

THE DIRECTOR OF PRISONS, PETITIONER, VS. THE JUDGE OF FIRST INSTANCE OF CAVITE, RESPONDENT.

G.R. No. 10543. January 23, 1915

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PER CURIAM:

The judge of the Court of First of Instance of Cavite fixed a definite date, the 12th of the present month of January, 1915, for the execution of a capital sentence, and then upon petition of one of the parties the same judge of first instance of the said district postponed or deferred for several days the date so fixed, by setting another definite date, the 27th of this same month. The Attorney-General applied to this Supreme Court for a writ of certiorari, alleging that the lower court had exceeded its jurisdiction, because after it had once performed its ministerial duty of fixing the date for execution of the sentence its jurisdiction had terminated and nothing done by it thereafter could have any validity. The respondent judge filed a demurrer to the Attorney-General's petition.

At the hearing on the demurrer the parties agreed that the facts had already been reviewed by this Supreme Court, as well as the question of law involved in the demurrer, and really the only fact is that the defendants were seeking a pardon or commutation of the capital penalty; and as the 12th day of January, 1915, the date on which the penalty was to be inflicted, was approaching, they requested the lower court to set another date or to grant the extension which the court ordered in deciding the motion. In view of this agreement of the parties it is unnecessary to call for the transcript of the record to be reviewed by this Supreme Court in accordance with the provisions of section 217 of Act No. 190, or to try the case and hear the parties in order to pass upon the application for the writ of certiorari, that is, whether the lower court exceeded its authority in the exercise of its powers, as is provided in section 220. In fact, even though the record had been called for and the application transmitted to the respondent judge, the present status of the case would have been attained whether he had filed the present demurrer or had answered. Hence we consider that there has been fully submitted to us the case of whether or not the lower court exceeded its authority in fixing another subsequent date for carrying out the capital sentence in question, already set by it for the 12th of the present month.

The question, therefore, is this: Did the court have jurisdiction, after fixing a date for the execution of its sentence, to set another subsequent date by deferring it or by fixing an interval of time for its fulfillment?

It is contended that after the court has once issued its order of execution it has performed its final act of jurisdiction and then has nothing more to do with the case; that the convict has then passed to the hands of the executive, the only authority thenceforward competent to perform the acts necessary for putting the penalty into effect; in other words, that judicial authority over the convict has terminated and that he has passed completely into the control of the executive. Hence it is inferred that if there were any cause or reason for putting off the execution, the application for that purpose could not be addressed to the court that ordered the execution but to the executive authority charged with carrying it out. In this way, it is further contended, the independence of each authority is maintained, and interference with one by another is prevented. Also, the immutability of the res judicata is assured by not permitting the court that has already said its final word in the case to add any further word whereby it may substantially alter or change its decision therein, which is what would happen by changing

or altering the execution date already fixed.

This Supreme Court has repeatedly declared in various decisions, which constitute jurisprudence on the subject, that in criminal cases, after the sentence has been pronounced and the period for reopening the same has elapsed, the court can not change or alter its judgment, as its jurisdiction has terminated, *functus est officio suo*, according to the classical phrase. When in cases of appeal or review the cause has been returned thereto for execution, in the event that the judgment has been affirmed, it performs a ministerial duty in issuing the proper order. But it does not follow from this cessation of functions on the part of the court with reference to the ending of the cause that the judicial authority terminates by having then passed completely to the executive. The particulars of the execution itself, which are certainly not always included in the judgment and writ of execution, in any event are absolutely under the control of the judicial authority, while the executive has no power over the person of the convict except to provide for carrying out the penalty and to pardon.

Getting down to the solution of the question in the case at bar, which is that of execution of a capital sentence, it must be accepted as a hypothesis that postponement of the date can be requested. There can be no dispute on this point. It is a well-known principle that, notwithstanding the order of execution and the executory nature thereof on the date set or at the proper time, the date therefor can be postponed, even in sentences of death. Under the common law this postponement can be ordered in three ways: (1) By command of the King; (2) by discretion (*arbitrio*) of the court; and (3) by mandate of the law. It is sufficient to state this principle of the common law to render impossible the assertion in absolute terms that after the convict has once been placed in jail the trial court can not reopen the case to investigate the facts that show the need for postponement. If one of the ways is by direction of the court, it is acknowledged that even after the date of the execution has been fixed, and notwithstanding the general rule that after the Court of First Instance has performed its ministerial duty of ordering the execution, *functus est officio suo*, and its part is ended, if however a circumstance arises that ought to delay the execution, there is an imperative duty to investigate the emergency and to order a postponement. Then the question arises as to whom the application for postponing the execution ought to be addressed while the circumstance is under investigation and as to who has jurisdiction to make the investigation.

Here are some possible instances that immediately present themselves, of postponement by mandatory provisions of the law. Commentators point out that of the execution of a woman who is pregnant. For example, the 12th of the present month of January is fixed for the execution of the capital penalty upon such a woman, and on the 11th, one day previous, a motion is presented to postpone the execution during investigation of the circumstance as to whether she is really pregnant. The law prescribes that the death penalty shall not be inflicted upon a pregnant woman, nor may the sentence wherein it is imposed be communicated to her until forty days after delivery (Penal Code, art. 104). If on the 11th of January it were clearly shown by sufficient evidence that the woman was pregnant, the law's precept must be obeyed; the capital penalty must not be inflicted, nor may the sentence even be communicated to her until forty days after her delivery. Were the penalty to be executed on the 12th of January on the ground that this date is unalterable on account of lack of jurisdiction in the trial court, the law's prohibition would be plainly violated and the consequent responsibility unavoidably incurred. Postponement, alteration of the date, or fixing an interval of time for investigating the emergency and carrying out the provision of the law, should the circumstance be proven, is absolutely necessary. No one can doubt that jurisdiction for investigating such a circumstance can not be other than judicial, so that a proper and decisive finding may be made on the point of law. The motion on this particular incident of the execution must necessarily be presented to the court, for to no body can it imply a change or alteration of the judgment, because the judgment remains in force and will be executed, as *res judicata*, and finished; it would not be a thing decided and finished if it were to have been executed on some particular date, since this is not a part of the judgment, for neither the judgment of the lower court nor the affirmation of the Supreme Court makes any mention of the date of execution. And if it did, for that

very reason the courts must be applied to for securing compliance with this article 104 of the Penal Code. So it is that it is always the courts to which application must be made for postponement of the execution, for deferring the time fixed therefor, because the law so directs, and the court is, beyond any doubt at all, the only authority competent to apply this provision of the Penal Code.

Another instance where the law intervenes is that where insanity develops in the convict before the date fixed for the execution. The same reasons as set forth for the preceding instance hold good in this one, wherein it is the Penal Code itself which positively determines the function of the trial court to pass upon and decide the matter. (Penal Code, art. 8, par. 2.)

An instance of the discretionary power (*arbitrio*) of the court that may be pointed out is that of identification of the convict to be executed. A capital sentence has been passed upon Pedro Fernandez, and one Pedro Fernandez has been a prisoner at the disposition of the court wherein all the proceedings in the case have been had; but before the date fixed for the execution it has been discovered on sufficient evidence that the prisoner Pedro Fernandez who is to be executed is not the Pedro Fernandez of the complaint in the case and of the judgment; and as the judgment cannot be executed upon any but the real culprit the execution must be postponed in order not to incur the risk, the inhumanity, and the iniquity of hanging an innocent person. It is an obligatory case of deferring or postponing the execution, and no one can doubt that it is the trial court, and not the executive authority, which has power to make the proper finding on the identity put in question, and therefore to it must be presented the application to postpone the execution for the purpose of investigating such emergency.

In these and analogous cases that may occur, a genuine point of law, and not of administration, presents itself, an incidental question of exact and strict law, of indisputable judicial character, which necessarily has to be inherent in the principal question decided, wherefore, the court, having jurisdiction over the principal question, must have jurisdiction over the accessory.

Now an instance is presented, in the case at bar, which is neither one of justice nor strictly of law. The parties have submitted for our decision as a stipulated fact that the reason for the motion presented to the respondent judge for ordering the postponement he decreed was the need of allowing time for action on the petition for pardon or commutation presented to the Governor-General, or, briefly, an act of clemency. This is an instance of postponement by command of the King under the common law.

The whole question now resolves itself into these definite terms: To whom should have been presented this application for postponement of the execution of the capital sentence fixed by the respondent judge for the 12th day of January, 1915? It is the most genuine instance of a reprieve—the postponement of a sentence of death. Webster defines the word reprieve as "the temporary suspension of the execution of a sentence, especially of a sentence of death," and there are not lacking those who maintain that this word ought to be applied only to postponement of a sentence of death.

In order to correct or prevent misconceptions some preliminary observations should be made: first, that reprieve, the postponement of execution of the judgment, is not a suspension of the judgment itself, the distinction being that the postponement merely puts off or defers the execution of the judgment to a certain day, while suspension of the judgment is for an indefinite time (*Carnal vs. People*, 1 N. Y., Parker Cr. R., 262); second, that postponement of execution of the judgment does not in any way affect the executory nature thereof, and it will be carried out on the day to which it has been set forward. What is done is to defer or postpone the execution.

In resolving the question we decide that there can be no doubt that the Governor-General, who has the power to pardon the convict or commute the penalty imposed upon him, has necessarily and as a consequence the power to defer or postpone the execution of the sentence, in order to enable him to consider the petition presented to him

and to exercise in due form such a sovereign prerogative; and it is clear that to him can be addressed the application for postponement of the date of execution fixed by the court in order that he may pass upon the petition which he has under consideration. But must the application for reprieve or postponement necessarily be presented to the Governor-General, along with the petition for pardon or commutation of the penalty, as the only one who has authority in such case? This we do not find to be determined by any provision, while the contrary is laid down as the principle in standard text books. The action of the respondent judge may have been guided by the principle that both fixing and postponement of a day for the execution of a convicted criminal is, under the common law, a judicial power and cannot be exercised by a governor unless he be expressly authorized by the Constitution. He may also have been guided by the principle that in the common law the power to postpone the execution, to reprieve, is vested in the courts as the agents of the King, who is regarded as the true source of justice and to whom appeals for administering it are not made in ordinary cases but only in those of extreme necessity. (State vs. Hawk, 47 W Va., 434; 34 S. E., 918.)

