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NOTES

MAY CORPORATIONS INVEST THEIR FUNDS IN OTHER CORPORATIONS UNDER THE PHILIPPINE LAW?

A. *What is Meant by this Power.* To invest, means to lay out capital in some permanent form so as to produce an income (Bouvier's Law Dictionary). To invest the funds of a corporation in the capital stock of other associations, means therefore to purchase and own shares of stock in other corporations, i. e., to become a stockholder in other corporations.

B. *Philippine Statutory Law on the Subject.* In examining the sections of our Corporation Law, specially section 13, which is an enumeration of the express powers granted to corporations organized under it, the writer did not come across any express and specific provision which authorizes a corporation organized under it to invest its funds in the capital stock of other associations; and a failure to grant such a power is an implied prohibition to exercise it. But now, can the said power of a corporation to invest its funds in the capital stock of other associations be implied from those powers expressly granted?

The writer is of the opinion that such power cannot be implied from those powers expressly granted; because when a corporation is duly created it can exercise no powers except those conferred by its charter, although in exercising those powers it may adopt any proper and convenient means tending directly to their accomplishment, provided it does not amount to the transaction of a separate unauthorized business. (In re Suttons Hospital, (1612) 10 Coke 23; Moss v. Averell, 10 N. Y. 449; Clark v. Farrington, 11 Wis. 306) And to allow ordinary corporations to

invest their funds in the capital stock of other associations, is tantamount to permiting said corporations to embark on another unauthorized business, which is an ultra vires act. Besides, a corporation, in carrying out the object for which it was created, must confine itself to its proper business, and should not divert its capital or extend its credit to the assistance of the other, even if such would be beneficial to it, unless expressly authorized by law or by its charter. (North Side Ry. Co. et al., v. Worthington et al., 88 Tex. 562, 30 S. W. 1055, Am. St. Rep. 778). Because the prime and governing rule limiting the doctrine of implied powers is that corporations have no implied power to engage in any enterprise other than that named in its charter or articles of incorporation, or to execute contracts, or do other acts not in pursuance of the purposes for which they are created. (Chewacla Lime Works v. Disumkes, 87 Ala. 344, 5 L. R. A., 100 n; Rockhold v. Canton Masonic and Sec., 129 III. 440, 21 N. E. 794, 2 L. R. A., 420, n).

Thus, a banking corporaiton cannot become a subscriber for the stock of railroad corporations, for it is rarely conceivable that a moneyed corporation, having under its charter the right to transact a banking business only, may legally engage, as a corporation, in the construction of railroads, or in furnishing money for such an object in exchange for the stock of a railroad corporation. (Nassau Bank v. Jones et al, 95 N. Y. 115, 47 Am. Rep. 14). Therefore, corporations organized under Act 1459, have, generally speaking, no power to invest their funds in the capital stock of other associations.

This however, is not an absolute rule, because a corporation having money to invest, may invest it in the stock of other corporations as well as in any other funds, provided it be done bona fide, and with no sinister or unlawful purpose; (Booth et al., v. Robinson, 55 Md. 419); but regard must be had to the charter purposes of the corporation so investing. (Robinson v. Holbrook et al., 148 Fed. 107).

This doctrine is applicable to corporations organized under the laws of the Philippine Islands; because subsec. 5, sec. 13, of Act No. 1459, provides:

> "A corporation has the power, to purchase..... and otherwise deal with such real and *personal* property as the purposes for which the corporation was formed may permit, and the transaction of the lawful business of the corporation may reasonably and necessarily require, unless otherwise prescribed in this Act....."

and in the terms "personal property" is included, shares of stock, because sec. 35 of the same law, expressly provides that shares

of stock are personal property. Furthermore, subsec. 9, sec. 13 of Act 1459, provides:

"A corporation has the power, to enter into any obligation or contract essential to the proper administration of its corporate affairs or necessary for the proper transaction of the business or accomplishment of the purpose for which the corporation was organized"

which clearly shows, that a corporation is authorized to enter into any obligation or contract, (such as the investing of its funds in the capital stock of other corporations), provided it is essential to the proper administration of its corporate affairs or to the accomplishment of the purpose for which the corporation was organized.

Mortgage and Savings Bank although authorized by sec. 104, of Act No. 1459, to invest their funds, nevertheless, they can not invest them in the capital stock of other associations, because sections 103 and 105 of the same Act, specify the things which may be given as security to the loan made by the said institutions, and among those specified shares of stock are not mentioned; so an express mention of the things which may be given as security to the loan, is an implied exclusion of all others.

In the case of banking corporations, with the power to loan money on personal security, the United States Supreme Court, held in the case of First National Bank of Charlotte v. Batuonal Exchange Bank of Baltimore, (92 U. S. 122, 23 L. Ed. 679), that, in the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss."

