LAISSEZ FAIRE AND THE DUE PROCESS CLAUSE: HOW ECONOMIC IDEOLOGY AFFECTS CONSTITUTIONAL DEVELOPMENT

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I. *Ideology and the legal system*

The ruling class in any society, if it expects to rule very long, must justify its exercise of power by means of an acceptable ideology. Indeed, ideology is the velvet glove with which the iron hand of power is wielded. The subject people do not just accept the naked use of power without revolting. Thus, to make the rest of society obey the wishes of the ruling class, there should be a justifying principle for the exercise of power.

The biographies of rulers is interwoven with theories of power. The "divine right" theory of late, for instance, was foisted upon the king's subjects to justify his exercise of unlimited power. When some of the French people ceased to believe in divine right, they beheaded the king in the name of another political theory, popular sovereignty. Ideology is, therefore, the handmaiden of power. Stalin's unguarded question, "How many divisions has the Pope?" betrays a militarist's failure to comprehend the usefulness of ideology.

The prevailing ideology, of course, differs from one society to another, depending on who rules. Yet invariably, substantive law reflects the dominant ideology of a given time and place. For law, seen from a realistic perspective, is simply a display of power. As such, it reveals the result of the power struggle among various groups in a genuinely pluralistic society, or the wishes of the power elite in an oligarchy. "So," Justice Holmes has said irreverently, "when it comes to the development of a *corpus juris* the ultimate question is what do the dominant forces of the community want and do they want it hard enough to disregard whatever inhibitions may stand in the way".[1]

In this light, law is seen as a legalizing principle for the imposition of the wants of the dominant group over the rest of the community. Such imposition of burdens, however, has to be done through the state if those affected are to accept it without question. For the state possesses

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[1] Holmes, *Letter to Dr. Wu,* in SHRIVER, JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 187-188 (1936).

a "monopoly of legality" which enables it to make impositions on the subject people without fear of rebellion. It is this monopoly which makes the burden acceptable, since

> "there is in legality a symbolic value of high importance in social relations. To be 'legal' is to bear the proud manner which rallies to its support great numbers of almost any community or tends to do so. To be 'illegal' is to deter many from support of a position or personality otherwise acceptable or expedient."[2]

It is thus that the legal system of a given society reflects the dominant ideology at any time. The laws put out by the legislative mill are the products of the wants and demands of the ruling class which must possess, aside from power, ideology.

II. *American origins: the birth of judicial conservatism*

Years before Commodore George Dewey steamed into Manila Bay in 1898, economic events pregnant with implications took place in the United States. By the latter half of the nineteenth century, the industrial revolution in that country had enthroned with it the economic doctrine of laissez faire even in the political arena. It was at this stage of America's development that various economic forces, headed by the emerging corporate centurions, fiercely struggled not only with each other but also with populist forces for a share of political power. Their hegemony spelled the dominance of laissez faire which, in turn, shaped political thought at that time. Thus, besides the *Wealth of Nations*, Herbert Spencer's *Social Statics* became the reading fare of the members of the rising industrialist class during the period, and it was for reasons other than literary. Slowly but inevitably, economic thought penetrated the political sphere.

The very nature of the judicial system made it impervious, at first, to the initial assaults of the emerging economic forces. This explains why it was only during the declining years of laissez faire in economics and politics that it gave birth to a new legal doctrine which would soon pervade American jurisprudence. In this sense, the task of an intellectual midwife was performed by the elite of the American bar, ably aided by the outstanding conservative jurists and commentators.[3] The delivery of the twin principles of substantive "due process" and "liberty of contract" into the judicial world was induced by the shock of the U.S. Supreme Court ruling in *Munn v. Illinois*[4] which, in the words of the dissent, was

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[2] CHARLES MERRIAM, POLITICAL POWER 12-13 (1934).

[3] This is the thesis of CORWIN, LIBERTY AGAINST GOVERNMENT (1948); see also ARNOLD PAUL, THE CONSERVATIVE CRISIS AND THE RULE OF LAW (1960).

[4] 94 U.S. 113 (1876), where the Supreme Court held that the state of Illinois could fix by statute and rates for the storage of grain in warehouses operated by private individuals. The majority of the Court rejected the defendant's

"subversive of the rights of private property".[5] According to Corwin, the American Bar Association was organized right after the decision in that case was handed down, and the association "soon became a sort of juristic sewing circle for mutual education in the gospel of laissez faire."[6]

It was primarily the cream of the American Bar Association which was responsible for the writing of laissez faire into the American Constitution,[7] although the role of the conservative bench and the well-known commentators should not be discounted.[8] A number of factors account for the important part played by the ABA lawyers, not the least of which is the fact that the members constituted the battery of retainers for the big corporate combines of the time. It was a natural consequence of the fact that the Association's membership consisted of the better-educated lawyers, and generally the more successful, who were thus called upon to represent the big corporations in the courts.[9] They thus had to cling to laissez faire, for it was the justifying principle for their success.[10]

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argument that the statute was unconstitutional as in violation of the due process clause of the Fourteenth Amendment of the U.S. Constitution.

Note should be taken of defendant's novel argument. In invoking the Fourteenth Amendment, the defendant contended that the due process clause has substantive as well as procedural meaning, and that it also applied to legislation regulating property rights. The defendant's brief is outlined in 24 L. Ed. 77-80.

[5] Justice Field, dissenting, *id.* at page 136.

[6] CORWIN, CONSTITUTIONAL REVOLUTION 85 (1941).

[7] Aside from Corwin, this is also the conclusion of C. HERMANN PRITCHETT, THE AMERICAN CONSTITUTION (1959) where he states that "a principal purpose of its (ABA) organization was to fight the 'barbarous' decision of Munn v. Illinois." (at 558).

See also PAUL, THE CONSERVATIVE CRISIS AND THE RULE OF LAW (1960) at 8-10, and Brockman, *Laissez Faire Theory in the Early American Bar Association*, 39 NOTRE DAME LAW. 270 (1964).

[8] See CLYDE JACOBS, LAW WRITERS AND THE COURTS (1954).

[9] Brockman, *supra*, note 7. (1964). Also TWISS, LAWYERS AND THE CONSTITUTION, Ch. VII.

Of course, it would not be fair to attribute the conservative attitude of the lawyers at that time to the size of their retainer fees. The fact is that free enterprise was the prevailing ideology during that period.

[10] The ABA and its members "stood with John Stuart Mill for individualism, agreed with Darwin's view of the inevitability of human struggle, and accepted Herbert Spencer's evolutionary theory of politics," state MASON and BEANEY in AMERICAN CONSTITUTIONAL LAW, 383 (1954).

Brockman also describes the typical attitude of the ABA member at that time thus:

> "To the lawyer of the late Nineteenth Century, *laissez faire* implied a sort of inherent goodness attached to private initiative as opposed to public authority. The lawyer believed that the good of the country was served through the massive combines that were building up American industrial empires. He considered the role of government as hardly more than that of a moderator of affairs which saw to it that the progress of industrial capital was not interfered with or unduly retarded. Conservative thought presumed that a natural law of social progress existed which in itself was capable of bringing the greatest happiness to the greatest number. The conservative mind saw, therefore, only error in the regulation of economic or social factors,

Not one of the successful practitioners at that time was a legal philosopher of note. But it was the strategic position of the lawyers and the judges to put the theory of laissez faire into legal jargon which accounted for their success in recasting judicial thought into the mold of the prevailing economic philosophy. At this juncture, too, the judiciary, awakened to the assaults against property rights, asserted its leadership over political thought, and indulged in judicial legislation.[11]

Of course, the intellectual spadework for the incorporation of laissez faire into the Constitution was done by influential commentators and jurists. Historian Arnold Paul singles out three: Thomas Cooley, Justice Stephen Field of the Supreme Court, and Christopher Tiedeman.[12] Thomas Cooley has been regarded by not a few legal historians as the most influential writer on the American Constitution in the 19th century, which explains why his *Constitutional Limitations* became the "conservative Bible".[13] In his monumental work, Cooley did more than string constitutional cases together; he also added his own conclusions which embodied his deeply-held philosophy of limited state power. As one author saw it, it was his commentaries which contributed greatly to the shift of emphasis from personal to property rights.[14]

Justice Field utilized his position in the high court to espouse his individualistic philosophy. Robert McCloskey points to him as the outstanding spokesman of laissez faire in the Supreme Court from 1870 to 1880.[15] His dissenting opinions in state regulation cases were first adopted by the state courts before they won over the majority of the federal tribunal.[16]

Christopher Tiedeman also put out a masterful treatise on limitations, *Limitations of Police Power.* As if the title of his book were not enough to apprise the reader of the author's purpose, Tiedeman writes his preface in all candor, thus:

> (T)he conservative classes stand in constant fear of the advent of an absolutism more tyrannical and more unreasoning than any before experienced by man, the absolutism of a democratic majority....