Finally, a consideration that decides the question involved in the present certiorari proceedings is the principle, well authenticated, that in the common law a reprieve or postponement can be granted by either one or the other, either by the King under his pardoning power or by the court; and that every court which has the power to order an execution has also the power to order its postponement. (Clifford vs. Heller, 63 N. J. L., 105; 42 Atl., 155; 57 L. R. A., 312.)

Only by demonstrating that all these principles are incorrect, and the only correct one is that the power to postpone the execution rests exclusively with the Governor-General and that the trial court cannot exercise it, can it be concluded that the respondent judge has exceeded his authority in the exercise of his jurisdiction and has given cause for the remedy sought. As this has not been demonstrated, his action appears to be lawful.

There is no ground for annulling the order of the Court of First Instance of Cavite sought to be reviewed in the present certiorari proceedings; without special finding as to costs. A copy of this final judgment will be transmitted to said court. So ordered.

Arellano, C. J., Torres and Araullo, JJ.

CONCURRING

CARSON, J.,

The object sought to be attained by the Attorney-General by the institution of these certiorari proceedings is to have this court declare null, void, and without effect an order entered in the Court of First Instance of Cavite, suspending the execution of a death penalty from January 12, 1915, the day originally set for the execution by a former order of that court, until January 27, 1915, in order to give the convicts a suitable opportunity to make application for executive clemency.

It is admitted that this Court should not issue the writ unless it appears, either that the judge of the court below had no jurisdiction or legal power to issue such suspending order, or that in doing so he abused the discretion conferred upon him in that regard. It is not contended, nor can it be successfully maintained, that if the judge below had legal power to suspend the execution there was any abuse in his discretion in suspending it for fifteen days. It is admitted that if the trial judge had any jurisdiction in the premises, the time allowed was neither excessive nor unreasonable. It is clear therefore that the only real question involved in these proceedings is whether a judge of a Court of First Instance, charged with the execution of a death sentence, has legal power, after the judgment imposing sentence has become final, and after he has set a day for its execution, to suspend the

execution of the sentence temporarily (for a short, definite and reasonable period), in order to give to the accused a suitable opportunity to submit an application for executive clemency. It is contended (in the language of the dissenting opinion) that "the moment a sentence in a criminal case becomes final, the judicial department has lost its jurisdiction over the person of the defendant;" and that "a distinction must be made between suspensions before the sentence becomes final, and suspensions after the sentence becomes final. The former is within the jurisdiction of the court. The latter suspension is a reprieve or a species of pardon which the courts cannot exercise."

To my mind the reasoning of the prevailing opinion, prepared by Chief Justice Arellano, satisfactorily establishes the power of the courts to suspend temporarily the execution of a capital penalty in order to secure and conserve any legal right asserted on behalf of a prisoner held under sentence of death, based upon grounds arising after judgment has become final, the adjudication of which does not challenge the validity of the judgment convicting and sentencing the convict, or involve a review or reconsideration of the proceedings upon which it rests. Among such grounds are the insanity or pregnancy of the convict, the non-identity of the prisoner with the person actually convicted and sentenced, the lack of suitable opportunity to be heard on an application for executive clemency, and the like. This separate opinion is, therefore, intended merely as an amplification of the prevailing opinion. In it I shall discuss more especially the contention of the Attorney-General against the existence of such power in the courts, based on the assumption that its exercise involves an invasion of executive authority; and I shall endeavor also to set forth at greater length the statutory provisions and the citations from common and civil law authorities which seem to me leave no room for any real question as to the existence of such powers in the Courts of First Instance.

Having stated affirmatively just what I conceive to be the real issue involved in these proceedings, perhaps it will make for clearness to set forth also at the outset and as summarily as may be, some cognate or closely related questions which, although not submitted for adjudication, have been injected into the discussion and have tended to create some confusion and uncertainty in the citation of authority and the reasoning of counsel upon the real issue in the case at bar.

- There is no question here of the power of the courts to grant indefinite, permanent or conditional suspensions of the execution of sentences pronounced in criminal cases. All are agreed that in the absence of statutory authority, it does not lie within the power of the courts to grant such suspensions. The allowance of a permanent, indefinite or conditional suspension of execution of a sentence lawfully imposed is in effect a grant of a pardon more or less absolute. The exercise of such a power is not expressly conferred upon the courts in this jurisdiction, nor is it inherent in the judicial function. The right of the courts to grant such suspensions of sentence has been quite uniformly denied, except in a few States wherein it is held that power to grant indefinite suspensions of prison sentences has been conferred upon the courts by constitutional or legislative enactment; and it is worthy of note that most, if not all the citations of authority to which our attention has been directed, wherein the authority of the courts to suspend execution of sentences has been denied, are cases wherein attempts were made to grant indefinite, conditional, or permanent suspensions.

- There is no question here of an attempt to modify, alter or amend a final judgment convicting and sentencing the defendant in a criminal case. We have frequently decided, in line with the uniform doctrine of the courts generally, that after a judgment imposing sentence in a criminal case has become final, there is no power in the courts to alter, modify or amend it. Mistakes of law or fact cannot then be corrected by the courts, and if by the production of newly discovered evidence, or otherwise, a doubt can be raised as to whether the accused was justly convicted, recourse for relief must be had to the pardoning power of the Chief Executive. But the temporary suspension of an order fixing the time for the execution of a capital sentence, in order to secure a legal right of the

prisoner arising after the imposition of sentence, in no wise tends to alter, modify or amend the judgment convicting the accused and imposing sentence upon him.

- This is not a question of the suspension of the execution of a prison sentence. It is a suspension of the irremediable execution of a capital penalty. In the very nature of things, a clear distinction exists, and has been universally recognized by the courts, in the proceedings looking to the enforcement of execution of the different classes of penalties prescribed by law. As we shall presently see, the enforcement of the execution of capital penalties is vested wholly and exclusively in the Courts of First Instance, acting through their proper officers, the judges and the sheriffs; so that the person of the convict is never turned over to the executive department of the Government for execution of the sentence. The contrary rule appears to prevail in the enforcement of the execution of prison sentences. Care, therefore, must be exercised to distinguish the reasoning of judicial and textbook authorities in treating of suspensions of execution of the different classes of penalties. There are some that deny the applicability to prison sentences of the common law rule referred to by the Chief Justice, but none has been cited, and a diligent search has failed to disclose any case, denying the existence of that rule in relation to the suspension of the execution of death penalties.

- We are not now considering the suspension of execution of a part of a sentence. Some questions have arisen as to the power of the courts to suspend a sentence in part without suspending it in its entirety. Such questions have no place in this discussion.

- We are not dealing with the exercise of a power expressly regulated or controlled by statutory enactment. In a few States attempts have been made by legislative enactment to restrict or control the exercise by the courts of power to suspend the execution of sentences, either temporarily or permanently; but we are not here concerned with the discussions which have arisen under such statutory enactments, since no legislation of this kind has been adopted in these Islands.

- We are not here concerned with any question as to the abuse of discretion by the judge below in the exercise of the power to suspend. Should the judge of a Court of First Instance abuse his discretion in this regard by repeated suspensions without reasonable grounds therefore, or by suspending the time fixed for the execution to so distant a date as to amount to an indefinite suspension, it can hardly be doubted that this court has the power, in appropriate proceedings, to compel him to perform the duty imposed upon him, and to proceed to the execution of the sentence without unnecessary or unreasonable delay. But no abuse of discretion of the trial judge is insisted upon at this time; and, in any event, arguments based on the possibility of abuse of discretion have no proper place in an inquiry as to the existence of legal power in a particular case in the judge of a court of general jurisdiction duly appointed by the Governor-General, by and with the consent of the Commission.

- We are not dealing with a power to reprieve in the sense in which that word is used in connection with the exercise of executive clemency by the authority in whose hands is vested the pardoning power. True, there is little or no difference in effect between a temporary suspension of execution of a capital sentence granted by the Chief Executive and such a suspension when granted by the courts. Both have the effect of staying the execution without impairing or affecting the judgment convicting and sentencing the convict. Both are referred to by the law writers as reprieves or respites. (Bishop's New Criminal Procedure, vol. II, par. 1299.) But the sources and origin of the power as exercised by the courts and the Chief Executive, are wholly distinct, as also are the grounds upon which it is exercised by the different departments of the government. As an incident to the pardoning power, reprieves are granted as an act of grace, and like pardons may be granted in the arbitrary discretion of the Chief Executive, without assigning and indeed without the existence of any special reason therefor. On the other hand, suspensions of executions of capital penalties, when granted by the courts, although sometimes called respites or reprieves, are in truth no more than stays of execution, which should only be granted for cause and in the exercise

of a sound judicial discretion, the power of the courts in this regard being derived from the inherent necessity for its exercise in order to secure some legal right of the prisoner arising after judgment has become final.

* * * * *

No one has ventured to question the power of judges of the Courts of First Instance, under the system of criminal procedure in force in these Islands prior to the transfer of sovereignty to the United States, to issue the necessary autos (orders) for the temporary suspension of the execution of death sentences. Under the Spanish law of procedure in criminal cases, there could be no doubt as to the power of those judges to grant temporary suspensions of executions of capital sentences, not merely to secure the legal rights of the convict arising after judgment imposing sentence has become final, but also in any case wherein a suspension was deemed necessary to secure the orderly and decorous course of the proceedings.

That such power existed becomes manifest from the most cursory examination of the procedure marked out by Spanish law for the execution of capital sentences. It appears by necessary implication from the provisions of articles 949 to 959 [1] of the "Enjuiciamiento Criminal" and the annotations to those articles in the "Compilaci6n Refor mada" by the author, Hermenegildo Maria Ruiz y Rodriguez; and it may fairly be inferred from the terms of the royal decrees communicated to the captains-general of Cuba, Porto Rico, and the Philippines on June 4, 1849,[2] and July 8, 1863. Indeed, as indicative of the powers and duties of the courts under the former law, I need only refer specifically to the provisions of two of the above-mentioned articles, 956 and 957, which prescribed that the Court of First Instance of the province wherein the execution took place should open session and continue sitting from the moment the convict left the gaol, in which he was detained, on his way to the place of execution,, until it had received the proper official report of his execution; and that the secretary of the court and the alguacil (sheriff), commissioned for that purpose, should proceed with the convict to the place of execution.