So far, the corporations referred to, are corporations organized under Act 1459; but what about corporations created by special charters, can they invest their funds in the capital stock of other associations? The writer, believes, that if the said corporations are expressly authorized in their charters to invest their funds in the capital stock of other associations, they can do so. The authority however, must be expressly granted, it cannot be implied from mere technicalities. But the authority in itself is not sufficient to validly effect the investment of their funds in the capital stock of other associations, because the approval of the Public Utility Commission must first be obtained, as may be seen from the following provision of law, specially if said corporations are public utility corporations.

Sec. 18, of Act No. 2307, provides:

"No public utility incorporated under the laws of the Philippines, shall..... make or permit to be made upon its books any transfer of any share or shares of its capital stock, to any public utility, unless authorized to do so by the Public Utility Commission. Nor shall any public utility as herein defined incorporated under the laws of the Philippines *sell any share or shares of its capital stock or make or permit any transfer thereof to be made upon its books, to any corporation, domestic or foreign, result of which sale or transfer in itself or* in connection with other previous sales or transfers shall be to vest in such corporation a majority in interest of the outstanding capital stock of such public utility corporation unless authorized to do so by the Public Utility Commission....."

From this, we clearly deduce, that it is the policy of the State not to encourage investing the funds of a corporation in the capital stock of other associations, and if it is allowed at all, it is only when it is not detrimental to the public interest, and not against public policy.

C. *The Power to Invest as Construed and Interpreted by American Decisions.* A corporation has no power to subscribe for or purchase shares of stock in another corporation, unless such power is expressly granted, or unless the nature of the corporation and the circumstances under which the stock is acquired are such as to render the transaction a necessary or reasonable means of carrying out the objects for which it was created, or of accomplishing some purpose which is authorized by its charter. In England it seems to be settled that a corporation, unless expressly prohibited, has the power to purchase and hold shares of stock in other corporations, provided the transaction is not inconsistent with its nature or object, and provided the shares are not acquired for an improper purpose. It has been so held, in the case of ordinary banking and trading companies, and in the case of a corporation organized for the purpose of "undertaking, assisting, and participating in financial, commercial, and industrial operations, and undertakings, both singly and in connection with other persons, firms, companies, and corporations." In the United States, there are some cases to the same effect, but they are opposed to the decided weight of authority both in the federal and state courts. The prevailing doctrine is that a corporation has no power either to subscribe for or purchase shares of stock in another corporation, unless such power is expressly granted upon it, by its charter, or unless the circumstances are such that the transaction is a necessary or a reasonable means of carrying out or accomplishing the objects for which it was created. (First Nat. Bank of Charlotte v. National Exchange Bank of Baltimore, 92 U. S. 122; Franklin

Bank of Cincinnati v. Commercial Bank of Cincinnati, 38 Am. Rep. 594).

Were this not so, one corporation, by buying up the majority of the shares of the stock of another, could take the entire management of its business, however foreign such business might be to that which the corporation so purchasing said shares was created to carry on. A banking corporation could become the operator of a railroad, or carry on the business of manufacturing and any other corporation could engage in banking by obtaining the control of the Bank's stock.

When a corporation has no power to subscribe for or purchase stock in another corporation, it cannot do so indirectly through a trustee or agent. (Nassan Bank v. Jones, 95 N. Y. 115) This rule is not affected by the fact that the corporations are of the same character or have the same object.

This rule is based upon the ground that such a transaction is generally foreign to the objects of its creation, and not upon any notion that the nature of a corporation renders it incapable of taking and holding stock in other corporations. A corporation, therefore, may take and hold stock in another corporation whenever it is expressly authorized to do so. (Market St. Ry. Co. v. Hellman, 109 Cal. 571; Zabriskie v. Cleveland, Clumbus and C. R. Co., 23 How. (U. S.) 381). But, such power should be granted in express words, it cannot be inferred from mere technicalities; thus, a statute providing that "any person" or "any two or more persons" may form a corporation, etc., does not authorize a corporation to become a subscriber for shares in another corporation. The word "person" in such a statute refers to natural persons only, in their individual capacity. (Denny Hotel Co. v. Schram, 36 Am. St. Rep. 130) Such power should be strictly construed; as for example, a grant to an insurance company of the power to invest its money "in real or personal property, stock or choses in action", gives it no authority to invest its capital by subscribing for stock of another corporation (Commercial Fire Ins. Co. v. Board of Revenue of Montgomery County, 99 Ala. 1).

A corporation however, may take stock without express authority, provided there is no express prohibition, whenever the circumstances are such as to render the transaction a necessary or proper means of accomplishing the objects of its creation; thus a manufacturing company may become a member of a mutual insurance company for the purpose of insuring its property. (St. Paul Trust Co., v. Wampch Mfg. Co., 50 Minn. 93).

If the nature and objects of a corporation require it to invest funds, it may invest the same in the stock of other corporations, unless there is some express or implied charter or statutory restriction. This is true, for example, of religious and charitable corporations, of corporations for literary and scientific purposes, of insurance companies, trust companies, and the like.

