TOWARDS FURTHER REFORMS IN PHILIPPINE CIVIL PROCEDURE*

*Antonio R. Bautista***

Law reform is a never-ending process. This reality finds stark reaffirmation in procedural law. For it is procedural law which has that peculiar dynamism and intensity derived from being part of the daily grind of the judicial mill. It is the lawyers' law, that which defines the rules of the game that lawyers and judges play.

Civil Procedure, the procedure governing the filing, processing and adjudication of civil actions, is fertile ground for law reform. Such reform had been last undertaken on a massive scale in this jurisdiction in 1997.[1] Still, the body of rules in this area continues to be tinkered with, formally in the form of amendments to the court rules and informally by way of Supreme Court opinions in decided cases. All these efforts unite towards the common objective of "securing a just, speedy and inexpensive disposition of every action and proceeding."[2]

The task of law reform in this area is fraught with subtle difficulties. Piecemeal reform, which must await a maturation and mellowing process preliminary to a studied and comprehensive revision, seems to be an inevitable

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* Work on this paper was undertaken by the author as holder of the Quintin Paredes Professorial Chair in Remedial Law at the University of the Philippines.

** J.D. (Michigan); Professorial Lecturer, College of Law, University of the Philippines and Ateneo de Manila University; Senior Partner, Antonio R. Bautista & Partners Law Offices.

[1] For earlier commentaries by the author on the 1997 revisions, see: Antonio Bautista, *The Rules of Court: A Few Loose Ends*, 12 LAWYERS REVIEW 8 (August 1998); Antonio Bautista, *The Rules of Court: Learning from Experience*, 11 LAWYERS REVIEW 3 (August 1997). As early as February 17, 1998, the Supreme Court adopted an en banc resolution in Bar Matter No. 803 correcting clerical errors in the Rules of Court and then again, on August 19, 1998, in the same Bar Matter No. 803, the court corrected clerical errors in Rules 30 and 71 and amended Rules 46 and 65.

[2] RULES OF COURT, rule 1, sec. 6.

stop-gap measure. This is because reform here is usually urgent and imbued with practical momentousness. Litigants must not be entrapped into losing substantive rights and claims through vague, ambiguous or open-ended provisions or lacunae in our law of Civil Procedure. Nor should substantively unmeritorious defenses be allowed to prevail through the inadequacy of our court rules. It is in the judicial handling of the parties' court-ventilated claims and defenses that the face of justice is publicly seen. This face cannot be stained or sullied by ineptitude in the drafting or crafting of our procedural rules.

This paper revisits the 1997 Rules of Civil Procedure after only four years of its implementation. From this vantage point, the reforms that this 1997 revision had instituted appear, in various important respects, inadequate and flawed. The paper will survey the need and scope of the area for further reforms and essay a few modest suggestions. The specific foci of proposed further reforms are identified here as being in respect to the following subjects: "cause of action", pleadings, default, dismissal of actions, discovery, summary judgment, provisional remedies and post-judgment relief.

I. "CAUSE OF ACTION"

What is a "cause of action"? Is it necessary to define, or try to define, the term?

No such definition was provided in the earlier versions of the Rules of Court or in the seminal Code of Civil Procedure.[3] The 1997 revisors evidently found a statutory definition to be in order. Hence, the following definition was essayed:

> A cause of action is the act or omission by which a party violates a right of another.[4]

The definition hews close to traditional court formulations which put the elements of a cause of action as three: a right of the plaintiff, a correlative obligation of the defendant, and an act or omission of the defendant in violation of said legal right.[5]

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[3] Act No. 190.

[4] RULES OF COURT, rule 2, sec. 2.

[5] 1 MORAN, COMMENTS ON THE RULES OF COURT 164-65 (1995).

The term "cause of action" pervades the length and breadth of the Rules of Civil Procedure. What the term means is critical in respect at least of the rules on various matters, such as those on the splitting of a cause of action,[6] sufficiency of the complaint,[7] forum shopping,[8] amendment of the complaint,[9] *litis pendentia*,[10] and *res judicata*.[11] It is however by no means clear that the term has a consistently uniform meaning in all the contexts of these disparate rules in which it is used.

As interesting and scholarly an exploration of the varied nuances of the term "cause of action" as can possibly be made was that undertaken by the Supreme Court of Oregon in *Elliott v. Mosgrove*.[12] The issue in that case was whether plaintiff may be allowed to amend her complaint to allege that defendant had either collected on the note or could have collected through the exercise of reasonable diligence. What was alleged in the original complaint was that defendant had collected in full on the note which was part of the trust res administered by him. Under the relevant Oregon statute the trial judge was given discretionary power to permit an amendment which "does not substantially change the cause of action."[13] The Oregon court was quick to acknowledge the conceptual subtleties inherent in any attempt at definition of the term "cause of action" as it said:

> The term "cause of action" employed in this section is the piece de resistance which has caused the trouble in the application of this section of our laws. In the stretching, hauling, pulling and contracting to which this phrase has been subjected it has made its way into that group of terms which lacks unity of signification. For a review of many of the definitions which have been placed upon this term, see United States v. Memphis Cotton Oil Co., 288 U.S. 62, 53 S.Ct. 278, 77 L.Ed. 619; East Side Mill Co. v. Southeast Portland Lumber Co., 155 Or. 367, 64 P.2d 625; The Code "Cause of Action", Clark, 33 Yale Law Journal 817; Actions and Causes of Action, McCaskill, 34 Yale Law Journal 614; and The Code "Cause of Action" Clarified by United States Supreme Court, Arnold, 19 A.B.A. Journal 215.[14]

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[6] RULES OF COURT, rule 2, sec. 2 and 3.
[7] RULES OF COURT, rule 6, sec. 3; rule 16, sec. 1(g).
[8] RULES OF COURT, rule 7, sec. 5.
[9] RULES OF COURT, rule 10, sec. 3.
[10] RULES OF COURT, rule 16, sec. 1(e).
[11] RULES OF COURT, rule 16, sec. 1(f); rule 39, sec. 47(b).
[12] 93 P.2d 1070 (1939).
[13] *Id.* at 1072.
[14] *Id.*

Holding that the amendment merely averred facts in an alternative form, the court ruled that the amendment did not change the cause of action pleaded in the original complaint. Explaining, the court said:

> It is plain that the amendment related to the same transaction that constituted the subject matter of the complaint. After the amendment the essential fact situation remained the same as before. The original complaint had merely been amplified. If the test of whether a proposed amendment will substantially change a cause of action is to inquire whether the amendment will facilitate the convenient, efficient dispatch of the business before the court – and we believe that such is the correct test – then it is evident that this amendment met that test. We say that the amendment met that test, because after its allowance neither party felt it was necessary to offer additional proof. Thus, by allowing the amendment the entire cause was determined, and the useless ceremony of dismissing this suit in order that another complaint incorporating the additional averments might be filed, was avoided. We are firmly convinced that the amendment did not substantially change the cause of action narrated in the original complaint.[15]

Dependence on a functional definition of "cause of action" is acutely felt where the plea of *res judicata* is made. *Norwood v. McDonald*,[16] an Ohio case, affords an instructive illustration of the problem. In the first action, the plaintiff filed a claim against the estate of Ada L. McDonald on the basis of title to the property allegedly derived from a resulting trust in that plaintiff furnished the purchase money for the acquisition of the property; this claim was dismissed. In the second action, the same plaintiff in the first action claims the same property through inheritance from Ada L. McDonald whom plaintiff claims to be his common–law wife. Since identity of the causes of action pleaded in both actions is determinative of whether the judgment in the first bars the second, the court had to descend first to a definition of "cause of action":

> [I]t is necessary to determine the claimed rights of the plaintiff, aside from the procedure followed by him in their assertion. A legal right is an interest with which the law invests a person, and for the infringement of which it gives him a remedy. The investiture of such right arises from and depends upon operative facts and circumstances which, under the law, create the right, preserve it and assure a remedy for its infringement. Such operative facts and circumstances constitute what is known as a cause of action. Although some confusion exists as

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[15] *Id.* at 1076.

