

CIVIL PROCEDURE

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The law on civil procedure is primarily found in the Rules of Court.¹ Judicial decisions, however, are not to be overlooked, for they have enriched said law in no small measure. The past year, as in other years, saw a number of Supreme Court decisions on civil procedure. Some of them have reiterated long-established doctrines. Others have amplified said doctrines. It is the aim of the article to show the effect of these decisions on the law on civil procedure.

SUBSTANTIVE OR REMEDIAL LAW

"Rules of procedure should be distinguished from the substantive law. A substantive law creates, defines or regulates rights concerning life, liberty or property, or the powers of agencies or instrumentalities for the administration of public affairs, whereas rules of procedure are provisions prescribing the method by which substantive rights may be enforced in courts of justice."²

Right to trial with the aid of assessors.—May the aid of assessors be invoked in a trial? *Primicias v. Ocampo*³ answers this in the affirmative. Petitioner filed a petition to prohibit respondent from proceeding with the trial of two criminal cases which were then pending against petitioner, without the assistance of assessors in accordance with the provisions of Section 49⁴ of the Charter of the City

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¹ Rules 1-72, Rules of Court of the Philippines.

² MORAN, COMMENTS ON THE RULES OF COURT, Vol. 1, p. 4, citing c. s. p. 963.

³ G. R. L-6120, June 30, 1953.

⁴ "Sec. 49—Assessors in the courts in the city.—The aid of assessors in the field of any civil or criminal action in the municipal court, or the Court of First Instance, within the city, may be invoked in the manner provided in the Code of Civil Procedure. It shall be the duty of the municipal board to prepare one list of the names of twenty five residents of the city best fitted by education, natural ability and reputation for probity to sit as assessors in the trial of actions in the municipal court and a like list of persons to sit as assessors in the trial of the action in the Court of First Instance. The Board may at any time strike any name from the list so prepared, by reason of the death, permanent disability or unfitness of the person named, and in case names are so stricken out, other names shall be added in their place, to be selected as in this section provided. Parties desiring to avail themselves of the use of assessors in the municipal court or Court of First Instance shall proceed as provided by law or rules of court; and the method of summoning assessors, enforcing their attendance, excusing them from attendance, their compensation, oath, duties and effect of dissent from the opinion of the judge shall be as provided in those laws or rules."

of Manila⁵ in relation to Section 154 of the Code of Civil Procedure.⁶ The issue which confronted the Supreme Court was whether the provisions on the right to trial with the aid of assessors has been repealed by the Supreme Court in the exercise of its rule-making power.⁷

The resolution of this issue depends upon a determination that said right is substantive or procedural.⁸ That the right to trial with the aid of assessors is substantive, was the decision of the Court. This accounts for its not having been provided for in the Rules of Court which consists of rules on pleading, practice, and procedure. The Supreme Court, therefore, could not have repealed said right by its failure to re-enact the Code of Civil Procedure provisions. In so deciding, previous decisions declaring said right to be absolute and substantial have been followed.⁹

As to why the right is substantive, the Supreme Court explained thus:

"It is another security given by the law to the litigants, and as such, it is a substantial right of which they cannot be deprived without vitiating all the proceedings. Were we to agree that for one reason or another the trial by assessors may be done away with, the same line of reasoning would force us to admit that the parties litigant may be deprived of their right to be represented by counsel, to appear and be present at the hearings, and so on, to the extent of omitting the trial in a civil case, and thus set at naught the essential rights granted by the law to the parties, with consequent nullity of the proceedings."¹⁰

Not only the bare right to trial with aid of assessors but also the provisions to enforce said right were held to subsist. Thus:

"There is a point in the claim that the provisions concerning trial by assessors embodied in the Code of Civil Procedure are not wholly substantive but portions thereof are remedial such as those which refer to the method of summoning assessors, enforcing their attendance, excusing them from attendance, their compensation, oath, duties and effect of dissent from the opinion of the judge, as to which no cogent reason is seen for

⁵ R. A. No. 409.

⁶ Act No. 190.

⁷ Sec. 13, Art. VIII, Constitution of the Philippines: "The Supreme Court shall have the power to promulgate rules concerning pleading, practice, and procedure in all courts, and the admission to the practice of law * * *."

⁸ Sec. 13, Art. VIII, Constitution of the Philippines: " * * * said rules shall be uniform for all courts of the same grade and shall not diminish, increase or modify substantive rights * * *."

⁹ *Berberi vs. Concepcion, et al.*, 40 Phil. 320; *Colegio de San Jose vs. Sison* 56 Phil. 344.

¹⁰ *Colegio de San Jose vs. Sison* 54 Phil. 344, 349.

their non-incorporation if the intent is not to eliminate them from the Rules of Court. This is true, but it is likewise true that because said remedial provisions are inextricably interwoven with the substantive part, it must have been deemed wise and proper to leave them as they were for reasons of coordination and expediency, it being a truism that the one cannot be detached from the other. *Ubi jus ibi remedium*. Remedial measures are but implementary in character and they must be appended to the portion of the law to which they belong."

The Court placed the provisions on the right to trial by assessors in the category of other provisions of the Code of Civil Procedure¹¹ which are not remedial in nature, such as those pertaining to prescription, the requisites for making a will, and the succession of the estate of an adopted child.

JURISDICTION AND VENUE

How jurisdiction is conferred and ascertained.—Jurisdiction is conferred by law and whether a court has jurisdiction over an action brought to it is ascertained from and determined upon the ultimate material facts pleaded in the complaint.¹² The amount which determines the jurisdiction of the courts of general jurisdiction is the amount sought to be recovered and not the amount found after trial to be due. This is the ruling in *Lim Bing It vs. Ibanez*¹³ where after an order of default, the respondent judge of the Court of First Instance of Manila pronounced himself without jurisdiction of plaintiff's suit on the ground that the cause of action was only for the amount of ₱326.30 and remanded the cause to the municipal court for proper proceedings. This was done notwithstanding the fact that the complaint sought a recovery for an amount well within the jurisdiction of a Court of First Instance.¹⁴ The decision in said case reversing the order of respondent is in accord with previous rulings of the Supreme Court.¹⁵

A prayer for unspecified exemplary damages does not deprive the municipal court of its limited jurisdiction, although the recovery

¹¹ *Loc. cit.*

¹² *Lopez vs. Matias de Tinio & Hon. Judge Cabrera*, G. R. L-6003, December 29, 1953.

¹³ G. R. L-5216, March 16, 1953.

¹⁴ "Sec. 88—*Original jurisdiction in civil cases.*—In all civil actions, including those mentioned in Rules 59 and 62 of the Rules of Court, arising in his municipality or city, and not exclusively cognizable by the Court of First Instance, the justice of the peace and the judge of the municipal court shall have exclusive original jurisdiction where the value of the subject matter or amount of the demand does not exceed two thousand pesos, exclusive of interest and cost * * *."

¹⁵ See MORAN, COMMENTS ON THE RULES OF COURT, Vol. 2, 1952 ed., p. 1016-1017.

may be found at the trial to be for an amount greater than that within the limit of its jurisdiction. But in such an eventuality, the judgment will be only for the amount within the court's jurisdiction, the claimant being presumed to know the limit of the court's jurisdiction and to have waived the excess by filing the complaint therein.¹⁶ In the case of *Singson vs. Aragon*¹⁷ the complaint was for the sum of ₱1,321.80 as actual damages and ₱500.00 as attorney's fees. The relief prayed for included a claim for such exemplary damages as the court may deem proper. The Municipal Court of Manila assumed jurisdiction. This was considered proper by the Supreme Court. Citing Articles 2229, 2223, and 2234 of the Civil Code,¹⁸ it was held:

"* * * exemplary damages may be imposed by way of example or correction only in addition, among others, to compensatory damages, but that they cannot be recovered as a matter of right, their determination depending upon the discretion of the court. It further appears that the amount of exemplary damages need not be proved, because its determination depends upon the amount of compensatory damages that may be awarded to the claimant. If the amount of exemplary damages need not be proved, it need not also be alleged, and the reason is obvious because it is merely incidental or dependent upon what the court may award as compensatory damages. Unless and until this premise is determined and established, what may be claimed as exemplary damages would amount to a mere surmise or speculation. It follows as a necessary consequence that the amount of exemplary damages need not be pleaded in the complaint because the same cannot be pre-determined. One can merely ask that it be determined by the court if in the use of its discretion the same is warranted by the evidence, and this is just what appellee has done."

*Galang vs. Pangan*¹⁹ was originally instituted in the Court of First Instance of Negros Occidental to recover the sum of ₱1,562.84 plus legal interest, unspecified attorney's fees, and costs. The trial court assumed jurisdiction over the objection of the defendant. The Supreme Court held this to be erroneous, by virtue of section 88²⁰ of the Judiciary Act of 1948,²¹ declared to be applicable to this case commenced subsequent to the approval of said act.

*Venue of action under the Workmen's Compensation Act.*²²—Venue is the place where an action must be instituted and tried. The venue of actions triable in inferior courts depends on whether the

¹⁶ *Singson vs. Aragon*, G. R. L-5164 January 27, 1953.

¹⁷ G. R. L-5164 January 27, 1953.

¹⁸ R. A. No. 186.

¹⁹ G. R. L-5864 June 30, 1953.

²⁰ See note 14.

²¹ R.A. No. 296.

²² Workmen's Compensation Act—Commonwealth Act 3428.

action is real or personal.²³ *Sipin vs. Rojas*²⁴ reiterates the rule that an action under the Workmen's Compensation Act²⁵ is personal and must be brought in the municipality or city where the defendant resides.²⁶ Said case was an action to recover damages under the Workmen's Compensation Act²⁷ for a sum amounting to ₱1,274. The cause of action rose out of an accident occurring in the municipality of San Nicolas, Ilocos Norte and it was in the Justice of the Peace Court of the same place that the complaint was filed. The trial court dismissed the action by virtue of the provisions of Rule 4, Section 2(c)²⁸ of the Rules of Court. In the Supreme Court the contention of the plaintiffs was that Section 88²⁹ of the Judiciary Act of 1948³⁰ repealed the above-mentioned provision of the Rules of Court on venue. The Supreme Court deciding otherwise, stated that Section 88 treats of jurisdiction of inferior courts while the rule of court in question concerns venue.

ACTIONS, PARTIES AND TRIALS

Splitting causes of action.—If separate complaints are brought for different parts of a single cause of action, a judgment upon the merits in either is available as a bar in the others.³¹ This rule was availed of in *Enriquez vs. Perez*³² which was an action to foreclose a mortgage. Plaintiff failed to set up allegations of registration of assignment and of partial payment giving rise to a new promise to pay. The action was dismissed on the ground that it was barred under the Statute of Limitations. The present case was instituted by the same plaintiff to foreclose the same mortgages setting up the aforementioned allegations. Plaintiff admitted the identity of the subject-matter and remedy. The action was dismissed on the ground of res judicata.

On appeal, the Supreme Court stated:

²³ MORAN, COMMENTS ON THE RULES OF COURT, Vol. 1, 1952 ed., page 112.

²⁴ G. R. L-5214 August 21, 1953.

²⁵ *Loc. cit.*

²⁶ *Ricafrente et al. vs. Cabrera et al.*, 47 O. G. (Sup. No. 12) 141; *Tenorio et al. vs. Batangas Transp. Co.*, G. R. L-4803, February 20, 1952.

²⁷ *Loc. cit.*

²⁸ "• • • All other civil actions in inferior courts shall be brought:

c. When the place of execution of the written contract sued upon does not appear therein, or the action is not upon a written contract, then in the municipality which the defendants reside or may be served with summons."

²⁹ *Loc. cit.*

³⁰ *Loc. cit.*

³¹ Sec. 4, Rule 2, Rules of Court.

³² G. R. L-5296 May 29, 1953.

"It is therefore contended by the plaintiff-appellant that the order of dismissal in civil case No. 149 cannot have the effect of barring plaintiff's cause of action in the present case No. 187, since the cause of action in the latter case is different from that in civil case No. 149. More specifically, the appellant points out that in the earlier case the plaintiff was relying on the mortgages executed in 1927, 1928, and 1932, whereas in the present case the plaintiff is relying on the partial payments made in 1941 which gave rise to a new promise to pay. It appears, however, that the order of dismissal in civil case No. 149 became final by reason of the failure of the plaintiff to appeal, with the result that, if said mortgages had ceased to be effective, they could not be revived by a subsequent complaint alleging partial payment. This new allegation might have been the subject of amendment, but since the plaintiff did not choose to appeal civil case No. 149 in which the court did not allow him to amend his complaint so as to cure the defects pointed out in the defendant's motion to dismiss, the new allegation cannot properly be brought in as a part of the second complaint in civil case No. 187. Otherwise, allegations may be split or presented piecemeal in separate complaints. The same consideration may be said as regards the additional averment that the assignment of the mortgage credit in favor of the plaintiff had already been registered."

Joinder of Parties.—Those who claim to be owners of a land involved in an action which concerns the right, title, and interest of the parties to such land and not the title of the land as against the whole world are not indispensable or necessary parties to such action. The reason is that such an action is in personam and not in rem and the judgment therein would bind only the parties thereto. The fact that the settlement of the action by which one party cedes to the other the land involved in the action takes place in a judicial proceeding, does not raise said action to the category of a proceeding in rem, binding the land and all people claiming the rights thereto.²³

Indispensable parties are those parties in interest without whom no final determination can be had of an action and must therefore be joined either as plaintiffs or defendants.²⁴ In a civil case²⁵ judgment was rendered against the defendants who were partners in an unregistered commercial partnership. The liability was solidary. Upon execution of said judgment, all the rights of the defendants in certain partnership properties were sold. Subsequently, a prior purchaser of the interest of one of the judgment debtors filed a motion in the case for a declaration of preference in the proceeds of the sale. The Supreme Court held that the purchaser at the execution sale as well as the other judgment debtors were indispensable parties to the motion. An order granting said motion without opportunity

²³ *Boal vs. Mendoza*, G. R. L-5539, April 17, 1953.

