SURVEY OF 1955 CASES IN SPECIAL PROCEEDINGS *

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"Special proceeding" is defined in the Rules of Court by what it is not. After defining "action," the rule continues: "Every other remedy is a special proceeding." [1] In the case of *Hagans v. Wizlizenus*,[1a] it was defined as "an application or proceeding to establish the status or right of a party, or a particular fact." And according to the Corpus Juris Secundum, "special" means—uncommon; unique; unusual; different from others; distinct from other kinds; having an independent character or trait; particular; peculiar; confined to a definite field of action; designed or selected for a particular purpose, occasion or the like.

Under the Rules of Court, there are nine special proceedings, each one different from an action and each one in turn distinct from the others. As a general rule, therefore, the respective rules peculiar to each special proceeding are confined to a definite situation. In this survey, we shall look into the doctrinal pronouncements of the Supreme Court on special proceedings cases for the year 1955.

I. SETTLEMENT OF ESTATE.

Summary Settlement of Estate. Under the Rules of Court on settlement of estate, the court of competent jurisdiction may proceed summarily to determine who are the persons legally entitled to the estate of the deceased and to apportion and to divide it among them after payment of the debts of the estate, if any.[1b] In the cases of *Asuncion v. de la Cruz*,[2] *Padilla v. Matela* [3] and *Ongsingco v. Tan*,[4] the Supreme Court reiterated the well-settled rule that a probate court sitting as such has no jurisdiction to determine title to property [5] which should be determined by the court in the exercise of its general jurisdiction.[6] The Court said that "the court in

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[1] See Rule 2, § 1.

[1a] 42 Phil. 880 (1920).

[1b] Rule 74, § 2, Rules of Court.

[2] G.R. No. L-7855, Nov. 23, 1955.

[3] G.R. No. L-7479, Oct. 24, 1955.

[4] G.R. No. L-7635, July 25, 1955.

[5] Franco v. O'Brien, 13 Phil. 359 (1909); Bauerman v. Casas, 10 Phil. 386 (1908).

[6] Guzman v. Anog, 37 Phil. 61 (1917).

a summary settlement proceeding only determines prima facie the ownership and possession of the properties." The adverse claimants to such properties are not prejudiced by such determination, as their remedy is to litigate the matter in a separate suit. Elaborating on the lack of authority of the probate court to determine title to property, Justice A. Reyes, speaking for the Court in the *Padilla* case, said that "especially should this be the case in proceedings for summary settlement of estate of small value where the object is to expedite settlement and distribution of the estate and to minimize expenses, so much so that even the appointment of an administrator is dispensed with."

Hence the CFI of Rizal acting as a probate court in the *Ongsingco* case was held to have exceeded its jurisdiction in granting an injunction prohibiting the possession of certain properties already submitted for adjudication as to ownership thereof to the CFI of Nueva Ecija. The Supreme Court added:

> ". . . no court has power to interfere by injunction with the judgments or decrees of a court of concurrent or coordinate jurisdiction having equal power to grant relief sought by injunction. A contrary rule would obviously lead to confusion and might seriously hinder the administration of justice. (Cabigao v. del Rosario 44 Phil. 182; PNB v. Javellana G.R. L-5270 Jan. 28, 1953; Montesa v. Manila Cordage Co., G.R. L-4559, Sept. 19, 1952)."

Liability of Distributees and Estate. Section 4 of Rule 74 allows an heir or other person unduly deprived of his participation in the estate within two years after summary settlement to compel settlement of the estate in the courts "in the manner hereinafter provided for the purpose of satisfying such lawful participation." In other words such deprived heir may apply for the appointment of an administrator. However, the partition so made shall not be disturbed,[7] as only such part of the property as is sufficient to cover the claim should be subjected to the administration. In fact the partitioning heirs may avoid the appointment of administrator by satisfying the claim. This two-year period is not a prescriptive period in the sense that inability to present a claim will bar an action to recover.[8] The practical effect of filing a claim within the two-year period is that the claimant can count on the bond[9] required of the distributees to be filed before the partition. After the two-year period, an heir can still enforce his claim before the lapse of the pres-

[7] McMicking v. Sy Congiong, 21 Phil. 211 (1912).
[8] Lajom v. Viola, 73 Phil. 563 (1942).
[9] Rule 74, § 3, Rules of Court.

criptive period on the ground of fraud.[10] The fraud as a ground for annulment of the judicial decree should constitute extrinsic or collateral fraud. The claimant in the case of *Cortez v. Brownell*[11] alleged that the fact that the attorney for the person adjudged the sole heir of the deceased knew he (claimant) was alive constituted fraudulent representation sufficient to annul the judicial decree. The Supreme Court held otherwise:

> "The refusal of Attorney Gonzales to believe that Narciso Cortez was alive[12] does not by any means constitute extrinsic or collateral fraud since presentation of false testimony or the concealment of evidentiary facts does not *per se* constitute extrinsic fraud, the only kind of fraud sufficient to annul a court decree."

