session, building of improvements and tender of payment amounts to partial performance. ORTEGA *v.* LEONARDO, G.R. No. L-11311, May 28, 1958.

REMEDIAL LAW — EVIDENCE — IT IS WELL SETTLED IN THIS JURISDICTION THAT THE STATUTE OF FRAUDS IS APPLICABLE ONLY TO EXECUTORY CONTRACTS, THAT ARE TOTALLY OR PARTIALLY PERFORMED. — Plaintiff Rosario Carbonel alleged that she purchased a parcel of land from Jose Poncio, advancing part of the price and the balance to be payable upon the execution of the deed of conveyance. One of the conditions of the sale was that the defendant would continue staying in said land for one year, as evidenced by a document signed by the latter. Poncio refused to execute the deed of sale and conveyed the the parcel of land to the other defendants. During the trial, the plaintiff introduced oral evidence to prove the sale. The defendant moved to dismiss the case upon the ground that the cause of action was unenforceable under the Statute of Frauds. The lower court granted the motion. Hence this appeal. **Held,** it is well settled in this jurisdiction that the Statute of Frauds is applicable only to executory contracts, not to contracts that are totally or partially performed. CARBONNEL *v.* PONCIO, G.R. No. L-11231 May 12, 1958.

REMEDIAL LAW — EVIDENCE — ALIBI IS AT BEST A WEAK DEFENSE AND CANNOT PREVAIL OVER THE TESTIMONY OF TRUTHFUL WITNESSES. — Ruben Rodriguez, Leonardo Alvarez, Ernesto Desiderio and Felipe Tan were charged in the CFI of Manila with the crime of murder. During the trial it was established that Eulogio Tagle was murdered by the accused. Upon Desiderio's surrender to the authorities, he gave an extrajudicial confession which was subsequently reduced to writing. At the trial, Desiderio was utilized as Government witness and his testimony was in substance the same as his extrajudicial confession. His testimony was corroborated. The other accused alleged the defense of alibi. To establish this defense, they presented relatives who testified that they were not at the scene of the crime. The counsel for the defendants submitted a motion for new trial based on newly discovered evidence consisting of an affidavit of Ernesto Desiderio retracting the testimony he had given on the trial. The resolution of the motion was deferred until the consideration of the case on the merits. The defendants appealed. **Held,** alibi is at best a weak defense and cannot prevail over the testimony of truthful witnesses. The motion for new trial is denied. The retraction should not be given any consideration. PEOPLE *v.* RODRIGUEZ, G.R. No. L-11498, May 30, 1958.

REMEDIAL — LAW — SPECIAL PROCEEDINGS — THE PROBATE COURT HAS JURISDICTION TO ORDER THE CONFISCATION AND EXECUTION OF THE BOND OF THE EXECUTOR OR ADMINISTRATOR WITHOUT FIRST DETERMINING THE LIABILTY OF THE EXECUTOR OR ADMINISTRATOR AND THAT OF THE SURETY IN A SEPARATE ACTION. —In a special proceeding pending before the respondent Judge, the petitioner posted an executor's bond in favor of Executor Tagakotta Sotto. On April 1955, Sotto was relieved of his trust for failure to perform his duties as such executor. On August 20, 1955, the court ordered the confiscation of Sotto's bond for failure to render an accounting as ordered by the Court. The court granted an extension within which to render an accounting, but the petitioner failed to cause the submission of the accounting. On October 31, 1955, the court issued a writ of execution of the bond. The petitioner instead of filing a notice of appeal asked for another extension, which was denied. Subsequently, the petitioner moved to annul the order of confiscation and executing on the ground that the court was without jurisdiction to issue such order, for the liability of the executor and that of the surety must first be determined in a separate action. **Held,** the probate court has jurisdiction to order the confiscation and execution of the bond of the executor or administrator without first determining the liability of the executor or administrator and that of the surety in a separate action. PACIFIC UNION INSURANCE CO. *v.* NARVASA, G.R. No. L-10696, May 28, 1958.