[16] 52 N.E. 67 (1943).

> to the distinction between right of action and cause of action (see Phillips' Code Pleadings, 28; section 31), for the purpose of applying the doctrine of *res judicata*, a cause of action may be defined as the fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief. 1 American Jurisprudence, 405, Section 2.

The majority then concluded that the plaintiff had two distinct causes of action but the dissenters theorized that he had but one cause of action but two remedies. The majority's analysis was rationalized in this manner:

> It is clear that the plaintiff's claims do not constitute a single but two distinct causes of action. This fact is established by the application of all the tests by which this question may be determined. The chief tests are found in the answer which must be given to such questions as: Do the two suits involve the same claim or demand? Even though there be identity of subject matter, is there identity of cause of action, that is, identity in the investitive facts which create the right of action asserted in each proceeding or suit? Is the same evidence necessary to sustain each cause of action? Did the claims or rights of action asserted by the plaintiff in both actions vest or accrue at the same time?
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> In each instance the answer, from the facts in this case, must be in the negative. Whether different proofs are required to sustain the two actions is said to be the best and most accurate test in determining whether the former action is a bar. 23 Ohio Jurisprudence, 973, Section 743; 2 Freeman on Judgments (5 Ed.), 1447, Section 687. In fact, it has been held to be an infallible test. Bittner v. West Virginia-Pittsburgh Coal Co., 4 Cir., 15 F.2d 652; Hodge v. Shaw, 85 Iowa 137, 52 N.W. 6, 39 Am. St. Rep. 290; Jacobs v. Jacobs, 92 Or. 255, 180 P. 515; Curtiss v. Crooks, Trustee, supra.

But that separate theories of recovery may make for distinct causes of action, is a point that has also been recognized. It is the constitutive facts forming the basis of the relief sought which are generally accepted as the critical determinant of the cause of action. Thus, in one case,[17] the first action was filed by the plaintiff for money due him under a contract of employment, and the defendant had failed to pay him despite the fact that he rendered the stipulated services. This action was dismissed for having been barred by the Statute of Frauds. But the second action, which was held not to have been precluded by the

[17] Smith v. Kirkpatrick, 305 N.Y. 66, 111 N.E.2d 209 (1953).

dismissal of the first, was for the value of the same services on the basis of *quantum meruit*. The court reasoned that the two actions involved different "rights" and "wrongs" and hence the evidence necessary to sustain recovery vary materially in each case.

It is not, however, always correct to postulate as a general proposition that separate theories of recovery will make for distinct causes of action. For *res judicata* purposes, matters that could have been raised in relation to the matter directly adjudged may also be precluded. A claim based on the same facts may be barred even if made to support different theories.

> This State has adopted the transactional analysis approach in deciding *res judicata* issues (*Matter of Reilly v. Reid*, 45 N.Y.2d 24, 407 N.Y.S.2d 645, 379 N.E.2d 172). Under this address, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy. (*id.*, at pp. 29-30, 407 N.Y.S.2d 645).

> When alternative theories are available to recover what is essentially the same relief for harm arising out of the same or related facts such as would constitute a single "factual grouping" (Restatement, Judgments 2d, § 61 [Tent. Draft No. 5]), the circumstance that the theories involve materially different elements of proof will not justify presenting the claim by two different actions.[18]

So it is also recognized that several causes of action may arise out of the same transaction. The plaintiff, for instance, may have been injured by the defendant in two different ways as where, in a vehicular collision, the car of the former is consequently damaged and he is personally injured. The rule in these cases is that there is one distinct cause of action for property damage and another one for personal injury. One may well wonder why this does not result in the splitting of a single cause of action under the transactional approach in our rules on *res judicata* which require the compulsory joinder of all claims arising out of the same transaction. The transactional approach creates an impact on the rule against splitting a single cause of action and serves to broaden the range of a "cause of action:"

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[18] O'Brien v. City of Syracuse, 54 N.Y.2d 353, 429 N.E.2d 1158, 1159-60 (1981).

> Restatement (Second) of Judgments § 24 (1980) opts for a transactional view of "claim," providing that "the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose" and also that the factual grouping constituting a "transaction" or a "series" is "to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." This transactional approach of the Second Restatement puts pressure on the plaintiff not to overlook or withhold from his initial complaint any grievance he has relating to the transaction in question regardless of differences in "evidence," "grounds," "theories," "remedies," or "forms of relief." Should he err in the first instance, he will, given a modern procedural system, almost certainly be allowed an opportunity to amend as the case unfolds. But failing that, he risks losing the unasserted portion of his claim.[19]

Philippine case law takes a slightly different tack. Summarizing Philippine Supreme Court rulings, Moran distills the test of the singleness of a cause of action as being dependent on the singleness of the violation and of the person whose right had been violated. In the vehicular accident case, our Supreme Court holds there to be a single cause of action if the injured person was also the owner of the damaged vehicle, but would recognize two separate and distinct causes of action where the vehicle is owned by another person.

> A single tort gives rise but to one cause of action no matter how many items of damages may have been caused to one person. Thus, a person driving his car sustained damages on his body and on his car when he was hit by another car driven negligently by its owner. There being in this case a single tort causing damages to one person there is accordingly a single cause of action, and the two claims, one for personal injury and another for damages to property, must be made in a single complaint. If a complaint is filed for personal injury and later, another complaint is brought for damages to the car, the second complaint is barred by the filing of the first.
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> But when by a single delict or wrong several rights belonging to different persons are violated, several causes of action will arise on behalf of such different persons. For instance, if as a result of a collision

[19] FIELD, KAPLAN & CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 976 (5th ed. 1984).