On the two-year period rule, the Court declared that the order "adjudging the property of Amario to his mother as his sole heir could be annulled to give other heirs their share within two years." The claimant brought his claim beyond the two-year period and "having no chance under the Rules, Narciso Cortez attacked the court order on the ground of fraud"—an alleged fraud found not sufficient to annul the former decision.

Where Estate of Deceased Persons Settled. The venue of probate proceedings is the CFI of the province in which the decedent resides (if an inhabitant of the Philippines) at the time of his death. "The court first taking cognizance of the settlement of the estate of the deceased, shall exercise jurisdiction to the exclusion of all other courts."[13]

In *De Borja v. Tan*,[14] the allegations in the petition that Francisco de Borja resided in Sta. Rosa, Nueva Ecija and had personal and real properties located there, conferred jurisdiction upon the CFI of Nueva Ecija.

> "Said jurisdiction cannot be impaired, either by the institution of a case in Rizal by Jose de Borja or by the issuance of the order[15] of April 20, 1954 by the respondent judge. To be sure, a jurisdiction already vested in a court may be divested neither by the act of private individual nor by the action of another court of the same rank."

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[10] Quion v. Claridad, 74 Phil. 100 (1943).

[11] G.R. No. L-7554, Aug. 31, 1955.

[12] "Plaintiff has himself to blame. He separated from his wife from 1925 and took no legal steps when she married the Japanese thereby allowing the impression to prevail in Davao that he was already dead."

[13] Rule 75, § 1, Rules of Court.

[14] G.R. No. L-7792, July 27, 1955.

[15] An order appointing Jose de Borja as special administrator of the estate of his father.

Probate of Will Conclusive as to Due Execution. According to section 1, Rule 76, "No will shall pass either real or personal estate unless it is proved and allowed in the proper court. Subject to the right of appeal such allowance of the will shall be conclusive as to its due execution." [16]

The only purpose of the probate of a will is to establish that the will was executed in accordance with the legal formalities and that the testator had capacity to make the will. The court can determine nothing more.[17] Only persons having interest in the will may intervene in the proceeding.[18] A person claiming to be an acknowledged natural child need not maintain a separate action for recognition but may simply intervene in the proceeding.[19] For such purpose it suffices that he produces *prima facie* evidence of such status and the probate court does not exceed its jurisdiction in allowing such evidence to be submitted.[20] While the court may permit the submission of such evidence to justify intervention in said proceedings, the same cannot be compelled by mandamus to accept or receive evidence of filiation. This was the pronouncement of the Supreme Court in *Reyes v. Ysip.*[21] There, the alleged natural daughter of the deceased filed opposition to the probate of the latter's will. The special administratrix objected to the personality and right of the oppositor to contest the will and asked the court to resolve her right to contest the will before hearing thereon. The judge ruled that only the probate of the will was in question and that filiation was out of place. Hence, this petition to permit presentation of evidence proving filiation.

The Supreme Court sustained the ruling the trial court. Again it stated the object of probate proceeding by saying that "to allow the petitioner to prove her filiation would be injecting matters different from the issues involved in the probate which, in this case, were the alleged non-execution of the will or the execution thereof under pressure, or forgery of signature of the testator." According

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[16] Art. 828, Civil Code: "No will shall pass real or personal property unless it is proved and allowed in accordance with the Rules of Court.

". . . .

"Subject to the right of appeal, the allowance of the will, . . . shall be conclusive as to its execution."

[17] Castañeda v. Alemany, 3 Phil. 426 (1904); Macam v. Gatmaitan, 60 Phil. 358 (1934).

[18] Such interest must be pecuniary and one detrimentally affected by the will. Paras v. Narciso, 35 Phil. 244 (1916).

[19] Lopez v. Lopez, 68 Phil. 277 (1939); Gaas v. Fortich, 54 Phil. 196 (1929); Severino v. Severino, 44 Phil. 343 (1923).

[20] Asinas v. CFI of Romblon, 51 Phil. 665 (1929).

[21] G.R. No. L-7516, May 12, 1955.

to the Court, the nature of the evidence of filiation if permitted would only be *prima facie*—"only to justify her intervention in the probate proceeding and it would not be decisive of her right to inherit as a recognized natural child since the final decision on the matter would be made after hearing for the declaration of heirs."

In passing it was stated that the order of the lower court did not amount to a prohibition to take part in the hearing of the probate of the will.

Allowance or Disallowance of Will. The Rules of Court enumerate the causes [22] for disallowance of a will, the first being that the will is "not executed and attested as required by law." The opposition to the probate of the will and codicil in the case of *Javellana v. Javellana*,[23] was based on the above ground. Specifically, the questions were: (1) whether the testament was executed in the presence of the instrumental witnesses, and (2) whether the acknowledgment clause of the codicil was signed and notarized without the presence of the testatrix and witnesses.

