July 24, 1957, Ong Ho filed a complaint (Civil Case No. 33251) against the PNB and the petitioners for the annulment of the two deeds of mortgage, claiming that the signatures purporting to be his in said documents were forgeries. Thereafter, Ong Ho filed a criminal complaint against the petitioners for falsification of the deeds of mortgage involved in Civil Case No. 994. The petitioners filed a motion to dismiss the criminal complaint on the ground that prejudicial questions are involved, in which case the civil case should first be resolved before proceeding with the criminal case. The City Fiscal denied the motion. Hence, this petition to prohibit the respondent Fiscal from proceeding with the investigation of the criminal charge was filed. *Held,* that the petition is denied. In the civil case for annulment of the deed of mortgage, the issue is that the signatures of Ong Ho appearing therein are forged. In the criminal case, the issue is likewise the falsification of the deeds in question. When the principal issues in both cases are the same and arise from the same facts, it is not necessary that the civil case should be resolved first before taking the criminal case. BENITEZ, *et al., v.* CONCEPCION, *et al.,* G.R. No. L-14646, May 30, 1961.

REMEDIAL LAW — SPECIAL PROCEEDINGS — A SALE OF PROPERTIES OF THE ESTATE OF A DECEASED AS BENEFICIAL TO THE INTERESTED PARTIES MUST BE MADE ONLY AFTER DUE NOTICE TO THE HEIRS AND A HEARING OF THE APPLICATION FOR AUTHORITY TO SELL. — Following the death of the spouses Alejandro Ros and Maria Isaac in 1935 and 1940, respectively, intestate proceedings for the settlement of their estate was commenced in the CFI of Camarines Sur. Upon application, Juan Garza, the administrator of the estate, was authorized to sell certain parcels of land of the estate. On August 31, 1944, the administrator sold said land to Soler. On October 14, 1944, the heirs of Maria Isaac sold their shares over certain parcels of land of the estate to Soler. On May 9, 1956, Julian Bonaga, the administrator, filed an action to annul the sales of August 30th and October 14th, 1944, on the ground that they were fraudulent and made without notice to Alejandro Ros' heirs. The court dismissed the action. Hence, this appeal. *Held,* that the lower court erred in dismissing the action without a hearing on the merits. A sale of properties of an estate as beneficial to the interested parties, under Sections 4 and 7, Rule 90 of the Rules of Court, must comply with the requisites therein provided, which are mandatory. Without them, the authority to sell, the sale itself and the order approving it, would be void *ab initio.* Nothing in the record would show whether, as required by Rule 90, Sections 4 and 7, Rules of Court, the application for authority to sell was set for hearing, or that the court ever caused notice thereof to be issued to Ros' heirs. Incidentally, these heirs were then allegedly in Spain. Rule 90 does not distinguish between heirs residing in and outside of the Philippines. Therefore, its requirements should apply regardless of the place of residence of those required to be notified under said Rule. BONAGA *v.* SOLER, *et al.,* G.R. No. L-15717, June 30, 1961.

CIVIL LAW — CONTRACTS — IN AN ASSIGNMENT OF CREDIT THE CONSENT OF THE DEBTOR IS NOT ESSENTIAL, NOR IT IS NECESSARY TO MAKE HIM LIABLE TO THE ASSIGNEE. — On July 16, 1947, the defendant purchased with a chattel mortgage from Elizalde Motors Inc. a de Soto truck. Down payment was made and the balance was to be paid in six monthly installments, for which the defendant executed six promissory notes to secure the payment of the balance. On August 18, 1947, the defendant again purchased another de Soto truck from Elizalde Motors under the same arrangement as the first purchase, made a down payment and signed six promissory notes for the balance. From January 20 to October 22, 1947, Elizalde Motors made repairs and sold materials on credit to the defendant. Part of this credit remains unpaid. On July 16, 1949, Elizalde Motors ceded and transferred its credit to the plaintiff Elizalde & Co., Inc. On August 16, 1949, the plaintiff made a formal demand for payment. The court of first instance rendered judgment ordering the defendant to pay to the plaintiff the balance on the promissory notes and accounts receivable. The defendant appealed. The issue is whether or not the assignment of the credit without the prior consent of the debtor is valid. *Held,* in an assignment of credit the consent of the debtor is not essential, nor is it necessary to make him liable to the assignee. The corresponding Articles 1625, 1626 and 1627 of the new Civil Code do not require the consent of the debtor to an assignment of credit for the validity thereof and to render him liable to the assignee. The law speaks not of consent but of notice to the debtor. The purpose of this notice is to inform the debtor that from the date of the assignment he should make payment to the assignee and not to the original creditor. The notice is thus for the protection of the assignee because before the said notice, payment to the original creditor is valid. ELIZALDE & CO., INC. *v.* BINAN TRANSPORTATION CO., (CA) No. 12037-R, April 6, 1960.