In like manner the power of the courts in this regard may fairly be inferred from those provisions of Spanish substantive law which clearly recognized the existence of legal rights to a suspension of an order for the execution of a death penalty, which might arise after the sentencia (sentence) had become final. Thus article 104 of the Penal Code prohibits the execution of a pregnant woman in express terms. So also, the Spanish law, like the common law of England, forbade the execution of an insane person. And, of course, it had in contemplation a legal remedy for one held a prisoner under sentence of death, claiming his non identity with the accused who had been actually tried and sentenced, a claim which has sometimes been made in cases of escapes and recaptures of convicts held under sentence of death. (U. S. vs. Santos, 18 Phil. Rep., 66.)

My Filipino associates, learned in the law formerly in force in these Islands, assure me that the power of the judge of the Court of First Instance to suspend the execution of a sentence of death in such cases was so clearly implied in the procedural and substantive law that a question as to his jurisdiction could hardly have arisen. Mr. Justice Torres tells me of a case which came under his personal observation during his service with the audiencia of Cebu. It appears that sentence of death in a case arising in Mindanao having been affirmed by the audiencia of Cebu and the record having been remanded to the judge of the Court of First Instance who imposed the sentence, and the date having been set for execution, some question arose as to whether the sentence could be executed under the conditions then existing. Confronted by the law of necessity, "the great master of things," the trial judge in the exercise of his sound judicial discretion suspended the order fixing the date of the execution for three days, after which the penalty was duly enforced. Thereafter the trial judge, in compliance with the rules of procedure laid down in such cases, officially reported his action to the audiencia, which ordered the report filed with its approval, although, due to the lack of prompt means of communication, this official report was received long after the date originally set for the execution, the date of the order suspending the execution, and the date when the

execution actually took place. It must be remembered that in former times the death penalty was usually inflicted as near as practicable to the spot where the crime was committed, and often in remote provinces cut off from communication with either the Chief Executive or the appellate court by days and even weeks of travel. Hence, in the very nature of things, it was necessary to confer upon the local judges charged with the execution of capital penalties such powers as might be necessary to secure the legal rights of prisoners held under sentence of death, and to make certain the orderly and decorous execution of the solemn judgments of the courts imposing such sentences.

Except in so far as it is modified by the provisions of Acts Nos. 451 and 1577 of the Philippine Commission, the law touching the execution of death sentences remains unchanged since the American occupation; unless it be held that it has been repealed in whole or in part, by necessary implication, as a result of organic changes in the principles of government incident to the assertion of American sovereignty over the Islands, or as a result of the adoption of a modified system of procedure in criminal cases, modelled on American and English precedents and set forth in General Orders, No. 58, which, however, contains no provisions expressly dealing with the questions now under consideration.

Let us first examine the express amendments of Spanish law in this regard as found in Acts Nos. 451 and 1577, the pertinent provisions of which are as follows.

Act No. 451, enacted September 2, 1902:

"SECTION 1. The use of the garrote as an instrument for the execution of criminals hereafter condemned to death is hereby abolished, except as hereinafter provided.

"SEC. 2. All persons who shall hereafter be finally sentenced to incur the death penalty, except as hereinafter provided, shall be sentenced to be executed by being hung by the neck until dead, and shall be so executed. The execution shall take place at the time and place and by the persons prescribed by the existing law or by such law as may be hereafter enacted.

"SEC. 3. This Act shall not apply to pending prosecutions, nor to prosecutions hereafter instituted for offenses heretofore committed, punishment for which is the death penalty. As to all prosecutions in this section named, the method of execution shall be such as is provided by the existing Spanish law."

Act No. 1577, enacted December 18, 1906:

"SECTION 1. Hereafter the execution of all criminals finally sentenced to incur the death penalty shall take place inside the walls of Bilibid prison in the city of Manila, and within an inclosure to be erected or arranged for that purpose, if none suitable exists, under the direction of the Director of Prisons, which inclosure shall be higher than the gallows and be so constructed as to exclude entirely the view of persons outside. For the purpose of carrying into effect all such executions of the death sentence the Director of Prisons shall perform the duties prescribed by existing law for sheriffs of the Courts of First Instance; the order of execution shall be directed to him instead of to the sheriff of the court, and he shall return to the court the order of execution, duly certifying thereon that he has complied therewith in the manner prescribed by law for sheriffs of the courts. Hereafter it shall not be necessary for the clerk of the Court of First Instance to witness the execution, nor to certify said act to the court. Such executions shall be conducted by the persons prescribed by existing law for the conducting of executions at said institution or by such law as may be hereafter enacted."

"SEC. 3. All provisions of the Spanish Penal Code, of Act Numbered Four hundred and fifty-one of the Philippine Commission, and of any other statute, rule, regulation, or order in conflict or inconsistent with the provisions of this Act are hereby repealed: Provided, That the terms of this Act shall not apply to the Moro Province, in which province the laws in force with respect to executions at the time of the passage of this Act shall continue in full force and effect."

It will readily be seen that these statutes leave in full force and effect the "existing law" touching the execution of death penalties, save only in so far as they are "in conflict or inconsistent" therewith. There is nothing in either Act in conflict or inconsistent with the provisions of Spanish law giving to the judges of the Courts of First Instance charged with the execution of death penalties discretionary control over the proceedings, at least to the extent necessary to secure the legal rights of prisoners held under sentence of death, as above set forth. On the contrary, the law expressly recognizes his jurisdiction in the premises. And it will be observed that it places the exclusive control of the person of the accused and of the execution of the death penalty in the hands of the judge of the court and his ministerial officer, the sheriff. "For the purpose of carrying into effect" the execution of the death penalty the Director of Prisons performs "the duties prescribed by law for sheriffs of Courts of First Instance." He acts exclusively upon the order of the court, and his return "certifying compliance therewith in the manner prescribed by law for sheriffs of the courts" is made to the court itself. Neither the person of the prisoner nor the conduct of the proceedings is turned over to the executive authorities as such, so that the execution of a death sentence may legally take place wholly without their knowledge or intervention.

Having examined the express provisions of law as found in the statute books, and having glanced at the practice and procedure in force for more than half a century (at least since the year 1849, the date of the above mentioned Royal Decree); and not having found anything therein which appears to sustain the Attorney-General's contentions as to a lack of legal power in the respondent judge, I come now to consider those contentions which rest upon the theory of the repeal, by necessary implication, of any provisions of Spanish procedural law conferring such powers on the courts.

It is said that the exercise of such power by the courts would amount to an invasion of the pardoning power of the Chief Executive under American sovereignty; and further, that it would be in direct conflict with the well recognized principles of practice and procedure in the courts of the United States and England, upon which the present system of criminal procedure in these Islands is modeled.

These contentions may well be considered together, since the reasoning and citation of authority for or against one proposition will, speaking generally, serve a like purpose as to the other.

I confess I am wholly unable to comprehend an argument which inveighs against the concentration of the power of government in one hand, whereby the "common people" are "governed by the whim or caprice of one man;" which lauds the system whereby, under prescribed law, the powers of government are "taken from the hands of one man and distributed into separate and distinct departments;" which deprecates the invasion by one department of the government of the functions of the other; which deplores the "days in the Philippines" when "one man made the law, interpreted the law and enforced the law;" which reflects upon the former system of government for its alleged failure to maintain a strict line of demarcation between the judicial and administrative functions of the government; and concludes by proposing to take the jurisdiction and legal power to adjudicate legal rights asserted by a prisoner and recognized in the substantive law of the land out of the hands of the courts, who were clothed with such jurisdiction under the Spanish law, and to vest the exercise of these peculiarly judicial functions in the Chief Executive as a matter of mere grace or executive clemency.

To support such a contention by the assertion that the courts "have no monopoly over the fountains of justice," in the exercise of his powers to extend executive clemency by the grant of pardons, will be any less likely than the courts themselves to do justice and to adjudicate righteously the prisoner's claim of a legal right, is, as it seems to me, to deny the very premises upon which those who have contended for a strict, separation of the functions of government into separate departments have always rested their contentions.

Whatever defects may be attributed to the Spanish system of procedural law in force in these Islands at the date of

the American occupation, I doubt much that there is any just ground for criticism on the ground of a failure to make due provision for the strict demarcation of the line marking the separation of the judicial and administrative branches of the government. And however this may be, it is certain that the former law clearly recognized the distinction between the functions of the two departments in relation to claims of right on behalf of even the most hardened criminal convicted of the commission of a capital offense, limiting the powers of the executive to the exercise of acts of grace and clemency; and prescribing the duty of the courts to adjudicate and determine all questions of legal right which might properly arise in the course of the trial, conviction and execution of the accused.

I think I have already demonstrated the lack of foundation, under both Spanish and American statute law, of the contentions of the Attorney-General, in so far as they are based upon the assumptions (again making use of the language of the dissenting opinion) that after final judgment in a capital case, "its execution has passed into the executive department of the Government," and that, "the moment a sentence in a criminal case becomes final, the judicial department has lost its control over the person of the defendant." I shall, therefore, content myself on this branch of the argument by a reference to the statutory provisions hereinbefore cited.

The lack of substance in the contentions of the Attorney-General, based on the fear of possible conflicts in the exercise of the power to suspend the execution of capital sentences by both the executive and judicial departments of the Government, must become apparent upon a moment's consideration of the fundamental difference, already indicated, between the nature, origin and mode of exercise of this power by the judiciary and by the Chief Executive. The power of the Chief Executive to grant reprieves is merely an incident of the pardoning power. It is always an act of grace. The Chief Executive never orders the execution of a death sentence. As we have seen, the power so to do is vested exclusively in the courts. His authority in the premises, unless he remits the penalty outright, is limited to the extension of the time which may be fixed for the execution by an order of the court. If thereafter the convict is finally executed, the execution takes place, not by virtue of the order of the Chief Executive extending the time already fixed therefor, but by virtue of the order of the court as extended by him.

No one questions that the pardoning power of the Chief Executive is above and beyond control by the courts, so that no order of the court directing the execution of a death sentence can be enforced so long as it is reprieved, respited or stayed by an appropriate executive order.

