

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. VENANCIO DE GUZMAN (ALIAS CACALASAN), DEFENDANT AND APPELLANT.*G.R. No. 9144. March 27, 1915*

Ponente: CARSON, J.

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Venancio de Guzman, the defendant and appellant in this case, was convicted in the court below of the crime of asesinato (murder) and sentenced to life imprisonment.

The evidence of record leaves no room for doubt that, on the day and at the place mentioned in the information, De Guzman, who was walking through a field with Pedro and Serapio Macarling and Rufino Garin, deceased, struck the latter on the head, knocked him down and held him on the ground while Pedro Macarling stabbed him to death. There is and there can be no question as to his guilt of the crime of which he was convicted in the court below, the only question raised on this appeal being his right to exemption from prosecution for the crime thus committed, on the ground that a former information, charging the same offense, had been dismissed as to him in order that he might testify as a witness for the prosecution.

It appears that some time prior to the trial of the case at bar an information was duly filed charging De Guzman, jointly with the two Macarlings, with the murder of Garin; that before the former case came on for trial De Guzman entered into an agreement with the fiscal under the terms of which he promised to appear and testify as a witness for the Government at the trial of his coaccused, and to tell the truth as to all that occurred, provided the information was dismissed as to him and he himself was not brought to trial. With the consent of the court, and in pursuance of this agreement, he was not arraigned nor brought to trial, and the information was dismissed as to him. One of his coaccused pleaded guilty and the other not guilty, and thereafter the case came on for trial. After several witnesses had been called, De Guzman was placed on the witness stand, and denied all knowledge of the murder. He denied that he had ever said anything implicating his coaccused, and swore that a statement made by him before a justice of the peace was false, and that it had been made through fear of certain police officers. Questions by the court developed that he had made still another statement to one Natnat, implicating his coaccused, but he swore that that statement had also been made through fear; and repudiating all former statements made by him, he declared that they were false, and had been procured by the prosecuting officials of the Government by the use of improper and illegal methods.

The Solicitor-General, relying on the provisions of sections 34, 35 and 36 of General Orders No. 58, recommends the discharge of the appellant, and that he be set at liberty forthwith, adding in the concluding paragraph of his brief that, although such action would result "in a palpable miscarriage of justice," nevertheless "the law provides for his dismissal and expressly bars a future prosecution" for the crime charged in the information which was dismissed as to him. We do not think so, and hold that, it conclusively appearing that appellant failed to carry out his agreement with the fiscal, and had knowingly and falsely testified at the trial of his coaccused, and that he fraudulently secured the dismissal of the former information, the state was wholly within its rights in bringing him to trial, and convicting and sentencing him for the crime with which he was charged in the former information.

Sections 34, 35, and 36 of General Orders No. 58, upon which counsel for defense and the Solicitor-General rely, are as follows:

"SEC. 34. When two or more persons shall be included in the same charge, the court, at any time before the defendants have entered upon their defense or upon the application of the counsel of the Government, may direct any defendant to be discharged, that he may be a witness for the United States.

"SEC. 35. When two or more persons shall be included in the same charge, and the court shall be of opinion in respect to a particular defendant that there is not sufficient evidence to put him on his defense, it must order him to be discharged before the evidence is closed, that he may be a witness for his codefendant.

"SEC. 36. The order indicated in sections thirty-four and thirty-five shall amount to an acquittal of the defendant discharged, and shall be a bar to future prosecution for the same offense."

These sections constitute a part of the notably short, compact and concise military order issued April 23, 1900, which prescribed, in very summary terms, the procedure to be followed in criminal cases in the various courts of the Islands authorized to administer justice under American sovereignty, and which continues in force, with a few amendments, to the present day. We have frequently held that, for the proper construction and application of the terms and provisions of legislative enactments which have been borrowed from or modelled upon Anglo-American precedents, it is proper and oftentimes essential to review the legislative history of such enactments and to find an authoritative guide for their interpretation and application in the decisions of American and English courts of last resort construing and applying similar legislation in those countries. (*Kepner vs. U. S.*, 195 U. S., 100; 11 Phil. Rep., 669; *Serra vs. Mortiga*, 204 U. S., 470; 11 Phil. Rep., 762; *Alzua vs. Johnson*, 21 Phil. Rep., 308.) Indeed it is a general rule of statutory construction that courts may take judicial notice of the origin and history of the statutes which they are called upon to construe and administer, and of the facts which affect their derivation, validity and operation (2 *Lewis' Sutherland on Statutory Construction*, sec. 309). This author in section 456, citing numerous cases in support of the doctrine, says also that:

"Where the meaning of a statute or any statutory provision is not plain, a court is warranted in availing itself of all legitimate aids to ascertain the true intention; and among them are some extraneous facts. The object sought to be accomplished exercises a potent influence in determining the meaning of not only the principal but also the minor provisions of a statute. To ascertain it fully the court will be greatly assisted by knowing, and it is permitted to consider, the mischief intended to be removed or suppressed, or the necessity of any kind which induced the enactment. If the statute has been in force for a long period it may be useful to know what was the contemporary construction; its practical construction; the sense of the legal profession in regard to it; the course and usages of business which it will affect."

The dismissal of complaints or informations as to one of several persons charged with the commission of an offense in order that he may be used as a witness against his coaccused, and the making of agreements whereby guilty persons are sometimes assured of exemption from criminal prosecution on condition that they testify against their coparticipants in the commission of a crime, would appear to have been authorized under the provisions of General Orders No. 58, as a necessary incident to the supplanting of the old system of criminal procedure with a system borrowed, in large part, from English and American precedents. This, doubtless, as a result of the emphasis placed by the new system on the presumption of innocence in favor of an accused person, on the requirement that the Government must establish its case beyond a reasonable doubt before the accused is called upon to defend himself, on the prohibitions against compelling an accused person to be a witness against himself, and against the drawing of inferences of guilt from the silence of the accused. Experience, under English and American procedural methods, has shown that without the aid of informers testifying against their coparticipants in crime, many guilty parties would escape, where the facts which would sustain a conviction are known only to the guilty persons themselves. Indeed, we do not doubt that the making of such agreements as the

one under consideration would be held to have been authorized under the new system of criminal procedure upon the authority of American and English precedents, even had it not been expressly recognized and provided for in General Orders No. 58.

In the Whiskey Cases (9 Otto, 594; 25 L. ed., 399), we find an interesting history of the origin and growth of the practice under consideration. It there appears that anciently, under the common law of England, the criminal could not interpose such an agreement with the state as a plea in bar to the prosecution for the offense with which he was charged, but that the faithful performance of the agreement entitled him to an equitable right to a recommendation to executive clemency. In more recent times, however, the practice has been quite generally recognized by statutory enactment in many jurisdictions, and under the statutes the faithful performance of the agreement is held to be a complete bar to a subsequent prosecution of the criminal. A search of the year books shows but few cases in which a defendant, after making an agreement with the prosecution to testify what he knows about the commission of the crime, failed to comply with his promise. In the discussion of the general subject, however, there is much dicta to the effect that the criminal must act in good faith and testify fully and fairly as to what he knows concerning the crime, in order to claim immunity. (The Whiskey Cases, *supra*; Rex vs. Rudd, Cowp., 331, as quoted in 41 N. J. L., 17; 4 Blackstone's Com., 330.)

The question arose in Texas under a statute providing that: "The attorney representing the State may at any time under the rules provided in article 37 dismiss a prosecution as to one or more defendants indicted with others, and the person so discharged may be introduced as a witness by either party." (Texas Code Crim. Proc, art. 709.)

Article 37 provides that when a district attorney desires to dismiss a case he shall file a written statement, setting forth his reasons for such dismissal, and such dismissal shall not occur without the permission of the presiding judge, who shall be satisfied that the reasons so stated are good and sufficient to allow such dismissal. These statutory provisions, as will be seen, are not widely dissimilar from our own, though we have no provision requiring a written statement of the reasons for dismissal to accompany motions of this nature, a feature nevertheless which might well be adopted, by the trial courts without the necessity for statutory enactment. In *Ex parte Greenhaw* (41 Tex. Crim. R., 278), the court touched upon the question of the obligation of the accused to keep faith with the State under such an agreement and said: "I can find no case in which the question has been directly presented as to the terms of this character of contract; I think, however, it may be fairly deduced from the authorities that the State or Sovereign can contract with the accomplice upon the following terms only: In consideration that he shall testify fully and fairly as to all he knows in regard to the guilt of his associates in the particular case in which the contract is made, that he will receive immunity from punishment as to such case. * * * Again, it is agreed that there must be a compliance with the terms of the contract on the part of the accomplice before he can claim immunity. * * * So it follows, if the accomplice testifies corruptly or falsely he cannot claim immunity."

In the later case of *Goodwin vs. State* (158 S. W., 274), the supreme court of Texas had the question of good faith on the part of the informer directly presented to it. The defendant had been jointly indicted with one Butler for adultery. She agreed with the prosecuting officer that if he would dismiss the case against her she would testify fully on the trial of her codefendant. The case was thereupon dismissed as to her, but when her codefendant was tried she refused to testify against him fully. She contended that the State was bound by its agreement, and that she could not thereafter be prosecuted. The supreme court, in sustaining the court's refusal to consider her discharge as a plea in abatement, said: "If she had carried out her agreement with the State and testified fully as she agreed on the trial of Butler then the State would have been bound by said agreement, and could not thereafter have prosecuted her. But certainly the State was not bound by its agreement unless she carried out her agreement with it. As shown above she refused to do so."