D. *Transactions which Do not Amount to, Dealing in Stocks of Other Corporations.*

1. *Taking Stock as Collateral.* Whenever a corporation has the power to lend money or enter into any contract, it has the power, unless prohibited by its charter or some other statute to take a pledge of stock in another corporation to secure payment of the loan or performance of the contract. Aand it has been held in the cases of Taylor County Court v. Baltimore and Ohio R. Co., (35 Fad. 161), and California Bank v. Kennedy (167 U. S. 362) that, lending money and taking a pledge of stock of a corporation as collateral are not within a charter or statutory prohibition against subscribing for or purchasing stock except in payment of a bona fide debt.

2. *Taking Stock in Payment of Debts.* There is no good reason why a corporation, when ithas the power to enter into a contract under which another may become indebted to it, may not take stock in another corporation in payment, even when the contract is made with this understanding, provided there is no express prohibition, and provided the purpose is to sell the stock, and not to hold it. (Holmes and Griggs Mfg. Co. v. Holmes and Wessell Metal Co., 127 N. Y. 252). However this may be, a corporation certainly has the power to take stock in another corporation in good faith in payment of a debt previously contracted, in order to collect the debt and prevent a loss. (First Nat. Bank of Charlotte v. National Exchange Bank of Baltimore, 92 U. S. 122).

Such a transaction is very generally expressly excepted from a charter or statutory prohibition against the taking and holding of stock in one corporation by another; and, even when there is no express exception, it is held that a prohibition, express or implied, against purchasing and holding stock or dealing in stock, does not apply to the taking of stock in good faith in payment of a debt. (127 N. Y. 252; 92 U. S. 122).

3. *Taking Stock to Effect a Compromise.* A corporation may also take stock in another corporation in good faith in order

to affect a compromise of a contested claim against it. Thus in the case of Holmes and Griggs Mfg. Co. v. Holmes and Wessell Metal Co., (92 U. S. 122), the Supreme Court of the United States, held, that: A national bank, though it has no power to deal in the stock of other corporations, may, in a fair and bona fide compromise of a contested claim against it growing out of a legitimate banking transaction, pay a larger sum than would have been exacted in satisfaction of the demand, so as to obtain by the arrangement a transfer of certain stocks in raiload and other corporations; it being honestly believed at the time, that, by turning the stocks into money under more favorable circumstances that then existed a loss which would otherwise accrue from the transaction might be averted or diminished. Such a transaction is not within an express prohibition against dealing in stocks.

4. *Taking Stock in Payment, on Sale of Property.* It has been held that a manufacturing corporation, cannot sell goods to a railroad or other corporation, and take payment therefor in stock of the latter (Valley Ry. Co. v. Lake Erie Iron Co., 46 Ohio St. 44); and this proposition is no doubt sound law when the intention is to hold the stock as an investment or for the purpose of controlling the other corporation. There is no reason, however, why a corporation which has the power to dispose of property should not be allowed, in the absence of express prohibition, to sell it for stock in another corporation, provided the transaction is for the bona fide purpose of advantageously disposing of the property, and the stock is taken with a view of selling it and converting it into money. (Howe v. Boston Carpet Co., 16 Gray (Mass) 495).

A manufacturing company, or other purely private corporation which owes no special duty to the public may in the absence of express prohibition, sell all of its property to another corporation, and take stock in the other corporation in payment therefor, provided all the stockholders consent, and provided the transaction is for the bona fide purpose of winding up the corporation and distributing the stock among the stockholders (Holmes and Griggs Mfg. Co. v. Holmes and Wessell Metal Co., 127 N. Y. 252).

Even when all the stockholders consent, however, a corporation has no power, unless it is expressly conferred by the legislature, to sell and transfer all of its property to another corporation for stock in the latter, where the purpose is, not to wind up its business and distribute the stock among its shareholders, but

to continue its existence as a corporation and hold the stock itself, or in other words, where the object is to continue corporate life and activity through the instrumentality of the other corporation.

Since corporations may acquire stock in other corporations for some purposes, it must be presumed that the taking of stock in one corporation by another is ultra vires, unless the contrary appears. (In re Rochester, Hornellsville and Lackawanna R. Co., 110 N. Y. 119; Evans v. Bailey, 66 Cal. 112). A corporation, even though it may have the power to take and hold shares of stock in other corporations as an investment or as collateral security for a loan or other debt, or in payment of a debt, has no power to go upon the stock exchange and buy shares as a speculation.

Where the object in purchasing and holding stock in another corporation is to obtain control of the business of the other corporation and remove competition, then such a purchase and holding of the stock is contrary to public policy and illegal, as well as ultra vires (De la Vergue Refrigerating Machine Co. v. German Savings Inst., 175 U. S. 40).

E. Resumé. The following are the conclusions to be drawn from the foregoing discussion.

1. Corporations organized under Act 1459, have, generally speaking, no power to invest their funds in the capital stock of other associations; but if it is essential and necessary to carry the purpose for which they were created, they may do so, no express authority being necessary.

2. Corporations created by special charters, however, may invest their funds in the capital stock of other associations, provided they are expressly authorized by their charters. And in case of a public utility corporation, before the investment can be validly effected the approval of the Public Utility Commission must first be obtained.

Vicente Ampil.