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since interference by government would upset the natural course of social evolution. Indebted intellectually to the *Social Statics* of Herbert Spencer, this element of conservative thought insisted upon the freedom of social and economic forces to achieve a natural harmony in which the best interests of all would be guaranteed." (Brockman, *ibid.* at p. 278)

[11] BROCKMAN, *id.* at p. 279.

[12] PAUL, *op. cit. supra* note 7; also JACOBS, *supra* note 8.

[13] BROCKMAN, supra note 11 at 282. A member of the Philippine Supreme Court in 1924, E. Finley Johnson, who penned the decision in People v. Pomar, 46 Phil. 440 (1924), likewise described Cooley as the "greatest expounder of the American Constitution," *id.* at 446.

[14] See Twiss, *supra* note 9 at 26.

[15] MCCLOSKEY, AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE, Chs. IV and V (1951).

[16] Paul, *supra* note 7 at 13.

> If the author succeeds in any measure in his attempt to awaken the public mind to a full appreciation of the power of constitutional limitations to protect private rights against radical experimentation of social reformers, he will feel that he has been amply requited for his labors in the cause of social order and personal liberty.[17]

The theoretical spadework done by these three legal minds in collaboration with lesser authors was undertaken at a time when the giant corporate aggrupations reigned supreme in the United States. Thus, the traditional weapon of the states, police power, was rendered impotent by the very size of the new business leviathans which had emerged as monopolies. For instance, the state of California in the middle 1880's found that its power had been outclassed by the economic power of the Union Pacific Railway, which then grossed an income five times that of the state.[18] Likewise, Pennsylvania at about the same time discovered its inefficacy in regulating the activities of Standard Oil.[19] Thus, the hitherto powerful states which had let the big corporations alone suddenly woke up to find that a new form of power had rendered their police power ineffective. In the ensuing battle between state and corporation, the courts delivered the *coup de grace* against the former.[20] Emerging as the victor in the judicial arena, the large corporations began to exercise political power. It came to a point that "about the only thing that Standard Oil, the Southern Pacific Railroad, the American Sugar Refining Company, or Carnegie Steel did not do was issue postage stamps," as John Roche observes.[21]

III. *How laissez faire was written into the American Constitution.*

The constitutional revolution began with the *Slaughter House* cases,[22] where the U.S. Supreme Court divided 5-4 over a Louisiana statute granting exclusive rights to a corporation with respect to the slaughter of animals. The "due process" argument, so ably advocated by retired Supreme Court Justice Campbell, lost out by one vote, but having been invoked for the first time, it was unexpected that it should win over to its cause four out of nine justices.[23]

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[17] Quoted in Paul, *id.* at 18.

[18] Graham, *An Innocent Abroad: The Constitutional Corporate Person*, 2 U.C.L.A. REV. 209 (1955).

[19] *Ibid.*

[20] See ROCHE, THE QUEST FOR THE DREAM (1963) where he states that "the crucial consideration in the liberation of the railroads from the police power was favorable state action on their claims. It was the United States Supreme Court, not the shade of Adam Smith, which broke their shackles and turned them loose" at 18.

[21] *Id.* at 20.

[22] 16 Wallace (U.S.) 36, 19 L. Ed. 915 (1873).

[23] Hamilton, *The Path of Due Process of Law*, in READ (ed.) THE CONSTITUTION RECONSIDERED 167 (1938).

Before this case, however, New York's highest tribunal, the Court of Appeals, had, in *Wynehamer v. New York*,[24] set aside a legislative prohibition against the sale of liquor as violative of due process. Here the court ruled that "there are some absolute private rights beyond the majorities' reach, and among these the Constitution places the right of property".[25] This decision articulated the new twist to the due process clause as follows: "Due process of law" does not mean the very act of legislation which deprives the citizen of his rights and property, since such legislation would be unjust, unreasonable and wrong. Thus, where property rights are acquired by a citizen under an existing law, no branch of government can take them away except the courts of justice which, in the course of administering and interpreting such existing law, finds that such property rights were held contrary to such existing law. The legislature cannot pass a law declaring that such property rights no longer exist, otherwise the constitutional provision would mean that no person shall be deprived of property or rights unless the legislature shall pass a law to effectuate the wrong.

This kind of reasoning was later utilized by the U.S. Supreme Court in *Yick Wo v. Hopkins*,[26] where it ruled that the "fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law". To the Court, the idea that a man may be compelled to hold his life, or his means of living, or any material essential to the enjoyment of life, at the mere will of another is inconsistent with the due process clause in the Fourteenth Amendment. It was thus that substance was infused into what was merely a procedural safeguard, and the due process clause came to be applied to the legislature aside from the courts.

At about the same time, economic forces more powerful than Yick Wo were knocking at the judicial gates. The lawyers for the railroad networks were also invoking the due process clause against rate-fixing legislation. The opening wedge to judicial conservatism came in the form of a U.S. Supreme Court decision that a railroad corporation was a "person" within the meaning of the Fourteenth Amendment and as such is entitled to the guarantees enjoyed by natural persons under the Constitution.[27]

From this premise, the corporations could invoke the due process clause. Thus, when Minnesota sought to regulate railroad rates for milk, the U.S. Supreme Court stepped in to defend the right of the company,

[24] 13 N.Y. 378 (1856)
[25] *Id.* at 387.
[26] 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886).
[27] Sta. Clara County v. Southern P. R. R. Co., 118 U.S. 394, 6 S. Ct. 1132, 30 L. Ed 118 (1886)

like a natural person, "to a judicial investigation, by due process of law, under the form and with the machinery provided by the wisdom of the successive ages".[28] A few years later, the same Court held unconstitutional a Lousiana statute prohibiting any person from signing any insurance policy in any company which had not been organized in accordance with the laws of that state.[29] Thus the Court evolved the doctrine of "liberty of contract"; it declared that the citizen's liberty mentioned in the Fourteenth Amendment refers not only to his freedom from personal restraint, but it also includes the right to pursue any livelihood, and for the purpose to enter into all contracts which may be proper and necessary to his carrying out that livelihood. These doctrines, then, constitute laissez faire in legal mantle. To minds accustomed to thinking along precedent, these were enough authorities, and for the next three decades, the wheel of judicial thought turned along the same conservative groove.

IV. *Importation of the concept of substantive due process into the Philippines*

In 1900, President William McKinley instructed the then District Judge William Howard Taft, who was known for his propensity to issue labor injunctions, as head of the Philippine Commission, to "impose" upon the Philippine government "the inviolable rule that no person shall be deprived of life, liberty or property without due process of law."[30] There is no doubt that the rule carried with it all the case law laid down by the U.S. Supreme Court. Even the manner of its interpretation in the Philippines was laid out along a narrow, undeviating path. The American Congress saw to it that the transplanted constitutional rights would be developed along lines laid out in the United States by providing that the Supreme Court of the United States had jurisdiction over all judgments of the Philippine Supreme Court in cases in which the Organic Law of the Philippines, or any statute, treaty, title, or privilege of the United States, was involved.[31] Furthermore, appeal from the judgment of the Philippine Supreme Court lay with that of the Washington Court.

The judiciary, as part of the colonial government organized in the Philippines at the beginning of the American regime, was doubtless expected to carry out the colonial policy of the Americans. Besides the influence of American jurisprudence on laws extended to the Philippines

[28] Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U.S. 418, 10 S. Ct. 462, 33 L. Ed. 970 (1890).

[29] Allgeyer v. Louisiana, 165 U.S. 578, 17 S. Ct. 427, 41 L. Ed. 832 (1897).

[30] President McKinley's Instructions to the Taft Commission, April 7, 1900, reprinted in 2 ARUEGO, THE FRAMING OF THE PHILIPPINE CONSTITUTION 762 (1937).

