RECENT DECISIONS

Civil Law—*Rights may be waived but the waiver must not be prejudicial to a third person with a right recognized by law.*

ISABEL PADILLA v. LUCIANO DIZON
G.R. No. L-8026, April 20, 1956

Waiver is defined as the relinquishment of a known right with both knowledge of its existence and an intention to relinquish it. The right, benefit or advantage must exist at the time of waiver; there must be actual or consructive knowledge of such existence; and there must be an intention to relinquish it. Voluntary choice is the essence of waiver.[1]

The rational foundation why a person can renounce[2] what has been established in his favor or for his benefit is because he prejudices nobody thereby; if he suffers some loss, he alone is to blame.[3] But the waiver must not be contrary to law, public order, public policy, morals, or good custom, or prejudicial to a third person with a right recognized by law.[4]

In *Isabel Padilla vs. Dizon*,[5] the plaintiff was not permitted to renounce her right because it was prejudicial to the defendant with a right recognized by law. Padilla, represented by her guardian, bought from defendant a parcel of land containing an area of 233.90 sq. m. for ₱18,000.00. Upon a resurvey, it was found to contain only 182 sq. m. Hence plaintiff brought this action, first to have the defendant return the purchase price upon a judicial declaration of the sale as void, or to order defendant to refund to plaintiff the sum of ₱4,000.00, as the proportionate reduction of the purchase price. The lower court rendered an alternative judgment for the plaintiff. Plaintiff asked for the second alternative but the defendant filed a motion to comply with the first alternative. The defendant was sustained. Later plaintiff filed a manifestation of waiver of her rights in the decision rendered in her favor by the trial court and asking that the status quo of the parties before the filing of the case be maintained. The plaintiff contends that only she as plaintiff acquired a right under the decision.

The Supreme Court in rendering the position of the appellant as untenable gave three reasons. Firstly, when acting upon the complaint which asked for two alternative remedies, the trial court rendered judgment giving the defendant the choice of complying with one of those remedies and he chose to comply with the first, he certainly acquired a right recognized by law,

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[1] I TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 28 (1953), citing several American cases.

[2] In order that a person may be considered to have validly renounced a right, the following requisites should be present:

(1) He must actually have the right which he renounces. Thus, one cannot renounce in advance liability arising from fraud, or a future inheritance, or the action to revoke a donation on the ground of the donee's ingratitude.

(2) He must have the capacity to make the renunciation.

(3) The renunciation must be made in a clear and unequivocal manner. The formality by law for such renunciation if there is any, should be followed; if no particular formality is required, the renunciation may even be tacit, provided the intent to renounce can be clearly established. Thus the renunciation of one particular right cannot be presumed from the renunciation of another, especially when the interested party, upon renouncing the latter did not know that he was entitled to the former. *Id.*, at 29, citing Sentencia of July 8, 1887, and Sentencia of March 11, 1864; I MANRESA 67.

[3] I OYUELOS 15-16.

[4] Article 6, new Civil Code.

[5] G.R. No. L-8026, April 20, 1956.

and he would be prejudiced by a subsequent waiver on the part of the plaintiff of her right acquired under the decision.

Secondly, the complaint may be regarded as an offer by her thru the court, to the defendant for him either to return the ₱18,000.00 and get back the land or refund ₱4,000.00. This offer was approved by the court. When the defendant expressed to the court his willingness to comply with the first alternative, he may be considered to have formally accepted the offer of the plaintiff. Acceptance of an offer gives the offeree a right to compel the offeror to comply with the ofer.

Thirdly, when the trial court granted the prayer of the complaint to rescind the sale and when that decision became final, the deed of sale was declared rescinded and there was nothing that the plaintiff could do about it. Where the judgment is in the alternative, granting defendant an option to do a specified act or suffer judgment for a designated sum, his election eliminates the alternative, and is binding on both parties.[6]

Civil Law—*Lease*

PHILIPPINE AIRLINES, INC. v. LEOPOLDO PRIETO, ET AL. G.R. No. L-6860, April 18, 1956

The National Airports Corporation and Prieto entered into a concession contract,[1] whereby the latter was granted the exclusive right to establish, operate, conduct and maintain a Snack Bar within the International Airport for a period of two years from March 15, 1949. Alleging that Prieto was delinquent in the payment of the rentals, the lessor instituted this action on October 27, 1949, for the recovery of said rentals. Prieto answered by alleging a breach of contract on the part of the lessor[2] by allowing the establishment in a building of petitioner to which the International Airport was leased, of a store engaged in the same business, and hence, prayed for damages against the lessor. Thereafter, the lessor filed a third party compaint[3] against the petitioner and to pay such amount as the lessor be sentenced to indemnify the lessee.

The only issue for determination is whether the lessor is entitled to reimbursement from the PAL. The latter maintains the negative upon two grounds, namely: that the lessor had consented to the establishment and operation of said cooperative store; and that the same was organized and maintained by, and belongs to, the PAL Cooperative Association, not the PAL, which is sepa-

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[6] 49 C.J.S. 877.

[1] Lease is a "consensual, bilateral, onerous and commutative contract by which one person binds himself to grant temporarily the use of a thing or the rendering to of some service to another who undertakes to pay some rent, compensation or price." (4 S.R. 736).

[2] One of the obligations of the lessor, is to maintain the lessee in the peaceful and adequate enjoyment of the lease for the entire duration of the contract. (Article 1654, new Civil Code of the Philippines).

"The lessor must see that the enjoyment is not interrupted or disturbed, either by other's acts or by his own. By his own acts, because, being the person principally obligated by the contract, he would openly violate it if, in going back on his agreement, he should attempt to render ineffective in practice the right in the thing he had granted to the lessee; and by other's acts, because he must guarantee the right, he created for he is obliged to give warranty x x x and, in this sense, it is incumbent upon him to protect the lessee in the latter's peaceful enjoyment." (Goldstein v. Rocas, 34 Phil. 582 (1917); IV PANELLA, CIVIL CODE ANN. 32 (1953).

[3] § 1, Rule 12, Rules of Court provides:

"When a defendant claims to be entitled against a person not a party to the action, hereinafter called the third party defendant, to contribution, indemnity, subrogation or any other relief's claim, he may file with leave of court, against such person a pleading which shall state the nature of his claim and shall be called the third-party complaint."

rate and independent from said association. The Supreme Court in affirming the decision of the trial court held:

> "It is not disputed that the lessor is guilty of breach of its contract with Prieto, that Prieto had, by reason of the operation of the cooperative store, sustained damages...
>
> "The lessor's alleged consent to the creation and operation of the cooperative store had not been proved. Apart from being conclusive upon us, this finding of the Court of Appeals, appears to be fully supported by the record.
>
> "With respect to the personality of the PAL Cooperative Association, which is said to be independent of that of the PAL, suffice it to say that the PAL is not sued, and has not been sentenced, for the acts of said association. Plaintiff's action and the decisions against the PAL are based upon its own acts, for which the PAL cannot disclaim responsibility, namely: for having expressly authorized—and ever abetted, by giving the space and the facilities necessary therefor—the organization and operation, within its premises in the International Airport, of said cooperative store, in violation of the rules and regulations... which are binding on the PAL."

Civil Law—*Nuisance*

HALILI, ET AL., v. ARSENIO LACSON
G.R. No. L-8892, April 11, 1956

One of the most serious hindrance to the enjoyment of life and property is a nuisance,[1] whether public or private. Provisions for its treatment, both judicial and extra-judicial, are therefore indispensable in a well rounded Civil Code.[2]

What is a public nuisance? A public nuisance, defined by our new Civil Code[3] as to the scope of its injurious effect, affects a community or neighborhood or any considerable number of persons, although the extent of the annoyance, danger or damage upon the individuals may be unequal. In Common Law, a public nuisance is a condition of things which is prejudicial to the health, comfort, safety, property, sense of decency, or morals of the citizens at large, resulting either from an act not warranted by law, or from neglect of a duty imposed by law.[4]

The case at bar, illustrates a public nuisance. Petitioner Alfredo Halili, Thomas Jacob and forty one other persons occupied the premises by building inside the Palomar Compound without the knowledge, authority or consent of the City of Manila, although later two of them succeeded in securing from the City Mayor a sort of written permission wherein they agreed to occupy the premises under certain specified conditions. This was allowed by the City of Manila simply upon tolerance in view of the fact that they lost their homes and their properties as a result of the liberation of said city, and one of the conditions upon which their occupancy was allowed is that they will remove the structures they had erected and vacate the premises within such time as may be specified in a notice to be issued by the city engineer.

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[1] The term nuisance is defined by Article 694 of the new Civil Code, as:
"A nuisance is any act, omission, establishment, business, condition of property, or anything else which,
(1) Injures or endangers the health or safety of others;
(2) Annoys or offends the senses; or
(3) Shocks, defies or disregards decency or morality;
(4) Obstructs or interferes with the free passage of any public highway or street, or any body of water; or
(5) Hinders or impairs the use of property."
The word "nuisance" is derived from the French word "nuire" which means to injure, hurt or harm.

[2] Report of the Code Commission, pp. 51-52.

[3] Article 696.

[4] II FRANCISCO, CIVIL CODE ANN. AND COMMENTS, 965 (1953).

On May 5, 1952, in line with the policy to restore the lawful use by the public of streets, parks, plazas esteros and other public lands, respondents ordered the removal of said houses on the ground that they constitute a public nuisance. A petition for *certiorari* was filed with the Court of First Instance of Manila in order to enjoin respondents from carrying out their order of demolition of the houses. The trial court dismissed the petition, hence this appeal. The Supreme Court in sustaining the dismissal of the petition, said that the structures constitute an obstruction to the use by the public of the parks, plazas, streets, and sidewalks that are affected by hem, hence, said houses constitute a public nuisance which can be ordered demolished by the city authorities pursuant to Section 1122 of the Revised Ordinance of the City of Manila.[5]

Civil Law—*Interpretation of contract; obligation of the vendor in the transfer of homestead rights.*

LEONISA BACALTOS, ET AL. v. FRANCISCO ESTEBAN, JR., ET AL. G.R. No. L-9121, April 11, 1956.

An applicant for a homestead patent, with the previous approval of the Secretary of Agriculture and Natural Resources may transfer his rights to the land and improvements [1] to any person legally qualified to apply for a homestead. Every transfer made without the previous approval of the said secretary shall be null and void and shall result in the cancellation of the entry and the refusal of the patent.[2]

Under a contract of sale covering said rights to the land and improvements, which does not specify the party who should secure such approval, several questions may arise. Who is in duty bound to secure the approval? Is it the vendor or the vendee? If such approval be not secured, is the vendee justified in asking for the rescission of the sale? The case under review resolved the foregoing questions.

It appears that Abejay, Ambuyon and Partosa, original applicants of homestead on three lots, transferred their rights and improvements on said lots to Dionisio Bonilla, who subsequently filed his own application over said lots. Bonilla then sold his rights and improvements on the same lots to Francisco Esteban Jr., and the latter in turn transferred the same rights to Leonisa Bacaltos. The latter sale was made *subject to the approval of the transfer of rights from Abejay, Ambuyon and Partosa by the Secretary of Agriculture and Natural Resources or his duly authorized representative.*[3] This approval

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[5] Sitchon, et al. vs. Aquino, G.R. No. L-8191, February 22, 1956.
Sec. 1122 of the Revised Ordinance of the City of Manila provides:
"Whenever the owner or person responsible for any unauthorized obstruction shall, after official notice from the proper department, refuge or neglect to remove the same within a reasonable time, such obstruction shall be deemed a public nuisance, and the city shall be engineer is authorized to remove the same at the owner's expense."

[1] Under Sec. 20 of Com. Act No. 141, otherwise known as the Public Land Law, as amended by Rep. Act No. 1242, the conditions precedent in order that a homestead applicant may make a valid transfer of his rights to the land and improvements, are the following:
(1) After the approval of the application and before the patent is issued, the applicant shall prove to the satisfaction of the Secretary of Agriculture and Natural Resources, that he has complied with all the requirements of the law,
(2) Cannot continue his homestead, through no fault of his own,
(3) There is a bona fide purchaser,
(4) The conveyance is not made for purposes of speculation, and
(5) The conveyance must be made with the previous approval of the Secretary of Agriculture and Natural Resources.

[2] Ibid.

[3] Underscoring supplied.

was never secured so the vendee instituted the present action to rescind the sale. The vendor contended that it was not his duty to secure the approval and even if it were his duty to do so he had done all he could under the circumstances by submitting to the Bureau of Lands all the papers necessary for the granting of the requisite approval.

As a general rule, the contract itself is the best evidence of its terms and of the intention of the parties, whenever a contract is entered into in writing.[4] A difficulty arises when the terms of the contract are obscure or ambiguous. The interpretation of obscure words or stipulations in a contract shall not favor the party who caused the obscurity.[5] This is just because the party who causes the obscurity generally acts with ulterior motives.[6] The nature of the condition embodied in the contract in the case at bar is ambiguous because it failed to state precisely the party who should secure the approval. This ambiguity, notwithstanding, the Supreme Court, through Justice Felix Bautista Angelo, said that it is the duty of the vendor to secure the approval because it is he who should give to the vendee a clear title to the property he is conveying.

The Court reasoned out that under the law the improvements on certain lots applied for as homestead cannot be transferred, on pain of nullity, without the approval of the Secretary of Agriculture and Natural Resources, and because of that requirement it was his concern that that approval be obtained within a reasonable time and as in the instant case more than one year had elapsed since the execution of the contract, the vendor has had more than enough time to secure such approval and his failure to do so justifies the rescission of the of the contract by the vendee.

Civil Law—*Assignment of option to purchase; effect of absence of notice to obligor of assigned credit.*

PILAR BAUTISTA ET AL. vs. THE COURT OF APPEALS ET AL.
G.R. Nos. L-6569 and 6576, April 18, 1956

On November 23, 1944, Mrs. Nelly Lovina, a registered owner of a fishpond, executed a deed granting Mariano Flores an option to purchase the fishpond. The option provided that the optionee shall exercise the option to purchase within the period of eighteen months after six months subsequent to the cessation of hostilities between Japan and the United States of America, that the term cessation of hostilities is understood to be the signing of the Treaty of Peace by both countries.

On January 6, 1945, Flores sold and assigned to Pilar Bautista his rights under the option. No notice of this assignment was served upon the grantor of the option,[1] prior to its recording in 1946. In the meantime on December

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[4] Sec. 44, Rule 123, Rules of Court.
[5] Article 1377, Civil Code of the Philippines.
[6] III CAPISTRANO, CIVIL CODE ANN. 468 (1950).
[1] In this connection the Court of Appeals said, that it may well be doubted whether rights may be validly separated from the correlative obligations by means of an agreement limited to the former, since the debtor against whom the assignment is to operate would be deprived, as against the assignees of the defense of non-performance of the obligations in his favor (exceptio non adempleti contractus). The reciprocal nature of the contract would be thus destroyed, and such a substantial change would at least require the consent and approval of the debtor, which here was not given.
"An assignment of a credit, right or action shall produce no effect as against third persons, unless...it is recorded in the Registry of Property in case the assignment involves real property" (Article 1625, new Civil Code).
"The debtor who, before having knowledge of the assignment, pays his creditor shall be released from the obligation." (Article 1626, id.) From this article it can be inferred that a notice to the debtor of the assignment is necessary so that said assignment may produce all its effects. Without the notice, the assignment is effective as between the parties but not as against the debtor. (II CAPISTRANO, CIVIL LAW REVIEWER 461 (1954).

28, 1945, Flores assigned again the option to purchase to the Manila Surety and Fidelity Co., Inc. represented by its president, Primitivo Lovina, the husband of the grantor, stipulating that his option to purchase shall be within two years from September 2, 1945, the official cessation of hostilities between Japan and the United States, thereby agreeing to a definite limitation of the period of the original option granted to Flores.

