wages or remuneration, but receiving as compensation from his employer an uncertain and variable amount depending upon the work done or the result of said work (piece-work) irrespective of the amount of time employed is not covered by the Eight Hour Labor law and is not entitled to extra compensation should he work in excess of eight hours a day."

In arriving at this construction, the Supreme Court found support in an opinion rendered by the Secretary of Justice,[16] and an Inter-

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[13] C.A. 444, Sec. 2: "This law embraces all persons employed in any industry or occupation, whether public or private, with the exception of farm laborers, laborers who prefer to be paid on piece work basis, domestic servants and persons in the personal service of another, and members of the family working for him."

[14] G.R. No. L-6339, April 20, 1954.

[15] See note 9, *supra*.

[16] Opinion No. 115 of July 1, 1939, as modified by Opinion No. 22 of January 11, 1940: "Chauffeurs of the Manila Yellow Taxicab Company who 'observed in a loose way certain working hours daily' and 'the time they report for work as well as the time they leave work was left to their discretion' receiving no fixed salary but only 20% of their gross earnings, may be considered as piece workers and therefore not covered the provisions of the Eight Hour Labor law."

pretative Bulletin of the Wage Administration Service of the Department of Labor.[17]

The nature of the service of the drivers falls squarely within the construction of the Court. The parties were agreed that the plaintiffs received no fixed compensation based on the hours or the period of time that they worked. Rather, they were paid on the commission basis, each driver receiving 20 per cent of the gross returns or earnings from the operation of his taxicab. The drivers in this case could operate their respective taxicabs for eight hours, or less than eight hours, or in excess of eight hours, or even for twenty-four hours on Saturdays, Sundays and holidays, with no limit or restriction other than his desire, inclination and state of health and physical endurance. They worked under no compulsion of turning in a fixed income for each given day. The number of working hours of the plaintiffs as taxi drivers was entirely characterized by its irregularity as distinguished from the specific and regular remuneration predicated on specific and regular hours of work of factors and commercial employees.

American jurisdiction is similar to the above-mentioned construction. "Piece-work" has been defined as work for which the employee is paid by the number or quantity produced.[18] And a "pieceworker" is an employee who renders personal service for an employer and is paid by the piece,[19] or one who has no contract to do any certain amount of work or to work any given number of days, or one who may be discharged at any time for any reason without violating the contract.[20]

The Supreme Court also found that since the drivers were paid an irregular and varied amount of commission, there was no "regular wage or salary" upon which to base the 25 per cent additional payment for overtime pay.[21]

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[17] WAS Interpretative Bulletin No. 2, May 28, 1952, Sec. 3: "The provisions of this Bulletin on overtime compensation shall apply to all persons employed in any industry or occupation, whether public or private, with the exception of farm laborers, non-agricultural laborers, or employees who are paid on piece work, contract, *pakiao*, task or *commission basis*, domestic servant and persons in the personal service of another and members of the family of the employer working for him."

[18] "Piece work is found in those industries where work is irregular, the product easy to measure, or where speed is a more important factor than quality. It is found in coal mining, in the manufacturing of ready-made clothing and in lathework among others." CASSELMAN, P. H., LABOR DICTIONARY, 363 (1949).

[19] *Burchett v. Department of Labor and Industries*, 261 Pac. 802, 804 (1927).

[20] "Relationship is that of employer and employee, if the employer exercises the right of supervision and control, not simply of result of work, but methods and manner by which result is to be attained, or if employee is a piece worker." *Ocean Accident and Guarantee Corp. v. Kennison*, 26 Pac. 2nd 113 (1933).

[21] C.A. 444, Sec. 3; see note 8, *supra*.

With regard to the claim of one month salary or *mesada,* the Court declared that Article 302 of the Code of Commerce, upon which the claim is based, has already been repealed by the Civil Code.[22] Besides, Article 302 of the Code of Commerce applies only to employees receiving a fixed salary,[23] and plaintiffs in this case have no fixed salary either by the day, week, or the month.

Land Registration—*Authority given to corporations in acquisition of any land granted as homestead to be used for certain specific purposes is subject to the 5-year prohibitive period; the principle of pari delicto.*

DE LOS SANTOS v. ROMAN CATHOLIC CHURCH OF MIDSAYAP
G.R. No. L-6088, February 25, 1954

On December 9, 1938, a homestead patent covering a tract of land situated in the municipality of Midsayap, Cotabato, was granted to Julio Sarabillo and an owner's certificate of title was issued in his favor. On December 31, 1940, Sarabillo sold two hectares of said land to the Roman Catholic Church of Midsayap to be dedicated to educational and charitable purposes. It was expressly agreed upon that the sale was subject to the approval of the Secretary of Agriculture and Natural Resources. In 1949, such approval was secured and in 1950 the deed of sale was registered in the Office of the Register of Deeds of Cotabato. Sarabillo died and herein plaintiff was appointed administratix. She instituted the present action in the Court of First Instance of Cotabato praying that the sale be declared null and void and of no legal effect because it was in violation of Section 118 of the Public Land law.[1]

This section provides in part:

> "Except in favor of the Government or any of its branches, units, or institution, or legally constituted banking corporations, lands acquired under free patent or homestead provisions shall not be subject to encumbrance or alienation from the date of the approval of the application and for a term of five years from and after the date of issuance of the patent or grant, nor shall they become liable to the satisfaction of any debt contracted prior to the expiration of said period; but the improvements or crops on the land may be mortgaged or pledged to qualified persons, associations or corporations."

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[22] R.A. 386, effective August 30, 1950, Art. 2270: "The following laws and regulations are hereby repealed: * * * (2) The provisions of the Code of Commerce governing sales, partnership, agency, loan, deposit and guaranty; * * *.

[23] TOLENTINO, A. M., I COMMERCIAL LAWS OF THE PHILIPPINES, 160 (4th Ed. 1947).

[1] Commonwealth Act No. 141.

The sale was clearly made in violation of this prohibition in section 118. As regards the approval given by the Secretary of Agriculture and Natural Resources, the Court ruled that it had no curative effect. The prohibition "cannot be obviated even if official approval is granted beyond the expiration of that period, because the purpose of the law is to promote a definite public policy, which is to preserve and keep in the family of the homesteader that portion of public land which the State has gratuitously given to him."[2]

The defendants claimed that the sale could be validated because it was made with the avowed aim that the property would be dedicated solely to educational and charitable purposes. In advancing this proposition, they relied on section 121 of the Public Land law which states:

> "Except with the consent of the grantee and the approval of the Secretary of Agriculture and Commerce, and solely for commercial, industrial, educational, religious or charitable purposes or for a right of way, no corporation, association, or partnership may acquire or have any right, title, interest, or property right whatsoever to any land granted under the free patent, homestead or individual sale provisions of this Act or to any permanent improvement on such land."