> a car sustained damages and at the same time a passenger therein not the owner of the car, sustained injury, although there is here a single delict, since there are two rights violated pertaining to different persons, two causes of action arise, one for each person whose right is thus violated. Accordingly, the passenger may bring an action separately from the owner of the car, although the rule of permissive joinder of parties applies here under section 6, Rule 3.[20]

Generalizing further, Moran states:

> For a proper understanding and application of the rule, it is important to determine when a cause of action may be said to be single. The singleness of a cause of action lies in the singleness of the delict or wrong violating the rights of one person. A single delict or wrong may consist of a single act or of a series of acts or of a single transaction or series of transactions. It may be either a breach of contract or a tort.[21]

The foregoing analysis that a single tort gives rise to one cause of action only despite the fact that the injury may be two-pronged, one to property and the other to person, corresponds with the majority opinion in the United States and which rule is founded on the policy against multiplicity of suits and vexatious litigation.[22] The minority rule, which has been put down as fallacious, is bottomed on the proposition that the right of bodily security is fundamentally different from the right of the security of property and that a single wrongful act may cause injuries to separate rights.

The "single wrong" test does not entirely dovetail with the "same evidence" test. This is because different evidence will necessarily be required to support a claim for different injuries arising from the same wrong. The conceptual difficulties which follow these contrasting applications of these two tests for determining what constitutes a "cause of action" has conduced to a definition which focuses, in a manner reminiscent of Judge Clark, on the factual basis of the transaction or event constituting the litigative unit or entity. The Restatement (Second) of Judgments puts it in this manner:

> "Claim", in the context of *res judicata*, has never been broader than the transaction to which it related. But in the days when civil procedure still bore the imprint of the forms of action and the division

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[20] 1 MORAN, *supra* note 5, at 178-79.

[21] *Id.* at 17.

[22] Rush v. City of Maple Heights, 167 Ohio St. 221, 147 N.E.2d 599 (1958), cert. denied 358 U.S. 814, 79 S.Ct. 21, 3 L.Ed.2d 57.

> between law and equity, the courts were prone to associate claim with a single theory of recovery, so that, with respect to one transaction, a plaintiff might have as many claims as there were theories of the substantive law upon which he could seek relief against the defendant. Thus, defeated in an action based on one theory, the plaintiff might be able to maintain another action based on a different theory, even though both actions were grounded upon the defendant's identical act or connected acts forming a single life-situation. In those earlier days there was also some adherence to a view that associated claim with the assertion of a single primary right as accorded by the substantive law, so that, if it appeared that the defendant had invaded a number of primary rights conceived to be held by the plaintiff, the plaintiff had the same number of claims, even though they all sprang from a unitary occurrence. There was difficulty in knowing which rights were primary and what was their extent, but a primary right and the corresponding claim might turn out to be narrow. Thus it was held by some courts that a judgment for or against the plaintiff in an action for personal injuries did not preclude an action by him for property damage occasioned by the same negligent conduct on the part of the defendant – this deriving from the idea that the right to be free of bodily injury was distinct from the property right. Still another view of claim looked to sameness of evidence; a second action was precluded where the evidence to support it was the same as that needed to support the first. Sometimes this was made the sole test of identity of claim; sometimes it figured as a positive but not as a negative test; that is, in certain situations a second action might be precluded although the evidence material to it varied from that in the first action. Even so, claim was not coterminous with the transaction itself.
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> The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.[23]

The foregoing formulation finds affirmation in a practical demonstration such as that made in the following opinion:

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[23] RESTATEMENT (SECOND) OF JUDGMENTS § 24 comment a (1982).

> The plaintiff cannot be permitted to splinter his claim into a multiplicity of suits and try them piecemeal at his convenience. x x x "The plaintiff having alleged operative facts which state a cause of action because he tells of defendant's misconduct and his own harm has had his day in court. He does not get another day after the first lawsuit is concluded by giving a different reason than he gave in the first for recovery of damages for the same invasion of his rights. The problem of his rights against the defendant based upon the alleged wrongful acts is fully before the court whether all the reasons for recovery were stated to the court or not."[24]

With the varying contexts in which the term "cause of action" is used, one may justifiably wonder whether the term is meaningful at all. The Federal Rules of Civil Procedure (FRCP) eschews the use of the term "cause of action" but uses rather the term "claim" or "claim for relief,"[25] The term "claim" is not exactly synonymous or analogous to "cause of action."[26]

Perhaps, it is only a matter of nomenclature but what should be truly decisive is the unit of facts which constitutes the basis for the relief sought by the plaintiff. In this light, the statutory definition in our Rules of Court of the term "cause of action" may have a misleading effect and may not fully capture the nuances of the concept. For this reason, it may serve the interest of better understanding of procedural rules and concepts if the definition were to be done away with altogether. A definition which does not clarify, but confuses as it focuses on one context of the term alone, is no definition at all.

II. SANCTIONS AGAINST FRIVOLOUS AND MALICIOUS ACTIONS

Pleadings are generally prepared by lawyers and not by their litigant-clients, and lawyers are bound by their ethical strictures not to engage in any dishonest or deceitful conduct[27] or to encourage any suit or proceeding for any corrupt motive or interest or delay any man's cause[28] or to file multiple actions

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[24] Matthews v. New York Racing Association, Inc., 193 F.Supp.293, 295 (S.D. N.Y. 1961).

[25] FED. R. CIV. P. 8(a), (3) [2], 10(b), 18.

[26] FIELD, KAPLAN, & CLERMONT, *supra* note 18, at 37.

[27] CODE OF PROFESSIONAL RESPONSIBILITY, rule 1.01.

[28] CODE OF PROFESSIONAL RESPONSIBILITY, rule 1.03. The prescribed oath for every member of the Philippine Bar commits him not to "wittingly or willingly promote or sue any

arising from the same cause.[29] These express proscriptions help raise the lawyer's ethical norms to a level higher than that of being merely hortatory. There is in our Rules a firm and positive declaration that the signature of counsel invests the pleading with good faith and verity:

> Every pleading must be signed by the party or counsel representing him, stating in either case his address which should not be a post office box.
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> The signature of counsel constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay.
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> An unsigned pleading produces no legal effect. However, the court may, in its discretion, allow such deficiency to be remedied if it shall appear that the same was due to mere inadvertence and not intended for delay. Counsel who deliberately files an unsigned pleading, or signs a pleading in violation of this Rule, or alleges scandalous or indecent matter therein, or fails to promptly report to the court a change of his address, shall be subject to appropriate disciplinary action.[30]

If the pleading was filed in violation of the above-quoted rule, it may be stricken out for being sham or false.[31] The lawyer's certification that the pleading is well supported is one only to the "best of his knowledge, information, and *belief*,"[32] a certification which is lower in quality than a verification which is to the effect that the party verifying the pleading affirms that the "allegations therein are true and correct of his knowledge or belief."[33] This rule applies not only to pleadings but extends to motions as well.[34]

FRCP Rule 11, which is the mother of our above-quoted rule, has been slightly refined to state that the signature of an attorney on a pleading "constitutes a certificate by the signer that the signer has read the pleading, motion, or other

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groundless, false or unlawful suit nor give aid nor consent to the same" nore "delay any man's cause for money or malice."

[29] CODE OF PROFESSIONAL RESPONSIBILITY, rule 12.02.

[30] RULES OF COURT, rule 7, sec. 3.

[31] RULES OF COURT, rule 8, sec. 12.