²⁴ Sec. 7, Rule 3, Rules of Court.

²⁵ *Leyte-Samar Sales Co. vs. Cea*, G. R. L-5963, May 20, 1953.

to be heard given to said indispensable parties was held therefore to be beyond the jurisdiction of the trial court.

In a later case, *Kong Chai Pin vs. Go-Quiolay*³⁶ a sale was made in an intestate proceedings. A petition to annul said sale was made by a partner of the deceased. Basis of the petition was the allegation that the deed of sale covered lands belonging to him and the deceased but without specifying that only the share of the latter was being conveyed, thereby depriving petitioner of his own share. The court granted the petition. On appeal made by the administratrix who opposed the order annulling the sale, the Supreme Court in reversing said order held:

"We note that the vendees in the sale annulled by the lower court, whose interest was necessarily affected by such annulment, were neither notified nor heard, for they were not made party to the proceedings for annulment, and this is one of the points raised in the appeal. The point is vital. Section 7 of Rule 3, Rules of Court, provides that parties in interest without whom no final determination can be had of an action shall be joined either as plaintiffs or defendants. The vendees in the present case come under this rule, for without them the question of whether the sale should be annulled or not cannot with finality be determined. Being indispensable parties, they should have been joined in the proceedings."³⁷

Death of a party.—After a party dies and the claim is not extinguished, the court shall order, upon proper notice, the legal representative of the deceased to appear and to be substituted for the deceased, within a period of thirty days, or within such time as may be granted. If the legal representative fails to appear within said time, the court may order the opposing party to procure the appointment of a legal representative of the deceased within a time to be specified by the court, and the representative shall immediately appear for and on behalf of the interest of the deceased. The heirs of the deceased may be allowed to be substituted for the deceased, without requiring the appointment of an executor or administrator and the court may appoint guardian ad litem for the minor heirs.³⁸ Where, however, it appears that no step has so far been taken relative to the settlement of the estate, nor an executor or administrator of the estate has been appointed, the deficiency may be obviated by making the heirs take the place of the deceased.³⁹

Claims that do not survive.—A claim for damages suffered by virtue of the issuance of a writ of preliminary injunction is not ex-

³⁶ G. R. L-5303, June 30, 1953.

³⁷ *Ocejo, Perez & Co. vs. International Banking Corporation*, 37 Phil. 631; *Alberto et al. vs. Mananghala et al.*, G. R. L-2715, May 30, 1951; *Garcia v. Reyes*, 17 Phil. 127.

³⁸ Sec. 17, Rules of Court.

³⁹ *Javier vs. Araneta*, G. R. L-4369, August 31, 1953.

tinguished by the death of the party against whom it is made before final judgement in the Court of First Instance.⁴⁰ Thus in the case of *Javier vs. Arameta*,⁴¹ where after dissolution of a writ of preliminary injunction, respondent filed a petition for damages suffered by respondent resulting from the issuance of the writ, the Supreme Court adjudged respondent entitled to continue the prosecution of the petition notwithstanding the supervening death of petitioner during the pendency of the hearing on said petition. The trial court's order dismissing the petition and releasing the surety on the bond, guaranty for payment of the damages claimed, was reversed by the Supreme Court. The holding was:

"The finding of the trial court that the claim for damages should be denied because of the death of the debtor, Lucia Javier, and the claim should be filed against the estate of the latter, is not well taken. This result only obtains if the claim is for recovery of money, debt, or interest thereon, and the defendant dies before final judgment in the Court of First Instance (Rule 8, Section 21, Rules of Court), but not when the claim is for damages for an injury to person or property (Rule 88, Section 1, *idem.*). In the present proceeding, the claim for damages had arisen, not while the action was pending in the Court of First Instance, but after the case had been decided by the Supreme Court. Moreover, the claim of respondent is not merely for money or debt but for damages to said respondent. * * *

Pauper litigant.—Under Section 22, Rule 3 of the Rules of Court the authority to litigate as a pauper shall include an exemption from payment of legal fees and from filing appeal bond, printed record and printed brief. It was considered in the case of *Matute vs. Macadaag*⁴² that by virtue of this authority the pauper litigant is entitled to appeal without need of filing an appeal bond and this right can only be divested when the court rules otherwise.

Dismissal of actions.—Dismissal of action by the plaintiff before the service of the answer does not bar a subsequent action for the same cause. There are however two cases where such dismissal operates as an adjudication upon the merits, namely where the plaintiff so provides in the notice of dismissal and where he has once filed an action for the same cause and dismissed it.⁴³ A dismissal made before answer upon motion of plaintiff consented to by the defendant and on the ground that the latter had paid and satisfied all the claims of the former as prayed for in the complaint is a dismissal with prejudice.⁴⁴

⁴⁰ *Ibid.*

⁴¹ G. R. L-4369, August 31, 1953.

⁴² G. R. L-5820, Sept. 18, 1953.

⁴³ Rule 30, Sec. 1, Rules of Court.

⁴⁴ *Serrano vs. Cabrens*, G. R. L-5189, Sept. 21, 1953.

Plaintiff sued defendant for rentals due and unpaid. Before service of answer the complaint was dismissed on motion of the plaintiff consented to by the defendant on the ground that the latter had paid all the claims of the former, as prayed for in the complaint. All this took place prior to *Serrano vs. Cabrera*,⁴⁵ in which plaintiff claims recovery of excess payment of rentals, for the cancellation of promissory note executed by him and for damages suffered by virtue of attachment issued in the previous case. The case was dismissed on the plea of *res judicata*. Plaintiff claims that the dismissal in the former case was without prejudice under Rule 30, Sec. 1, Rules of Court.⁴⁶ The ruling was:

"Section 1, Rule 30, cannot be invoked in this case, because a dismissal of the action without order of the Court, which is without prejudice, is one by the plaintiff before the filing of an answer by the defendant. It means that such dismissal would not preclude the plaintiff from bringing another action against the same defendant on the same subject matter. Such dismissal under the rule does not bar the institution of an action by the defendant which he could have brought in the action against him by means of a counterclaim or cross-claim."

The Supreme Court treated the motion to dismiss in the first case by plaintiff as a compromise which, as between the parties, was held to have the same authority as *res judicata*. Actually, there was an extrajudicial settlement of the case. It may be concluded that both parties abandoned the action and Rule 30 had no applicability at all.

An order of dismissal predicated on the Statute of Limitations is on the merits, patently falling under Section 4⁴⁷ of Rule 30, Rules of Court.

The denial of a motion to dismiss filed by defendant after plaintiff has closed his evidence does not deprive the former of the right to adduce evidence on his part.⁴⁸ Whether the motion is made with or without reservation, if denied, the defendant may still be allowed to introduce evidence.⁴⁹

⁴⁵ G. R. L-5189, Sept. 21, 1953.

⁴⁶ "An action maybe dismissed by the plaintiff without order of court by filing a notice of dismissal at anytime before service of answers. 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 claims."

⁴⁷ *Enriquez vs. Perez*, G. R. L-5296, May 29, 1953.

⁴⁸ *Madrid vs. Mañalac*, G. R. L-5517, March 19, 1953.

⁴⁹ MORAN, COMMENTS ON THE RULES OF COURT, 1952 ed. p. 672, cited in the case of *Madrid vs. Mañalac*.

In *Buenaventura vs. Buenaventura*,⁵⁰ the court *motu proprio* dismissed the complaint for lack of cause of action after the case was called for trial. The court, however, revoked its order upon plaintiff's motion and ordered the parties to file an agreed statement of facts with memoranda within a fixed period. The order was not complied with and the court dismissed the case. This was considered erroneous. The failure to file the promised agreed statement of facts by the parties and memoranda as ordered was declared to be not sufficient to justify the dismissal of the case *motu proprio*. It was held that to do so will result in putting it within the power of one party to have a case dismissed by not signing any stipulation of facts which his adversary might propose. The Court further stated that the ends of justice would have been better served had the trial court, upon being appraised that the parties could not agree on the facts, set the case for hearing and permitted them to present evidence on the matters where no agreement could be reached.

Postponements.—That postponements of trial are addressed to the sound discretion of the court and this discretion should not be interfered with unless it has been abused was reiterated in *Sarreal vs. Tan*.⁵¹ Plaintiff filed a motion for postponement of the hearing which was denied. At the hearing neither plaintiff nor his counsel appeared. The Supreme Court held that while the motion was not entirely groundless, movant had no reason to assume that the court would grant it and that he could therefore afford to be absent at the trial.⁵²

Cost of the Trial.—Can an appeal be made from the order of the trial court approving the taxation of costs made by the clerk of court, the pleadings required by the Rules of Court for perfecting an appeal having been filed in due time? The question was decided in the affirmative. Thus:

"We find no cogent reason why this order cannot be appealed from if one is not agreeable to the costs as taxed by the court. The same is final in character, not merely interlocutory, so much so that unless set aside the payment of the costs shall be enforced by execution. The only way to prevent execution is to appeal in due time. The inquiry before us is not new. Appeal has been entertained by this court."⁵³

PLEADINGS, MOTIONS AND OTHER PAPERS

Motion to dismiss.—In order that a motion to dismiss may prosper on the ground that there is already a pending action between the

⁵⁰ G. R. L-6208, Dec. 29, 1953.

⁵¹ G. R. L-5429, Feb. 19, 1953.

⁵² *Ibid.*

⁵³ *Del Rosario vs. Bayona*, G. R. L-5686, April 17, 1953.

same parties,⁵⁴ the facts must be such that the judgment in one case would constitute *res judicata* for the second. It was so decided in *Francisco vs. Vda. de Blas*.⁵⁵ Said action was filed during the pendency of two actions against plaintiff for the recovery of strips of land forming part of plaintiff's land. This action was filed by plaintiff to quiet the title to the same land. The motion to dismiss made by the defendants who were plaintiffs in the first two cases was sustained notwithstanding the difference in forms between the first two actions and the third action. The Supreme Court cited with approval the following:

"The application of the doctrine of *res judicata* to identical causes of action does not depend upon the identity or differences in the forms of the two actions. A judgment upon the merits bars a subsequent suit upon the same cause, though brought in a different form of action, and a party therefore, cannot, by varying the form of action or adopting a different method of presenting his case, escape the operation of the principle that one and the same cause of action shall not be twice litigated."⁵⁶

The judgment considered the motion sufficient. There was identity of parties; identity of reliefs; declaration of ownership; and identity of causes of action, claim of ownership. A decision therefore in the first two cases would be *res judicata* in the third.

However, in a later case, *Diana vs. Batangas Transportation Co.*,⁵⁷ the order of dismissal on the same ground was reversed by the Supreme Court. A motion to dismiss was filed in a civil case for the recovery of damages from defendant as party subsidiarily liable for the crime committed by an insolvent employee in the discharge of the latter's duty. The basis of the motion was the pendency of another action between the same parties for the same cause.⁵⁸ The action referred to was an action based on quasi delict arising from the same act for which employee was convicted. The proper interpretation of the ground for dismissal under Rule 8, Section 1(d) was averred to be the following:

"In order that this ground may be invoked there must be between the action under consideration and the other action, (1) identity of parties or at least such as representing the same interest in both actions; (2) identity of rights asserted and relief prayed for, the relief being founded on the same facts; and (3) the identity on the two preceding particulars should be such that any judgment which may be rendered on the other

⁵⁴ Rule 8, Sec. 1(d).

⁵⁵ G. R. L-5078, May 4, 1953.

⁵⁶ 30 Am. Jur. 919, cited in the case of *Francisco vs. Vda. de Blas*.

⁵⁷ G. R. L-4920, June 29, 1953.

⁵⁸ *Ibid.*

action will, regardless of which party is successful, amount to *res judicata* in the action under consideration."⁵⁰

The motion to dismiss was insufficient by the standard set by the Court. While the parties were identical in both actions, the Court found the second identity absent. One was for civil liability arising from crime⁶⁰ while the other was for recovery of damages arising from a quasi delict.⁶¹

In view of the new Civil Code provision⁶² by virtue of which a plaintiff cannot recover damages twice for the same act or omission of the defendant, a question may arise as to the third identity required. When recovery has been made for civil liability arising from a crime, is an action for culpa aquiliana arising from the same act barred on the ground of *res judicata*, or vice versa? The question should be answered in the negative. The ground would be the specific provision of the Civil Code, rather than *res judicata* which requires the existence of the three identities; of parties, of cause of action and of relief. In the actions for civil liability arising from a crime and for damages based on culpa aquiliana, only the identity of parties for the action exists. The causes of action and the reliefs prayed for are different.⁶³

Intervention.—A person may at any period of a trial, be permitted by the court, in its discretion, to intervene in an action if he has legal interest in the matter in litigation.⁶⁴ In an action which concerns the right, title, and interest of the parties to a piece of land, and not the title of the land as against the whole world, the matter in litigation is not the land itself, but the right, title, and interest in the land and so those who claim to be owners thereof have no interest in the subject of the action to entitle them to intervene. This ruling was enunciated in *Bool vs. Mendoza*⁶⁵ in which the issue was the rights of a surviving spouse in certain properties alleged to be conjugal. In deciding the case the Supreme Court also considered the following: that petitions for intervention are addressed to the sound discretion of the court, that the intervenors' rights to the property are not in any way affected by the judgment in the action,

⁵⁰ MORAN, COMMENTS ON THE RULES OF COURT, Vol. 1, 1952 ed., p. 168 cited in the case of *Diana vs. Batangas Transportation Co.*

⁶⁰ Art. 103, Revised Penal Code.

⁶¹ Art. 2176, Civil Code (R.A. No. 186).

⁶² Art. 2177 Civil Code (R.A. No. 186).

⁶³ *Barredo vs. Garcia and Almorio*, 73 Phil. 607.

⁶⁴ Sec. 1, Rule 13, Rules of Court.

⁶⁵ G. R. L-5539, April 17, 1953.

and that their claim to the land as against the parties to the action can be decided in another proceedings.⁶⁶

As to the time for filing a motion for intervention, the Court in the above-cited case had occasion to rule that the term "trial" as used in the phrase "at any stage of the trial," means the period for the introduction of evidence by both parties.⁶⁷ The motion to intervene filed after the trial court had approved the amicable settlement of the parties in its decision, was held to have been too late.