Apparently, the defendants misconstrued the effect of this provision of the law. It is true that it authorizes corporations to acquire land granted the homestead law for certain purposes. Nevertheless, corporations, like individuals, are subject to the 5-year prohibitory period in section 118. The prohibition to alienate the homestead within the 5-year period is inapplicable only with regard to the entities expressly mentioned therein.[3]

As Mr. Justice Angelo Bautista said, "This provision (section 121) should be interpreted as a mere authority to a corporation, association, or partnership to acquire a portion of the public land and not as an unbridled license to acquire without restriction for such would be giving an advantage to an entity over an individual which finds no legal justification."

The acquisition of land from a homesteader, by corporations and individuals alike, should be after five years.

In the same case, the Supreme Court ruled that, notwithstanding the application of the principle of *pari delicto*[4] to the appellee,

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[2] "The object and purpose of the homestead law is to encourage residence upon and the cultivation and improvement of the public domain." *Aquino v. Director of Lands*, 39 Phil. 850 (1919).

[3] The government, its branches, units, institutions, and banking corporations.

[4] "When the nullity proceeds from the illegality of the cause or object of the contract, and the act constitutes a criminal offense, both parties being in *pari delicto*, they shall have no action against each other, and both shall be prosecuted." Art. 1411, par. 1, New Civil Code.

she could nevertheless maintain an action to nullify the transaction because of public policy.[5]

Ordinarily, the principle of *pari delicto* would apply in this case as the appellee's predecessor-in-interest sold the homestead within the prohibited period and with the presumed knowledge of its illegality. The Court itself admitted that "the principle of *pari delicto* has been applied by this court in a number of cases [6] wherein the parties to a transaction have proven to be guilty of having effected the transaction with knowledge of the cause of its invalidity."

However, the Court stated:

> "We doubt if these principles can now be invoked, considering the philosophy and the policy behind the approval of the Public Land Act. The principle. . .recognizes certain exceptions, one of them being when its enforcement or application runs counter to an avowed fundamental policy or to public interest [7]. . . The case under consideration comes within the exception above adverted to. Ordinarily, the principle of *pari delicto* would apply to her because her predecessor-in-interest has carried out the sale with the presumed knowledge of its illegality [8] but because the subject of the transaction is a piece of public land, public policy requires that she, as heir, be not prevented from re-acquiring it because it was given by law to her family for her cultivation. This is the policy on which our homestead law is predicated."

It is interesting to note that our fundamental law establishes certain definite social and economic policies reflecting contemporary attitudes and practices of governments, one of these being the nationalization of land ownership.[9] Yet, in the case of *Cabauatan et al. v. Uy Hoo et al.*[10] the Supreme Court applied the principle of *pari delicto*, holding that the State alone is entitled to get the land either by escheat or reversion.

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[5] "It is not within the competence of any citizen to barter away what public policy by law seeks to preserve." *Gonzalo Puyat & Sons, Inc. v. Pantaleon de los Ama, et al.*, 74 Phil. 3 (1942).

[6] *Bough & Bough v. Cantiveros*, 40 Phil. 210 (1919); *Rellosa v. Gaw Chee Hun*, G.R. No. L-1411; *Trinidad Gonzaga de Cabauatan v. Uy Hoo, et al.*, G.R. No. L-2207; *Caoile v. Yu Chiao Peng*, G.R. No. L-4068; *Talento, et al. v. Makiki, et al.*, G.R. No. L-3529, cited by the court.

[7] "This doctrine is subject to one important limitation, namely, 'whenever public policy it considered advanced by allowing either party to sue for relief against the transaction.'" *Rellosa v. Gaw Chee Hun, supra.*

[8] 8 Manresa 4th ed., 717-718.

[9] See SINCO, V. G., *The Constitutional Policy on Land Tenure*, 28 Phil. Law Journal, (1954).

[10] *Supra.*

In the case under review, the Court decreed that, while the government does not take the steps to assert its title, by reversion,[11] to the homestead, the vendor or his heirs is better entitled to the possession of the land, the vendee being in no better situation than any intruder.

Seemingly, the policy behind homestead law is more strictly applied than the policy behind the constitutional ban on alien ownership of land.

Land Registration—*Owner of a building erected on premises leased from another to contribute to the assurance fund when he petitions for annotation of his ownership in the corresponding certificate of title.*

MANILA TRADING & SUPPLY CO., V. REGISTER OF DEEDS OF MANILA
G.R. No. L-5628, January 28, 1954

The authors of the Torrens system of land registration wisely included provisions intended to safeguard the rights of prejudiced parties rightfully entitled to an interest in land but shut off from obtaining titles thereto. Pecuniary compensation by way of damages was provided for in certain cases for persons who had lost their property. For this purpose, an assurance fund was created.[1]

Where does this fund come from? Section 99 of the Land Registration Law[2] mentions the persons who are to contribute to the fund. It provides in part:

> "Upon the original registration of land under this Act, and also upon the entry of a certificate showing title as registered owners in heirs or devisees, there shall be paid to the register of deeds one-tenth of one per centum of the assessed value of the real estate on the basis of the last assessment for municipal taxation, as an assurance fund."

Primarily, it is upon the original registration of land that contribution to the assurance fund is taxed. However, it is not only owners of land who are liable but also owners of buildings who seek to have their ownership annotated on the corresponding certificates

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[11] "Any acquisition, conveyance, alienation, transfer, or other contract made or executed in violation of any of the provisions of sections one hundred and eighteen * * * of this Act shall be unlawful and null and void from its execution and shall produce the effect of annulling and cancelling the grant, title, patent, or permit originally issued, recognized, or confirmed, actually or presumptively, and cause the revision of the property and its improvements to the State." Sec. 124, Act No. 496.

[1] *Estrellado v. Martinez*, 48 Phil. 256, 263 (1925).