The Texas statute is silent, as is our own, as to the consequence of bad faith on the part of the accused, and yet, as we have seen, the Texas court held that a discharge of this kind, secured in bad faith, did not exempt the informer from prosecution unless he keeps faith with the Government.

The more common form of the statutory declaration of this practice appears to be to permit any person accused of crime to testify concerning it at the request of the prosecuting officer, with the understanding that when a person has so testified he shall not be subject to prosecution for anything he may have done in connection with such crime. This is the method adopted in various immunity clauses in Acts of Congress (see Act of Feb. 25, 1903, 32 Stat, 854, 903, 904, c. 775), with proviso that persons committing perjury, when so called upon to testify, may be punished therefor. (For a discussion of the history and an enumeration of these laws, see U. S. vs. Swift, 186 Fed., 1002.)

The constitution of Oklahoma, however, contains the following provision which, like our own statute, has no proviso authorizing a prosecution for perjury when the witness fails to state the truth: "Any person having knowledge or possession of facts that tend to establish the guilt of any other person or corporation charged with an offense against the laws of the State shall not be excused from giving testimony or producing evidence, when legally called upon so to do, on the ground that it may tend to incriminate him under the laws of the State; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence."

In discussing the effect of the failure of a defendant to keep faith with the Government when called upon to testify against his codefendants under this constitutional provision, the supreme court of that State recently said: "In this respect our immunity clause differs from the statute of Wisconsin, which reserves the right of prosecution for perjury committed in the giving of such testimony. Touching this reservation the supreme court of Wisconsin, in the case of State vs. Murphy (128 Wis., 201), in discussing the question as to whether or not under this statute a witness could only secure immunity when he had testified to the truth, said: 'The statute itself, however, refutes any such meaning, for it expressly reserves the right to prosecute for perjury "in giving such testimony." ' "

"The same reservation is contained in the Acts of Congress granting immunity. See United States Comp. St. 1901, p. 3173 (Act Feb. 11, 1893, c. 83, 27 Stat, 443). If Congress had thought that a person who testified falsely in answer to questions of an incriminating character would be subject to prosecution for perjury, why the necessity for this reservation? We have no such reservation in our constitutional provision; and, as before said, if we should follow the precedents, when the witness does not speak the truth, the State would be left without redress, although the witness had violated the purpose and spirit of the constitution. We cannot believe that it was the purpose of the intelligent and justice-loving people of Oklahoma, when they voted for the adoption of the constitution, to grant immunity to any man, based upon a lie, or, in other words, that they intended that the commission of perjury should atone for an offense already committed. It is a familiar rule of common law, common sense, and common justice that a legal right cannot be based upon fraud. We therefore hold that the witness who claims immunity on account of self-incriminatory testimony which he had been compelled to give must act in good faith with the State, and must make truthful replies to the questions which are propounded to him, and which he had been compelled to answer, and that any material concealment or suppression of the truth on his part will deprive him of the immunity provided by the constitution; and the witness must testify to something which, if true, would tend to criminate him. This immunity is only granted to those who earn it by testifying in good faith. In our judgment any other construction would be an insult to and a libel upon the intelligence of the people of Oklahoma, an outrage on law, and a prostitution of justice." (Scribner vs. State, 132 Pac, 933, 940.)

From a review of the history and development of the practice under consideration, and reasoning along the line of the above cited cases, we are all agreed that the failure of the accused in the case at bar, faithfully and honestly to

carry out his undertaking to appear as a witness and to tell the truth at the trial of his coaccused, deprived him of the right to plead his former dismissal as a bar to his prosecution in the case now before us.

We have found considerable difficulty however in coming to an agreement as to the precise scope of the rule thus adopted. All are agreed that in the absence of the above cited provisions of section 36 of General Orders No. 58, which provides that an order discharging one of two or more accused persons that he may be a witness for the prosecution "shall amount to an acquittal of the defendant thus discharged and shall be a bar to further prosecution for the same offense," a corrupt and fraudulent agreement, or an agreement not faithfully complied with by the accused would be no bar to further prosecution. Some of the members of the court are of opinion that notwithstanding this provision, such agreements are always vitiated by the failure of the accused to testify honestly and faithfully, it matters not whether the accused is discharged at or before the trial. Other members of the court, of whom the writer of this opinion is one, are inclined to believe that while the general rule as held by the majority is applicable in all cases where the agreement is made and the order of discharge is entered before the trial actually begins, it is limited and restricted by the provisions of section 36, and that in any case wherein an accused person is thus discharged after he has entered on trial, the discharge amounts to an acquittal and a bar to further prosecution. This on the assumption (questioned by various members of the court) that sections 34, 35 and 36 purport only to deal with, and do in fact deal only with incidents of "the trial," and declare merely what the procedure shall be in cases of such discharges after the trial has begun.

But however this may be, we are all agreed that in the case at bar, in which the order discharging defendant was made before the trial began, appellant was not entitled to have the order of discharge held to amount to an acquittal or a bar to further prosecution.

We find no errors in the proceedings prejudicial to the substantial rights of the accused, and the judgment convicting and sentencing him should therefore be affirmed, with the costs of this instance against him. So ordered.

Arellano, C. J., and Torres, J., concur.

Araullo, J., dissents.

CONCURRING

TRENT, J.,

I concur.

In view, however, of the dissenting opinion, which seems to challenge the findings of fact set forth in the majority opinion, it might be well to state the result of a careful examination of the record in this regard.

The evidence as to the guilt of the accused of the crime of murder of which he was convicted is conclusive, beyond a reasonable doubt. It consists of clear, definite, competent, and incontrovertible evidence as to the three separate confessions of guilt by the accused, wherein he set forth in detail the circumstances under which he, together with Pedro and Serapio Macarling, for and in consideration of a promise of fifty pesos, assassinated Rufino Garin, deceased. These confessions were corroborated by the testimony of a number of witnesses, and leave no room for the shadow of a doubt as to the truth and accuracy of the finding in the majority opinion, " that on the day and at the place mentioned in the information, De Guzman, who was walking through a field with Pedro and Serapio Macarling and Rufino Garin, deceased, struck the latter on the head, knocked him down and held him on the ground while Pedro Macarling stabbed him to death."

In the majority opinion the court says: "It appears that some time prior to the trial of the case at bar, an information was duly filed charging De Guzman, jointly with the two Macarlings, with the murder of Garin; that before the former case came on for trial De Guzman entered into an agreement with the fiscal, under the terms of which he promised to appear and testify as a witness for the Government at the trial of his coaccused, and to tell the truth as to all that occurred, provided the information was dismissed as to him and he himself was not brought to trial. With the consent of the court, and in pursuance to this agreement, he was not arraigned or brought to trial, and the information was dismissed as to him. One of his coaccused pleaded guilty and the other not guilty, and thereafter the case came on for trial. After several witnesses had been called, De Guzman was placed on the witness stand, and denied all knowledge of the murder. He denied that he had ever said anything implicating his coaccused, and swore that a statement made by him before a justice of the peace was false, and that it had been made through fear of certain police officers. Questions by the court developed that he had made still another statement to one Natnat, implicating his coaccused, but he swore that that statement had also been made through fear; and repudiating all former statements made by him, he declared that they were false, and had been procured by the prosecuting officials of the Government by the use of improper and illegal methods."

With regard to this citation the writer of the dissenting opinion says: "The contention that I am making in regard to this case and the foundation of my dissent is that there is not a word or syllable of evidence in the record to support a single fact set forth in the foregoing quotation, except the fact that the accused in this case was discharged to be used as a witness for the prosecution in a prior case."

I do not think that this criticism is supported by the record. I find on page 2 of the original record in the court below the following note entered by direction of the court: "At this point the attorney for the accused asked the court to dismiss the case and acquit the accused because of the fact that he had been discharged from the former complaint and under section No. 34 of General Orders No. 58 and that under order or section No. 36 of the same general order No. 58 his discharge amounts to an acquittal and bars the present prosecution for the same offense. The court understands that that section No. 36 is for the purpose of avoiding that the accused be put twice in jeopardy. In the case at bar the accused was excluded from the complaint before he had answered whether he was guilty or not and before any witness had declared in the case. The court understands that jeopardy had not at that time attached, and, therefore, he denies the motion."

I find on page 20 of the record the following:

"The FISCAL. Government rests.

"MR. BERNABE DE GUZMAN (attorney for defense). I offer in evidence the description of notes of the evidence taken in case No. 3983 first case against the same accused with three others, in which it appears a motion for the prosecution asking for the exclusion of the accused who will be utilized as a witness for the prosecution.

"The Court. Claim will be admitted as asked for by the attorney."