On the other hand, since the intervention of the Chief Executive is strictly an act of grace, there can be no ground of complaint on his part, or of conflict with his authority, *Director of Prisons vs. Judge of First Instance of Cavite*, should the courts see fit to extend the time set for the execution beyond the time to which he may have thought proper to respite it. His intervention is not for the purpose of hastening the date of execution. It is purely an act of executive clemency; and while he himself, having once granted a reprieve, may be unwilling to again extend the time set in the court's order, he can have no well founded objection to a respite or extension of the time to which he may have suspended the execution, if granted by the court itself.

It follows that in any case wherein both an executive and judicial suspension of an order fixing the time for the execution of a death penalty have been allowed, there can be no conflict of authority if full force and effect be given to both of the orders suspending the execution, which in that event will take place on the last date to which the time set in the original order is suspended by either executive or judicial respite.

A somewhat extended examination of English and American authorities, both textbook and judicial, has developed nothing which appears to me to support the contentions of the Attorney-General in this regard.

That the power to suspend the execution of sentence, either before or after judgment, belonged to every trial court, as "of common right" seems to have been universally recognized at the common law, at least in relation to capital

cases. (2 Hale P. C, chap. 58, p. 512; 1 Chitty Crim. Law, 1st ed., 617-758; Hawke P. C, Book 2, chap. 51, par. 8; Blackstone, Book 4, chap. 31.)

Thus Blackstone says: "A reprieve, from *reprendre* (to take back), is the withdrawing of a sentence for an interval of time; whereby the execution is suspended."

And in his discussion of judicial reprieves he says: "This may be, first, *ex arbitrio judicis* (at the will of the judge) ; either before or after judgment; as where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offense be within clergy; or sometimes if it be a small felony, or any favorable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their session be finished, and their commission expired; but this rather by common usage, than of strict right."

And again: "Reprieves may also be *ex necessitate legis* (from legal necessity) : as, where a woman is capitally convicted, and pleads her pregnancy; though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered."

And again: "Another cause of regular reprieve is, if the offender becomes non compos between the judgment and the award of execution: for regularly, as was formerly observed, though a man be compos when he commits a capital crime, yet if he becomes non compos after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution: for "*furiosus solo furore punitur*" (a madman is punished by his madness alone), and the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings." (Cooley's Blackstone, 4th ed., Vol. II, pp. 394-5.)

But we are told that the doctrine thus announced by the great common law authorities "is an antiquated, threadbare doctrine" which can have no weight in the disposition of the case now before us.

I think, however, that the bare assertion of that proposition is not sufficient, without citation of abundant authority, to sweep away a doctrine so deeply imbedded in the system of criminal procedure upon which the modern system now in force in England and the United States has its solid foundation; and this especially when it is made for the purpose of denying the existence of legal powers in the courts in these Islands on the ground that their exercise is in conflict with the practice and procedure in the United States. No authority has been cited, either textbook or judicial, which denies the continued existence of the common law doctrine in full force and vigor in American jurisprudence in so far at least as it relates to the powers of the courts to suspend sentences in capital cases. On the contrary, as I shall endeavor to demonstrate, the highest authorities, both textbook and judicial, appear to be in substantial agreement as to the continued existence of such powers in the courts down to the present day.

No writer upon criminal practice and procedure in the United States is entitled to greater deference and respect than Bishop, and perhaps the following citation from the last edition of his work on "Criminal Evidence, Pleading and Practice," published in the year 1896, should be sufficient in itself to sustain my position in this regard.

"Respite—Reprieve.—The law of respite or reprieve appears to apply only to capital sentences. The two terms are nearly synonymous. Either signifies the suspension, for a time, of the execution of a sentence which has been pronounced. Every court 'which,' says Hawkins, 'has power to award an execution,' may grant it of its own sentences. In England, it appears, a reprieve may be ordered by the judges even in vacation; and perhaps the same may be done under the common law of this country. The crown, also, has the power of reprieve in England; and so have our executives, under some, at least, of the constitutions. It is a part of the power of

pardon, and included therein. If a statute requires a respite, it becomes a right in the prisoner." (Bishop's New Criminal Procedure, Vol. II, par. 1299.)

In support of these various propositions, abundant citations of authority, ancient and modern, are to be found in the notes attached to the text.

A great array of cases, dealing with the general subject of the power of the courts to suspend sentences and the execution of sentences, will be found collated in the exhaustive notes to two very recent cases, in the Lawyers Reports Annotated (new series, vol. 33, p. 112, and vol. 39, p. 242). I have examined most, if not all of these cases which are to be found in our library, and I think I have examined all the cases submitted by counsel or in the consultation chamber. I have found none which questions the doctrine laid down by Bishop as to the power of the courts in capital cases. On the contrary, it appears to be recognized as in full force and effect by all the courts which have dealt with the subject, except in so far as it has been modified in a few States by express constitutional or legislative enactment. It would be a mere affectation of learning and research to set out at length the numerous cases on the subject which can readily be found in the above-mentioned reports, and to do so would extend this opinion to an intolerable length. I shall content myself therefore with a few citations bearing directly on the questions now under consideration.

The supreme court of Tennessee, in the case of *Fults vs. State* (34 Tenn. 2 Sneed, 234), in ruling that the courts of that State "have control of criminal cases" after final judgment so far as necessary to suspend the execution thereof, "sufficient reason therefor appearing," observed:

"There are many cases, no doubt, where it is necessary and proper to suspend the execution of the final judgment. For instance, where the prisoner has become non compos between the judgment and the award of execution; or, in order to give room to apply to the executive for a reprieve or pardon: or, in special cases, where the necessity and propriety of such course are rendered evident to the mind of the court. (*Allen vs. State*, Mart. & Y., 297; 4 Bla. Com., 395.)

"In *Allen's* case it was considered that a right to petition the executive for a pardon was a constitutional right, and as the prisoner was convicted of manslaughter, and sentenced to be branded in the hand, under the law then in force, time was allowed him, until the next term, to petition for a pardon."

In dealing with the alleged conflict of powers between the judicial and executive departments of the government, involved in the exercise by the courts of that State of the power to suspend sentences after conviction, the New York Court of Appeals, in the case of *People vs. Court of Sessions of Monroe County*, decided in 1894 (141 N. Y., 288), held as follows:

"The power to suspend sentence and the power to grant reprieves and pardons, as understood when the constitution was adopted are totally distinct and different in their origin and nature. The former was always a part of the judicial power; the latter was always a part of the executive power. The suspension of the sentence simply postpones the judgment of the court temporarily or indefinitely, but the conviction and liability following it, and all civil disabilities, remain and become operative when judgment is rendered. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender. It releases the punishment, and blots out of existence the guilt, so that in the eye of the law, the offender is as innocent as if he had never committed the offense. It removes the penalties and disabilities, and restores to him all his civil rights. It makes him, as it were, a new man, and gives him a new credit and capacity. (*Ex parte Garland*, 71 U. S., 4 Wall., 333, 18 L. ed., 366; *United States vs. Klein*, 80 U. S., 13 Wall., 128, 20 L. ed., 519; *Knote vs. United States*, 95 U. S., 149, 24 L. ed., 442.)

"The framers of the federal and state constitutions were perfectly familiar with the principles governing the power to grant pardons, and it was conferred by these instruments upon the executive with full knowledge of

the law upon the subject, and the words of the constitution were used to express the authority formerly exercised by the English crown, or by its representatives in the colonies. (Ex parte Wells, 59 U. S., 18 How., 307, 15 L. ed., 421.) As this power was understood, it did not comprehend any part of the judicial functions to suspend sentence, and it was never intended that the authority to grant reprieves and pardons should abrogate, or in any degree restrict, the exercise of that power in regard to its own judgments, that criminal courts had so long maintained. The two powers, so distinct and different in their nature and character, were still left separate and distinct, the one to be exercised by the executive, and the other by the judicial, department. We therefore conclude that a statute which, in terms, authorizes courts of criminal jurisdiction to suspend sentence in certain cases after conviction,—a power inherent in such courts at common law, which was understood when the constitution was adopted to be an ordinary judicial function, and which, ever since its adoption, has been exercised by the courts, is a valid exercise of legislative power under the constitution. It does not encroach, in any just sense, upon the powers of the executive, as they have been understood and practiced from the earliest times."

The power of the courts to reprieve a prisoner, after sentence on a capital conviction, was discussed in Miller's Case (9 Cow., N. Y., 730), in which it was held that the court had power to stay the execution in a capital case, notwithstanding the power to grant reprieves and pardons rested with the executive. In that case the court said:

"Far be it from me to call in question the wisdom of placing the power of granting reprieves and pardons in the executive. All that I contend for is, that although he indubitably has the ultimate or superior power, and that there is no power which can prevent him from reprieving, yet that there is nothing in the Constitution annulling the qualified limited power of the judges. Constitutions, like laws, should receive such a construction as will advance the remedy and suppress the mischief. The object of this provision is to enable the executive, in all cases, to prevent injustice. The limited power of the judges is only to remove an obstruction of their own creating, in the way to the mercy seat—a power necessary to enable the executive to exercise his prerogative upon every suitable occasion—a power which has been sanctioned by the experience of our ancestors for ages, and which was the offspring of the imperious dictates of justice and humanity."

The supreme court of Indiana, in the case of Parker vs. State, 1893 (23 L. R. A., 859), solemnly reversed a ruling in a former case (Butler vs. State, 97 Ind., 373), based on the theory of conflict of powers in the executive and judicial departments, to the effect that "Where the constitution confers upon the executive the exclusive power to remit fines and forfeitures, and to grant reprieves, commutations, and pardons, a statute authorizing the supreme court, on an appeal from a judgment of conviction, to suspend sentence of death and to remit forfeitures, is unconstitutional." The doctrine thus announced in the former case was repudiated in the following terms:

"We are aware that a different conclusion was reached by this court in the case of Butler vs. State (97 Ind., 373), but we cannot give our assent to the conclusion reached in that case. The error in that case consists in assuming that the granting of stay of execution by this court in case pending before it is a reprieve within the meaning of section 17, article 5, of the Constitution of the State. A conclusion based upon an erroneous premise is seldom, if ever, correct. In so far as that case conflicts with the conclusion reached here, it is modified."

Citing a number of authorities, the court held that:

"Granting a stay of execution by an appellate court pending an appeal in a capital case is not a reprieve within the meaning of a constitutional provision giving to the governor the power to grant reprieves; and a statute authorizing such stay declares the inherent power of the court, independent of any statutory provision."