[32] Emphasis supplied.

[33] RULES OF COURT, rule 7, sec. 4.

[34] RULES OF COURT, rule 15, sec. 10.

paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

FRCP Rule 11 recognizes that the litigation process may be abused for purposes other than delay. There is then this other significant enlargement in the Federal Rules which commends itself to us for adoption. Under FRCP Rule 11 the court is expressly empowered to award expenses including attorneys fees to a litigant whose opponent acts in bad faith in instituting or conducting the litigation. This is how FRCP Rule 11 is now further worded:

> If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The federal rule requires some pre-filing inquiry into both the facts and the law to satisfy the affirmative duty imposed on the attorney signing the pleading. This standard is more stringent than the original good-faith standard under our rule.[35]

But the main point of difference between FRCP Rule 11 and our rule on the import of the signature of a lawyer on a pleading or motion is that the court is expressly authorized by FRCP 11 to strike out the pleading or motion which is improperly signed whereas, under our rule, the authority of the court to strike out a pleading or motion is based on the fact that the pleading is sham or false as was the rule originally under the Federal Rules, where the decisions tended to confuse the issue of attorney honesty with the merits of the action,[36] and thereby inhibited the imposition of sanctions.

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[35] *See* Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n, 365 F.Supp. 975 (E.D. Pa. 1973); Nemeroff v. Abelson, 620 F.2d 339 (2nd Cir. 1980).

[36] *See* Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Fed. R. Civ.*, 61 MINN. L. REV. 11 (1976).

Another significant difference is that under our rules,[37] the improperly signed pleading or motion may be stricken out only upon motion of a party. Under FRCP 11, the court may strike out such improper pleading on motion by a party or on its own motion. Furthermore, under the Federal Rules, the sanction may be imposed not only on the lawyer but also on the party or on both; under our rule the sanctions may be imposed on the signing attorney only.

On the whole, the more expansive and more refined wording of the present FRCP Rule 11 contains several marked improvements on our existing rule. Therefore, it is worthwhile for us to ingraft these improvements into our rule and thereby further the interest of curtailing abuses of the litigation process.

III. DISCOVERY

The importance of discovery is now well appreciated in this jurisdiction.[38] With the limited available judicial time, the increase in the docketed cases in our courts and the perennial delay in the disposition of cases, the parties' need to resort to discovery has been accentuated. However, our discovery procedure needs to be fine-tuned in a few respects.

The first and foremost area that needs amendment in our discovery rules is the scope of discoverable materials, especially that of documents.

As long ago as 1947, there was carved out by the United States Supreme Court in the landmark case of *Hickman v. Taylor*[39] an exception for materials and impressions of a lawyer gathered and developed in preparation for litigation. The exception was rationalized as a measure of protection of the legal profession:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare

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[37] RULES OF COURT, rule 8, sec. 12.

[38] *See*, e.g., Republic v. Sandiganbayan, G.R. No. 90478, November 21, 1991, 204 SCRA 212 (*en banc*).

[39] 329 U.S. 495 (1947).

> his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interest. This is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways – aptly though roughly termed by the circuit Court of Appeals in this case as the "Work product of the lawyers." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interest of the clients and the cause of justice would be poorly served.[40]

The Federal Rules of Civil Procedure[41] have now codified *Hickman v. Taylor*, together with a distillation and clarification of the case law which evolved from it, into a rule to the following effect:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable . . . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

The adoption of the foregoing exception for trial preparation materials will have an impact on the existing requirement in our Rule 27 of a showing of "good cause" for the production of documents and things whether or not for trial preparation. This requirement, therefore, must be deleted so that there will only be a single formula for determining whether the documents, whether or not trial preparation is involved, should be produced. Under the present requirement of "good cause" in Rule 27, production of materials other than those for trial

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[40] *Id.* at 510-11.

[41] FED. R. CIV. P. 26(b)(3)

preparation requires merely a showing of relevance and absence of privilege, but there is of course still available resort to a protective order should production be unduly burdensome or oppressive.[42] But for trial preparation materials, production will, under the proposed amendment, require a special showing of substantial need of the materials and inability without undue hardship to obtain the substantial equivalent of the materials by other means. The required showing of "good cause" tended to be confusing, some cases requiring a showing merely of relevance and of non-privilege and some requiring the special showing required by the proposed amendment.[43]

IV. SUMMARY JUDGMENT

Our Rules unfairly discriminate against the plaintiff as to the time within which he may move for summary judgment. Section 1 of Rule 35 qualifies the right of plaintiff to move for summary judgment by allowing such motion only "after the pleading in answer thereto has been served." The rationale for this limitation has been put in these terms: the responsive pleading may not tender an issue.[44] If that be the case, why await the answer?

The plaintiff may be able to establish, even in advance of any responsive pleading from the defendant, his entitlement to a judgment as a matter of law. This may well be accomplished by the plaintiff's ability to show, by his complaint, supporting affidavits, depositions, and admissions on file "that, except as to the amount of damages, there is no genuine issue as to any material fact."[45] Plaintiff may then want an earlier disposition of his case and may well resort to discovery devices such as a request for admission or interrogatories to the defendant. On the other hand, defendant may well delay the filing of his formal answer by seeking time extensions or by various sorts of preliminary motions as a motion to dismiss or a motion for bill of particulars.

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[42] RULES OF COURT, rule 23, sec. 16.

[43] *See*, e.g., Brown v. New York, N.H. & H.R.R., 17 F.R.D. 324 (S.D. N.Y. 1955); Guilford Nat'l. Bank v. Southern Ry. Co., 297 F.2d 921 (4th Cir., 1962); Mitchell v. Bass, 252 F.2d 513 (8th Cir., 1958); Hauger v. Chicago, R.I. & Pac. R.R., 216 F.2d 501 (7th Cir., 1954); Burke v. United States, 32 F.R.D. 213 (E.D. N.Y. 1963).

[44] 2 MORAN, COMMENTS ON THE RULES OF COURT 183-84 (1996).

[45] RULES OF COURT, rule 35, sec. 3.

The Federal Rules have, since 1946, allowed plaintiff to file a motion for summary judgment even before an answer has been served. FRCP Rule 56(a) allows the plaintiff to move for summary judgment "at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party." We would do well to adopt the same rule except that the 20 days should be reduced to 15 days to jive with the period allowed under our Rules for the defendant to answer.[46]

The proposed amendment is eminently fair. The defendant is allowed to move for summary judgment "at any time."[47] That is why the plaintiff is allowed to dismiss his complaint by filing a notice of dismissal "at any time before service of the answer *or of a motion for summary judgment.*"[48] Where the defendant files, before answer, a motion for summary judgment, the plaintiff should be entitled to counter-move for summary judgment.