Interpleader.—The majority opinion in *Rivera vs. Ocampo*⁶⁸ is of the view that where money, subject-matter of an action for interpleader, has been deposited with the court, it may not be allowed to be withdrawn by any of the parties to the action. This was held to be so, even though a bond is filed for the protection of the rights of the other parties upon such withdrawal. Why a bond cannot take the place of the money deposited was explained thus:

"El importe de la fianza no es cantidad que puede distribuir el escribano en cualquier tiempo que el juzgado ordene, porque no está en su poder. Para que el escribano pueda entregarlo o distribuirlo, tiene que ordenar antes el juzgado al fiador que lo deposite en la escribania. Si la casa aseguradora, por algun tecnicismo o ya porque no tenga fondos disponibles o por algun otro motivo, no cumple inmediatamente la orden del juzgado, los reclamantes que tienen derecho a cobrar quedan en la expectativa esperando la voluntad de la casa fiadora. Cuántas causas se incoan en los juzgados porque los fiadores no han cumplido los términos precisos de sus fianzas."

The Court also stated that the deposit by the plaintiff in interpleader was made so that after hearing the conflicting interests of the claimants, the money may be delivered to the prevailing claimant and that it may not be used by one or more of the parties for his own advantage.

To this decision Justice Pedro Tuason dissented. He believes that by virtue of Rule 14, Section 2 of the Rules of Court,⁶⁹ that the subject-matter of the action be paid or transferred into court, is left to the sound judgment of the judge handling the case. The plaintiff in interpleader may therefore not be required at all to do so. The aforementioned Justice raises this question: "If the court can allow the plaintiff to keep the fund in his possession during the pendency of the suit without obligation to give any security, why can it

⁶⁶ *Ibid.*; also see *Santaromana and Ledesma vs. Barrios*, 64 Phil. 456, 459-460.

⁶⁷ *Ibid.*; also see MORAN, COMMENTS ON THE RULES OF COURT, Vol. 1, 1952 ed. p. 291.

⁶⁸ G. R. L-5968, August 5, 1953.

⁶⁹ " * * * If the interest of justice require, the court may command in such order that the subject matter be paid or transferred to court."

not make a responsible third party, with good and sufficient bond, the bailee of the money?" It is his opinion that adequate provisions could be made in the selection of a solvent surety of good standing to obviate the fears expressed in the majority opinion.

Effect of filing motion for bill of particulars upon time specified for filing answer.—The Rules of Court give the defendant 15 days, after service of summons, to file his answer.⁷⁰ It is likewise provided in said Rules that before responding to a pleading or, if no responsive pleading is allowed by the rules, within ten days after service of the pleading upon him, a party may move for a more definite statement or for a bill of particulars.⁷¹ The time allowed for filing a motion for particulars is co-extensive with that allowed for filing the answer which is a responsive pleading. A timely motion for particulars suspends the running of the period for filing an answer, and the defendant is entitled to the same time to serve his answer as that to which he was entitled at the time of serving his motion, but not less than five days in any event after notice of the denial of his motion or, if the motion was successful, after service of the amended complaint of bill of particulars.⁷²

These rules were applied in *Woodcraft Works, Ltd. vs. Moscoso*,⁷³ where the defendant's (Woodcraft Works, Ltd.) motion for a bill of particulars filed thirteen days after the service of the summons upon it was considered timely. The trial court was deemed to have exceeded its jurisdiction when the defendant was declared in default upon its failure to appear at the hearing of its motion. It was held:

"* * * at the time defendant was declared in default the time for filing its answer had not yet expired, for it was only then that its motion for specifications was denied and it still should have, after notice of such denial if any had been given no less than five days to file its answer."

Amended and supplemented pleadings.—*Paeste vs. Carpio* ⁷⁴ is authority for the view that amendment of a complaint before answer, although presented after the original complaint has been dismissed but before the order of dismissal has become final, may be made. This ruling was justified in this way:

"Amendments to pleadings are favored and should be liberally construed in the furtherance of justice. Moreover, under section 1 of Rule 17,

⁷⁰ Sec. 1, Rule 9, Rules of Court.

⁷¹ Sec. 1, Rule 16, Rules of Court.

⁷² Sec. 2, Rule 16, Rules of Court.

⁷³ G. R. L-5470, April 29, 1953.

⁷⁴ G. R. L-5711, Dec. 29, 1953.

Rules of Court, a party may amend his pleadings once as a matter of course, that is without leave of court at any time before a responsive pleading is served. A motion to dismiss is not a responsive pleading."

However, the trial court was deemed to have acted within its authority in ordering an amended complaint filed without leave stricken from the record, to wit:

"It appearing that the amended complaint was filed after defendants had already filed their answer the admission thereof had to be with leave under section 2, Rule 17, Rules of Court."⁷⁵

Leave of court may be secured at any stage of the action, not after rendition of a final judgment.⁷⁶ However, an amendment has been allowed even after final decision has been rendered to cure the defect of party plaintiffs there being no prejudice to defendants,^{76a} but not where damages already finally disallowed by the Court of Appeals were prayed for in the supplemental answer, with the result that a final judgment is sought to be altered on a substantial matter. This was the ruling in *Ocampo vs. Mañalac*,⁷⁷ when a supplemental answer for damages which was not allowed on appeal was sought to be admitted after the case had been remanded to the trial court, both as an amendment under Rule 17, Section 2⁷⁸ and as a supplemental pleading under Section 5 of the same rule.⁷⁹

Depositions.—By leave of court after jurisdiction has been obtained over any defendant or over property which is the subject of the action, or without such leave after an answer has been served, the testimony of any person, whether a party or not, may be taken, at the instance of any party by oral examination or written interrogatories.⁸⁰ The taking of a deposition is not a matter of absolute right after the answer is filed by virtue of Section 16, of Rule 18, Rules of Court which provides that after notice is served for taking a deposition by oral examination, upon motion reasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken. It is clear from this section that the taking of a deposition is discretionary with the trial

⁷⁵ *Buenaventura vs. Buenaventura*, G. R. L-6208, Dec. 29, 1953.

⁷⁶ See MORAN, COMMENTS ON THE RULES OF COURT, 1952 ed., Vol. 1 p. 377 citing *Espiritu vs. Ansfield*, 14 Phil. 588, 591.

^{76(a)} *Cuyugan vs. Dixon*, 45 O. G. 2, 673.

⁷⁷ G. R. L-5952, March 26, 1953.

⁷⁸ Rules of Court.

⁷⁹ Rules of Court.

⁸⁰ Sec. 1, Rule 18, Rules of Court.

court.⁸¹ That the taking of the deposition will delay the proceedings in the case and will lead the parties or the court to no practical result, was held to be a plausible and cogent reason for an order preventing such taking.⁸²

The holding that a deponent may not be required to answer an incriminating question upon the taking of a deposition, was announced in *Isabela Sugar Co., Inc. vs. Macadaeg*.⁸³ Thus:

"When the deposition of a witness is being taken under the provisions of Rule 18 of the Rules of Court, the party objecting to a question claimed to be immaterial or irrelevant may object thereto, but such party cannot prevent the witness from answering the question (Sec. 17, Rule 18) because the relevancy or materiality will only be decided upon the trial when the deposition is introduced as evidence (Sec. 29, Rule 18). An exception to this general rule obtains when the questions propounded are annoying, embarrassing, or oppressive to the deponent (Sec. 18, Rule 18, Rules of Court), in which case the matter may be submitted to the trial judge for a ruling, or when the constitutional privilege against self-incrimination is invoked by the deponent or by counsel on his behalf, to enforce the constitutional privilege defined in Section 79, Rule 123, Rules of Court, in which latter case also the staying hand of the trial judge may also be demanded."

Motions.—Upon motion made to set a petition to hold defendant for contempt for hearing, and proof of notice of the date set made by the movant upon said defendant, the court may proceed to hear said petition, by virtue of Sections 4,⁸⁴ 5⁸⁵ and 6,⁸⁶ of Rule 26 of the Rules of Court. It is not necessary that the court itself order the motion to be set for hearing, as a prerequisite therefor, because the notice given by the party is sufficient. Where the defendant failed to appear on the date set for hearing and order was rendered against him, said order may not be set aside on the ground that it was issued without due process of law. This was the holding in *Embate vs. Penolio*⁸⁷ where the Supreme Court held that the defendant was given an opportunity to be heard under the above circumstances.

⁸¹ *Jacinto vs. Amparo*, G. R. L-6096 Aug. 25, 1953. See also *Frank & Co. vs. Clemente*, 44 Phil. 30.

⁸² *Ibid.*

⁸³ G. R. L-5924, October 28, 1954.

⁸⁴ "Notice of a motion shall be served by the applicant to all parties concerned, at least three days before the hearing thereof together with a copy of the motion and of any affidavits and other papers accompanying it. The court however on good cause may hear a motion on shorter notice, specially on matters which the court may dispose of on its own motion."

⁸⁵ The notice shall be directed to the parties concerned and shall state the time and place for the hearing of the motion.

⁸⁶ "No motion shall be acted upon by the court, without proof of service of the notice thereof."

⁸⁷ G. R. L-4942, Sept. 23, 1953.

The denial of a premature motion may not be considered as a bar to a second motion, filed after the ground for the motion has arisen or come into existence. A motion for reconsideration with a prayer to set aside a compromise agreement approved by the court, filed before the report of the commissioners appointed to make a partition in accordance with said agreement was filed, was held to be premature because it was not until said filing that the error both of the commissioners and of the parties became patent, and the cause or reason for setting aside the compromise agreement may be said to have arisen. Said motion was not a bar to a subsequent petition to set aside the agreement based on the same ground.⁸⁸

Date of filing pleadings and other papers.—The date of the mailing of motions, pleadings, or any other papers or payments or deposits, as shown by the post-office registry receipt, shall be considered as the date of their filing, payment, or deposit in the court in accordance with Section 1, Rule 27, of the Rules of Court. In *De la Cruz vs. Cañizares*,⁸⁹ the date of filing was considered to be the date of the actual receipt by the clerk of court and not the date of mailing, the mailing having been made by special delivery and not by registered mail.

The above-cited rule was declared to be applicable to proceedings in inferior courts. The Court once more held that the enumeration in Section 19 of Rule 4, Rules of Court of rules applicable to inferior courts is not exclusive.⁹⁰

Service of notice.—The general rule has been to the effect that where a party appears by attorney in an action or proceeding in a court of record, all notices thereafter required to be given therein must be given to the attorney and not to the client, and a notice given to the client and not to his attorney is not a notice in law.⁹¹ However, where service upon the party himself is ordered by the court, service must be made upon him.⁹²

⁸⁸ *Saminaida vs. Mata*, G. R. L-4358, Jan. 2, 1953. See Sec. 8, Rule 26, Rules of Court.

⁸⁹ G. R. L-6129, Feb. 28, 1953. In said case the court found that the period had expired whether it be counted from the date of mailing or from the date of actual receipt by the clerk of court.

⁹⁰ *Manabat vs. Aquino*, G. R. L-5558, April 29, 1953. The following rules were held applicable in inferior courts in the following cases respectively: (1) Rule 17 in the case of *Viola vs. Fernando*, 43 O. G. 145; (2) Rule 124 in *Beltran vs. Cabrera*, 73 Phil. 666; (3) Rules 8, 16, 17, 20, 21, 22 and appendix of forms after Rule 133 in the case of *Co Tiamco vs. Diaz*, 75 Phil. 672.

⁹¹ See MORAN, COMMENTS ON THE RULES OF COURT, Vol. 1, 1952 ed., p. 386.

⁹² Sec. 2, Rule 27, Rules of Court.

In *Ortiz vs. Mania*,⁹³ the general rule was likewise not applied to the notice provided for in Section 7, Rule 40 of the Rules of Court which expressly provides that notice of the docketing of an appeal from the justice of the peace or municipal court to the Court of First Instance be given to the parties. It was thus stated:

"This provision, being express and specific, cannot be interpreted to mean that the notice can be given to the lawyer alone. The reason for this provision for the notification of the parties and not of the lawyers lies in the fact that in an appeal from an inferior court only the complaint in the justice of the peace court is deemed reproduced and the proceeding immediately following the filing of the complaint is the summoning of the defendant. Instead, however, of being summoned he is only personally notified because he is already within the court's jurisdiction, the notice taking the place of the summons."

A corollary to the general rule is that a notice to counsel is notice to the party represented. The latter therefore may not claim that he received notice on a later date than the date of notice to his counsel.⁹⁴

JUDGMENTS AND ORDERS

Judgment by default in inferior courts.—In the justice of the peace court failure to appear, not failure to answer, is the sole ground for default.⁹⁵ This doctrine was reiterated in *Carballo vs. Encarnacion*⁹⁶ where on the date set for trial, counsel for defendant entered his written appearance but failed to file an answer. No appeal was allowed from the judgment rendered against him upon failure to appear on the date to which the hearing had been postponed, and after plaintiff's evidence had been received. Basis of the denial was that since the judgment was by default, it is not appealable.⁹⁷ The Supreme Court allowed the appeal considering the judgment as one rendered after a hearing ex-parte, and not a judgment by default. The appearance by counsel was considered sufficient by virtue of the holding that an appearance in whatever form without expressly objecting to the jurisdiction of the court over the person, is a submission to the jurisdiction of the court over the person.⁹⁸

Judgment on the pleadings.—Rule 35, Section 10 of the Rules of Court provides:

⁹³ G. R. L-5147, June 2, 1953.

⁹⁴ *Viloria vs. Viloria*, G. R. L-5217, May 13, 1953.

⁹⁵ *Quison vs. Arellano*, G. R. L-4461, Dec. 28, 1951.

⁹⁶ G. R. L-5675, April 27, 1953.

⁹⁷ *Lim Toco vs. Go Tay*, 45 O. G. 8, p. 3350.

⁹⁸ *Flores vs. Zurbito*, 37 Phil. 746.