On February 25, 1946, Bautista recorded the assignment unaware of what Flores had stipulated with the Manila Surety. On April 12, 1947, Bautista without notice to Lovina, leased the fishpond to Wencesiao Pascual for two years. On the assumption that the option of Flores had expired on September 2, 1947, without being exercised, Lovina attempted to resume possession of the property. Hence Pascual filed a complaint against Bautista to rescind the lease and for damages. Bautista filed a cross-claim against the Lovinas. The Court of Appeals held that the option expired on September 2, 1947 and awarded damages in favor of Pascual against Bautista only. Hence these petitions for review filed by Bautista and Pascual.

The basic issue in the case is whether the agreement of December 28, 1945, whereby Flores stipulated that his option would expire on September 2, 1947, is an effective defense against Bautista, the assignee. Bautista maintains that the deed cannot modify the terms of the deed of November 23, 1944, for Mrs. Lovina was not a party to it and the same was signed by Mr. Lovina in his capacity as president of the Surety company. In this connection, the Supreme Court, in sustaining the Court of Appeals, said that the object of the contract between Mrs. Lovina and Flores is presumed to form part of the conjugal partnership [2] of the Lovinas, hence the consent of Mr. Lovina was necessary to give full effect to said agreement. Although Mr. Lovina signed as president, he thereby implicitly sanctioned, in his individual capacity the contract executed by his wife.

It is next urged that the deed of December 28, 1945 cannot prejudice her rights because her assignment is prior and she was not a party to said deed. The Supreme Court held against the foregoing argument because neither Mr. Lovina nor Mrs. Lovina on December 28, 1945, knew that Flores had on January 6, 1945 conveyed his option to Bautista. The Court observed that there was not even a constructive notice of the assignment inasmuch as the deed covering the same was filed sixty days after the execution of the assignment in favor of the Manila Surety Co. Being a mere successor to the rights of Flores, Bautista could not have derived from him more rights than those he had against the Lovinas as of the date of the registration of the assignment.

It is a general rule in assignments that the obligor of the assigned credit may interpose against the assignee any and all defenses that could be validly interposed against the assignor up to the date the obligor is notified or acquires reliable knowledge of the assignment. The debtor or party liable on contracts like the one in question is not affected by the assignment until he has notice thereof, and consequently he may set up against the claim of the assignee any defense acquired before notice that would avail him against the assignor, or any compromise or release of the assigned claim by the latter before notice, will be valid against the assignee and discharge the debtor.[3]

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[2] The property subject of the option was purchased by Mrs. Lovina during the marriage. wherefore, the assent of the husband to the deed whereby the expiration of the option was explicitly set on September 2, 1947 is valid and binding upon the spouses.

[3] *Cf.* Sison vs. Yap Tico, 37 Phil. 584, 588 (1918).

The same rule obtains in Anglo-American Law.[4] The Restatement on Contracts of the American Law Institute[5] states the rule that an assignee's right against the obligor is subject to all limitations of the obligee's right, to all absolute and temporary defenses thereto, and to all set-offs and counterclaims of the obligor which would have been available against the obligee had there been no assignment, provided that such defenses and set-offs are based on facts existing at the time of the assignment or are based on facts arising thereafter prior to knowledge of the assignment by the obligor.

Inasmuch as Bautista's right of possession was co-extensive with that of her assignor, whose right expired on September 2, 1947, Bautista could no longer lease the property after this date to Pascual, hence she is liable to Pascual.

Luis J. Fe, Jr.

Civil Law—*Purchase and sale; rights of a purchaser in execution sale.*

BELLEZA v. ZANDAGA, ET AL.
G.R. No. L-8080, March 26, 1956
52 O.G. No. 5, 2542

It is settled that upon receipt of the definitive deed in an execution sale, legal title over the property sold is perfected.[1] If the land bought at an execution sale is not redeemed within the period allowed for that purpose, its ownership becomes consolidated in the purchaser and the latter as absolute owner is entitled to its possession and to receive the rents and fruits thereof.[2]

In an instant case the plaintiff purchased a piece of land at an execution sale and a deed of definitive sale having been issued to him, the sheriff placed him in possession of a piece of land pointed out by the defendant Zandaga but which in fact proved to be different. It turned out that Zandaga was in possession of the land mentioned in the deed claiming it as "successor in interest" of judgment labor.

From the facts stated such claim by the defendant could not exclude the plaintiff from possession of the land unless it was adjudged that this alleged successor had a better right to the property than the purchaser. In the absence of further evidence of such better right, dismissal of the action based on defendant's claim was premature adjudication of such better right. There was need for further hearing.

Although the Rules of Court[3] gives the purchaser of real property in execution sale if he fails to recover possession thereof recourse against the judgment creditor, it does not bar him from his right to recover possession when that right has not yet been denied by the courts.

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[4] 4 Am. Jur. 801 (1932).
[5] Vol. I, Sec. 167, id.
[1] 33 C.J.S. 554.
[2] Powell v. Philippine National Bank, 54 Phil. 54, 63 (1929).
[3] Rule 39 § 32.

Civil Law—*Succession; right of illegitimate children to inherit.*

MORALES v. YANES
G.R. No. L-9315, March 24, 1956
52 O.G. No. 4, 1945

The new right recognized by the New Civil Code in favor of illegitimate children of the deceased cannot be asserted to the impairment of vested rights.[1]

Plaintiff's action in this case is based on the provisions of the new Civil Code[2] giving illegitimate children the right to succeed where decedent leaves no ascendants nor descendants. There is no doubt that the land which is the subject matter of the action belonged to Eugeniano Sarenas who died intestate in 1937 leaving no ascendants nor descendants and that defendant Yanes and his sister as surviving nephews took possession of said lands. Defendant on the other hand claim the right to inherit under the old Civil Code[3] since decedent died before the effectivity of the new Civil Code. The trial court decided in favor of the defendant hence this appeal.

Appellant contend that the plaintiff cannot acquire vested right without first commencing proceedings to settle Eugeniano's estate. It has been held before, however, that the right of heirs to the property of the deceased is vested from the moment of death.[4]

Of course judicial confirmation is still needed but before such judicial declaration, such rights are already protected from encroachments.[5]

A more conclusive consideration is based on Art. 2263 of new Civil Code which provides that rights to inheritance from a person who died before its effectivity shall be governed by the old Civil Code.

Lilia R. Bautista

Civil Law—*Effect of sale by wife of the conjugal property.*

SUSANA CORPUZ v. DOMINGO GERONIMO
G.R. No. L-6786, March 21, 1956

By means of the conjugal partnership of gains the husband and wife place in a common fund, the fruits of their separate property and the income from their work or industry, and divide equally, upon the dissolution of the marriage or of the partnership, the net gains or benefits obtained indiscriminately by either spouse during the marriage.[1] Upon the death of one of the spouses, the conjugal partnership is dissolved,[2] and one undivided half becomes the property of the surviving spouse and the other undivided half becomes the property of the heirs of the deceased.[3] Since the surviving spouse is the owner of only the undivided half, "a sale by a widow of the conjugal partnership property pertaining to her and the deceased spouse, who is survived by the legitimate chil-

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[1] Uson v. del Rosario, G.R. No. L-4963, Jan. 29, 1953.
[2] See Arts. 287 and 988, new Civil Code.
[3] See Arts. 946, 947 and 948 of the Old Civil Code.
[4] Art. 657, new Civil Code. Mijares v. Nerl, 3 Phil. 196 (1904); Velasco v. Vizmanos, 45 Phil. 675 (1924); Ilustre v. Frondosa, 17 Phil. 321 (1910); Bondad v. Bondad, 34 Phil. 232 (1916); Fule Vizmanos, *supra* note 4.
[5] Coronel v. Ona, 33 Phil. 456 (1916); Nable v. Nable Jose, 41 Phil. 713 (1916); Velasco v. Vizmanos, *supra* note 4.
[1] Art. 142, Civil Code.
[2] Art. 175, Civil Code provides: "The conjugal partnership of agins terminates: (a) upon the death of either spouse...."
[3] Siuliong and Co. v. Chio Tayaun, 12 Phil. 13 (1908); Bondad v. Bondad, 34 Phil. 232 (1916).

dren, is void as to the half pertaining to the husband which passed by operation of law to sai dchildren upon his demise." [4]

In the instant case the ruling in *Talag v. Langkengko* [5] was reiterated The facts are: In 1936, the spouses Domingo Geronimo and Olimpia Legazpi sold to the spouses Domingo Corpuz and Eugenia Regal the land involved in the litigation. Three years later, Eugenia Regal thumbmarked a document acknowledging receipt of ₱100.00 from the vendors and giving the later the right to repurchase the property within four years. Domingo Corpuz, the husband of the vendee did not sign this document; however, his son Isabelo was one of the witnesses thereto. In 1943, D. Corpuz died. His wife reconveyed in 1946, the land to Geronimo, Susana Corpuz, Isabelo's wife, acting as one of the witnesses thereto.

Eugenia Regal and Isabelo Corpuz having died, Susana Corpuz, in her capacity as guardian of her three minor children by the deceased Isabelo, executed an extrajudicial partition of the estate left by her husband (which estate included the land in question). A transfer certificate of title was issued in the name of the minors. However, Geronimo, who was then in possession of the land refused to surrender the same to the plaintiff. Hence, plaintiff instituted a complaint against Geronimo praying that the latter be ordered to vacate the land. The defendant claimed that the transaction of 1936 with the spouses Corpuz and Regal was a *pacto de retro* and that the land was in fact reconveyed in 1946.

The trial court held that there was no *pacto de retro* sale but that under the evidence, the land was resold to the defendant. It relied on the documents thumbmarked by Regal and witnessed by her son, Isabelo, and on the other document likewise thumbmarked by Regal and witnessed by her daughter-in-law, Susana, and ruled that Eugenia acted as her deceased husband's representative in the reconveyance and that Susana by acting as a witness participated in behalf of her minor children in the reconveyance.

In ruling that the minors are owners of the undivided half of the land (the other undivided half being owned by the defendant) the Supreme Court said that the reconveyance by Eugenia Regal in 1946 was ineffective because her husband did not participate in the agreement to reconvey executed in 1939 and if ever there was a reconveyance it was beyond the four-year period. The fact that Isabelo acted as a witness in the agreement of 1949 produced no effect as his father was then alive and the land was still the latter's property. Much less could Susana's acting as a witness in the reconveyance executed in 1946 bind the minors because: (a) Eugenia had no authority to sell the undivided half of the conjugal property pertaining to her deceased husband which passed after the latter's death to his heir Isabelo Corpuz[6] and (b) even assuming that by acting as a witness, the plaintiff was estopped, her act could not legally prejudice her minor children inasmuch as on the date of the transaction, March 1, 1946, she was not yet the legal guardian of her children's property and even as natural guardian she was prohibited from selling, ceding or compromising her wards' property without judicial authority.[7]

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[4] Talag v. Langkengko, G.R. No. L-4633, October 24, 1952.
[5] *Ibid.*
[6] Citing Talag v. Langkengko, *supra* note 4.
[7] Art. 320 Civil Code provides: "The father or in his absence the mother, is the legal administrator of the property pertaining to the child under parental authority. If the property is worth more than two thousand pesos, the father or the mother shall give a bond subject to the approval of the Court of First Instance." See also Palanca v. Baguisi, 38 Phil. 182 (1918).

Civil Law—*Contracts; nullity for lack of cause or consideration.*

FRANCISCO MONARES v. JOSE MARAÑON AND REMEDIOS PINUELA
G.R. No. L-6830, March 9, 1956

One of the essential requisites of contracts is cause.[1] Hence, contracts without cause or with unlawful cause produce no effect whatever.[2]

In the instant case, a contract to set aside the reconveyance of a parcel of land was held to be inexistent because of lack of consideration. The facts show that the plaintiff and his wife sold in 1935 a parcel of land to the defendants, with the right to repurchase after five years but not beyond nine years. Before the expiration of the nine-year period, plaintiff and defendant executed a deed of reconveyance wherein the latter in consideration of ₱800.00 emergency notes, resold to the former the aforesaid lot.

It was however, further agreed that this property should be delivered after August, 1944. The defendant, however, refused to accept the emergency notes, but the plaintiff prevailed upon the former to keep the money, promising the defendant that after the war, he would exchange these notes with genuine money. This agreement was reduced to writing, which reads in part: "...That each party acknowledges that after the emergency or war and the value of the above money changes, it shall be necessary that the amount of ₱800.00 in our genuine money be completed and to whichever party corresponds the deficit or the excess in value shall respond for the deficit or excess to complete the amount of ₱800.00 in our genuine money...."

Twice, the defendant demanded of the plaintiff the exchange of the emergency notes with genuine money; once in April 1945 and again in 1946, at the rate of 10 emergency notes to 1 genuine peso. Having failed to comply with this demand, the plaintiff declared that the resale of the land was not to be carried out. Hence, on May 27, 1946, the defendant had the land registered in his name and his wife's name and the corresponding transfer certificate of title was issued to them. In this action, the plaintiff sought to annul the transfer certificate of title in the name of the defendans, to recover possession of the property and to collect damages. The trial Court rendered judgment for the plaintiff but the Court of Appeals reversed it, holding that the complaint should be dismissed because the plaintiff failed to comply "with his obligation to exchange the redemption money with genuine Philippine money". Hence, this petition for review.

The Supreme Court held that no exchange of notes was agreed upon but a payment of the difference in value between the notes delivered and the postwar legal tender. Since the instrumnt did not specify the date or agency that would determine the difference in value of the two currencies, the obligation of the plaintiff was not legally demandable until the value of the emergency notes was authoritatively fixed by law or by the courts. This was done in 1949 when Rep. Act 869 was enacted. Thus, when the defendant demanded the exchange of the notes with genuine currency in 1945 and in 1946, his demand was not in accord with the agreement and the plaintiff was not in any way bound to comply. Hence, the defendant's act in causing the title to the land be transferred to his name was not warranted.

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[1] Art. 318 of the Civil Code provides: "There is no contract unless the following requisites concur: (1) Consent of the contracting parties: (2) Object certain which is the subject matter of the contract: (3) Cause of the obligation which is established."

[2] Art. 1352 Civil Code.

Even assuming that Monares had agreed to renounce his right to reacquire his property, such agreement was made on the erroneous assumption that (a) he was obligated to exchange the emergency notes with legal tender and (b) that the difference in value had been authoritatively fixed in 1946. Neither assumption was true and consequently such waiver of the reconveyance was invalidated by false or non-existing "causa" or consideration, since the assent of the plaintiff to the setting aside of the resale was based on false premises.[3]

Amelia R. Custodio

Criminal Law—*Prescription as to fines.*

PEOPLE v. SALAZAR
G.R. No. L-8570, March 23, 1956

The rule on prescriptions as to fines does not refer to subsidiary imprisonment. It takes into account the nature of the penalty: afflictive, correctional and light.[1] *Arresto mayor* is an exception.[2] Subsidiary imprisonment is not *arresto mayor* and there is no reason to classify it as such, considering especially that exceptions are restrictively applied. This is the import of the ruling of our Supreme Court in the case of *People v. Salazar.*

In the instant case the fiscal appealed from the order of the court of first instance dismissing the information filed in 1953 which charged the defendant with violation of Article 319 of the Revised Penal Code because between 1947 to 1948, after having mortgaged 75 cavanes of palay under the terms of the Chattel Mortgage Law, he sold and disposed of them without the knowledge and consent of the mortgage to the prejudice and damage of latter.[3]

Under the Revised Penal Code the crime is punishable by *arresto mayor* or fine twice the value of the property[4] and the same code provides that "those punishable by a correctional penalty shall prescribe in ten years; with the exception of those punishable by *arresto mayor* which shall prescribe in five year..."[5] and Art. 26 of the code states that "A fine whether imposed as a single or as an alternative penalty, shall be considered as afflictive penalty if it does exceed ₱6000; a correctional penalty if it does not exceed ₱6000 but is less than ₱200; and light penalty, if it be less than ₱200."