CIVIL LAW — CREDIT TRANSACTIONS — A CHATTEL MORTGAGE CONSTITUTED ON A HOUSE IS A NULLITY AND ITS REGISTRATION IN THE CHATTEL MORTGAGE REGISTRY IS MERELY A FUTILE ACT. — On October 9, 1950, Dolores Genove constituted a mortgage on a house in favor of Salvador Villareal to secure a loan. The mortgage was not registered. On December 23, 1952, she again mortgaged the same house to Antero Manalo. This mortgage was registered in the Chattel Mortgage Registry. On January 14, 1954, in view of her failure to pay off Salvador Villareal, Dolores Genove executed a conditional sale of the same house with Villareal as the vendee. Dolores failed to pay off Antero Manalo, so that the latter foreclosed the mortgage, resulting in the public auction sale of the house on April 5, 1956

in favor of Manalo as the highest bidder. On September 10, 1956, Salvador Villareal brought suit to annul the said auction sale and to declare him the owner of said house by virtue of the conditional sale executed in his favor on January 14, 1954. The validity of the chattel mortgage on the house is assailed. *Held,* the registration of the mortgage deed in favor of Manalo in the Chattel Mortgage Registry was a futile attempt. A house is immovable property, irrespective as to whether or not it is erected on land belonging to the same owner (Lopez v. Orosa, G.R. No. L-10817-18, Feb. 18, 1958). It follows that the mortgage and public sale of the house in favor of Manalo are without force and effect whatsoever. Since the deed of conditional sale was executed with all the essential requisites provided by law, the same should govern the relations of the parties thereto. One year had passed since the execution of the deed of sale, without the appellees paying the full amount of ₱2,000. There is, therefore, no question as to the right of Villareal to file suit in order to recover possession of and title to the house in question. GENOVE, *et al., v.* MANALO, *et al.,* (CA) No. 21423-R and No. 22992-R, April 8, 1960.

CIVIL LAW — OBLIGATIONS AND CONTRACTS — FOR A CONTRACT TO BE RESCINDED IN FRAUD OF CREDITORS, THE PLAINTIFF SEEKING THE RESCISSION MUST LEGALLY ENJOY THE CHARACTER OF A CREDITOR; THERE MUST BE FRAUD; AND THE CREDIT CANNOT BE SATISFIED IN ANY OTHER MANNER. — Plaintiff corporation sued Gapuz for unpaid bills amounting to ₱18,789.45 and a copy of the complaint together with the summons and the writ of preliminary attachment was served upon defendant Gapuz on March 19, 1957. On March 20, 1957 Gapuz sold for ₱15,000 his only property consisting of three parcels of land and a house built on one of them to their mortgagee Federico Orpilla who had knowledge of the pending suit having been informed of it by the Manager of the People's Surety and Insurance Co., another mortgagee of the property being the guarantor of Gapuz to the plaintiff corporation. Plaintiff corporation had foreclosed on the bond filed by the Surety Co. pursuant to the guaranty and the latter wanted to foreclose on said parcels of land but desisted and allowed the sale to Orpilla who guaranteed to pay the debt of Gapuz to the Surety Co. Hence, the action to rescind. *Held,* In order that a contract may be rescinded as one made in fraud of creditors, the first indispensable requisite is that the plaintiff seeking the rescission legally enjoys the character of a creditor, that is there exists a credit in his favor, which must be prior to the contract sought to be rescinded, although demandable later. The other requisites are, that there must be fraud which may either be presumed or proved, and the satisfaction of the credit in any other manner is impossible without however requiring the existence of insolvency.