"Where an answer fails to tender an issue, or otherwise admits the material allegations of the adverse party's pleading, the court may on motion of that party, direct judgment on such pleading, except in actions for annulment of marriage or divorce wherein the material facts alleged in the complaint shall always be proved."

*When is a judgment on the pleadings proper?—Fabella vs. Provincial Sheriff of Rizal*⁹⁹ answers this question. Defendant in said case filed an answer containing specific denials and in addition a counterclaim. Plaintiff entered a general denial, as a consequence of which defendant moved for judgment on the pleadings on the counterclaim. The trial court, however, on motion of plaintiff rendered judgment on the pleadings on both the complaint and counterclaim. On appeal the Court restated the rulings on the nature of a judgment on the pleadings. Thus:

"When the defendant neither denies nor admits the material allegations of the complaint, judgment on the pleadings is proper (*Aleman, et al. v. Sweeney*, 8 Phil. 114). But where the defendant's answer tenders an issue, judgment on the pleadings should not be rendered (*Ongsin v. Riarte*, 46 O.G. No. 1, p. 67). And when the defendant admits all allegations of the complaint, the admission is a sufficient ground for judgment. One who prays for judgment on the pleadings without offering proof as to the truth of his own allegations, and without giving the opposing party an opportunity to introduce evidence, must be understood to admit the truth of all the material and relevant allegations of the opposing party, and to rest his motion for judgment on those allegations taken together with such of his own as are admitted in the pleadings. (*Baeurmann v. Casas*, 10 Phil. 115; *Tanchico v. Ramos*, 48 O.G. No. 1, 654.)"

It concluded:

"It is apparent from these rulings that judgment on the pleadings can only be rendered when the pleading of the party against whom the motion is directed, be he plaintiff or defendant, does not tender any issue, or admits all the material allegations of the pleading of the movant. Otherwise judgment on the pleadings cannot be rendered."

A judgment on the pleadings was held proper on the counterclaim, but not on the complaint since the answer tendered an issue in setting up specific denials.

The effect of an agreement to submit a case for decision merely on the parties' memoranda without a hearing was explained in *Vda. de Tecson vs. Tecson*.¹⁰⁰ In this action a petition to set aside a judgment by default, accompanied by affidavits of merit was filed by defendants. The parties agreed to do away with the hearing

⁹⁹ G. R. L-6090, Nov. 27, 1953.

¹⁰⁰ G. R. L-5233, Sept. 30, 1953.

on the petition and submitted merely their memoranda. On appeal the question raised was whether the appellate court may consider all the facts brought out in the pleadings and affidavits and not merely those found by the trial court. In deciding the question in the affirmative, the Supreme Court held:

"Considering that the petition for relief did not go through a hearing because both parties agreed to submit memoranda in support of their contentions, which implies that they waived their privilege to submit evidence, the logical consequence is that plaintiff or her counsel is deemed to have admitted the truth of all material and relevant allegations appearing in the petition as well as in the affidavits of merit and to have submitted the case upon those allegations." ¹⁰⁰

Judgment upon a compromise.—A compromise agreement approved by the court is not in effect a judgment, because no finding on any issue of fact or law is made, and no legal conclusion or pronouncement is made thereon as to the respective rights and obligations of the parties in so far as the subject-matter of the action is concerned. A decision must state clearly and distinctly the facts and the law upon which it is based;¹⁰¹ these essentials of a judgment are lacking in a decision on a compromise agreement. This is a reasoning which was used as basis for the conclusion that the limitation of the period during which a petition to set aside a judgment may be filed does not apply to a "judgment upon a compromise" in the opinion of *Saminiada vs. Mata*.¹⁰² However, that a judgment rendered in accordance with a compromise is not a judgment as this term is used in the Rules of Court is not a decisive ruling of the Supreme Court.¹⁰³ Although seven justices decided on the same result, only four of them were in agreement as to the basis of the result. It is interesting to note that in a later case where a judgment was also rendered upon a written stipulation of the parties which was approved by the court, the Supreme Court considered the petition for relief from judgment as having been filed too late under the limitation provided for in Section 3, Rule 38 of the Rules of Court.¹⁰⁴

Relief from judgments; when and where petition is filed.—In the opinion announced in *Saminiada vs. Mata*,¹⁰⁵ with which only

¹⁰⁰ (a) *Evangelista vs. de la Rosa*, 42 O. G. 2100; *Aquino vs. Blanco*, 45 O. G. 2080.

¹⁰¹ Sec. 1, Rule 35, Rules of Court.

¹⁰² G. R. L-4358 Jan. 2, 1953.

¹⁰³ See MORAN, COMMENTS ON THE RULES OF COURT, Vol. 1, p. 714 (Rule 35, Sec. 10).

¹⁰⁴ *Viloria vs. Viloria*, G. R. L-5217, May 13, 1953. In the case of *Anzures vs. Alto Surety & Ins. Co.*, G. R. L-5693, Feb. 28, 1953, a judgment by compromise was considered a judgment within the meaning of Sec. 12, Rule 59 of the Rules of Court.

¹⁰⁵ G. R. L-4358, Jan. 2, 1953.

four justices of the Supreme Court concurred, it was held that the period provided for within which to file a petition to set aside a judgment does not start to run until after the commissioner appointed had made the segregation of the land, subject-matter of the compromise, and his report had been approved by the court. The reason relied upon was that until that time the judgment had not acquired the character of finality but was merely an interlocutory order because something yet had to be done, i.e., the segregation agreed upon, which, together with the court's approval, will be the ones to give it finality.

A petition for relief under Rule 38, Rules of Court must be filed within sixty days after the petitioner learns of the judgment, order, or other proceeding to be set aside, and not more than six months after such judgment or order was entered, or such proceeding was taken.¹⁰⁶ When is a petitioner supposed to have knowledge of a judgment, order or other proceeding against him? No definite ruling in this point was announced in *Tuazon & Co., Inc. vs. De la Cruz*.¹⁰⁷ In that case, however, the petition to set aside an order disapproving an appeal filed on November 20, 1950, was belated whether the period of sixty days be counted from September 19, 1950, the date of personal knowledge or from June 28, 1950, the date when petitioner's counsel was notified.

The Court in the later case of *Viloria vs. Viloria*¹⁰⁸ positively held that the petitioner for relief from judgment in said case cannot claim that he learned of the judgment only on July 23, 1951, because he was represented by counsel who received notice on March 13, 1951, and this is notice to the petitioner. The petition filed on August 1, 1951 was therefore not filed in due time.

Where should the petition be filed?—In order that relief from judgments, orders or other proceedings in a Court of First Instance on the ground of fraud, accident, mistake or excusable negligence may prosper, the petition therefor must be submitted in the same case.¹⁰⁹ It cannot be claimed in an independent action. In an independent action, the plea of *res judicata* will defeat the petition, because such petition involves questions of fact which are presumed to have been considered and passed upon in the original case. It was so decided in *Ramos vs. Albano*¹¹⁰ where the petition for relief merely imputes the commission of certain mistakes in the appre-

¹⁰⁶ Rule 38, Sec. 3, Rules of Court.

¹⁰⁷ G. R. L-4883, March 25, 1953.

¹⁰⁸ G. R. L-5217, May 13, 1953.

¹⁰⁹ See Rules of Court, Rule 38, Sec. 2.

¹¹⁰ G. R. L-5380, March 25, 1953.

ciation of the evidence to the court of origin as well as to the Court of Appeals.

It would be useful to observe that in case the judgment sought to be set aside was rendered by an inferior court, the petition to set aside is made subject of an independent action instituted in the Court of First Instance of the province in which the original judgment was rendered.¹¹¹ An independent action may also be instituted to procure a final and executory judgment to be set aside with a view to the renewal of the litigation (a) when the judgment is void for want of jurisdiction, and (b) when it has been obtained by fraud, which must be extrinsic to the litigation.¹¹²

Same, when proper.—The relief provided for by this rule is of exceptional character and is allowed only in exceptional cases: where there is no other available remedy.¹¹³ This was relied upon to sustain the order of the trial judge in refusing to extend relief under Rule 38 in the case of *Arante vs. Rosel*.¹¹⁴ The petitioners were found to have another remedy, a civil action under Rule 39, Section 17¹¹⁵ and had actually commenced a separate civil action, to avoid a sale under execution alleged to have been made without the proper notices of sale which is the same purpose of the petition for relief.

A petition for relief is addressed to the sound discretion of the court. Thus it was so held in *Josc vs. Consolidated Investments, Inc.*,¹¹⁶ in which case the Court found no abuse of discretion on the part of the trial court in granting a petition for relief under the nature and circumstances of the case. In said case, defendants were declared in default upon motion of plaintiff not only for failure to appear at the hearing but also because defendant's answers had been filed out of time. After the case had been submitted for decision but before the court had been able to render it, counsel for defendant corporation filed a petition to set aside the proceedings so far had and to fix a date for the presentation of the evidence. The reasons alleged were that the case involved a big amount of money and the failure of defendant's counsel, Atty. Claro M. Recto, to appear was due not to his negligence but to some other independent causes beyond his control. The failure to appear at the hearing

¹¹¹ Sec. 1, Rule 38, Rules of Court.

¹¹² *Ramos vs. Albano*, G. R. L-5380, March 25, 1953; *Anuran vs. Aquino*, 38 Phil. 29; *Banco Español vs. Palanca*, 37 Phil. 921, 949; *Garchitorena vs. Sotelo*, 74 Phil. 25 cited in *Ramos vs. Albano*. See MORAN, COMMENTS ON THE RULES OF COURT, Vol. 1, 1952 ed., pp. 776-777.

¹¹³ See MORAN, *op. cit.*, p. 784.

¹¹⁴ G. R. L-5292, May 13, 1953.

¹¹⁵ Rules of Court. See MORAN, *op. cit.*, pp. 830-831.

¹¹⁶ G. R. L-5023, Sept. 18, 1953.

was found attributable to the fact that the notice of hearing was not addressed to Atty. Recto but to his assistant and also to the failure of his clerk to notify either himself or his assistant attorney of the date of hearing.¹¹⁷ These were considered sufficient to explain the failure to appear at the hearing. The order granting the petition was sustained by the Supreme Court, rejecting the contention that it was granted merely because the chief counsel of defendant corporation was Atty. Recto. With regards to the other defendant, his failure to appear was sufficiently explained by the finding that he was not notified.

With regard to the contention that the answers were filed out of time, apparently no explanation was given by defendants. However, the Court considered the fact that the answers had been filed long before the date of hearing and the fact that the case is of far-reaching consequence to the defendant corporation. These considerations together with the reasons for failure to appear were held to indicate that the petition for relief was granted by the trial court in the interest of justice.

In a subsequent case, *Vda. de Tecson vs. Tecson*,¹¹⁸ a petition for relief from a judgment by default for failure to answer within the reglamentary period, was denied by the trial court. From the affidavits filed by defendant-petitioners, it was shown that the notice to answer was received by an employee of a business firm which occupied part of the office of defendants' counsel, during the absence of counsel and his employees and that it never came to the knowledge of said counsel, until he received to his surprise, a copy of the decision by default.

The Supreme Court stated that if the failure to deliver the notice on the part of the firm's employee or the failure to leave a substitute by counsel's messenger upon leaving the office were acts of negligence, they were excusable negligence because there was no deliberate intent on their part to cause inconvenience to the court or delay the administration of justice. In addition, defendants' affidavits showed that they had a good and meritorious defense.

The Court reversed the order denying the petition, holding:

"While a petition for relief as a rule is addressed to the sound discretion of the court, however, when it appears that a party has a good and meritorious defense and it would be unjust and unfair to deny him his day in court, equity demands that the exercise of judicial discretion be reconsidered if there are good reasons that warrant it. Here these reasons exist if only all the facts are considered."

¹¹⁷ See Sec. 4, Rule 27, Rules of Court.

¹¹⁸ G. R. L-5233, Sept. 30, 1953.

An allegation that due to illiteracy of petitioner, a stipulation was signed, on which the decision of the action was based without knowing its true contents, was held to be not sufficient to constitute fraud or mistake to justify the setting aside of said stipulation adopted under the circumstances in *Viloria vs. Viloria*,¹¹⁹ it having been shown that:

"The stipulation bore not only his signature but also that of his attorney, and during the hearing held on March 5, 1951, he confirmed, upon being questioned by the trial Judge, his thumbmark appearing on the document containing the stipulation. His attorney was also present at the hearing, and it cannot be supposed, in the absence of any showing to the contrary, that the latter acted irregularly. Indeed, the appellant did not ask for a change of attorney."

Same; appeal.—The order of the court setting aside the judgment, order, or proceeding is not appealable until a final judgment is rendered upon the merits in the principal case.¹²⁰ However, where the petition for relief is denied, thereby leaving the judgment, order or proceeding sought to be set aside in force, it has been uniformly held that the order denying relief is appealable.¹²¹ For this reason, a petition for certiorari cannot be availed of.¹²²

Extent of judgment.—When the allegation that an action is premature is sustained as basis for dismissal, may the court decide any other issue raised? This was the question which confronted the Supreme Court in *Lingayen Gulf Electric Power Company, Inc. vs. Baltazar*.¹²³ This action was for the recovery of unpaid balance on a contract of subscription of stocks of plaintiff corporation. Defendant disclaimed liability on two grounds; namely, (1) that the action is premature because there was no valid call and (2) that granting that there was a valid call, he was released from the obligation for the balance by a stockholders' resolution. The first ground was upheld by the trial court and the case was dismissed but the issue raised by the second was also ruled upon, the court declaring the resolution null and void so far as it tried to relieve the defendant from liability on his contract, the resolution not having been approved by all the stockholders. The Supreme Court confirmed the power of the trial court to make the ruling on the second issue on two grounds, to wit:

¹¹⁹ G. R. L-5217, May 13, 1953.

¹²⁰ Rule 38, Sec. 8, Rules of Court.