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CIVIL LAW — LEASE — UNDER ARTICLE 1687 OF THE CIVIL CODE, AFTER THE EXPIRATION OF THE LEASE, THE COURT IS GRANTED DISCRETION WHETHER TO FIX A LONGER TERM OR NOT. — The plaintiff company was the owner of an old building. By virtue of a verbal contract with the defendants, the latter were permitted in 1947 to occupy it with a monthly rental of ₱300. The rental was subsequently increased, because the defendants occupied additional space. No fixed duration was agreed upon by the parties. In the oral contract, there was a prohibition against the introduction of repairs and improvements on the building and the subleasing of the same without the knowledge and consent of the plaintiff. During the lease, the defendants violated this prohibition. The plaintiff, upon discovery of the acts of the defendants, notified the latter in writing to vacate the premises and declared the lease terminated as of October 31, 1954. The defendants refused to vacate the premises. An action for unlawful detainer was commenced in the Municipal Court. The defendants claimed that the lease was without a definite period and that it was agreed that the building would remain leased for such length of time as the defendants would have need of the property. The Municipal Court rendered judgment for the plaintiff. The defendants appealed to the Court of First Instance, which judgment rendered also for the plaintiff. The defendants appealed, contending among other things, that under Article 1687 of the Civil Code, the court must mix a longer term for the lease after the same has expired. **Held,** under Article 1687 of the Civil Code, after the expiration of the lease, the court is granted discretion whether to fix a longer term or not. In the exercise of this discretion, the court takes into consideration the peculiar circumstances of the case, such as the length of time of occupancy after the demand by the lessor, the availability of housing facilities, the manner the lessee has complied with his obligations, and the like. The defendants openly disregarded the prohibition, and therefore, should not be entitled to the period of grace granted under Article 1687. SUSANA REALTY INC. *v.* DE GUZMAN, (CA) G.R. No. 16738-R, December 11, 1957.

CIVIL LAW — PARTNERSHIP — IN DETERMINING WHETHER OR NOT A PARTICULAR TRANSACTION CONSTITUTES A PARTNERSHIP AS BETWEEN THE PARTIES,

THE INTENTION AS DISCLOSED BY THE ENTIRE TRANSACTION, AND AS GATHERED FROM THE FACTS AND FROM THE LANGUAGE EMPLOYED BY THE PARTIES, AS WELL AS THEIR CONDUCT, SHOULD BE ASCERTAINED. — On September 29, 1950, the plaintiffs filed suit against the defendant in the Court of First Instance of Leyte, for the recovery of possession and management of the Liberty Theater, situated in Carigara, Leyte, and for an accounting of all money and property appertaining thereto. The plaintiffs alleged that the theater was owned and operated by a partnership composed of the plaintiffs and the defendant. The defendant, on the other hand, alleged that he was the sole and exclusive owner of the said theater and that the plaintiffs were merely his creditors. The trial court rendered judgment for the defendant. Hence this appeal. **Held,** in determining whether or not a particular transaction constitutes a partnership as between the parties, the intention as disclosed by the entire transaction, and as gathered from the facts and from the language employed by the parties, as well as their conduct, should be ascertained. Taking these circumstances into consideration, a partnership was created among the plaintiffs and the defendant. NEGADO *v.* MAKABENTA, (CA) G.R. No. 10342-R, February 28, 1958.

CIVIL LAW — PERSONS — FAILURE TO FILE THE COMPLAINT FOR ADULTERY IN DUE TIME DOES NOT IMPLY CONSENT OR ACQUIESCENCE TO THE ILLICIT RELATION IF THERE ARE GOOD REASONS IN SUPPORT OF SUCH FAILURE. — In December, 1937, Juan de la Cruz and Atanacia Bijerano were legally married. Out of the marriage, four children were born to them. On November 16, 1949, when coming home at about 9 o'clock in the evening, Juan heard a shot coming from his house. Shortly afterwards, he saw Leoncio Alejandro, who was only in drawers, jump out of the window carrying a rifle. When he entered the house, he found his wife only in chemise. Due to that incident, Atanacia went away to live in her brother's house, despite Juan's persistent efforts to bring her back for the sake of their children. When Atanacia's brother died, she lived with Leoncio Alejandro. Juan used to see his wife and Leoncio together. He consulted a lawyer who advised him to wait after his wife has given birth before filing the action for adultery. After Atanacia has given birth to two children by Leoncio, the action for adultery was instituted. The lower court convicted the accused of the crime charged. Hence this appeal. **Held,** failure to file the complaint for adultery in due time does not imply consent or acquiescence to the illicit relation if there are good reasons in support of such failure. PEOPLE *v.* ALEJANDRO, (CA) G.R. No. 15434-R, Juanry 31, 1958.