In the decision filed with the record in the court below I find the following:

"This accused is the same Venancio de Guzman who was charged with the crime of 'asesinato' together with Antonio Soriano, Serapio Macarling, and Pedro Macarling in criminal case No. 3983 of this court. When that case was called for trial and before the accused Venancio de Guzman had been required to plead, the fiscal asked the court to dismiss the case against Venancio de Guzman under the circumstances set out in the first paragraph of the decision in the case which is as follows:

"When this case was called for trial the accused, Antonio Soriano, plead not guilty; Serapio Macarling plead guilty, and Pedro Macarling plead not guilty. Venancio de Guzman was not required to plead as under an

agreement with the fiscal and Sr. Monserrat, an attorney assisting the prosecution, that he would state the whole truth, and as upon his statement and promise they expected to secure the conviction of Antonio Soriano the prosecution asked that he be excluded from the complaint. The court then granted this petition of the fiscal, also under the same understanding and agreement as the fiscal had been under as per his statement to the court; but after several of the witnesses had been presented the witness Venancio de Guzman was called, he denied that he had ever said anything to anyone implicating Antonio Soriano and said that his statement made, before the justice of the peace was untrue, that he only made it through fear of the Constabulary. After the court questioned him he admitted he had made some statement implicating Antonio Soriano to Diego Natnat, but stated that he did that through fear and not knowing what he was stating, and stating now that all those statements implicating Antonio Soriano were untrue. The fiscal has stated that he was deceived by the statement of Venancio de Guzman to him as to what his declaration would be on the witness stand and under that agreement or deception practiced by Venancio de Guzman he asked that the case be dismissed as regards to him but now desires that the case be reinstated. Therefore the court orders the fiscal to file a new complaint against Venancio de Guzman, summon the witness and set a day for its hearing.'

"The attorney who was representing the four accused in said case No. 3983, attorney Mr. E. S. Smith, has asked permission of the court to be relieved from further defending Venancio de Guzman, because he, too, had taken part in the agreement with the fiscal, having been misled by former statements of Venancio de Guzman. The court therefore relieved Mr. Smith and as the said Venancio de Guzman stated he would not employ another attorney the court appointed Mr. Bernabe his 'defensor de oficio' to defend the present case."

I think that these citations from the record of this case in the court below clearly and conclusively establish that the record of the former case No. 3983 was before the trial judge when he rendered his decision in this case, and that that record was submitted by the accused himself, in support of his plea in bar. The record of the former case was the best evidence, and indeed the only competent evidence of the alleged fact upon which the accused set up his plea in bar. It may be admitted that the language of the record is somewhat informal and lacking in technical precision, but unless we are to look only to the form and not the substance, and unless we are to demand an unreasonably high degree of technical precision in the annotation in the record of incidents occurring in trial courts, there can be no manner of doubt that the accused himself at the trial in this case offered the record of the former case in support of his plea in bar, and also in support of his claim that his former discharge amounted to an acquittal and barred the prosecution of the present case.

With the record of the former case before him, the trial judge declined to dismiss the information on the grounds set forth in his opinion. In the opinion he sets forth the above cited extract from the decision entered in the former case, which contains a relation of all the material facts touching the proceedings in the former case necessary to sustain the conclusions of the court below and of this court as to the lack of sufficient grounds for his contentions in support of his plea of double jeopardy and his prayer for the dismissal of the information.

It may be admitted that the original record of the former case should have been brought here on appeal; and doubtless the necessary orders for that purpose would have been issued in response to a request to that effect by any interested party. But the only object of the introduction of the record by the accused was to establish his claim that the information in the former case had been discharged as to him under the circumstances set forth in section 34 of General Orders No. 58; and the extract from the former decision cited in the opinion filed in this case sets forth just what these circumstances were, and the facts above set forth were not challenged or controverted by the accused who himself offered the record in support of his plea.

Counsel's opinion of the lower court's findings of fact in regard to the sole defense offered by the accused may be gathered from the following quotations from his brief on this appeal: "In the trial of the present case, the attorney for the defendant Venancio de Guzman waived the preliminary investigation and asked the court to dismiss the

case, based upon the exclusion of this defendant in case No. 3983, which, according to section 36 of General Orders No. 58, is equivalent to an acquittal.

* * * * *

"The fiscal was deceived as to what the accused promised to testify in the first case; let him be charged with whatever legal crime may be proper; but there is no reason why he should again be accused of the same crime."

Thus it will be seen that both the court below and the defendant's counsel agree upon the nature of the evidence which was introduced by the offer of the latter, recorded on page 20 of the record. Not the slightest criticism is offered by the defendant's counsel concerning the findings of fact by the court below relative to the special defense under the provisions of sections 34-36 of General Orders No. 58. The case has been submitted to this Supreme Court for review by both parties upon the theory that the comment contained in the judgment below upon the evidence introduced by the accused in support of his plea in bar was a true resume thereof. Unless we hold that no evidence at all was submitted to the trial court in support of the defendant's plea, it is difficult to perceive upon what ground part of the court's findings upon the point may be accepted and the remainder rejected. If that part of the court's findings which relates to the dismissal of the information against the accused in the former case be accepted, why not, in the absence of any objection, accept the other part relating to the circumstances leading up to and subsequent to the dismissal?

In the absence of any objection on the part of the accused, this court accepted the relation of facts set forth in the opinion of the trial judge as a correct report of the incident relied upon by counsel for the appellant in support of his contention that the trial court erred in construing these facts as it did. Under all these circumstances and bearing in mind that the accused substantially admits the truth and accuracy of the relation of the facts set forth in the opinion of the trial court, how can it be maintained "that there is not a word or syllable in the record" to support the facts as to the incident on which this court, as well as the court below, relied in disposing of the contentions of the accused? By presenting the record of the former case without raising any question as to the truth and accuracy of the relation of the incidents of the former trial, the accused clearly consented to be bound thereby and, in truth, admitted the correctness of that record in this regard.

Nor do I consider, with the evidence of the defendant's fraud upon the state's prosecuting officer and upon the trial court admitted, that the accused was at any time or in any way misled by the interposition of this fraud to nullify the effect of the proceedings taken under the provisions of sections 34-36 of General Orders No. 58. No one could have been better apprised of the fact of his deceit than the defendant himself, and he was apprised also of the use which the Government intended to make of his duplicity. This is shown from that part of the judgment of the court wherein it stated: "Therefore, the court orders the fiscal to file a new complaint against Venancio de Guzman, to summon witnesses, and to set a day for its hearing."

This shows that the court's sole reason for disregarding the dismissal granted the accused was due to his failure to keep faith with the Government. With knowledge of his own fraud and of the use which the Government intended to make of it, can it be said with reason that the accused was surprised by the turn of affairs? Here again there is no complaint on the part of the accused. He has not objected to the consideration of his fraud. He has not objected to its being considered in determining the efficacy of his plea under the provisions of section 34-36 of General Orders No. 58. Both are established by the most satisfactory kind of evidence, the unquestioned findings of the court which tried the case.

DISSENTING

MORELAND, J.,

The decision of the court states: "It appears that some time prior to the trial of the case at bar, an information was duly filed charging De Guzman, jointly with the two Macarlings, with the murder of Garin; that before the former case came on for trial De Guzman entered into an' agreement with the fiscal, under the terms of which he promised to appear and testify as a witness for the Government at the trial of his coaccused, and to tell the truth as to all that occurred, provided the information was dismissed as to him and he himself was not brought to trial. With the consent of the court, and in pursuance of this agreement, he was not arraigned nor brought to trial, and the information was dismissed as to him. One of his coaccused pleaded guilty and the other not guilty, and thereafter the case came on for trial. After several witnesses had been called, De Guzman was placed on the witness stand, and denied all knowledge of the murder. He denied that he had ever said anything implicating his coaccused, and swore that a statement made by him before a justice of the peace was false, and that it had been made through fear of certain police officers. Questions by the court developed that he had made still another statement to one Natnat, implicating his coaccused, but he swore that that statement had also been made through fear; and repudiating all former statements made by him, he declared that they were false, and had been procured by the prosecuting officials of the Government by the use of improper and illegal methods."

The contention which I am making in regard to this case and the foundation of my dissent is that there is not a word or syllable of evidence in the record to support a single fact set forth in the foregoing quotation, except the fact that the accused in this case was discharged to be used as a witness for the prosecution in a prior case. As to the balance of the statement, the record is devoid of evidence to support a fact found therein, although the facts presented by the statement form the sole basis upon which the court founds its decision in this case, namely, that the defendant can be tried after the case against him has been dismissed and he has been discharged under sections 34 and 36 of the Code of Criminal Procedure.

The fact that the case was so dismissed and the accused discharged is admitted by the prosecution. (See brief of the Solicitor-General in this court.) The defendant pleaded it, and the truth of the plea was in effect admitted in the court below by the prosecuting attorney and is here by the Solicitor-General, and was found as a fact by the trial court. The sole reason for a dismissal of that plea was that the release of accused was obtained by fraud as stated in the prevailing opinion already quoted. All there is in the record in this case which, in any manner, refers to the alleged fraud and misrepresentation as set out in the quotation is the opinion of the trial court convicting the accused, dictated in this very case, in which he purports to give the history of the case leading up to the discharge of the defendant to be used as a witness for the prosecution. As I have said, the facts thus stated in the opinion of the trial court relative to the alleged fraud and deceit, which have been taken and accepted as true by this court in deciding this case and are the sole basis of its decision, are not supported by a scintilla of evidence in the record.

Of course, under sections 34 and 36 of the Code, quoted in the prevailing opinion, the discharge of the defendant to be used as a witness for the Government is a bar to a subsequent prosecution with respect to the same charge. This court seeks to escape that bar, the effect and efficacy of which is admitted, by setting forth that the discharge of the accused under those sections was attained by false and fraudulent representations and deceit on his part; that the dismissal of the case against him was obtained solely by that method and that, therefore, the bar ought not to stand. The whole basis of the refusal of the court to follow sections 34 and 36 in this case is that there was a fraud committed by the accused on the Government and that, in law, nobody can take anything by fraud.