V. DEFAULTS

Where the defendant fails to answer and is consequently declared in default, there is the implicit assumption that he wittingly allowed himself to be defaulted. The situation is akin to a defendant entering confession of judgment or expressly agreeing that judgment be entered against him as prayed for in the complaint. The plaintiff cannot, therefore, recover against a defaulted defendant more than what he prayed for in his complaint.[49]

Acting on such presumed intention of the defaulted party, our Rules define the quality and extent of the judgment that may be rendered against him. Section 3(d) of Rule 9 states:

> (d) *Extent of relief to be awarded.* – A judgment rendered against a party in default shall not exceed the amount or be different in kind from that prayed for nor award unliquidated damages.

The limitation of the relief to that amount or kind prayed for in the complaint makes eminent sense. This limitation consists with the *pro confesso*

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[46] The period to answer is 20 days under FED. R. CIV. P. 12(a) and 15 days under our Rule 11, sec.1.

[47] RULES OF COURT, rule 35, sec. 2.

[48] RULES OF COURT, rule 17, sec. 1. (emphasis supplied)

[49] Javelona v. Yulo, 31 Phil. 388 (1915).

character of a default judgment. A judgment for an amount larger than, or different in kind from, that prayed for in the complaint would violate the natural expectation of the defendant when he allowed himself to be defaulted by not answering the complaint. This expectation is that the complaint and its prayer set the upper limit to the relief which plaintiff may be awarded against him. The same limitation is also found in the Federal Rules.[50]

But the prohibition against an award of unliquidated damages against a defaulted party does not make much sense. The demand for such damages was in the complaint and summed up and reiterated in its prayer. Defendant presumably read and understood the complaint and he opted not to answer it. He thereby took the chance that such demand, as that for liquidated amounts, would be granted. The court for its part, however, should not grant such a demand for unliquidated damages without evidentiary basis. It should, as it is empowered to, receive evidence on the matter of entitlement to, and the amount of, such damages.

The rule prohibiting the award of unliquidated damages puts it in the hands of the defendant the means to defeat plaintiff's entitlement to such damages. To obtain this windfall, all that defendant would have to do is to default. For defendant to answer would be to give plaintiff an opportunity to prove his claim to damages, which claims may even be to actual or compensatory damages,[51] in an *ex parte* presentation should defendant opt not to participate in the trial. By this odd twist in the Rules, the defendant, then, would gain an unfair advantage over the plaintiff, as well as a premium for being declared in default.

VI. DISMISSAL OF ACTION ON PLAINTIFF'S NOTICE

There is a privilege granted to the plaintiff under our Rules which needs to be qualified or restricted. This is the privilege given the plaintiff to file a notice for the dismissal of his complaint "at any time before service of the answer or of a motion for summary judgment." Rule 17 states the conditions and scope of the privilege:

> SECTION 1. *Dismissal upon notice by plaintiff.* – A complaint may be dismissed by the plaintiff by filing a notice of dismissal at any time

[50] FED. R. CIV. P. 54(c).

[51] *See* CIVIL CODE, art. 2199-2215.

> before service of the answer or of a motion for summary judgment. Upon such notice being filed, the court shall issue an order confirming the dismissal. Unless otherwise stated in the notice, the dismissal is without prejudice, except that a notice operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in a competent court an action based on or including the same claim.

While the Rules state that the court should issue an order confirming the dismissal, it fails to state on what terms or conditions the court may issue such an order or whether it may refuse to issue such an order and on what grounds it may base such refusal. From all that appears, the plaintiff's mere filing of a notice of dismissal takes effect immediately and the court order is merely confirmatory. This is the impression which may fairly be derived from the situation where the dismissal is sought by the plaintiff after defendant's answer has been filed. The plaintiff cannot then simply give a notice for the dismissal of his complaint but he must file a motion for dismissal and this motion may only be approved "upon such terms and conditions as the court deems proper."[52]

The right of the plaintiff to unilaterally cause dismissal of his complaint should not be absolute and the Rules should make this clear. The reason is plain enough to see and appreciate: the court may have already taken such action on the complaint as to have created an impact on the defendant. This action, for instance, may be in the form of a temporary restraining order or injunction or a replevin writ. In such case, the defendant who may have been enjoined or restrained or whose property may have been replevied may have a cause of action for damages.[53] In case the injunction or replevin writ may have been unlawfully or irregularly obtained, the consequential damages are mandated to be recovered in the same action.[54] But such recovery would, of course, be pre-empted by the premature dismissal of the complaint. While a separate action for damages is possible, it may turn out to be both expensive in terms of filing fees, time and effort, and may run afoul of the policy against multiplicity of suits.

There is case law in the United States that such a dismissal by the plaintiff cannot be effected if it is prejudicial to the defendant.

> A discontinuance, dismissal or nonsuit is generally entered by leave and order of court. If the rights of the defendant or other interested parties will not be affected, and the application therefor is seasonably made, a

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[52] RULES OF COURT, rule 17, sec. 2.

[53] RULES OF COURT, rule 58, sec. 8; rule 60, sec. 10.

[54] RULES OF COURT, rule 58, sec. 8; rule 60, sec. 10.

> dismissal or nonsuit is usually granted as a matter of course and, under some statutes, the plantiff is entitled thereto as a matter of right. As a general rule, a discontinuance must be by leave of court, express or implied, and on its order, especially after the proper time has passed for discontinuing the cause; and *ordinarily a dismissal cannot be accomplished by the mere act of plaintiff alone*, particularly after a trial or verdict. It, generally, is considered that the granting or the refusal of leave to dismiss, discontinue, or take nonsuit is a matter of practice to be exercised at the discretion of the court with reference to the rights of both parties, and so as not to prejudice others or the public...[55] (emphasis supplied)

Furthermore:

> On a motion by plaintiff to discontinue, the vital question is whether defendant will suffer prejudice by the discontinuance, and a plaintiff's right to take a voluntary nonsuit or dismissal depends on the effect it will have on defendant's rights. He may dismiss any claim where such dismissal will not prejudicially affect the interest of defendant, but he will not be permitted to dismiss, to discontinue, or to take a nonsuit, when by so doing defendant's rights will be prejudiced. Thus plaintiff cannot take a voluntary discontinuance where defendant has acquired in the course of the proceeding some substantial right or advantage which would be lost or rendered less efficient by dismissal, or he will be deprived of any just defense.[56]

In replevin cases, where the property of the defendant had already been repossessed, the case against allowing the plaintiff to voluntarily dismiss or non-suit his own complaint is clear and strong:

> In an action of replevin, both parties are regarded equally as actors; and, where plaintiff in replevin has been put in possession of property under his writ, he will not be permitted to escape liability to defendant by suffering a nonsuit or dismissing his action, except with the consent of defendant.
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> ...
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> After the property has been seized and delivered to plaintiff, defendant becomes the virtual plaintiff in this case, and on plaintiff's failure to prosecute his suit to final judgment, defendant has the right,

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[55] 27 C.J.S. *Dismissal and Non-Suit* § 11 (1959). (emphasis supplied)
[56] *Id.* at § 26.