COMMERCIAL LAW — INSURANCE — AN ACTION FOR THE PAYMENT OF AN INSURANCE POLICY FILED AFTER TWELVE MONTHS FROM THE HAPPENING OF THE LOSS OR DAMAGE CONTRARY TO THE STIPULATION IN THE POLICY IS ALREADY BARRED BY PRESCRIPTION. — On April 2, 1948, Tan Kian insured with the defendant company the contents of his warehouse for the sum of ₱5,000 against loss or damage by fire and lightning for a period of one year commencing on April 2, 1948. These goods were also covered by similar insurance obtained from the New Zealand Insurance Co. and this fact was disclosed in a rider in the insurance policy. With the consent of the defendant company, the proceeds of said insurance policy was assigned to the plaintiff

Lavadia. On May 19, 1948, while the said policy was in force, the warehouse and the stock in trade then on hand were burned. Notice of loss was duly communicated to the defendant company. On May 25, 1948, the defendant company instituted a criminal action for arson against Tan Kian. In August, 1948, during the pendency of the criminal action, the plaintiff demanded full payment of the policy, without any result. In February, 1949, after the criminal action for arson was dismissed, demand for payment was again made, but the plaintiff was told to await the result of the suit brought by the defendant company against the New Zealand Insurance Co. Instead of waiting for the result of the latter case, the plaintiff, on July 8, 1950, filed an action against the defendant company. Judgment was rendered for the defendant company. Hence this appeal. **Held,** an action for the payment of an insurance policy filed after twelve months from the happening of the loss or damage contrary to the stipulation in the policy is already barred by prescription. LAVADIA *v.* SAINT PAUL FIRE AND MARINE INSURANCE CO., (CA) G.R. No. 8449-R, January 30, 1958.

CRIMINAL LAW — ATTEMPTED ARSON — IT IS NOT NECCESSARY THAT THERE SHOULD BE A BLAZE BEFORE THE CRIME OF ATTEMPTED ARSON CAN BE COMMITTED. — The accused Go Kay was the owner of a store which had been insured for ₱30,000. The store was suffering heavy losses. On April 18, 1954, the accused soaked rags, blankets and rolls of toilet paper in gasoline, put them in a box and placed the box in the ceiling of the store. However, somebody discovered that gasoline was dripping from the ceiling and reported the matter to the police. The police found the gasoline-soaked rags and blankets in the ceiling. They investigated Go Kay, who admitted his intention to set fire to the store later in the evening. The accused was charged with the crime of attempted arson in the Court of First Instance. The accused moved to quash the information on the ground that under the facts alleged therein no crime of attempted arson was committed. The lower court denied the motion and later convicted the accused of the crime of attempted arson. The accused appealed, contending that the overt acts established during the trial were not sufficient to constitute the crime of attempted arson, because there must be a blaze. **Held,** it is not necessary that there should be a blaze before the crime of attempted arson can be committed. PEOPLE *v.* GO KAY, (CA) G.R. No. 17474-R, December 19, 1957.

CRIMINAL LAW — ESTAFA — THE DISTINGUISHING FEATURE BETWEEN SWINDLING AND THEFT IS THAT A SWINDLER ORDINARILY RECEIVES THE THING FROM THE OFFENDED PARTY, WHILE A THIEF USUALLY TAKES THE THING FROM ITS OWNER. — The Luzon Brokerage Company received a consignment of goods for delivery to the Philippine Handicraft, Inc. at 2801 Herran St., Manila. This address was crossed out and instead, 21A Quesada, Tondo, Reyes Textiles Co. was written. The driver of the company delivered the goods to the latter address and the accused Ko Lai Tang received the goods and signed the delivery papers. Subsequently, it was discovered and the accused was charged with the crime of theft. The lower court convicted the accused of the crime charged. The accused appealed contending that the facts established during the trial constituted estafa and not theft. **Held,** the distinguishing feature between swindling and theft is that a swindler ordinarily reecives the thing from the offended party, while a thief usually

takes the thing from its owner. PEOPLE *v.* KO LAI TANG, (CA) G.R. No. 17931-R, January 31, 1958.

CRIMINAL LAW — HOMICIDE THRU RECKLESS IMPRUDENCE — THE ACT OF A PERSON IN AN EMERGENCY, ALTHOUGH A MISTAKE OF JUDGMENT, CANNOT BE CHARGED AGAINST HIM AS NEGLIGENCE. — Pedro Co was the owner of a 6 x 6 truck. On April 1, 1954, the regular driver was not available. Pelagio Bustillos, the truck helper, who did not have a driver's license, took out the truck to load stones. Besides Bustillos on the front seat was the truck owner, Pedro Co. During the trip, Bustillos made a left turn causing the truck to veer toward the soft shoulder of the road where some people were walking. As the truck continued toward the soft shoulder, Co grabbed the steering wheel and struggled with Bustillos to get control of the same. At this instant Felisa Macaraeg was struck by the vehicle causing her death. Shortly after the accident, Co presented himself to the police and surrendered his driver's license. Pedro Co and Pelagio Bustillos were charged with the crime of homicide thru reckless imprudence. Bustillos pleaded guilty, while Co pleaded not guilty. After the trial, Co was convicted and sentenced by the lower court. Hence this appeal. **Held,** the act of a person in an emergency, although a mistake of judgment, cannot be charged against him as negligence. The appellant, however, is guilty of a violation of Section 28 of the Motor Vehicles Law, for having employed an unlicensed driver. PEOPLE *v.* Co, (CA) G.R. No. 17283-R, December 27, 1957.