In the recent case of State vs. Abbott, decided February 2, 1911 (33 L. R. A., N. S., 112), in which the supreme court of South Carolina denied the power of the trial courts to suspend sentences of imprisonment indefinitely or on good behavior, the court nevertheless said, after citing the common-law rule as stated by Blackstone:

"At common law there was no appeal, the trial court had no power to grant new trials in cases of treason and felony, and the punishments were often by branding or other physical infliction; and hence the temporary suspension of the sentence which would otherwise be fully suffered was necessary, to the end that the convict might not suffer the penalty without having an opportunity to apply for pardon or other relief provided by law. On this principle of implied power arising from necessity, it was held in this state to be within the power of the court to postpone until the next term of the court the imposition and execution of the sentence of burning in the hand, provided by law, so that the convict might apply to the governor for a pardon. (State vs. Frink, 2 Bay, 168.) But the common-law power to suspend sentence has been expressly held in this state to be limited by this principle of necessity, as having application only to cases where but for a suspension, the convict would irretrievably lose some legal right. (State vs. Chitty, 1 Bail. L., 379.)"

In the very recent case of *Fuller vs. Mississippi*, decided January 15, 1912, and reconsidered on a suggestion of error March 11, 1912 (39 L. R. A., 242), wherein execution of a prison sentence had been suspended by the trial court after conviction and after the judgment imposing sentence had become final, the court, while deciding that there is no authority of law in that State for the indefinite suspension of the execution of prison sentences by the trial courts, carefully distinguishes such cases from the cases of judicial respite or reprieve in capital cases mentioned by Chitty and Blackstone, and after an extended discussion of the doctrine of judicial reprieves or respites observes:

"As all of the early cases which have come under our observation, upholding this power of the court, were cases wherein the death penalty was imposed, it may be that the law relative thereto applies only to capital cases. It is unnecessary, however, for us to so hold here, for the reason that the power to suspend the execution of a sentence was never exercised or claimed by the courts at common law, as we have heretofore stated, except when necessary to prevent an abuse of their process, or to prevent irreparable injustice from being done a defendant."

Finally the doctrine supported by numerous citations of authority is thus summed up in 12 Cyc, 790:

"The term 'reprieve' signifies the withdrawing of a sentence for an interval of time, which operates in delay of execution. At the common law, reprieves after judgment were of three kinds: (1) At the pleasure of the crown; (2) in the discretion of the court; and (3) of necessity, which latter was in the case of a woman convict alleging pregnancy when called for sentence. In the United States, unless the terms on which a stay of execution may be granted are definitely fixed by statute, the court may stay execution whenever it considers that under the circumstances of the case such action would be right and proper. Thus a stay may be granted to allow the accused opportunity to apply for a pardon, to procure a writ of error, or to secure a certificate of probable cause from the trial judge."

I might extend the citations indefinitely, but I think I have set out enough to make it clear that there is no such recognition by either textbook or judicial authority in the United States of any peculiarly American rule of practice and procedure, or of any peculiarly American doctrine touching the separation of the various departments of the Government as will sustain the contention that the power reposed in the Courts of First Instance of these Islands to grant temporary judicial reprieves or respites of the execution of death penalties, prior to the American occupation, has been abrogated, annulled or destroyed by necessary implication as a result of the mere fact of change of sovereignty, and the introduction of a system of procedure and practice modeled on English and American precedents.

It will perhaps be objected, that the more recent decisions from which the above citations are taken, were rendered in cases involving the suspension of execution of prison sentences, or dealt with suspensions granted after conviction and before the judgment became final, so that they are not direct authority for the respite of capital penalties after final judgment. To such objection I would reply:

First. That our attention has not been called to any recent cases dealing with the suspension of the execution of capital sentences except one from the State of Oklahoma, in which State it appears that, contrary to the practice prevailing in most of the other States of the Union, the granting of stays of execution of "judgments of death" by the courts, or by any officer of the State other than the governor, is prohibited by express legislative enactment even in cases of appeals. (Opinion of the judges, 3 Okla. Crim. Rep., 315.) There is no express legislation in this jurisdiction conferring exclusive jurisdiction to grant reprieves, respites or stays of execution upon the Chief Executive.

Second. That the ratio decidendi of the cases cited and of the multitude of cases decided by the various courts of the United States wherein it is quite uniformly held that permanent or indefinite suspensions of prison sentences by the courts constitutes an invasion of the prerogatives of the pardoning power of the Chief Executive, while temporary suspensions of such sentences do not constitute such an invasion, whether granted before, or after conviction, or before or after imposition of sentence, clearly discloses that there is no ground for the contention of the Attorney-General based on an alleged invasion of the prerogatives of the Governor-General of the Philippine Islands by the temporary suspension of execution of a death penalty.

Third. That I have selected for citation the two most recent reported cases touching the suspension of execution of sentences imposed in criminal cases (State of South Carolina vs. Abbott (*supra*), decided in 1911, and Fuller vs. State of Mississippi (*supra*), decided in 1912, because in both cases it is clear from the reasoning of the opinions. that the courts of last resort of those ancient commonwealths were of opinion that at least in capital cases the common law doctrine of judicial reprieves is no "antiquated and threadbare doctrine;" and that it was necessary to distinguish the cases then under consideration so as to take them out from the principles on which the common law doctrine rests.

In this connection it may be well also to direct attention to the clear recognition, by most of the American authorities above cited, of a substantial legal right in a convict, under sentence of death, to a suitable opportunity to be heard upon an application for executive clemency. Of course there is no legal right in the convict to the grant of a pardon. It is always an act of grace on the part of the Chief Executive, and rests in his uncontrolled discretion. But the law having reposed the power in him to extend executive clemency in the exercise of his discretion, a convict under penalty of death is clearly entitled to a suitable opportunity to be heard on an application for pardon, Otherwise the power to pardon would be a vain thing, and the right of the Chief Executive to exercise his discretion as to whether clemency should or should not be extended in a particular case might be wholly cut off and destroyed by those charged with the execution of a death penalty.

That this was substantially the doctrine under the Spanish as well as the American law will readily be deduced from the provisions of article 954 of the "Enjuiciamiento Criminal," which forbade the remission by the audiencia to the trial court of its certificate affirming a judgment in a capital case, until and unless the audiencia had first received a formal acknowledgment from the minister of grace and justice of any recommendation to executive clemency which may have been made by the court. A provision which was based upon article 32 of the Provisional Law of June 18, 1870, touching "el ejercicio de la gracia de indulto" (the exercise of the power of pardon) which prescribed that "an application or recommendation for pardon will not have the effect of suspending the execution of a final sentence, save only in cases in which the penalty of death may have been imposed, which penalty will not be executed until an acknowledgment of the application or recommendation for pardon has been received from the government (el gobierno) by the tribunal which pronounced sentence."

These provisions of the old law have, of course, been abrogated under the new system of procedure on appeals, but it must be manifest that the right of a convict under sentence of death to be heard on an application for pardon has not been lost; and that the judge of the Court of First Instance charged with the execution of the sentence is

empowered, in the exercise of a sound judicial discretion, to secure that right to the convict by the temporary suspension of his order to the officer acting as sheriff of his court directing that the execution take place on the day designated therein.

It may be well now to glance at the authorities relied upon in support of the Attorney-General's contentions. I shall limit myself to those cited in the dissenting opinion. There are just seven. Of these only one (*In re Webb*, 89 Wis., 354), was a case involving the question of the suspension of execution of a sentence in a criminal case. All the others, three of which are civil cases, are rulings denying the right of the courts to change, alter or modify in matters of substance, a judgment in a cause, either civil or criminal, which has become final—a doctrine as to which we are all agreed.

Examining the Wisconsin case (*In re Webb*, *supra*), it is to be observed that the reasoning of the opinion in that case was directed against the power of the courts in that State to grant indefinite or permanent suspensions of the execution of prison sentences. The court held, in the language of the syllabus, that "after sentence has been pronounced in a criminal case, the court cannot as a matter of leniency to the defendant, suspend indefinitely its execution;" and this upon the ground that the action of "the court in the premises" was "an attempted exercise of power, not judicial, but vested in the executive." A conclusion with which we are all agreed.

The case from California, *Baldwin vs. Kramer* (2 Cal., 582), as appears on the face of the citation in the dissenting opinion, involved merely the power of a court of that State to set aside its judgments after they became final and to grant a new trial. The four cases cited from our own reports (three of which were civil cases), raised substantially the same question as to the right of the courts to set aside or amend, alter, or modify their own judgments in matters of substance after they have become final; and in these and other cases which might be cited we have steadfastly denied the power of the courts of these Islands so to do. In the case at bar, however, there is no question of setting aside, changing, altering, or modifying the final judgment convicting and sentencing the accused. The temporary stay of execution granted by the respondent judge in no wise affected the validity or the terms of that judgment. The order to the sheriff directing the execution of the judgment was not itself a final judgment in a criminal case. It was merely a ministerial order issued by the judge of the court which was charged with the execution of the final judgment convicting and sentencing the accused, and addressed to the officer acting as his sheriff. It is true that in issuing that order the judge was bound to exercise a sound discretion in fixing the time when the execution should take place, but we held in the case of *U. S. vs. Beecham* (23 Phil. Rep., 258) that:

"It has always been and still is the duty of the trial court, after a judgment imposing the death penalty has become final and the record has been returned to the court for the execution of the sentence, to enter in the record an order fixing the time and place therefor, and directing the proper officer to carry out the sentence of the court.

"After final sentence of death has been rendered, the convict has no right to be present, and there is no necessity for his presence, at the further ministerial steps necessary to be taken to carry such sentence into execution, save only upon the occasion when the death penalty is actually inflicted."

In the *Beecham* case we cited with approval the ruling in the case of *Fielden vs. People* (128 111., 595), that: "The mere naming of the day on which the sentence was to be executed was but the exercise of a ministerial power, which, at common law, was sometimes exercised by the sheriff, (1 Chitty's Crim. Law, 5th Am. ed., 782, 783), and is in this State exercised by the governor in case of a temporary reprieve."