The judge dismissed the information on the ground that the crime must have been discovered prior to February 1948 which is more than five years and therefore has already prescribed.

To adopt the lower court's viewpoint would mean that the heaviest fine, even exceeding ₱6000 is never afflictive, because the subsidiary imprisonment could not go beyond 6 months.[6]

That his subsidiary imprisonment could not exceed 6 months is immaterial.[7]

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[3] Obejera and Istok v. Ign Sy, 76 Phil. 581 (1946): The Court ruled that the deed of transfer dated April 19, 1943 whereby the plaintiffs paid ₱500.00 to the defendant and further promised to transfer their property under Transfer Certificate of Title No. 666 in case they failed to return on Dec. 31, 1943 the balance of the loss for which they cannot be held liable is null and void for lack of consideration.

[1] Art. 24, Rev. Penal Code.

[2] Art. 90, *id.*

[3] United States v. Kilayko, 32 Phil. 619 (1915).

[4] Art. 319, Rev. Penal Code.

[5] *Supra*, note 2.

[6] Art. 39, par. 2, Rev. Penal Code provides that: "When the principal penalty imposed be only a fine, the subsidiary imprisonment shall not exceed six months, if the culprit shall have been prosecuted for a grave or less grave felony, and shall not exceed fifteen days, if for a light felony."

[7] People v. Califio, 40 O.G. 522 (1944).

Criminal Law—*Conspiracy; liability of the conspirators.*

PEOPLE v. RIPAS, ET AL.
G.R. No. L-6246, March 26, 1956

Persons who besides taking direct part in the killing also conspire with their leader and co-accused, and act in concert with them for a common cause are also guilty as principals of the crime. In conspiracy the act of one is the act of all and participation in such criminal design may be established by the circumstances.[1] In one case it was held that conspiracy of the accused was sufficiently established with their simultaneous and concerted attack and the gravity of the wounds inflicted.[2]

The instant case was reopened for the imposition of sentence on the accused who escaped after conviction for murder. The defendants, members of the Hukbalahap Organization led by Ripas infiltrated into the town of Libacao, Capiz, captured a certain Apio but released him upon his promise to pay ₱100. He did not keep his promise and the defendants went to his house, beat him, took him with them and killed him on the way.

Previously, the case was reopened when one of the defendants, Orbista, was recaptured, and the said accused was sentenced to *reclusion perpetua*. The liability of two other defendants Agudas and Esto is now in question.

The Revised Penal Code enumerates those who are liable as principals.[3] The expression "those who take a direct part in the commission of the deed" in said enumeration means "those who, participating in the criminal resolution, proceed together to perpetrate the crime and personally take part in its same end."[4] That was precisely what Agudo and Esto did. It is established by competent testimony that they boloed their victim, each delivering a blow which caused the intestines of the victim to come out. The liability of Agudo and Esto, therefore, should be similar to their co-accused Orbista.

Lilia R. Bautista

Criminal Law—*Coercion; where the allegations of the complaint or information do not include violence as an element of the offense, the crime is punishable under Par. (2) of Article 287 of the Revised Penal Code.*

PEOPLE v. REYES, ET AL.
G.R. No. L-7712, March 23, 1956

A person who, by means of violence, shall seize anything belonging to his debtor for the purpose of applying the same to the payment of the debt is penalized under par. (1) of Article 287 of the Revised Penal Code.[1] Under par. (2) of the same article any other coercions or unjust vexations is penalized.[2] In the first paragraph, violence in an element of the offense while in the second paragraph, it is not.

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[1] People v. Tiam, G.R. No. L-36, Aug. 29, 1946.
[2] People v. Reyes, 47 Phil. 635 (1925).
[3] See Art. 17, Rev. Penal Code.
[4] I VIADA 341.
[1] The penalty is *arresto mayor* in its minimum period and a fine equivalent to the value of the thing, but in no case less than seventy-five pesos.
[2] The offense is punished by *arresto menor* or a fine ranging from five to two hundred pesos, or both.

When the information alleges the commission of coercion under the first paragraph of article 287 without however, alleging violence can the accused be penalized under paragraph two of the same article? The Supreme Court answered this question in the affirmative in the instant case. The facts show that the City Fiscal filed in the Municipal Court of Manila an information herein quoted in part:

> "The undersigned accuses Bernardo Reyes and Mariano Reyes of the crime of coercion committed...through deceit and misrepresentation did then and there wilfully and feloniously seize, take and hold possession of a passenger jeep belonging to Agustin Blasco, without the knowledge and consent of the latter, for the purpose of answering for the debt of said owner...."

Upon motion of the defendants, the Court dismissed the information because it did not allege the use of violence notwithstanding the fact that the offense charged was coercion under par. (1) of article 287 of the Revised Penal Code. The CFI dismissed the appeal for lack of merit, so the prosecution appealed to the Supreme Court contending that the offense charged is coercion or unjust vexation under par. (2) of article 287. The Supreme Court agreed with the appellant. It ruled that although the offense named in the information is coercion it does not necessarily follow that the applicable provision is the first paragraph since the second paragraph also speaks of "coercions". Inasmuch as the recitals in the information do not include violence, the inevitable conclusion is that the coercion contemplated is that described and penalized under the second paragraph. The offense falling under the second paragraph cannot include violence as an element of the offense; otherwise it would come under the first provision.

The Court added that the case of *United States v. Tupular*,[2] relied upon by the court of origin was not controlling because the offense involved therein was coercion defined in article 498 of the Old Penal Code which expressly called for violence, and which was the counterpart of the first paragraph of article 287 of the Revised Penal Code.

Amelia R. Custodio

Constitutional Law—*Double compensation. Double appointment is not illegal provided there is no incompatibility in duties.*

QUIMSON v. OZAETA
G.R. No. L-8321, March 26, 1956

Under the Constitution, no officer or employee of the Government shall receive additional or double compensation unless specifically authorized by law.[1] Legally there is really no objection for an employee or officer of the Government occupying two positions or offices provided that the corresponding functions appertaining thereunder are not incompatible. When there is incompatibility of duties between the two offices, the acceptance of one of them *ipso facto* results in the forfeiture of the other and for that matter, incompatibility between the two offices, the acceptance of one of them *ipso facto* results in the forfeiture of the other and for that matter, incompatibility between the offices refers to the inconsistency in the functions of the two and not the physical in-

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[2] 7 Phil. 8 (1906). Here, attorney-in-fact De la Riva, seized from the store of a Chinaman, a debtor of De la Riva, certain goods as payment of the debt, against the will of the debtor. He was found guilty of light coercion.

[1] Sec. 8, Art. XII, PHIL. CONST.

compatibility or impossibility of performing the duties pertaining to them at the same time by the officer.[2]

The jurisprudence of the Philippines seems to be different from that of the United States. In at least one case, the criterion laid down by the Supreme Court is not so much on functional incompatibility as on physical incompatibility.[3]

The main purpose of the constitutional prohibition of giving double compensation to an officer or employee is to prevent a person holding an office or appointment for which the law provides a definite compensation by way of salary or otherwise, which is intended to cover all services which as such officer he may be called upon to render, from receiving extra compensation, additional allowances or pay for other services which may be required of him either by act of Congress or by order of the head of his department or in any other mode, added to or connected with the regular duties of the place which he holds.[4] This prohibition does not however, apply to a case of a person performing functions of two distinct offices, each of which has its own duties and its own compensation not incompatible with the other,[5] for the officer, in such case is in the eyes of the law, two officers holding two places of appointment, and according to all decisions, he is entitled to recover the two compensations.[6]

It cannot be denied however, that under the Constitution, it is still permissible for an officer or employee of the Government to receive additional or extra compensation provided there is a special legislation authorizing the same and this has been interpreted to mean a specific authority given to a particular officer or employee of the Government because of peculiar or exceptional reasons warranting the payment of extra or additional compensation.[7]

In this case of *Quimson vs. Ozaeta*,[8] the Supreme Court had another occasion to interpret the aforementioned constitutional provision. Braulio Quimson was serving as deputy provincial treasurer and municipal treasurer of Caloocan, Rizal. By virtue of an action taken by the Board of Directors of the Rural Progress Administration, he was appointed as agent-collector of the corporation with a salary of ₱720.00 per annum. The appointment was signed by Chairman Ramon Ozaeta, and through the Secretary of Finance the appointment was endorsed to the President of the Philippines for his approval. There were several objections to the appointment, among them, that of the Auditor General, on the ground that since Quimson was deputy provincial treasurer and treasurer, his additional compensation as agent-collector of the Rural Progress Administration would contravene the Constitutional prohibition against double compensation.

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[2] People ex rel. Ryan v. Green, 58 N.Y. (1874). In this case the relator performing the duties of a deputy clerk of the Court of special sessions for the City of New York was later elected member of the legislature. It was contended that his election operated to vacate the office of deputy clerk and therefore cannot recover the salary pertaining to the latter office. It was held that there may be physical impossibility of performing the duties of the two offices at the same time but the incompatibility of two offices refers to the inconsistency of functions between them.

Bryan v. Cattel, 15 Iowa, 538. A district attorney was appointed captain in the volunteer service of the United States. The court said that there was nothing in the nature of the two offices incompatible with each other. His right to recover was sustained.

[3] Summers v. Ozaeta, G.R. No. L-1534, P.D. 1948B, 519.

[4] United States v. Saunders, 120 U.S. 126 (1887).

[5] SINCO, POLITICAL LAW 660 (2nd ed.)

[6] United States v. Saunders, *supra* note 4.

[7] Saduesta v. Surigao, 72 Phil. 485 (1941).

[8] G.R. No. L-8321, March 26, 1956; 52 O.G. No. 4, 1954 (1956).

In the meantime, pending the approval of his appointment, Quimson assumed the position and rendered service as agent-collector without waiting for the result of his appointment, until he was informed that his services were terminated. In his opinion, however, the Auditor General opined that under Section 691 of the Revised Administrative Code[9] the appointing officer who made the illegal appointment can be liable for the payment of salary of the appointee. This contention apparently induced Quimson to file the action for the recovery of his salary against Ozaeta.

The Supreme Court denied the claim of the plaintiff, ruling that Section 691 of the Revised Administrative Code refers and applies to unlawful employment and not to unlawful compensation. The appointment or employment of Quimson as agent-collector was not in itself unlawful because there is no incompatibility between the said appointment and his employment as deputy provincial treasurer and municipal treasurer. Explaining further, the Supreme Court stated:

> "There is no legal objection to a government official occupying two government offices and performing the functions of both as long as there is no incompatibility.... The objection or prohibition refers to double compensation and not to double appointments and performance of functions of more than one office."

The Supreme Court reiterated also the necessity of the approval of an appointment of any government official before assuming the duties of his office, otherwise the absence of the approval would be fatal to the recovery of any salary due him. It declared:

> "The trouble was that plaintiff herein assumed office without waiting for the result of the action to be taken upon his appointment and compensation by the President and the different offices which his appointment had to go through... Plaintiff therefore took the risk or hazard of not being paid for any service that he may render in the meantime."

Administrative Law—*Rights in indivisible sugar quota; intervention by the State in the transfer thereof.*

SUAREZ, ET AL. v. MOUNT ARAYAT SUGAR CO.
G.R. No. L-6435, April 11, 1956

Administrative controls over the most common economic activities are now an inseparable part of local, state and national government. They affect the conduct of the vast majority of trades, professions, business and public utilities from the individual practitioner or tradesman to the great corporate enterprises which span the entire country.[1] As held in the case of *Ang Tibay v. Court of Industrial Relations*,[2] the policy of *laissez faire* has to some extent given way to the assumption by the Government of the right of intervention even in contractual relations affected with public interest.[3] To effectuate this work of the Government to administer details and perform some ministerial functions, administrative agencies are being created.

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[9] Rev. Adm. Code, Sec. 691: *Payment of persons employed contrary to law; Liability of Chief of Office.*—No person employed in the classified service contrary to law or in violation of the civil service rules shall be entitled to receive pay from the Government, but the Chief of the Bureau or office responsible for such unlawful employment shall be personally liable for the pay that would have accrued had the employment been lawful, and the disbursing officer shall make payment to the employee of such amount from the salary of the officer so liable.

[1] CARROW, MILTON MICHAEL, BACKGROUND OF ADMINISTRATIVE LAW (1948).

[2] 69 Phil. 635 (1940).

[3] RIVERA, LAW OF PUBLIC ADMINISTRATION 6 (1955).

The instant case is an illustration of the right of the State to interfere in the exercise of the rights of the parties to transfer their rights over an indivisible sugar allotments. This is a motion for reconsideration of the previous decision of the Court,[4] ruling that the sugar allotments given to the petitioner and respondent, (sugar planter and miller, respectively) are indivisible and are transferable only as a whole by joint action of the interested parties; that where such parties fail to reach an agreement, the State may through the Sugar Administrator, redistribute or reallocate the sugar quota. Both parties were dissatisfied with that decision hence this motion.[5]

The Court ruled that the parties cannot transfer independently of the other their respective rights in the quota. The quota is indivisible as it was given to the central in consideration of its participation in the production and not as a reward for past services. The entirety of the sugar allotment is held by both the planter and sugar central, leading to the inevitable conclusion that its disposition must be by their joint action. But when no such concerted action is possible, then the State, through the Sugar Quota Administrator, should intervene to reallocate the quota as required by the general interest; for to recognize in the planter or the mill the absolute ownership of their quota shares is to declare that either or both have the right to refuse to produce the sugar and thereby dislocate the economy of the country.

Justice J. B. L. Reyes, speaking for the Court, said:

> "Of course, in making this reallocation, the Sugar Quota Administrator is bound to consider the fact that the decision of the Central (sugar mill) to forego manufacturing sugar can not result in compelling the planter to do likewise and stop planting sugar cane: nor can such decision reduce the planter's share below the amount that he was entitled to receive had the Central continued to manufacture sugar which would be an indirect way of compelling the planter to abandon production because of diminished incentives. Consequently, in reallocating the quota, the Sugar Administrator must not only determine the central to which the planter can resort for the delivery of his cane, but also see to it that new quota allocation will be sufficient to permit the planter to maintain his original share under the corresponding quota, taking into account the conditions of the planter's agreement with the new central that should be found willing to mill the planter's cane.

Pilipina A. Arenas

Naturalization—*Enrollment of children of applicant for naturalization in public schools.*

YU HIANG *alias* MARIANO YU v. REPUBLIC
G.R. No. L-8378, March 23, 1956

Aliens who desire to become Philippine citizens must possess each and all of the qualifications laid down by the law and none of the disqualifications.[1] From a decree of the court granting the petition for naturalization filed Yu Hiang oppositor appeals on the ground that: (1) the petitioner did not make a declaration of intention to become a citizen of the Philippines one year prior

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[4] Suarez v. Mount Arayat Sugar Co., G.R. No. L-6435, March 31, 1955.

[5] The planter contended that under § 9 of Act 4166 (Philippine Sugar Limitation Act), the "allotment" attaches to the land; and this allotment, it is argued, refers to the entire sugar "production allowance" as distinguished from "marketing allotment" that is divided between the planter and the mill. The Court held this to be untenable because under the terms of the basic sugar limitation regulations (Exec. order nos. 477, 512, & 573 series of 1934 & 1935) the plantation owner's allotment" is only the sugar that may be "marketed by the planter alone"; and is arrived at by taking the plantation's *pro rata* share in the average sugar production of the mill district and multiplying it "by the plantation share expressed in percentage." Neither definition results in the plantation owner's allotment "being equivalent to the totality of the sugar produced from the cane raised in the plantation."

[1] Bell v. Attorney General, 56 Phil. 667 (1932).

to the filing of his petition for naturalization, and (2) the petitioner has not given primary and secondary education to all his children in public schools or in private schools recognized by the government and not limited to any race or nationality.