Let us suppose that the accused did commit a fraud on the Government and that he represented that he would tell the truth in the trial against his companions and that, upon that representation, he obtained his discharge; that later

he refused to tell the truth about the matter and denied all knowledge of his companions' guilt. Let us suppose all this. What must the Government do to get the matter properly before the court? If the defendant sets up his former discharge and the corresponding privileges conceded under sections 34 and 36 as a bar to the action against him, and the Government desires to destroy the virtue of that plea, what must it do? Why, just the same as any other litigant when he wishes to deny or avoid what his adversary has pleaded. He brings the matter to an issue either by denying the plea or by affirmatively alleging new matter which, if true, avoids it. When the Government, in reply to a plea in bar under sections 34 and 36, cries fraud and deceit, should it not be required to allege the facts constituting that fraud and deceit and tender an issue with respect thereto, and thus give the accused an opportunity to meet the allegation? Moreover, when the Government alleges fraud, is it not its duty to prove it? Where a statute permits the defendant to plead in bar a former judgment of acquittal and he sustains that plea by evidence or admissions, and the Government, desiring to avoid the effects of that plea, alleges as a defense to that plea that the defendant obtained that acquittal by fraud and deceit, is it not the business of the Government to prove that allegation by competent and relevant evidence? Unquestionably so. The Government cannot deprive an individual of the benefits of sections 34 and 36 of the Code of Criminal Procedure by naked allegations. Mere allegations of fraud have no effect; they must be proved to produce results.

It is clear, therefore, that, even according to the theory of the prevailing opinion, the plea of former acquittal as a bar is conclusive until the Government shows by evidence that that acquittal was obtained by fraud and deceit. As I have before stated, there is not a single word of evidence anywhere in the record upon that subject. The court has assumed every fact it has found against the defendant. Not one of them is proved. Without facts, without evidence, without support or basis of any kind, it has overruled and set aside the judgment of dismissal in favor of this defendant rendered on a former trial, and wiped out the plea founded thereon by virtue of the sections referred to. Has the record in the case against the Macarlings, "the one in which the defendant was discharged, been offered in evidence in this case? Has the prosecuting attorney been sworn and has he testified what the alleged fraudulent representations were, who made them and how he was imposed upon and deceived by them? Has the private prosecutor been sworn relative to the same matter? Or accused's own counsel who, the trial court says, was also deceived? Has the court testified and informed us how he was wheedled into dismissing the case against the accused by reason of his false representations and deceit? Has any documentary evidence been offered or has any witness declared with respect to the fraud alleged to have been committed upon the Government by this defendant? Not a single document has been presented, not a single witness has testified to a single fact relative to the fraud alleged to have been perpetrated against the Government. The only evidence offered by the prosecution in this case was (1) the testimony of Brigido Serafica, Francisco de Aquino, Manuel Garcia, Diego Natnat, Blandina Garin, Liberate Garin, Gabriel Prado and Lorenzo Llamas, all of whom testified in the case at bar with respect to the guilt of the defendant of the crime charged; and (2) a statement made by the accused to the justice of the peace when he was arrested, which was evidently admitted on the theory that it was a confession of guilt as to the crime for the commission of which he was then under arrest. None of the evidence relates in any way to the fraud which it is alleged the defendant committed against the Government. Not only is there no evidence in the record supporting the charge of fraud and misrepresentation made by this court in the prevailing opinion, and not only was there no evidence to that effect in the court below, but there was never even an allegation of fraud made during the trial. No issue was tendered to the accused on that subject. When the defendant entered the plea in bar the prosecuting attorney, as well as the court, admitted it. The prosecuting attorney offered no allegations opposed to this plea, no pleading on that subject was filed by him or anyone else with the trial court, and no issue was ever framed or tendered on the subject, either expressly or impliedly. On the contrary, the refusal to allow—that is, the dismissal of—the plea was expressly placed on wholly different grounds. On page 2 of the evidence appears the following:

"THE COURT. At this point the attorney for the accused asked the court to dismiss the case and acquit the accused because of the fact that he had been discharged from the former complaint and under section No. 34 of General Orders No. 58 and that under order or section No. 36 of the same General Order No. 58 his discharge amounts to an acquittal and bars the present prosecution for the same offense. The court understands that section No. 36 is for the purpose of avoiding that the accused be put twice in jeopardy. In the case at bar the accused was excluded from the complaint before he had answered whether he was guilty or not and before any witness had declared in the case. The court understands that jeopardy had not at that time attached, and, therefore, he denies the motion."

As clearly appears from this, there was no defense to the validity of defendant's plea upon the ground that he had obtained his discharge by fraud and deceit. The refusal to recognize the plea was based solely upon the ground that he had not been placed in jeopardy in the first trial and that, therefore, the plea in bar was without value, the trial court understanding that the question of jeopardy, and not of bar under sections 34 and 36, was raised by the plea. At that time it had not occurred to the judge or to the Government to assert the proposition that the defendant had obtained his discharge by fraud and deceit. The cause went to trial upon the merits, the prosecution presented its witnesses and rested its case. The charge of fraud not having occurred either to the judge or to the Government, no allegation to that effect had been made by the Government and, of course, no evidence was introduced with regard to it. Fraud was not made an issue in the cause, was not even an element in the case, was not mentioned or even thought of by anybody and, of course, no evidence was offered to sustain it. From one end to the other of the record in the Court of First Instance there is no allegation, or intimation of an allegation, of fraud, and throughout the whole record there is not a scintilla of evidence relating thereto.

The first intimation of fraud of any kind or character was made after the trial was completed. It is found in the opinion of the judge convicting the accused. I repeat that, up to that point, there is not only no evidence whatever relative to fraud and deceit practiced by the defendant, but there is not even an allegation or an intimation that he ever practiced any. The court said on that subject in its opinion finding the accused guilty of murder:

"As in the present case the accused Venancio de Guzman in the case No. 3983 deceived his own attorney, the fiscal and the court, by his statements, and then, when on the witness stand, denied all these statements and the testimony resulted in the acquittal of the accused Antonio Soriano when it was sought and expected to result in his conviction. He practiced deception on the fiscal, did not attempt to comply with his agreement and therefore cannot complain if the fiscal has instituted a new complaint against him; nor can he claim the protection of former jeopardy since jeopardy had not attached when the complaint against him was dismissed. Nor was his declaration as a witness in said case No. 3983 necessary to the conviction of those two accused, Pedro Macarling and Serapio Macarling, nor has it been used against him in any way in the present case."

Let us again recall that throughout this whole case there had not been even an allegation of fraud against the accused and no evidence whatever sustaining such a charge. No one had ever claimed that the accused had "deceived his own attorney, the fiscal, and the court," that "when on the witness stand" he had "denied all these statements," that "he practiced deception on the fiscal and did not attempt to comply with his agreement." These things were utterly, unheard of during the trial. What, then, must have been the surprise of the accused to read in the decision of the court, after all opportunity to defend himself upon that charge had passed, the statement that his plea was disallowed because he had obtained it by false and fraudulent representations. It is too late for the accused to defend himself against charges which appear for the first time in the decision convicting him. He is utterly helpless when the opinion goes outside of the record and bases the conviction upon charges never before formulated. If such things can occur, the accused has no possibility of defending himself. It is not enough to urge, if it can be urged, that the trial court had the right to take judicial notice of its own records, because there had been presented no allegation and there had been framed no issue with respect of which this record could have been evidence. Before there can be evidence there must be an issue. Moreover, if the accused had been notified that he

was being charged with fraud and deceit and thereby deprived of the benefits of sections 34 and 36, he would have had the opportunity, as he would have had the right, to meet the allegations and evidence presented by the prosecution by making counter-allegations himself and presenting evidence in his own behalf; and while, for the sake of argument, it may be conceded that the Court of First Instance had the right to take judicial notice of a previous record, that does not lessen the gravity of the error committed against the rights of the accused, because he had a right to be heard upon the issue with respect to which the court took judicial notice of this record and to present his own proofs with respect thereto.

The finding in the opinion of the trial court that the accused had obtained his discharge by false and fraudulent representations and deceit was a complete surprise. No allegation to that effect had been made; no evidence to support it had been offered. Upon that subject he has not had his day in court. No issue has been tendered him relative to that matter, no evidence has been offered against him on that subject and he has had no opportunity to offer evidence in his own behalf. He has been deprived of his rights without due process of law.

The concurring opinion attempts, by argument, to sustain the opinion of the court. In doing so several errors of fact have, in my opinion, been committed and various conclusions drawn which, according to my view of the case, do not follow from the premises presented. Much of the concurring opinion strives to show that the decision of the court is based on evidence which was introduced during the trial, but which it is admitted, is not found in the record of the trial court or in the record on this appeal. The result was to anticipate the argument of the dissenting opinion that there was not a fact in the record which supported the fundamental basis of the decision that the accused was not entitled to the advantages of sections 34 and 36 for the reason that he had obtained his discharge in the former case by fraud and deceit. Passing for the moment the attempt made, not only in the opinion of the court but in the concurring opinion as well, to treat and use as facts proved the statements of the trial court made in its judgment of conviction in case No. 3983 as well as in this case, a method of obtaining facts for the conviction of an accused which is sanctioned by no authority that I can find, I note, in the first place, that the concurring opinion, to establish the proposition that there is evidence showing the fraud which the accused is charged in that opinion and the opinion of this court with having committed in obtaining his release, quotes from page 20 of the record in this case as follows:

"The FISCAL. Government rests.