RECENT DECISIONS OF THE SUPREME COURT REVIEWED

CAPITAL PUNISHMENT—CORROBORATION NECESSARY.—*P. P. I. v. Moro Mandagan et al., G. R. No. 28629, Sept. 12, 1928, Facts:* On July, 1927, at about midnight, Hassim, Sailabi, Jahura, Abisaini, and appellant Mandangan, committed robbery in the house of Moro Maadil, upon which occasion, they appropriated and carried away clothes and jewelry worth ₱1,355.50, and at the same time, Maadil was assaulted and slain. The first three accused pleaded guilty. Abisaini was used as witness for the Government. Mandangan was sentenced to death penalty while the three who pleaded guilty were sentenced to cadena perpetua. Mandangan appealed. *Held*: As this witness (Abisaini) was confessedly one of the principal actors in the outrage, his statements must be received with caution; but his testimony with respect to the participation of the appellant in the offense is corroborated by this irresistible fact that when the search was made in the appellant's house at the time of his arrest, various articles of the stolen property, were carefully secreted in and under said house. The possession of these things by the appellant is inconsistent with his innocence; and the proof abundantly sustains the conclusion of the trial court that the appellant was one of the five who participated in the crime.

"In the estimation of the offense there can be considered against the appellant the aggravating circumstance of nocturnity and the further circumstance that the offense was committed in the dwelling of the injured person. The further circumstance that the offense was committed by a band of more than three armed men is supported only by the testimony of Abisaini, who said that all the five men concerned in the affair were armed. While there is a probability that this statement is true, it is not corroborated by other evidence and should not, we think, be estimated for the purpose of imposing the death penalty, there being no corroboration from other sources thru Abisaini. In fixing the penalty for the appellant in this case the trial court undoubtedly gave much weight to Abisaini, the leader of the gang. But this fact also rests wholly upon the testimony of Abisaini; and it is a notorious fact in human nature that a culprit, confessing a crime, is likely to put the blame on others rather than himself. We are therefore constrained to hold, and more readily because the point is one involving a capital sentence, that the leadership of the band by Mandangan is not sufficiently proved to justify appreciating this fact against the appellant. Judgment modified." (In banc—per Street, concurred by Avanceña, Johnson, Malcolm, Villamor, Ostrand, Romualdez, and Villareal.)

Briefed by D. J. Puyat.

CRIMINAL LAW—MURDER.—*P. P. I. vs. Juan Bangug et al.; R. G. No. 28632—Sept. 17, 1928. Facts*: On December 23, 1916, two hunting parties one from Ilagan, Isabela, and the other from Naguilian, Isabela, were encamped in the region called Gulu or Cama, situated in the subprovince of Bontoc. On the day mentioned, two Constabulary soldiers named

Nabagtec and Sison accompanied by a cargador an Igorot named Tulang arrived near the camps of the hunters. The two soldiers and their cargador were then returning to their station at Natonin, Bontoc from a trip to Sili to escort Lieutenant Gloria of the Constabulary Medical Corps.

Once in the camp of the hunters from Iligan, the Constabulary soldiers examined the licenses of the shotguns and after taking all the amunition, returned the guns to their respective owners, Juan Bangug and Gabriel Bangug. The soldiers then told the hunters that they would be taken to Natonin the next morning to answer for a violation of the hunting law in using artificial lights. Later, about sunset while the two soldiers and the Igorot cargador were cooking their supper, the Ilagan hunters gathered together and agreed to kill the two soldiers and the Igorot. Evidently the soldiers did not notice the secret confab for after eating supper they laid down. The hunters with the Igorot cargador slept inside the shed while the soldier slept outside. Sometime between midnight and three o'clock in the morning while the two soldiers and the Igorot cargador were sleeping soundly, the murder was perpetrated. First, Juan Bangug slipped up quietly and possessed himself of the carbines of the Constabularymen. Then the soldiers and the Igorot were attacked by the members of the Ilagan party, the latter being armed with the guns of the soldiers and with bolos and lances. Altho the soldiers put up the best fight possible against hopeless odds, and altho one of the soldiers succeeded in wounding Francisco Bangug so seriously that sometime later he succumbed to his wounds, with in a short time the soldiers and the Igorot cargador were killed. The horse of the Constabularymen was shot, the carbines were hid in the bushes, and the three corpses were dragged a short distance and left.

Antonio Mandagap of the Naguilian hunting party, who saw most of the tragedy, departed hurriedly on being threatened with death if he should ever disclose the incident to any one. The members of the Ilagan hunting party returned to their homes on December 25 and reported to the authorities the death of Francisco Bangug, stating that he had fallen from his horse and accidentally wounded himself with his lance. So the whereabouts of the missing soldiers and the Igorot cargador remained a mystery until May 1927 when certain rumors were run down and investigated with the result that suspicion pointed to the Ilagan and Naguilian hunters. As a result of the investigation, the members of the Ilagan party were identified and arrested. They were taken to the scene of the crime, and there three human skeletons were found, which were shown to be those of the two soldiers, and the Igorot cargador. *Held*:—1. *Criminal Law; Murder; Qualifying and Aggravating Circumstances*:—Four accused are found guilty of the crimes of triple murder deliberately planned and treacherously committed in an isolated region where discovery was improbable. For the crimes, the two leaders are sentenced to the death penalty and the two other accused as accessories to imprisonment for eight years and one day for each of the three murders.