The requirement that the applicant must have enrolled his children of school age in any of the public or recognized private schools in the Philippines,[2] is not without utmost importance. It is intended that all the minor children of an applicant must learn Philippine history, government and civics inasmuch as upon naturalization of their father they *ipso facto* acquire Philippine citizenship.[3] The requirement is complied with if such children are studying, even if they have not yet finished secondary education.[4]

The fact that one of the petitioner's children is in China and has never been to the Philippines shows that he has not enrolled all his minor children of school age in any of the public or private schools recognized by the Government and not limited to any race or nationality. The exemption from filing a declaration of intention cannot embrace the case of petitioner.[5] His petition should have been dismissed.[6]

Lilia R. Bautista

Taxation—*Determination of gross estate of decedent; properties outside of the Philippines not included.*

INTESTADO DE DON VALENTIN DESCALS
v.
ADMINISTRADOR DE RENTAS INTERNAS
G.R. No. L-7253, March 28, 1956

Taxation is an inherent power of sovereignty. It is the act of laying a tax or imposing those burdens or charges upon persons or property, or in other words, th eprocess or means by which the taxing power is exercised. A tax is a pecuniary burden laid on individuals or property for the purpose of supporting the government. The theory of taxation is that the taxes are imposed for the support of the government in return for the general advantage and protection which the government affords the taxpayer and his property and that there where there is no such benefit, there is no power to tax.

In the Philippines, the principal law governing the raising and collection of national taxes is Commonwealth Act No. 466, as amended, otherwise known as the National Internal Revenue Code. This case of *Intestado De Don Valentin Descals vs. Administrator de Rentas Internas*,[1] involves the interpretation of sections 88 and 89 of the National Internal Revenue Code[2] with respect to the

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[2] Com. Act No. 473 as amended by Act No. 535.
[3] In re Petition of Lim Lian Hong, G.R. No. L-3575, Dec. 26, 1950.
[4] Yee Bo Nan v. Republic, G.R. No. L-1606, May 23, 1949.
[5] *Supra*, note 2.
[6] Chan Tiao v. Republic, G.R. No. L-6430, Aug. 31, 1954; Chen Su Hok v. Republic, G.R. No. L-3470, Nov. 27, 1951; Hao Lian Che v. Republic, 48 O.G. 1750 (1952); Ang Yee Kee Sengku v. Republic, G.R. No. L-3262, Dec. 7, 1951.
[1] 52 O.G. No. 4, 1958 (1954).
[2] The pertinent provisions of §88, N.I.R.C. states:
Sec. 88. Gross estate: The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated exempt real property outside of th Philippines...
The pertinent provisions of §89, N.I.R.C. states:
SECTION 8. Net Estate:—For the purpose o fthe taxes imposed in this chapter the value of the net estate shall be determined:
(a) In the case of citizen or resident of the Philippines, by deducting from the value of the gross estate—

inclusion of properties of a decedent outside the Philippines in the determination of gross estate for inheritance and estate taxes purposes.

Valentin Descals, an American citizen, died on September 17, 1948, in the City of Manila where he was a resident. He left as his heirs his brothers, Antonio and Ricardo, and a sister, Angeles. Two years before his death he and Ricardo jointly bought a piece of real property in Barcelona, Spain, but because of differences between them they agreed that Valentin should become the owner of the entire property after buying the interest of Ricardo in the amount of ₱46,000, as evidenced by a promissory note dated November 1, 1946. After his death, administration proceedings were intiated but the administrator did not include in his inventory that property in Spain. The gross value of the estate was ₱64,000 but after paying the expenses it was reduced to ₱44,000 and when the claim of Ricardo was approved there was practically no property left in the estate and inheritance taxes. The Collector of Internal Revenue assessed the estate for taxation without deducting the claim of Ricardo notwithstanding its approval, and demanded ₱701.53 as estate taxe and ₱2,144.10 as inheritance tax. The tax was paid under protest and this action was brought to get a refund. The lower court dismissed the complaint and the plaintiff appealed.

Although it is expressly provided in section 88 of the Tax Code that properties of decedent outside of the Philippines are not taxable, the Supreme Court nevertheless affirmed the decision of th lower court by declaring thus:

> "It will be seen that under section 88 real property situated outside of the Philippines is not included in the value of the gross estate of the deceased resident. Not being included as part of the estate, it cannot be subject to taxation such as estate and inheritance taxes. Because of this, section 89(e) provides that for the purpose of the taxes imposed under that chapter of the Tax Code, in the determination of the value of the net estate, in order that indebtedness in respect to property may be allowed to be deducted from the value of the gross estate, the value of the decedent's interest in said property, undiminished by said indebtedness must be included in the value of the gross estate. Where however, in the determination of the gross estate the law does not permit the inclusion of property outside of the Philippines, then it is but just and reasonable that the indebtedness incurred by the decedent by reason of said property or in the acquisition thereof should also not be discounted from the gross estate for purposes of taxation."

This also seems to be the rule and practice in the United States, that in the determination of gross and net estate of a decedent properties outside the jurisdiction and indebtedness incurred in respect to or by reason of said property, are not considered, the same being regarded as impossible items.[3]

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(1) *Expenses, losses, indebtedness, and taxes*—Such amounts—
(A) For funeral expenses which shall in no case, exceed five per centum of the gross estate;
(B) For judicial expenses of the testamentary or intestate proceeding;
(C) For claims against the estate;
(D) For claims of the deceased against insolvent persons where the value of the decedent's interest therein is included in the value of the gross estate; and
(E) For unpaid mortgages upon or *any indebtedness in respect to property where the value of decedent's interest therein, undiminished by such mortgage or indebtedness is included in the value of the gross estate*, but not including any income taxes upon income received after the death of the decedent, or property taxes not accrued before his death or any estate or inheritance taxes.

[3] "Inasmuch as real property situated outside of the United States does not form a part of the gross estate, no deduction may be taken of any mortgage thereon or any indebtedness in respect thereof." 2 RABKIN AND JOHNSON, FEDERAL INCOME, GIFT AND ESTATE TAXATION § 53.03 (10), 5319 (1954).

Rodiek vs. Helvering, 87 Fed. (2d) 328, 331 (1937) where it was said that, "...the deduction is allowed only in case the mortgaged property was included in the gross estate..."

City Bank Farmers' Trust Co. v. Bowers, 68 Fed. (2d) 909, 913 (1934), where it was said that "...among the deductions allowed were 'unpaid mortgages,' an impossible item unless the whole value of the mortgaged property is to be included in the gross estate under section 402(a), 40 Stat. 1097, as an interest...subject to the payment of charges against his estate."

Taxation—*Rentals derived from the use of race tracks by the owner is income and therefore taxable.*

COLLECTOR OF INTERNAL REVENUE
v.
MANILA JOCKEY CLUB, INCORPORATION
G.R. No. L-8755, March 23, 1956

This case involves the interpretation of Republic Act No. 79[1] in relation to Republic Act No. 309[2] and section 193[3] of the National Internal Revenue Code. The case arose because of an assessment made by the Collector of Internal Revenue Code. The case arose because of an assessment made by the Collector of Internal Revenue on the income of the defendant which claims exemption under Republic Act No. 79. Noteworthy in passing upon this case is the settled rule in our law and jurisprudence, that in taxation, exemptions are not favored and in order to be entitled thereto, it must be shown indubitably to exist, the presumption being against the surrender of the taxing power.[4] An exemption from the common burden cannot be permitted to exist upon vague implication,[5] notwithstanding the fact that in the interpretaion of statues levying taxes or duties, doubt should be resolved most strongly against the government and in favor of the citizen.[6]

The Manila Jockey Club, Inc. is the owner of the San Lazaro Hippodrome which is used principally for holding horse races, either conducted by the Club itself or leased to other charitable institutions. In 1951 and 1952 the Philippine Charity Sweepstake Office held benefit races for charitable relief and civic purposes in said hippodrome and because of this use the club was paid for rentals the amount of ₱107,185.02 in 1951 and ₱122,855.47, in 1952 which were included in the income tax return of the club for said years. From the total amount of the rentals the collector assessed and collected the amount of ₱59,692.97 as income tax. The club filed a claim for refund of said amount which was ordered refunded by the Court of Tax Appeals on the ground that under Section 3 of Republic Act No. 79, the rentals received by the club from the Philippine Charity Sweepstake Office for the use of the tracks were exempt from taxation. On the days that the races were continued, the Charity Sweepstake Office employed its own personnel, tellers and other employees in the race tracks. It did not employ any personnel of the club but merely used its track, apparatus and other paraphernalia necessary for horse racing.

The Supreme Court reversed the Court of Tax Appeals for the reason that there is no clear showing that the exemption clause in section 3 of Republic Act No. 79 exempts the racing club from its duty to pay income tax. "The provisions of section 3 should be interpreted as conveying the meaning that one

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[1] Rep. Act No. 79 is "An Act to Authorize the Holding by the Philippine Charity Sweepstake Office of Horse Races, with Betting, on Saturday Afternoons, for Charitable, Relief and Civic Purposes.

"Sec. 3 The racing club holding these races shall be exempt from the payment of any municipal or national tax."

[2] Rep. Act No. 309, which regulates the horse racing in the Philippines, provides:

"Sec. 26—Any person, race track, racing club or other entities holding or conducting a horse race shall be required to pay a city or municipal license fee of ₱600 for each day of racing..."

[3] The pertinent provisions of § 193 N.I.R.C. provides:

"Sec. 193—Amount of tax on business:—Fixed taxes on business shall be collected as follows, the mount stated being for the whole year, where not otherwise specified:

. . .

"(r) Owners of race tracks for each day on which races are run on any track, five hundred pesos."

[4] Castle Bros. Wolfson and Sons vs. McCoy, 21 Phil. 306 (1911); Molina vs. Rafferty, 37 Phil. 545 (1917).

[5] Asiatic Petroleum Co. vs. Llanos, 49 Phil. 466 (1926); House vs. Posadas, 53 Phil. 338 (1929).

[6] Manila Railroad Co. v. Collector, 53 Phil. 960 (1929).

holding the races is not the racing club but the Philippine Charity Sweepstake Office and that the exemption therein only refers to those taxes that the law requires to be paid in connection with said races. In other words said provision should read to mean 'the racing club where the races are held' in order to be consistent with the purpose of the law."

To connect this meaning to Republic Act No. 3909 and Section 193 of the Tax Code, the Court concluded:

> "Section 3 of the law merely intends to exempt the racing club in whose premises or tracks the races are held from the payment of license fee under Republic Act No. 309 and a fixed tax under section 193 of the National Internal Revenue Code, and cannot refer to any income tax that may be imposed on rentals that may be paid for the use of those tracks and other paraphernalia. That is an income that the racing club has to account for income purposes because it is an income that the club earned because of the use of its tracks The tax paid for such income cannot therefore be considered as one connected with those races within the purview of the exemption clause."

This is in line with the principle laid down in the United States that income tax laws should be broadly construed with an obvious purpose to tax income comprehensively.[7]

Mariano M. Tajon

Taxation—*Approval of the Secretary of Finance; requisite for validity of municipal ordinances increasing license taxes on business.*

MUNICIPAL GOVERNMENT OF PAGSANJAN, LAGUNA v. REYES
G.R. No. L-8195, March 23, 1956

A municipal council is empowered to impose municipal license taxes upon persons engaged in any occupation or business.[1] Municipal license taxes may also be increased, subject however to the condition that the same be approved by the Secretary of Finance.[2] Such approval is necessary to forestall abuse of power by the municipal councils.[3] The approval of the Secretary of Finance is a condition *sine qua non* for the validity of an ordinance passed under Commonwealth Act 472.[4]

In the instant case the validity of a municipal ordinance increasing the license tax on a business was in question. The facts show that the defendant was the owner of a dessicated coconut factory located in Pagsanjan. At the time the defendant commenced his business the license tax was ₱600.00 *per annum*. On March 14, 1948, the municipal council of Pagsanjan passed Ordinance No. 2, Series of 1948, increasing said tax to ₱3,000.00 *per annum*, which ordinance was approved by the Provincial Board of Laguna on April 5, 1948, and by the Secretary of Finance on February 22, 1949. The defendant had paid

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[7] Commissioner vs. Jacobson, 336 U.S. 28.

[1] Commonwealth Act No. 472, § 1 provides: "A municipal council or municipal district shall have authority to impose municipal license taxes upon persons engaged in any occupation or business, or exercising privileges in the municipality or municipal district, by requiring them to secure licenses at rates fixed by the municipal council or district council and to collect fees and charges for services rendered by the municipality or municipal district and shall otherwise have power to levy for public local purposes ,and for school purposes, including teacher's salaries, just and uniform taxes other than percentage taxes on specified articles."

[2] § 4, *Ibid* provides that the approval of the Secretary of Finance shall be secured "2. Whenever the rate of fixed municipal license taxes on business not excepted in this Act or otherwise covered by the preceding paragraph and subject to the fix annual tax imposed in section one hundred eight-two of the National Internal Revenue is in excess of fifty pesos per annum, and 3. Whenever the municipal license tax on any business, occupation or privilege the rate of which is not limited above is increased by more than fifty per centum."

[3] Santos v. Aquino, G.R. No. L-5109, November 8, 1953.

[4] Li Seng Giap and Co. et al. v. Dact, 54 Phil. 625 (1930); Smith Bell and Co. v. Municipality of Zamboanga 55 Phil. 467 (1930).

₱150.00 and made a deposit of ₱600.00 upon account of his license taxes. Computing the tax at the rate of ₱3,000.00 *per annum*, the plaintiff demanded from the defendant the sum of ₱4,500 which the latter refused to pay, contending not only that the plaintiff had no power to enact Ordinance No. 2 which he claimed was oppressive, unjust and unreasonable, but also that ever if valid, it became effective only in the year succeeding the approval of said ordinance by the Secretary of Finance. From a decision that Ordinance No. 2 became effective on January 1, 1949, the year following its passage in 1948 and that the defendant pay ₱4,140.00 plus surcharge, the latter appealed.

The Supreme Court held that Com. Act 472, under which the ordinance in question was passed is not merely one which permits or assumes the validity of an ordinance until disapproved by the Secretary of Finance. The evident purpose of the law is to forestall the imposition of unreasonable and oppressive license taxes on businesses. Thus, Ordinance No. 2 became valid only after it was approved by the Secretary of Finance on February 22, 1949. The Court added that to be valid, however is one thing and to be effective and enforceable is another thing. Section 2230 of the Administrative Code provides that an ordinance or resolution shall take effect on the tenth day after its passage. This is the general rule; but section 2309 of said Code provides that "a municipal license tax already in existence shall be subject to change only by ordinance enacted prior to the fourteenth of December of any year for the next succeeding year; but an entirely new tax may be created by an ordinanc enacted during the current year, effective at the beginning of any succeeding quarter year...." Since Ordinance No. 2 imposes a tax on dessicated coconut business, and merely changes the rate already in existence by increasing it to ₱3000.00 *per annum* said ordinance became effective and enforceable on January 1,1950, the year following February 22, 1949, when it was approved by the Secretary of Finance.

As regards the contention that the ordinance was oppressive, unjust and unreasonable, this fact was not mentioned in the stipulation of facts submitted by the parties and no evidence was offered by the defendant to support uch a claim.

Taxation—*Compensating tax; not a tax on imports but one on the use of imported goods not subject to sales tax.*

INTERNATIONAL BUSINESS MACHINES CORPORATION OF THE PHILIPPINES

v.