[31] Act of July 1, 1902, 32 Stat. 1369.

by congressional edict and by the principle of stare decisis, the appointing powers had always seen to it that majority of the members of the Supreme Court of the Philippines were Americans.[32] And President McKinley instructed the Taft Commission that "an indispensable qualification for all positions of trust and authority must be absolute and unconditional loyalty to the United States;" and "absolute and unhampered authority and power to remove and punish any officer deviating from that standard" was retained in the hands of the colonial administrators.[33] Thus, the rights were given to the Filipinos in much the same way that Napoleon decreed liberty to the English.

It must be noted, however, that the Filipinos had their own notions of "due process" before the coming of the Americans. The provision of the Malolos Constitution on due process provided that

> no person shall be deprived temporarily or permanently of his property or rights, or disturbed in his possession, except by virtue of a judicial sentence.[34]

There is no mistaking this provision for substantive due process; it is patently a guarantee of procedure, that is, judicial procedure. And this was to be governed by the existing Code of Procedure, without prejudice to certain modifications which in special circumstances the laws may prescribe.[35]

That substantive due process was transplanted in a country distant from either Runnymede or Philadelphia can be seen from Philippine conditions at the time of its introduction. Indeed, the guarantee was incongruous in an idyllic setting of economic underdevelopment. The American colonial administrators found this out in the first two decades of the American regime as they asserted the paramountcy of police power during the period when they were setting up a stable civil government.

The second Philippine Commission set up in 1900 was charged with the task of setting up a new government. The commission was vested with legislative and executive functions, while the judicial functions were exercised by a judiciary with an American-dominated Supreme Court at its apex.[36] The grant of legislative power to the Philippine Commission meant the influx of borrowed laws as well as of common law doctrines. The dearth of laws at the beginning of the American regime greatly stimulated legislative activity on the part of the Commission. The almost

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[32] HAYDEN, THE PHILIPPINES: A STUDY IN NATIONAL DEVELOPMENT 243 (1942).

[33] Pres. McKinley Instructions, *supra* note 30, *ibid.*

[34] The Malolos Constitution, reprinted in 2 ARUEGO, *supra* note 30 at 1070.

[35] *Ibid.*

[36] Act No. 136 sec. 18 (1901).

indiscriminate borrowing from American models made it inevitable for the Philippine Supreme Court to interpret the provisions of those laws in line with American precedents.[37] Subsequently, the U.S. Supreme Court stamped its *imprimatur* on this practice in line with the rule of construction that the provisions of borrowed laws must be construed with reference to the parent statute.[38] Then the Philippine Court laid down the rule that all provisions of the United States Constitution for the protection of the rights and privileges of individuals which were extended to the Philippines must be interpreted as meaning what like provisions meant when the U.S. Congress made them applicable to the Philippines.[39]

The exigencies of asserting American authority and of setting up a civil government made it imperative for the Philippine Supreme Court to subordinate property rights to police power. Thus, the first decision of the Court where the issue of due process was raised affirmed the supremacy of police power especially where the property involved is invested with a social function.[40] It was ruled in this case that the state not only has the authority under its police power to make such rules for the protection of its citizens, but it may also regulate private business in such a way that the business of one man shall not be a nuisance.[41] In another case that cropped up in 1915, the Court upheld the validity of the law prohibiting the slaughter of carabaos for human consumption.[42] On the defendant's contention that the prohibition constituted undue deprivation of one's property, the Court stated that the law was a just and reasonable exercise of the power of the legislature to regulate and restrain the use of property as would be inconsistent with or injurious to the rights of the public. The court pointed to the emergency caused by the rinderpest of 1902 as the basis for the remedial legislation, and declared that police power rests upon necessity and the right of self-protection.[43]

It was in the regulation of shipping and in the imposition of burdens that the shipping companies began their persistent efforts to limit police power. In *De Villata v. Stanley,*[44] the Court held that the government may require shipping companies to carry mail free of charge. The Court reasoned that the business of common carriers is a quasi-public employment and it is only when the owner of a vessel enters the business

[37] Alzua v. Johnson, 21 Phil. 308 (1912).
[38] See Kepner v. U.S., 195 U.S. 100, 24 S. Ct. 797, 49 L. Ed. 114 (1904); Serra v. Mortiga, 204 U.S. 470, 27 S. Ct. 343, 51 L. Ed. 571 (1907).
[39] U.S. v. Bull, 16 Phil. 7 (1910).
[40] U.S. v. Ling Su Fan, 10 Phil. 104 (1908); aff'd, in Ling Su Fan v. U.S., 218 U.S. 302, 31 S. Ct. 21, 54 L. Ed. 1049 (1910).
[41] *Ibid.*
[42] U.S. v. Toribio, 15 Phil. 85 (1910).
[43] *Ibid.*
[44] 32 Phil. 541 (1915).

that additional burdens may be imposed upon him. The operator should not, therefore, complain of deprivation of property without due process when he voluntarily entered the business of shipping, for he knew that one of the conditions for obtaining a license was to agree to free carriage of mail. However, four years later, when another shipping firm challenged the statute on the same ground, the Court reversed its ruling and held the law invalid as repugnant to the due process clause.[45] In still another case, an order of the Board of Public Utilities Commissioners which required an operator of a steamship company to maintain and publish a fixed schedule of the arrival and departure of ships was challenged as violative of due process. Again, the Court upheld the contention of the petitioner, saying:

> It is not due process of law to charge a public utility with one act or omission and convict it of another; nor is it due process of law to investigate a particular subject in a given proceeding and then make an order which relates to an entirely different subject.[46]

V. *Ascendancy of substantive due process*

The political mood of the twenties in the United States profoundly affected the course of judicial thought in the Philippines. The change of administration in Washington also meant a change in economic policies. President Harding, and later President Coolidge, made laissez faire a plan for dynamic action.[47] By that time, William Howard Taft had been named to the U.S. Supreme Court as Chief Justice, and he saw no greater domestic issue in the 1920 election "than the maintenance of the Supreme Court as the bulwark to enforce the guaranty that no man shall be deprived of his property without due process of law."[48] President Harding, whose guiding slogan was "less government in business and more business in government,"[49] did not spare the Philippines, which at that time was known for its numerous government-owned development and marketing corporations.[50] Appointed Governor-General of the Philippines was Leonard Wood, a trusted Harding lieutenant who, upon his induction into office in 1921, hammered on his policy of "keeping the government out of business in order to encourage private enterprise".[51] He thus reversed the policy laid down by his predecessors,

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[45] Board of Public Utility Commissioners v. Ynchausti, 251 U.S. 401, 40 S. Ct. 277, 64 L. Ed. 327 (1920).

[46] Yangco v. Board of Public Utility Commissioners, 36 Phil. 116, 126 (1917).

[47] Leighton, The Aspirin Age, quoted in MASON, SECURITY THROUGH FREEDOM 56 (1959).

[48] Taft, *Mr. Wilson and the Campaign*, 10 YALE REVIEW 19-20 (1920).

[49] MASON, SECURITY THROUGH FREEDOM 38 (1959).

[50] APOSTOL, THE ECONOMIC POLICY OF THE PHILIPPINE GOVERNMENT: OWNERSHIP AND CONTROL OF BUSINESS 93 (1923).

[51] *Ibid.*

and sold to private firms almost all governmental operations.[52] He strongly opposed the grant of Philippine independence on the ground that the country did not have a stable government, and he defined a stable government as "one where public and private funds are abundant and readily seek investment at moderate rates of interest."[53] The colonial government's partiality to American businessmen can be seen from the fact that federal taxes supposed to be paid by American businessmen doing business in the Philippines were not collected during the Harding, Coolidge, and Hoover administrations, upon strong representations made by Justice Taft, Governor General Wood, and even President Hoover himself.[54]

It was at this stage of Philippine economic development that the American-dominated judiciary became a model of what a court should be in protecting property interests against the assaults of the Filipino legislature.

Thus, new meaning came to be infused into the due process clause of the Organic Act when, in 1922, an executive order of the previous Governor General fixing the price of rice was challenged before the courts.[55] At that time, the Philippines could not produce sufficient rice and it used to import rice from Saigon. A rise in price in Saigon caused a corresponding increase in the Philippines, and as the stocks of rice became depleted and the chances for importation grew uncertain, the rice merchants withdrew their stocks from the stores and hoarded them, awaiting the high prices that would follow. The machinations of market manipulators made the price soar beyond the means of the consumers. It was thus that the government sought to remedy the situation by regulating the price of rice.[56] A Chinese merchant, Ang Tang Ho, was accused of violating the executive order and, by way of defense, he challenged the constitutionality of the executive order as well as the enabling statute granting authority to the Governor General to fix the price of rice.[57] In declaring both the executive order and the statute unconstitutional, the Supreme Court adopted a rigid and absolutist approach to the Constitution, and declared:

> "The Constitution is something solid, permanent and substantial. Its stability protects the life, liberty and property rights of the rich and poor alike, and that protection ought not to change with the wind or any emergency condition. The fundamental question involved in this case is the right

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[52] *Ibid.*

[53] ANDERSON, THE PHILIPPINE PROBLEM 139 (1939).

