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DEDICATED TO OUR LADY, SEAT OF WISDOM

## REFERENCE DIGEST

POLITICAL LAW: FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS. CAN THE GOVERNMENT BE HELD LIABLE FOR DELAYS CAUSED BY THE GOVERNMENT? In 1955, in the case of *Ozark Dam Constructors vs. United States*[1] the Court of Claims held that the Federal Government could not avoid liability for extra costs incurred by a government construction contractor, resulting from the government's delay in the delivery of cement it had agreed to deliver to the constructor as needed, notwithstanding that the contract expressly exempted the Government from liability for any expense caused the constructor for such delay.

On the other hand, the Supreme Court of the United States has ruled[2] that the Government cannot be held liable for delays from which it has exempted itself.

The Court of Claims recognized the principle that a party to a contract may not escape responsibility merely by exculpatory language in the contract for conduct which is opposed to public policy.[3]

Basically, the law on this regard is no different than the law which governs construction contractors in their contractual relations with private owners.

The cases[4] examined in this discussion demonstrate quite clearly that the Government will not be held liable for damages due to delay caused by it, in its sovereign capacity, and that it will not be held liable for damages caused by it in its contractual capacity unless it has breached an express obligation or a representation on which the constructor was entitled to rely, or in the alternative, has exhibited a lack of diligence or other similarly unreasonable conduct in carrying out any of its contractual obligations, express or implied. In the absence of any of one of these conditions, the Government cannot be held liable no matter how great are the increased costs resulting from the *government-caused delays*.

Where a suspension of all or part of the work ordered for the convenience of the Government pending a change in plans and specifications is for an unreasonable period, the constructor will be entitled, not only to be compensated for the increased in costs, including reasonable overhead and pro-

[1] 130 Ct. Cl., 354; 127 F. Supp., 187 (1955).
[2] Wood v. U.S., 258 U.S., 120 (1922); Well Bros. Co. v. U.S., 254, U.S. 83 (1930).
[3] WILLISTON, CONTRACTS, 1751 (Rev. Ed. 1938).
[4] Chouteau v. United States, 95 U.S. 61 (1877).

fit, of the work or change, but may be compensated as well under the *suspension* clause for increased costs (which may include or consist of overhead but not profit) resulting from the reasonable delay or suspension.[5]

On the other hand, if a breach of contract can be established and there is no *suspension* clause in the contract, the constructor may recover all the damages reasonably flowing from the *government-caused delays,* through appropriate litigation in the United States District Court or the Court of Claims. (E. Maning Seltzer & Albert M. Gross, *Federal Government Construction Contracts*: *Liability for Delays Caused by the Government,* 25 FORDHAM LAW REVIEW, No. 3, at 432-488 (1956). $1.00 in U.S.A., $1.15, foreign at Fordham University Press, New York, U.S.A. This issue also contains: John Fix Fuin, *Insurance Against the Over-reaching of Sovereignty*: Edward T. Fagan, Jr., *Commercial Bad Faith in the Law of Negotiable Instruments;* Serge L. Levitsky, *The Soviet Press and Copyright Legislation*: *Some Legal Concepts.*)

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CONSTITUTIONAL LAW: HOW CONSTITUTIONAL IS MOVIE CENSORSHIP? In a dictum[1] the United States Supreme Court stated that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the constitutional provision on the freedom of speech and of the press.

The constitutional guaranty of the freedom of the press extends to both previous restraints and censorship.[2] In its broadest sense, it includes security against laws enacted by the legislative department of the government or measures resorted to by either of the other branches for the purpose of stifling just criticism or muzzling public opinion.[3] This last guaranty of the freedom of the press is covered by the Philippine Constitution.

Freedom of the press is not, however, without limitations. It is subject to the police power of the state. This police power is, in turn, exercised by the legislature. In turn, this sovereign power has its limitations.[4] Curtailment or regulation of these basic personal liberties is justifiable only when necessary for the promotion of the general welfare. For the purpose of preserving morality the police power may also extend to censorship of moving pictures.[5] The state would also be justified in resorting to its police power so long as public interests make censorship of motion pictures necessary.

