afforded satisfaction through criminal processes. Should we allow our criminal courts and the prosecuting offices of the justice department to be conveniently utilized as mere collection agencies at the cost of public funds? Those who favored Act 3313 as well as those who supported the objectives of the Ilarde Proposal and the Padilla Amendment answer the question in the affirmative and in effect espouse the view that criminal processes should be open as alternative remedy to satisfy purely civil obligations such as pre-existing debts. To this group belong former Justice Alvendia[38] and Justice Pacifico de Castro.[39] Another school of thought advocates a total shut-off of criminal processes upon the theory that there are various remedies available, both judicial and extra-judicial, adding that the criminal courts and the government prosecuting offices should not be permitted to degenerate into collection agencies. The Diaz Committee which drafted the Revised Penal Code, the legislators who approved it, and those who voted affirmatively for the enactment of the supposed amendatory R. A. No. 4885 knowing well the implications of its defect in draftsmanship represent a middle ground, a compromise view which allows in a limited way the utilization of the criminal process for check issuances prior to or simutaneously with the commission of fraud. P. D. 818 suggests to us that the present dispensation too must be counted among those who favor the middle ground.

In a very real sense, therefore, our present law on bouncing checks is, in so far as it denies aid in the satisfaction of pre-existing debts and obligations, a return to 18th-century thinking. It has been said, however, that a good idea is a good idea, no matter of what vintage. This could have been in the mind of the Diaz Committee when it struck the midway by not totally adopting Act 3313. The legislators might have thought of this too, when they approved S. B. No. 413 instead of H. B. No. 751. Finally, the drafters of P. D. No. 818 could have taken this into consideration, when they did not correct the familiar defect of R. A. No. 4885, but retained the same middle ground. Indeed shall we say: "In medio virtus"?

[38] See Note 13, supra.

[39] Court of Appeals Justice Pacifico de Castro advanced the opinion that the issuance of a bouncing check is prima facie an act of estafa. See BULLETIN TODAY, Sept. 23, 1977, p. 40

TRIAL IN ABSENTIA SANS ARRAIGNMENT UNCONSTITUTIONAL

VICENTE DE PAUL VERDADERO*

I. ARRAIGNMENT

A. Definition and Purpose

Bishop defines arraignment as consisting of reading the indictment to the accused and asking him in open court whether or not he is guilty of what it alleges against him.[1] Its purpose is to obtain from the defendant his answer, in other words, his plea to the indictment.[2]

B. Constitutional and Statutory Provisions

Provisions regarding arraignment can be found in our Rules of Court and the 1973 Constitution. Section 1 of Rule 116 provides for arraignment and the manner thereof. The pertinent provision is quoted hereunder:

> Section 1. Arraignment — How made. — The defendant must be arraigned before the court in which the complaint or information has been filed. x x x The arraignment must be made by the judge or clerk, and shall consist in reading the complaint or information to the defendant and delivering to him a copy thereof, including a list of witnesses, and asking him whether he pleads guilty or not guilty as charged . . .[3]

With the new provision on trial on absentia in the 1973 Constitution, arraignment became a mandatory Constitutional provision when it provides:

> Sec. 19. . . . However, after arraignment, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustified.[4]

From the aforecited provision, trial in absentia can only be had if three conditions concur: (1) accused has been arraigned, (2) notice of trial was served to him and properly reutrned, and (3) his failure to appear in court has no justifiable reasons.

* Ll.B. '78.

[1] Bishop, New Criminal Procedure, T.H. Floyd & Co., Chicago, 1895.

[2] Ibid., citing Whitehead vs. Curry, 19 Grat. 646.

[3] Moran, II Rules of Court, 1969 ed.

[4] Art. IV, The New Constitution.