> on application to the court, to secure an inquiry into, and a determination of, his right of property and possession. By failure to prosecute plaintiff cannot and does not deprive defendant of the latter's right to establish his title and right to possession, and obtain a judgment for the return of the property or its value, and damages for the taking and withholding of the property. If the rule were otherwise, plaintiff, under color of legal process, might perpetrate a fraud on the law and be allowed to keep property, the title to which was prima facie in defendant from whom it was taken at the beginning of the suit.[57]

At all events, non-suit or voluntary dismissal by the plaintiff should not relieve him of all liability. For one, he may be held liable for damages for filing a frivolous or malicious suit. This was the ruling of the United States Supreme Court in *Cooter & Gell v. Hartmarx Corp.*[58] It was there ruled that plaintiff's voluntary dismissal of the complaint does not preclude the court from imposing sanctions for its frivolous and malicious institution:

> Petitioner contends that filing a notice of voluntary dismissal pursuant to this rule automatically deprives a court of jurisdiction over the action, rendering the court powerless to impose sanctions thereafter. Of the Circuit Courts to consider this issue, only the Court of Appeals for the Second Circuit has held that a voluntary dismissal acts as a jurisdictional bar to further Rule 11 proceedings. *See Johnson Chemical Co., Inc. v. Home Care Products, Inc.*, 823 F.2d 28, 31 (1987).
>
> The view more consistent with Rule 11's language and purposes, and the one supported by the weight of Circuit authority, is that district courts may enforce Rule 11 even after the plaintiff has filed a notice of dismissal under Rule 41(a)(1). *See Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1076-1079 (CA7 1987), cert. dism'd, 485 U.S. 901 (1988); *Greenberg v. Sala*, 822 F.2d 882, 885 (CA9 1987); *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 603-604 (CA1 1988). The district court's jurisdiction, invoked by the filing of the underlying complaint, supports consideration of both the merits of the action and the motion for Rule 11 sanctions arising from that filing. As the 'violation of Rule 11 is complete when the paper is filed,' *Szabo Food Service, Inc.*, 823 F.2d, at 1077, a voluntary dismissal does not expunge the Rule 11 violation....In our view, nothing in the language of Rule 41(a)(1)(I), Rule 11, or other statute or Federal Rule terminates a district court's authority to impose sanctions after such a dismissal.

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[57] 77 C.J.S. *Replevin* § 190 (1952).
[58] 496 U.S. 384 (1990).

It is well established that a federal court may consider collateral issues after an action is no longer pending. For example, district courts may award costs after an action is dismissed for want of jurisdiction. See 28 U.S.C. § 1919. This court has indicated that motion for costs or attorney's fees are 'independent proceeding[s] supplemental to the original proceeding and not a request for a modification of the original decree.' *Sprague v. Ticonic National Bank*, 307 U.S. 161, 170 (1939)....A court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated. *See United States v. Mine Workers*, 330 U.S. 258, 294 (1947)....Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate. Such a determination may be made after the principal suit has been terminated.

Because a Rule 11 sanction does not signify a District Court's assessment of the legal merits of the complaint, the imposition of such a sanction after a voluntary dismissal does not deprive the plaintiff of his right under Rule 41(a) to dismiss an action without prejudice. 'Dismissal without prejudice' is a dismissal that does not 'operat[e] as an adjudication upon the merits,' Rule 41(a)(1), and thus does not have a *res judicata* effect. Even if a district court indicated that a complaint was not legally tenable or factually well founded for Rule 11 purposes, the resulting Rule 11 sanction would nevertheless not preclude the refiling of a complaint. Indeed, even if the Rule 11 sanction imposed by the court were a prohibition against refiling the complaint (assuming that would be an 'appropriate sanction' for Rule 11 purposes), the preclusion of refiling would be neither a consequence of the dismissal (which was without prejudice) nor a 'term or condition' placed upon the dismissal (which was unconditional, see Rule 41(a)(2).

...

Both Rule 41(a)(1) and Rule 11 are aimed at curbing abuses of the judicial system, and thus their policies, like their language, are completely compatible. Rule 41(a)(1) limits a litigant's power to dismiss actions, but allows one dismissal without prejudice. Rule 41(a)(1) does not codify any policy that the plaintiff's right to one free dismissal also secures the right to file baseless papers. The filing of complaints, papers, or other motions without taking the necessary care in their preparation is a separate abuse of the judicial system, subject to separate sanction.

> As noted above, a voluntary dismissal does not eliminate the Rule 11 violation. Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11 merits sanctions even after a dismissal.[59]

Following the logic of the foregoing authorities, the Rule 17 should be amended as follows:

> SECTION 1. *Dismissal upon notice by plaintiff.* – A complaint may be dismissed by the plaintiff by filing a notice of dismissal at any time before service of the answer or of a motion for summary judgment, *but this notice shall not take effect until confirmed by the court.* Upon such notice being filed, the court shall issue an order confirming the dismissal *where no prejudice shall be caused to the defendant.* Unless otherwise stated in the notice, the dismissal is without prejudice, except that a notice operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in a competent court an action based on or including the same claim. [Emphasis supplied.]

VII. PRE-JUDGMENT RELIEF: PRELIMINARY ATTACHMENT AND REPLEVIN

Two provisional remedies which may be granted plaintiff or applicant for relief may operate very harshly or violently and, when issued *ex-parte* and without prior notice to the affected party, may effect an unconstitutional deprivation of property without due process of law. These provisional remedies are those of preliminary attachment and replevin.

Under our Rules, both a writ of preliminary attachment and a writ of replevin may be issued *ex-parte* and without prior notice to the defendant. The impact on the defendant of such writs can perhaps only be matched by that of a warrant of arrest issued by a municipal judge on the basis solely of a sworn complaint of the complainant and the affidavits of his witnesses.[60]

The need for reform in this area is marked and urgent. The procedure for issuance of these two writs under our existing Rules is unconstitutional. Well-

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[59] *Id.* at 394-398.

[60] *See* RULES OF COURT, rule 112, sec. 6(b).

reasoned rulings of the United States Supreme Court on comparable state statutes in the United States show up the vice in our procedure.

Attachment and replevin writs are issuable in this jurisdiction without prior notice to the defendant and without any reasonable opportunity for him to be heard.

Fuentes v. Shevin,[61] while not the first United States Supreme Court decision[62] on the matter, clearly identified the constitutional defect in pre-judgment statutes like ours. What was involved there were the Florida and Pennsylvania replevin statutes which established a procedure for issuance of the writ of replevin remarkably similar to that provided under our Rule 60. Under the Florida statute, the applicant need only file a complaint for the possession of goods or chattels and then recite conclusorily that he is "lawfully entitled to the possession of the property" and that this property is "wrongfully detained" by the defendant and that he file a bond. The court is then authorized to issue a writ on the sole basis of the complaint and the bond. The officer who seizes the property under the writ is required to keep it for three days during which period the defendant may reclaim its possession by posting a counterbond in double its value.

Under the Florida statute, the applicant for the replevin writ must post a bond in double the value of the property but the writ may be issued without any prior notice or hearing to the other party who is however allowed to post a counterbond within three days to regain possession.