The fact that the vendee in the instant case is also a creditor of the vendor, cannot detract from the nature of the sale that it is fraudulent, even if the vendee has in his favor a valid credit, or that the consideration is valid

and legitimate. It is not sufficient that the transaction is founded on good consideration or that it was made with *bona fide* intent. It must have both elements. The vendor's and vendee's hurried act of executing the deed of sale at bar inspite of knowledge on their part of the writ of attachment is wanting in good faith. It appearing that the defendant has no other property to satisfy his just obligation to the plaintiff who enjoys the character of a creditor, the three requisites are completed. Rescission is granted. ARANETA INSTITUTE OF AGRICULTURE *v.* GAPUZ AND ORPILLA, (CA) No. 24670-R, March 5, 1960.

CIVIL LAW — PARTNERSHIP — THE SALE OF SHARES TO ADDITIONAL PARTNERS, THOUGH UNREGISTERED, RENDERS THE INCOMING PARTNERS LIABLE FOR THE PARTNERSHIP OBLIGATIONS. — The M. M. Domingo & Co. is a general commercial partnership duly registered with the Securities and Exchange Commission and having five general partners. By virtue of a resolution approved by all the partners, the managing partner borrowed money from the plaintiff, the Philippine National Bank, secured by chattel mortgages on three landing barges. A few days later, Dalmacio Catipon and Marta Velasquez acquired portions of the individual shares of the registered partners. Such sale, however, was not registered with the Securities and Exchange Commission. The partnership failed to pay its obligation, so the PNB instituted the present action. Catipon and Velasquez claimed that they are not liable on the promissory note because they cannot be considered partners of M. M. Domingo & Co. since their names do not appear in the registered articles of partnership. The PNB, on the other hand, contended that inasmuch as when the deed of sale was executed, it was with the common consent of all the original partners, they (Catipon and Velasquez) shall be considered partners. Hence, they are liable on the promissory note, notwithstanding the fact that it had not been registered in the Securities and Exchange Commission. *Held,* that by virtue and as a result of the transfer made by all the original partners of a portion of their shares to Catipon and Velasquez, as evidenced by the deed of sale, the latter were admitted as copartners in the defendant partnership, although such deed of sale has not been registered with the Securities and Exchange Commission, nor have the articles of partnership been amended in order to include Catipon and Velasquez. And since the sales had been the unanimous consent of the original partners Catipon and Velasquez are unquestionably considered partners and as such are jointly and severally liable for obligations incurred by the partnership. In fact, since the appellees as incoming partners were received as such by all the original partners of the partnership, they have become partners under the original articles of partnership without the necessity of registration. PNB *v.* M. M. DOMINGO & Co., *et al.,* (CA). No. 15343-R, January 30, 1960.

COMMERCIAL LAW — NEGOTIABLE INSTRUMENTS — WHERE THE REFERENCE TO A CHATTEL MORTGAGE MADE IN A PROMISSORY NOTE IS A

SIMPLE RECITAL OF THE CONSIDERATION FOR WHICH THE NOTE WAS GIVEN, OR IS A MERE MENTION OF THE ORIGIN OF THE TRANSACTION, ITS NEGOTIABILITY IS NOT AFFECTED. — On July 16, 1947, the defendant purchased from Elizalde Motors Inc. a De Soto truck with a chattel mortgage. Down payment was made and the balance to be paid in six monthly installments, for which the defendant executed six promissory notes to secure payment of this balance. On August 18, 1947, the defendant again purchased another De Soto truck from Elizalde Motors under the same arrangement as the first purchase, made a down payment and signed six promissory notes for the balance. In the promissory notes reference was made to the chattel mortgage constituted by the defendant in favor of the motor company. On July 16, 1949, Elizalde Motors ceded and transferred its credit to the plaintiff Elizalde & Co., Inc. On August 16, 1949, the plaintiff made a formal demand for payment. The court of first instance decided for the plaintiff. The defendant appealed. Among the issues raised on appeal is whether or not the promissory notes were negotiable, the same having made reference to the chattel mortgage contracts to which they respectively appertain. *Held,* the promissory notes are negotiable; in each of them the defendant promises to pay to the Elizalde Motors, Inc. or its "order." The reference made therein to the corresponding chattel mortgage contract is merely incidental of the note and was not intended to vitiate the negotiability of the note. The reference in a note to some extrinsic agreement, in order to destroy its negotiability, must be such as to indicate unmistakably that the paper is to be burdened with the conditions of that agreement. It is well-settled that when the reference is a simple recital of the consideration for which the paper was given, or is a mere mention of the origin of the transaction, its negotiability is not thereby affected. ELIZALDE & CO., INC. *v.* BINAN TRANSPORTATION CO., (CA) No. 12037-R, April 6, 1960.