COLLECTOR OF INTERNAL REVENUE

G.R. No. L-6782, March 6, 1956

All persons residing or doing business in the Philippines who purchase or receive from without any commodities, goods wares or merchandise not subject to specific taxes, shall pay a compensating tax thereon, such tax to be paid upon the withdrawal or removal of such commodities, goods, a wares, or merchandise from the customhouse.[1] The purpose of this tax is to place persons purchasing goods from dealers doing business in the Philippines on equal footing for tax purposes with those who purchase goods directly from without the Philippines.[2] It is also designed as a substitute to make up or compensate for the revenue lost to the government through the avoidance of sales taxes by means of direct purchases abroad.[3]

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[1] Com. Act No. 466 (The National Internal Revenue Code). §190.
[2] I Report of the Tax Commission of the Philippines, pp. 74-75.
[3] *Ibid.*

In the instant use, the question involved is whether the tax on the machines bought by the plaintiff directly from abroad, and rented by it to its customers, is a compensating tax or a sales tax. The facts show that the plaintiff was engaged in the business of selling machine cards and in leasing business machines. Plaintiff paid the 3-1/2% sales tax on the machine cards sold by it. Defendant likewise collected from the plaintiff the amount of ₱1,267.75 representing the alleged compensating tax on the business machines brought by the latter into the Philippine covering the period from July 1, 1939 up to and including March 1, 1941. Within the two years from the date of the payment thereof, the plaintiff filed a claim with the defendant but the latter denied such claim. From a decision of the CFI on denying recovery of the amount claimed, the plaintiff brought this appeal. The appellant contended that the compensating tax collected during the Commonwealth under the original Section 190 of the Internal Revenue Code, before the same was approved by the President of the United States, was in fact, a tax on imports and could not become law without Presidential approval, as provided for in section 2(a) par. 9 of the Philippine Independence Act.

The Supreme Court affirmed the decision of the lower Court and ruled that the compensating tax thus imposed is not a tax on the importation of goods. According to the Court, this is evident from the proviso that imported merchandise which is to be disposed of in transaction subject to the sales tax under sections 184, 185, 186, 187, and 189 of the Internal Revenue Code is expressly exempted from the compensating tax.[4]

This feature shows that it is not the act of importation that is taxed under section 190 of the Code, but the use of imported goods not subjected to sales tax; otherwise, the compensating tax would have been levied on all imported goods regardless of any subsequent tax that might accrue. Moreover, the compensating tax accrues whether or not the imported goods are subject to pay custom duties.

Amelia R. Custodio

Labor Law—*Appointment by the Secretary of Labor of a Wage Board; nature and extent of duties of a Wage Board.*

CALTEX INC., ET AL. v. THE HON. AURELIO QUITORIANO
G.R. No. L-7152, March 21, 1956

Under the Minimum Wage Law, the Secretary of Labor is empowered to appoint a Wage Board.[1] It is the duty of the Wage Board "to cause an investigation to be made of the wages being paid to the employees in such industry and their living conditions, to ascertain if any substantial number of such employees are receiving wages which are less than sufficient to maintain them in health, efficiency, and general well-being".[2] Must the Secretary of Labor hold

[4] §190 of the National Internal Revenue Code before its amendment by Commonwealth Act No. 503 provides: "*Compensating tax*—All persons purchasing or receiving from without the Philippines any commodities, goods, wares, or merchandise, excepting those subject to specific taxes under Title IV of this Code, shall pay on the total value thereof at the time they are received by such persons, including freight, postage, insurance, commission, and all similar charges, a compensating tax equivalent to the percentage tax imposed under this Title on original transaction effected by merchants, importers, or manufacturers, such tax to be paid upon the withdrawal or removal of said commodities, goods, wares, or merchandise from the customhouse or post office: Provided, however, That merchants, importers, and manufacturers, who are subject to tax shall under sections 184, 185, 186, 187, and 189 of this Title not be required to pay the tax herein imposed where the articles purchased or received by them from without the Philippines are to be resold, bartered, or exchanged, or used in connection with their business."

[1] Rep. Act No. 602, § 4(n).

[2] *Ibid.*

public hearings and call interested parties before the appointment of a Wage Board? This question was answered in the negative by the Supreme Court in this case.

The facts show that the petitioners who were dealers in mineral oils and allied products filed a petition for prohibition, seeking to restrain the Secretary of Labor from enforcing Administrative Order WB-6, "creating a Wage Board for the Mineral Oil Industry" for the purpose of "fixing a minimum wage for such industry". It appeared that the Acting chief of the Wage Administration service conducted a preliminary investigation of the wage conditions in local oil firms pursuant to the instruction of the Secretary of Labor. He submitted a report that the employees were receiving a minimum wage rate which was less than the minimum adequate standard of living and recommended the appointment of a Wage Board. Acting upon this report, the Secretary of Labor issued the Administrative Order in question, pursuant to section 4(a) of the Minimum Wage Law.

Petitioners claimed that the Order is null and void because; (a) no investigation was conducted as required by law prior to the appointment of a wage board; (b) the Secretary of Labor did not render an opinion that a substantial number of oil industry employees received "less than sufficient to maintain them in health, efficiency and general well-being"; (c) there was no proof before the Secretary to justify such an opinion; and (d) the employers were not heard before the Wage Board was appointed.

In upholding the legality of the appointment of the Wage Board and the validity of Administrative Order WB-6(a), the Court said:

> "The report o fthe Chief of the Wage Service sufficiently shows that the Secretary directed the investigations required by law to be made: and the facts disclosed in the report indicate that the average minimum wage in oil industry was below the estimated requirement of a nadequate standard of living. It is to be noted that the law does not prescribe that the investigation be made by the Secretary himself nor attempt to specify what the precise facts must be disclosed by this investigation and for a good reason. It is the Wage Board that will conduct the real inquiry into the facts under Section 5(b)[3] of the Minimum Wage Law and for that purpose the Board is empowered to summon witnesses and call for such additional information as it may require. In addition after the Wage Board has filed its report and recommendation Section 6(a)[4] of the law requires the Secretary to notify the interested parties and then hold public hearings thereon before issuing a final wage order....
>
> "Sec. 4(a) of the Minimum Wage Law in requiring that the Secretary should be of the opinion that a substantial number of the employees in a given industry are receiving wages insufficient to maintain them "in Health, efficiency and well being" does not demand more than a reasonable belief or conviction of the Secretary, that such undesirable conditions exist much less does it prescribe that the Secretary should express or issue a written statement of his opinion."

As to the contention that the employers were not heard before the Board was appointed, the Court held that the law contemplates no hearing or inves-

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[3] "The Secretary of Labor shall present to a Wage Board all the evidence and information in his possession relating to the wages in the industry for which the Wage Board was appointed and all other information which he deems relevant to the establishment of a minimum wage for such industry and shall cause to be brought before the Board any witness whom he deems material. A Wage Board may summon other witnesses or call upon the Secretary to furnish additional information to aid in its deliberations."

[4] "Upon the filing of the Wage Board's report the Secretary of Labor shall give notice to interested parties and conduct a public hearing thereon within fifteen days....Due notice of any hearing provided for in this section shall be given by publication in such newspaper of general circulation and by such other means as the Secretary of Labor deems reasonably calculated to give general notice to interested parties. The procedure at the public hearing before the Secretary of Labor shall be consonant with due process of law...."

tigation of the employers prior to the constitution of the Wage Board, because the appointment of such Board was a mere preliminary step to the full inquiry which will take place afterwards. Since the employers are represented in the Wage Board, their interests are fully protected.[5]

Amelia R. Custodio

Civil Procedure—*Judgment; dispositive part of decision controlling. When principle of* res judicata *attaches.*

EDWARDS, ET AL. v. ARCE, ET AL.
G.R. No. L-6932, March 6, 1956

Upon the conclusion of a judicial trial of a case presented before a competent court, it is incumbent upon the latter to render a judgment either for the plaintiff or for the defendant[1] which judgment must be in writing, personally and directly prepared by the judge, signed by him, stating clearly and distinctly the facts and the law on which it is based and filed with the clerk of the court.[2]

Although it is a rule that judgments of the courts should be considered in their entirety to get the true meaning and intent of any particular portion thereof,[3] it is however, necessary to distinguish the real judgment and the opinion of the court[4] for the purpose of applying the principle of *res judicata*[5] and for execution purposes, because in a case decided by a court on appeal, the true judgment is that entered by the clerk of said court pursuant to the dispositive part of its decision.[6]

After a judgment or order has become final, in the sense that it is no longer subject to appeal or motion for a new trial such judgment or order should be entered as having become final and executory[7] and is conclusive in a subsequent case between the same parties and their successors in interst litigating upon the same thing and issue regardless of how erroneous it may be[8] or not withstanding the probability of its being reversed had an appeal been taken by the party to the case.[9]

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[5] § 5(a) "The Wage Board appointed under the provisions of this Act shall be composed of a member representing the public who shall act as Chairman of the Board, two representatives of the employees in the industry and two representatives of the employer in the same industry."

[1] Rule 4, §11, in the case of Inferior Courts, and Rule 35, §2, in the case of the Court of First Instance.

[2] Art. VII, §12 PHIL. CONST. §1, Rule 35, Rules of Court, in the case of Court of First Instance, and §15, Rule 4, Rules of Court, in the case of Inferior Courts. With respect to the form of judgment, a distinction should be made between the one rendered by a judge of the inferior court and that rendered by a court of record in relation to the requirement of the Constitution that "No decision shall be rendered by any court of record without expressing therein clearly and distinctly the facts and the law on which it is based."

[3] Escarella v. Director of Lands, G.R. No. L-1283, April 30, 1949.

[4] "A judgment must be distinguished from an opinion. The latter is the informal expression of the views of the court and cannot prevail against its final order or decision. While the two may be confined in one instrument the opinion forms no part of the judgment. So...there is a distinction between the findings and conclusions of a court and its judgment itself. They amount to nothing more than an order for judgment, which must of course, be distinguished from the judgment."
I FREEMAN ON JUDGMENTS 6; Contreras, et al. v. Felix, et al., 43 O.G. No. 11, 4306 (1947).

[5] Archbishop v. Director, 35 Phil. 339 (1916).

[6] Gutierrez v. De la Riva, 46 Phil. 827 (1924).

[7] Rule 35, §2.

[8] Lanuza v. Gonzales, 17 Phil. 413 (1910); Chereau v. Fuentebella, 43 Phil. 216 (1923); Fernandez v. De Castro, 48 Phil. 128 (1925); Paccial v. Palermo, et al., 47 O.G. p. 6184 (1951).

[9] Regalado v. Luchsinger & Co., 5 Phil. 625 (1905); Macondray & Co. v. Quintero, 6 Phil. 429 (1906); Tanguinlay v. Quiros, 10 Phil. 360 (1908).

In this case of *Edwards, et al. vs. Arce, et al.*, it appears that Rosario Neri was the exclusive owner of a parcel of land consisting of 137 square meters, and jointly with her husband, T. H. Edwards, of another portion consisting of 43 square meters. These two portions taken to gether from a lot called Divisoria Lot. This lot was delivered to the respondents for administration with the obligation to render accounting thereof and surrender it when demanded by the owners. Respondents never rendered an accounting but instead they leased the property to a Chinese. The petitioners commenced this action to recover the possession of the lot. It is admitted by the respondents that they administered the lot in question but they alleged that they had the portion consisting of 137 square meters and were declared owners thereof in a civil case in whch the lot was litigated upon. In this civil case, the Arces as plaintiffs demanded specific performance against the petitioners to compel them to execute a deed of conveyance of the land. The trial court in that civil case decided that the Arces were only entitled to demand fulfillment of the contract with respect to the 137 square meters and absolved the petitioners. The Arces did not however, appeal from this decision and consequently it became final and executory. In their defense in this present suit, the respondents claimed that petitioners should be ordered to execute the deed of conveyance in favor of them.

It is contended by the petitioners that the decision in the civil case previously rendered became final and executory for lack of appeal and since they were absolved from the complaint, there is already *res judicata* which bars the respondents in raising the question of specific performance of an alleged contract of sale relative to the lot in question. Consequently the implication that can be drawn from it is that they are already freed from the alleged effects of the contract of sale.

From the foregoing facts the Supreme Court declared:

> "While it is true that in the decision in Civil Case No. 123 the court made a finding that the respondents were entitled to demand the fulfillment of the contract of sale regarding the portion o fthe lot containing an area of 137 square meters such however, is not controlling for the purpose of *res judicata* but what appears in the dispositive part of the decision. In fact, the only portion of the decision that became the subject of execution is what is ordained or decreed in such dispositive part.... The presumption of *res judicata* cannot be deduced from the grounds of the order, but from the *fallo*, or from the dispositive part of the order which is the real judgment in the case in litigation."

With respect to the question of when *res judicata* attaches, the court reiterated the well-settled rule that a "final judgment or order on the merits rendered by a court having jurisdiction of the subject matter and of the parties, is conclusive in a subsequent case between the same parties and their successors in interest litigating upon the same thing and issue, regardless of how erroneous it may be,"[10] and the reason underlying the principle is that "public policy and sound practice demand that at the risk of occasional errors, judgments of courts should become final at some definite date fixed by law. The very object for which courts were constituted was to put an end to controversies.[11] It seems however, that the court was too technical notwithstanding the fact that it was earnestly cognizant of the right of the respondents with respect to a particular portion of the lot in litigation, while we must bear in mind the time-honored rule that judicial litigation is not "a game of technicalities in which one, more deeply schooled and skilled in the subtle art of movement and position, entraps and destroys the other.....

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[10] *Supra* note 8.

[11] Dy Cay v. O'Brien, 38 Phil. 521 (1918); Layda v. Legaspi, 39 Phil. 83 (1919); Aquino v. Director of Lands, 39 Phil. 850 (1919); Querido v. Querido, G.R. No. L-8373, July 25, 1956.

Lawsuits, unlike duels, are not to be won by a rapier's thrust," [12] the Court should not have contented itself by saying, "we sympathize with the plight of the respondents."

Civil Procedure—*Dismissal of a claim for damages on the ground that it was premature and consequently it states no cause of action.*

ERLANGER & GALINGER, INC., ET AL. v. VILLAMOR, ET AL.
G. R. No. L-8767, March 23, 1956

The defendant in an action filed against him, may within the time for filing an answer, move for the dismissal of the action under certain legal grounds provided for in the Rules of Court.[1] Among the grounds for dismissal of an action are that there is another action pending between the same parties for the same cause and that the complaint states no cause of action. When invoking the former ground it must be shown that there is an identity of parties or at least represention of the same interest in both actions, identity of rights asserted and relief prayed for, such relief being founded on the same facts. The identity of parties and identity of rights should be such that any judgment which may be rendered on the other action will, regardless of which party is successful, amount to *res judicata* in the action under consideration.[2]

When dismissal is sought on the ground that the complaint states no cause of action, this fact must appear on the face of the complaint, in the sense that only the facts alleged and no other should be considered.[3] The real test therefore of the sufficiency of the facts alleged in a petition to constitute a cause of action is whether or not admitting the facts alleged, the court could render a valid judgment upon the same in accordance with the prayer of the petition,[4] and when there is a conflict or contradiction between the allegations of a complaint and a document or exhibit attached to and made part of it, instead of dismissing the complaint, defendant should be made to answer the same so as to establish an issue. Then the parties will be given an opportunity, the plaintiff to reconcile any apparent conflict between the allegations in this complaint and a document attached to support the same, and the defendant to refute the allegations of the complaint and to show that the conflict is real, material and decisive.[5] In the same manner, when the court finds the allegations to be sufficient but doubts their veracity, it must deny the motion to dismiss and require the defendants to answer and then proceed to try the case on the merits.[6]

In this case of *Erlanger and Galinger, Inc., et al., v. Hon. Emilio Villamor, et al.*, the petitioner, a domestic corporation filed an action against Emilio Flor in the Municipal Court of Manila to recover a refrigerator or its equivalent

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[12] Alonzo v. Villamor, 16 Phil. 315 (1910).

[1] Rule 8, Sec. 1. *Preliminary questions:*—Defendant may, within the time for pleading, file a motion to dismiss the action on any of the following grounds: ...(d) That there is another action pending between the same parties for the same cause; ...(f) That the complaint states no cause of action.