In the Philippines, by provisions of Act 3582, movie censorship is lodged

[5] F. H. McGraw & Co. v. United States, 131 Ct. Cl., 501; 130 F. Supp. 394 (1955).
[1] U.S. v. Paramount Pictures, 334 U.S. 131 (1948).
[2] Grosjian v. American Press Co., 297 U.S. 233 (1936).
[3] 11 AM. JUR. 1113.
[4] Primicias v. Fugoso, 45 O.G. 3286 (1949).
[5] 11 AM. JUR. 1024.



in the Philippine Board of Review for Moving Pictures. This Board is empowered to examine all films which in its judgment are immoral or contrary to law and good customs or injurious to the prestige of the Republic of the Philippines or its people.[6]

This power is legislative in character. The question then may be asked; was the delegation of this legislative power valid?

For a valid delegation, the statute so delegating must be complete; or even if incomplete, it furnishes a guide or standard sufficient to enable an administrative board or body to decide what is and what is not in violation of the law.[7]

Act 3582, as amended, provides as guides or standards the following: (1) picture is immoral; (2) contrary to law and good customs; or (3) injurious to the prestige of the Republic of the Philippines or its people.

We ask: Are these sufficient guides or standards?

An early American case[8] held that the *sense* and *experience* of the members of the board were a sufficient guide or standard in deciding whether a certain motion picture was of a moral, educational, amusing or harmless character.

One can easily quarrel with the decision of the Court. Who can tell whether any of the members of the board has the requisite sense and experience? Are his sense and experience adequate? Will he at all times apply or utilize them in formulating his opinions? The members of the board are left entirely at liberty in deciding what films to approve and what to disapprove by the simple expedient of announcing that their sense and experience tell them this or that.

The Supreme Court of the United States has held[9] the term *sacriligious* to be vague. The same could be said of the words *immoral, good customs* and *injurious to the prestige of* the Philippine Republic or its people, words employed by Act 3582.

Necessarily then, the Board of Censors is granted an unlimited latitude in the exercise of its discretion, absolute delegation of a power which the legislature alone can legally exercise. (Salvador C. Ceguera, *Freedom of the Press v. Movie Censorship,* 4 F.E.U. L.Q. No. 3 at 336-345 (1956). ₱1.50 at Inst. of Civil Law, F.E.U., Quezon Blvd., Manila. This issue also contains: Pineda, *Corporation*: *Growth in the Philippines and its Valuable Role in the Development of Our National Economy.*)

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CONSTITUTIONAL LAW: DOES THE CONSTITUTION OF THE PHILIPPINES CALL FOR A CHANGE? The constitutional system has consistently been under

[6] Sec. 2 (a), Act 3582, as amended by C.A. No. 167 and C.A. No. 305.
[7] MARTIN, PHILIPPINE POLITICAL LAW, 84 (1955 ed.).
[8] Mutual Film Corp. v. Industrial Commercial, 263 U.S. 230, 1915).
[9] Joseph Burstyn, Inc. v. Wilson, et al., U.S. Supreme Court, L. Ed., Vol. 46, Advanced Opinions, June 16, 1952, p. 687.

attack as being anachronistic. And in parts of the world following a constitutional system, the legislatures have up dated the constitutions of their states to cope up with the rapidly changing conditions of modern times.

The Great Depression began a series of criticisms and attacks on the constitutional system of the United States. The Great Depression effected a major change in the role of government constitutionalism. Since then, critics have attacked the American Constitution as being anachronistic and obsolete.[1]

The period which saw the framing of the American Constitution was one in which politics was struggling hard to unshackle itself from the rigors of absolutism. Mercantilism held sway in economics.

With this back drop of despots and persecutions, the framers of the American Constitution naturally looked upon political power as inherently dangerous. The American Constitution became then, a limitation on political power. It afforded checks and balances to its exercise.[2] Bills of Rights were drawn from the constitutions of the original states and incorporated into the constitution then enacted.