[2] Act No. 496.

of titles.[3] The term "land" in section 99 has been interpreted to include "buildings." This ruling was laid down in *Manila Trading & Supply Co. v. Register of Deeds.*[4]

The Manila Trading & Supply Co., a corporation, was the lessee of three parcels of land in the Port Area, Manila, belonging to the Philippine government, such lease having been recorded on the government's Certificate of Title No. 4939. The structures built by said company upon the lots were destroyed during the last war. After liberation, it erected new buildings that cost over a million pesos. Thereafter, on April 2, 1951, it requested the Manila Court of First Instance to require the Register of Deeds to enter and annotate on Certificate of Title No. 4948 its declaration of property ownership of such valuable improvements. The Court granted the request. The Register of Deeds, however, demanded payment of ₱1,308 for the assurance fund pursuant to section 99 of the Land Registration law. The company refused to pay and applied to the court for relief through a petition-consultation. The Register of Deeds was upheld. Hence, this appeal.

The Court, through Mr. Justice Bengzon, declared:

> "Upon examination of the whole Land Registration Act, we are satisfied that 'land' as used in section 99 involves buildings. For one thing, the same section uses 'real estate' as synonymous with land. And buildings are 'real estate.' (Sec. 334, Civil Code, Art. 415, New Civil Code, Republica de Filipinas v. Aniza, L-4169, Dec. 17, 1951). For another, although entitled '*Land* Registration,' the Act (496) permits the registration of interests therein, improvements, and buildings. Of course, the building may not be registered separately and independently from the parcel on which it is constructed, as aptly observed by Chief Justice Arellano in the case of Manila Building and Loan Association, 13 Phil. 575. But 'buildings' are registerable just the same under the Land Registration System. It seems clear that having expressly permitted in its initial sections (sec. 2) the registration of title 'to land or buildings or an interest therein' and declared that the proceedings shall be in rem against the land and the buildings and improvement thereon, the statute used in subsequent provisions the word 'land' as a short term equivalent to 'land or buildings or improvements' to avoid frequent repetition of 'buildings or improvements'."

The Court in making this declaration probably had in mind the thought that as owners of buildings registered under the Torrens system enjoy the benefits assured by the system, there is no reason why they should not share in the burdens of the system.

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[3] See *Loewenstein v. Page*, 16 Phil. 84 (1910), where holders of patents were deemed included within section 99.

[4] G.R. No. L-5623, January 28, 1954.

Land Registration—*Mere occupation of public land and the planting thereon of improvements do not convert it into private land.*

ARNIDO V. FRANCISCO
G.R. No. L-6764, June 30, 1954

Mere possession, even though acts of ownership be performed by the possessor, does not convert public land into private land.[1] This cardinal principle in land law was reiterated in the case of *Arnido v. Francisco.*[2]

This was an action to recover the title to and possession of land. The land in question formed part of the homestead application of one Albaro Vergara presented in 1926. The application was approved in 1931 and in 1941 Vergara sold his homestead rights to herein defendant Alfonso Francisco. In August, 1948, after proper investigation and report by a lands officer, such rights were assigned to Francisco who filed his own homestead application for the land. In November, 1948, Vergara, the original applicant, entered into a compromise with plaintiff Ignacio Arnido whereby he recognized Arnido's title to the property, as a result of which judgment was entered in favor of Arnido in a case between Arnido and Vergara. Defendant herein refused to deliver the property to plaintiff.

The trial court held that the land is private land, solely on the grounds that improvements had been made on it. No evidence, however, had been presented to show that the land was owned by any one prior to Vergara's occupation.

The Supreme Court held that mere occupation of public land and the planting thereon of improvements do not convert it into private land. Vergara's action in applying for the homestead shows that he occupied it as public land and his admission in the compromise agreement that it belonged to plaintiff Arnido is no evidence that the land is private land.

As a corollary to the principle of non-convertibility of public land into private land by mere possession is the doctrine that prescription does not run against the state. The Civil Code incorporates this doctrine, in article 1113.[3]

Referring to the compromise between Vergara and Arnido, Mr. Justice Labrador who penned the decision said that it could not affect Francisco as the deed of assignment was executed in his favor on August 10, 1948, a month before such compromise.

The land being public land, it is subject to acquisition under the public land law. Defendant was upheld.

[1] *Valenton v. Murciano,* 3 Phil. 538 (1904); *Cancino v. Valdez,* 6 Phil. 320 (1906); *Tiglao v. The Insular Government,* 7 Phil. 80 (1906).

[2] G.R. No. L-6764, June 30, 1954.

[3] All things which are within the commerce of men are susceptible of prescription, unless otherwise provided by law. Property of the State or any of its subdivisions not patrimonial in character shall not be the object of prescription."

The rule is the same in property law as expressed in *Li Seng Giap & Co. v. Director of Lands,* 59 Phil. 687 (1934).

Special Proceedings—*Compensation of executors and administrators.*

VDA. DE PRIETO v. ROSARIO VALDEZ, ET AL.
G.R. No. L-6485, May 26, 1954

The Rules of Court [1] provides for the compensation of executors and administrators of estates of deceased persons. The reason is to repay them for time, labor, and responsibility involved and to reward them for the fidelity with which they discharged their trust.[2] The law goes farther. It specifically fixes what that compensation shall be, except in special cases which, in the complexity of human affairs, are bound to arise. This has been found to be advisable to prevent unnecessary lawsuits on the matter and thus accelerate the settlement of estates. Moreover, a person nominated for the office of executor or administrator is enabled to determine in advance whether or not he can afford to discharge its duties. If he does not consider the renumeration sufficient, he may decline the nomination.[3]

Thus, an executor or administrator is entitled, by way of compensation, to the following: (1) either a per diem of four pesos or to a commission,[4] and (2) in any special case, a greater or additional sum, where the estate is large, and the settlement has been attended with great difficulty, and has required a high degree of capacity on the part of the executor or administrator.[5]

With respect to the first form of compensation, the executor or administrator is entitled to either alternative.[6] He may "collect for his services as such the sum of four pesos for every day actually and necessarily spent by him in the administration and care of the estate of the deceased person, not for every act or task he might perform, even if it were to take only a few minutes to do so." [7] The rule is that per diem compensation of an executor or administrator can only be allowed for necessary services.[8] Or he may collect a commission based "upon the value of so much of the estate as comes into his possession and is finally disposed of by him in the payment of debts, expenses, legacies, or distributive shares, or by delivery to heirs or devisees."[9] Of course, the law does not contemplate that he should collect commission on the amounts to which he himself is entitled as

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[1] Rule 86, Sec. 7.