[2] I MORAN, COMMENTS ON THE RULES OF COURT 139 (1960) Manuel v. Wiggett, 14 Phil. 9 (1909); Hongkong and Shanghai Banking Corporation v. Ibañez de Aldecoa and Past Co., 30 Phil. 255 (1915); *See also:* Viuda de Hernaez v. Jison, 40 O.G. 3646 (1944); J. Northcott & Co. v. Villa-Abrille, 41 Phil. 465 (1921); Santos v. Tierra, G.R. No. L-3999, Aug. 22, 1951; Capati v. Ballesteros, 47 O.G. 5127 (1951); Olayvar v. Olayvar, 51 O.G. No. 12, 6219 (1955).

[3] Paminsan v. Costales, 28 Phil. 487 (1914); Blay v. Batangas Transportation Co., 45 O.G. (Supp. to No. 9), 1 (1949); De Jesus v. Belarmino, 50 O.G. No. 7, 3064 (1954).

[4] Dimayuga v. Dimayuga, 51 O.G. No. 5, 2397, (1955), citing, Paminsan v. Costales, *supra*.

[5] World Wide Insurance and Surety Co. Inc., v. Manuel, et al., 51 O.G. No. 12, 6214 (1955); *see also:* Mercado v. Tan Lingco, 27 Phil. 319 (1914).

[6] Pinero v. Enriquez, G.R. No. L-833, October 20, 1949.

value and pursuant to a writ of replevin issued by the court the refrigerator was seized by the sheriff. Flor was declared in default and after the denial of a motion for new trial, he appealed to the Court of First Instance where the case was docketed.

Two weeks after perfecting his appeal, Flor filed an action for damages in the Court of First Instance of Ilocos Norte against the Corporation and the Sheriff, claiming that the petitioner Corporation had misrepresented at the trial the actual balance of his indebtedness and the amount of attorney's fees due from him under the contract. The Corporation filed a motion to dismiss calling attention to the other case in Manila contending that the claims of Flor in the second action should be litigated in the Manila Court of First Instance to avoid multiplicity of actions. The judge refused to dismiss the case, hence this petition for certiorari. The issue to be decided is whether the complaint for damages states a cause of action.

In graning the writ the court stated that the existence of the alleged misrepresentation depends upon the final judgment to be rendered in the case appealed from the Municipal Court. "If the court sustains Flor's appeal and petition for relief, there will be a trial *de novo* where he can prove his correct indebtedness for he will be concluded by the Court of First Instance of Manila. In any event Flor's demand for damages is premature until the final judgment in Manila has been rendered and as of now the complaint states no cause of action." In consonance with the established rule in this jurisdiction, the damages claimed due to the replevin must be litigated in the main suit, that is, the action in the Court of First Instance of Manila.

Civil Procedure—*Execution of judgment; Judgment cannot be executed when the party had ceased to be entitled to the relief.*

HERNANDEZ, et al. v. CLAPIS, et al.
G.R. No. L-6812, March 26, 1956

Under the Rules of Court, execution shall issue upon a final judgment or order upon the expiration of the time to appeal when no appeal has been perfected.[1] In such a case the prevailing party is entitled as of right to its execution[2] and it becomes the court's ministerial duty to issue the writ of execution.[3] His refusal would be considered unwarranted and consequently he may be compelled to do so by mandamus.[4] The judgment cannot be vacated or amended, except to correct clerical errors and the court loses its jurisdiction thereafter, save to order its execution.[5] However, these principles would seem to be the general rules only because there are doubtless certain exceptions settled by decisions of the Supreme Court, as for example, when there has been a change in the situation of the parties which makes such execution inequitable[6] or when it appears that the controversy has never been brought and submitted to the judgment of the court,[7] or when it appears that the writ of execution

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[1] Sec. 1, Rule 39, Rules of Court.
[2] Fiesta v. Lloreata, 25 Phil. 554 (1913); Lim v. Singian, 37 Phil. 817 (1917); Ebero v. Cañizares, 45 O.G. No. 2, 725 (1949).
[3] Buenaventura v. Garcia, 44 O.G. No. 12, 4822 (1948).
[4] Kabasta v. Paredes, 63 Phil. 1 (1936).
[5] Arnedo v. Lloreata, 18 Phil. 257 (1910); Anuran v. Aquino, 33 Phil. 29 (1915); Valez v. Justice of the Peace, 42 Phil. 547 (1921); Phil. National Bank v. De la Vila, 46 Phil. 63 (1924); Contreras v. Felix, 44 O.G. No. 11, 4906 (1948).
[6] Amor v. Juco, 44 O.G. No. 1, 60 (1948); Ben Meyer & Co. v. McMicking, 11 Phil. 276 (1908); Molina v. De la Riva, 8 Phil. 549 (1907); Espiritu v. Crossfield, 14 Phil. 522 (1910); Flor Mata v. Lichauco, 36 Phil. 309 (1917); Chua A. H. Lee v. Mapa, 51 Phil. 624 (1928).
[7] Yulo v. Powell, 36 Phil. 722 (1917).

has been improvidently issued, or that it is defective in substance or is issued against the wrong party,[8] or that the judgment debt has been paid or otherwise satisfied,[9] or when the writ has been issued without authority,[10] or when the judgment has left matters for completion and settlement in a subsequent proceeding,[11] in which case the judgment cannot be considered final, or, as in this case, the party had ceased to be entitled to the relief.[12]

The record of this case of *Hernandez, et al. vs. Clapis, et al.*, shows that the plaintiff filed an action of forcible entry and detainer against the defendants. The plaintiffs won and on appeal the Supreme Court affirmed the lower courts decision. The decision of the court having become final, the plaintiffs filed a motion for a writ of execution. Opposition was filed by the defendants alleging, that the land in question is public agricultural land under the control and disposal of the Department of Agriculture and Natural Resources, that on March 5, 1949, the Secretary of said department revoked the plaintiff's right to possess and administer the land and the defendants were given the preference to apply for and occupy the same by virtue of Republic Act No. 65. The decision of the Secretary was affirmed by the President of the Philippines. In spite of this new fact introduced by the defendants, the judge issued, nevertheless, the writ of execution under the theory that it was ministerial and mandatory for him to do so, the decision having become final.[13] From this decision, the defendants appealed.

In giving due course to the appeal and modifying the ruling of the lower court, the Supreme Court emphasized:

> "While the decision in the forcible entry and detainer case is final, it can no longer be executed at least, in so far as the possession of the land is concerned, because under section 4 of Commonwealth Act No. 141, the Director of Lands has direct executive control of the survey, classification, lease... and his decision as to questions of fact are conclusive when approved by the Secretary of Agriculture... The situation is not that the judgment in the forcible entry and detainer case has lost its validity but the plaintiffs had subsequently ceased to be entitled to the relief awarded by said judgment."

Civil Procedure—*Petition for relief under Rule 38, Rules of Court; when granted.*

FAJARDO v. BAYONA, et al.
G.R. No. L-8314, March 28, 1956

Rule 38 of the Rules of Court [1] prescribes the period [2] within which a party prejudiced by the decision of the Court of First Instance which has become

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[8] Velez v. Martinez, et al. 63 Phil. 231 (1936).
[9] Dimayuga v. Raymundo, 42 O.G. 2121 (1946).
[10] Wolfson v. Del Rosario, 46 Phil. 41 (1924).
[11] Ignacio, et al. v. Hilario, et al., 43 O.G. No. 1, 140 (1947).
[12] Hernandez v. Clapis, et al., G.R. No. L-6812, March 26, 1954.
[13] The action of the trial judge is technically correct under the general rule in our civil procedure that the parties will not be allowed to object to the execution by raising new issues of fact or law. *See* Amor v. Jugo, 44 O.G. No. 1, 160 (1948); Castro v. Surtida, et al. G.R. No. L-3236, August 11, 1950. However, in justifying all allowance of the objection, it is submitted that the judicial situation between the parties has materially changed that the execution of the judgment would be inequitable, or even illegal, under the facts of this case. *See* Note 6, *supra* (by implication).
[1] Rule 38, §§1, 2, Rules of Court.
[2] *Id.*, §3.
Under this section, there are two periods of time to be taken into account. The first is sixty (60) days after the petitioner learns of the judgment, order or proceeding complained of. And the second is six (6) months after such judgment, order or proceeding was taken. The second period is a limitation to the first. The petition must be filed within sixty days after knowledge is acquired of the proceeding, provided it is not beyond six months after the proceeding has actually occurred. I MORAN, COMMENTS ON THE RULES OF COURT 699 (1960).

final and executory[3] may file a petition to set it aside in the same court in order to prevent a miscarriage of justice.[4] However, it has been the settled rule that the remedy provided for under Rule 38 is an equitable remedy which is not regarded with favor by the courts[5] and the period provided for therein is never extendible nor interrupted by another independent action.[6]

The question that may be asked is: can the party avail himself of a remedy at law, e.g., by appeal, certiorari, error, etc., and if unsuccessful proceed to seek relief under the rule? There is authority to the effect that "except where such remedies (at law) are cumulative under the governing statutes, a motion to vacate or set aside a judgment will not be entertained when the proper remedy of the party aggrieved is by appeal, error or certiorari...[7] but the courts have given more acquiescence to the more general proposition that it is a "vicious practice indeed for a party first to pursue a legal remedy and later abandon it and prosecute that in equity.[8] The apparent justice promoted by this rule is to avoid multiplicity of suits because to allow the parties to avail of remedy after another would result to an endless litigation.[9]

Under Philippine jurisprudence, this case of *Fajardo v. Bayona, et al.*, made it clear that once a party pursues a remedy at law he can no longer avail himself of a remedy in equity under Rule 38 of the Rules of Court. The facts of the case are: In Civil Case No. 12345 entitled *Fajardo v. Fajardo*, a decision was rendered by the respondent court in favor of the defendant, and dismissed the plaintiff's complaint. The plaintiff tried to perfect an appeal from said judgment but failed to present the record on appeal within the period fixed by the trial court, for which reason the appeal was declared abandoned. In connection with the previous attempt of petitioner to appeal from said judgment it should be noted that a petition for *mandamus* was filed before the Supreme Court to compel the respondent judge to give due course to his appeal but the Supreme Court dismissed the petition without prejudice to the filing of the proper action in the Court of Appeals, the remedy being in aid of its appellate jurisdiction. But the Court of Appeals also dismissed the petition.

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[3] Aquino v. Azuran, 38 Phil. 29 (1918); Velez v. Justice of the Peace of Sariaya, 42 Phil. 557 (1921); *See:* Braca v. Tan, G.R. No. L-3053, Sept. 22, 1949.

[4] Montara and Ecsina v. West of Scotland Ins. Office, Ltd., 30 Phil. 994 (1915).

[5] "A suit to set aside a judgment and retry the original case or an attack on a judgment on the ground of fraud, is generally an equitable proceeding or in the nature of such a proceeding... The remedy in equity does not assail the court in which the judgment was rendered; it need not seek to change, modify, suspend or vacate the judgment but may be employed to secure relief against the judgment on the ground that the rights acquired thereunder cannot be retained in good conscience." (49 C.J.S. 692).

"Equity will never interfere to vacate a judgment where the party seeking the relief could not possibly derive any benefit from the relief sought, and thus he is generally required to show that if relief were granted, a different result would obtain than that reached in the judgment which he complains... It is not regarded with favor and the judgment would be voided where the complaining party has or by exercising proper diligence would have had an adequate remedy at law or by proceedings in the original action by motion, petition, or the like to open, vacate, modify or otherwise obtain relief against the judgment... but where it is very evident as shown by the facts of the case that the granting of the writ would not profit the petitioner to obtain said remedy, for like a mirage it would merely raise false hopes and in the end avail the petitioner nothing, said petition... will be dismissed. (49 C.J.S. 694-696. *See also* Paner v. Yatco, 48 O.G. 59 (1952).

[6] "The remedy allowed by Rule 38 is an act of grace as it were, designed to give the aggrieved party another and last chance. Being in the position of one who begs, such party's privilege is not to impose conditions, haggle or dilly-dally, but to grab what is offered him. Palomares v. Jimenez, G.R. No. L-4513, Jan. 31, 1952 *cf.* Rafanan v. Rafanan, 52 O.G. No. 1, 228 (1956); Santos v. Manila Electric Co. G.R. No. L-7735, Dec. 29, 1955; accord, Gana et al. v. Abaya, et al., 52 O.G. No. 1, 221 (1956).

[7] 49 C.J.S. p. 511.

[8] Mellerio v. Freeman, 211 Pa. 302, 60 Atl. 735.

"It has generally been held that a party waives his right to apply for a vacation of the judgment by pursuing other remedies, as by taking an appeal from it, or by instituting an independent action for substantially the same purpose. 49 C.J.S. 518.

[9] Palomares v. Jimenez, *supra* note 6.

On January 6, 1954, three days before the dismissal of his appeal plaintiff filed a petition for relief under Rule 38, alleging the impossibility of presenting the amended record on appeal because he was in Jolo at that time and the record was so voluminous that the period of five days. Attached to the petition was an "affidavit of merit" supporting his counsel's excusable negligence.

The defendant objected to the petition on three grounds, one of them being, that the plaintiff is barred from filing the petition for relief for the reason that he had presented a petition with the Supreme Court to compel the judge to give course to the appeal, which petition was denied.

In practically adopting the ruling laid down in the case of *Palomares v. Jimenez*,[10] the court declared:

> "The presentation of the petition for relief under Rule 38, for the purpose of securing an appeal should not be allowed petitioner because he already had the opportunity to prosecute or compel the allowance of his appeal from the judgment when he instituted the action of certiorari and mandamus against the judge who had refused to approve his record on appeal... The remedy first pursued by the petitioner when he tried to have his appeal admitted was a remedy at law. That which he subsequently pursued when he sought relief because of excusable negligence was a remedy in equity... As we said the remedy under Rule 38 is to be availed of only in exceptional cases and where there is other remedy at law it should not be allowed to be used."

But another potent reason why the relief should not be granted is the fact that the affidavit of merit is defective because it states the counsel's excusable negligence and not an affidavit that petitioner Fajardo has a meritorious cause of action. This pronouncement is an affirmation of a long line of decisions on the matter promulgated by the Supreme Court.[11]

Civil Procedure—*Deprivation of a clear legal right with grave abuse of discretion is a necessary element of a special civil action of certiorari.*

MONTOYA v. GONZALES, et al.
G.R. No. L-9413, March 26, 1956

When any tribunal, board or officer exercising judicial functions, has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion and there is no appeal, nor plain, speedy and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings of such tribunal, board or officer as the law requires, with costs.[1] The special civil action of *certiorari* does not interrupt the principal case unless there is a writ of injunction stopping it[2] and to warrant its issuance there must be a grave abuse of discretion committed by the tribunal, board or officer taking cognizance of the proceedings

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[10] The only distinction between the Palomares case and the Fajardo case is that in the former, the remedy availed of is mandamus, while the latter is certiorari. But it makes no difference because certiorari and mandamus are both legal remedies.

[11] Coombs v. Santos, 24 Phil. 446 (1912) Phil. 24 (1923); McGrawth v. del Rosario, 49 Phil. 330 (1926); Bank of P.I. v. De Coster, 47 Phil. 594 (1925); Baron v. Sampang, 50 Phil. 756 (1927); Phil. Guaranty Co. v. Belanio, 53 Phil. 410 (1929); Paz v. Inandan, 42 O.G. 714 (1946). *See also:* Mehn Meyer & Co. v. Arnalot Hermanos, 7 Phil. 742 (1907); Phil. Engineering Co. v. Argosinio, 49 Phil. 983 (1927); Banco-Español Filipino v. Palanca, 37 Phil. 921 (1918); Estrella v. Zamora, 5 Phil. 415 (1906).

[1] §1, Rule 67, Rules of Court.