But despots have given way to legislatures. Mercantilism is sleeping in its grave. Giant combinations and trusts have thrown out the cotton-planter aristocracy. The simple social and economic life which gave birth to the Bills of Rights of the various original states has been replaced by a complex culture.

The theories and principles of the American Constitution were, in turn, transplanted into the Philippine Constitution.

Now that the climate in which American constitutionalism found growth in the Philippines is forever gone, the question may be asked: Is our 18th century Constitution still suited to our times?

Bills of Rights are intended to effect desirable relations between the government of the community and the individual citizens of that community. The community ideas change with historical developments. With this change the Bills of Rights must need undergo considerable alteration. There is need for adjustment.[3]

In the United States and in the Philippines the broadening complexities of life have been met by progressive interpretations of the affected provisions of the constitutions of both countries. In the United States, Justice Brandeis and Holmes ushered in a new era of governmental interference to protect human rights from exploitations. In the Philippines, Justices Malcolm and Laurel held that human rights were preferred to property rights.[4]

The Four Freedoms of President Roosevelt found explicit reaffirmation in the Atlantic Charter as regards the two Freedoms — *Freedom from Want*

[1] CARL BECKER, FREEDOM AND RESPONSIBILITY, esp. Ch. IV (1955).
[2] See THE FEDERALIST, Numbers 10, 51, etc.
[3] CARL J. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY, esp. Ch. IX (Revised Ed. 1951.)
[4] Rubi v. Prov. Board, 39 Phil. 660 (1919).



and *Freedom form Fear*. The United Nationas, in turn, gave them sanction.[5]

Liberty could no longer be looked upon as mere absence of restraint. Rather, liberty is the maintenance of such an atmosphere as enable men to be their best selves. Such is the new concept of liberty.

Indeed, the temper of the times calls for such a new concept of personal liberty. The limitations to freedom no longer come from the antagonism of government. The massive habits of physical nature, its iron laws, determine the scene for the suffering of man.

In a country like the Philippines, where 90 per cent of the people are in need and where 100th of one per cent of the people own about 42 per cent of the farm area, personal liberty means land reform. It also means increasing the per capita income and product of the people; it means more job opportunities for our increasing battalions of unemployed; it means, in short, releasing men from the haunting fears of the morrow and its uncertainties.

It is in this sense where our Philippine-American constitutional system is anachronistic. Our constitutional system fails to meet the primary demand of the rigorous requirement of living.

There is increasing need for the recognition that it is only when a man feels safe and secure that he may cultivate the spiritual aspects of his existence. It is only then that the captive can be truly free to embark on what can very well be the ultimates in human experience. (August Caesar Espiritu, *Constitutionalism and the Positive Concept of Liberty*, 31 PHIL. L.J. No. 5, at 654-663 (1955). ₱2.50 at U.P., Diliman, Q.C. This issue also contains: Mendoza, *Philippine Film Censorship Laws: An Appraisal.*)

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CRIMINAL LAW: LIBEL. Suppose that in the heat of a passionate debate regarding the constitutionality of the *Noli-Fili Law*, a person makes derogatory remarks *tending to blacken the memory* of our national hero, Dr. Jose P. Rizal, would such a person be the subject of a criminal charge for libel?

Suppose an historian in the course of his commentaries touching upon the purely private lives of men like Hitler, Napoleon, Nero, Stalin, denominated them as murderers, thieves and rapists, thus tending to blacken their memory, would such historian be exempt from the laws on libel?

These and similar others are ticklish questions (sufficient to arouse the curiosity of the legal mind.

Libel as defined in Art. 353 of the Revised Penal Code is a public and malicious imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstance tending to cause

[5] HARRY N. HOLCOMBE, HUMAN RIGHTS IN THE WORLD COMMUNITY 4-5 (1948).

the dishonor, discredit, or contempt of a natural or juridicial person or to blacken the memory of one who is dead.