2. *Id.; Id.; Id.; Treachery*:—Treachery is present where at the time of the sudden and unexpected attack the victims were in sound sleep and practically defenseless.

3. *Id.; Id.; Id.; Evident Premeditation*:—Evident premeditation is present where there was a concerted plan by the guilty parties and there

had elapsed sufficient time between its inception and its fulfillment for them dispasionately to consider and accept the consequences.

4. *Id.; Id.; Id.; Uninhabited Place*:—The aggravating circumstance of uninhabited place is present when the locality where the crimes were perpetrated was isolated and far from human habitation. The fact that occasionally persons passed there and that on the night the murders took place another party was not a great distance away, does not change the characteristics attending this circumstance. It is the nature of the place which is decisive.

5. *Id.; Id.; Id.; Lack of Instruction*:—It is for the trial court rather than the appellate court to determine the proper application of article 11 of the Penal Code relating to the degree of instruction of the offender. Present and concurring Avanceña C. J., Johnson, Street, Malcolm, Villamor, Ostrand, Romualdez and Villa-Real J. J. Mr. Justice Johns was absent on leave when this case was considered, voted and promulgated. *Reported by Pedro Camus.*

CRIMINAL LAW AND PROCEDURE—RENUNCIATION OF RIGHT TO APPEAL AMOUNTS TO PERFORMANCE OF THE SENTENCE.—*Fausta Lamestosa y Bernabe Lames vs. Francisco Santamaria, Juez de Primera Instancia de Iloilo, R. G. 30076, September 13, 1828. Facts:* Nine days after receiving notice of the judgment, the petitioners renounced voluntarily and in writing their right to appeal and asked to be sent to Bilibid Prison at the earliest opportunity. The court before granting the petition, ordered them brought before him and examined them in person. On the next day the petitioners presented a motion for reconsideration alleging that the previous petition had been made when they "were in despair for the lack of interest or for the inability of said Mariano Lames (husband and father respectively of the petitioners) to obtain bail." Fausta Lames also alleged that she had a 10-months old baby who was sick and required her care. The trial court denied this motion. *Held*: "that the renunciation of the right to appeal made by an accused nine days after being notified of the judgment of conviction pronounced against him, accompanied by a voluntary petition that he be sent immediately to Bilibid Prison, amounts to a voluntary performance of the sentence and puts an end to the jurisdiction of the trial judge over the same, and the Court cannot order said judge to revive the right to appeal of the accused." Mandamus denied (*In banc, by Villareal J.*) *Briefed P. M. Syquia.*

CRIMINAL LAW AND PROCEDURE—LIBERTY BONDS IN LIEU OF CASH BAIL—MAY THEY BE APPLIED TO INDEMNITY OF THE OFFENDED PARTY?—*Rosario Esler Vda. de Tad-y vs. Jose B. Ledesma, Provincial Sheriff of Iloilo, Nicolas Valencia, and Mateo Villavert, Clerk of Court of First Instance of Iloilo. R. G. 28638, September 21, 1928. Facts:* Plaintiff's chauffeur was charged with the crime of serious physical injuries. To secure his release, plaintiff deposited two Liberty bonds valued at $1,000 with the clerk of court. The chauffeur was convicted and sentenced to imprisonment and to indemnify the offended party in the sum of ₱2,996.00 with subsidiary imprisonment and costs. On motion, the court ordered that the Liberty bonds be applied to the payment of the indemnity. In spite of plaintiff's opposition, the order was complied with. The present

action is to recover the value of the Liberty bonds. "The precise question determining the appeal can fairly be said to be this: Where Liberty bonds are deposited in lieu of money with the Clerk of Court by a friendly third person to gain the discharge of a defendant, may the Liberty bonds be applied not only to the payment of the fine and costs but to the indemnity? In other words, restricting the field of inquiry even further, within the meaning of section 74 of the Code of Criminal Procedure, may indemnity be considered as coming within the meaning of the word "fine"? *Held:*

1. *Criminal Law and Procedure; Cash Bail; Code of Criminal Procedure, Section 74, Construed*:—Section 74 of the Code of Criminal Procedure reads as follows: "At any time after the amount of bail is fixed by order, the defendant, instead of giving bail, may deposit with the nearest collector of internal revenue the sum mentioned in the order, and, upon delivering to the court a proper certificate of the deposit, must be discharged from custody. Money thus deposited shall be applied to the payment of the fine and costs for which judgment may be given, and the surplus, if any, shall be returned to the defendant." Within the meaning of this section, it is held that where Liberty bonds are deposited in lieu of money with the Clerk of Court by a friendly third person to gain the discharge of a defendant, the Liberty bonds may be applied only to the payment of the fine and costs and not to the indemnity.