[2] In Re *Estate of Marchildon*, 246 N.W. 676, 677 (1933); In Re *Baker's Estate*, 294 N.W. 222, 224, (1940).

[3] *Chung Muy Co's Administrator v. Lim Quioc*, 23 Phil. 518, (1912).

[4] MORAN, II COMMENTS ON THE RULES OF COURT, 423 (1952).

[5] Section 7, Rule 86, Rules of Court.

[6] MORAN, *op. cit.* 423.

[7] *Nicolas v. Nicolas*, 63 Phil. 332, 335-336 (1936).

[8] *Dacanay v. Hernandez*, 53 Phil. 824, 838 (1928).

[9] Section 7, Rule 86, Rules of Court; see also MORAN, *op. cit.*

necessary expenses or for actual services rendered, as part of the funds disposed of by him.[10] The specific rates of commission varies according to the amount involved.[11]

The compensation allowed in ordinary cases is not merely for the execution of documents and keeping of accounts. It also includes those services which require discretion and an ordinary degree of business ability in their execution. For he is expected to employ in the discharge of his duties ordinary business ability and careful, economical management, his appointment being based upon such consideration.[12]

In order to justify the allowance of extra compensation, three requisites must concur:[13] (1) the estate must be large, (2) the settlement attended with great difficulty, and (3) a high degree of capacity required.[14] The actual services rendered must have been of extraordinary character and necessary for the protection of the estate or the promotion of some object beneficial to it.[15] What services will be regarded as extraordinary necessarily depends on the peculiar circumstances of each case. To be such, they must be of a nature not ordinarily required of an executor or administrator in the discharge of his duties—not within the routine of administration.[16] It has been held, that in all cases, a claim for extraordinary compensation should be cautiously scrutinized,[17] and that the better practice, in such cases, is to itemize the account and explain fully in what particular the services are extraordinary or unusual.[18] The amount of an executor's or administrator's fee in special cases is a matter largely in the discretion of the probate court, which shall not be disturbed on appeal, except in cases of abuse thereof.[19]

The case of *Prieto v. Valdez* [20] may be given as an illustration of what may be considered to justify the allowance of extraordinary compensation. In this case, appellant was the administratrix of Tuason y de la Paz estate valued, according to appellant's inventory, at ₱3,513,037.62 or, according to the government's determination, at ₱4,925,588.44. The commission representing the ordinary compensation, upon these sums is ₱9,232.59 or ₱12,763.97, respectively. Deducting the said commission from ₱20,000 adjudicated by the lower Court to appellant as her total fees, the additional compensation awarded to her was either ₱10,767.41 or ₱7,236.03, as the case may

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[10] *De Viademonte v. Gavieres*, 12 Phil. 155, 159 (1908).
[11] Section 7, Rule 86, Rules of Court; MORAN, *op. cit.*, 424.
[12] *Chung Muy Co's Administrator v. Lim Quioc*, 23 Phil. 518, 521-523 (1912).
[13] Note 11, *supra*.
[14] *Rodriguez v. Silva*, G.R. No. L-4090, January 31, 1952; *Chung Muy Co's Administrator v. Lim Quioc*, note 11, *supra*.
[15] *Chung Muy Co's Administrator v. Lim Quioc*, note 11, *supra*.
[16] In re *Carmody's Estate*, 145 N.W. 16, 17 (1914).
[17] Note 14, and note 15, *supra*.
[18] Note 14, *supra*.
[19] *Rosenstock v. Elser*, 48 Phil. 708 (1926); *Rodriguez v. Silva*, note 13, *supra*.
[20] G.R. No. L-6485, May 26, 1954.

be. The issue in the present case was whether appellant was entitled to more than either sum, as additional fees for her services as administratrix.

To dispose of the appeal, the Supreme Court took into account among others, the following: (1) size of the estate, (2) number of heirs, (3) number of tenants occupying the property, (4) income of the estate, and (5) difficulties allegedly attending the valuation of the estate and partition thereof.

It was admitted that the estate in question was large. This fact alone does not establish, however, the presence of the other requisites, according to the Supreme Court. The decedent in this case had fourteen heirs who were divided into two groups, namely, the three Prietos on the one hand and the six Valdeses and five Legardas on the other. This led the Supreme Court to hold that the number of said heirs did not appear to have rendered the settlement greatly difficult or to have required a high degree of capacity. It was alleged but not proved that there were 2,000 tenants, apart from innumerable squatters on the property. The Supreme Court said that the number of tenants and the existence of squatters did not necessarily prove that the settlement required a high degree of capacity on the part of the administratrix. The average monthly net income of the estate was ₱5,657.27. On the other hand, it was alleged but not proved that the average monthly income prior to the death of the deceased was from ₱3,000 to ₱4,000. The requisites of law, according to the Supreme Court, are not necessarily deducible from these figures. Moreover, the staff in charge of the menial and routine work of administration was substantially increased during appellant's incumbency. Again, during the lifetime of deceased, when the properties were much bigger, the administrator charged for his services only ₱200 a month. Lastly, in order to fix the value of the estate and to find a formula for partition thereof, the heirs held about twenty-one or twenty-two meetings. The minutes of the meetings, however, showed nothing concerning any effort, proposal or suggestion made by the administratrix to settle or assist in the settlement of any issue involved. The Supreme Court, therefore, concluded that the amount of ₱20,000 awarded by the lower court, was sufficient ordinary and extra-ordinary compensation.

Special Proceedings— *Sale of property of estates of deceased persons.*

GARIEL, ET AL. v. ENCARNACION, ET AL.
G.R. No. L-6736, May 4, 1954; 50 O.G., No. 6, 2440

HALILI v. LLORET
G.R. No. L-6306, May 26, 1954; 50 O.G., No. 6, 2493

Under the Rules of Court, real property of deceased persons may be sold when necessary for the payment of debts, expenses of administration and legacies,[1] or when beneficial to the heirs, devisees

[1] Section 2, Rule 90, Rules of Court.

and other interested persons, although not necessary for such payment.[2] In both instances, the court having jurisdiction of the estate of the deceased may authorize the administrator to sell real property in accordance with certain prescribed regulations.[3] Among them may be mentioned: 1) the administrator shall file a written petition setting forth facts showing that the sale is necessary or beneficial,[4] and 2) the court shall fix a time and place for hearing such petition and cause notice thereof to be given to all persons interested.[5] The requirements of law apply to testate and intestate proceedings because in both cases the heirs are entitled to be given an opportunity to be heard and to protect their rights and interest in the estate.[6] It has been held that the law in this respect must be strictly complied with.[7] It must also be taken as mandatory. Failure to comply with it renders void the order authorizing the sale as well as the sale made in pursuance thereof.[8] The present case of *Gabriel v. Encarnacion* [9] reiterates the foregoing observation.