In the same case we quoted from the case of *Holden vs. Minnesota* (137 U. S., 483), as follows: "The court sentenced the convict to the punishment prescribed for the crime of murder in the first degree, leaving the precise

day for inflicting the punishment to be determined by the governor. The order designating the day of execution is, strictly speaking, no part of the judgment, unless made so by statute. And the power conferred upon the governor to fix the time of infliction is no more arbitrary in its nature than the same power would be, if conferred upon the court. Whether conferred upon the governor or the court, it is arbitrary in no other sense than every power is arbitrary that depends upon the discretion of the tribunal or the person authorized to exercise it. It may be also observed that at common law the sentence of death was generally silent as to the precise day of execution."

In the case of *State vs. Haddox* (40 S. E. Rep. (W. Va.), 387) the court said: "In *ex parte Howard* (17 N. H., 548), it is said that if, from any cause, 'the time prescribed for execution has passed, the court must make a new order, if no other disposition has been made of the case.' Nor is the presence of the prisoner necessary or required when such order is made. He has had his trial, been convicted, and sentenced to death. All that remains to be done is to fix the time and carry the execution of the sentence into effect. Whether that time shall be short or long, on Monday or Friday, on the first or thirteenth of the month, it is for the law and the trial court to fix; and, having forfeited his life by his criminal conduct, he is permitted no voice in the matter. It has nothing to do with the trial."

In the light of those decisions it cannot be seriously contended that the ministerial order of the judge of a Court of First Instance to the officer acting as his sheriff, issued in the absence and without the knowledge of the convict, and which under our rulings in the *Beecham* case, and the cases there cited, constitutes no part of the judgment convicting and sentencing him, is a final judgment in the sense in which that term is used in the cases referred to in the dissenting opinion. Neither under American nor Spanish precedents did the issue of the order exhaust the power of the judge in the premises. Should the sheriff fail for any reason to carry out the order on the day designated or on the day to which the time of execution may have been lawfully reprieved, respited, or stayed, it would still be the duty of the judge of the court charged with the execution of the sentence, to issue such new and further orders to the sheriff, designating another day for the execution, as might be necessary to secure the final execution of the judgment imposing the death penalty. So the officer acting as sheriff of the court, in performing the duty thus imposed upon him, continues under the direction and control of the court and subject to all the lawful orders of the court, until he has made his return of the order to the court duly certifying thereon that he has "complied therewith in the manner prescribed by law for sheriffs of the court." And even if it were conceded that in a strictly technical sense the order of the court to the officer acting as its sheriff might be called a final order, we are satisfied that the general power of the court over the proceedings had for the execution of a convict sentenced to the death penalty is such, that, on principle and precedent, an exception would have to be made with regard to such orders, to the general rule touching the loss of power of the courts over their judgments after they have become final, at least to the extent necessary to secure legal rights in the convict to a temporary suspension of the execution, which arise after the judgment convicting and sentencing the accused has become final. The grounds on which the general rule rests are not such as to justify the inclusion within its terms of a ministerial order touching the execution of a death penalty, issued by the judge of the court charged with the execution of the sentence, to the officer acting as his sheriff "for the purpose of carrying it into effect."

The only other case cited in support of the contentions of the Attorney-General is the case of *Ex parte Gordon* (66 U. S., 503). But an examination of the opinion of the court in that case clearly discloses that it affords no authority for the denial to the courts of power to suspend the execution of sentence in capital cases to secure legal rights arising after judgment has become final.

In that case, decided in 1862, the petitioner, sentenced to death for the crime of piracy, and alleging irregularities and errors in the proceedings, was endeavoring to secure a review of those proceedings, and to have the court set aside the judgment of conviction which had become final. Upon an application for a writ of prohibition to the Circuit Court and its officers, the court held that it had no power to review the proceedings by appeal, or by writ

of error, or by writ of prohibition, or to examine them by a certiorari. And the court further held that the judgment convicting and sentencing the accused having become final and the warrant for its execution placed in the hands of the marshal, neither the court itself nor the court below had power to recall the warrant, the case having passed out of the hands of the court. These observations must of course be read in connection with the proceedings in regard to which they were made, which had for their object the revision and correction of alleged errors committed in the course of the trial and in the judgment convicting and sentencing the petitioner. It will be seen, therefore, that the court merely announced the doctrine so frequently referred to in this opinion, and with which we are all agreed, that when a judgment in a criminal case has become final, the courts have no power to intervene further in the proceedings for the purpose of revising alleged errors in the judgment, or amending, altering or changing it in matters of substance, except, perhaps, to the extent necessary to correct mere clerical errors of omission or commission.

The truth is that the opinion of the Supreme Court of the United States cannot be called to the aid of the contentions of either party to the proceedings in the case at bar. The question as to the power of the trial courts to suspend sentence in capital cases, or to suspend the execution of such sentences does not appear to have been submitted to that great tribunal. The only reference in the reports of that court to the question of suspensions of sentences after conviction, to which my attention has been directed, is to be found in the case of *Pointer vs. United States* (151 U. S., 419), in which the court, commenting upon an order of the trial court suspending sentence upon a conviction of murder on one count of an indictment, said:

"It is necessary, however, in order to avoid any misapprehension, to say that this court must not be understood as expressing any opinion upon the question suggested by the words of that order, whether a court of the United States, in the absence of authority conferred by statute, has the power, after passing sentence in a criminal case, to suspend its execution indefinitely, and until the court in its discretion removes such suspension. A decision of that question is not necessary to the disposition of this case upon its merits."

It will be seen that even as to indefinite suspensions of execution, after passing sentence in a criminal case, the opinion of the court of last resort in the United States has yet to be announced, and so far as we are advised there is nothing in the reports of the opinions of that court which sustains, either directly or indirectly, the contentions of the Attorney-General in the case at bar.

In conclusion, perhaps I should say, that in order that there might be no delay in the publication of the judgment of the court, and at the unanimous suggestion of the members who took part in the discussion of the case, I signed the prevailing opinion, concurring with the disposition of the proceedings then pending, but reserving the right to file a separate opinion, the preparation of which before the announcement of the judgment of the court would have involved some delay in the final disposition of the case.

[1] The ruling by the majority of the court on the motion for a rehearing, hereinafter set out on page 319, reaffirmed and adopted the reasons assigned in the prevailing opinion, as amplified in the concurring opinion.

[1] Commenting on these articles, Ruiz makes the following observations: "In reality, the practice is as follows: If the sentence be carried out in the capital of a district, the Court of First Instance, composed of the judge, the public prosecutor, the clerk of the court, and two alguaciles, opens session in the prison. At eight in the morning the alcaide delivers the convict to one of the alguaciles and records in the book the start for the scaffold. The convict leaves under guard, and accompanied by two priests and members of the benevolent societies. The alguacil and the clerk of court attend to witness the execution, while the judge and the public prosecutor remain in the prison with the other alguacil. At the same time, the criminal branch of the audiencia meets in the courthouse and the judge reports to it the departure of the convict from the prison. When the execution is over, the clerk of

the court issues a certificate and delivers it to the judge, who in turn forwards it to the criminal branch, which reports it to the supreme court and the minister of justice. If the sentence be carried out in a town that is not the capital of a district, the practice is as above described, except with reference to the meeting of the audiencia; but report is made thereto by telegraph of the starting of the convict and of the execution, and the certificate is also forwarded to it." (Compilacion Reformada de las Disposiciones Vigentes sobre el Enjuiciamiento Criminal, p. 256.)

[2] The royal order of June 4, 1849, is here set out in full, because it clearly discloses that, as early as the year 1815, the civil courts asserted and exercised exclusive authority over the proceedings had in the execution of convicts sentenced to death by those courts; and that they even went so far as to set up an unsuccessful claim of a like authority, in cases of similar proceedings had in the execution of convicts sentenced to an ignominious death by military commissions.

"1849. June 4. Royal order providing that execution of the sentences wherein the penalty of death on the garrote is imposed by the military authority be carried out by it, securing the public executioner from the audiencia.

"Excellency: The Minister of War has to-day advised the Minister of Justice as follows:

"I have reported to the Queen (God save the Queen) what your Excellency was kind enough to make known to me concerning the royal order of December 13 last with regard to the conflict that arose between the captain-general of Catalonia and the audiencia of that territory, because the former insisted, on the strength of the royal order of June 30, 1815, that the audiencia itself should provide for the execution of the sentence of ignominious death on the garrote, imposed by the military commission of Barcelona upon eleven offenders tried for robbery and the kidnaping of five residents of the town of Sanz. Having been thus informed, as likewise of the report in this matter by the supreme council of war and navy and in accordance with its opinion, her Majesty has deigned to decide that, in order hereafter to avoid conflicts of this kind, it be established as a general rule, as this ministry proposed, that whenever the military authority imposes the penalty of death on the garrote in cases falling within its jurisdiction, the sentence shall be carried out by it, after notice to the audiencia of the territory, in order that the latter may without delay place at its disposal the public executioner with the apparatus necessary for inflicting the penalty.—By Royal Order, to be communicated, etc.—Madrid, June 4, 1849—To the Governors and Captains-General of the Islands of Cuba, Porto Rico, and the Philippines."

CONCURRING

TRENT, J.,

I concur. The filing of the foregoing separate opinion, with which I am in entire accord, makes it unnecessary for me to prepare the separate opinion which I reserved the right to do at the time the prevailing opinion was published.

DISSENTING

JOHNSON, J.,

I regret exceedingly that I cannot secure the consent of my mind to wholly agree with my worthy associates upon a question which so vitally affects the administration of justice and the maintenance, without interference, of the separate departments of the Government, executive, legislative, and judicial, in the Philippine Islands.

This was a petition for the writ of certiorari. Its purpose was to inquire into the jurisdiction of the judge of the trial court to order the Director of Prisons to suspend the execution of a final death sentence. Said order of suspension was made after final decision and after the date for the execution of said sentence had been fixed. The date fixed for the execution of said sentence was the 12th day of January, 1915. Said order of suspension directed the Director of Prisons to suspend the execution of said sentence until the 27th day of January, 1915. No reason whatever appears in the order for the suspension. The facts upon which the petition is based are as follows:

First. That on the 27th day of April, 1912, the prosecuting attorney of the Province of Cavite presented an information against Roman Malabanan, Mariano Noriel, and Luis J. Landas, charging each of them with the crime of assassination.

Second. That on the 28th day of June, 1912, after a lawful trial of said cause, the Court of First Instance of the Province of Cavite found each of the defendants guilty and sentenced each of them to the penalty of death.