CRIMINAL LAW — LIBEL — AN EXPLANATION PUBLISHED IN A SUBSEQUENT ISSUE OF THE SAME NEWSPAPER THAT PUBLISHED THE LIBELOUS ARTICLE, EVEN IF CONSIDERED TO BE AN APOLOGY BY THE ACCUSED DOES NOT CONSTITUTE A DEFENSE OR JUSTIFICATION. — The accused were charged before the CFI of Manila with libel for having allegedly published in the "News Behind the News" an article headlined "RM Junior In Bawdy House!" Bernardo Salumbides, editor of the weekly newspaper, supplied the headlines while the news item was written by Romulo Tacad. The news story was to the effect that RM Junior goes to nightclubs, exclusive dives and even super-exclusive bawdy joints, thereby attacking his honor, virtue, character and reputation and exposing him to ridicule, discredit and contempt. It went on to say that RM Junior was being made a tool of a Mindanao Congressman to get favors from President Magsaysay. Subsequently, an explanation amounting to an apology was published in the same newspaper, worded in the following tenor: "We are sorry that we ran that headline... in the manner that we did last issue... we assure him and his mother that there was absolutely no malice in what we wrote, and we hope he understands how deeply we feel it when we made this act of contrition." No evidence was presented as to the alleged truth of the story that RM Junior frequented houses of ill-repute and that in behalf of a congressman he intervened to seek favors from his father. Bernardo Salumbides asserted that the story was true; that three weeks before the publication he heard rumors about RM Junior's visits to houses of ill-repute; and that Salumbides was assured by a reporter that the story was true and upon such assurance he published the news item. He invokes as defenses lack of malice and the editorial of the same newspaper containing the foregoing apology. The court of first instance convicted Salumbides and Tacad, but acquitted Parado. Salumbides appealed. The issue is whether or not libel was committed considering that an apology was publicly made for the libelous news item. *Held,* In a libel case the accused must prove for his defense three essential requisites, to wit: truth, good intention, and justifiable motive (Article 361, Revised Penal Code). Even truth, in the present case, is not a defense, because the acts atributed to RM Junior do not constitute an offense and he is not a government employee, charged with acts related to the discharge of official duties. The truth of the story not having been established, its publication is presumed to be malicious and this presumption is conclusive if the communication, as in the instant case, is defamatory *per se.* An explanation published in a subsequent issue of the same newspaper that published the libelous article, even if considered to be an apology by the accused does not constitute a defense or justification. An apology not made by reason of any promise, express or implied, by the person defamed, that it should be a full reparation for the injury, is not a bar to the action. PEOPLE *v.* SALUMBIDES, *et al.,* (CA) No. 14224-R January 22, 1960.

CRIMINAL LAW — MAINTAINING OPIUM DIVES — THE OFFENSE OF MAINTAINING AN OPIUM DIVE OR RESORT IS NOT INCLUDED IN NOR DOES IT NECESSARILY INCLUDE THE CRIME OF VISITING SAID DIVE OR RESORT. — On April 1, 1952, police authorities searched the premises at No. 828, San Nicolas, Binondo. Among those apprehended in the house were accused Jose So who was then seated beside the table where morphine injections were being administered by another Chinese, and En Choy who was found with other Chinese in the same room. Jose So was charged with being a maintainer of a resort or dive where opium and its derivatives were used in and upon the human body. En Choy with 12 other Chinese and one Filipino were charged in the same court with violation of Article 191 of the Revised Penal Code for visiting an opium den. The 12 Chinese, co-accused of En Choy, pleaded guilty as charged and were accordingly sentenced. En Choy testified, and was corroborated in some points by the testimony of his laundry woman, that he was in the raided premises to collect a sum of money he loaned to Tan Po. The court found this testimony incredible. As to Jose