Why is the publication of libel made punishable as a crime? Under the common law the *publication of such articles tends to affect injuriously the peace and good order of society*. But "modern enactments x x x make a libelous publication criminal if its tendency is to injure the person defamed, regardless of its effects upon the public. The present Philippine Law on libel conforms to this modern tendency".[1]

Since under our present law, libel is made punishable as a crime because it violates a *personal* constitutional right, what is the effect of the maxim *Actio personalis moritur cum persona?*

Again Art. 360, par. 4 of the Revised Penal Code states: No criminal action for defamation which consists in the imputation of a crime which cannot be prosecuted *de oficio* shall file the complaint since the victim of the publication is dead?

With regard to the historian, the *fair comment and criticisms* rule is accorded by the law as a shield.

*But when does a deceased pass on to history in order to enable anyone to pass judgment upon him and his private life without incurring in libel or defamation? In other words are history personages capable of being victims of libel? If so, would such libel be actionable. Why? How?*

The author poses these questions and expresses the hope that some authoritative pen elucidate the answers. (Antonio Molina, *A Query on Libel of the Deceased*, VII U.S.T. LAW REVIEW No. 4 at 233 (1956). ₱2.00 at U.S.T., España, Manila. This issue alco contains: Syquia, *The Extent of the Territorial Sea Under International Law*.)

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CRIMINAL LAW: TWO PROBLEMS IN CRIMINAL ATTEMPTS. (1) Is it always necessary on a charge of attempt, to prove an intention to commit the substantive crime? Or will recklessness, or negligence, or even blameless inadvertence in some circumstances suffice?

(2) Can the defendant be convicted of an attempt where he has done or attempted to do an act, believing in the existence of circumstances which, had they existed, would have rendered that act a substantive crime, but where the circumstances, in fact, were such that his act was not a substantive crime?

FIRST PROBLEM: Defendant, not knowing whether his wife (whom he left a year ago) is alive or dead, attempts to go through a form of marriage with P, the injured person, but is prevented by the intervention of wife at the altar.

[1] PADILLA, REVISED PENAL CODE 1126 (1953 ed.).



May the defendant be convicted of an attempt to commit a crime (bigamy)?

Defendant could be convicted of an attempt without destroying the general principle that intention is required in attempts.

Defendant's act must be intentional with respect only to the consequences and, as a necessary corollary of that, the consequential circumstances.

That is, it must be shown that the defendant desires and foresees, or foresees as substantially certain the consequences of his act; and, in order to do that, it must be shown that he either hopes for or believes in the existence of the consequential circumstances. With regards to the pure circumstances (wife being alive), however, recklessness will suffice, provided only that recklessness will suffice for a complete crime. That is, if it is enough for the complete crime that defendant realizes the probability of the existence of the pure circumstance, that is enough to ground liability for an attempt.

The same holds true with negligence in attempts: The act must be intentional with respect to the consequences and, therefore, the consequential circumstances; but, as for the pure circumstances, if negligence is all that is required for the substantive crime, it will suffice for an attempt.

SECOND PROBLEM:

Lady Eldon intended to smuggle French lace into England. At Dover, a customs officer discovered it. But it turned out, contrary to Lady Eldon's belief, the lace was not French but of English manufacture — not subject to duty.

Was Lady Eldon guilty of an attempt to smuggle French lace?

It seems clear that the authorities, as far as they go, answer this question in the negative.

The only case which would not lead to her complete acquittal is *Dadson*[1] and this case would lead to the conclusion that Lady Eldon, if she had deceived the customs officer, would have been guilty, not merely an attempt to smuggle, but of actual smuggling. Such a conclusion is indeed preposterous.

It is submitted that the result reached by the cases[2] is right in principle.

It is fundamental to our law that a man is not punished merely because he has a criminal mind. It must be shown that he has with that criminal mind, done an act which is forbidden by the criminal law.

If it appears wrong that the accused should escape unpunished in the particular circumstances, then it may be that there is something wrong with the substantive law and his act ought to be criminal. But the remedy then is to alter the substantive crime.