The United States Supreme Court struck down both the Florida and Pennsylvania statutes for being unconstitutional in that they deprived the defendant of his property without due process of law. The Court's reasoning explained the constitutional defect in the statutes very lucidly and persuasively:

> The primary question in the present cases is whether these state statutes are constitutionally defective in failing to provide for hearings "at a meaningful time." The Florida replevin process guarantees an opportunity for hearing after the seizure of goods, and the Pennsylvania process allows a post-seizure hearing if the aggrieved party shoulders the burden of initiating one. But neither the Florida nor

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[61] 407 U.S. 67 (1972).

[62] An earlier case, Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), invalidated a Wisconsin statute which permitted the garnishment of wages without notice and an opportunity for hearing.

Pennsylvania statute provides for notice or an opportunity to be heard before the seizure....

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivation of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference....

...

The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision-making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights ... [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and the opportunity to meet it." Joint Anti-Fascist Refugee Committee vs McGrath, 341 U.S. 123, 170-172 (Frankfurter, J., concurring).

If the right to notice and hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not ... embraced the general proposition that a wrong may be done if it can be undone." Stanley vs Illinois, 405 U.S,. 645, 647.

This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the *form* of a hearing "appropriate to the nature of the case," *Mullane vs Central Hanover Tr. Co.*, 339 U.S. 306, 313... and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]," *Boddie v. Connecticut*, 401 U.S. 371, 78, the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect ... "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interests, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' Boddie v. Connecticut, supra 401 U.S.., at 378-379 (emphasis in original)."

The Florida and Pennsylvania prejudgment replevin statutes fly in the face of this principle. To be sure, the requirements that a party seeking a writ must first post a bond, allege conclusorily that he is entitled to specific goods, and open himself to possible liability in damages if he is wrong, serve to deter wholly unfounded applications for a writ. But those requirements are hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in his rights. Since his private gain is at stake, the danger is all too great that his confidence in his cause will be misplaced. Lawyers and judges are familiar with the phenomenon of a party mistakenly but firmly convinced that his view of the facts and law will prevail, and therefore quite willing to risk the costs of litigation. Because of the understandable, self-interested fallibility of litigants, a court does not decide a dispute until it has had an opportunity to hear both sides – and does not generally take even tentative action until it has itself examined the support for the plaintiff's position. The Florida and Pennsylvania statutes do not even require the official issuing a writ of replevin to do that much.

The minimal deterrent effect of a bond requirement is, in a practical sense, no substitute for an informed evaluation by a neutral official. More specifically, as a matter of constitutional principle, it is no replacement for the right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property. While the existence of these other, less effective, safeguards may be among the considerations that affect the form of hearing demanded by due process,

> they are far from enough by themselves to obviate the right to a prior hearing of some kind.[63]

The opportunity allowed by both the Florida and Pennsylvania statutes for the defendant to recover what has been replevied by posting a counterbond after three days did not minimize the "deprivation" in the terms of the Due Process Clause. The Court explained:

> The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind.[64]

It is however fair to note that *Fuentes v. Shevin* had a significant qualifier which may have a bearing on our attachment statute which provides among the grounds for its issuance that the debtor has concealed, removed or disposed of his property.[65] This qualifier was as follows:

> There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods. But the statutes before us are not 'narrowly drawn to meet any such unusual condition.' *Sniadach v. Family Finance Corp.*, supra, 395 U.S. at 339, 89 S.Ct. at 1821. And no such unusual situation is presented by the facts of these cases.[66]

Our own Supreme Court had recognized the force of *Fuentes v. Shevin* when, in *Chiao Liong Tan v. Court of Appeals*,[67] it observed:

> In the State of California, from whose Code of Procedure we copied our rule on replevin, their old replevin rule which allowed the immediate delivery of the chattel at the commencement of the action upon application with bond by the replevin plaintiff has already been struck down as early as July 1, 1971 in the case of *Blair vs Pitchess*.(45 ALR 3d 1206) As in fact, on June 12, 1972 when the United States Supreme Court struck down as unconstitutional the Florida and Pennsylvania

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[63] 407 U.S. 80-84.
[64] 407 U.S. at 86.
[65] RULES OF COURT, rule 57, sec. 1(c).
[66] 407 U.S. at 93.
[67] G.R. No. 106251, November 19, 1993, 228 SCRA 75 (1993).

> replevin statutes in *Fuentes vs Shevin* (407 U.S. 67, 32 L. Ed., 556, 92 S.Ct.1983), most of the states, on their own, changed their replevin statutes to include a mandatory preliminary hearing before the writ could be issued, similar to our mandatory preliminary hearing before the writ of preliminary injunction can be issued. (*Section 5, Rule 58 , Rules of Court, as amended by BP 224*).[68]

So was the Georgia garnishment statute invalidated by the United States Supreme Court[69] on similar due process grounds. Under the Georgia statute, the writ of garnishment was issuable on the affidavit of the creditor or his attorney and which affidavit need not even be based on personal knowledge and need contain conclusory allegations only, the writ being issuable by the court clerk without participation by the judge. The only way by which the debtor could dissolve the garnishment was to file a counterbond and the statute made no provision for an early hearing at which the creditor would be required to show cause for the garnishment. The posting of a double bond by the creditor was found insufficient to save the statute.

Our Rules evince some guarded awareness of the infirmity which infects our pre-judgment replevin and attachment procedure. This awareness may be discerned from the limitation of the *ex-parte* grant of a temporary restraining order to 72 hours only together with the stringent requirement that the summons and the accompanying documents be served immediately.[70] The constitutionality of such limited *ex-parte* issuance of a temporary restraining order, which, like a writ of replevin or attachment, may effect a deprivation of property, does not seem to have been addressed by the courts although the problem has been perceived and noted by commentators.[71]

The requirement of prior notice and hearing in respect to a preliminary attachment may have to allow for an exception where the writ is sought not for the purpose of security but for the purpose of creating *quasi-in-rem* jurisdiction.[72]

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[68] Chiao Liong Tan v. Court of Appeals, G.R. No. 106251, November 19, 1993, 228 SCRA 75, 77 (1993).

[69] North Georgia Finishing, Inc. v. Di-Chem, Inc. 419 U.S. 601 (1975).

[70] *See* RULES OF COURT, rule 58, sec. 5, 2nd par.

[71] *See* COUND, FRIEDENTHAL, MILLER & SEXTON, CIVIL PROCEDURE: CASES AND MATERIALS 224 (5th ed. 1989).

[72] *See* Banco Español-Filipino v. Palanca, 37 Phil. 921, 929-30 (1918).

An exception may have to be carved for such a situation, as otherwise the court may not be able to acquire jurisdiction at all over the case.[73]

A wholesale transplantation of the *Fuentes v. Shevin* line of thinking in our jurisdiction will radically change our judicial system and the flow of commerce in the country. Merchants may understandably become timid in extending credit, realizing that collection efforts may well be stymied or seriously embarrassed by the law's delays. The entire merit or value to the creditor of an attachment lies in the element of surprise which attends its *ex-parte* issuance. To set the application for a writ of attachment or of replevin for hearing after notice is to alert the debtor and give him the opportunity to secrete his property or otherwise put it beyond his creditor's reach. The efficacy of the attachment and replevin remedies as a pre-judgment security would thereby be defeated or diluted. But, then, the entire point of the due process guarantee is, precisely, that the debtor's property not be taken away from him absent a showing, made after an opportunity for him to be heard, that the plaintiff is entitled to the property or even only to its temporary use or possession.