¹²¹ *Tuason & Co. vs. de la Cruz*, G. R. L-4883, March 25, 1953; *Phil. Mfg. vs. Imperial*, 47 Phil. 810; *Government vs. Cabangos*, 49 Phil. 107; *Medran vs. Court of Appeals*, G. R. L-1350, March 26, 1949.

¹²² *Arante vs. Rosel*, G. R. L-5292, May 13, 1953.

¹²³ G. R. L-4824 and G. R. L-6344, June 30, 1953.

"It must be borne in mind, however, that this was one of the principal issues involved in the case and the trial court was called upon to pass upon it, because unless so passed upon and determined, it might decisively affect the case on appeal. Supposing that on appeal the appellate court decides that the call was valid, then it would be important to know whether or not in spite of the validity of the call, defendant was nevertheless not liable because he had been validly released by a resolution of the corporation. If that question was not decided by the trial court, and naturally was not touched upon in the appeal, then the appellate court would have no occasion to pass upon it, and it might be necessary to bring another action to determine the point, which means multiplicity of suits. Moreover, the authority given to the courts to render judgments for declaratory relief in order to determine the rights or duties of parties over a certain transaction or under a certain written instrument or to remove the uncertainty or controversy over the same (Rule 66 of the Rules of Court), justified the trial court in passing upon this question of release."

Final judgment.—By section 6 of Rule 39¹²⁴ only final judgments may be revived by separate action after the expiration of five years.¹²⁵ When does a judgment become final? Generally, a judgment becomes final upon the expiration of the time to appeal when no appeal has been perfected.¹²⁶ However, a "judgment declaring plaintiff entitled to share in the assets of the partnership and directing the defendant to render an accounting of the expenses incurred in the purchase and exploitation of mining claims" does not become final until the accounting has been effected and acted upon. It is merely interlocutory and not appealable.

It was so decided in *Carrascoso vs. Fuentebella*,¹²⁷ an action for the revival of judgment. There it was also stated that although the different items of the judgment be independent of the others and are not subject to the results of the accounting ordered, the plaintiff is estopped from asserting that the judgment on some parts thereof became executory by reason of defendant's failure to prosecute his appeal to its final conclusion, the appeal having been dismissed in its entirety due to plaintiff's objection that it was premature.

However, in a later case, *Arnaldo vs. Bernabe*,¹²⁸ where a judgment was rendered partly for the plaintiff and partly for the defendant, each part was treated independently of the other. Thus the mere fact that the judgment for the defendant had been declared final and executory upon motion of defendant for a writ of execution, it did not result in rendering the judgment final and executory *in toto*. The part of the judgment favorable to the plaintiff was held still

¹²⁴ Rules of Court.

¹²⁵ *Carrascoso vs. Fuentebella*, G. R. L-5888, April 22, 1953.

¹²⁶ Sec. 1, Rule 39, Rules of Court. G. R. L-5888, April 22, 1953. See note 125.

¹²⁷ G. R. L-5888, April 22, 1953.

¹²⁸ G. R. L-4702, July 27, 1953.

subject to defendant's motion for reconsideration who was not estopped by the motion for execution.¹²⁹

Execution of judgment.—A judgment may be executed on motion within five years from the date of its entry.¹³⁰ In *Castro vs. Pecson*,¹³¹ a petition for mandamus was issued to compel execution of judgment which became final on February 19, 1949, the motion for execution filed in 1952, having been filed within the required period.

If by virtue of a sale under execution of properties belonging to a partnership, the shares of a partner who was not a party to the litigation where the execution was made, is sold, the proper remedy is the institution of a proper action to vindicate his claim to the property sold, as provided in Section 15, Rule 39, Rules of Court.¹³² Action under this section means action as defined in Section 1, Rule 2.¹³³ Motion in the same case where the sale by execution was made is not sufficient. His remedy is to claim the property, not the proceeds of the sale, which the sheriff is directed by Section 14, Rule 39¹³⁴ to deliver unto the judgment creditors.¹³⁵

Res judicata.—An appraisal of the nature and object of the principle of *res judicata* was cited in *Perkins vs. Benguet Consolidated Mining Co.*¹³⁶ as follows:

"The doctrine of *res judicata* is primarily one of public policy and only secondarily of private benefit to individual litigants. It draws its strength not so much from the private advantage of the party seeking to invoke it, but its roots lie in the principle that public policy and welfare require a definite end to litigation when each of the parties has had a full, free and untrammelled opportunity of presenting all of the facts pertinent to the controversy. The primary object of *res judicata* (public policy) is based upon the maxim *resipulioas ut sit, finis litium*—it concerns the commonwealth that there be a limit to litigation. 2 Freeman on Judgments, sec. 626; 38 *Yale Law Journal* 299; 33 C.J. 267. Many authorities include as a basis of *res judicata* the subordinate maxim *nemo debet bis vexari pro una et eadem causa*—No one ought to be twice vexed for one and the same cause. • • •"¹³⁷

In order that a judgment or order rendered in a case may be conclusive in a subsequent case, the following requisites must be present:

¹²⁹ See Secs. 3 and 4, Rule 35, Rules of Court.

¹³⁰ Sec. 6, Rule 39, Rules of Court.

¹³¹ G. R. L-5815, May 29, 1953.

¹³² *Leyte-Samar Sales Co. vs. Cea*, G. R. L-5963, May 20, 1953.

¹³³ Rules of Court. *Manila Herald Publishing Co. vs. Ramos*, G. R. L-4268, Jan. 1851. See MORAN, *op. cit.*, p. 46.

¹³⁴ Rules of Court.

¹³⁵ *Leyte-Samar Sales Co. vs. Cea*, G. R. L-5963, May 20, 1953.

¹³⁶ G. R. L-1981 and 1982, Oct. 30, 1953.

¹³⁷ (a) *Coca Cola Co. vs. Pepsi Cola Co.*, 172 Ad. 260.

- (a) It must be a final judgment or order;
- (b) The court rendering the same must have jurisdiction of the subject-matter and of the parties;
- (c) It must be a judgment or order on the merits;
- (d) There must be between the two cases identity of parties, identity of subject-matter, and identity of cause of action.¹²⁷

In *Perkins vs. Benguet Consolidated Mining Co.*,¹²⁸ which is an action to compel defendant corporation to deliver the dividends of certain stocks to plaintiff and to recognize plaintiff as the person who has control and dominion over said stocks, the final judgment in the case of *Perkins vs. Perkins and The Guaranty Trust Co.*¹²⁹ filed in the New York Supreme Court, for the delivery of certificates and dividends of the same stocks was held to have the force of *res judicata*. In the latter case, Mrs. Perkins was adjudged to be the absolute owner of the stocks as against plaintiff Mr. Perkins' claim that said stocks were conjugal properties. The Supreme Court held that in the two cases there are identity of subject matter, the stocks and dividends; identity of causes, because the plaintiff claimed in both cases ownership and possession; and identity of parties because the plaintiff in each case is Mr. Perkins and the principal defendant is Mrs. Perkins. There was also found to exist identity of the capacity in which the actions were instituted since the plaintiff and the defendant claim the stocks as owners, in both actions.

In the cited case one question raised was whether defendant corporation which was not a party to the New York case may raise *res judicata* of said case as a defense. The Court decided that it may since it does not claim any adverse right to the stocks. It is only a fideicommissary of the dividends and its obligation is to pay to the person who has the right to them, according to the judgment. In resolving the question one other reason advanced was that since the question of ownership of the stocks has been resolved by the judgment on the New York case, the accessory question as to whom the dividends are to be paid is necessarily understood to have been decided. On this point the Rules of Court in Section 45, Rule 39 provides:

"That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

¹²⁷ See MORAN, COMMENTS ON THE RULES OF COURT, Vol. 1, 1952 ed., p. 866 citing *San Diego vs. Cardona*, 40 O. G. (8th Supp.) 116, 70 Phil. 281, 283.

¹²⁸ *Loc. cit.*

¹²⁹ (a) 8 V. E. (2d) 849, 858.

A decision rendered in California, U.S.A., on a case brought by Mrs. Perkins against defendant corporation for the recovery of dividends on the stocks involved in the New York case, where the latter case was held to be *res judicata* binding the corporation, was also held to be binding on Mr. Perkins. He was not allowed to set up the objection that he was not a party to such decision and therefore may not be deprived of his rights without being served with legal process or opportunity to be heard, since the action instituted by him in New York was the basis of the California decision. The Court quoted the following as basis:

"Que si bien es cierto que la ley 20, Tit. 22, de la Partida e.a, establece como regla general que la cosa juzgado no perjudica a personas que no intervinieron en el juicio, tambien lo es que exceptiona aquellos casos en que estas personal ejercitan la misma acción con igual objeto, invocan los mismos derechos y fundan sus pretensiones en los mismos títulos, de manera que la situación juricada de las partes es idéntica en uno y otro juicio.

"Que la doctrina en cuya virtud para que pueda estimarse la excepción de cosa juzgada es preciso que se den de modo conjunto las tres identidades de personas, cosas y acciones, absolutamente en nada desvirtúa la jurisprudencia también establecida, y en cuya virtud se estima jurídicamente que existe identidad de personas cuando la que litiga en el segundo pleito ejercita la misma acción que se ejercitó en el primero, invocar iguales fundamentos y su pretensión en los mismos títulos."

The reason for the cited doctrine was stated thus:

" * * The requirement of mutuality must yield to public policy. To hold otherwise would be to allow repeated litigation of identical questions, expressly adjudicated, and to allow a litigant having lost on a question of fact to re-open and re-try all the old issues each time he can obtain a new adversary not in privity with his former one."*

In a project of partition, the surviving spouse renounced her rights to conjugal properties and such properties together with the exclusive property of the deceased were divided equally between the surviving spouse and the eleven children of the deceased. Subsequently, the case of *Vitug vs. Montemayor*¹³⁹ was instituted to recover the hereditary portion pertaining to plaintiff in certain conjugal properties belonging to the marriage of her deceased father and his second wife which were not included in the above-mentioned project of partition agreed upon between all the heirs of said deceased person. Plaintiff alleged that the distribution should be in accordance with the proportion agreed upon in the partition which had been approved by the court in an intestate proceedings. In other

¹³⁹ G. R. L-5297, Oct. 20, 1953.

words, plaintiff claimed the partition to have the force of *res judicata* in the later civil action. However, the Court ruled otherwise thus:

"Carece de base la pretensión de la apelante de que las 30 partición de 22 de julio de 1933, presentado en el intestado del finado Clodualdo Vitug, porque tanto el proyecto como el auto aprobándolo solamente se refieren a los terrenos o bienes descritos en el inventario, y no a las 30 parcelas que no estaban incluidas. Por tanto, dicho auto no constituye *res judicata* en este asunto porque (a) no hay identidad en la cosa litigiosa en ambas causas y (b) porque el auto fué el resultado de un simple arreglo y no de una vista en que se haya discutido la verdadera naturaleza de los bienes y la ley aplicable."

Abandonment of rights under a judgment.—In the cited case of *Perkins vs. Benguet Consolidated Mining Co.*,¹⁴⁰ "that a party who after obtaining a favorable judgment raises identical issues in another case, abandons the former judgment renouncing all rights adjudicated in his favor thereunder," was a doctrine enunciated by the Court. Plaintiff in said case was declared to have abandoned the judgment in a previous Philippine Supreme Court decision¹⁴¹ which held the stocks involved to be conjugal, as he alleged by bringing another suit in New York raising the issue of ownership of the same shares of stock anew. The Supreme Court ruled that he may not be allowed to impugn the judgment in the New York case just because it was unfavorable to him and attributed to said judgment the character of *res judicata* on the question of ownership. In so deciding, the Court quoted the following:

"Where city as plaintiff was successful in its ejectment suit for possession of land, but while appeal was pending elected to assert identical cause of action as a counterclaim in quiet title suit by defendants, the election constituted an abandonment of rights which city had acquired in the judgment in the ejectment suit. (*City of Caruthersville v. Cantrell*, 241 S.W. 2d, 790).

"* * * The parties are therefore in the anomalous position of having two judgments on the same issues, one in favor of plaintiff and one against him. This condition was brought about by the action of plaintiff. We think that the doctrine of election applied, and the bringing of the second suit on the same issues was an abandonment of all rights under the first suit and judgment. Plaintiff having elected to pursue his remedy by a second suit, he ought not to be permitted after judgment has been rendered against him to return to the first and assert rights thereunder inconsistent with the course he pursued in the bringing of the second suit." (235 S.W., 437.)

APPEALS

Appeal from inferior courts to Courts of First Instance; how perfected.—Rule 40, Section 2, Rules of Court provides:

¹⁴⁰ *Loc. cit.*

¹⁴¹ 57 Phil. 215.

"An appeal shall be perfected within fifteen days after notification to the party of the judgment complained of, (a) by filing with the justice of the peace or municipal judge a notice of appeal; (b) by delivering a certificate of the municipal treasurer showing that the appellant has deposited the appellate court docket fee, or, in chartered cities, a certificate of the clerk of such court showing receipt of the said fee; and (c) by giving a bond."

Where a judgment is amended, the date of the amendment should be considered as the date of decision for the computation of the period for perfecting the appeal.¹⁴² In the case of *Capistrano vs. Cariño*,¹⁴³ a second decision, rendered after a motion for reconsideration and new trial which made findings of fact with respect to defendant's special defense and counterclaim and adjudicated them by declaring them dismissed for lack of merit, was given the character of an amendment although such decision ordered the defendant to pay to the plaintiff the same amount already adjudged in the first decision. It was considered an amendment, so much so that the computation of the fifteen days for perfecting an appeal was held to run from the date of notification of the second decision and not from the date of notification of the first decision, because the Court stated that the absence of adjudication on the defendant's special defense and counterclaim in the first decision made it incomplete and necessitated the rendering of another decision to cure the defect.

In *Manabat vs. Aquino*,¹⁴⁴ the computation of the 15-day period was started from the date of deposit in the mails by registered mail of the notice of appeal, with the docket fees and appeal bond, and not from the date of actual receipt at the court by applying Section 1 of Rule 27, Rules of Court under which the date of mailing of court papers as shown by the post office registry receipt shall be considered as their date of filing in court. In addition, a postal money order payable to the justice of the peace court for ₱16.00 as docket fees, in lieu of a certificate of the municipal treasurer showing deposit of docket fees, was considered to be a substantial compliance with the deposit requirement for purposes of perfecting the appeal.