On November 28, 1952, respondents, one of whom was the administratrix, filed a motion with the competent court praying that all the real properties of the intestate be sold for cash at public bidding on the date and hour to be fixed by the court. The motion was set for hearing on December 5, 1952 and due notice thereof given to the opposite parties. However, on the date fixed, it was not heard because there was no judge to act and take cognizance thereof. On April 6, 1953, respondents filed another motion inviting attention of of the court to the pendency, among others, of the motion of November 28, 1952 and praying that all the pending motions and incidents of the estate be referred to the court holding sessions at Pasig, Rizal.

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[2] Section 4, Rule 90, Rules of Court.

[3] Section 7, Rule 90, Rules of Court.

[4] Section 7(a), Rule 90, Rules of Court: "The executor or administrator shall file a written petition setting forth the debts due from the deceased, the expenses of administration, the legacies, the value of the personal estate, the situation of the estate to be sold, mortgaged, or otherwise encumbered, and such other facts as shown that the sale, mortgage, or other encumbrance is necessary or beneficial".

[5] Section 7(b), Rule 90, Rules of Court: "The court shall thereupon fix a time and place for hearing such petition, and cause notice stating the nature of the petition, the reason for the same, and the time and place of hearing, to be given personally or by mail to the persons interested, and may cause such further notice to be given, by publication or otherwise, as it shall deem proper".

[6] *Baun v. Baun*, 53 Phil. 654, 661 (1929).

[7] *Id*: "Sections 714 and 722 of Act No. 190 (Sections 2 and 7, respectively of Rule 90, Rules of Court) provide for the sale of the property belonging to the heirs We are of the opinion that the procedure prescribed by said sections for the sale of property under these conditions must be strictly construed".

[8] *Gabriel v. Encarnacion*, G.R. No. L-6736, May 4, 1954; 50 O.G., No. 6, 2440, citing *Ortaliz v. Registrar of Deeds of Occidental Negros*, 55 Phil. 33 (1930); *Hashim v. Bautista Vda. de Nolasco*, 56 Phil. 788 (1931); *Estate of Gamboa v. Floranza*, 12 Phil. 191 (1908).

[9] Note 8, *supra*.

To this motion, petitioners interposed opposition. On April 20, 1953, petitioners as well as respondents appeared and expressed their argument for and against the motion filed on April 6, 1953. On April 29, 1953, the court issued an order granting the motion for authority to sell and setting the date of the sale. Petitioners filed a motion for reconsideration on the ground that the motion granted was not before the court during the hearing that took place on April 20, 1953. Upon denial, the case was elevated to the Supreme Court by certiorari. The question was: Were the regulations above-mentioned followed in the present case. This was answered by the Court, thus—

> "The answer must of necessity be in the negative for the simple reason that the motion filed by respondents for the sale of the real properties of the estate has not been set for hearing by the court as required by the regulations." [10]

At the hearing of the motion to transfer the case to the Pasig branch, the parties incidentally discussed the merits relative to the sale of the properties. This, however, was not the purpose of the hearing, according to the Supreme Court. Counsel for petitioners went to the court not precisely to argue that matter but merely the question relative to the transfer of the case.

Once the authority to sell the property of deceased persons has been duly granted, the next step ordinarily is the negotiation and execution of the sale. The executor or administrator seems to be required to see to it that the terms of his authority conform with those of the sale executed by him. Otherwise, the provisions of the Rules of Court prescribing the regulations relative to the granting of authority,[11] would be set at naught. This observation gains cogency when the mandatory character [12] and purpose of the said regulations [13] are considered. A conveyance whose terms are at variance with the authority under which the same was executed seems to be no better than an unauthorized transaction. The pertinent question that may be raised is: What is the effect of the variation upon the sale? The case of *Halili v. Lloret* [14] is in point.

At the outset, it should be stated that in the present case, there was no sale but merely a negotiation to that effect. Defendant R.

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[10] "It should be noted that said motion was primarily set for hearing by counsel on December 5, 1952, upon giving due notice to the opposite counsel, but that the motion was not actually heard because there was no judge who could act and take cognizance thereof. Aside from that instance, the motion was never set for hearing again for which reason counsel for petitioners was surprised when he received copy of the order of the court granting the motion for the sale of the property".

[11] Note 3, *supra*.

[12] Note 8, *supra*.

[13] Note 6, *supra*.

[14] G.R. No. L-6306, May 26, 1954; 50 O.G., No. 6, 2493.

G. Lloret, judicial administrator of the estate of F. A. Gonzales, requested and obtained from the court authority to sell certain real property of the deceased. Thereafter, negotiations between plaintiff and defendant were made leading to the execution of a document Exhibit D. The terms of this document were at variance with those of the authority to sell in three points. First, the authority to sell referred to certain lands in the barrio of Sabang, municipality of Baliwag, Bulacan. The negotiations, however, included, among those to be sold, lands situated in the barrio of San Roque. Second, the authority had the express condition that the encumbrance affecting the lands to be sold would first be paid. On the other hand, the document embodying the negotiations stipulated that the sale would be free from any encumbrance, with the exception of the sum of ₱30,000 which was indebted to one Valero, that the possession of the lands sold should be delivered to the purchaser sometime in March, 1954, and that if this could not be done, the lands would be substituted by others of the same area, value and conditions, belonging to the same estate.[15] Third, the authorization called for the sale of six parcels of land belonging to the estate. In the document as drawn up, however, it appeared that only five parcels of land would be sold to plaintiff and the other parcel to defendant administrator, through plaintiff.[16] In an action for specific performance, the Supreme Court held:

> "Both plaintiff and defendants knew well that the properties were subject to judicial administration and that the sale could have no valid effect until it merits the approval of the court, so much so that before the lands were opened for negotiation the judicial administrator, with the comformity of the heirs, secured from the court authorization to that effect, and yet. . .the terms that were made to appear in the document Exhibit D differ substantially from the conditions prescribed in the authorization given by the court, which indicates that said document cannot have any binding effect upon the parties nor serve as basis for an action for specific performance, as now pretended by the plaintiff, in the absence of such judicial approval."