[2] Palomares v. Jimenez, G.R. No. L-4513, Jan. 31, 1952.

complained of.[3] As a general rule all special civil actions, including *certiorari* will not be entertained where there is remedy by appeal.[4] However, in several instances, court has established the propriety of granting certiorari notwithstanding the remedy by appeal?[5]

From the foregoing theories the Supreme Court decided the case of *Montoya v. Gonzales, et al.* Here the records showed that a judgment for damages in the amount of ₱31,000.00 was rendered against Marcelino Ignacio on December 29, 1953. To execute such judgment, the provincial sheriff levied an attachment in February 1954 upon a house and lot set its sale by public auction for April 20, 1954. Marcelino and his wife Estelita submitted a motion to the court praying that said property be declared exempt from execution[6] on the ground that it was their family home. The motion was denied, the court noting that the constitution of the house had been recorded in the Register of Deed's Office[7] only on January 19, 1954, after the promulgation of the judgment against Marcelino. Because of this denial of the motion, the respondents Marcelino and Estelita filed a petition for *certiorari* and *mandamus* in the Supreme Court but the latter dismissed said petition on the ground that the petitioners, now respondents, had another adequate remedy of appeal or suit against the sheriff. This action of the Supreme Court might have impelled the petitioners herein to believe that it was a final ruling that the property was not exempt from execution, forgetting that there was a pending appeal in the Court of Appeals regarding the matter. The property was sold at public auction—and Montoya was the highest bidder. After one year from the sale, the sheriff issued to petitioners the final deed of sale. Consequently, a motion for a writ of possession was filed in the trial court but the latter denied it in view of the pendency of the appeal in the Court of Appeals involving the exemption of the family home. This ruling is now the subject matter of *certiorari* and *mandamus*.

The Supreme Court very aptly denied the petition on the ground that there was no deprivation of a clear legal right with grave abuse of discretion, a necessary element of a special civil action of certiorari because the question of attachability of the property had been submitted to the Court of Appeals

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[3] Abad Santos v. Province of Tarlac, 67 Phil. 48, (1938); Tan v. People, G.R. No. L-4269, April 27, 1951; It was said in these cases, that by grave abuse of discretion is meant such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction. Tavera-Luna, Inc. v. Nable, 67 Phil. 340 (1938); Alafriz v. Nable, 72 Phil. 278 (1941). The abuse of discretion must be grave as where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility and it must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law.

[4] Visayan Surety & Insurance Corporation v. Lacson, et al., 51 O.G. No. 6, 2914 (1955); Claudio, et al. v. Zandueta, 64 Phil. 812 (1937); Haw Pia v. San Jose, et al. 44 O.G. No. 8, 2708 (1948).

[5] Certiorari was granted notwithstanding remedy by appeal in order to avoid a future litigation and in some cases the orders complained of had been found to be completely null and void and the time to appeal had already expired when the writ of certiorari was applied for in these cases. Alfonso v. Yatco, 45 O.G. (Supp. to No. 9) 35 (1949); Director of Lands v. Abada, 41 Phil. 71 (1920); Director of Lands v. Santamaria, 44 Phil. 504 (1923); Perlas v. Concepcion, 34 Phil. 559 (1916); Director of Lands v. Gutierrez David, 50 Phil. 797 (1927); Clements v. Lukban, 53 Phil. 931 (1929); Government v. Judge, 57 Phil. 500 (1933); Ballis v. Imperial, 52 Phil. 530 (1928).

Certiorari was also granted in the following cases, notwithstanding the remedy of appeal, on reason of public welfare and the advancement of public policy, in view of the many merchants interested in the Chinese Bookkeeping Law, and inasmuch as the Surplus Property cases have attracted nationwide attention making essential to proceed with dispatch in the consideration thereof: People v. Zulueta, G.R. No. L-4017, Aug. 30, 1951; Yu Cong Eng v. Trinidad, 47 Phil. 385 (1924).

Likewise certiorari may be granted, notwithstanding the remedy of appeal, when the right to appeal was not an adequate remedy, such cases, for instance as the right to appeal from orders of preliminary attachment or appointment of receivers. Rocha v. Crossfield, 6 Phil. 335 (1906); Leung Ben v. O'Brien, 38 Phil. 182 (1918).

[6] Exemption of family house extrajudicially constituted from execution, forced sale or attachment, see, Art. 243, new Civil Code.

[7] For extrajudicial constitution of family house, see, Art. 240, new Civil Code.

and there being the collateral issue of suspension of the redemption year. Furthermore, said the court, "at any rate if the trial judge felt reluctant to proceed in view of the pendency of the appeal... he may not be declared wrongfully neglected to enforce a clear legal right of the herein petitioners."

Mariano M. Tajon

Civil Procedure—*Grounds for dissolution of injunction; sufficiency of petition.*

PARINA v. CABANGBANG, ET AL.
G.R. No. L-8398, March 21, 1956

An injunction is an order requiring a person to refrain from a particular act. It may be of two kinds: (a) A preliminary injunction is one granted at any stage of an action prior to a final judgment; (b) a final injunction is one included in the judgment as the relief or part of the relief granted as a result of the action.[1] Since this is a provisional remedy, parties may resort to it "for the preservation or protection of their rights or interests; and for no other purpose, during the pendency of the principal action."[2]

One of the grounds for the dissolution of an injunction is the "insufficiency of the complaint as shown by the complaint itself or upon affidavits on the part of the defendants...."[3] In the instant case, Parina sought to enjoin the execution of the judgment rendered in the Case entitled *Cabangbang* v. *Parina*, ordering Parina to pay the sum of P556.31. The writ of preliminary injunction was issued by the CFI *ex parte* and another order was issued ordering the sheriff to return possession of the properties levied upon.

Cabangbang sought to dissolve the injunction on the ground that Parina had been given every opportunity to appear and that his petition for relief was merely intended for delay. In effect, he questioned the sufficiency of Parina's petition. The motion to dissolve the injunction was served upon Parina's lawyer on October 15, 1954; hearing was set on October 16, 1954. Parina's attorney objected to the consideration of the motion on the ground that the three days period of notice for motions was not given. The injunction was dissolved; reconsideration having been denied, a petition for certiorari was filed by Parina to the Supreme Court. Petitioner claimed that the order of dissolution was not based on any of the grounds mentioned in Rule 60 of the Rules of Court.[4] Our Supreme Court disagreed with the petitioner. Speaking through Justice Labrador, the Court said:

> "The action instituted by Parina was one for relief against the decision of the Municipal Court on the ground that Parina failed to appear on the expectation that a motion for postponement presented by his lawyer would be granted. Neither party nor a lawyer has the right to assume that his motion for postponement would be granted by the court. Petitioner's absence at the time of the trial can not therefore be said to be excusable. His petition for relief was thus insufficient."

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[1] Rule 60 § 1.
[2] Calo v. Roldan 42 O.G. 12, 3174, 3179 (1946).
[3] Rule 60, § 6.
[4] Dissolution of the writ of injunction may also be granted "If it appears that the plaintiff is entitled to the injunction, but the issuance or continuance thereof, as the case may be, would cause great damage to the defendant, while the plaintiff can be fully compensated for such damages as he may suffer, and the defendant files a bond in an amount fixed by the judge conditioned that the defendant will pay all the damages which the plaintiff may suffer by reason of the continuance during the action of the acts complained of...."

As regards the contention that the petitioner did not have the three days notice of the motion to dissolve the injuntcion, the Court ruled that although the pettiioner did not have the full three days notice he had an opportunity to object thereto prior to the granting of the same by the Judge. Again opportunity was given him when he presented the motion for reconsideration. As he had the opportunity to be heard, he can not complain that the original motion was set for hearing without the three days notice required by the Rules.[5]

Civil Procedure—*Jurisdiction; test to determine jurisdiction when there are several causes of action arising out of the same or different transactions.*

CAMPOS RUEDA CORPORATION v. STA. CRUZ TIMBER INC. and ALFONSO FELIX
G.R. No. L-6884, March 21, 1956

Courts of First Instance have original jurisdiction in all cases "in which the demand exclusive of interest or the value of property in controversy amounts to more than two thousand pesos."[1] Justices of the Peace and the judges of Municipal Courts have exclusive original jurisdiction in all civil actions "where the value of the subject matter or the amount of the demand does not exceed two thousand pesos, exclusive of interests and costs."[2]

The question of jurisdiction, where several causes of action arising from the same or different transactions is involved is no longer new.[3] In the instant case, the Supreme Court settled once and for all this question. Here, the plaintiff corporation filed in the CFI of Manila an action against the Sta. Cruz Timber Co. and Alfonso Felix, to recover the amounts of ₱1,125.00 and ₱1,075.00 executed by the defendants jointly and severally. Holding that the two notes constitute two separate causes of action, each involving less than ₱2,000, the CFI dismissed the case for lack of jurisdiction. Subsequently, the plaintiff filed another action in the Municipal Court of Manila against the same defendants for the collection of the two notes, which plaintiff consolidated under a single cause of action. After trial on the merits, the Municipal Court likewise dismissed the action on the ground the case was outside its jurisdiction. On appeal, the CFI sustained the dismissal of the case by the Municipal Court. Hence, this appeal to the Supreme Court.

Speaking through Justice J. B. L. Reyes, the Supreme Court ruled that the CFI had jurisdiction because "...the correct and sound interpretation of the Judiciary Act which bases the jurisdiction of both the CFI and the Municipal Court on the *amount of the demand* is that made in *Soriano v. Omilia*:[4] that where there are several claims or causes of action between the same parties embodied in a single complaint, the jurisdiction of the court depends not upon the value of demand in each single cause of action but upon *the totality of the demand in all causes of action*. In other words, the *amount of the demand* means the total or aggregate amount demanded in the complaint irrespective of whether the plural causes of action constituting the total claim, arose out of the same or different transactions."

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[1] De Borja v. Tan, G.R. No. L-6126, May 25, 1953.
[1] §44, Rep. Act No. 296 (Judiciary Act of 1948).
[2] §88, *Id.*
[3] Villaseñor v. Erlanger, 19 Phil. 574 (1911); Soriano v. Jose 47 O.G. 154 (1950); Go v. Go, G.R. No. L-7020 June 30, 1954; Gutierrez v. Ruiz, 50 O.G. 2488 (1954), Soriano v. Omilia, G.R. No. 1-7112, May 21, 1955.
[4] G.R. No. L-7112, May 21, 1955.

In adhering to the rule of the *Omilia case*, the Supreme Court abandoned the rule in *Go v. Go*,[5] which held that a distinction should be drawn between a claim composed of several accounts arising from different transactions and another which is composed of several accounts arising from the same transaction. In the first instance, the amount of each account furnishes the test of jurisdiction, while in the second, the jurisdiction is determined by the total amount claimed.[6]

Criminal Procedure—*Intervention of offended party in a criminal case; when precluded.*

OTILIO GOROSPE ET AL. v. HON. MAGNO GATMAITAN ET AL.
G.R. No. L-9609, March 9, 1956

One of the rights granted to an injured party is the right to take part in the prosecution of the offense.[1] Section 15 of the Rules of Court guarantees this right.[2] Thus, the offended party may as of right intervene in the prosecution of a criminal action, but then only when, from the nature of the offense, he is entitled to indemnity and he has not, expressly reserved or waived his action.[3]

In the instant case, the question was whether the offended parties may intervene in the prosecution of the criminal action notwithstanding the fact that they had earlier instituted a civil action against the same defendants. The facts show that petitioners filed an action against Samu and the General Indemnity Co., to annul certain contracts and to recover damages. Upon the instance of the petitioners, the City Fiscal of Manila filed against the same respondents an action for estafa. When the attorneys for the petitioners entered their appearance in the criminal case, the respondents objected and sought to prevent such intervention on the ground that having already instituted a civil action, the offended parties ceased to have a right or authority to intervene in the criminal case. The trial Court ruled for the respondents., hence petitioners filed a petition for certiorari.

The Supreme Court agreed with the trial court and quoted with approval the rulings in *People v. Maceda*,[4] *People v. Velez*,[5] and *People v. Capistrano*.[6] The reason of the law in not permitting the offended party to intervene the prosecution of a criminal case, if he has waived his right to institute a civil action arising from the criminal act, or has reserved the right to institute

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[5] G.R. No. L-7020, June 30, 1954.
[6] Justice Angelo Bautista, in his concurring and dissenting opinion, said: "I concur in the result because it appears that the two promissory notes herein involved arose out of the same transaction but I still adhere to the ruling laid down in Go. v. Go, which I believe to be sound. One wholesome effect of this ruling is that it would forestall any attempt at circumvention of the jurisdiction of inferior courts by joining different accounts in one action even if they arise out of different transactions simply because of the desire to place them within the jurisdiction of a higher court. This would amount to a deprivation of the jurisdiction by judicial ruling..."
Chief Justice Ricardo Paras concurred in this opinion.
[1] Gonzales v. Judge of Court of First Instance of Bulacan, 63 Phil. 846 (1936). The two other rights of the offended party are: to exact civil liability arising therefrom and to appeal from such order of the court as affects the right to restitution, reparation, and indemnization, but not with respect to the criminal action.
[2] "Intervention of the offended party in criminal action—Unless the offended party has waived the civil action or expressly reserved the right to institute it after the termination of the criminal case, and subject to the provision of Section 4 hereof, he may intervene, personally or by attorney in the prosecution of the offense."
[3] People v. Maceda, 73 Phil. 670.
[4] *Ibid.*
[5] 77 Phil. 1026 (1947).
[6] G.R. No. L-4448.

a separate action or, *a fortiori, already instituted the said civil action.* is that he has no special interest in the prosecution of the criminal action.[7] Since the offended party has already filed a civil action arising from the criminal act, he has no right to intervene in the prosecution of the case.[8] The Court concluded that this ruling is strengthened by article 33 of the New Civil Code which provides that, "In all cases of defamation, fraud, and physical injuries, a civil action for damages entirely separate and distinct from the criminal may be action brought by the injured party," and that such action may be proved independently of the criminal and for its determination preponderance of evidence would suffice.

Criminal Procedure—*Amendment of information; double jeopardy.*

PEOPLE v. OPEMIA, ET AL.
G.R. No. L-7987, March 26, 1956

Amendment is allowed before the defendant pleads, even without leave of court, whether it be of form or substance.[1] After plea or during the trial, however, amendment may only be allowed by the court as to matters of form if such amendment would not prejudice the rights of the defendant.[2] There can be no amendment as to substance because any such change would adversely affect the rights of the accused. After trial or after judgment, no amendment is allowed except for purely clerical errors[3] not afecting the rights of the accused.

In *People v. Opemia*, an information was filed charging theft of large cattle alleged to have been committed on or about June 18, 1952. During the trial, date of the crime was declared to be sometime in July, 1947 whereupon objected on the ground that the rights of the accused would be prejudiced. The trial court sustained the objection and dismissed the case.

The lower court with good reasons considered the amendment as referring to substance and not merely to form. But even supposing it to be the contrary, its allowance, after the defendants had pleaded was discretionary with the court and would be proper only if it would not prejudice their rights.[4] The court made good use of its discretion in disallowing the amendments because it would really be unfair to the defendants.[5]

The dismissal of the case by the lower court on the ground of variance between the allegation and proof amounted to an acquittal and the defendants could not be tried again without defendants being put twice in jeopardy of punishment for the same offense.[6]

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[7] *Ibid.*
[8] People v. Olavides, 45 O.G. 3334 (1943).
[1] People v. Galintanan, 43 O.G. 3207 (1947).
[2] United States v. Ababot, 28 Phil. 678 (1918); Castro et al. v. Ossets, 65 Phil. 335 (1938).
[3] United States v. Vayson, 27 Phil. 447 (1914).
[4] United States v. Smith, 3 Phil. 29 (1903); U.S. v. Arces, 11 Phil. 585 (1908).
[5] United States v. Dichoso, 27 Phil. 632 (1914). Where the exact date cannot be fixed, or where the prosecuting officer is not certain that he can prove a precise date, he should allege in the information that the crime was committed on or about a date named. Under such an allegation it is not required to prove the precise date but any date which is not so remote as to surprise and prejudice the defendant.
[6] People v. Diaz, G.R. No. L-6518, March 30, 1954; People v. Bangalao, G.R. No. L-5410, Feb. 17, 1954; Catilo v. Abaya, G.R. No. L-6921, May 14, 1954.