"Mr. BERNABE DE GUZMAN (attorney for defense). I offer in evidence the description (transcript) of notes of the evidence taken in case No. 3983 first case against the same accused with three others, in which (it) appears a motion for (of) the prosecution asking for the exclusion of the accused who will (to) be utilized as a witness for the prosecution.

"The Court. Claim will be admitted as asked for by the, attorney."

In addition to this the concurring opinion quotes from the judgment of the trial court in case No. 3983 and in this case convicting the accused for the purpose of setting forth what is claimed to be the evidence which was before the court when it made the decision in this case. There is no claim that the court took judicial notice of any records or that it had the right to. The sole contention is that there is evidence in the record showing fraud and deceit and that the accused himself introduced it, and it is upon the evidence which it is alleged the accused himself produced that the claim is based that there was evidence of fraud and deceit in the record in the court below and here upon which are based the findings quoted; and it is to substantiate this claim that the concurring opinion cites the part of the record above set out, which, it is claimed, proves the assertion. Upon that quotation from the record, then, rests the whole contention that there was evidence before the trial court supporting the finding that the accused obtained his discharge by fraud and deceit. From this record is drawn the following conclusions, among others: "I think that these citations from the record of this case in the court below clearly and

conclusively establish that the record of the former case No. 3983 was before the trial judge when he rendered his decision in this case, and that that record was submitted by the accused himself, in support of his plea in bar."

And: "* * * there can be no manner of doubt that the accused himself at the trial in this case offered the record of the former case in support of his plea in bar, and also in support of his claim that his former discharge amounted to an acquittal and barred the prosecution of the present case."

And: "With the record of the former case before him," etc.

It is clear from the face of the concurring opinion itself, so far as it refers to this particular point, that the writer thereof fell into error, not only of fact but of conclusion. According to the quotation which the concurring opinion itself contains, all that is claimed is that the accused offered in evidence the "notes of the evidence" taken in case No. 3983. Assuming that they were offered and received in evidence, does that justify the conclusion that the record of cause No. 3983 was introduced in evidence? Is there no difference between "notes of the evidence" and the record of the case? Is there not something in the record of a case besides "notes of the evidence?" and is it not a long jump from the "notes of the evidence" to the whole record of a criminal case? This error is carried throughout the entire discussion and is repeated and reiterated. The record of case No. 3983 was not offered in evidence by anybody, was not received in evidence by the court, was not made a part of the record in the trial court, or of the record on appeal, and has not been assumed to have been in evidence by anybody except this court. The only exhibit in the case is the one listed by the clerk of the trial court who made up the record and sent it to this court (section 48, Code Crim. Proc), and that is Exhibit A, introduced by the prosecution itself, consisting of a statement made by the accused before the justice of the peace at the time of his arrest and to which I have already referred in this opinion. There is not another exhibit in the case; and no other exhibit was, at any time, received by the trial court. It having been erroneously assumed that the record in case No. 3983 was offered in evidence, and the opinions in this case being based wholly upon that assumption, and that assumption being without foundation, there can be but one result.

But there is another error; and that is the assumption that the "notes of the evidence" offered by the accused were in fact received in evidence by the court, were part of its record, and were properly before it in its consideration of the case. In the first place, as a matter of fact, the part of the record offered was not received in evidence, and, in the second place, it was not necessary that it be received, as the fact which its introduction would establish was, in effect, admitted by everybody. As I have already stated in this opinion, the plea of the accused that he had been discharged in the former case (No. 3983) to be a witness for the Government, and the facts upon which it was based, were admitted by the prosecuting attorney, by the court on the trial, and by the Attorney-General in this court on this appeal. No one at any point in the case has ever denied or even questioned either the plea or the facts upon which it was based. They were always undisputed and uncontradicted. As I have already stated, the instant that the plea was made, and that was at the beginning of the trial, the court, with the acquiescence of all parties, assumed to be true the facts upon which it was based and then and there finally determined the question raised by the plea, held it bad and rejected it. He based his rejection of the plea, not on the ground that the accused had committed fraud in obtaining his discharge, but on the ground that the accused had not been in jeopardy. The court could have made no decision as to the efficacy of the plea if the facts on which it was based had not been admitted, as no evidence had been offered to prove the plea and there was no evidence before the court on that subject.

The attorney for the accused, however, in spite of the fact that it appears to have been admitted by everybody that the accused had been released on a former charge to be a witness for the Government, nevertheless offered in evidence so much of the record as would show that fact. This offer again developed the fact that it was admitted that he had been so released. This is shown by the quotation found in the concurring opinion, taken from page 20

of the record. The court did not receive in evidence that portion of the record offered by the accused but, on the contrary, assured the accused that his claim that he had been so discharged was admitted as he asserted it. That this is the case is clear from the quotation referred to. When that portion of the record was offered the court did not say "that portion of the record offered is received in evidence and marked exhibit so and so," as a court would naturally say if it had received the evidence offered. On the contrary, there is not a word which shows that it was received in evidence or that it was marked as an exhibit. The language of the court used at that time does not warrant the statement that it was received and the fact that it was not made an exhibit, was never referred to in the court below, never became a part of the record in that court, was not physically before that court, is not a part of the record on this appeal, is not physically before this court, and is not referred to by the attorneys who argued the case, is clear proof, unless it is entirely immaterial, that it was not received in evidence and that the court never intended to receive it. On the other hand, the language used by the court when the evidence was offered, namely, "claim will be admitted as asked for by the attorney," shows that the claim of the accused that he had been released on a former occasion, and to sustain which he was offering that portion of the record, would be admitted. That being the case, there was no necessity for receiving that portion of the record offered; and, as a matter of fact, it never was received and never was, physically or otherwise, a part of the record in that court and is not a part of the record here.

The third error in the concurring opinion is connected somewhat with the error first pointed out, namely, that of assuming that because the "notes of the evidence" were offered as evidence, the whole record became a part of the evidence in the case. That error consists in assuming that, even though the portion of the record in the previous case offered by the attorney for the accused had been received in evidence and had been made a part of the record in this case as made up by the trial court, it would have included all of the evidence taken in case No. 3983. It should be noted that the only evidence taken in case No. 3983 offered by counsel for the accused was those "notes of the evidence * * * in which appears a motion for the prosecution asking for the exclusion of the accused to be utilized as a witness for the prosecution." The accused did not offer all of the evidence taken in case No. 3983. None of the evidence was competent, relevant or material to the fact which defendant desired to establish, namely, that he had been, discharged under a former indictment charging the same crime with which he was charged in the case in which he entered the plea. What Tom, Dick and Harry may have testified to in case No. 3983 relative to the guilt of the persons there on trial would be of no consequence in establishing defendant's plea in bar. What he was required to prove was that he had been before charged with the same crime that he then stood charged with, that others were charged with him in the same information, that upon the motion of the Government he had been released from that charge in order to be a witness for the Government. Those are the only facts that the defendant had to prove to sustain his plea. His offer, therefore, was only of so much of the stenographer's notes as showed the fact that he had been so discharged. That was all that he could properly and legally offer, so far as the evidence in case No. 3983 was concerned as that was all that was material. We cannot assume, as the concurring opinion assumes, and as we must assume if we are to hold that the evidence referred to was really received in evidence, that the defendant offered incompetent, irrelevant and immaterial evidence, that the Government failed to object to it, and that the court admitted it. The only part of the record in case No. 3983 which defendant offered was that which showed that he had been discharged. He did not offer all the evidence in that case or any other portion of the evidence of that case; and what he did offer was not received by the court or made a part of the record.

Even if all the evidence in case No. 3983 had been admitted, as claimed, it would not have been sufficient to prove defendant's plea. It would have been necessary, in addition, to prove that the crime with which he stood charged in cause No. 3983 was the same crime with which he was charged in the case in which the plea was offered, that, in cause No. 3983, he was charged jointly with others, and that, on motion of the Government, he

was discharged in that case to be used as a witness for the Government. None of these facts were proved, nor did defendant offer to prove any of them, except one. They were all admitted, in effect; and he was under no obligation to prove them when even the court itself without objection of any kind from anybody assumed their existence. They have been assumed to be true in every step of the proceedings since that time; and in this court one of the first to admit the existence of those facts, although there was not a particle of evidence in the record establishing them, was the Attorney-General on this appeal.