[15] "This is an onerous condition which does not appear in the authorization of the court. Of course, this is an eventuality which the plaintiff wanted to forestall in view of the fact that the lands subject of the sale were pending litigation between the estate and Ambrosio Valero, but this is no justification for departing from the precise terms contained in the authorization of the court".

[16] In this connection, it was agreed upon that, after the execution of the sale, plaintiff would in turn resell to defendant, who was the administrator of the estate whose land was the subject of the sale, one of the parcels for an undisclosed amount. The court observed that "this cannot legally be done for, as we know, the law prohibits that a land subject of administration be sold to its judicial administrator." The law referred to is Art. 1491 of the Civil Code of the Philippines. See also *Rodriguez v. Mactal*, 60 Phil. 13, 16 (1934).

Special Proceedings—*Issue in probate of wills.*

VAÑO V. VAÑO VDA. DE GARCES
G.R. No. L-6303, June 30, 1954; 50 O.G., No. 7, 3044

The present case of *Vaño v. Vaño vda. de Garces*[1] seems to be a new impression in Philippine jurisprudence. In this case, Teodoro Vaño petitioned the Court of First Instance of Cebu to have an instrument purporting to be the will of deceased Jose Vaño probated. Paz Vaño vda. de Garces and others filed an opposition, alleging, among others, that (1) the supposed will was procured by undue and improper pressure and influence, (2) the signatures of the alleged testator were procured by fraud and trickery, and (3) the supposed testator was incapable of making a will at the time of its execution. During the trial, oppositors presented a handwriting expert, who testified that the signatures purporting to be those of Jose Vaño were forgeries. Objection was interposed by petitioner on the ground that the opponents not only failed to allege as a basis of their opposition that the signatures of the testator on the supposed will were forged but, on the contrary, they impliedly admitted the genuineness of said signatures, merely claiming that said signatures were obtained through trickery and fraud and under undue pressure and influence. The issue squarely presented, in the words of the Supreme Court, was "what evidence an opponent to a probate of a will may be permitted to present at the hearing—whether or not he is limited to presenting evidence to sustain the particular objection or ground on which he bases his opposition to the probate."

In some jurisdictions in the United States, the rule is that the issue in contested wills is made up by the pleadings or framed from the same, and no evidence can be introduced except in support of allegations contained in such pleadings.[2] In other words, the *allegata* and the *probata* must correspond.[3] Thus, it has been held that where there were no allegations that the will was not properly signed and attested, a verdict for the contestant cannot be sustained on evidence tending to prove that such was the case.[4] In another decision, it was ruled that where the petition in a will contest case does not allege that the will was signed by testator's wife, and not by him, evidence to show such fact is inadmissible.[5] The example given by the Philippine Supreme Court is that, if the only opposition to the probate of a will is lack of mental capacity of the testator, then the oppositor in presenting evidence will be confined to that point. The reason for the procedural requirement that the assailant of a will should state the ground or grounds upon which he bases his opposition is that "it enables those who claim under the will to prepare for trial upon the real issues upon which the controversy is to be decided and prevents them from being taken by surprise by the testi-

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[1] G.R. No. L-6303, June 30, 1954; 50 O.G., No. 7, 3044.
[2] *Vaño v. Vaño vda. de Garces*, note 1, *supra*.
[3] *Purdy v. Hall*, 25 N.E. 645, 646-647 (1890), citing *Flinn v. Owen*, Ill. III.
[4] *Ibid.*, *Carmichael v. Reed*, 45 Ill. 108.
[5] *Wood v. Carpenter*, 166 Mo. 465, 66 S.W. 174 (1901).

mony introduced."[6] It seems that the Rules of Court contains a substantially similar requirement. Section 10 provides that "anyone appearing to contest the will must file a writing stating his grounds for opposing its allowance, and serve a copy thereof on the petitioner and other residents of the province interested in the estate."[7] The reason given by the Philippine Supreme Court for this provision is also substantially the same as that set forth above.[8] As may be seen presently, however, the section and the reason did not prevent the Supreme Court from answering the issue in the present case in the negative.

In other jurisdictions, a different rule obtains. There, the issue in testamentary contests is fixed by statutes and is practically the old common law issue *devisavit vel non*[9]—is the instrument presented for probate the last will and testament of the testator? Said issue may not be varied by the pleadings and every attack on the validity of the will may be employed.[10] In the State of Ohio, for instance, the issue involved in this kind of contest is fixed by Section 5861, Rev. St. 1892, which provides that "an issue shall be made up, either in the pleadings or by an order on the journal, whether the writing produced is the last will or codicil of the testator, or not. . ."[11] Within this general issue, there may be included—and generally they are included—a number of issues special in their nature. Among these are the following: 1) that the testator was lacking in mental capacity, 2) that he was unduly influenced, as that term is defined by law, 3) that there was a defective signing or attestation, and 4) that the testator was not of legal age.[12] In all cases, however, the general issue, having been specifically prescribed by statute, "cannot be varied or restricted by averments in the pleadings, whether controverted or not."[13] The law in this respect is

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[6] Note 3, *supra.*

[7] Rule 77, Rules of Court.

[8] "The purpose of this legal provision is clear, and it is to apprise the person or persons seeking the probate of a will, as well as any other persons interested in the estate, of the reasons in opposing probate so that they may prepare the necessary evidence to counteract and disprove said ground of opposition, this, in addition to apprising the court itself of the issue involved in the proceedings so that it may intelligently direct the presentation of evidence during the hearing". *Vaño v. Vaño vda. de Garces*, note 1, *supra.*

[9] "Did he devise or not? An issue *devisavit vel non* is an issue of fact as to whether a will in question was made by the testator as his own responsible act." BALLANTINE, J. A., Law Dictionary with Pronunciation (1948) 372; See also BOUVIER'S Law Dictionary and Concise Encyclopedia (1914) 861.

[10] *Vaño v. Vaño Vda. de Garces*, note 1, *supra.*

[11] The section is taken from the case of *Tacey v. Cunningham*, 68 N.E. 1001, 1003 (1903).

[12] *Niemes v. Niemes*, 97 Ohio St. 145, 150; 119 N.E. 503, 504-505 (1917); *Fox v. Lynch*, 183 N.E. 177, 180 (1932).