Special Proceedings—*Settlement of the estate of a deceased person; residuary funds.*

SIDECO, ET AL. v. TEODORO
G.R. No. L-6704 March 26, 1956

As a general rule, all of the property of a decedent of whatever character is liable for the payment of his debts. But as to the order in which a decedent's property is liable, it is a well-settled principle that in the administration of debts and legacies which must first be exhausted before the real estate can be made liable.[1] In keeping with this principle, our Rules of Court provides that the personal estate of the deceased shall be first chargeable with the payment of debts and expenses.[2]

The applicability of the above mentioned rule is contested by the defendant in this case on the ground that said rule refers to personal and real properties and not to the properties of the deceased which are in the hands of the administrator nor to the properties of the estate which are already in the hands of the heiress.

In this case the Supreme Court in 1951 rendered a decision ordering the Testate Estate of Margarita David to pay the claim of the Testate estate of Crispulo Sideco. The other heiress, Sison, delivered her share of the debt but the defendant Teodoro refused contending that the estate has real property which could be sold to pay the Sideco claim. The administrator of Sideco brought an action to compel Teodoro to deliver her share. In a motion to sell real property to satisfy the amount the court stated that residuary funds in the hands of the heiress can be used to satisfy he claim. From this order the defendant appealed.

Contrary to the contention of Teodoro, the residuary funds in the hands of the heiress are funds of the estate and court has jurisdiction to compel delivery to the administrator of the Sideco estate the necessary portion for the payment of the claim.[3]

It is a rule that in the ordinary course of an intestate proceeding the probate court should not authorize the delivery of the properties until after payment has been made of the recognized debts of the deceased and the expenses of administration.[4] If there has been such delivery as when the court thinks that there are no more debts[5] a remedy is provided under Section 6, Rule 89, Rules of Court.[6]

Lilia R. Bautista

Special Proceedings—*Validity of investments by the guardian of the property of the ward; implied judicial authority.*

IN RE: GUARDIANSHIP OF BRAULIO MARCELINO
PHILIPPINE TRUST COMPANY v. MARCELA BALLESTEROS
G.R. No. L-8261, April 20, 1956

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[1] Sutherland v. Harrison, 86 Ill. 363.
[2] § 3, Rule 89, Rules of Court.
[3] Pavia v. de la Rosa, 8 Phil. 70 (1907); Lopez v. Enriquez, 16 Phil. 336 (1910); Favie v. Yulo, 24 Phil. 240 (1913).
[4] Cu Unjieng v. Tiaoqui, 64 Phil. 566 (1937).
[5] § 1, Rule 91, Rules of Court.
[6] "Where devisees, legatees, or heirs have entered into possession of portions of the estate before the debts and expenses have been settled and paid, and have become liable to contribute for the payment of such debts and expenses, the court having jurisdiction of the estate may, by order for that purpose, after hearing, settle the amount of their several liabilities, and order how much and in what manner each person shall contribute, and may issue execution if circumstances require."

The general rule is that unless otherwise expressly provided bf statute, a guardian maf make investments of his ward's funds without an order of court.[1] Under our law,[2] the authority of the court is necessary for a guardian [3] to be able to invest validly the proceeds of the estate of the ward. Thus, section 5 of Rule 96 provides: "The court may authorize and require the guardian to invest the proceeds of sales or encumbrances, and any other of his ward's money in his hands, in real estate or otherwise, as shall be for the best interest of all concerned, and may make such other orders for the management, investment, and disposition of the estate and effects, as circumstances may require." In the instant case, the Court laid down the ruling that granting that such judicial authority is necessary to enable the guardian herein to invest the ward's property, such authority need not always be express; it may be impliedly given.

The petitioner Philippine Trust Co. was appointed guardian of the property of the incompetent Braulio Marcelino; the latter's wife (the respondent) was appointed guardian of his person. The petitioner kept custody of the pension that accrued in favor of the ward. The accounting of 1947 showed a deduction of P5,841.46 representing the pre-war loans extended by the appellant. They were paid during the Japanese occupation, but which payment was subsequently invalidated. It is worth noting that in a previous accounting made by the appellant, the court did not disapprove the items submitted including the loans in question.

The lower court, relying on Sections 1 and 2 of Rule 96 [4] of the Rules of Court, held that the deduction made was not binding on the ward because of failure of the appellant to secure a prior judicial authority to make such investments.

In reversing the ruling of the lower court, the Supreme Court ruled that the proper law applicable was Section 5 of Rule 96, because Sections 1 and 2 apply only to sale or encumbrance of the property of the ward or investments of the proceeds thereof;[5] that while Section 5 requires prior judicial authority in order that a guardian may invest the ward's money, it does not provide that said authority must always be express. The approval by the lower court of the accounting made before the war had the effect of impliedly validating appellant's accounts and will therefore bind the ward.

The Court through Chief Justice Paras declared: "The rule seeks principally to protect the funds of the ward against imprudent or unsafe investments

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[1] 25 AM. JUR. 53.

[2] Rule 96 of the Rules of Court governs the selling and encumbering of the property of the ward and investing the proceeds thereof.

[3] The word "guardian" precludes any implication having reference to any person other than judicial guardian. Laforga v. Laforga, 22 Phil. 374 (1913), cited in II MORAN COMMENTS ON THE RULES OF COURT 415 (1947).

[4] § 1 of Rule 96 provides: "When the income of an estate under guardianship is insufficient to maintain the ward and his family or to maintain and educate the ward when a minor, or when it appears that it is for the benefit of the ward that his real estate or some part thereof be sold, or mortgaged or otherwise encumbered, and the proceeds thereof put out at interest, or invested in some productive security, or in the improvement or security of other real estate of the ward, the guardian may present a verified petition to the court by which he was appointed setting forth such facts, and praying that an order issue authorizing the sale or encumbrance."

A guardian has no authority to sell real estate of his ward, merely by reason of his general powers, and in the absence of any special authority to sell conferred by will, statute or order of court. A sale of the ward's realty by the guardian without authority from the court is void. Into, et al. v. Quintana, et al., 45 O.G. 5430 (1948), cited in JACINTO, SPECIAL PROCEEDINGS AND INSOLVENCY LAW 237 (1955).

[5] The appellant also cites section 189 of Act No. 1459 which provides that deposits or moneys received by any trust corporation as guardian or trustee of an incompetent, unless otherwise directed by the instrument creating the trust can be loaned and invested in accordance with the provisions of law governing investments of savings and mortgage banks; and that being a trust corporation the appellant was not required to obtain previous authority from the court to loan its ward's funds.

by the guardian; and it is not intimated herein that the loans made by he appellant were of that kind."

It should be noted that under the facts of the case, previous judicial authority is not indispensable. Act No. 3854 dealing with the guardianship of incompetent veterans, does not expressly profide for a previous judicial authority. It was only since June 18, 1949, when Republic Act No. 390 which repealed Act No. 3854 was passed that judicial authority has been required.[6]

Pilipina A. Arenas

Evidence—*Defense of alibi cannot prevail over the positive identification of the offender by the offended party.*

PEOPLE v. COLLADO, ET AL.
G.R. No. L-8433, March 23, 1956

In common parlance the defense of alibi simply means the absence of the accused at the scene of the crime at the time of its commission and therefore it would follow that the accused could not have been the perpetrator of the crime. This is the weakest defense that can be resorted to,[1] the easiest to concoct[2] and requires positive, clear and satisfactory evidence to substantiate it.[3] Weak as it is, however, it is not entirely useless for in the face of an air-tight alibi testified to by witnesses whose credibility is so apparent and positive, that doubt may be engendered to an extent favorable to the accused.[4]

The principal defense in this case of *People v. Collado, et al.* is alibi. It is established by the records of the case that Lim Ha, his wife, Guillerma Marzan and their 13-year old daughter were living in their store in Quirino, Maria Aurora, Quezon. On September 16, 1953, after the store had already closed for the night, a band of four armed men, one of them masked, knocked at the door of the complaintant, on the pretext of buying cigarettes. After gaining entrance, by the use of force and intimidation, they took money and goods amounting to ₱343.43 and also raped Guillerma and her dauihter, and inflicted physical injuries upon Lim Ha. The commission of the crime was not disputed but the controversy lies principally on the sufficiency of identification of the accused made by the complainants. The accused alleged that on the hour in question when the crime was committed, he was at his house four kilometers away, entertaining his guests with a dinner. His allegations were corroborated by his *comadre* who is a teacher.

The offended party Guillerma testified that although the accused Collado had his face partly covered with a handkerchief, she was able to recognize him because handkerchief fell when she scratched it off as she pushed his head while trying to prevent him from kissing her.

Under the foregoing facts, the court considered defendant's alibi as "inconclusive and cannot prevail over Guillerma's postive testimony which the trial court found so clear, natural, and convincing." The court also noted the that Guillerma could not have been mistaken about the identity of the accused

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[6] It provides: "Every guardian shall invest the funds of his ward's estate in such securities or property as authorized under the laws of the Philippines but only upon prior order of the court except when investment is in certain obligations of the governments of the Philippines or of the United States."

[1] III MORAN, COMMENTS ON THE RULES OF COURT 15 (1950).
[2] People v. De Asis, 61 Phil. 884 (1934); *see:* People v. Lingad, 51 O.G. 6191 (1955).
[3] People v. Limbo, 49 Phil. 94 (1926); People v. Pili, 51 Phil. 965 (1928).
[4] People v. de los Santos, G.R. No. L-4880, May 18, 1953.

because there was liiht and she knew the accused well for he frequented her store and they even addressed each other as "compadres". This ruling is to be expected from the facts of the case taking into account the numerous cases decided on the point.[5]

Mariano M. Tajon

Evidence—*Admission by silence; rule when a person is under arrest or in custody.*

PEOPLE v. TIA FONG *alias* AH SAM
G.R. No. L-7615, March 14, 1956

Qui tacet consentire videtur (silence means consent) is a well-recognized rule of evidence.[1] Thus the Supreme Court once ruled that if a man remains silent when he ought to speak, he will be debarred from speaking later.[2] A number of principles had been pronounced by the Supreme Court as regards admission by silence. In a case,[3] it was held that if a defendant remains silent during an official investigation by a Fiscal such silence is no evidence of his guilt as said official investigation was no occasion for denying the imputation then being made against him. However, in *United States v. Bay*[4] the Court ruled differently. Here, the defendant was accused before the councilman of a barrio with having criminally assaulted the offended party. The defendant kept silent as the latter explained the assault, neither admitting or denying the imputation. At the trial, he alleged that the imputation was false, but the Court held that if it were so, he would have instanly and indignanly denied the mputaton when made before the councilman.

In the instant case, the Court ruled that in considerng whether silence is an admission of guilt while a person is in custody or under arrest, all circumstances must be taken into account. The defendant Tia Fong and three others were accused of the murder of one Lian Kao, the son of Wong Kiat. It appeared that the defendant and the father of the deceased were partners in a business, but the defendant separated from Wong Kiat and formed his own business. On February 20, 1951, the day before Lian Kao was found dead, the defendant had a conversation with one Hermogenes Tago and the former complained to the latter that he was losing in business because the father of the deceased would not sell him bread. The defendant said that "it is better that Wong Kiat and Lian Kao be whipped."

The evidence mainly relied upon for conviction of the accused was his silent participation in the reenactment of the crime by his three co-accused. With the aid of the written confessions of these three, two Philippine Constabulary officers (who acted as investigators) directed the accused to reenact the crime and photographs of the reenactment were taken. In all the most important in-

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[5] People v. Asis, *supra*; People v. Medina, 71 Phil. 283 (1940); People v. Niem, 75 Phil. 663 (1946); People v. Dy Teo, 47 O.G. 5633 (1951); People v. Faltado, G.R. No. L-1604, June 27, 1949; People v. Mendoza, G.R. No. L-6385, July 16, 1954; People v. Jistiado, G.R. No. L-5478, (1951); People v. Liberia, G.R. No. L-6525, July 16, 1954; People v. Jistiado, G.R. No. L-5478, April 29, 1954; People v. Faber, G.R. No. L-6782, March 12, 1954; People v. Mamadra, G.R. No. L-6580, August 20, 1955; People v. Unay, G.R. No. L-5590, June 23, 1955; People v. Macion, G.R. No. L-7627, August 30, 1955; People v. Bensal, G.R. No. L-8265, October 31, 1955; People v. Tulala, G.R. No. L-7283, May 18, 1955; People v. Custodio, G.R. No. L-7462, October 24, 1955; People v. Caubat, et al., G.R. No. L-7285, June 23, 1955.

[1] Rule 123 provides: "Admission by silence—Any act or declaration made in the presence or within the observation of a party who does or says nothing when the act or declaration is such as naturally to call for action or comment if not true, may be given in evidence against him."

[2] Gabriel v. Baena, 56 Phil. 314 (1931).

[3] United States v. De la Cruz, 12 Phil. 7 (1908).

[4] 27 Phil. 496 (1914).

cidents and details of the crime, the accused took part, although silently and on one occasion he corrected the position of his co-accused as they were reenacting their respective parts.

The trial judge held that the guilt of the accused Tia Fong was proved by his participation in the reenactment of the crime. On appeal, the defense claimed that it was error for the trial Court to consider said participation as an evidence against him because all that the appellant did was to remain silent and do what he was told and directed to do. The accused claimed that he followed the directions of the investigators during the reenactment because he had already been maltreated.

In affirming the conviction, the Supreme Court, after quoting extensively from American authorities[5] and citing the provisions in the Rules of Court,[6] held that the better rule is to consider the circumstances in each case and decide the admissibility of the silence accordingly.[7] The Court said:

> "It is to be noted that the implication of guilt in the case at bar is not derived from mere silence; it is derived from appellant's silent acquiescence in participating in the reenactment of the crime. More than mere silence, appellant committed positive acts without protest or denial when he was free to refuse. Had he not actually participated in the commission of the offense for which he was charged, he would have protested being made to take part in the reenactment thereof, he would have informed the public officials at the time of the reenactment or immediately prior thereto, that he did not actually take part in commission of the offense. The trial court committed no error in taking into account appellant's participation in the reenactment as voluntary and in considering it as evidence against him."

Amelia R. Custodio

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[5] "§ 1259 (d) Silence under arrest. Some of the courts have held that one is under arrest and in custody of an officer, when he is silent under accusation prevents his silence or the statements themselves from being admissible against him on the ground that under the circumstances he is not called upon to speak. Other courts have held that this circumstance alone does not render the evidence inadmissible, and that an accusation of crime calls for reply even from a person under arrest or in the custody of an officer, where the circumstances surrounding him indicate that he is free to answer if he chooses to do so." (16 C.J. 633). See also 20 Am. Jur. 486.

[6] Rule 111, § 1 (c) "Rights of the defendant at the trial.... His neglect or refusal to be a witness shall not in any manner prejudice or be used against...."

[7] Rules 123, § 79 provides: "Witness bound to answer. Exceptions—A witness must answer questions pertinent to the matters at issue, though his answer may tend to establish a claim against him but, unless otherwise provided by law, he need not give an answer which will have a tendency to subject him to punishment for an offense...."

[8] "Certain situations in particular may furnish a positive for silence without regard to the truth or falsity of the statement whether the fact that the party is at the ime under arrest creates a situation has been the subject of opposing opinions. A few courts (for the most part in acceptance of an early Massachusetts precedent) by a rule of thumb exclude the statement invariably but the better rule is to allow some flexibility according to the circumstances..." IV WIGMORE ON EVIDENCE 80-81 (1940).