The fourth error committed in the concurring opinion is found in the assumption that, even if the whole record in case No. 3983 had been introduced in evidence by the defendant, it would have proved defendant's fraud in obtaining his discharge, and would, therefore, have avoided the force of the plea. This conclusion, drawn by the concurring opinion as well as the prevailing opinion (although the record in No. 3983 is not here and no one has seen it), does not at all follow. Apart from the statement made in the opinion of the court in that case, it nowhere appears in the record in case No. 3983, so far as is known, that the Government was deceived or defrauded by the defendant, unless the inference of fraud and the resulting deception may be drawn from the fact that the defendant may not have testified in favor of the Government. I do not know whether that fact appears in the record in case No. 3983, because, as I have stated, no part of that record is here. All that I know about it I gather from what the trial court has said in its opinion. But even if it does appear in that case that the defendant did not testify in favor of the Government, that does not prove that he deceived the officials of the Government. It cannot be assumed from the mere fact that a witness did not testify to anything that aided the Government that he was guilty of willfully deceiving the Government or of deliberately practicing deceit on its officials. So far as the statement of the court shows, as made in its opinion in case No. 3983, what the accused did as a witness was to deny that he had ever made any statements unfavorable to his coaccused. He testified to nothing that affected the Government's case in any way. All that happened was that the accused failed to testify in any sense, either for or against the Government. From that fact alone it cannot be assumed that he committed a fraud by reason of which the Government lost its case against the other accused. As I have said before, no one testified, either in this case or in case No. 3983, what the agreement of the accused was with the Government officials. Neither the prosecuting attorney nor the private prosecutor was put on the stand to prove how he was to testify, or the nature and terms of the agreement under which he was discharged. Neither of those persons has testified that he was deceived by the accused, or that he was induced to obtain the discharge of the accused by fraud and deceit. Neither in case No. 3983 nor in the case at bar is there a syllable of evidence showing that the accused in any way deceived the Government or its officials or that he in any way or to any extent; obtained his discharge by fraud and deceit. All that there is in the record of either case is the statement made by the court, without a particle of evidence of record to sustain it, that the accused obtained his discharge by fraud. The court itself, in its opinion, admits that nobody testified to facts constituting fraud when it says that "the fiscal has stated that he was deceived by the statement of Venancio de Guzman to him as to what his declaration would be on the witness stand." The mere statement of the prosecuting attorney to the court is not evidence against anybody. He was not sworn as a witness, was not put on the stand as a witness for any party, was not examined under oath, and no opportunity was given the accused or his counsel to cross-examine him. The mere statement of the court in its opinion in case No. 3983 cannot, as I have before stated, be used to prove, in the case at bar, the existence of facts stated therein. In other words, a court cannot make a record in a criminal case by incorporating in its opinion all of the facts which ought to appear in that record. Records in criminal cases are not made in that way.

It seems to me clear, therefore, that, even if the record in case No. 3983 were before the trial court and this court, it would not prove the fact that the accused committed fraud against the Government and that he obtained, by that means, his discharge in case No. 3983. The conclusion of the concurring opinion that the fraud is proved from the record of case No. 3983 is, therefore, erroneous—erroneous in two ways, first, it assumes that the record is here,

and, second, it assumes what it would prove if it were.

While there is much comment in the concurring opinion on the necessity of the elimination of technicalities and of looking at the substance and not the form, I find nothing on the injustice of depriving a person of his statutory rights without notice of the grounds upon which it is proposed to do so. Here was an accused who entered a plea the facts supporting which were admitted on all hands. That plea, as admitted, was sufficient, under sections 34 and 36 of the Code of Criminal Procedure, to bar the action in which the plea was made and to require the immediate discharge of the accused from custody. The only possible way of defeating that plea and destroying the efficacy thereof was for the Government to prove that the former discharge had been obtained by false and fraudulent representations and deceit and that it was, therefore, of no legal force or value. Now, if it was the purpose of the Government to make that defense to the plea, was not the accused entitled to know it? Was he not, as a matter of plain justice, entitled to know that the Government intended to destroy the force and value of his plea by claiming that it had been obtained by false and fraudulent representations? Was it not the duty of the Government, as one of the litigants in a court of justice, to give the accused some notice of what it was going to do? I pass over without comment the position taken in the concurring opinion that, inasmuch as the accused knew better than any one else of the fraud that he had committed, it was not necessary for the Government to give him notice of its intention to avoid his plea on that ground. As I understand it, it is the duty of a party to an action to inform his adversary of the nature of his claim or defense so as to afford a fair opportunity to meet it. In what part of the record in this case has the Government done this thing? At what point and when in the trial of this case did it notify the accused that it proposed to destroy his plea by claiming that he had obtained it by fraud and deceit? Where did they tender him an issue upon that point? Nowhere and at no time was he notified nor did he have the slightest knowledge that an attempt was to be made to destroy his plea on that ground. Not only can we assert without hesitation that no such notice was given him, but we can declare that the Government did not intend to give him such notice. This is clearly shown from the fact that the Government did not offer a syllable of evidence during the trial to show that the accused had obtained his discharge by fraud and deceit. It seems to me extraordinary that it can be claimed that it can avoid defendant's plea by alleging fraud at this time, when, throughout the trial, it did not offer a word of evidence to establish it. Where in the record does it appear that the prosecution offered a syllable of evidence to show that the accused committed fraud? Not only has the Government not offered evidence of that character, but no other entity or person has offered any. Throughout the record there is not a word of evidence on the subject. Has anyone testified to any fact showing fraud or deceit? Has the prosecuting attorney testified as to what his agreement with the accused was? Has he shown that the accused deceived him? Has the private prosecutor been sworn on the same subject? Has the judge himself testified that the accused deceived him? Has any documentary evidence been offered to show the nature of the agreement or the fact of fraud? To all of these questions: No. No one ever testified to the nature of the agreement that the accused made with the Government; no one has testified that the Government officials were deceived; and nobody has testified to any fact which would warrant the conclusion that the accused obtained his discharge by fraud and deceit.

The concurring opinion says: "It may be admitted that the language of the record is somewhat informal and lacking in technical precision, but unless we are to look only to the form and not the substance, and unless we are to demand an unreasonably high degree of technical precision in the annotation in the record of incidents occurring in trial courts, etc., etc." I do not see the force of the expression "the language of the record is somewhat informal and lacking in technical precision." It is not formality or language that I complain of; it is the absence of evidence. Nor do I understand what the concurring opinion means by "unless we are to demand an unreasonably high degree of technical precision in the annotation in the record of incidents occurring in trial courts, etc., etc., etc.," If by that language the writer means to commend the failure to prove and, therefore, to insert in the record,

elements which are essential to the conviction of the accused, or, if the writer proposes to ask the trial as well as the Supreme Court to convict upon a record from which are missing the most essential and necessary parts, then I do not agree with the proposition asserted. I do not consider it technical to require the Government to state its case against an accused. I do not regard it technical to require the Government to prove its case against an accused. I do not regard it as technical to require a record on appeal to contain the evidence upon which the accused was convicted and the grounds upon which the court based its judgment. That the Supreme Court has not heretofore regarded these requirements as technical is shown by its decisions.

In the case of *United States vs. Quilatan* (4 Phil. Rep., 481), the record did not contain the evidence taken during the trial of the cause. With respect to that defect the court said: "When defendants appeal in criminal cases, the entire record, including all of the proof, must be sent to this court, in accordance with the provisions of section 48. * * * this cause is hereby ordered to be returned to the clerk of the Court of First Instance of the Province of Ambos Camarines, with directions to the Court of First Instance of said province to proceed to a new trial against the defendant."

Section 48 of the Code of Criminal Procedure referred to in the case just cited provides: "Upon an appeal being taken, the clerk or judge of the court with whom the notice of appeal shall have been filed must, within five days after the filing of the notice, transmit to the clerk of the court to which the appeal is taken the complete record in the case together with the notice of the appeal," etc.

In the case of *United States vs. Tan* (4 Phil. Rep., 625), it appeared that only a part of the evidence taken in the case was sent up on appeal. The record being thus incomplete, the Solicitor-General made a motion that the appeal be dismissed on the ground that the record in the appellate court did not contain the testimony of Alipio Gimano and Claudio Casiguan and contained only a part of the testimony of Leoncio Dapitan, and that it was the duty of the appellant to furnish a complete record. Resolving the question presented by the motion the court said: "The record itself furnishes intrinsic evidence that the facts stated in the motion of the Solicitor-General are true, and it appears that two witnesses testified at the trial in the court below whose testimony is not contained in the record before us, and it also appears that a copy of their testimony can not be obtained so as to complete the record."

The court then cited section 48 of the Code of Criminal Procedure and continued: "It is thus made the duty of the Government to cause a record to be kept of the proceedings in a criminal cause in the Court of First Instance, and to cause that record to be transmitted to this court. This rule is, of course, radically different from the rule which prevails in civil causes, and is also radically different from the rule which prevails in probably most of the United States.

* * * * *

"Upon an appeal to this court in a criminal cause we are required to examine the evidence and to enter the judgment which ought to be entered. This can not be done unless we have before us all the evidence in the case. In this case we have not all of that evidence, and it can not be obtained. The only thing that can be done is to reverse the judgment and direct a new trial."

In the case of *United States vs. Hollis* (5 Phil. Rep., 531), a certain document was introduced in evidence by the prosecution and marked Exhibit 2. This exhibit was not made a part of the record on the appeal. With respect to that defect the court said. "This document, 'Exhibit 2,' does not now appear in the record in this court. It has been lost; where or in what manner we are unable to say; there is no positive proof that it was ever received by the clerk of this court. Whereas this document furnishes the principal evidence in the cause against the defendant, and whereas it is necessary for this court to have the said document in order that it may ascertain for itself whether the

alleged indorsement is a forgery or not, we are unable to reach a decision in the case without it and therefore hereby order the said cause to be returned to the inferior court for a new trial."

In the case of *United States vs. Dacanay* (6 Phil. Rep., 367), the court said: "We do not have before us, therefore, the evidence which was presented in the trial court. In accordance with the decisions in the cases of *United States vs. Pablo Tan* (4 Phil. Rep., 625) ; *United States vs. Hollis* (5 Phil. Rep., 526); and *United States vs. Quilatan* (4 Phil. Rep., 481), the judgment must be reversed and a new trial ordered."