[13] *Dew v. Reid*, 52 Ohio St. 519, 40 N.E. 718, 719-720 (1895); *Campbell v. Detroit Trust Co.*, 266 N.W. 351, 355 (1936); *Adams v. Foeley*, 173 N.E. 197, 201 (1929) dissenting opinion; *Fox v. Lynch*, 183 N.E. 177, 180 (1932).

imperative in its terms.[14] It has been held that the evidence need not be confined to the pleadings nor should it correspond with the allegations therein.[15] In all cases, the will may be assailed upon any and all grounds that would expose its invalidity,[16] regardless of whether those grounds are alleged or not.[17] Any competent evidence therefore, tending to prove, for any reason, such invalidity is admissible and should receive proper consideration.[18] The reason for the rule is "to prevent a disposition of cases for the contest of wills upon the mere consent or acquiescence of the parties, in any form." [19]

The Philippines has no provision expressly stating that the issue in will contests shall be "whether the writing produced is the last will or codicil of the testator or not." However, under section 12, Rule 77, of the Rules of Court, the probate court, before allowing a will, must first be satisfied, upon proof taken and filed, that the will was duly executed, that the testator at the time of its execution was of sound and disposing mind, and that he was not acting under duress, menace, and undue influence, or fraud.[20] Section 9 of the same Rule also provides that the will shall be disallowed (a) if not executed and attested as required by law; (b) if the testator was mentally incapable of making a will; (c) if it was executed under duress, or the influence of fear, or threats; (d) if it was procured by undue and improper pressure and influence, on the part of the beneficiary, or of some other person for his benefit; (e) if the signature of the testator was procured by fraud or trick, and he did not intend that the instrument should be his will at the time of fixing his signature thereto.[21] Because of these two provisions, the Supreme Court declared:

> "As the law in our jurisdiction on the probate of wills now stands, we are inclined to adopt the second view, namely, that the law itself fixes or determines the issue."

Accordingly, the oppositors in the present case were not precluded from attacking the will in question on the ground of forgery despite the fact that their opposition was confined to grounds (b), (d), and

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[14] *Dew v. Reid, supra* 13; citing *Walker v. Walker*, 14 Ohio St. 157.

[15] *Dew v. Reid, supra* 13, citing *Runyun v. Price*, 15 Ohio St. 1: "There are no pleadings to which the evidence must be confined, or with the allegations of which it must correspond".

[16] *Dew v. Reid, supra* 13; citing *Runyun v. Price, supra* 15.

[17] *Fox v. Lynch*, Note 12, *supra*, citing *Dew v. Reid*, note 13, *supra*.

[18] *Dew v. Reid*, note 13, *supra*, *Fox v. Lynch*, note 12, *supra*.

[19] *Dew v. Reid, supra* 13, citing *Walker v. Walker*, note 14, *supra*.

[20] Sec. 12, Rule 77 of Rules of Court.—"If the court is satisfied, upon proof taken and filed, that the will was duly executed, and that the testator at the time of its execution was of sound and disposing mind, and not acting under duress, menace, and undue ifluence, or fraud, a certificate of its allowance, signed by the judge, and attested by the seal of the court, shall be attached to the will and certificate filed and recorded by the clerk."

[21] See also Art. 839, Civil Code of the Philippines.

(e) of section 12, Rule 77 as above stated. In the light of this ruling, an oppositor objecting to the probate of a will on one or two specific grounds may, during the hearing, add other grounds and submit evidence in support of the same. It may not be amiss to state, however, that a careful practitioner would not, as much as possible, avail of the procedure. For as stated by the Supreme Court, "when this happens, as it did in the present case, one is more or less justified in inferring that they were in doubt as to the basis of their opposition, a fact which naturally and not inconsiderably weakens their stand. . . Conduct and attitude, changeable and uncertain, does not strengthen their position."

Special Proceedings—*Liquidation of conjugal partnership property.*

MACALINAO, ET AL. V. ANGELES, ET AL.
G.R. No. L-5705, June 30, 1954; 50 O.G., No. 7, 3041

Upon the termination of the conjugal partnership of gains,[1] the community property shall be liquidated. If the dissolution is brought about by the death of either spouse,[2] the liquidation may take place in the testate or intestate proceedings of the deceased, in accordance with section 2, Rule 75 of the Rules of Court,[3] or in an ordinary action for liquidation and partition authorized by Act No. 3176.[4] It has been held that these remedies are alternative, and not simul-

[1] Article 175, Civil Code of the Philippines:—"The conjugal partnership of gains terminates: (1) Upon the death of either spouse; (2) When there is a decree of legal separation; (3) When the marriage is annulled; (4) In case of judicial separation of property under article 191."

[2] If the dissolution takes place by annulment of marriage, legal separation, or judicial separation of property, there are only two ways of liquidation. namely: (1) extrajudicial partition between the husband and wife, and (2) ordinary action for partition. (TOLENTINO, A. M., I COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES [1953] 430; FRANCISCO, V.J., I CIVIL CODE OF THE PHILIPPINES, ANNOTATED AND COMMENTED [1953] 576).

[3] Sec. 2, Rule 75, Rules of Court.—"When the marriage is dissolved by the death of the husband or wife, the community property shall be inventoried, administered, and liquidated, and the debts thereof paid, in the testate or intestate proceedings of the deceased spouse. If both spouses have died, the conjugal partnership shall be liquidated in the testate or intestate proceedings of either."

[4] Act No. 3176, which amended section 685 of the Code of Civil Procedure: "When the marriage is dissolved by the death of the husband or wife, the community property shall be inventoried, administered, and liquidated, and the debts thereof shall be paid, in the testamentary or intestate proceedings of the deceased spouse, in accordance with the provisions of this Code relative to the administration and liquidation of the estates of deceased persons, or in an ordinary liquidation and partition proceeding, unless the parties, being all of age and legally capacitated, avail themselves of the right granted to them by this Code of proceeding to an extrajudicial partition and liquidation of said property." (First paragraph).

taneous.[5] Given a case, which of the two ways of liquidating the conjugal property shall be selected and adopted? Where the estate has debts testate or intestate proceedings, which are especially adapted to the settlement of estates of deceased persons, may be commenced.[6] On the other hand, when there are no debts to pay, the liquidation and partition of the property of the conjugal partnership may be made in an ordinary action instituted for that purpose.[7] Thus, in the case of *Macalinao v. Angeles*,[8] it was held that an ordinary action for accounting, liquidation and partition of a conjugal estate is preferred to an intestate proceeding, when the heirs are of age or duly represented and the estate has no debts. This is so because, in such case, "there is no reason why the estate should be burdened with the cost and expenses of an administrator,[9] the judicial administration and the appointment of an administrator being superfluous and unnecessary.[10]

The antecedent facts of the above-cited case are as follows: In a land registration case wherein defendants were applicants and plaintiff was oppositor, the latter manifested to the court that she would file intestate proceedings with a view to determining the ownership of the two parcels of land sought to be registered. This led the court to issue an order suspending the said registration proceeding until the determination of the real owner of the said land in the proposed intestate proceedings. However, plaintiff, instead of doing

[5] *Calma v. Tañedo*, 66 Phil. 594, 596-597 (1938): The reason for the ruling is that "an anomalous and chaotic situation would result if conjugal property were administered, liquidated and distributed at the same time in a testamentary proceeding and in an ordinary action for liquidation and partition of property."