1. Importance of Arraignment

In Philippine jurisprudence, occasions were had in the past wherein the Supreme Court upheld the importance and indispensability of arrraign ment in a public trial, absence of which was considered fatal in a case decided during the pre-Commonwealth era. In U.S. vs. Palisoc,[5] the defendants were charged with robbery and all the accused were accordingly convicted. From the judgment of conviction, one of the accused appealed to the Court and sought the reversal of the lower court's decision on the ground that he was not arraigned. The record showed that at the beginning of the trial, the appellant was not present and did not appear in court until after the fiscal had presented all the witnesses for the prosecution. The rest of the accused were properly arraigned, pleaded not guilty and were represented by a lawyer. It was only after the prosecution has rested its case against all the accused, except the appellant, when the court discovered that the appellant was outside the courtroom. Upon discovering this fact, the court called the appellant to appear inside the courtroom and then and there called one of the witnesses for the prosecution and proceeded to examine the latter with reference to the part the appellant took in the robbery charged. This was done without arraigning the appellant and informing him of his right to be represented by a counsel. The Court reversed the lower court's decision in so far as the appellant's case is concerned because Sec. 16, 17 and 18 of General Order No. 58 (which provided for the criminal procedure during that time) were not strictly observed by the trial court.[6]

C. Presidential Decree No. 39

On November 7, 1972, Presidential Decree No. 39[7] was promulgated pursuant to General Order No. 8,[8] dated September 27, 1972, General Order No. 12, dated September 30, 1972,[9] and General Order No. 12-A, dated October 2, 1972.[10] The decree embodies the rules governing the creation, jurisdiction, and other matters relevant to the Military Tribunals. A provision in said decree is pertinent to the present discussion and states:

> (5) *Rights of the Accused* — the accused shall be entitled:
> x x x x x x x x x
> c. To be present at the arraignment, when he enters a plea of guilty and at the pronouncement of judgment or conviction. Where the accused is in custody or charged with a capital offense, he shall be entitled to be present at all stages of the trial. *In cases where there is allegation of conspiracy and one or more of the accused are available for trial and others are not, trial may proceed against all, provided that the indictment shall be published at least once a week for two consecutive weeks in any newspaper of general circulation and a copy of a notice of trial shall have been served on the accused or on his next of kin or at his last known residence or business address with a person of sufficient discretion to receive the same.*[11]

A perusal of this provision in relation to the entire body of the decree shows that the decree provides for trial in absentia even without arraignment in cases where "there is allegation of conspiracy" because trial may proceed against "all" even if "one or more accused are available for trial and others are not." What, therefore, substituted for arraignment of the absentee-accused is the publication of the indictment at least once a week for two consecutive weeks in any newspaper of general circulation and a copy of the notice of trial being served on the accused or on his relative or on a person with sufficient discretion to receive the notice, if the notice is served at his last known residence or business address.

Relative to this provision, three questions are raised:

1. Does the word "trial" as provided in the decree, or any kind of trial before judicial tribunals, include arraignment?

2. In a case of conspiracy, does the determination of the guilt of the conspirators present during the trial conclusive upon and operate as a determination of the guilt of the other conspirator(s) who are absent during the trial?

3. How is jurisdiction acquired over the person of the accused?

Whether arrangement is part of trial or not, has been settled by U..S. vs Beecham[12] when it expounded on the doctrine of an earlier case[13] regarding the right of the accused to be present at the trial. Said *Beecham*:

> . . . "the phrase 'at the trial' is to be taken to include everything that is done in the course of the trial, from the arraignment until the sentence is announced . . . ."

It is clear, therefore, that arraignment is part and parcel of trial and, in fact, the first stage of trial. Prescinding from the Beecham's doctrine, when the decree speaks of trial proceeding against all, it does say that those who are not present at the trial may be tried and convicted without the benefit of arraignment, a substantial prerequisite before trial in absentia can be held.[14]

The second question arises because the decree categorically states that in cases of allegations of conspiracy, the "against all" doctrine will

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[5] 4 Phil 207.
[6] id., p. 208.
[7] unpublished, c/o JAGO, AFP.
[8] as cited in P.D. 39.
[9] id.
[10] id.