Same; what may be raised on appeal.—It has been uniformly held that in a case appealed from the Justice of the Peace Court to the Court of First Instance the parties may not present new issues

¹⁴² *Cuenco vs. Paredes, et al.*, 40 Phil. 346.

¹⁴³ G. R. L-5269, Sept. 8, 1953.

¹⁴⁴ G. R. L-5558, April 29, 1953.

not raised in the Justice of the Peace Court.¹⁴⁵ This doctrine was held to be inapplicable to the facts in *Sarreal vs. Tan*.¹⁴⁶

Plaintiff in said case filed an action against defendant to recover damages for breach of contract to deliver logs. Defendant, having failed to appear on the day of trial, the case was heard and judgment was rendered in favor of plaintiff. Defendant appealed to the Court of First Instance where he filed an answer with a counterclaim for balance of price of logs and for unrealized profits. Plaintiff was declared in default on the counterclaim upon his failure to answer. He filed a motion to set aside the order of default which was denied, and a motion to disregard and to strike out issues and points not raised in the court of origin, without touching upon the counterclaim. In other words he never objected to the Court of First Instance taking cognizance of the counterclaim until almost three months after it was filed after his complaint had been dismissed and the counterclaim had been ordered heard.

The Court declared a threefold reason in allowing the counterclaim in spite of the doctrine stated above and enunciated in previous cases, to wit:

"In the first place, as defendant did not have the opportunity to present an answer, verbal or written, it can not be said that he raised any issue at all, and so he may not be said to have changed the issues on the appeal. In the second place, the right to demand the limitation of the issues to those presented in the Justice of the Peace Court is purely a procedural privilege or right, lodged in the party adversely affected, and, like any other procedural or statutory right not involving a public policy, subject to waiver by him. The party accorded the privilege must raise it at the first opportune time, and his failure to do so amounts to a waiver thereof. (Section 8, Rule 26, Rules of Court.) Lastly, the objection to the counterclaim had no legal standing in court as it was filed after he was declared in default and was never accepted by the court."

The Supreme Court made the statement that as to defendant's counterclaim, it is true that the same could not have been entertained in the Court of First Instance on appeal, if it clearly appears that it was not presented in the Justice of the Peace Court. However, it may be said that the Court has adopted a liberal attitude in the determination of what issues to allow on appeal from the Justice of the Peace Court, in effect enlarging the doctrine enunciated in the other cases, as may be gleaned from the following:

"Besides, there is nothing sacred in the pleadings and proceedings of an inferior court not of record. A case appealed therefrom is to be tried *anew* (trial *de novo*) upon its merits, as if the same has been originally

¹⁴⁵ *Sarreal vs. Tan*, G. R. L-5429, Feb. 19, 1953, citing *Bernardo vs. Genato*, 11 Phil. 603; *Yu Tay vs. Galves*, 40 Phil. 651.

¹⁴⁶ *Loc. cit.*

commenced in the Court of First Instance. Once in this court the rules applicable thereto govern. In accordance therewith, amendments are allowed freely in the discretion of the court in order to render substantial justice, and more especially to the end that the real matter in dispute and all matters in the action in dispute may, as far as possible, be completely determined in a single proceeding. (Section 2, Rule 17, Rules of Court). The counterclaim presented by defendant in the case at bar is directly connected with plaintiff's action. Plaintiff is seeking damages for failure of defendant to furnish all the logs he had promised to deliver, while the defendant in his counterclaim demands the actual cost of the logs he delivered. Defendant's counterclaim is a perfectly fair, legitimate, and valid one, directly related to plaintiff's cause of action. The admission of the counterclaim, therefore, especially without the timely objection of the plaintiff, petitioner herein, and the refusal of the court to strike it out, after he had once answered it and upon his subsequent belated motion to disregard it, can not be said to be an abuse of discretion."

Appeal from the Court of First Instance to the Court of Appeals; how appeal is taken.—The Supreme Court in *Vda. de Espartero vs. Ladau*¹⁴⁷ declared:

"The rules governing appeals from a judgment of a Court of First Instance to an appellate court are simple and clear. Under section 3, Rule 41, an appeal may be taken by serving upon the adverse party and filing with the trial court within thirty days from notice of judgment, a notice of appeal, appeal bond and a record on appeal. Under section 5 of the same Rule, the appeal bond shall be approved by the court. And under section 9, upon the filing of the notice of appeal, the appeal is deemed perfected and the trial court loses its jurisdiction over the case.

"The above provisions require that the notice of appeal, appeal bond and record on appeal should be filed in court and served upon the adverse party within thirty days from notice of judgment. These provisions are compulsory in nature. The three requirements must be complied with within the thirty-day period. The failure to comply with any of the requirements within the said period would give rise to the dismissal of the appeal, and so it is expressly provided that 'where the notice of appeal, appeal bond or record on appeal is filed but not within the period of time herein provided, the appeal shall be dismissed'. (Section 13, Rule 41). But there is nothing in the rules which imposes upon the party appealing the duty of securing from the court, the approval of the appeal bond. This is an act which the court should attend to once said bond is filed by the appealing party. This is a duty imposed upon the court by section 5, Rule 41, Rules of Court. The only duty of the appealing party is to file it within the reglamentary period."

Thus it was held that the failure to secure the approval of the appeal bond did not justify the dismissal of the appeal.

The mere fact that a single notice of appeal and a joint record on appeal were filed in the appeals made in two cases jointly tried was

¹⁴⁷ G. R. L-5181, Feb. 24, 1953.

held not to justify the filing of only one appeal bond of ₱60. This was the decision in *Aquino vs. de Guzman*.¹⁴⁸ However, the appeal was allowed just the same in said case for the following reasons enumerated by the Court:

"One is the fact that the civil case is entirely dependent upon the registration case; no recovery of possession can be decreed in favor of, and no damages can accrue to, the plaintiff unless he is declared the owner of the property subject of both cases. * * * The other reason is the fact that as the two cases were inextricably related to each other and they were tried jointly and only one joint record on appeal presented, appellant's attorney or his client or both may have overlooked the need of filing two bonds or thought one was sufficient without the other. This constitutes excusable oversight."

The period for filing the record on appeal may be extended in the interest of justice in the discretion of the trial court provided the motion for extension is filed before the expiration of the period fixed by law.¹⁴⁹ However, an order granting an additional period for the filing of a record on appeal does not likewise extend the period for the filing of an appeal bond.¹⁵⁰ In addition, it has been held that a motion for the extension of the time for taking an appeal does not suspend the running of said period.¹⁵¹

Same; appeal by pauper.—In *Matute vs. Macadaeg*,¹⁵² the authority to litigate as a pauper was granted under Section 22, Rule 3.¹⁵³ Upon appeal, however, the pauper litigant still filed a motion to appeal as a pauper litigant. The motion was opposed and it was denied by the trial court. A motion for reconsideration was filed six days after the notice of denial. Said motion was also denied and an appeal bond was filed on the date of notice of the denial of the second motion. The Court held that the appeal bond was filed on time although beyond the 80-day requirement. It was so held because the appellant was entitled to appeal as a pauper under the original authority until the court ruled otherwise. It was only from the notice of denial of the motion to appeal as pauper that the obligation to file an appeal bond arose. The time during which the motion for reconsideration was deducted by the Court and therefore the ap-

¹⁴⁸ G. R. L-5763, Sept. 28, 1953.

¹⁴⁹ *Moya vs. Barton*, 43 O. G. 3, 836-837, 76 Phil. 831. See also *Santiago vs. Valenzuela*, 44 O. G. 9, 3291; *Lim vs. Singian*, 37 Phil. 817; *Layda vs. Legaspi*, 39 Phil. 83.

¹⁵⁰ *El Juez de Primera Instancia de Baguio contra Jose Valles*, G. R. L-4948, April 29, 1953.

¹⁵¹ *De la Cruz vs. Canizares*, G. R. L-6129, Feb. 28, 1953.

¹⁵² G. R. L-5820, Sept. 18, 1953.

¹⁵³ Rules of Court, *loc. cit.*

peal bond was considered filed six days after the denial of the motion to appeal as a pauper.

The following observations may be made. Since the authority to litigate as a pauper includes exemption from filing appeal bond, printed record and printed brief, a motion to appeal as a pauper under Section 16, Rule 41, Rules of Court¹⁵⁴ is no longer necessary once said authority has been granted. In the above case the denial of the motion to appeal as a pauper was in effect a revocation of the authority to litigate.

Appeal from Court of Appeals to Supreme Court.—Only questions of law may be raised in an appeal by certiorari from a judgment of the Court of Appeals.¹⁵⁵ Respondent in *Ng vs. Villa*¹⁵⁶ questioned the jurisdiction of the Supreme Court to entertain and decide the appeal in said case on the ground that the issues involved are factual, citing the above stated rule. The Supreme Court, however, assumed jurisdiction, the evidence being purely documentary the authenticity of which is not questioned. In so deciding it reiterated the doctrine in the case of *Cunanan vs. Lazatin*,^{156a} where it was held that where the issue is the construction or interpretation to be placed by the Court of Appeals upon documentary evidence, or where a case is submitted upon an agreed statement of facts, or where all the facts are stated in the judgment and the issue is the correctness of the conclusion drawn therefrom, the question is one of law which may be reviewed by the Supreme Court.

Matters affecting threat or intimidation are questions which largely depend on the credibility of witnesses whose consistency has to be determined in the light of surrounding circumstances. They are questions of fact which cannot be raised in an appeal from the Court of Appeals to the Supreme Court.¹⁵⁷

Questions that may be raised on appeal.—Rule 49, Section 19 of the Rules of Court provides:

"Whether or not the appellant has filed a motion for new trial in the court below, he may include in his assignment of errors any question of

¹⁵⁴ "Where a party desiring to appeal shall establish to the satisfaction of the court that he is a pauper and unable to pay the expenses of prosecuting the appeal and that the case is of such importance, by reason of the amount involved or the nature of the question raised, that it ought to be reviewed by the appellate court, the trial judge may enter an order entitling the party to appeal as pauper. The clerk shall transmit to the appellate court the entire record of the case, including the evidence taken on trial and the record on appeal, and the case shall be heard in the appellate court upon the original record so transmitted without printing the same."

¹⁵⁵ Sec. 2, Rule 46, Rules of Court.

¹⁵⁶ G. R. L-5331, May 13, 1953.

^{156(a)} 74 Phil. 719.

¹⁵⁷ *Talento vs. Makiki*, G. R. L-3529, Sept. 29, 1953.

law or of fact that has been raised in the court below and which is within the issues made by the parties in their pleadings."

This rule was the basis of the ruling in *Talento vs. Makiki*¹⁵⁸ where the allegation of appellant that the questions raised by him for the first time on appeal being mere questions of law need not be pleaded in his complaint, was rejected by the Court. The following was cited by the Court:

"It is a well-settled rule that no action will be considered by the appellate court which has not been raised in the court below, except questions on jurisdiction over the subject matter which may be raised at any stage of the proceedings. When, however, the jurisdiction depends upon a question of fact, the question must be first raised and determined in the court whose jurisdiction is in question. Questions on the constitutionality of law must, as a general rule, be raised in the court below before they may be raised on appeal. The constitutionality of Republic Act No. 342 cannot be made an issue on appeal, where moratorium has not been invoked as a defense or as a ground for a motion to dismiss."¹⁵⁹

The procedural objection, notwithstanding, the Supreme Court answered the legal questions raised by the plaintiff for the first time on appeal, said questions being well-settled by previous decisions.

PROVISIONAL REMEDIES

Attachment, discharge of.—An order of attachment may be dissolved under Section 12, Rule 59¹⁶⁰ upon the making of a deposit or the filing of a bond on the part of the defendant, or under Section 13 of the same rule upon proof that the attachment has been improperly or illegally issued.

In the first case of discharge, the bond filed or deposit made takes the place of the property released and is a security for the satisfaction of any judgment that may be recovered by the plaintiff in whose favor the order of attachment was issued, just as the property attached was such a security. Thus in *Anzures vs. Alto Surety and Insurance Co., Inc.*,¹⁶¹ where a judgment was rendered in accordance with a compromise between the parties under which the defendant was held liable for the amount claimed by the plaintiff, the Court held that the bond filed for the discharge of an attachment cannot be cancelled and the sureties released. The judgment by compromise was adjudged a judgment within the meaning of Section 12, Rule 59 for the satisfaction of which the bond is a security.¹⁶²

¹⁵⁸ G. R. L-3529, Sept. 29, 1953.

¹⁵⁹ MORAN, COMMENTS ON THE RULES OF COURT, Vol. 1, 1952 ed. p. 970.

¹⁶⁰ Rules of Court.

¹⁶¹ G. R. L-5693, Feb. 28, 1953.

¹⁶² See note 104.

Villiongco vs. Panlilia ¹⁶³ involved a discharge under Section 13, Rule 59.¹⁶⁴ The writ of attachment in said case was issued ex parte, upon the complaint filed supported by affidavits, alleging that defendants have removed or concealed, or about to remove or conceal or dispose of their property to defraud their creditors, and that there is no other security for the claim of the plaintiffs.¹⁶⁵ In a motion to dissolve filed by defendants, such allegations were expressly traversed, i.e. the allegations in the plaintiff's affidavit, and it was then incumbent upon plaintiffs to prove the facts in issue either by affidavits or depositions, or by other forms of evidence.¹⁶⁶

The Court held thus:

"The affidavit supporting the petition for the issuance of the preliminary attachment may have been sufficient to justify the issuance of the preliminary writ, but it cannot be considered as proof of the allegations contained in the affidavit. The reason is obvious. The allegations are mere conclusions of law, not statement of facts."