[6] FRANCISCO, *op. cit.*, 576, TOLENTINO, *op. cit.*, 432: "If there are debts, and the parties interested cannot agree on the settlement of said debts, the liquidation of the partnership can take place only in judicial administration proceedings."

MORAN, M. V., II COMMENTS ON THE RULES OF COURT (1952) 336: "It is only when debts exist and there is no way of collecting them extrajudicially because the creditors have not reached an amicable settlement with the heirs, that they can compel the filing of special proceedings before the court for the liquidation of said debts."

[7] *Cruz v. de Jesus*, 52 Phil. 870, 873 (1929); In this case, plaintiff filed an action for partition of conjugal property, but the court dismissed the same, it being of the opinion that the proper remedy was a testate or intestate proceeding. The estate had no debts. *Held*: "We are of the opinion and so hold, that in accordance with section 685 of Act 190, as amended by Act No. 3176, when there are no debts to pay, the liquidation and partition of the property of the conjugal partnership, dissolved by the death of one of the spounses, may be made in an ordinary action instituted for that purpose."

[8] G.R. No. L-5705, June 30, 1954; 50 O.G., No. 7, 3041.

[9] *Ilustre v. Alaras Frondoza*, 17 Phil. 321, 323-324 (1910); *Bondad v. Bondad*, 34 Phil. 232, 235-236 (1916); *Baldemor v. Malangyaon*, 34 Phil. 367, 369-370 (1916).

[10] *Utulo v. Pasion Vda. de Garcia*, 66 Phil. 302, 306 (1938), citing *Ilustre v. Alaras Frondoza, supra; Malahacan v. Ignacio*, 19 Phil. 434, 435-436 (1911); *Bondad v. Bondad, supra; Baldemor v. Malangyaon, supra; Fule v. Fule*, 46 Phil. 317 (1924).

what she had announced, instituted against defendants an action for accounting, liquidation and partition of a conjugal estate involving the aforementioned two lots. The lower court dismissed the action, upon motion of defendants on the ground that intestate proceedings should have been filed in accordance with the order of the court. Hence this appeal. The Supreme Court reversed the appealed decision, holding that plaintiff's manifestation that an intestate proceeding would be filed thus leading the lower court to suspend the registration proceeding, did not legally deprive her of the right to avail of the proper judicial remedy. The essential basis of the order suspending the registration case was the necessity of determining the ownership of the controverted land. Substance should be preferred to form.[11]

Under Act No. 3176, which amended section 685 of Act No. 190,[12] there were three ways of liquidating the community property, namely: 1) in the testate or intestate proceedings of deceased persons, 2) in an ordinary liquidation and partition proceedings, and 3) by an extra-judical partition and liquidation.[13] The present case applied the second method.[14]

Under the Rules of Court, it seems that the said liquidation may also take place in three ways:[15] 1) by extra-judicial partition,[16] 2) by an ordinary action for partition,[17] and 3) by testate or intestate proceedings.[18] The choice of the proper remedy seems to depend upon the facts of each case. If the decedent left no debts [19] and the heirs and legatees are all of age, or the minors are represented by their judicial guardians,[20] the parties may, without securing letters of administration, divide the estate among themselves as they see fit by means of a public instrument filed in the office of the register

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[11] In *Macalinao v. Angeles*, *supra*, the Supreme Court further observed: "Appellees' contention that the action at bar is not any better than the land registration case wherein the question of title can as well be decided, finds an easy answer in the fact that the appellants seek, in addition to their ownership, an accounting and liquidation of the conjugal estate of their predecessors in interest."

[12] See note 4.

[13] PADILLA, A., I CIVIL CODE, ANNOTATED, (1953) 322.

[14] Sec. 2, Rule 75 of the Rules of Court "is without prejudice to the action for liquidation and partition authorized by Act No. 3176." (II MORAN, *op. cit.*, 355).

[15] TOLENTINO, *op. cit.*, 430; FRANCISCO, *op. cit.*, 575.

[16] Sec. 1, Rule 74 of Rules of Court; PADILLA, *op. cit.*, 322.

[17] Sec. 1, Rule 74 of Rules of Court.

[18] Sec. 2, Rule 75 of Rules of Court.

[19] Sec. 1, Rule 74 of Rules of Court.—"It shall be presumed that the decedent left no debts if no creditor files a petition for letters of administration within two years after the death of the decedent."

[20] MORAN, *op. cit.*, 337: "Note, however, that under Rep. Act 386, the father, or in his absence the mother, is the legal administrator of the property pertaining to the child under parental authority (Art. 320) without need of judicial appointment (Report of the Code Commission on the proposed Civil Code, p. 91)."

of deeds.[21] Should they disagree as to the division of the estate, an action for partition may be brought.[22] In such action, the liquidation of the partnership property is implied.[23] If there are debts and the parties interested cannot agree on the settlement of said debts, the liquidation can take place only in judicial administration proceedings.[24]

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[21] Sec. 1, Rule 74 of Rules of Court.—"If there is only one heir or one legatee, he may adjudicate to himself the entire estate by means of an affidavit filed in the office of the register of deeds."

[22] Sec. 1, Rule 74 of Rules of Court; MORAN, *op. cit.*, 343.

TOLENTINO, *op. cit.*, 432: "An ordinary action for liquidation and partition of the property of a conjugal partnership, which has already been dissolved, will be proper, if the parties cannot agree and if there are no debts to be paid."

[23] *Cruz v. De Jesus*, 52 Phil. 870, 873 (1929), citing *Remolino v. Peralta*, G.R. No. L-10834, November 16, 1917, not reported.

[24] TOLENTINO, *op. cit.*, 432; FRANCISCO, *op. cit.*, 576.