[54] *Id.* at 49.

[55] Apostol, *supra* note 50 at 23.

[56] Report of the Secretary of the Department of Commerce and Communications (1919).

[57] Act No. 2868 sec. 1 (1919).

> of the people of the Philippine Islands to be and live under a republican form of government. We make the broad statement that no state or nation, living under a republican form of government, under the terms and conditions specified in Act No. 2868, has ever enacted a law delegating the power to any one to fix the price at which rice should be sold."[58]

In the same decision, the Court emphasized the private nature of the property whose price was sought to be regulated, and distinguished this from the wheat and flour commandeered by the U.S. government during the first world war. According to the Court, the latter became public property after they were commandeered, and the government could thus fix the price; in the Philippine case, the government was dealing with *private property* rights which, in the eyes of the Court, are "sacred under the Constitution".[59] While the Court was not oblivious of the hardship encountered by the people, it declared that "the members of this Court have taken a solemn oath to uphold and defend the Constitution, and it ought not to be construed to meet the changing winds or emergency conditions".[60] Thus, the Court set itself up as the reviewing branch of economic legislation.

After this far-reaching decision in favor of private property, the Court adopted from the United States the doctrine of "liberty of contract" to complete the cult of laissez faire. The constitutional challenge was thrown at the Women and Child Labor Law,[61] which required employers to give maternity leave pay to women employees. An employer who refused to comply with the statute was indicted and, as a defense, he challenged the law as violative of his freedom to contract.[62] In declaring the law unconstitutional, the Court, speaking through Justice E. Finley Johnson, said:

> "The law has deprived every person, firm or corporation owning or managing a factory, shop or place of labor of any description within the Philippine Islands, of his right to enter into contracts of employment upon such terms as he and the employee may agree upon. The law creates a *term* in every such contract, without the consent of the parties. Such persons are, therefore, deprived of their liberty to contract. The Constitution of the Philippine Islands guarantees to every citizen his liberty and one of his liberties is the liberty to contract."[63]

The Court agreed with U.S. Supreme Court Justice Sutherland who penned the *Adkins* case decision[64] that "wages are the heart of a contract" and then stated:

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[58] U.S. v. Ang Tang Ho, 43 Phil. 1, 17 (1932).

[59] *Id.* at 18.

[60] Citing Tyson & Bros. United Ticket Theatre Offices v. Banton, 273 U.S. 418, 47 S. Ct. 426, 71 L. Ed. 718 (1927).

[61] Act No. 3071 (1916).

[62] People v. Pomar, 46 Phil. 440 (1924).

[63] *Id.* at 454.

[64] Adkins v. Children's Hospital of D.C., 261 U.S. 525, 43 S. Ct. 394, 67 L. Ed. 785 (1923).

> In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land, under a constitution which provides that no person shall be deprived of his liberty without due process of law.[65]

The copious citations from American cases point to the helplessness of the Court in the grip of stare decisis. The Court could not go against the current of dominant judicial thought spawned by the free enterprise philosophy. *Adkins, Adair,*[66] and *Coppage*[67] were more than names in the Supreme Court reporter system; they were the guiding doctrines in the heyday of laissez faire.

The influence of Chief Justice William Howard Taft as high priest of the new constitutionalism was not limited to the United States. An opportunity for him to write his notion of what is fair and reasonable into the Philippine Organic Act cropped up with the *Yu Cong Eng* case,[68] which involved the Chinese Bookkeeping Act. Sometime in 1920, the Philippine Legislature, seeking to prevent tax evasion among the Chinese businessmen, passed an act which made it unlawful for any person engaged in commerce, industry or any other activity for the purpose or profit to keep its account books in any language other than English, Spanish, or any local dialect.[69] As expected, the Chinese merchants brought the case to court on the issue of constitutionality. The Supreme Court, attempting to give every intendment possible to the validity of the act, indulged in semantics by defining "account books" to mean only those that are necessary for purposes of taxation. The Court limited the meaning of the phrase by way of compromise between upholding the law and safeguarding the rights of the Chinese merchants.

On appeal to the U.S. Supreme Court, the latter, speaking through Chief Justice Taft, rejected the construction given by the Philippine Court and instead took the view that the law by its plain terms forbade the Chinese from keeping their account books in any language except English, Spanish, or any local dialect; in short, according to the Washington Court, it forbade the Chinese to keep their account books in Chinese.[70] That Court then held that to prohibit Chinese merchants from maintaining a set of books in Chinese would be "oppressive and arbitrary" as it would prevent them from being advised of the status of their business. The Court took note of the fact that majority of the

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[65] *Id.* at 452.
[66] Adair v. U.S., 208 U.S. 161, 28 S. Ct. 277, 52 L. Ed. 436 (1908).
[67] Coppage v. Kansas, 236 U.S. 1, 35 S. Ct. 240, 59 L. Ed. 441 (1915).
[68] Yu Cong Eng v. Trinidad, 271 U.S. 500, 46 S. Ct. 619, 70 L. Ed. 1059 (1926).
[69] Act No. 2972 sec. 2 (1920).
[70] *Id.* at 511.

Chinese merchants in the Philippines did not speak or write English, Spanish or any local dialect. Without their books of account in Chinese, according to the Court, such merchants would be prey to all kinds of fraud. To the Court, this "would greatly and disastrously curtail their liberty of action, and be oppressive and damaging in the preservation of their property".[71] As against Chinese merchants, "the law deprives them of something indispensable to the carrying of their business and is obviously intended chiefly to affect them as distinguished from the rest of the community".[72]

Thus, after many years, the doctrine of *Yick Wo v. Hopkins* had at last reached the Philippines through the efforts of the U.S. Supreme Court. Under another Chinese name, the concept of due process in its substantive aspect had been transplanted in Oriental soil. Other cases which followed were decided on the same principle until, the Filipinos, given an opportunity to draw up their own Constitution, rejected the concept of laissez faire.

VI. *Political action against judicial conservatism*

It was C. Herman Pritchett who, drawing the moral from the Dred Scott decision and its tragic aftermath, observed that when the Supreme Court attempts to thwart the political decisions of a democracy, it will be overridden, sooner or later, peacefully or with violence.[73] In the Philippines, the assault on the judiciary began in 1930 when the Philippine Legislature, in a futile attempt to change the composition of the American-dominated Supreme Court, tried to increase the membership of the Court from 11 to 15, and it nominated four Filipinos immediately to the four new vacancies.[74] However, the U.S. Senate, which retained the power to confirm nominations to the judiciary, aborted the ill-conceived plan by outrightly refusing to confirm the nominees. Undaunted, the legislature passed another "reorganization act"[75] which emasculated the Supreme Court *vis-a-vis* the legislative and executive departments: it provided that, in declaring an act of the legislature invalid, seven out of the eleven justices should concur. This provision was incorporated as Section 10, Article VIII of the Constitution by the framers who wanted to limit judicial power over legislation permanently. They had in mind not only the Philippine experience but also that of the United States where, a few years before the constitutional convention of 1934, the U.S. Supreme Court had ruled as unconstitutional

[71] Id. at 514.
[72] *Ibid.*
[73] PRITCHETT, THE ROOSEVELT COURT 73 (1948)
[74] Hayden, *op. cit.*, 242, fn. 6 (1942).
[75] Act No. 4023 (1932).

11 major New Deal legislation, and by a divided five to four or six to three voting of the justices therein.[76] The convention delegates thus looked at this provision as a "decided advantage" of the Philippine Constitution over that of the American Constitution.[77] The Court that had sown the wind had reaped the whirlwind.