In the case of *United States vs. Talbanos* (6 Phil. Rep., 541), the defendant pleaded guilty. In that case a dissent was written by Judge Carson, who is the writer of the opinion for the court in the present case, in which he said: "On the other hand, if, as appears from the record and the judgment of the trial court, further testimony was taken upon which the judge exercised his discretion in imposing the death penalty, then all this evidence should be before us when we are called upon to review the judgment of the court below. We are charged with the duty of examining the record for the purpose of correcting errors both of law and of fact, and this court has repeatedly held that it will not affirm a judgment in a criminal case unless all the testimony taken at the trial is brought before it on appeal. (*U. S., vs. Pablo Tan*, 4 Phil. Rep., 625; *U. S. vs. Hollis*, 5 Phil Rep., 526; and *U. S. vs. Quilatan*, 4 Phil. Rep., 481.)"

The case of *United States vs. Tan Yak* (25 Phil. Rep., 116), was a deportation case in which the defendant appealed from an order of deportation issued by the Court of First Instance of Zamboanga. To that cause, although in no sense a criminal case, was applied the rule laid down by the decisions above cited.

The decision in that case, also written by Judge Carson. says: "The Solicitor-General in his brief admits or rather asserts 'that no notes of the testimony were taken in the court below,' and we are satisfied not only from his admission, but from a careful review of the whole record brought before us, that if any testimony was in fact taken, it was not reduced to writing, and that it cannot therefore be certified to this court for review in accordance with the practice in this jurisdiction."

For these reasons the court reversed the decision and returned the case for a new trial, holding that it was illegal for this court to convict a defendant in a criminal case unless all of the evidence taken at the trial was before us in the record; and that the appeal in a deportation case being the same as in a criminal case (according to the doctrine laid down in the same case), the court had no authority to act until the record was complete.

It is the unchallenged doctrine, therefore, in this jurisdiction (or was until the present decision was written) that the Supreme Court cannot legally convict in a criminal action without having before it the entire record, including all of the evidence upon which the trial court acted in its conviction of the accused. It is also the unchallenged doctrine (or was before the opinion in this case was written) that it is the duty of the Government, when an appeal is taken in a criminal case, to make up a complete record of the trial, including the evidence on which the trial court based its judgment of conviction. Heretofore, whenever the record, in a criminal case, has been found by this court to be in any way incomplete, the judgment of conviction has been reversed and a new trial ordered. We have even gone so far, as we have seen, as to apply this doctrine to deportation cases also; and it is now the rule that, in such cases, the Government of the Philippine Islands must itself, at its own expense, make up the record on appeal.

These cases, and the doctrine therein laid down, bring us to the fifth error of the concurring opinion (also an error of the majority opinion), which consists in the insistence of those opinions that the accused be convicted on a record which both opinions admit to be incomplete and not to contain, so far as the plea of the accused is concerned, the most important of all the testimony taken during the trial of the cause. Certain it is, if the previous decisions of this court mean anything, that the accused ought to have a new trial, or at least a correction and

perfection of the record, inasmuch as, according to the claim of the concurring opinion, and necessarily of the majority opinion also, the most important evidence relative to the plea of the accused which it is claimed was before the trial court and upon which it based its decision is not a part of the record on appeal and is, therefore, not before this court. In spite of the decisions referred to, however, the accused is convicted on an incomplete record, from which, according to the contention of the concurring as well as the majority opinion, is omitted the most important part of the evidence taken in the court below.

In view of these decisions and the condition of the record on appeal, I am unable to find justification for the decision in this case.

The concurring opinion seeks to demonstrate that the decision of the court is well founded, and, to do this, it attempts to show that there was evidence introduced in the court below which, if here, would support it. But no allusion is made to the proposition that, for such evidence to be of any value for that purpose on appeal, it is necessary that it be in the record before this court. The fact that such evidence was introduced on the trial, if it is a fact, is of no consequence when the case arrives in the Supreme Court. To be worth anything the evidence must be in the record. Evidence which is introduced on the trial but left in the court below, that is, not brought up on appeal, is valueless, and can produce no effect in this court. That this is so is the unchallenged doctrine of this court as laid down in the decisions cited and is the statutory law of the country as found in section 48 of the Code of Criminal Procedure. It is undisputed, as it is a physical fact and appears instantly and conclusively on examining the record on this appeal, that the evidence to which the concurring opinion alludes as that which supports the opinion of the court is not in the record on this appeal. The record on this appeal consists only of the information, warrant of arrest, return, arraignment and plea of the accused, the evidence, including Exhibit A of the prosecution already referred to, which is simply a statement made by the accused when brought before the justice of the peace at the time of his arrest, the judgment of conviction and sentence, and the notice of appeal. This is all that the record in this court contains. Neither the record in case No. 3983, nor any part thereof, nor the "notes of the evidence" in that case, referred to in the quotation in the concurring opinion, is in the record in this court, nor are they before this court in any form or manner. Now, let us take into considerations these two facts, namely, that (1) no part of the record of case No. 3983 is before this court and (2) the fact that it is the uniform doctrine of this court that an accused cannot be convicted by this court when the record does not contain all of the evidence taken in the court below, or when the record is in any manner incomplete, and then let us ask ourselves the question: How can the conviction of the accused be justified on this record? And of what materiality is the claim that "in the absence of any objection on the part of the accused, this court accepted the relation of facts set forth in the opinion of the trial judge as a correct report of the incident relied upon by counsel for the appellant in support of his contention that the trial court erred in construing these facts as it did" and "if that part of the court's findings which relates to the dismissal of the information against the accused in the former case be accepted, why not, in the absence of any objection, accept the other part relating to the circumstances leading up to and subsequent to the dismissal?" These statements ignore, in my humble opinion, the rule laid down in the cases cited. It is of no consequence what the trial court puts in its judgment of conviction. The Supreme Court is a trial court, i. e., it tries cases de novo on the record, (*Serra vs. Mortiga*, 204 U. S., 470; 11 Phil. Rep., 762; *Kepner vs. United States*, 195 U. S., 100; 11 Phil. Rep., 669) and as such must have evidence, proved facts, and not the opinion of a trial court as to what the facts are. It cannot convict on the mere say so of a trial court. It cannot abdicate its functions as a court which decides on evidence and permit a trial court to exercise those functions for it. It has no right to accept the findings of fact of the trial court in a criminal case as the real facts established by the evidence. This court has steadily and uniformly held that it must have the evidence before it before it can discharge its duty according to justice and the law. (See cases cited.) Yet, in full view of these decisions, the accused is convicted of murder and is sent to penal servitude for life upon a record which was not sufficient to

sustain a conviction for homicide in *United States vs. Quilatan*, or brigandage in *United States vs. Tan*, or forgery in *United States vs. Hollis*, or to deport a Chinaman in *United States vs. Tan Yak*. Even admitting the widest claims of the concurring opinion, namely, that the record of case No. 3983 was introduced in evidence in the trial court, all admit that such record is not a part of the record on this appeal. Does not that fact alone preclude a conviction on the record as it stands? According to the decisions of this court, upon which all men accused of crime have a right to rely in defending themselves, must not the accused have a new trial, or must not the record be made complete before his life is closed like a book? What is there about this case which requires the judges of this court to treat it differently from other cases in like condition? Why should Venancio de Guzman be convicted of murder on a record which was not sufficient to deport Tan Yak? Why should he be sent to prison for life on a record that this court held was too defective to permit the conviction of Hollis for forgery?

The statement and claim made by the concurring opinion that the record of case No. 3983 was considered by the trial court with the consent of the accused is equally without foundation with the statements already referred to "that the record of the former case No. 3983 was before the trial judge when he rendered his decision in this case, and that the record was submitted by the accused himself," and that "the facts above set forth were not challenged or controverted by the accused who himself offered the record in support of his plea." These statements, as we have seen, are disproved by the quotation from the record as made in the opinion itself. But, aside from that, the claim is, I believe, without merit when we consider the object to be gained by getting the record of case No. 3983 before the trial court and this court. That object is to obtain facts which will show "fraud and deceit on the part of the accused in obtaining his discharge in that case, and thus sustain the decision of this court in that regard. But such object is seen to be impossible of attainment when we recall that there was no question of fraud raised by the Government, or by anybody else for that matter, throughout the trial of the case; and the reasoning is seen to be specious and groundless when we call to mind the fact, which stands out in this case as clear as the sun at noonday, that it is legally impossible that fraud or deceit be an issue or even a question in this case. If fraud is not and cannot be a question in this case, what justification can there be for basing a conviction upon it and especially for attempting to get into the record evidence to establish fraud? It is futile to insist on there being evidence of fraud in the record when there is no issue or question of fraud in the case. That no such question or issue can be in the case is beyond dispute. As I have already observed, the Government did not raise that question or present that issue at any time during the trial and introduced no evidence whatever in relation thereto. The accused had no notice at any stage of the trial that that question was in the case and no issue was ever created in respect thereto. But, in addition to this proof that no such question was in the case, we have the fact that the possibility of such a question being in the case was eliminated at the very beginning of the trial by the court dismissing defendant's plea on the ground that he had not been in jeopardy in case No. 3983 and thereby wiping the plea and everything in connection with it entirely from the case, so far as that trial was concerned. At the opening of the trial the accused made the plea of former discharge and asked to have the case against him dismissed on that ground. The court held the plea bad on the ground that the accused had not been in jeopardy in the former case. That holding eliminated from the case, so far as the Government was concerned, the plea and everything connected with it. Thereafter, so far as the Government was concerned, it was not an issue, was not a question in the case, and no evidence could be introduced concerning it, no decision could be based upon it and nothing could be done further unless the court reversed its first ruling with regard to it. Until reversed that was conclusive. It being in favor of the Government and entirely destroying the plea itself, the Government could do nothing more. It is evident that, if a special defense set up in an answer is dismissed on demurrer or stricken out or disallowed on motion, no evidence to sustain that defense is admissible on the trial. So, when the special defense urged in this case, viz, the plea in bar, was stricken out or disallowed on motion, no evidence to sustain or destroy it was admissible on the trial. The next question to be raised was one in this court on appeal to determine whether the action of the trial court overruling and dismissing the plea was correct.