2. *Id.; Id.; Id.*:—One who induces a court to take Liberty bonds as bail for one in custody of the law is a party to the wrong and is estopped to deny that the court had jurisdiction so to do.

3. *Id.; Id.; Id.*:—A fine imposed on the accused may be satisfied from the cash deposit, and this is true although the money has been furnished by a third person. But while as between the state and the accused the money deposited by a third person for the release of the accused is regarded as the money of the accused, it is not so regarded for any other purpose. As between the accused, and a third person, the residue of the cash bail is not subject to the claim of a creditor of the accused.

4. *Id.; Id.; Id.*:—Within the meaning of section 74 of the Code of Criminal Procedure, indemnity may not be considered as coming within the meaning of the word "fine." "Fine" is a pecuniary punishment imposed by a lawful tribunal upon a person convicted of a crime or misdemeanor. The term does not embrace pecuniary penalties or forfeitures provided by statute.

5. *Id.; Id.; Id.*:—The civil liability for reparations of damages and for indemnification for the harm done is purely statutory. It is necessary to make particular mention of indemnity in statutes if it be recoverable.

6. *Id.; Id.; Id.; Statutory Construction*:—The Code of Criminal Procedure as a penal statute should be construed strictly. (In banc by Malcolm, J. Johnson, Villamor, Ostrand, JJ, concur. Street, J. concurs in separate opinion. Romualdez J. dissents in a separate opinion. Avanceña J. and Villareal. J. did not take part. Johns J, absent.) *Briefed by P. M. Syquia.*

ELECTION LAW; MANDAMUS LIES TO COMPEL PROVINCIAL BOARD OF CANVASSERS TO CONSIDER PROPERLY AMENDED

RETURNS.—*Tomas Dizon vs. Board of Canvassers of Laguna, R. G. 30243 September 10, 1928. Facts:*—In the race for the office of Provincial Governor of Laguna, in the last general elections, the votes received by the two leading candidates, Eulogio Benitez and Tomas Dizon appear to be so nearly evenly balanced, that in so far as the present controversy is concerned, the outcome hinges upon the results from the first precint of the Municipality of Biñan. In the original official return from this precint Benitez is credited with 148 votes, while in the amended return he is credited with 129 votes, a reduction of 19 votes. The consequence is that, if the original return from this precint be adhered to in the canvass made by the Provincial Board, Benitez wins by nine votes; while ,if the amended returns be accepted, Dizon will win by nine votes. The provincial Board of Canvassers finished the tabulation of the election returns on June 9th, 1928. On June 11, they received the amended return in question. On June 11, they were enjoined by the Supreme Court from proclaiming the result of the elections for provincial governor until the case of Benitez vs. Paredes, R. G. 29865, was decided. The decision was promulgated on August 18, 1928. On August 25, the Board convened and after discussion decided to adopt the original return and proclamation was accordingly made to the effect that Eulogio Benitez had been elected governor of Laguna. The present action in mandamus is to compel the Provincial Board of Canvassers to incorporate in the results of their canvass the figures shown in the amended return from the first precint of Biñan, as regards the votes for the office of Provincial Governor, to eliminate from said canvass the results shown in the original return from the same precint, and to make proclamation of the result of the election for the office of Provincial Governor in conformity with the showing of said amended return. The Supreme Court considered the following questions:

1. Does the tabulations of the returns constitute a complete performance of the duties of Board with respect to the canvass of the returns and the proclamation of the results; whether after the returns have been thus tabulated there still remains to be done other acts necessary to the complete discharge of the Board's duties? *Held:* "These proceedings (at the meeting of August 25) show that the Board recognized the necessity for an official announcement of the result of the election for the office of governor, in addition to the mechanical tabulation of the returns which it had finished on June 9, 1928,—a necessity which was also deducible from the interpretation of the law adopted by this court in Manalo vs. Sevilla, 24 Phil.. 609, where it was held an election for the office of provincial governor cannot be considered complete until proclamation of the result is made by the Provincial Board of Canvassers."

2. Was the provincial Board bound to follow the amended result? *Held:* "One point about which there can be no discussion is that the amended return was in due form and that it was the duty of the provincial Board of Canvassers to take account of it. This point was decided in Benitez vs. Paredes, supra." ...."When Benitez vs. Paredes, supra, was decided, it was of course obvious to us that the Provincal Board of Canvassers of the Province of Laguna, the present respondents, would be presently confronted with the necessity of passing upon the amended return, but inasmuch as these respondents were not then before us, we merely observed, in the opinion in that case that when the amended return should

be presented to the Board, it should be given its proper legal effects. As the present respondents were not parties to that action, it was not then proper for the court to go further and command them to take said return into account."

3. What legal effect should be conceded to it? *Held:* "Upon this point it is obvious enough that, inasmuch as the amended return was proper in form, authentic, and of later date than the original return, it necessarily had the effect of abrogating that return".... "Where power is conceded to an person to modify a legal act, the document expressive of such modification necessarily takes precedence over the thing modified."