A lesson may be taken then from the procedure in respect to a temporary restraining order. A possible accommodation of the creditor's interest may be made by allowing the *ex-parte* issuance of the attachment and replevin writs for a 72-hour duration only and coupled with a strict requirement that the summons and complaint be served on the defendant simultaneously with the service of the writ. The *ex-parte* grant of the writ should also be conditioned on a clear showing by the applicant, by competent evidence and not by conclusory allegations only of the facts supporting his principal claim on the merits. As a further deterrent to the unmeritorious obtention of the writs, there should also be a provision making the applicant's bond directly and immediately liable upon plaintiff's failure to establish probable cause for the issuance of the writ at the hearing to be held within the 72-hour period or well before trial of the merits. To subject the bonds to liability only upon the applicant's failure to prove its case after trial of the merits would be to provide an illusory remedy to defendant and an ineffectual deterrent to plaintiff. There would be inevitable delay, given the time allowed for appeal and interlocutory review. With this delay, the defendant may well lose interest in resisting plaintiff's claim, thereby emboldening plaintiff in suing out the writs for harassment or leverage purposes.

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[73] *See* COUND, FRIEDENTHAL, MILLER & SEXTON, *supra* note 71, at 224-26.

VIII. DIRECT ACTION TO ANNUL FINAL JUDGMENT ON THE GROUND OF LACK OR DENIAL OF DUE PROCESS

Until 1981, when the Judiciary Reorganization Act of 1980[74] became effective, a direct action to annul a final judgment of the Regional Trial Court (RTC) was within the exclusive original jurisdiction of another RTC.[75]

This procedure was thought to be unseemly as it effectively gave an RTC a revisory power over a co-equal and coordinate RTC. The new Judiciary Law removed this kink in our judicial scheme when it vested exclusive original jurisdiction over direct actions for annulment of a final RTC judgment in the Court of Appeals,[76] although retaining in the RTC the exclusive original jurisdiction over actions for annulment of final judgments of metropolitan trial courts, municipal trial courts and municipal circuit trial courts.[77]

This is all very well, and Rule 47, which was inserted by the 1997 amendments, established the procedural route and parameters which the action to annul should take and follow. But Rule 47 had left a gaping void. It limited the grounds for annulment of a final judgment, to two, to wit: extrinsic fraud and lack of jurisdiction. Glaringly omitted as a ground for annulment of a final judgment is the long-recognized ground of lack or denial of due process. This is a ground which is separate and distinct from that of lack of jurisdiction.[78] The distinction was clarified as long ago as 1918 by the Supreme Court in *Banco Español-Filipino v. Palanca*[79] where it took pains to give the following explanation:

> It will be observed that in considering the effect of this irregularity, it makes a difference whether it be viewed as a question involving jurisdiction or as a question involving due process of law. In the matter of jurisdiction there can be no distinction between the much and the little. The court either has jurisdiction or it has not; and if the requirement as to the mailing of notice should be considered as a step antecedent to the acquiring of jurisdiction, there could be no escape from the conclusion that the failure to take that step was fatal to the validity of the judgment. In the application of the idea of due process of law, on the other hand, it is clearly unnecessary to be so rigorous.

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[74] Batas Pambansa Blg. 129 (1980).

[75] *See* Singsong v. Isabela Sawmill, G.R. No. 27343, February 28, 1979, 88 SCRA 623.

[76] Batas Pambansa Blg. 129 (1980), sec. 9(2).

[77] Batas Pambansa Blg. 129 (1980).

[78] RULES OF COURT, rule 47, sec. 2.

[79] Banco Español-Filipino v. Palanca, 37 Phil. 921, 929-30 (1918).

> The jurisdiction being once established, all that due process of law thereafter requires is an opportunity for the defendant to be heard; and as publication was duly made in the newspaper, it would seem highly unreasonable to hold that the failure to mail the notice was fatal. We think that in applying the requirement of due process of law, it is permissible to reflect upon the purposes of the provision which is supposed to have been violated and the principle underlying the exercise of judicial power in these proceedings. Judged in the light of these conceptions, we think that the provision of the Act of Congress declaring that no person shall be deprived of his property without due process of law has not been infringed."[80]

The reason for the omission is not clear as in fact it is not even certain that the omission was deliberate. It may not be fairly assumed that the 1997 revisors had understood lack or denial of due process to be included within the purview of lack of jurisdiction, because it is not. In fact, even after the investiture in the Court of Appeals of exclusive original jurisdiction over direct actions to annul RTC judgments, our Supreme Court still recognized lack or denial of due process as a separate and independent ground for direct actions for annulment of a final judgment.[81]

Therefore, the first paragraph of Section 2 of Rule 47 should be amended to read as follows:

> The annulment may be based only on the grounds of extrinsic fraud, [and] lack of jurisdiction, *and lack or denial of due process*.

IX. POSTSCRIPT

There is a certain arcane and esoteric quality to rules of procedure. Unlike rules of substantive law, the rationale of procedural rules and their manner of operation is usually not obvious. There is a subtle interlacing of considerations of fairness and of convenience. Thus, the definition of "cause of action" is critical to the determination of how much to plead and the preclusive effect of a judgment. In pleading, one has to reckon with the rules on joinder of both causes of action and of parties, the rule against splitting a single cause of action and the

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[80] *Id.* at 937-38.

[81] Ruiz v. Court of Appeals, G.R. No. 93454, September 13, 1991, 201 SCRA 577; Villa v. Lazaro, G.R. No. 69871, August 24, 1990, 189 SCRA 34.

policy against multiplicity of suits. One's pleading must sufficiently be communicative and informative but need not be overly so, and the level of specificity must be adjusted to the rules of discovery and of *res judicata*.

It is, of course, not possible to have a perfect code of procedure. But the imperfections in our present rules of Civil Procedure are serious, although easily correctible. The rule against the filing of frivolous and malicious actions must be refined and expanded, and so should the definition of discoverable materials. Plaintiff's right to move for summary judgment should be balanced against that of the defendant. There should not be an absolute bar to an award of unliquidated damages in a default judgment. The right of the plaintiff to non-suit or to effect a voluntary dismissal of his complaint should be qualified. The present procedure of allowing *ex-parte* issuance of the writs of preliminary attachment and replevin should be radically modified to allow such issuance under circumstances similar to the *ex-parte* grant of a temporary restraining order. A direct action to annul a final court judgment should expressly be allowed on the ground of denial or lack of due process or the implication that such ground is not available should be removed.

The identification made by this paper of some areas for reform in our law of Civil Procedure makes no claim to comprehensiveness. But a serious consideration of the herein proposed reforms will definitely help improve our law of procedure and the delivery of justice in civil actions.

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