So, the court found no evidence that he was the maintainer of the opium joint. Nevertheless, the court convicted him together with En Choy of violation of Article 191 for visiting an opium den. Both appealed. Is the offense of maintaining an opium dive included in, or does it necessarily include, the crime of visiting said dive? *Held,* the offense of maintaining an opium dive or resort, as defined and penalized under Article 190 of the Revised Penal Code, is not included in nor does it necessarily include the crime of visiting said dive or resort, under Article 191 of the same Code. In the first place, the phrase "not being included in the provisions of the next preceding article" in Article 191 is highly indicative of an intention on the part of the legislators to treat the crime of maintaining an opium dive as distinct from the crime of visiting said joint or dive. In the second place, and the more substantial and compelling reason, it is not legally feasible to fuse an identity of elements of the two crimes. True, that one or two elements may be found common in both crimes, but fundamentally, they are different. It cannot be said that all maintainers of opium joints are visitors thereof, for an opium dive can well be maintained thru the instrumentality of an agent. Much less can it be said that all visitors of opium joints are maintainers thereof. While it is possible that some maintainers of opium dens may be at the same time visitors thereof, and *vice-versa,* such possibility absolutely discounts necessary inclusion of one in the other for which reason the rule laid down in Section 4, Rule 116 of the Rules of Court, of convicting an accused of the "the offense proved included in that which is charged, or of the offense charged in that which is proved cannot be applied. PEOPLE *v.* So, (CA) Nos. 25774-R & 25775-R, March 9, 1960.

CRIMINAL LAW — OTHER SIMILAR COERCIONS — PAYMENT OF THE RENUMERATION OF AN EMPLOYEE FIXED AND AGREED UPON ON TIME AND NOT ON COMMISSION, PIECEWORK OR TASK BASIS CANNOT BE MADE TO DEPEND UPON THE SUCCESS OR FAILURE OF THE ENTERPRISE IN WHICH HE IS EMPLOYED. — Enrique Basea was charged with having failed to pay the the salary of his employee, Ariston Cabasares. Accused, Basea, contended that his failure to pay was not motivated by deceit or fraud but brought about by force majeure since he sustained losses in the fishing venture in question. The lower court convicted him for violating C.A. 303 in relation to Art. 288 of the Revised Penal Code. *Held,* Payment of the remuneration of an employee duly fixed and agreed upon on time and not on commission, piecework or task basis cannot be made to depend upon the success or failure of the enterprise in which he is employed. PEOPLE *v.* BASEA, No. 15588-R, March 8, 1960.

CRIMINAL LAW — PENALTIES — WHEN THE PENALTY IMPOSED IS FINE AND PUBLIC CENSURE SUBSIDIARY IMPRISONMENT CANNOT BE IMPOSED IN CASE OF INSOLVENCY OF THE ACCUSED. — The accused was the mayor of Naguilan, Isabela. He inflicted physical injuries upon Eugenio Ra-

mos. He was tried and convicted by the justice of the peace court of Naguilan and again convicted in the court of first instance of Isabela for slight physical injuries and sentenced to pay a fine of ₱30.00 and public censure, with subsidiary imprisonment in case of insolvency. The accused appealed this decision. *Held,* that subsidiary imprisonment may not be imposed upon the appellant herein. This case does not come within the purview of Article 39, par. 2, Revised Penal Code. The imposition of subsidiary imprisonment within the limits therein set forth is proper when the penalty imposed "be only a fine." Our industry does not yield a penal statute which clearly states that where the penalty is a fine and public censure, subsidiary imprisonment may be imposed. PEOPLE *v.* GARCIA, (CA) No. 2674-A, February 29, 1960.