In fact, the framers of the Constitution saw to it that the Supreme Court rulings in *Pomar* and in *Ang Tang Ho* would have no precedent value by inserting provisions in the Constitution calculated to blunt the legal effect of the two cases. Thus, to override the *Pomar* doctrine, the delegates approved a blanket protection for laborers by providing that the state should "afford protection to labor, especially to working women and minors, and shall regulate the relations between landowner and tenant, and between labor and capital in industry and agriculture".[78] To wipe out the effect of the *Ang Tang Ho* decision, the framers took care to provide that "in times of war or other national emergency, the National Assembly may by law authorize the President, for a limited period and subject to such restrictions as it may prescribe, to promulgate rules and regulations to carry out a declared national policy".[79] In fact, the delegates also painted in broad strokes the policy guidelines for the government. They provided that "the promotion of social justice to insure the well-being and economic security of all the people should be the concern of the state".[80] Also, "the State may, in the interest of national welfare and defense, establish and operate industries and means of transportation and communication, and, upon payment of just compensation, transfer to public ownership utilities and other private enterprises to be operated by the government".[81]

The Constitution is, in the view of J. Ralston Hayden, socialistic rather than capitalistic in orientation. Expounding on the philosophical underpinnings of the Constitution, President Manuel Quezon sounded the dirge for laissez faire:

> "Under our constitution it is provided that one of the main duties of the State is to look after the interests of the largest number.... The philosophy of *laissez faire* in our Government is dead. It has been substituted by the philosophy of government intervention whenever the needs of the country require it."[82]

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[76] WOOD, DUE PROCESS OF LAW 68 (1950).

[77] See, e.g. Recto, *The Independence of the Judiciary Under the Constitution*, 4 LAWYERS J. 209 (1936).

[78] Const. art. XIV, sec. 6.

[79] Const. art. VI, sec. 26.

[80] Const. art. II, sec. 5.

[81] Const. art. XIII, sec. 6.

[82] Speech of Pres. Quezon before the Foreign Policy Association, New York, April 3, 1937, printed in MESSAGE OF THE PRESIDENT 67-68, Vol. III, Part I (1937).

Law always lags behind any social or economic development. Being concerned with stability rather than change, conservation rather than progress, the legal system moves with the leaden feet of *stare decisis* behind the times. Sometimes, it needs a sudden jolt or a vigorous push from the restless majority to shove it out of the rut of time-worn doctrines or to free it from the weight of the dead past. In the Philippines, it took some time for the judiciary to realize the full implications of the new provisions of the Constitution of 1935.

The assault on judicial conservatism was precipitated by a Court of Appeals decision denying compensation to a laborer who was drowned after obeying an order from his superior to jump into the flooded Pasig river to salvage a piece of lumber.[83] No other than President Quezon led the attack, who assailed the judges concerned for their "sixteenth century minds" and "for safeguarding the interests of the wealthy". The lawyers also came under fire "for trampling down on individual rights in defending property interests".[84] There was a counterattack both from the bar and the public for the President's meddling in judicial affairs,[85] but from the progressive sector of the legal profession came a call for judicial statesmanship and for a revision of the techniques of legal reasoning. Thus, the President of the Constitutional convention, Senator Claro M. Recto, took pains to point out that under the Constitution, the protection of property rights has been subordinated to human values and national welfare, and this guiding principle should be implemented by the judiciary.[86] U.P. President Jorge Bocobo assailed legalism as "the forbidding bulwark of the dominant caste, whether social or economic," and he called upon the lawyers "boldly to storm this fortress of special privilege".[87] President Bocobo further called for the "socialization of the law":

> "This movement stands for the principle that the whole legal structure — statutory and judge-made — must be reconstructed on the bases of changed and changing social and economic conditions of modern life. The breath of the new life of society must be breathed into the traditional concepts of law."[88]

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[83] The account is found in the Philippines Herald, September 22, 1937, p. 1. The case is Cuevo v. Barredo, G.R. 1278, July 19, 1937, printed in 5 LAWYERS J. 791 (1937). The Supreme Court reversed the Court of Appeals decision.

[84] *Ibid.*

[85] See Philippines Herald editorial, September 23, 1937; Manila Daily Bulletin, September 24, 1937. The statements and resolutions have been compiled in 5 LAWYERS J. 848-852 (1937).

[86] Recto, *The Philippine Constitution,* 6 LAWYERS J. 225 (1938).

[87] Bocobo, *The Cult of Legalism,* 17 PHIL. L. J. 253 (1937); also in 6 LAWYERS J. 3 (1938).

[88] Bocobo, *Unfettering the Judiciary,* 17 PHIL. L. J. 139 (1937); also in 6 LAWYERS J. 97 (1938).

Even under the pressure, the shift in judicial thought in the late 30's was painfully slow and imperceptible. The Supreme Court stuck to its old judicial habits of thought and refused to disengage itself from absolutistic reasoning. Dogmatism was mistaken for independence as stare decisis prevailed over change.

Gradually, the shift in constitutional doctrine began in 1939 with the first *Ang Tibay* case.[89] While the Court upheld the outmoded argument of freedom of contract and twisted the meaning of the social justice clause, the foot in the door was Justice Jose P. Laurel's concurring opinion. In voting for the validity of the law creating the Court of Industrial Relations, Justice Laurel pointed out the doctrinal basis for the law:

> "These provisions in our Constitution all evince and express the need of shifting emphasis to community interest with a view to affirmative enhancement of human values. In conformity with the constitutional objective and cognizant of the historical fact that industrial and agricultural disputes have given rise to disquietude, bloodshed and revolution in our country, the National Assembly enacted Commonwealth Act No. 103."[90]

This relatively mild pronouncement heralded balanced judicial reasoning as against absolutistic reasoning utilized by the majority. Justice Laurel, however, went further. To reject the notion of absolute freedom to contract, he had to diminish the effects of the *Pomar* doctrine. Thus, he stated, after noting that it has been discredited, that "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".[91]

Yet this did not budge the Supreme Court from the grip of absolutism. In another case,[92] the high court expressed indignation over an order of the Court of Industrial Relations directing a bus company to recruit its employees from the ranks of one labor union and that the company may recruit non-members only if the union fails to provide applicants with the needed qualification. Withdrawn from the realities of economic life, the justices must have been shocked at the initial appearance of what is now known as the "hiring hall;" and they declared:

> "The general right to make a contract in relation to one's business is an essential part of the liberty of the citizens protected by the due process clause of the Constitution. The right of a laborer to sell his labor to such person as he may choose is, in its essence, the same as the right of an employer to purchase labor from any person whom it chooses. The employer

[89] Concurring opinion in Ang Tibay v. CIR and National Labor Union, G.R. No. 46496, May 29, 1939, published in 7 LAWYERS J. 487, 494 (1939).

[90] *Ibid.*

[91] *Ibid.*

[92] Pambusco v. Pambusco Employees Union, 68 Phil. 541 (1939).

and the employee have thus an equality of right guaranteed by the Constitution."[93]

In another case, the Court, in refusing to reinstate striking employees, used the same reasoning. It held that the employees' uncompromising attitude precluded reinstatement by the Court of Industrial Relations.[94] Then the Court went on to say that "the Constitution guarantees the free exercise of the right of property, and the freedom to contract is such right, of which the possessor cannot be deprived without due process of law".[95] To compel reinstatement in such case would therefore violate the right to contract, concluded the Court.

These pronouncements by the Court, apparently emphatic and unequivocal, were in reality the dying gasps of laissez faire in the judicial field. While the opinions were unanimous, they were by no means unalterable. Indeed, they were changed the following year, 1940, when the Court began to show an awareness of the economic and social unrest in the country. A large-scale labor strike in the mine fields opened the eyes of the Supreme Court justices to the need for the socialization of the law when the case reached the Court. The company had disputed the constitutionality of the law creating the Court of Industrial Relations which handed down an order adverse to the interests of the company. In upholding the law and the labor court's order, the Court relied on, and quoted verbatim, the pertinent portions of Justice Laurel's concurring opinion in the *Ang Tibay* case.[96] Thus, the Court disengaged itself from absolutistic reasoning and subordinated property interests to human values. In another case, the Court held that an employer's right to freely select and discharge his employees is subject to the regulation by the state basically in the exercise of police power.[97] Freedom of contract had ceased to be sacred and absolute, and equality of employer and employee had been shown to be more apparent than real.

Thus, the area protected by the substantive aspect of due process began to shrink. What had been immutable rights of property became relative concepts, and they were placed on the balance with more important values.