It being evident that the plea was destroyed and wiped out of the case by the decision of the court dismissing it, where is the point of the attempt to show a destruction of the plea on the trial by proving that the discharge upon which it was based was obtained by fraud and deceit? And to what purpose is the argument of the concurring opinion that there was evidence introduced during the trial to destroy the plea? The plea, so far as that particular trial was concerned, was destroyed and wiped out by the decision of the court upon it; and that decision was made before the trial began. Now, if the plea was destroyed and wiped entirely out of the case before the trial began, what possible purpose could there be in trying to destroy it after the trial began? The plea having been annihilated before the trial, could not be a question during the trial, as it was not in existence; and the talk about evidence having been introduced to destroy it is, it seems to me, without point. Until the trial court reversed its own ruling on the plea, neither the plea nor anything in connection with it could have been a question in the case during the trial. That decision eliminated the plea from the case and it remained so and will remain so, as this court does not reverse that decision. I believe the court unanimous in the belief that the trial court erred in dismissing the plea upon the ground of former jeopardy, as former jeopardy had nothing to do with the question raised by the plea.

What has already been said disposes of the contention that "the case has been submitted to this Supreme Court for review by both parties upon the theory that the comment contained in the judgment below upon the evidence introduced by the accused in support of his plea in bar was a true resume thereof." In my judgment, the remarks in question about the "theory" of the case have no real foundation. How could the theory of the case be such as stated? The accused was charged with murder. Before the trial began he filed a plea in bar based on a former discharge under the same information. The facts upon which the plea was based were admitted and, therefore, no evidence was offered or received to prove them. The Government made no reply of fraud to the plea or the facts; offered no defense of fraud; made no allegation of fraud; said and did nothing which even hinted at fraud. On the contrary, it took the position that the plea was bad, erroneously assuming that the plea was "once in jeopardy" under section 24 of the Code of Criminal Procedure instead of a plea in bar under sections 34 and 36 thereof; and that it should be dismissed, as, according to the admitted facts, the accused had not been in jeopardy in the former case (No. 3983). The court took the Government's view of it and disallowed the plea. Not one word of fraud, not a hint of it. The plea having been eliminated from the case, the trial began on the merits. Now, on that trial, with the plea out of the case completely, can it be contended that evidence of fraud on the part of the accused in obtaining his discharge was admissible? or that such fraud was an element or an issue in the case? or that such fraud was the "theory" of the case? or that the "accused himself introduced evidence" of his own fraud? The plea being out of the case entirely, no one thought of fraud. What would have been the use of raising the question of fraud to kill a plea which was already dead, having been completely killed by the theory of "once in jeopardy?" And yet, in the face of this, it is urged that "the case has been submitted to this Supreme Court * * * upon the theory that the comment contained in the judgment below," showing fraud and deceit, "was a true resume thereof." The accused appealed from the judgment of conviction and the order overruling and dismissing his plea, on the ground that they were both erroneous. On such an appeal how can the issue of fraud arise and how can the "theory" of the case be fraud and deceit?

It is urged in the concurring opinion that counsel for the defense, in his brief, in this court, admitted that the accused had deceived the court, and it quotes from the brief to substantiate that claim. As is seen from reading the part quoted and especially the context, the statement was made in an argumentative way and without any intent or expectation that it would be taken as an admission that his client had deceived the Government. The language itself is ambiguous and it cannot be said with certainty whether the idea intended to be conveyed is that the prosecuting attorney deceived himself or that he was deceived with or without the fault of the accused. The brief is in Spanish, and better sense would be given to the language by putting the first sentence in the conditional. It would then read, in substance: "If the fiscal was deceived by the accused as to what he would testify in the case,

let him charge the accused with the crime which his fraudulent acts constituted but do not let him be prosecuted over again for the same crime." As will be seen from a careful reading of the quotation, the version I have given makes better sense than the translation in the concurring opinion. Besides, it will not readily be assumed that counsel, in a murder case, has admitted the guilt of the accused or has conceded a fact which deprives the case, of his client of all virtue.

It is also urged that the accused made no objection to the consideration by the court of the charge of fraud against him. This claim is, in my judgment, specious. The accused is here claiming that the action against him is barred by the fact that he had been previously discharged upon an indictment charging him with the same offense and that such discharge constituted an acquittal. Yet it is claimed by the concurring opinion that he does not object to the assumption by the Government, without proof, of facts which will absolutely destroy the defense which he is making. But even if it be well based, what is the result? If the question is put, Why did not the accused object in the court below to the use by the Government of such facts? the simple answer is that never throughout the trial did the Government allege or claim that the accused had committed a fraud against it and had obtained his discharge by that means. If the further question be asked, Why did he not make an objection in this court? the answer is, in the first place, such an objection was inherent in the nature of his defense and it was not necessary, in order to bring it to the attention of this court, to make it specially; in the second place, the Attorney-General, the accredited representative of the Government, filed a brief in this court to the effect that the accused was entitled to be acquitted on his plea and that it made no difference whether he had deceived the Government into his discharge or not. There was never any contention in this court by anybody that the accused could be convicted in this case. Both his attorney and the attorney for the Government were agreed upon the proposition that his discharge in the former case was a bar and that he should be acquitted. This fact may have induced the attorney for the defense not to urge separately and with force and vigor all of the points which his client was entitled to have urged on the hearing. Enough was presented by him, however, to require this court to determine the case on the merits without attempting to extract from the defendant's brief doubtful admissions for the purpose of convicting him of murder, or interpolate into the record matters which were not put there on the trial.

I again assert that it is my opinion that there is no evidence in the record in this case to sustain the fundamental basis of the decision of this court, that the accused obtained his discharge in case No. 3983 by false and fraudulent representations and deceit.

The proposition that the Government may withdraw its agreement with an accused, set aside its order dismissing the case against him, that is, its judgment of acquittal, and try him upon the same charge, on the ground, not that he has not testified to the truth, but that he has not testified as he had agreed with the Government officials, or that he did not testify as they expected him to, I do not now stop to discuss at length. I believe, however, that, in order to leave the matter open, I should suggest, with the Solicitor-General, who recommends that the accused be discharged on the ground that section 34 and 36 are absolutely conclusive of this case, that "section 36 is unconditional; it is not made dependent upon the fact whether or not the defendant discharged had entered his plea, whether witnesses had been, examined, whether the party discharged deceived the fiscal or his own attorney, or whether his evidence was useful to the prosecution or otherwise. If section 36 is too broad and 'gives too much leeway to practice fraud on the prosecuting attorney and the court' it becomes the duty of the legislative branch of the Government to amend it; it is not a function of the courts to add to or to take from the plain and unambiguous language of the law. * * * The law does not make the discharge referred to in section 34 operative as a contract between the fiscal and the party discharged. It plainly says that the court may direct any defendant to be discharged that he may be a witness for the United States, and that such order shall amount to an acquittal of the defendant discharged and shall be a bar to a future prosecution for the same offense."

I also believe it my duty to suggest that the makers of the Code of Criminal Procedure knew thoroughly the conditions in this country relative to the administration of justice and that the power of public prosecutors to make the acquittal of the accused depend upon how he testifies is one of the most powerful inducements to corruption and most effective agencies of fraud and perjury that could be placed in his hands. It is dangerous enough to permit public prosecutors to make agreements with criminals to testify against their fellows in consideration of granting them absolute immunity, that is, immunity which can never be revoked; but when to that power is added the right of public prosecutors to withdraw that immunity when the witness does not testify to suit their purposes, in other words, when public prosecutors are permitted to make the immunity of the accused depend upon the kind of testimony he gives, there is presented a condition which is full of danger.

Knowing so thoroughly the conditions existing in this country, it would seem, from the language of section 36, that the makers of the code in which that section is found intended to use language so clear, explicit and powerful as to place its meaning beyond the pale of discussion. Section 36 uses two of the strongest words known to the language of the law in describing the efforts of the dismissal of the case against the accused for the purpose of using him as a witness for the Government. It provides, first, that the discharge "shall amount to an acquittal of the defendant discharged" and, second, "shall be a bar to future prosecution for the same offense." Stronger and more explicit language it is impossible to use and I call attention to it for the purpose of suggesting that such language should not be considered lightly nor deprived easily of its signification.

I do not desire, however, to express an opinion upon this phase of the case. That the accused should be acquitted upon the other branch of the case already discussed at length is so clear and undoubted that I have not given this branch sufficient attention to warrant a deliberate opinion.

For these reasons I dissent.

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