CRIMINAL LAW — R.A. No. 145 — FOR CONVICTION UNDER R.A. No. 145, IT IS ENOUGH THAT ONE SOLICITS, COLLECTS, AND RECEIVES AN AMOUNT EXCEEDING ₱20 AS COMMISSION IN CONSIDERATION OF A PROMISED ASSISTANCE. — The accused Domalaon was charged with the violation of R.A. No. 145 for having allegedly assisted the complainant, Epetacia Esmeria Vda. de Fombuena, in the prosecution of her claim for compensation and other benefits resulting from the death of her husband Magno Fombuena in Bataan in 1942, as a member of the United States Armed Forces in the Far East (USAFFE), and for having solicited and received from her as compensation the sum of ₱900.00 out of ₱3,057.00 awarded to her by the Government of the United States, said compensation or fee being in excess of the amount fixed by law. The accused, having been convicted and sentenced accordingly by the lower court, appealed, contending that there was an absence of evidence that he actually rendered assistance in the preparation, presentation and prosecution of the complainant's claim with the Veteran's Administration. *Held,* that the contention is untenable. For the purpose of R.A. No. 145, it is enough that one solicits, collects and receives an amount exceeding ₱20.00 as commission in consideration of a promised assistance. The kind or extent of the assistance is immaterial, and if this is imaginary, there is stronger reason to apply the full force of the law. PEOPLE *v.* DOMALAON, (CA) No. 21585-R, February 29, 1960.

CRIMINAL LAW — THEFT — IN THEFT OF LARGE CATTLE, EVIDENCE OF SUBSEQUENT DISPOSAL IS NOT NECESSARY FOR CONVICTION. — Marasigan was accused of theft of two carabaos owned by Jose Montalbo and Crispulo de Guzman. Evidence showed that the accused was seen in possession of the carabaos; that at about 5:00 P.M. of August 17, 1957, the accused was riding a carabao and pulling another behind him in a marshy place. The witness Eligio Maala testified that he recognized the carabao on which the accused was riding as the one that belonged to Montalbo and the one towed as the one belonging to de Guzman. Accused appealed, after his conviction by the lower court, contending that there was no evidence of

disposal of the said carabaos. *Held,* that the contention is untenable. Having been seen with the stolen carabaos, the appellant is liable under the indictment even if there is no evidence that he has subsequently disposed of them. The consummation of this class of crime takes place upon the voluntary and malicious taking of the property belonging to another which is realized by the material occupation of the thing whereby the thief places it under his control and in such situation as he could dispose of it at once. PEOPLE *v.* MARASIGAN. (CA) No. 26054-R, February 29, 1960.

REMEDIAL LAW — CIVIL PROCEDURE — THE EXEMPTION FROM EXECUTION AS PROVIDED FOR IN SEC. 12 (1), RULE 39 OF THE RULES OF COURT WAS NOT MEANT TO DEFEAT THE SATISFACTION OF A FINAL JUDGMENT. — Defendant-appellant Enriquez defaulted in the payment of the sublease of a parcel of land belonging to the plaintiffs for a period of ten years. In an action brought by the plaintiff, final judgment was entered ordering the defendant to deliver said parcel of land and to pay monthly the rent of ₱300 until the delivery of the land. The salary of the defendant from the Madrigal Shipping Co. was garnished and notwithstanding defendant's claim of exemption from execution, the court ordered him to pay out of his salary of ₱400 the sum of ₱130 monthly to the plaintiffs. *Held,* the exemption from execution as provided for in Sec. 12 (1), Rule 39 of the Rules of Court, was not meant to defeat the execution of a final judgment. When the sole income of a judgment debtor is his salary for his personal services, the courts may in the exercise of sound discretion, pass upon the debtor's expenses to determine what and how much is necessary for the support of the family and require the debtor to readjust his family obligations considering his decent and minimum requirements and the amount due from him. DIAZ and DELENA *v.* ENRIQUEZ *et al.,* No. 24271-R, March 23, 1960.