4. Did the Provincial Board have any discretion as to which return it would give effect? *Held:*. No.—.... "the provisions of the law seem to be carefully drawn out with a view to the total suppresion of any discretionary or judicial function to be exercised by the Board of Canvassers. Under section 469 of the Election Law the Provincial Board of Canvassers is given authority to procure by messenger or otherwise any missing return. Furthermore, in case material matters or forms are omitted, the Board may require the correction of such matters by the Board of Inspectors. Finally when all returns are before it, the Board is directed to proceed to a canvass of all the votes. All these functions are of a purely ministerial nature; and the canvassing of the returns consists merely of the act of compiling and adding up the results. In no part of the process is any judicial or discretional power exercised." .... "the two returns are not contemporaneous and hence not equally cogent as evidence of the true number of votes cast. The amended return is of later date than the original return, and of a character such as necessarily abrogates the original in so far as the office in question is concerned." .... "there can be no room for choice between a thing that exists and another that has ceased to exist; and even if the Board had any discretion it could not be lawfully exercised for the purpose of setting up what has been abrogated in the place of something that actually exists. (9 R. C. L. p. 1110; 20 C. J. 200-203) (McCrary on Elections 4th Ed., p. 198, Secs. 261, 262.)"

5. Is mandamus the proper remedy? *Held:* The writ of mandamus is an appropriate remedy to compel individual comprising said Board to reconvene and perform the ministerial duty which the law enjoins upon it. Direct authority upon the later point is found in Municipal Council of Las Piñas vs. Judge of Court of First Instance et al 40 Phil., 279."—"But it is said in the memorandum for the respondents that an obstacle to the admission of mandamus as an appropriate remedy in this case is found in the decision of this court in Benitez vs. Paredes, R. G. No. 29865, since among other things, we there held that the writ of mandamus cannot now be used to constrain the election inspectors of a municipality to amend an election reurn against their will. But apart from the particuar provision of law now applicable to that point, it must be remembered that the inspectors of election in a municipality perform many duties decidedly not of a ministerial character. These officers are the judges of the election, and it is incumbent upon them in such capacity to ascertain the true number of votes cast and make returns accordingly. They are therefore more than mere canvassers. The Provincial Board of Canvassers, on the other hand, exercises duties which, aside from determining the regularity and authenticity of the returns, are purely of a ministerial character." Mandamus Granted.

(In banc, by Street, J., Avanceña, C. J. Johnson, Malcolm, Villamor, Ostrand, Romualdez, Villareal, J. J. concurr.) *Briefed by P. M. Syquia.*

NUISANCES—SUMMARY ABATEMENT.—*Tomas Monteverde vs. Sebastian Generoso et al; R. G. No. 28491, Sept. 29, 1928. Facts:* Tomas Monteverde is the owner of a parcel of land situated in the barrio of Santa Ana, obtained in 1921. The parcel of land is bounded on the northwest by the Agdao River. The Tambongon Creek is a branch of the Agdao River and runs through Monteverde's land. For fish-pond purposes, Monteverde constructed two dams across the Agdao River and five dams across the Tambongon Creek. The two dams in the Agdao River were destroed by order of the District Engineer of Davao. The Provincial Governor of Davao also threatened to destroy the other dams in the Tambongon Creek. The motive behind the destruction of the dams in the Agdao River and the proposed destruction of the dams in the Tambongon Creek was to safeguard the public health. To prevent the contemplated action with reference to the Tambongon Creek, Monteverde sought in the Court of First Instance of Davao to obtain an order of injunction in restraint of the Provincial Governor, the District Engineer and the District Health Officer, but in this attempt Monteverde was unsuccessful in the lower court. *Issue:*—Is a Provincial Governor, a District Engineer or a District Health officer authorized to destroy private property consisting of dams and fish-ponds summarily and without any judicial proceedings whatever under the pretense that such private property constitutes a nuisance? Held:—

Nuisances; Classes:—Nuisances are of two classes: Nuisances *per se* and nuisances *per accidens.*

2. *Id.; Id.; Abatement:*—As to nuisances *per se* since they affect the immediate safety of persons and property they may be summarily abated under the undefined law of necessity. As to nuisances *per accidens,* even the municipal authorities, under their power to declare and abate nuisances, would not have the right to compel the abatement of a particular thing or act as a nuisance without reasonable notice to the person alleged to be maintaining or doing the same, of the time and place of hearing before a tribunal authorized to decide whether such a thing or act does in law constitute a nuisance.

3. *Id.; Id.; Id.; Destruction of Dams and Fish-Pond in Navigable Streams as Nuisances:*—A Provincial Governor, a District Engineer, or a District Health officer is not authorized to destroy private property consisting of dams and fish-ponds summarily and without any judicial proceedings whatever under the pretense that such private property constitutes a nuisance.

4. *Id.; Id.; Id.; Id.:*—A dam or a fishery constructed in a navigable stream is not a nuisance *per se.* A dam or a fish-pond may be a nuisance *per accidens* where it endangers or impairs the health or depreciates the property by causing water to become stagnant.