[11] #4 (b) (5) (c), Rules governing Military Tribunals, P.D. 39, underscoring supplied.
[12] 23 Phil. 259, 265.
[13] U.S. vs. Karelsen 3 Phil 223
[14] supra, note #4.

apply. It can be perused from the provision that the guilt of the absentee-conspirator can be determined, as long as there are other conspirators at the trial. Conspiracy, it is true, is a "one for all, all for one" crime committed by two or more persons "who come to an agreement concerning the commission of a felony and decide to commit it".[15] But it is equally true also that the guilt of an alleged conspirator in an alleged conspiracy is not determined by the testimonies of the conspirators present (i.e., conspirators apprehended) *at the trial*, since to hold otherwise, would run counter to the rule of *res inter alios acta.*[16] On the other hand it cannot be disputed that under the rules of evidence respecting admissions and confessions of an accused, conspiracy may be proved by circumstantial evidence.[17] But the circumstantial evidence which must prove conspiracy independently of other evidence as required by the *res inter alios acta* rule may be established by other acts and declarations of the conspirators present and by the offended party himself, directly or indirectly imputing to the absentee-conspirator his participation in the commission of the crime. By way of illustration, a hypothetical case is enlightening:

> X, Y and Z conspire to rape W. On the way to the house of W, Z changes heart and will not go on with the rape, tries to convince X and Y to call off the plan and even goes with X and Y to the house of W while dissuading the two. A neighbor of W sees and observes the three at a distance on the way to the house of W. While X is raping W, policemen arrive. X, Y and Z run but X and Y are apprehended and make extrajudicial confessions incriminating Z. During the trial, W, who knows and hates Z since Adam, pointed to Z as the one who held her legs apart while X and Y ravished her. The three were convicted despite Z's absence from the entire duration of the trial in accordance with P.D. 39.

The conviction of Z is no doubt wanting of due process, for he was tried in absentia without arraignment and the right to confront the witnesses against him is denied. The Supreme Court, in a decision rendered long after the promulgation of the aforecited decree, has this to say:

> The right of a party to confront and cross-examine opposing witnesses in a judicial litigation, be it criminal or civil in nature, or in proceedings before administrative tribunals with quasi-judicial powers, is a *fundamental right which is part of due process.*[18] (underscoring supplied)

Be it a case, therefore, of conspiracy or not, the accused must be afforded the chance to be heard by himself and counsel and the other

[15] Art. 8, Revised Penal Code.

[16] re: admission of a conspirator is receivable in evidence against his co-conspirator. Requisites: 1. conspiracy must be established by independent evidence; 2. statement refers to the object or purpose of conspiracy: 3. statement made during the conspiracy's existence *but* vicarious statement of a co-conspirators after conspiracy is admissible against all (See Rule 130, Sec. 27; People vs. Dacanay, 92 Phil. 873; People vs. Atencio, L-22518, Jan. 17, 1968 and People vs. Ryon, 363 N.Y. 198).

[17] People vs. Cadag, L-13830, March 30, 1961 2 SCRA 388; People vs. Vicente, L-26241, May 21, 1969 28 SCRA 72.

[18] Savory Luncheonette vs. Lakas ng Manggagawang Pilipino, 62 SCRA 258.

Constitutional right given him in cases of criminal prosecutions. Otherwise, the proceedings therein are a nullity, for they fall short of the constitutional reguirements of due process. Parenthetically;

> ". . . in the application of the principle of due process, what is sought to be safeguarded is not lack of previous notice but the denial of the opportunity to be heard."[19]

The last question is the matter of jurisdiction. The famous Jabidah Massacre in Corregidor brought life to the case of Arula vs. Espino.[20] In this case, Arula questioned the jurisdiction of the general court-martial created to try the accused involved in the massacre. The matter of jurisdiction was brought up on the ground that charges had already been filed with the fiscal's office before the court-martial was created and took cognizance of the case, although, admittedly, the latter exercises concurrent jurisdiction with the civil courts. The Supreme Court ruled, thus:

> "To paraphrase: beyond the pale of disagreement is the legal tenet that a court acquires jurisdiction to try criminal cases only when the following requisites concur: (1) the offense is one which the court is by law authorized to take cognizance of; (2) the offense must have been committed within its territorial jurisdiction, and (3) *the person charged with the offense must have been brought into its forum forcibly by warrant of arrest or upon his voluntary submission to the court*". (underscoring supplied)

And because the general court-martial was able to prove that it satisfied the three requisites, particularly the third, by putting under technical arrest the accused before the filing of the charges with the fiscal's office. Arula's petition was dismissed.