In the same case it was held that the motion to dissolve was not impliedly waived by the filing of an answer, the reason being that the issues raised in the motion to dissolve are different from those developed in the main action. It was further stated that the answer filed could deal with the facts constituting the cause of action and these alone, and not the facts giving rise to the right to a preliminary attachment.

Preliminary injunction.—In *De los Reyes vs. Elepaño*,¹⁶⁷ a petition for certiorari with a prayer for the issuance of a writ of preliminary injunction to suspend the period of appeal and prohibit the respondent Justice of the Peace from carrying out the execution of the judgment rendered by him and from taking further action in the case until further orders from the Supreme Court, was filed. This was done within the 15-day period within which an appeal may be perfected from a judgment rendered by an inferior court. However, the writ of preliminary injunction was rendered after the expiration of said period. It was held that the said writ suspended the running of the period of appeal and that it was retroactive to the date of the filing of the petition. Thus the appeal made by petitioner on the date of the denial of the petition for certiorari and the consequent dissolution of the writ of preliminary injunction was held to be timely.

¹⁶³ G. R. L-6214, Nov. 20, 1953.

¹⁶⁴ Rules of Court.

¹⁶⁵ Sec. 1, Rule 59, Rules of Court; Sec. 3, Rule 59, Rules of Court.

¹⁶⁶ Sec. 100, Rule 123, Rules of Court.

¹⁶⁷ G. R. L-5282, May 29, 1953.

The doctrine in this jurisdiction is to the effect that no court has power to interfere by injunction with the judgment or decrees of a court of concurrent or coordinate jurisdiction having equal power to grant the relief sought by injunction.¹⁶⁹ It was held applicable to a writ or preliminary injunction issued by a judge of one court, to enjoin a sheriff from proceeding with a sale by virtue of a writ of execution issued by another judge of the same court but of a different branch thereof, in the case of *Phil. National Bank vs. Javellan*,¹⁶⁹ where the Court declared:

"It is true that both are judges of the same court, but they preside over different branches and the orders were issued in different and separate cases. While they belong to the same court, however, as they preside over different branches or salas, they discharge functions which are co-equal in character and as such they should be coordinated and not derogatory to each other. This is necessary to bring about a harmonious and smooth functioning of court proceedings among the different branches of the same court."

Receiver, how appointed.—In a case to establish ownership and to recover possession of property a petition *ex parte* for the appointment of a receiver was made on the allegation by plaintiff "that defendant had been enjoying the products to the prejudice of plaintiff and that the former has not offered any security and assurance that he would be able to reimburse the plaintiff in case decision was favorable to him so that decision of the court may be rendered ineffectual because of the inability of the losing party to make good the restoration of the products to the prevailing party so that a receiver should be appointed to preserve the products."¹⁷⁰ This was considered to be a sufficient ground for the appointment of a receiver in *Medel vs. Aquino*¹⁷¹ which was a petition for certiorari to annul said appointment.

The Court rejected the objection made to the appointment on the ground that petitioner had not been notified stating that Section 3, Rule 61 of the Rules of Court contemplates the appointment of a receiver upon an *ex parte* application.¹⁷² In deciding that in making

¹⁶⁹ *Cabigao and Izquierdo vs. del Rosario*, 44 Phil. 182.

¹⁶⁹ G. R. L-5270, Jan. 28, 1953.

¹⁷⁰ *Medel vs. Aquino*, G. R. L-5587, April 17, 1953.

¹⁷¹ G. R. L-5587, April 17, 1953.

¹⁷² "If a receiver be appointed upon an *ex parte* application, the court before making the order, may require the person applying for such appointment to file a bond executed to the party against whom the application is presented in an amount to be fixed by the court, to the effect that the applicant will pay such party all damages he may sustain by reason of the appointment of such receiver in case the applicant shall have procured such appointment without sufficient cause, * * *."

the appointment in question, the respondent judge had not abused his discretion, the Supreme Court stated:

"It is a well-settled rule that the granting of a petition for the appointment of a receiver is discretionary with the court. Once the discretion of the trial court is exercised on the matter of appointment of a receiver, the appellate court will not interfere with it except in a clear case of abuse thereof or on extra-distribution of jurisdiction. (Moran, *op. cit.*, pp. 85-88)."

In holding also that the allegation of failure to verify did not constitute a ground for certiorari the Court quoted from Moran's Comments on the Rules of Court,¹⁷³ thus:

"The application for a receiver should be made not by motion but by petition under oath and supported by affidavits. The failure to follow such procedure constitutes a defect which may justify a denial of the petition. But such a defect does not affect the jurisdiction of the court and cannot serve as a ground for certiorari unless there has been a gross abuse of discretion that amounts to substantial prejudice to the adverse party."

Alimony pendente lite.—The Court in *Salazar vs. Salazar*¹⁷⁴ held that there was substantial compliance of the procedure prescribed in Section 5, Rule 63, thus:

"The rule requires that the court shall determine provisionally the pertinent facts in the same manner as provided in section 4. That means that to determine pertinent facts there is a need of receiving oral testimony. It is enough that those facts be established by affidavits or other documentary evidence on the record. In the instant case the court has relied on the main allegations of the complaint which is verified and supported by documentary evidence. Moreover the court set the incident for hearing and the parties were given enough opportunity to be heard."

It was likewise held that the monthly income of the adverse party appearing on the complaint which is not disputed is a sufficient basis in the determination of the amount of *alimony pendente lite* until the contrary is shown when the case is decided on the merits.

Contempt.—By virtue of a writ of execution issued in an action for partition, plaintiff in *Aragon vs. Aragon*¹⁷⁵ was placed in possession of a parcel of land adjudicated in her favor, ousting therefrom the defendants. Subsequently, defendants re-entered the land and executed acts of ownership and possession. Plaintiff filed a complaint and the trial court issued an order requiring the defendants

¹⁷³ Vol. 2, 1953 ed., p. 84.

¹⁷⁴ G. R. L-5823, April 29, 1953.

¹⁷⁵ G. R. L-5129, Jan. 30, 1953.

to show cause why they should not be held in contempt of court for disobeying a court order. However, the same court, through another judge, dismissed the complaint declaring that the complainant's remedy is to file a complaint in forcible entry and detainer.¹⁷⁶ On appeal the court ruled otherwise citing Section 8, Rule 64¹⁷⁷ where on of the acts punishable for contempt is:

"The act of a person who, after being dispossessed or ejected from any real property by the judgment or process of any court of competent jurisdiction, enters or attempts to enter into or upon such real property, for the purpose of executing acts of ownership or possession, or in any manner disturbs the possession given to the person adjudged to be entitled thereto."

The following excerpt from Moran's Comments on the Rules of Court¹⁷⁸ was likewise made a basis for the decision, thus:

"Dispossession after execution.—Generally any order or judgment of a court finally disposing of an action should be enforced by ordinary execution proceedings, except special judgment proceedings in accordance with Rule 39, sec. 9. However when by virtue of a judgment or order rendered by a competent court, a litigant has been placed in possession of real property the act of the adverse party who have been evicted therefrom of re-entering or attempting to re-enter into it constitute contempt and there is no limit as to the time in which re-entry or attempted re-entry constitute contempt. This rule applies when possession has been given by the officer by virtue of a writ issued in a land registration proceeding."

Rule 64 of the Rules of Court applies only to inferior and superior courts and does not comprehend contempt committed against administrative officials or bodies, unless said contempt is clearly considered and expressly defined as *contempt of court*. It is evident that where the law desires and intends to punish any violation of disobedience for any process of order issued by any administrative official or body, it clearly defines, or it authorizes said official or body to summarily punish for contempt, providing at the same time the corresponding penalty; and where the aid of the courts is necessary, the corresponding penalty upon conviction is also prescribed.¹⁷⁹

SPECIAL CIVIL ACTIONS

Declaratory relief.—For a petition for declaratory relief to prosper, there must be (1) real parties in interest (2) asserting adverse claims and (3) presenting a ripe issue.¹⁸⁰ The rule that actions must

¹⁷⁶ Rule 72, Rules of Court.

¹⁷⁷ Rules of Court.

¹⁷⁸ Vol. 2, 1952 ed., p. 34.

¹⁷⁹ *People vs. Mendoza*, G. R. L-5059 & 5060, Jan. 30, 1953.

¹⁸⁰ MORAN, *op. cit.*, 1952 ed., p. 147.

be brought in the name of the real party in interest¹⁸¹ applies to actions under Rule 66 for declaratory relief. A manager who is neither owner nor part owner of a movie theatre affected by an ordinance has no interest in the theatre and he is not entitled to bring an action for declaratory relief. The fact of being manager does not make him a real party in interest.¹⁸²

The petition for declaratory relief in the case of *In re Hospicio Obiles vs. Republic of the Philippines*¹⁸³ did not present a justiciable controversy and was held improper. The petitioner sought a declaration of his citizenship status which he feared was lost by virtue of a registration made by him in 1941 as an alien with the municipal treasurer of his town. It was shown that no official of the government had taken steps or was intending to take steps or threatening to take steps to hold the petitioner to any obligation, responsibility or liability by reason of such registration. The Court held that:

"The supposed fear in the mind of the petitioner is not what the law considers as an actual controversy or a justiciable controversy, which requires the intervention of the courts of justice in order that the rights, obligations, or liabilities arising therefrom may be predetermined. In effect petitioner's allegations of fact in his petition are entitled to no more than an advisory opinion because a ruling on the effect of the registration makes no actual, genuine live controversy affecting a definite legal relation."

In so ruling, the Court considered the fact that the Solicitor General's opposition filed in said case was not presented to deny petitioner's allegations but to show that he had no cause of action because nobody had ever contested his pretensions. Said opposition therefore did not give rise to a controversy. Likewise it was averred that the registration was not a contract in which another party or person is involved but rather a unilateral act of the petitioner himself not affecting or binding anyone else but himself, not creating any right or obligation on the part of any other party or on that of the state—therefore no one has an interest therein except himself.

The petition in the case of *Santos vs. Aquino*¹⁸⁴ which contained a prayer to declare certain tax ordinances null and void was held not to be one for declaratory relief as it purported to be, because the terms of the ordinances assailed were not ambiguous or of doubtful meaning to require construction thereof by the Court. The Supreme Court also held that petitioners cannot bring an action for declaratory

¹⁸¹ See Sec. 2, Rule 3, Rules of Court.

¹⁸² *Santos vs. Aquino*, G. R. L-5101, Nov. 28, 1953.

¹⁸³ 49 O. G. 923.

¹⁸⁴ *Loc. cit.*

relief since they had not paid the taxes imposed by the ordinances under the rule that such relief must be asked before a violation of the ordinance is committed by virtue of Sec. 2, Rule 66 of the Rules of Court.

In *Acuña vs. Turukaua Plantation Co.*¹⁸⁵ the Court decided that amendment of a certificate of title to transcribe therein the names of plaintiffs as owners of improvements existing on the homestead occupied by them, registered in the name of defendants, is "a remedy that can be granted only under the Land Registration Act and is therefore, not within the scope and purpose of an action for declaratory relief as contemplated in Rule 66."

Certiorari.—The writ of certiorari lies when the following requisites are present: (a) that it is directed against a tribunal, board or officer exercising judicial functions; (b) that such tribunal, board or officer has acted without or in excess of jurisdiction or with grave abuse of discretion; and (c) that there is no appeal nor any plain, speedy, and adequate remedy in the ordinary course of law.¹⁸⁶

It may be seen from the foregoing that a petition for a writ of certiorari to prosper, there must either be grave abuse of discretion or lack or excess of jurisdiction on the part of the respondent tribunal, board or officer. Mere errors of judgment are not sufficient as has been held in a long-line of Supreme Court decisions.¹⁸⁷ It has therefore become necessary to make a distinction between errors of judgment and errors of jurisdiction and the Court does so in the recent case of *Bimeda vs. Perez*,¹⁸⁸ thus:

"As a rule, the errors which the court may commit in the exercise of its jurisdiction are merely errors of judgment. In the trial of a case, it becomes necessary to distinguish errors of jurisdiction from errors of judgment. The first may be raised in a certiorari proceeding; the second, by appeal. Errors of jurisdiction render an order or judgment void or voidable, but errors of judgment or procedure are not necessarily a ground for reversal. (Moran, Comments on the Rules of Court, Vol. 2, 1952 ed., p. 158.)"

In the above-cited case the Court ruled that the act of the trial judge if erroneous was an error of judgment which should be corrected by appeal. The act questioned is the ruling made by respondent judge that the evidence offered by petitioner to prove irregularity in election proceedings "could serve no useful purpose for even if it be followed, it may not have the effect of nullifying the election as such would have the effect of disenfranchising two hundred or

¹⁸⁵ G. R. L-5833, Oct. 22, 1953.

¹⁸⁶ MORAN, *op. cit.*, 1952 ed., p. 153.

¹⁸⁷ See MORAN, *op. cit.*, 1952 ed., p. 158.

¹⁸⁸ G. R. L-5588, August 26, 1953.

more legitimate voters whose right has never been questioned." In an earlier case,¹⁸⁹ it was likewise decided that a petition for certiorari is not the proper remedy because the alleged error in the mathematical apportionment of the shares of the heirs involved in the case, did not amount to excess of jurisdiction but "was mere error, if any, corrigible by appeal in due time."

Certiorari lies where there is no appeal, nor any plain, speedy and adequate remedy in the ordinary course of law.¹⁹⁰ The existence of an appeal, therefore, is a bar to a writ of certiorari, where such appeal is in itself a sufficient and adequate remedy, in that it will promptly relieve the petitioner from the injurious effects of the order or judgment complained of.¹⁹¹ Thus in the case of *Lapid vs. Cabrera*,¹⁹² the Court considered a writ of certiorari improper to impugn a judgment by default after a petition to set aside said judgment under Rule 38, Rules of Court had been denied on the ground that an adequate remedy by appeal from the order of denial was available to petitioners. In the latter case of *Dans vs. Court of Appeals*¹⁹³ the petition for certiorari to annul a decision of respondent court together with an order of execution resulting from said decision, was denied after it was shown that petitioner had previously instituted a special proceeding where petitioner sought a judgment which would have the same effect as the writ of certiorari. With regards to the order of execution, the court stated that it was more expedient for petitioner to ask the Court of First Instance which issued said order to suspend its own order of execution in view of the pendency before it of the special proceeding filed by petitioner.