LABOR LAW — OVERTIME PAY — THE FAILURE OF AN EMPLOYEE TO DEMAND OVERTIME AND EXTRA COMPENSATION EVERYTIME HE SIGNS THE PAYROLL TO RECEIVE HIS PAY DOES NOT MILITATE AGAINST HIS CLAIM. — The plaintiffs were employees of CEPOC, a government-owned corporation. They alleged that while in the employ of the defendant they rendered services in excess of eight hours and during Sundays and holidays, but were not paid the overtime and extra compensation prescribed by law. They also alleged that the daily wage given them by their employer was below the minimum wage provided for by law, and therefore, pursuant to the Minimum Wage Law, they should be entitled to the corresponding differential pay. The defendant argued that the Eight-Hour Labor Law was not applicable to government corporations and that the differential pay claimed by the plaintiffs corresponded to services rendered before the date of applicability of the Minimum Wage Law to government employees. The lower court dismissed the complaint. Hence this appeal. **Held,** the failure of an employee to demand overtime and extra compensation everytime he signs the payroll to receive his pay does not militate against his claim. The Eight-Hour Labor Law is applicable to it, because CEPOC is not a corporation invested with sovereign powers of the Government, but in the eyes of the law, nothing more than an ordinary private corporation. MONTEADORA *v.* CEBU PORTLAND CEMENT CO., (CA) G.R. No. 18131-R, February 17, 1958.

REMEDIAL LAW — CRIMINAL PROCEDURE — JUSTICE OF THE PEACE COURTS ARE WITHOUT JURISDICTION TO DECIDE CASES INVOLVING THEFT OF LARGE CATTLE, BECAUSE THE PENALTY FOR THE OFFENSE IS BEYOND THEIR JURISDICTION. IN THIS CASE, THE AMOUNT OF THE LARGE CATTLE IS IMMATERIAL. — Lucio Tegio brought an action for qualified theft against Icasiano Bacolongan in the Justice of the Peace Court of Dolores, Samar, alleging that the accused took and carried away without his knowledge and consent the carabao of the former with a reasonable value of ₱80.00. As he pleaded not guilty to the charge, the accused underwent trial, after which he was found guilty and sentenced accordingly. The accused appealed to the Court of First Instance where he was also declared guilty of the same offense and sentenced accordingly. Hence this appeal. **Held,** Justice of the Peace Courts are without jurisdiction to decide cases involving theft of large cattle, because the penalty for the offense is beyond their jurisdiction. In this case, the amount of the large cattle is immaterial. PEOPLE *v.* BACOLONGAN, (CA) G.R. No. 20340-R, January 27, 1958.

REMEDIAL LAW — SPECIAL PROCEEDINGS — THE FAILURE OF THE PUBLICATION NOTICE TO CONTAIN THE NAME OF THE PARTY AS GIVEN IN THE CIVIL REGISTER PREVENTS THE COURT FROM OBTAINING JURISDICTION. — On October 28, 1954, the petitioner Alfreda Jacobo filed a petition for the change of name. She alleged that she owned several parcels of land, some of which were in the name of Alfreda, some in the name of Aida, and if all her properties were placed in the name of Aida, uniformity would be obtained and confusion avoided. The publication of the order of hearing was in the name of Aida Jacobo. During the trial, it was established through direct and cross-examination that Alfreda was her name not only in her baptismal certificate but also in her certificate of birth and that she had been enrolled in school from the primary grades to college in the name of Alfreda. The lower court denied the petition for lack of merit. Hence this appeal. **Held,** the failure of the publication to contain the name of the party as given in the civil register prevents the court from obtaining jurisdiction. The order of the lower court is null and void for lack of jurisdiction. The petition is lacking in merit. JACOBO *v.* REPUBLIC, (CA) G.R. No. 15676-R, December 24, 1957.