REMEDIAL LAW — CRIMINAL PROCEDURE — AN ACCUSED CANNOT BE CONVICTED OF AN OFFENSE NOT CHARGED OR NECESSARILY INCLUDED IN THE COMPLAINT OR INFORMATION, EVEN THOUGH THE OFFENSE IS PROVED AT THE TRIAL. — Jose So was among those apprehended by the police authorities in a raid conducted by the latter on April 1, 1952. Jose So was charged with being a maintainer of a resort or dive where opium and its derivatives were used in and upon the human body. The court found no evidence that the accused was the maintainer of the opium joint. Nevertheless, the court convicted him of violation of Article 191 of the Revised Penal Code for visiting an opium den. He appealed. *Held,* that appellant Jose So is acquitted of the charge of violation of Article 190 of the Revised Penal Code for want of evidence, and of his conviction under Article 191 of the same Code for lack of proper charge. The right of everyone accused of a crime to be informed of the nature of the accusation against him is expressly preserved in the Constitution. This right requires that the offense be charged

with clearness and all necessary certainty to apprise the accused of the crime for which he stands charged. It matters not how conclusive and convincing the evidence of guilt may be. An accused person cannot be convicted of any offense, unless it is charged in the complaint or information on which he is tried, or necessarily included therein. To convict him of an offense other than that charged in the complaint or information would be an unauthorized denial of his constitutional right. PEOPLE *v.* So, (CA) Nos. 25774-R & 25775-R, March 9, 1960.

REMEDIAL LAW — CRIMINAL PROCEDURE — ERRONEOUS CONVICTION UNDER A REPEALED STATUTE DOES NOT PREVENT CONVICTION UNDER THE REPEALING STATUTE WHICH PUNISHES THE SAME. — *FACTS*: Enrique Basea was charged and convicted for failure to pay the salary of his employee Ariston Cabasares from June 26, 1952 to October 12, 1952 in violation of Sec. 4, C.A. 303 in relation to Art. 288 of the Revised Penal Code. R.A. 602 repealing C.A. 303 took effect 120 days after April 6, 1951 the date of its approval. *Held,* although we agree that C.A. 303 was repealed by R.A. 602, approved April 6, 1951 and became effective 120 days thereafter, the fact that appellant was erroneously accused and convicted under a statute which had already been repealed and therefore no longer existed at the time the act complained of was committed, does not prevent conviction under the repealing statute which punishes the same act provided the appellant had an opportunity to defend himself against the charge. (PEOPLE *v.* BASEA, No. 15588-R, March 8, 1960.

REMEDIAL LAW — EVIDENCE — ALTHOUGH EVIDENCE OF A PREVIOUS CRIMINAL ACT IS INADMISSIBLE TO PROVE THAT A PERSON PERFORMED THE SAME OR SIMILAR ACT AT ANOTHER TIME, THE SAME EVIDENCE MAY BE RECEIVED TO PROVE SPECIFIC INTENT, NEGLIGENCE OR HABIT. — In the morning of December 17, 1954, Jose del Rosario, three years of age, was hit by a passenger bus driven by Mauro Bulan. The victim sustained a fractured skull and had cerebral hemorrhage which resulted in his death on the same day. An information for homicide thru reckless imprudence was filed against Mauro Bulan. The prosecution claims that the accused is a speed maniac; and it presented evidence consisting in a traffic violation receipt, the license of the accused, and the testimonies of Sgt. Borja who issued the TVR for violation of Sections 52 and 58 of Act No. 3922, as amended, and of Alfredo Bon, the local Motor Vehicles Registrar. The court of first instance convicted the accused and sentenced him accordingly. The accused appealed. The admission by the court of evidence of the accused's previous the testimonies of Sgt. Borja and Bon regarding the appellant's previous criminal act is questioned. *Held,* that the trial court did not err in admitting the testimonies of Sgt. Borja and Bon regarding the appellant's previous apprehensions for overspeeding and other traffic violations. While it is true

true that pursuant to Section 17, Rule 123 of the Rules of Court, evidence of a previous criminal act is not admissible to prove that a person performed the same or similar act at another time, the same evidence may be received to prove a specific intent, negligence or habit. Therefore, the declarations of Borja and Bon and the appellant's license showing his previous apprehensions for speeding, are material, relevant and admissible evidence. As the Supreme Court said in the case of U.S. v. Pineda, 37 Phil. 456, "As a general rule, the evidence of other offenses committed by a defendant is inadmissible. As one exception, however, it is permissible to ascertain the defendant's knowledge and intent and to fix his negligence. If the defendant has on more than one occasion performed similar acts, accidents in good faith are possibly excluded, negligence is intensified and fraudulent intent may even be established. There is no better evidence of negligence than the frequency of accidents." PEOPLE *v.* BULAN, (CA) No. 26324-R, April 13, 1960.