However, it was held in *Woodcraft Works, Ltd. vs. Moscoso*¹⁹⁴ that "while it is true that defendant could have appealed from the order denying its motion to set aside, and the rule that certiorari does not lie when there is appeal, the rule may be relaxed where, as in the present case, a writ of execution had already issued and in the process of being carried out." Likewise in *De Po vs. Moscoso*,¹⁹⁵ certiorari was considered the proper remedy since "an order for the issuance of a writ of execution in a detainer case is interlocutory in character and is not appealable," and it can hardly be expected that petitioner in long and continued, peaceful possession of her land and occupancy of her house therein, threatened with summary ejection by means

¹⁸⁹ *Equio vs. CFI of Negros Oriental*, G. R. L-6047, April 27, 1953.

¹⁹⁰ See Sec. 1, Rule 67, Rules of Court.

¹⁹¹ *MORAN, op. cit.*, 1952 ed. p. 166.

¹⁹² G. R. L-5640, May 29, 1953.

¹⁹³ G. R. L-5432, July 31, 1953.

¹⁹⁴ G. R. L-5470, April 29, 1953.

¹⁹⁵ G. R. L-5858, June 30, 1953.

of a writ of execution will calmly submit to said forcible measure and patiently wait for the termination of the trial and rendition of judgment and then appeal to a higher court. That there is no point or necessity in expelling a party from his house and land on the strength of a writ of execution which derives its force and authority from judicial proceedings and judgments of a justice of the peace court which may later be declared null and void for want of jurisdiction, was taken into consideration in granting the writ.

A writ of certiorari will be denied where the appeal is an adequate remedy though less speedy than certiorari. Mere possible delay in the perfection of an appeal or in securing a decision from the appellate court is no justification for departing from the prescribed procedure unless there was lack or excess of jurisdiction or abuse of discretion and delay would work injustice to the complaining party.¹⁹⁶ Likewise, the circumstance that at the beginning of the certiorari proceedings, the period for such an appeal had already lapsed, does not usually modify the principle that certiorari does not lie where petitioner has an adequate remedy by appeal. Otherwise parties who through negligence or other circumstances failed to appeal on time will resort to this special remedy to accomplish the revision of executory judicial decisions.¹⁹⁷

Nevertheless the Supreme Court in *Leyte Samar Sales Co. vs. Cea*¹⁹⁸ granted the writ of certiorari prayed for after the lapse of the period of appeal. This diversion from the doctrine enunciated above was justified by the finding that the orders impugned were promulgated in excess or outside the trial court's jurisdiction. The Court cited the following excerpt from Moran's Comments on the Rules of Court, thus:

“ . . . And in those instances wherein the lower court has acted without jurisdiction over the subject-matter, or where the order or judgment complained of is a patent nullity, courts have gone ever so far as to disregard completely the question of petitioner's fault, the reason being, undoubtedly, that acts performed with absolute want of jurisdiction over the subject-matter are void *ab initio* and cannot be validated by consent, express or implied, of the parties. Thus, the Supreme Court granted a petition for certiorari and set aside an order reopening a cadastral case five years after the judgment rendered therein had become final. In another case, the Court set aside an order amending a judgment six years after such judgment acquired a definite character. And still in another case, an order granting a review of a decree of registration issued more than a year ago had been declared null and void. In all these cases the existence of the right to appeal had been disregarded. In a probate case,

¹⁹⁶ *Bimeda vs. Perez*, *loc. cit.*

¹⁹⁷ *Equio vs. CFI*, *loc. cit.*

¹⁹⁸ *Loc. cit.*

a judgment according to its own recitals was rendered without any trial or hearing, and the Supreme Court, in granting certiorari, said that the judgment was by its own recitals a patent nullity, which should be set aside though an approval was available but was not availed of. * * * 199

The order impugned in the cited case was held null and void because it was rendered without bringing in indispensable parties.

In addition it was held that the ruling in *Melocotones vs. Court of First Instance*,^{199a} where the theory of laches was applied to petitioner's three-year delay in requesting certiorari, does not apply to the *Leyte-Samar Sales Co.* case. A month's delay, the Court stated, may not be regarded as laches.

Mandamus.—The special civil action of mandamus may be instituted only by the "person aggrieved" by the act of a tribunal that unlawfully excluded said person from the use and enjoyment of a right to which he is legally entitled, and there is no other plain, speedy and adequate remedy in the ordinary course of law. The Supreme Court, in the case of *Luis vs. Belmonte*,²⁰⁰ had occasion to decide on whether or not the heirs of a victim in a criminal case for murder could properly sue for a writ of mandamus to compel the execution of a judgment of conviction and indemnity rendered in such a case. The decision which was in the affirmative was to the effect that "it being undeniable that the heirs of the deceased Donato Luis have interest in the execution of the judgment rendered in the criminal case above mentioned because of the indemnity awarded to them in said judgment, their petition for a writ of mandamus to compel execution is hereby granted."

Mandamus lies to compel an officer to perform a ministerial duty but not to compel the performance of a discretionary²⁰¹ duty. This doctrine was reiterated in the case of *Jacinto vs. Amparo*²⁰² where the court held that the taking of a deposition under Rule 18, Rules of Court, is discretionary with the trial court and that mandamus may not be issued to compel the trial court to allow such taking "for the reason that this remedy is available only to compel the performance of a mandatory and ministerial act on the part of an officer."

The Court in two recent cases granted writ of mandamus to compel the execution of final judgments. In one case,²⁰³ the writ was issued to compel execution of a judgment of conviction and indemnity

¹⁹⁹ MORAN, *op. cit.*, p. 177; also see Sec. 3, Rule 67, Rules of Court.

^{199(a)} 57 Phil. 144.

²⁰⁰ G. R. L-5224, March 26, 1953.

²⁰¹ See MORAN, *op. cit.*, pp. 187-188.

²⁰² G. R. L-6096, Aug. 25, 1953.

²⁰³ *Luis vs. Belmonte*, *loc. cit.*

in a criminal case after the decision had become final and the case was remanded to the court of origin for the execution of the said judgment. In the other case, *Castro vs. Pecson*,²⁰⁴ mandamus was granted for the execution of a final judgment upon motion for execution reasonably filed within five years from date of entry thereof.

Partition.—In an action for partition in accordance with the provisions of Rule 71, Rules of Court, one party may recover from another his just shares of rent and profits received by such other party from the real estate in question, and the judgment shall include an allowance for such rents and profits. This provision, the court held, "contemplates a case where a proper claim has been timely pleaded, clearly not a case where a decision has become final, expressly eliminating an award for such damages."²⁰⁵

Forcible entry and detainer.—The Court in the case of *Dy Sun vs. Brillantes*²⁰⁶ stated:

"Under the law (Section 1, Rule 72), a person has two causes of action: (1) Forcible entry, in which defendant's possession of the property is illegal from the beginning; and (2) Unlawful detainer, wherein defendant's possession was originally lawful but it became unlawful by the expiration of his right to possess (Moran, Vol. II, Comments on the Rules of Court, 1952 ed., p. 291). Under the first, the action may be brought by a person who is deprived of the possession of the land by force, intimidation, threat, strategy, or stealth, and under the second, by a landlord, vendor, vendee or other person against whom the possession of the land is unlawfully withheld after the expiration or termination of the right to hold it (Rule 72, Section 1, Rules of Court)."

This quotation was the basis of the decision by the Court in the cited case for unlawful detainer by a vendee relying on a sale admitted by respondent to have been made thus:

"As such vendee, petitioner could not allege prior physical possession of the land as against respondent. In an action for unlawful detainer, such allegation is not required upon the theory that the vendee steps into the shoes of the vendor and succeeds to his rights and interests. In contemplation of law, vendee's possession is that of vendor."²⁰⁷

The peculiar nature of these actions is that they are merely quieting processes, not processes to determine the actual title to an estate. They are summary actions intended to provide an expeditious means of protecting actual possession or right to possession of property.

²⁰⁴ G. R. L-5815, May 28, 1953.

²⁰⁵ *Ocampo vs. Mañalac*, G. R. L-5952, March 26, 1953.

²⁰⁶ G. R. L-4478, May 27, 1953.

²⁰⁷ *Dy Sun vs. Brillantes*, *supra*.

Title is not involved.^{207a} The only issue in these actions is the physical possession of the real property—possession *de facto* and not possession *de jure*.

May an allegation of ownership divest a justice of the peace court of its jurisdiction over a forcible entry or unlawful detainer?—This question was raised in four recent cases; namely, *Centeno vs. Gallardo*,²⁰⁸ *Dy Sun vs. Brillantes*,²⁰⁹ *De Po vs. Moscoso*²¹⁰ and *Raymundo vs. Santos*.²¹¹ The first two cases followed the general rule that a mere allegation by defendant claiming ownership of the property does not divest the court of its jurisdiction.²¹²

In *Centeno vs. Gallardo*²¹³ an unlawful detainer case brought by plaintiff-landlord against defendant-tenant, the latter claimed to have brought the property involved from a certain person. The Court stated:

"The rule that a possessory action cannot be quashed and overthrown by the simple expedient of setting up title in the defendant has peculiar and greater force where the relation of landlord and tenant exists between plaintiff and defendant. This is so because the tenant is not allowed to deny his landlord's title at the commencement of the relation. (Sec. 68 [b], Rule 123.) Where, as in this case, defendant entered upon the possession of the premises as lessee, "the facts of the lease and the expiration of its terms are the only elements of the action" and "if the defendant denies plaintiff's ownership, as he does, he raises a question unessential to this action." (*Sevilla v. Tolentino*, 51 Phil. 833)

In the second case of *Dy Sun vs. Brillantes*,²¹⁴ also an unlawful detainer case, the defendant questioned the validity of the sale of the land, subject-matter of the suit, made by his landlord to plaintiff on the ground that the latter is a Chinese citizen and therefore had no right to acquire said land. The holding was as follows:

"The case before us can be determined without the necessity of passing upon the validity of the acquisition made by petitioner of the land in question. That issue should be determined in a separate action. That issue is not involved here. Respondent admits the fact of sale of the land to petitioner and unless that sale is disputed in a proper action and rendered invalid, petitioner is entitled to be recognized as owner or is entitled to

^{207(a)} MORAN, COMMENTS ON THE RULES OF COURT, Vol. II, 1952 ed., pp. 289-290.

²⁰⁸ G. R. L-6165, May 15, 1953.

²⁰⁹ *Loc. cit.*

²¹⁰ *Loc. cit.*

²¹¹ G. R. L-4770, June 30, 1953.

²¹² See MORAN, *op. cit.*, pp. 295-301.

²¹³ *Loc. cit.*

²¹⁴ *Loc. cit.*

the possession of the property. Admittedly, he is but a mere tenant who holds no definite tenure. Whether he is entitled to its possession, or is unlawfully withholding it, is now the issue in this case. This can be determined without looking into the validity of the sale of affecting the property."

On the other hand, if it appears during the trial that, by the nature of the proof presented, the question of possession cannot be properly determined without settling that of ownership, then the jurisdiction of the justice of the peace court is lost and the action should be dismissed.²¹⁵

In *De Po vs. Moscoso*,²¹⁶ this doctrine was made the basis of the court's decision. The same was true in *Raymundo vs. Santos*.²¹⁷ In the first as in the second case, the cause of action for unlawful detainer was predicated in a certificate of title issued in plaintiff's name, the validity of which was disputed by the defendant on the ground that plaintiff's grantor had obtained fraudulently a deed of absolute sale of the property instead of a mere mortgage. The Court decided in said cases that the right of the plaintiff to the possession of the property in question necessarily involves the issue of the validity or effectiveness of his title. The justice of the peace court was therefore held without jurisdiction over the case.

It has been held in a long line of decisions that in accordance with Sec. 8 of Rule 72, Rules of Court, it is mandatory on the part of the Court of First Instance, on petition of the plaintiff, to order the execution of the judgment of the justice of the peace court in a forcible entry and detainer case, upon failure of the defendant to comply with either of two obligations; namely, the filing of supersedeas bond and deposit of rentals which defendant had been sentenced to pay by the inferior court.²¹⁸

Execution though may not be denied where the delay in making the deposit was due to fraud, error or excusable negligence.²¹⁹ Thus in *Cebu Portland Cement Co. vs. Varela*²²⁰ the delay in the deposit of rentals was excused as being due to an honest belief that the supersedeas bond covered both past and future and that, defendant's right to remain in office and enjoy its emoluments, including free quarters,

²¹⁵ See note 212.

²¹⁶ *Loc. cit.*

²¹⁷ *Loc. cit.*

²¹⁸ *Centeno vs. Gallardo, loc. cit.*

²¹⁹ *Bantug vs. Roxas*, 73 Phil. 13; *Cunanan vs. Rodas*, 44 O. G. 4927; *Yu Phi Khim vs. Amparo*, 47 O.G. (Supp. 12) 98.

²²⁰ G. R. L-5438, Sept. 29, 1953.

involved in the unlawful detainer case, was still pending determination in the Court of Industrial Relations.

A supersedeas bond covers only rentals in arrears, up to the elevation of the case to the Court of First Instance on appeal, by the perfection of the appeal, and in addition to the supersedeas bond, to stay the execution during the appeal, the defendant-appellant should deposit in court or pay to the plaintiff the current rentals as they become due or before the tenth of each calendar month for the preceding month.²²¹

Upon the rendition of a judgment by the Court of First Instance on appeal from a judgment in an unlawful detainer or forcible entry action, the decision of the justice of the peace court becomes *functus officio*.²²² This principle was reiterated in *Madrigal & Co., Inc. vs. Court of Appeals*.²²³

²²¹ *Bagtas vs. Tan*, G. R. L-6050, Sept. 25, 1953.

²²² *De la Fuente vs. Jugo*, 42 O. G. 2764.

²²³ G. R. L-4940, April 22, 1953.