When a man has achieved all the consequences which he set out to

[1] The Queen v. Dadson, 2 Denison, Cr. Case, 35; 169 Eng. Rep. 407 (1850).
[2] R. v. Percy Dalton, Ltd., 33 Crim. App. R, 102 (1949).

achieve and those consequences do not, in the existing circumstances, amount to an act as it is in accordance both with principle and authority, then that man should be held not guilty of any crime. (J.C. Smith, *Two Problems in Criminal Attempts,* 70 HARV. LAW REV. No. 3 at 422-448 (1957). $1.25 in U.S.A.; $1.35, foreign at Harv. Law Reviews Ass., Boston, Mass., U.S.A. This issue also contains: Herwits, *Accounting for Long-Term Construction Contracts*: *The Lawyer's Approach.*)

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CRIMINAL LAW: TESTIMONY OF HANDWRITING EXPERTS. The science of handwriting study was born in France in the beginning of the 19th century. The first known criminal court case involving the identification of handwriting was the celebrated *Dreyfus Case* in 1894.

The *Dreyfus Affair* was, perhaps, the world's most notorious case involving a miscarriage of justice. The miscarriage was due mainly to the mistake of Alphonse Bertillon in identifying the true author of the *Bordereau.* By the way Bertillon was the leading handwriting expert in Europe when the *Dreyfus* case broke.

An examiner of questioned document should remain forever aware of Bertillon's mistake, a mistake born either in prejudice or out of misguided zeal to tell his superiors what they wanted to know. Neither the prejudices of the day nor the reputation of experts on the other side should deter an honest expert from expressing and demonstrating his opinion based upon proof developed from conscientious and objective investigation.

One of the fundamentals of a handwriting expert is to shy from making an off-hand or curbstone opinion by merely looking at the document. To do so is comparable to a physician looking at a patient and making a diagnosis of perfect health or, let us say, of cancer.

The preliminary examination of a questioned document is, perhaps, a misnomer, for it consists of a painstaking analysis under the magnifier, microscope and other instruments of both standards and the questioned writing. Until such examination is made, the expert is as much in the dark as to the authenticity or otherwise of a writing as is the layman.

The handwriting expert is always at the helm of a thousand and one difficulties. One so common is the necessity to take a handwriting sample in court. A person, whether innocent or guilty whose handwriting is requested in open court, frequently becomes nervous and apprehensive. The fact that he is asked to give a sample of his handwriting implies suspicion, and having to do so in court room, with all eyes on him, creates a psychological block which may affect his handwriting. This indeed, offers a high possibility of error.

Another difficulty of an expert is when he comes across two similar handwritings that require close scrutiny. It is a cardinal principle among



experts that writings although similar are never identical just as two persons who look exactly alike are not the same.

A testimony of a handwriting expert is accorded great weight in our Court of Justice. The celebrated *Dreyfus Case* secured conviction on the testimony of one expert alone.

What is the effect of circumstantial evidence as against expert testimony? If an expert is secure in his opinion that, for example, the handwriting is not that of the accused, he should not be swayed by testimony that one or more persons saw the accused write the disputed writing. Not only is memory fallible, but, human motives for testifying "Yes" or "No" are many and varied. Painstaking examination and comparison of handwriting, on the other hand, detail by detail is in effect, physical proof in support of an expert's opinion. If the expert's reasoning and comparative analysis are convincing, *he need not be concerned with anything else.* If he shows, clearly and logically, why the accused could not have written the disputed document, his opinion will withstand the effect of any contrary testimony. In other words, if an expert has complete proof, no circumstantial evidence should change or even shake his opinion. (Hauna F. Sulner, *Disputed Documents in Criminal Cases,* 3 CRIMINAL LAW REVIEW No. 1 at 6 - 28 (1956). $1.00 in USA, $1.50, foreign at the office of the Association of Lawyers of the Criminal Courts of Manhattan, 101 West 10th Street, New York, N.Y. This issue also contains: Dr. Alexander S. Wiener, *Application of Blood Tests in Criminal Cases;* Ordway Hilton, *Handwriting Comparison Clears the Innocent Suspect.*)