All other requisites being present, the court only acquires jurisdiction to try the case when it has jurisdiction over the person of the accused, when the latter is brought into its forum by voluntary or forced submission thereto. Prescinding, therefore, from this jurisprudential doctrine, trial will not prosper as long as jurisdiction over the person of the accused is not acquired despite the presence of the other two requisites.

It is submitted, however, that with the constitutional provision on trial in absentia, the third requisite is deemed satisfied as long as the accused is present at the arraignment. The accused may escape in the course of the trial but the trial may validly go on inasmuch as jurisdiction over the person has already been acquired at arraignment.

Do military tribunals then acquire jurisdiction over the person of the accused, when the latter is absent and not arraigned accordingly? The answer is obviously in the negative by virtue of the aforecited case.[21]

[19] Cornejo case, L-32818, June 28, 1974.

[20] L-28949, June 23, 1969.

[21] Arula case, see note #20, supra.

Inferentially, however, absence of arraignment notwithstanding, the decree says that the publication of the charge and the service of notice of trial on the accused or on his next of kin, gives the court jurisdiction over the person of the accused and consequently over the case. Such provision is not only negated by the Arula case but its constitutional impropriety can be inferred from the case of Pantaleon vs Asuncion wherein the Court said:

> ". . . it is a well settled principle of Constitutional Law that in action strictly in personam, like the one at bar, personal service of summons within the forum is essential to the acquisition of jurisdiction over the person of the defendant, who does not voluntarily submit himself to the authority of the court. *In other words, summons by publication can not — consistently with the due process clause in the Bill of Rights — confer upon the court jurisdiction upon said defendant.*"[22]

And the same doctrine was emphatically reiterated by the Court in Citizen's Surety and Insurance Co. vs. Melencio-Herrera.[23]

But the aforementioned cases are civil cases and protagonists may say that the doctrine laid down therein will not apply in a criminal case. Yet, the cardinal point is this: If in a civil case, where no life is endangered, the due process clause with regard to jurisdiction is jealousy invoked so as to nuliify summons by publication, how much more in a criminal case when the very life and liberty of an accused are at stake? Elementary reason dictates that Constitutional safeguards should be equally, if not more strictly observed in a criminal case.

And speaking again of due process, the Court laid down the requirements in Banco Español Filipino vs. Palanca, to wit:[24]

> "As applied to judicial proceedings . . . it may be laid down with certainty that the requirement of due process is satisfied if the following conditions concur, namely: (1) there must be a court or tribunal clothed with judicial power to hear and determine the matter before it; (2) jurisdiction must be lawfully acquired over the person of the defendant or over the property which is the subject of the proceedings; (3) the defendant must be given an opportunity to be heard; and (4) judgment must be given upon lawful hearing."

II. OTHER FEATURES OF THE DECREE

Other provisions of the decree are good subjects for dissertation. But for purposes of this article and to the extent relevant to the present discussion, a cursory examination of the same is sufficient.

The decree also provides that among the five members of each military tribunal only one is a lawyer.[25] It does not require that the law member must have held a position in the bench and thus nurtured

[22] L-13141, May 22, 1959, emphasis supplied.
[23] L-32170, March 31, 1971.
[24] 37 Phil 921, 934.
[25] #2(b) (1), Rules Governing Military Tribunals, PD 39.

by the judicial tradition like a judge in the ordinary courts. And while the Judiciary Act of 1948[26] provides that death sentence is subject to an automatic review by the Supreme Court and its affirmation needs the concurence of at least eight justices of the Court (now ten), Presidential Decree No. 39 empowers solely the President to have the final and exclusive review of the death sentence imposed by the military tribunals.[27] Without reflecting on the wisdom and competence of the President, it is submitted that it is appropriate that the delicate task, such as reviewing the death sentence, be entrusted to the Supreme Court which is created, inter alia, for the very purpose, and not to a single individual as the President of the Republic whose office and executive responsibilities demand his full attention and time throughout the day. The contention gains more weight, if the condemned person has lost the graces and favors of the President, the latter's martial law powers being the source of the life of the military tribunals and the tenure of the members thereof. This is the cry of former Senator Aquino right now. He believes that as the creator of the tribunal which is trying him and the ultimate judge of the decisions of said tribunal, the President can never be fair, he cannot expect fair trial. Thus, he believes he is doomed. But even without subscribing to what Mr. Aquino believes and without reflecting on the justice and fairness of the President, it is not an exercise in futility if we seek guidance and authority in the past such as in the case of Geotina vs. Gonzales:

> ". . . elementary due process requires a hearing before an impartial and disinterested tribunal . . ."[28]

and in the case of Luque vs. Kayanan;[28]

> "All suitors . . . are entitled to nothing short of cold neutrality of an independent, wholly free, disinterested and impartial tribunal".

III. THE CONSTITUTION AND PRESIDENTIAL DECREE NO. 39

When the New Constitution was ratified last January 17, 1973, the following events took place:

First, Art. IV, Sec. 19 of the Constitution, like the rest of the provisions therein, became a part of the Constitution.

Second, Art. XVII, Sec. 3(2) was also ratified and Presidential Decree 39 embodied therein became a part of the law of the land. In so far as the provision is concerned, the decree has merely the force and effect of an ordinary statute.

[26] II Permanent and General Statutes 927.
[27] #4(c) (2), see note #20, supra.
[28] 41 SCRA 66.
[29] 20 SCRA 165.

To facilitate comparative analysis of the two provisions, the same are quoted hereunder:

> Art. IV, Sec. 19 — . . . However, after arraignment trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustified.[30]
> Art. XVII Sec. 3(2) — All proclamations, orders, decrees, instructions and acts promulgated, issued, or done by the incument President shall be part of the law of the land . . .[31]

Based on the preceding discussions, it is submitted that Presidential Decree 39 runs counter to the Constitution when the former provides for trial in absentia without arraignment, arraignment being a Constitutional requirement. The validity of the decree is by force of Art. XVII, Sec. 3(2). It is therefore the source of life of the decree which gives it its "constitutional" character. The cardinal question arises: Which one of the two aforecited Constitutional provisions prevails over the other? The question may, therefore, be focused on the conflict between the two aforementioned provisions.

A perusal of the two provisions will yield the fact that *Sec. 19, Art. IV* is special and specific while Sec. 3(2), Art. XVII is broad and general. The former specifically defines the rights and safeguards the Constitution affords the accused in criminal prosecutions; whereas, the latter provision speaks of all proclamations, orders, decrees, instructions and acts of the President which cover all branches of law — criminal, political, labor, administrative, social, economic, tax, remedial and agrarian measures. Applying then the rules in statutory and constitutional construction, the former (Sec. 19, Art. IV) will prevail over the latter (Sec. 3(2) of Art. XVII). In case of conflict between a special provision and a general provision, the former prevails over the latter. This is so because the mind of the framers of the Constitution is directed to a particular matter and, therefore. the special provision is more expressive of the intention of the legislature.

> "And it is a well known principle that special provisions prevail over general provisions". (Sancho vs. Lazarga, 55 Phil 601).

The doctrine in Montenegro vs. Castañeda[32] which says that "the provision in the Constitution which is last in the order of time and in local position shall prevail" in case of conflict with another provision, must be abandoned in view of the doctrine laid down in People vs. Curtice that such rule can only apply when no other rules of construction could be used in construing constitutional provisions.[33]

Black, in his Interpretation of Laws,[34] made mention that the cardinal rule in the construction of the constitution is to seek out the

[30] The New Constitution, National Media Production Center.
[31] Ibid.
[32] 48 O.G. 3392, 3397.
[33] 117 Pac. 357, 362 cited in *Montenegro*.
[34] Quoted in Martin, Handbook on Statutory Construction.

intent of the framers thereof and to give effect thereto. Provisions, therefore, must be construed in the light of this intent which can be found in the preamble of the Constitution:

> "Even then (when martial law has been declared) the primordial objective should be a regime of justice as contemplated in the preamble of the constitution. (Nara vs. Gatmaitan, 90 Phil 172, 180).