VII. *Conclusion*

Constitutional concepts do not exist in a vacuum. Rather, they are the products of social and economic developments that mold the pat-

[93] *Ibid.*
[94] National Labor Union v. CIR, 68 Phil. 732 (1939).
[95] *Ibid.*
[96] Antamok Goldfields Mining Co. v. CIR and National Labor Union, 70 Phil. 340 (1940).
[97] Manila Electric Co. v. National Labor Union, 70 Phil. 617 (1940).

terns in which such concepts are cast. If law, as Justice Holmes had put it, is the skin of living thought, then the legal concept of substantive due process was the skin of laissez faire, which was the dominant economic and political thought in the 19th century.[98] Laissez faire was already a dying philosophy when it penetrated judicial thinking at the turn of this century. Once it had entered the sphere of judicial thought, however, it began an existence all its own, nurtured by stare decisis and insulated from recent events by judicial absolutism.

The concept of substantive due process did not spring from the genius of the Filipinos. Indeed, it was just part of the intellectual baggage of the free enterprise system which was one of the legacies of the American colonial administrators. Substantive due process was just a backwash of the constitutionalism that emerged in the United States before the turn of the twentieth century. The fact that the concept of due process gripped judicial thought for about two decades in the Philippines is attributable to the favorable ideological atmosphere created by free enterprise and reinforced by the lawyer's fetish for precedent.

In the first decade of American civil rule, the exigencies of asserting American authority over a rebellious people made it necessary for the Supreme Court to subordinate due process to police power. The civil government had to restore disrupted lines of authority, impose its will on an alien people fighting for independence, create, by legislation, a society in the American image, and attend to multifarious administrative chores. Thus, the American-dominated Supreme Court had to uphold the paramountcy of police power, for that was the legal weapon of the colonial ruler.

After the first decade of American rule, however, a number of American business concerns looking for new markets and for raw materials began to follow the flag. In another decade, they became sufficiently established and the need for protecting their property interests arose with the establishment of a Filipino lawmaking body. They looked for protection, therefore, to the American-dominated Supreme Court. Thus, when there was a resurgence of laissez faire philosophy in the United States in the 1920s, followed by the almost indiscriminate application of substantive due process by the U.S. Supreme Court, businessmen in the Philippines merely had to cite American authorities to protect themselves from regulatory legislation and welfare laws which the Philippine Legislature had minded to enact. In constitutional jurisprudence, property rights and the freedom to contract were elevated

[98]Cf. Lava, *The Unwarranted Application of the Due Process Clause*, 18 PHIL. L. J. 114, 177, 249 and 317 (1938).

to a preferred position, and substance was infused into the procedural guarantee of due process.

The conservatism of the Supreme Court created a reaction. The Filipino legislature sought to limit the Court's power to declare laws unconstitutional by a court-packing scheme which antedated the Roosevelt attempt by seven years. When the U.S. Senate aborted this plan, the Philippine Legislature passed a law requiring a two-thirds vote of the Court to declare a law unconstitutional. This law, now incorporated as a constitutional provision, represents a thrust by the populist forces at the last bastion of property rights.

In the late thirties in the Philippines, circumstances conspired to compel a change not only in constitutional thought but also in judicial technique. Labor strikes began to proliferate. The growing agrarian unrest in Central Luzon threatened to erupt into a full-scale revolution. It was at this stage that the Court began to adopt a more liberal and humane outlook in constitutional construction by utilizing the balancing approach to determine whether a law is unconstitutional or not. Justice Laurel's concurring opinion in the first *Ang Tibay* case illustrates how, by proper balance, property rights may be subordinated to human values. Police power, once again, began to prevail over substantive due process. Property rights were dislodged from their premier position in the constitutional scale of values as they were placed on balance against individual dignity and rights. At this juncture, no other than President Quezon eulogized: "The philosophy of laissez faire in our government is dead."

From a higher historical perspective, it can be said that the development of substantive due process in the Philippines followed a route parallel to that of the same concept in the United States. But, like a seedling transplanted in alien soil, substantive due process did not attain its full growth here. The basic differences between the two countries in political traditions, economic development, and cultural heritage account for the stunted growth of the due process clause. But its development followed very closely the growth of our social and economic institutions. Since substantive due process served as the legal mantle of laissez faire philosophy, it was subordinated to police power when the invisible hand of the market became imperceptible in the political arena.

As a phase in the history of the Supreme Court, the brief supremacy of substantive due process can be viewed as the transient triumph of judicial over political power. But lacking a master possessed of the style and clarity of a Holmes or a Brandeis, the Supreme Court failed to articulate the political undertones of the struggle for due process, and they got buried in the mass of legal niceties and judicial homilies.

PRICE v. NEAL AND OUR SUPREME COURT

JOSE C. CAMPOS, JR.*

Much of the business in this country is carried on with the use of negotiable instruments. It is therefore highly desirable that the rules governing the rights of parties involved in these instruments be clear and definite so that the stability of commercial transactions may be maintained and enhanced.

One of the most fertile sources of conflicts of rights of innocent parties to a negotiable instrument is the forged check. When a check is presented for payment to the bank on which it is drawn, the latter would normally pay it provided that two conditions are present: first, that the depositor-drawer's signature is genuine; and second, that the drawer has sufficient funds deposited in the bank to cover the check. Once these conditions are satisfied, the bank will pay the holder of the check and debit the amount thereof against the drawer's account. It is quite possible however that though the bank may in good faith believe the drawer's signature to be genuine, it may in fact be forged. In such a case, the bank would have no right to charge the amount of the check to the account of the drawer.[1] Barring any estoppel on the part of the drawer,[2] the bank would therefore have to restore the amount of the forged check to the drawer's account. Not wishing to bear the loss, the drawee would seek recovery from the person to whom it paid by mistake (hereinafter called the "recipient.") Does the Negotiable Instruments Law allow him to do so? The weight of authority in the United States, from which jurisdiction our own law was copied verbatim,[3] is that it does not.

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[1]Sec. 23 of the Negotiable Instruments Law (NIL) provides: "When a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inorperative, and no right to retain the instrument, or to give discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature unless the party against whom it is sought to enforce such right is precluded form setting up the forgery or want of authority."

Furthermore, section 18 in part provides: "No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise provided."

Since the drawer never signed the forged check, he never gave any order to his bank to pay the holder thereof. The relation existing between the bank and a depositor being that of creditor and debtor, the bank can justify a payment on the depositor's account only upon the actual direction of the depositor. (See Critten v. Chemical National Bank, 171 NY 219; 63 NE 696, 57 LRA529 (1902).

[2]Note that sec. 23 quoted in note 1 under which a forged signature is wholly inoperative, excepts the situation where the party against whom any right on the forged check is "precluded" from setting up forgery. "Precluded" has been held to include estoppel as well as ratification. (see Strader v. Haley, 216 Minn. 315; 12 NW 2d. 608).

[3]Our NIL is copied almost *verbatim* from the Uniform Negotiable Instruments Law of the United States drafted and approved in 1896 by the National Confer-

Section 62 of the NIL provides:

> "Sec. 62. *Liability of Acceptor* — The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits —
>
> (a) The existence of the drawer, *the genuineness of his signature,* and his capacity and authority to draw the instrument; and
>
> (b) The existence of the payee and his then capacity to indorse." (Underscoring ours)

This provision can be traced back to the rule laid down by one of England's greatest jurists, Lord Mansfield,[4] in the famous leading case of *Price v. Neal.*[5] In that case, two bills of exchange were presented to the drawee, Price, by Neal to whom the bills had been indorsed by the original payee. The first bill was paid by Price upon presentment. The second bill was accepted first by Price, returned to Neal and later on paid by Price. The drawer's signature on both bills had been forged and Price sought to recover from Neal what he had paid. In denying recovery, Lord Mansfield held that the drawee who pays or accepts a bill was bound to satisfy himself that the bills were really drawn by the alleged drawer and that *unless* the recipient was himself guilty of *fraud* or *negligence,* the loss should be borne by the drawee-payor. This rule is conceded to be an exception to the rule which permits the recovery of money paid under mistake of fact. It was recognized and accepted as part of the law merchant of England as well as of the United States,[6] with only a few courts disapproving of it.[7] Although most of the courts agreed with the rule, they were far from unanimous in their evaluation of the reason why Lord Mansfield arrived at such a decision. Some were of the opinion that it was based solely on the drawee's negligence;[8] others believed

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ence of Commissioners on Uniform State Laws. This was adopted by all the states although some made modifications therein. Some of these states have now replaced their NIL with the adoption of the Uniform Commercial Code, which contains a chapter on commercial paper.