5. *Id.; Id.; Id.; Id.; Due Process of Law:*—The public health may be conserved only in a legal manner. Due process of law must be observed before the citizens' property or personal rights or liberty can be interfered with. Conceding without deciding that article 24 of the Law of Waters is

in force, it can only be made use of by conforming to the provisions of the organic Law.

6. *Id.; Id.; Id.; Id.; Id.; Whether Summary Abatement or Judicial Proceedings Necessary:*—It is not easy to draw the line between cases where the property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. One criterion is the value of the property, whether of great value or trifling value (Lawton vs. Steele (1894) 152 U. S. 122.)

Decision of lower court reversed and injunction prayed for issued prohibiting defendants from destroying the dams and fish-ponds in question. (In banc by Malcolm, J., Johnson, Street, Ostrand, Romualdez, Villa-Real JJ. oncurring:) *Briefed by Pedro Camus.*

LEASE—ASSIGNMENT BY SUBLEASE—LACK OF CONSENT OF LESSOR.—*Santiago Sy Juco and Jose del R. Jeuqueco, plffs.-appts. vs. Donato Montemayor, Clodualdo Vitug, Ambrosia Salao, and Josefa Evangelista, defs.- appts. R. G. No. 28230, Sept. 17, 1928.—Facts:* Action to recover damages and unaccrued rental of fishery. Defendants Montemayor and Vitug executed and delivered a contract of lease of a fishery in favor of defendants Salao and Evangelista. Subsequently, and while said lease was subsisting, defendants Salao and Evangelista executed and delivered to plaintiffs Sy Juco and Jeuqueco a so-called contract of sub-lease by the terms of which "las condiciones establecidas en el contrato de arrendamiento se entenderan transmitidas a los sub-arrendatarios...." Inasmuch as immediate repairs on the fishery were necessary, Sy Juco and Jeuqueco advised Salao and Evangelista about them who in turn told the former to take up the matter with the owners, Montemayor and Vitug. It was agreed that inasmuch as Montemayor did not have money, Sy Juco would advance the expenses and that Montemayor would reimburse him later. In spite of these repairs, the fishery was still in dilapidated condition and as no further repairs of the dikes were made by the defendants in spite of the insistent demands of the plaintiffs, heavy rains and flood destroyed the dikes and the fish escaped out valued at about ₱12,000 and the plaintiffs were obliged to rescind the contract of sub-lease before its expiration. Lower court gave judgment for plaintiffs against all defendants. On appeal by both parties, judgment was modified and rendered in favor of plaintiffs and against defendants Montemayor and Vitug, (the owners), only. Held: By the so-called contract of sub-lease, defendants Salao and Evangelista made an absolute and complete assignment to the plaintiffs of their lease on the fishery, including all of their rights and obligations as such lessor. Said contract of sub-lease shows that its real nature, purpose and effect is to make a complete assignment of the lease held by Salao and Evangelista. Such assignment has the effect of creating the relation of lessees and lessors between the plaintiffs and the owners of the fishery with the same identical rights and obligations specified in the original contract of lease. The fact that the assignment of the lease was made without the consent of the owners does not vitiate the assignment. (In Banc) (Per Johnson, J.) Avanceña, C. J., Malcolm, Villamor, Ostrand, Romualdez, Villareal, J. J. concurr.) *Briefed by D. J. Puyat.*

WATER RIGHTS—EASEMENT.—*Ciriaco Antonio, plff.-appt. vs. Ignacia de Leon, def.-appellee. G. R. No. 29028 (Sept. 24, 1928) Facts:*

Action to recover damages for trespass by defendant in removing obstructions to the flow of water which the plaintiff had placed in an *estero* flowing thru the plaintiff's land. In answer, the defendant put in a cross-complaint, demanding damages because of the expense to which he had been put by the plaintiff in removing obstacles to the flow of water, alleged to have obstructed by plaintiff. This case is really one of water rights. Lower court adjudged for defendant, and on appeal by plaintiff judgment was affirmed. Held: In art. 552 C. C., it is declared that the lower estates must receive the waters which naturally and without the intervention of man descend from higher states, and the owner of the lower estates shall not construct works to impede the enjoyment of this easement. Precisely the same rule is stated in Art. 111 of the Special Law of waters of Aug. 3, 1866. It must be considered, therefore, that the defendant has a right to the use of the estero in question for the purpose of draining surplus water from his fish pond and for the purpose of receiving from the stero the water which has been customarily used in the defendant's fish pond. This is *lega easement*, and such use of the water cannot lawfully be impeded by the palintiff. Nor has the easement thus existing in favor of the plaintiff been destroyed by the registration of the servient estate in the name of the plaintiff without the notation of the existence of such easement in the certificate. In Banzon vs. Banzon XXVI O. G. 2303, it was held that whi'e *voluntary* easements are extinguished by the registration of the easement in the title, *legal* easements are not affected by such registration. The easement before us is not of the latter type since it results from a rule relative to the use of water pertinent of all sorts of real property. (Second division) (Per Street, J.), (Malcolm, Ostrand, Villareal, J. J. concurr.)—

Briefed by D. J. Puyat.

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