Another reason why Sec. 19, Art. IV must prevail over the other provision is that the disputed decree embodied in the latter is merely incorporated by reference as part of the law of the land and it is a well-settled rule that in case of conflict between the two (a constitutional provision and a statutory provision) the constitutional provision prevails. Sec. 19, Art. IV is a constitutional provision, amendment thereto needs ratification by the people. On the other hand, the decree may be amended, repealed, or revoked by the President without ratification by the people. For obvious reasons, the decree cannot be allowed to defeat the purpose of Sec. 19, Art. IV for the former is transitory and general in scope.

Lastly, any ambiguity arising from the presence of conflicting provisions in the Constitution should be resolved in favor of the least derogation of rights and safeguards afforded the accused. The doubt as to whether the accused could be tried in absentia without arraignment in the face of Sec. 19, Art. IV, should be resolved in favor of said section.

IV. CIVIL LIBERTIES UNDER MARTIAL LAW

But it may be said that Sec. 3(2), Art. XVII has more force and effect because of Martial Law. Does martial law, therefore, suspend, if not abolish, rights guaranteed by the Constitution?

It is submitted that the constitutional rights of the people are not abolished or suspended despite martial law. Inasmuch as the Philippine concept of constitutionalism is but a transplant from the American concept, it is worthy to note what American authorities have to say on the question. Willoughby says:

> "During the time that the military forces are employed for the enforcement of law, that is to say, when the so-called martial law is enforced, no new powers are given to the executive, no extension of arbitrary authority is recognized, no civil rights of the individual rights are suspended.[35]

And *Ex Parte Milligan*:

> "The Constitution . . . is a law for rulers and equally in war and in peace and covers with the shield of its protection to all classes of men, at all times, and under all circumstances.[36]

[35] III Willoughby, Constitutional Law of US; 2ed; p. 1952.
[36] 4 Wallace 2 (1866); 18 l.ed., 281, 295.

And even the incumbent President himself, in his book, Today's Revolution: Democracy, acknowledges the continued existence of such rights even under martial law:

> "However, even during the period of employment of such extraordinary power to suppress a riot or disorder or the suspension of the privilege of the writ of habeas corpus, where persons may be arrested and kept under the custody for any period of time without any charge before the court, or under the proclamation of martial law, in a situation bordering upon war, where in effect, the armed forces of the Philippines assume power of government, *the rights of the citizens and residents of the country who are not participants in the Jacobin type of revolution should be respected.*"[37] (underscoring supplied)

Martial law or no martial law, therefore, the rights of the citizens continue to exist.

STOCKHOLDER INSPECTION OF CORPORATE RECORDS: MAKING SECTION 51 A MORE EFFECTIVE SAFEGUARD

RODOLFO V. ROMERO*

I. PREFATORY STATEMENT

One of the most significant elements in the development of the world economy in the last three hundred years has been the evolution of the corporation into the institution that we know today. Such, indeed, is the importance attached to the role played by the corporation in world economic development that some economic historians have suggested that the process would not have been as rapid in the absence of the corporate form of business enterprise. A. A. Berle, Jr. and Gardiner C. Means have written, for example, that

> "the true significance of the corporation can best be seen in the light of the development of business in the last three centuries."[1]

The evolution of the corporation as the dominant form of modern-day business enterprise has not been confined to the industrial societies, where

> "the relative growth of the large companies in the last twenty years has been such that if the same rate were maintained all corporate wealth would be in the hands of two hundred companies within fifty years — a concentration of economic power unknown in the world's history."[2]

The economic development of the what are referred to today as the developing countries has been characterized by the emergence of the corporation as the dominant form of business enterprise. Recent listings of the 1,000 largest business enterprises indicate that the economic development of the Philippines has not been the exception to the rule.[3] With the change in the legal structure of Philippine business has necessarily come a shift in its ownership pattern.

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* LL.B. '79.

[1] A. A. Berle, Jr. and Gardiner C. Means, *The Modern Corporation and Private Property*, Commerce Clearing House, New York, 1932.

[2] Ibid.

[3] *1,000 Largest Corporations in the Philippines*, Business Day, 1976.