Third. That on the 9th day of July, 1912, said defendants appealed to the Supreme Court, which court, after a due consideration of the record in said cause, entered a judgment confirming the sentence of the Court of First Instance on the 23d day of March, 1914.

Fourth. That said sentence of the 23d of March, 1914, became final, conclusive, unappealable, and without possibility of vacation or modification on the 14th day of September, 1914.

Fifth. That, in pursuance of the order of the Supreme Court confirming the sentence of the lower court, the record was returned to the Court of First Instance of the Province of Cavite, with direction that said sentence be executed; that by an order duly made by the judge of the Court of First Instance of the Province of Cavite, the 12th day of January, 1915, was fixed as the date for the execution of said sentence by the Director of Prisons of the Philippine Islands. It was admitted that said order was made on December 24, 1914.

Sixth. That on the 11th day of January, 1915, the respondent judge of the Court of First Instance of the Province of Cavite entered an order directing that the Director of Prisons suspend the execution of said sentence, which was to take place on the 12th day of January, 1915, until the 27th day of the same month.

Upon the foregoing facts the petitioner alleged that "the Court of First Instance had exceeded its jurisdiction and had acted beyond its lawful power in entering said order of the 11th day of January, 1915 (Exhibit A) ; that the excess of jurisdiction and power attempted to be exercised by the Court of First Instance in said cause, if allowed to stand, will not only be a violation of law, but will result in a serious miscarriage of justice. That there is no appeal by your petitioner from the proceedings had in the court below, and there is no other plain, speedy, and adequate remedy available whereby justice may be done," and prayed that the Supreme Court issue an order directed to the Court of First Instance of the Province of Cavite, directing said court to certify to this court the record in said criminal cases (Nos. 2329 and 2347) entitled "United States vs. Mariano Noriel et al., for asesinato," together with all of the processes, proceedings, papers, and orders composing a proceeding had before the Court of First Instance of the Province of Cavite, for the purpose of postponing the date of the execution of the defendants named in said cases.

To the foregoing petition the respondents demurred, alleging:

"First. That the plaintiff has not the legal capacity to bring an action; and

"Second. That the said petition does not state facts sufficient to constitute a cause of action or complaint in behalf of said plaintiff against the said defendants."

Upon the issue thus presented by the petition and the demurrer, we have the following questions presented:

First. Whether or not a trial court, after final decision and after the time has been fixed for the execution of the death penalty, may order a suspension of said execution; and

Second. Whether or not the Director of Prisons, whose duty it is under the law to execute the death sentences imposed in the courts of the Philippine Islands, is a proper person, in a petition for certiorari, to test the jurisdiction of the trial court, after final sentence, to suspend the execution of such sentence.

Upon the second question the court voted to consider the present action as one by the Attorney-General, on behalf of the Government. The court also voted to consider the demurrer as an answer to the original petition. It is unnecessary, therefore, to further discuss that question.

The respondents, during the hearing, expressly admitted that the facts stated in the petition of the Attorney-General were correctly stated.

The various and annoying experiences of the most enlightened nations have taught them that a division of the powers of the Government is highly advisable and necessary, in order to securely safeguard the rights of the common people. They have also found, by sad experience, that an interference by one separate department of the Government with the administration of the functions of the other is highly destructive of both and all. The pages of ancient history run red with the blood of peoples as proof of the atrocities of governments in which the laws have been made, construed, and executed by a combination of all these powers in the hands of one man. The older inhabitants of the Philippine Islands well remember the blighting influence and the destructive character to the rights of the people, of a Government without a separation and absolute independence of the different powers of the Government and with out the checks and balances thereto attached. In the Government of the Philippine Islands to-day the Legislature makes the laws, the judicial department interprets them, the executive department enforces them. One department is not permitted to encroach upon the functions of the other.

One of the express powers conferred upon the executive department of the Government is the power to pardon. (See the very excellent opinion of the Honorable Gregorio Araneta, then Attorney-General of the Philippine Islands, vol. 4, page 539, of the Opinions of the Attorney-General.)

If the Governor-General is vested with that power he must have all of it unless it has been divided and part of it is expressly given to some other department of the Government. No claim is made that the power to pardon has been divided, or that the right to exercise the same, or any part thereof, belongs or has been given to the courts. The respondents admitted, during the hearing of the present cause, that the power to pardon included the power to reprieve. If that be true, then the executive department of the Government is the only power which can grant a reprieve, and the judicial department, without a violation of its duties and its jurisdiction, can not exercise such power. For the courts to grant a reprieve then would be to exercise a function conferred upon the executive. If the executive department alone can exercise the pardoning power, including reprieve, then it is clear, if the courts attempt to exercise the same power, they are encroaching upon the functions of the executive department, and thus a conflict immediately arises. We believe that it is a principle well established in well organized governments, with the separate departments, that the judicial department cannot exercise revisory authority over executive acts. If both have a right to exercise the same function of pardon or reprieve, a conflict of authority is bound, sooner or later, to arise. Suppose, for example, the court should reprieve a person charged with a crime, upon whom the death sentence has been imposed, until, for example, the 27th day of a particular month; and suppose the executive department of the Government, exercising the same right, should reprieve said person until the 26th day of said month. Upon which day could the death penalty be executed? Such a conflict of power is bound, sooner or later, to result in the utter destruction of the separate and distinct departments of the Government.

We believe, and we think we are supported by all the authorities, without a single exception, that the courts, in the absence of statutory authority, have no right or jurisdiction to interfere, in any manner whatever, with a criminal cause, after the decision in the same has become final and its execution has passed into another department of the Government. During the argument upon the questions presented in the present case, the respondents were requested to cite a single case in support of their contention. A number of cases were cited. Each of them has been examined, and it is confidently asserted that none of them are authority in support of the contention. That the courts may suspend execution of a sentence before the same becomes final, is not disputed. But a distinction must be made between suspensions before the sentence becomes final and suspensions after the sentence becomes final. The former is within the jurisdiction of the court. The latter is a reprieve or a species of pardon, which the courts cannot exercise.

The present is not the first time the question of the right of the courts to continue jurisdiction over causes or cases after final decision, has been brought to this court. (*Perez vs. Sweeney*, 8 Phil. Rep., 157; *Molina vs. De la Riva*, 8 Phil. Rep., 569; *Espiritu vs. Crossfield*, 14 Phil. Rep., 588; *U. S. vs. Crossfield*, 24 Phil. Rep., 321.)

In the case of *United States vs. Crossfield*, supra, this Director of Prisons vs. Judge of First Instance of Cavite. court said: "After a sentence has become final, any attempt by the judicial department to alter, amend, or modify the same, except to correct clerical errors, is unwarranted in law and can in no way affect the final sentence. Long experience has induced the courts to establish the rule that when a sentence once becomes final, it cannot be changed, altered, or modified by them, except to correct clerical errors. It is believed to be the wiser policy, after a sentence has become final, in case it is discovered for the first time that clemency should be exercised, to refer the matter to the executive department of the Government to deal with it under the general pardoning power. The moment a sentence in a criminal case becomes final, the judicial department has lost its jurisdiction over the person of the defendant, as well as its right to change, alter, or amend said sentence. The defendant is then in the custody of the executive department of the Government for the execution of the sentence. If an injustice has inadvertently been done, the executive department of the Government has authority under the general pardoning power to correct it."

The supreme court of California, in the case of *Baldwin vs. Kramer* (2 Cal., 582), said: "We hold that after the expiration of the term of a district court, no power remains in it to set aside a judgment or grant a new trial. A different doctrine would lead to great uncertainty and possibly to gross abuse. There must be a time when the rights of the parties are to be considered as determined, and for litigation to cease; and for this purpose the law has wisely fixed the rule here indicated."

After judgment is rendered and a case returned to the lower court for execution, the party liable under the judgment will not be permitted, in opposition to the execution, to present for consideration new issues of fact and law upon the question of his liability.

As was said above, none of the cases or decisions cited by the respondents show a case where the judicial department of the Government attempted in any way to interfere with the execution of a final sentence. We have a case, however, in which the Supreme Court of the United States, speaking through its great Chief Justice Taney, expressed an opinion upon the power of the trial court to recall a final sentence. In the case of *Ex parte Gordon* (66 U. S., 503), Mr. Chief Justice Taney said: "But this motion asks the court to do even more than exercise appellate power * * * for the case has now passed out of the hands of the court, and the warrant is in the hands of the marshal, commanding him to execute the judgment of the court. The circuit court (corresponding to the Court of First Instance) itself has not now the power to recall it."

This decision was rendered by Mr. Chief Justice Taney in 1861, after the Supreme Court of the United States had

been organized for a period of nearly ninety years. In the course of the opinion, Mr. Chief Justice Taney said: "We are not aware of any case in which a similar motion has heretofore been made in this court in a criminal case."

There is still another case where the courts attempted to interfere with a final decision. It is that of *In re Webb* (89 Wis., 354). In that case the decision had become final. Thereafter the court attempted to suspend said sentence. In discussing his right so to do, the supreme court of the State, speaking through Mr. Justice Pinney, said: "After the defendant had been convicted, and a sentence of law in legal and proper form had been pronounced against him, it is difficult to understand upon what principle the court could further interfere in the premises. The right of a court, for cause, within the exercise of reasonable discretion, to postpone sentence or suspend sentence, as it is said, seems to be clear; but we think, both upon principle and authority, its right to suspend the execution of a sentence after it has been pronounced, cannot be sustained, except as to the extent of a review of the case upon a writ of error or upon other well-established legal grounds. After a sentence is given, the matter within these limits would seem to be wholly within the hands of the executive officers. The sole power is vested in the Government to grant reprieves, commutations and pardons, after conviction, for all offenses * * * and the action of the court in the premises, after it had regularly pronounced the punishment provided by law for the offense in question, is clearly obnoxious to the objection of its attempted exercise of power, not judicial, but vested in the executive."

Is the mere fact that the condemned has presented a petition for grace to the executive department, a sufficient reason why the judicial department of the Government should, in the exercise of a doubtful authority, take jurisdiction of a case which has passed out of its jurisdiction, and itself exercise acts of grace, thereby superseding the executive authority?