[4]Lord Mansfield served as Chief Justice of the King's Bench from 1756 to 1788. He made special efforts to familiarize himself with commercial usages, and even had a select group of merchants which advised him on cases involving conflicts between merchants. In this way, he translated custom into judicial precedent. (See FARNSWORTH, NEGOTIABLE INSTRUMENTS., 1959, p. 2-3)

[5]3 Burr. 1354 (1762)

[6]Bank of U.S. v. Bank of Georgia, 10 Wheat. 333, 6 L. Ed. 334 (1825); First National Bank of Quincy v. Ricker, 71 Ill 439, 22 Am. Rep. 104 ,1874); First National Bank of Lavenworth v. Tappan, 6 Kan. 456, 7 Am. Rep. 568 (1870); Howard v. Mississippi Bank, 28 La. Ann. 727, 26 Am. Rep. 105 (1876) National Bank of North America vs. Baugh, 106 Mass. 441, 8 Am. Rep. 347 (1871); Frank vs. Chemical National Bank, 84 NC 209, 83 Am. Rep. 501 (1881); Bank of St. Albans vs. Farmer's 10 Vt. 141, 33 Am. Dec. 188 (1838); Johnston c. Comm. Bk. 27 W.Va. 343, 55 Am. Rep. 315 (1855)

[7]American Express Co. vs. State Nat. Bank, 27 Okl. 824, 123 P. 711 (1911); Union Nat. Bank vs. Farermer's and Mech. National Bank, 271 Pa. 107, 114 A. 506, 16 ALR 1120 (1921).

[8]Bacal vs. National City Bank of N.Y. 262 NY Supp. 839, 146 Misc. 732. The drawer's negligence as the basis for the rule is however belied by Lord Mansfield's

it was grounded on natural justice.[9] But many agreed that it was based on commercial convenience and necessity.[10] There would be much instability in commercial transactions involving bills of exchange if the question of the genuineness of the drawer's signature is not definitely and finally settled by the fact of the drawee's payment. Bona fide recipients of proceeds from forged checks would be holding the same subject to the right of the drawee to disaffirm its act of payment due to the forgery of the drawer's signature. As between two innocent parties, the one who made the loss possible should bear it. Since it is the drawee and not the recipient who can possibly know the drawer's signature, the loss must therefore be borne by him.

When the rules of the law merchant were codified in the Uniform Negotiable Instruments Law in the United States, a conflict of opinion arose as to whether section 62 quoted above was intended to embody the *Price v. Neal* doctrine in its entirety. Some American courts believe that only part of it is embodied in said section. They reason that since the section uses the word "accepting," the rule that the drawee warrants the drawer's signature can apply only to a bill which he has accepted and cannot cover a bill which he pays outright without previous acceptance. The basis for this view is that "payment" is different from "acceptance," since the former discharges the instrument and converts it into a mere voucher, while the latter implies the continued existence and possible negotiation of the bill. Even under this view, however, the *Price v. Neal* rule is still applied to checks paid without previous acceptance, through section 196, which provides that any case not provided by the Negotiable Instruments Law and other legislation, shall be governed by the Law Merchant.[11] A great majority of the American courts however recognize that section 62 is a codification of the entire *Price v. Neal* doctrine[12] — i.e., that a drawee cannot recover what it has paid on a

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statement towards the end of the Price v. Neal decision: "If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man x x x x x."

[9]That as between two persons having legal equities, the legal title should prevail. See Britton, Bills and Notes, 1943, p. 616, who cites also Ames: The Doctrine of Price vs. Neal, 1891, 4 HARV. L. REV. 297.

[10]Dedham National Bank vs. Everett National Bank, 177 Mass. 392, 59 NE 62, 83 Am. St. Rep. 286 (1901); Jones vs. Miner's and Merchants' Bank 144 Mo. App. 428, 128 SW 829 (1910). See also Woodward: The Law of Quasi-Contracts, (1913) Sec. 86.

[11]South Boston Trust Co. vs. Levin, 249 Mass. 245, 143 NE 816 (1924); Bank of Pulaski v. Bloomfield State Bank, 226 NW 119 (1929). Sec. 196 provides: "Cases not provided for in this Act shall be governed by the provisions of existing legislation, or in default thereof, by the rules of the Law Merchant."

[12]U.S. vs. Bank of NY National Banking Association, 219 F, 648 (1914); First National Bank of Portland vs. U.S. Nat. Bank of Portland, 100 Ore. 264, 196 P. 547 (1921); Nat. Bank of Rolla vs. First Nat. Bank of Salem, 141 Mo. App. 719 125 SW 513 (1910); Nat. Bank of Commerce of Lincoln vs. Farmer's and Mer-

bill, whether or not the same had been previously accepted by him. This view furthermore regards that although section 62 provides no exceptions, the exceptions laid down in *Price v. Neal* should also be considered as exceptions to section 62[13] — i.e., that if the recipient of the money from the drawee is guilty of either *fraud* or *negligence*, then such recipient must return the amount received from the drawee. In other words, the drawee's warranty that the drawer's signature is genuine cannot be extended in favor of a negligent or fraudulent recipient. The majority view bases its conclusion on the assumption that it was the intention of the legislators to merely codify and make uniform the existing common law or the law merchant, which at the time was the *Price v. Neal* rule. The minority view that "payment" is different from "acceptance" is refuted by the majority by the argument that payment is more than an acceptance because while the latter is merely an obligation to pay, the former is the discharge of such obligation. And if one binds the drawee, "it is inconceivable why the other would not."[14] Thus, although there *is* concededly a difference between payment and acceptance, for the purpose of section 62, the majority view considers that one who pays necessarily accepts. As to the exceptions of fraud and negligence, although the minority view rejects the theory that section 62 incorporates them, it nevertheless recognizes said exceptions based on the law merchant as expressly authorized by section 196.[15] In the final analysis therefore, both the majority and the minority views uphold the *Price v. Neal* rule and deny the right of a drawee to recover money paid out by it on a forged bill or check, regardless of whether it had been previously accepted or not. They differ only as to the basis of such rule — the majority view bases it on section 62 alone while the minority view bases it on the application of section 62 and the law merchant through section 196.

The question of the applicability of section 62 to forged checks paid by the drawee without previous acceptance or certification[16] came up before our Supreme Court in the case of *Philippine National Bank*

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chant's Bank of Lincoln, 87 Neb. 841, 128 NW 522 (1910); First Nat. Bank of Cottage Grove vs. Bank of Cottage Grove, 59 Ore. 388, 117 P. 293 (1911).

[13]First Nat. Bank of Portland vs. U.S. Nat. Bank of Portland, *supra* note 12; Citizens' Bank of Fayette vs. J. Black and Sons Inc. 228 la. 246, 153 So. 404 [1934); Farmer's Nat. Bank of Augusta vs. Farmer's and Trader's Bank of Mayville, 159 Ky. 141, 166 SW 986 (1914); Williamsburg Trust Co. vs. Tom Suden, 120 App. Div. 518, 105 NYS 335 (1907).

[14]First National Bank vs. Bank of Cottage Grove, 59 Ore. 388, 117 P. 293 (1911)

[15]Bank of Pulaski vs. Bloomfield State Bank, supra. note 11; Louisa Nat. Bank vs. Kentucky Nat. Bank, 239 Ky. 302, 39 SW 2d. 497 (1931)

[16]As to checks, the term used is "certification" rather than "acceptance". Sec. 187 provides: "Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance." However, a certification can have

v. National City Bank of New York.[17] The facts of the case showed that the signatures of the officers of the Pangasinan Transportation Co. had been forged on two checks drawn on the PNB and payable to the International Auto Repair Shop. Although the checks were on their face crossed generally,[18] these were cashed by the Motor Service Co. in favor of persons unknown to them and who purported to be authorized agents of the International Repair Shop. The Motor Service Co. in turn indorsed the checks for deposit with the National City Bank of New York. The checks were cleared and the PNB credited the amount in favor of the National City Bank of New York, which in turn also credited the amount in favor of the Motor Service Co. When the forgery was discovered, the PNB sought to recover the amount of both checks against the collecting bank (National City Bank) or in the alternative, against the Motor Service Co. Upon agreement of the parties, the collecting bank was dropped as a defendant and the case was tried only against the Motor Service Company. The defendant company contended that under section 62 the payment of the checks constituted an "acceptance" thereof and that by paying the checks the PNB had warranted that the signature of the drawer was genuine. The Supreme Court rejected this contention on the ground that "payment" is not the equivalent of "acceptance," and therefore said drawee's warranty could apply only to an accepted or certified check but not one which had not been accepted before being paid. The Court dealt quite lengthily on the distinction between the two terms and could have granted recovery on this ground alone. However, the Court apparently wished to seek stronger reasons in support of its conclusion that the PNB was entitled to recover. It went on to state in no uncertain terms that the rule first announced in *Price v. Neal* that a bank is bound to know the drawer's signature and should not be allowed to recover money paid on a forged bill is "fast fading into the misty past where it belongs." No sooner had it made this statement however, when it said:

> "But now the rule is perfectly well settled that in determining the relative rights of a drawee, who, under a mistake of fact has paid, and a holder who has received such payment, upon a check to which the name of the drawer has been forged, it is only fair to consider the question of diligence or negligence of the parties in respect thereto. (Woods and Malone vs. Colony Bank, 1902, 56 L.R.A. 929,) *The responsibility of the drawee who pays a forged check,*

different effects as an acceptance where a check is certified by the drawee bank at the instance of the holder. In such a case, the certification discharges the drawer and the indorsers of the check. (See. 188) An acceptance of a bill, though procured by the holder (as is usually the case) does not affect the liability of the drawer and indorsers thereof.

[17]63 Phil. 711 (1936)

[18]This is done by writing two diagonal parallel lines on the face of the check, or on a corner thereof. It indicates that the checks can only be collected through a bank.

for the genuineness of the drawer's signature, is absolute only in favor of of one who has not, by his own fault or negligence, contributed to the success of the fraud or to mislead the drawee. (Citation omitted) . . . In other words, to entitle the holder of a forged check to retain the money obtained thereon, he must be able to show that the whole responsibility of determining the validity of the signature was upon the drawee, and that the negligence of such drawee was not lessened by any failure of any precaution which, from his implied assertion in presenting the check as a sufficient voucher, the drawee had the right to believe he had taken. (Citation omitted) . . ." (Italics supplied)

The Court then ruled that the Motor Service Co. was negligent in taking the checks from strangers and in cashing them though they were crossed. The Motor Service Co. was therefore ordered to return to the PNB the amount it received on the forged checks. It was quite clear that the main basis of the Court's decision was the negligence of the recipient. Suppose then, that the Motor Service Co. had not been negligent, would the PNB have recovered from it? Pursuing the line of reasoning of the Court, the only logical conclusion is that recovery would have been denied and the recipient would have been allowed to keep the proceeds of the checks. If so, what then would be the basis for such conclusion? Would it not have to be the doctrine that a drawee who pays a bill drawn on it is bound to know the signature of the drawer, the doctrine, that is, of *Price v. Neal*? The Court, in fact, recognized this duty in the above-quoted statement.

In listing down its conclusions, the Court stated in part:

"In the light of the foregoing discussion, we conclude:

"1. That where a check is accepted or certified by the bank on which it is drawn, the bank is estopped to deny the genuineness of the drawer's signature and his capacity to issue the instrument;

"2. That if a drawee bank pays a forged check which was previously accepted or certified by the said bank it cannot recover from a holder who did not participate in the forgery and did not have actual notice thereof;

"3. That the payment of a check does not include or imply its acceptance in the sense that this word is used in section 62 of the Negotiable Instruments Law;

"4. That in the case of the payment of a forged check, *even without former acceptance*, the drawee can not recover from a holder in due course not chargeable with any act of negligence or disregard of duty; (underscoring ours)

"5. That to entitle the holder of a forged check to retain the money obtained thereon, there must be a showing that the duty to ascertain the genuineness of the signature rested entirely upon the drawee, and that the constructive negligence of such drawee in failing to detect the forgery was not affected by any disregard of duty on the part of the holder, or by failure

> of any precaution which, from his implied assertion in presenting the check as a sufficient voucher, the drawee had the right to believe he had taken;"

The Supreme Court, though expressly avowing its rejection of the rule in *Price v. Neal* clearly, and perhaps unwittingly, incorporated such rule in conclusions number 4 and 5 and in effect *applied* the exception laid down by said case that although the drawee of a bill which has been paid without previous acceptance cannot as a rule recover the money it paid, the recipient who was guilty of fraud or negligence would have to return to the drawee what it had received. It is significant to note that nowhere in its decisions did the Court refer to section 196 or to the law merchant although it quoted freely and abundantly from American cases. Does this mean that since the *Price v. Neal rule*, which the Court had actually adopted, did not come in through section 62? The apparent inconsistencies in its conclusions could easily have been avoided had the Court stopped after distinguishing "payment" from "acceptance" and, on the basis of this distinction, allowed the PNB to recover since it made no warranty of the genuineness of the drawer's signature. But, though it was apparently not aware of the history behind section 62 nor of the inconsistencies of its stand, it must have been convinced of the wisdom of the rule enunciated by Lord Mansfield more than two centuries ago, and followed since by the great majority of the courts in the United States.

Have these inconsistencies been ironed out in the recent case of *Philippine National Bank v. Court of Appeals*?[19] In this case, the signature of the responsible officers of the GSIS were forged on a check drawn on the PNB. The latter cleared the check and credited the amount thereof to the Philippine Commercial and Industrial Bank (PCIB), the collecting bank, despite a previous stop order from the GSIS informing it of the loss of the check. When the forgery was discovered, the GSIS demanded that the amount of the check be credited back to its account. This the PNB did, but then attempted to get back from the PCIB the amount it paid to the latter. The Supreme Court upheld the lower court in denying recovery to the PNB, mainly on the basis of its negligence in clearing the check despite the stop order. On appeal, one of PNB's contentions was that the lower court had erred in not considering that "clearing" is not "acceptance" within the contemplation of the Negotiable Instruments Law, and in not holding that since the PNB had not accepted the check, it is entitled to reimbursement.[20] Answering this contention the court said:

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[19]G.R. No. 26001 promulgated on October 29, 1968.

[20]Apparently, the reference must have been to Section 62 of the Negotiable Instruments Law, although the report of the case does not say so.

> "Referring to the fourth and fifth assignments of error, we must bear in mind that, in general, "acceptance" in the sense in which this term is used in the Negotiable Instruments Law is not required for checks, for the same are payable on demand. Indeed 'acceptance' and 'payment' are, within the purview of said Law, essentially different things, for the former is a "*promise* to perform an act," whereas the latter is the "actual performance" thereof. In the words of the law, 'The acceptance of a bill is the signification by the drawee of his *assent* to the order of the drawer,' which, in the case of checks, is the payment, on demand, of a given sum of money. Upon the other hand, actual payment of the amount of the check implies *not only* an assent to said order of the drawer and a recognition of the drawee's obligation to pay the aforementioned sum, but, also, a *compliance* with said obligation." (footnotes omitted)

It would seem from the foregoing that the Court treated "clearing" as "payment" rather than "acceptance" but, though seeing the difference between the latter two terms, recognized that payment encompassed acceptance. The Court however did not pursue the point nor did it refer to section 62 at this point. It proceeded immediately to discuss the negligence of the PNB. However, in denying the right of the drawee bank to recover, it concluded by quoting section 62 and saying quite tersely:

> "The prevailing view is that the same rule applies in the case of a drawee who pays a bill without having previously accepted it."

The decision ends here without any further explanation of section 62 or of the history thereof. No reference was even made to its former statement regarding "payment" and "acceptance," giving one the impression that the Court did not connect the earlier statement with the later one. If, as implied from the first statement, "payment" *includes* "acceptance," then a drawee who pays without *actually* accepting would also be an accept or and therefore would be deemed to have made the warranties in section 62. Except as a footnote to the distinction between payment and acceptance and as to the effect of PNB's negligence, no reference at all was made to the first PNB case on this matter. In view of the rather lengthy discussion in that case justifying the court's holding that section 62 does not apply to payment, the Supreme Court in the later case should have explained, no matter how briefly, why it did not follow the earlier case. At the very least, it could have stated: "The rule in PNB v. NCBNY, to the extent that it is inconsistent with this case, is hereby overruled." Or — was the Supreme Court in the later case not aware of the effect of its decision on the pronouncement in the earlier case, or did the inconsistencies of that case also confuse the Court?

In view of all the above, can one answer with certainty the query: In this jurisdiction, has the *Price v. Neal* rule "faded into the misty past" or is it very much alive in section 62 of the Negotiable Instruments Law?