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INTERNATIONAL LAW: INDIVIDUAL RESPONSIBILITY FOR INTERNATIONAL CRIMES. The experience of the Nuremberg and Tokyo Trials brought to light one sad deficiency of positivism as a basis of International Jurisprudence. The author shows the vulnerability of individual responsibility to the defenses of Act of State, the Principle of Superior Orders and the Pleas of Military Necessity on the basis of the positivist principle of *Nulla Poena Sine Lege.*

Individual responsibility has been enunciated by the Nuremberg Trial in its judgment as follows:

"Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[1]

This principle of individual responsibility finds its basis from three (3) sources: history, the nature of international law, and judicial cases.

The three (3) important defenses which mitigate or render inapplicable

[1] *Nazi Conspiracy and Aggression,* Opinion and Judgment (Washington, 1947), p. 53.

the principle of individual responsibility in International Law are:

1. Defense of Act of State —

This doctrine enunciate the proposition that an individual who acts in the name of the State or Sovereign and with its authority is liable for any wrong that may be done only in the Courts of his own State. Foreign Courts have no jurisdiction over him for those who act as instruments of their State may interpose its sovereignty in order to claim immunity from punishment by a foreign State. This is based on the principle that no State has authority over another sovereign State.

There are two (2) views regarding this doctrine:

(a) Absolute: this view believes in the complete omnipotence of the State and under no circumstance can the Court of one State pass upon the guilt or innocence of officials acting in the name of another State.

(b) Limited: This view limits its application to certain general acts only which comply with two conditions precedent, to wit:

(1) That the acts in question are not crimes in international law;

(2) That the State of the Actors would try them in case the offended State surrenders its jurisdiction to the former.

The purpose of this view is *the achievement of peace between nations,* and *it should not stand in the way of the promotion of the international social interest* x x x ?

This was the view adopted by the Nuremberg Trial.

2. Superior Orders

Of the three defenses, the defense of Superior Orders was the principal refuge of the war criminals in the Nuremberg and Tokyo Trials. The reason for this is obvious. While the defense of *Act of State* is limited to high officials and officers of the State and that of *Military Necessity* only to commander in the field, this defense of *Superior Orders* is open to all, whether high or low.

The principle of *Superior Orders* enunciates that a person of inferior rank who owes duty of obedience to a superior who gives the order, is immune from punishment for acts done pursuant to the order on the ground that his act had been ministerial and done pursuant to the legal order of his superior. This is based on the maxim of *Respondeat Superior.*

If the inferior successfully pleads this doctrine, the liability for the commission of the criminal act is not extinguished, though the inferior be immune from the same, but is transferred to the Superior who issued the order.

3. Military Necessity

This defense covers those circumstances arising from a *State of War* which, according to international law, could justify all measures of regulated violence necessary to the bringing of the war to a successful conclusion.[2]

Regarding this defense, there are two views:

(a) Absolute: This plea of military necessity as an absolute defense is not subordinate to the positive rules of international law.

(6) Limited: This plea is limited to positive International law. This view was the one followed in the Nuremberg Trials.

Both the Nuremberg and Tokyo Trials have held that individuals can be and are tried and punished for international crimes. What the world needs now, according to the author, is the *establishment of an international criminal court and the promulgation of an international criminal code for the actual trial and punishment of future international criminals.* (Enrique P. Syquia, *Individual Responsibility for International Crimes,* 2 FRANCISCO L. J. No. 4, at 182 (1956), ₱2.00 at Francisco College, Taft Avenue, Manila. This issue also contains: Coquia, *Legal Education in the Philippines: Need of a Fresh Approach.*)

[2] DUNBAR, N. C. H., *Military Necessity in War Crimes Trials,* 29 British Yearbook of Int'l L. 442 (1952).