But it is said, suppose it is found that the person to be executed is a pregnant woman (which fact does not, in our opinion, require a judicial investigation), or is insane (which fact the executive department may investigate as well as the judicial department), or that a petition for pardon is pending, then it would not only be contrary to law, but would shock the public conscience to permit the execution to take place, and therefore the courts must interfere and retake jurisdiction in order to prevent such a calamity and injustice.

Have the courts a monopoly over the fountains of justice? Have the courts a right to assume that the Governor-General or the executive department is going to violate the law? Have the courts a right to assume that the conscience of the Governor-General is so calloused that he will turn a deaf ear to the claims and the cries of justice? Can the courts assume that the executive department of the Government will disregard the fundamental rights of men? Have the courts a right to pretend that they are the only institutions or persons in the State who can do justice?

For the courts to intervene in a case after the same has passed out of their jurisdiction and control and into the hands of another distinct, coordinate, and independent department of the Government, is to presume that they have no confidence in the integrity of said department nor in its disposition or capacity to do justice.

The doctrine that the pardoning power may be exercised (a) *ex mandato regis*, (b) *ex arbitrio iudicis*, (c) *ex necessitate legis*, is an antiquated, threadbare doctrine, established several hundred years ago, before kings and menruled governments had begun to even dream of the sacred rights of the common people—of the rights of the common people to directly participate in the affairs of the government and of the division of the powers of the government into separate and distinct departments. In the palmiest days of kings—of one-man rule—the kings, in their most disturbed slumbers, never dreamed the day would arrive when the common people would no longer be governed by the whim or caprice of one man, but by prescribed law, made by themselves, and that the powers of government would be taken from the hands of one man and distributed into separate and distinct departments of Government, each acting as a check and balance upon the, absolute powers conferred upon the other.

The Government of the Philippine Islands now is a Government by prescribed law. The days in the Philippine Islands when one man could make the law, interpret the law, and enforce the law, have passed, I hope, forever. Under the Government in the Philippine Islands to-day, the people have a right to know in advance by what law they shall be governed—by prescribed law. The day has passed in the Philippine Islands, when a law may be promulgated, based upon the mere whim or caprice of any one man. The people of the Philippine Islands are vested to-day with authority to say generally what shall be the law.

Even in ancient times when this doctrine (*ex arbitrio judicis*) was first announced (2 Hale, 412; 1 Chitty Criminal Law, 758), it was said with reference to the same, that: "Sometimes the judge reprieves before, judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment is defective; and sometimes after judgment, if it be for some small felony, or in order to a pardon or transportation. The power of granting this respite belongs of common right to every tribunal which is invested with authority to award execution. Judges of assize may, by long practice, either arbitrarily grant reprieves, or take them away after the termination of their sessions; though, this seems rather to stand on ancient usage than on express authority or recognized principle."

In our opinion, after a careful examination of the authorities, with special reference to the finality of sentences, and the separate and distinct functions of the different departments of the Government, we have reached the conclusion that the act of the judge, in his effort to grant a reprieve, in his suspension of a final sentence, was an invalid usurpation of executive authority, and an illegal exercise of his judicial function, beyond and in excess of his powers and jurisdiction. He had no more right or authority to make said order, than if the case had never been brought or commenced in his court.

In my opinion and for the reasons given before, which constitute but a few of the reasons upon which I base my conclusions, the writ of certiorari prayed for should be granted. Inasmuch, however, as the respondents have admitted in open court that the facts stated in the petition are a correct statement of the facts as they occurred in the lower court, I deem it unnecessary to order the record of the lower court brought to this court. The writ of certiorari should, therefore, issue at once, nullifying and setting aside the order of the lower court made and issued upon the 11th day of January, 1915.

It should be so ordered.

The foregoing dissenting opinion was written by the undersigned before he had an opportunity to see or read the opinion of the majority of the court. He desires to answer some of the arguments contained therein. In support of some of the doctrines contained in the decision, the decisions in the cases of *State vs. Hawks* (34 S. E. Rep., 918) ; *Clifford vs. Heller* (63 N. H. L., 105) ; *Camel vs. People* (1 Parker Crim. Reps., 262), were cited. We have now had an opportunity to make a very hasty examination of said cases and we find that the facts in none of them support the contention, that the judicial department of the Government can suspend the execution of a final decision in a capital case.

In the case of *State vs. Hawks*, *supra*, the question was whether or not the governor of the State could suspend the execution of a sentence of imprisonment, in order that the defendant might present a writ of error to the appellate court. No question of the right of the courts to suspend final sentence was presented.

In the case of *Clifford vs. Heller*, *supra*, the question was not whether the court could suspend the execution of a sentence, but whether or not the president of the senate of the State, acting in place of the governor, could, while acting; as governor, suspend the execution of a final death sentence. The court held that at the time of the suspension of the sentence, he was the acting governor, and could exercise all of the powers conferred upon the

governor of the State.

In the case of *Camel vs. People*, supra, the question was whether or not the *nisi prius* court could grant a stay of execution of a sentence, pending the question of the right of the accused to appeal. Here again, no question was presented to the court with reference to the right of the court to suspend the execution of a final sentence in a capital case.

Reserving to myself the right to amplify this opinion "en lo futuro," giving other reasons in support of the same, I, for the present, desire to dissent from the conclusions of the majority opinion.

The very day after the foregoing dissenting opinion was filed, there came to the table of the undersigned an opinion of Mr. Justice Hughes, of the Supreme Court of the United States, in the case of *United States vs. Mayer* (235 U. S., 55, decided November 16, 1914), in which he said, speaking for the court: "In the absence of statute providing otherwise, the general principle obtains that a court cannot set aside or alter its final judgment, after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during that term."

It is admitted that there is no statutory provision in the Philippine Islands giving such authority.

In support of that doctrine, Mr. Justice Hughes cites many decisions. The same doctrine had been theretofore announced by the Supreme Court of the United States in the following cases: *Hudson vs. Guestier* (7 Granch, 1 [1812]), *Martin vs. Hunter* (1 Wheat., 304, 355 [1816]), *Cameron vs. McRoberts* (3 Wheat, 591 [1818]), *Bank vs. Wistar* (3 Pet, 431 [1830]), *Jackson vs. Ashton* (10 Pet, 480 [1836]); *Sibbald vs. U. S.* (12 Pet., 488 [1838]), *Brockett vs. Brockett* (2 How., 238 [1844]), *United States Bank vs. Moss* (6 How., 31 [1848]), *Sheppard vs. Wilson* (6 How., 260 [1848]), *Corning vs. Troy etc., Nail Factory* (15 How., 451 [1853]), *McMicken vs. Perin* (18 How., 507 [1855]), *Rice vs. Minnesota etc. R. R. Co.* (21 How., 82 [1858]), *Noonan vs. Bradley* (12 Wall., 121 [1870]), *Magwire vs. Tyler* (17 iWall., 253 [1872]), *Roemer vs. Simon* (91 U. S., 149 [1875]), *Insurance Co. vs. Boon* (95 U. S., 117 [1877]), *Cambuston vs. U. S.* (95 U. S., 285 [1877]), *Brooks vs. Railroad Co.* (102 U. S., 107 [1880]), *Bronson vs. Schulten* (104 U. S., 410 [1881]), *Schell vs. Dodge* (107 U. S., 629 [1882]), *Philips vs. Negley* (117 U. S., 665 [1885]), *U. S. vs. Pile* (130 U. S., 280 [1888]), *Amy vs. Watertown No. 1* (130 U. S., 301 [1888]), *Williams vs. Conger* (131 U. S., 390 [1888]), *Central Trust Co. vs. Grant Works* (135 U. S., 207 [1889]), *In re Wight* (134 U. S., 136 [1889]), *Bent vs. Thompson* (138 U. S., 114 [1890]), *Lewisburg Bank vs. Sheffey* (140 U. S., 445 [1890]), *Hickman vs. Ft. Scott* (141 U.S., 415 [1891]), *Hume vs. Bowie* (148 U. S., 245 [1891]), *Moelle vs. Sherwood* (148 U. S., 21 [1892]), *Bushnell vs. Crooke Min. etc., Co.* (150 U. S., 82 [1893]), *Colvin vs. Jacksonville* (158 U. S., 456 [1894]), *The Bayonne* (159 U. S., 687 [1895]), *Kingman vs. Western Mfg. Co.* (170 U. S., 675 [1897]), *Illinois vs. Ill. Cent. R. R.* (184 U. S., 77 [1901]), *Tubman vs. Baltimore R. R.* (190 U. S., 38 [1902]), *Gagnon vs. U. S.* (193 U. S., 451 [1904]), *Wetmore vs. Karrick* (205 U. S., 141 [1906]), *Re Metropolitan Trust Co.* (218 U. S., 312 [1901]), *U. S. vs. Mayer* (235 U. S., 55 [decided Nov. 16, 1914]).

Following the jurisprudence established by the Supreme Court of the United States, this court, in the case of *United States vs. Crossfield* (24 Phil. Rep., 321), said: "After the sentence has become final any attempt by the judicial department of the Government to alter, modify, or amend the same, except to correct clerical errors, is unwarranted in law and can in no way affect the final sentence. Long experience has induced the courts to establish the rule that when a sentence once becomes final, it cannot be changed, altered, or modified by them. It is believed to be the wiser policy, after a sentence has become final, in case it is then discovered for the first time that clemency should have been exercised, to refer the matter to the executive department of the Government to deal with it under the general pardoning power."

This doctrine has been announced several times by this court.

It is believed that the rule above announced is applicable alike to both civil and criminal cases. (Ex parte Lange, 18 Wall., 163; Bassett vs. U. S., 9 Wall., 38; Goddard vs. Ordway, 101 U. S., 745; Bronson vs. Schulten, 104 U. S., 410; Philips vs. Negley, 117 U. S., 665.)

There is no authority in the record for the statement that said suspension was made in order that a petition for pardon might be presented.

RULING ON MOTION FOR REHEARING.

FEBRUARY 13, 1915.

The court, having duly considered the petition of the Acting Attorney-General for a rehearing in this case, resolved, that, reaffirming the action already taken for the reasons assigned in the prevailing opinion, as amplified in the concurring opinion, with which we are all agreed, the petition should be and is denied.

Arellano, C. J., Torres, Carson, Trent, and Araullo, JJ.

Johnson, J., concurs in the result.

Motion for rehearing denied.

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