REMEDIAL LAW — EVIDENCE — ANTE-MORTEM DECLARATION IS ADMISSIBLE, BUT IT SHOULD BE TESTED FOR ITS VERACITY IN MANNER IN WHICH THE VERACITY OF THE TESTIMONY OF ANY WITNESS IS TESTED. — On March 4, 1954, Aniceto Fuentes received injuries and he was brought to the clinic of Dr. Delloto. He died at about 12:30 in the morning of March 5, 1954. A while before his death, he gave the following statement: "that at about 3:00 o'clock in the afternoon of March 4, 1954, I passed by the house of Leodegario Dela who was having a blow out. When I passed, Jose Delay went down the house and asked me what my intention was — to fight or not to fight. My answer was that there was nothing bad in my pasing that way and I was then boloed by Jose Delay, and then by Leodegario Dela and Federico Delay." Jose and Federico Delay and Leodegario Dela were accused and convicted of homicide in the CFI of Capiz. Only Fderico and Leodegario appealed. They contended, among other things, that the ante-mortem declaration had no weight whatsoever. *Held,* that the declaration in question is admissible for the same was made in the clinic where he died two hours after his arrival so that it can be presumed that he (the deceased) was then conscious of impending death. In People v. Serrano (58 Phil. 669), it was held that it is not essential to the admissibility of a dying declaration that the declarant had expressly stated that he had lost all hope of recovery; it is sufficient that the circumstances are such as to lead "inevitably to the conclusion that at the time he made the declaration he did not expect to survive the injury resulting in his death." But this declaration should be tested for its veracity in the manner in which the veracity of the testimony of any witness is tested. We find that the statement is one-sided as it refers only to the actual assault on the declarant without allusion to any reason why he was so assaulted. Appellants are hereby acquitted. PEOPLE *v.* DELAY *et al.,* (CA) No. 21622-R, February 27, 1960.

REMEDIAL LAW — SPECIAL PROCEEDINGS — DISBURSEMENT INCIDENTAL TO ADMINISTRATION MAY BE MADE OUT OF ESTATE FUNDS WITHOUT PREVIOUS COURT APPROVAL BUT THE COURT SHOULD THEREAFTER HOLD A FULL HEARING ON THE QUESTION OF WHETHER SUCH WERE PROPER OR IMPROPER. — Consorcia Serrano, administratrix of the intestate estate of her late husband, Ricardo Sanchez, as ordered, submitted to the court an accounting of the estate. After the filing but before the hearing thereof, she received ₱14,964.18 constituting the retirement pay due her husband, out of which she made disbursements without previous court approval. The court upon notice ordered her to raise the whole amount and deposit it with a bank. She filed a motion for ratification of the disbursements but the court instead of hearing the motion ordered her, giving her time, to explain why she should not be dealt with accordingly for failure to deposit said amount with a bank as ordered. She filed a supplemental motion for ratification together with her explanation but the court refused to hear the motion and instead ordered her committed to jail. Hence, the petition for habeas corpus. *Held,* As a rule disbursements may be made out of estate funds only with previous court approval. However, in the very nature of things, certain expenses incidental to administration must be made immediately and it is not always possible to obtain previous court approval for them. The court should hold a full hearing on the question of whether disbursements made without previous court authority were proper or improper, and therafter to decide whether to disapprove them all or to approve some and disapprove others. If all or some of them are disapproved the court would be entitled to require the administratrix to make the corresponding reimbursements and upon her failure to do so, to find her guilty of contempt and/or issue a writ of execution against her bond. Not having followed this proceedure, the order is without authority of law. The petition for habeas corpus is granted. IN THE MATTER OF THE PETITION FOR THE HABEAS CORPUS OF SERRANO; SANCHEZ and SANCHEZ, No. 27239-R. March 15, 1960.