The Court found that the will was executed in accordance with the law and rejected the "improbable story of the witnesses" (not instrumental witnesses) presented by the oppositor. "It is squarely contradicted by the concordant testimony of the instrumental witnesses who asserted under oath that the testament was executed by the testatrix and the witnesses in the presence of each other." [24]

As to the second question the decision was that under the present law,[25] the subsequent certification by the notary that the will was duly acknowledged by the participants therein is no part of the acknowledgment itself nor of the testamentary act, hence their separate execution not in the presence of said parties did not violate the rule that testaments should be completed without interruption.[26]

Petitions and Contest For Letters Testamentary. A petition for letters of administration must be filed by an interested person.[27] In accordance with this rule the Supreme Court, in the case of *Eusebio*

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[22] See Rule 77, § 9.

[23] G.R. No. L-7179, June 30, 1955. See Notes, *Recent Decisions*, 30 PHIL. L.J. 649-51 (1955).

[24] Straightforward testimony of the subscribing witnesses deserves full credit (Roxas v. Roxas, G.R. No. L-2396, Dec. 11, 1950), and has more weight than the testimony of those merely present at the time of the making of the will (Garcia v. Garcia de Bartolome, 63 Phil. 419 [1936]).

[25] Art. 806, Civil Code: "Every will must be acknowledged before a notary public by the testator and the witnesses . . . ."

[26] Andalis v. Pulgeras, 59 Phil. 643 (1934).

[27] Rule 80, § 2, Rules of Court.

v. Valmores,[28] dismissed the proceedings instituted by an alleged adopted son of the deceased who was not able to prove satisfactorily that he was legally adopted. On the contrary, the oppositor presented a certificate of the local civil register that there was no such record of adoption. The testimony of the petitioner's brother was held to be incompetent evidence.[29]

The proceedings were also found irregular in that the notices of the time and place for the hearing of the petition to be given to known heirs and creditors of the decedent as required by the rules[30] were not complied with. "The requirement as to notice is essential to the validity of the proceedings in order that no person may be deprived of his right to property without due process of law."

This was also touched upon in the case of *Rodriguez v. Reyes* [31] where it was held:

> "That a finding in an order appointing an administrator for a deceased's estate, to the effect that certain persons are the next of kin of the deceased can not conclude persons who were not as yet parties to the proceeding."

Since the administration of the estate is for the interest of those having a right to the same, certain persons are given preference to be appointed as administrator. This order of preference is enumerated in the Rules of Court.[32] The first on the list is the surviving spouse if qualified and competent.

The *obiter dictum* in the case of *De Borja v. Tan* [33] recognized this right of the surviving spouse where the son of the deceased was appointed special administrator of his father's estate. He did not name the deceased's second wife as one of the heirs. He induced the court to believe that there was no person claiming to be a widow of the deceased.

> "Inasmuch as the widow of a deceased person is under section 6, Rule 80 given preference in the administration of the estate of the decedent, it would then seem apparent that the order appointing Jose de Borja as special administrator would not have been issued had he revealed that the petitioner claimed to be the widow of the deceased."

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[28] G.R. No. L-7019, May 31, 1955. See Notes, *Recent Decisions*, 30 PHIL. L.J. 699-70 (1955).

[29] Rule 123, § 4, Rules of Court.

[30] Rule 80, § 3, *id.*

[31] G.R. No. L-7760, Sept. 30, 1955. See Notes, *Recent Decisions*, 30 PHIL. L.J. 880-82 (1955).

[32] See Rule 79, § 6.

[33] G.R. No. L-7792, July 27, 1955.

Removal of Executors or Administrators. "If an executor or administrator neglects to render his account and settle the estate according to law, or to perform an order or judgment of the court, or a duty expressly provided by these rules, or absconds, or becomes insane, or otherwise incapable or unsuitable to discharge the trust, the court may remove him, or in its discretion, may permit him to resign." [34] The above enumeration by the Rules for the causes of removal of executors or administrations is not exclusive. In fact the phrase "unsuitable to discharge the trust" includes all possible cases where the executor or administrator is unfit to discharge the powers of such office. In the case of *Borromeo v. Borromeo*,[35] the Court ruled that "it is not unreasonable to suspect a plan inconsistent with his trusteeship" (which was to make it appear that the estate had no funds thereby sustaining his objection to the widow's allowance) in that the executor withdrew, without authority from the court, money from a joint current account belonging to him and the deceased. He deposited the same in the joint current account with his another brother. He also did not include as income of the estate several sums received as proceeds from the farm of the deceased.

Another circumstance which should "finally tip the judicial balance on the side of removal or resignation" was the fact that the executor claimed as his own certain shares of the Interisland Gas Service, in the name of the deceased whom he asserted as his mere "dummy." Conflict of interest between the executor and deceased alone suggests the propriety of relieving the executor as such.[36]

Acceptance of the resignation of the executor by the court amounts to a removal.[37] In the above case, the trial court modified its order of removal by permitting the executor to resign in that he "was relieved of his commitments as such executor." Instead of resigning, the executor appealed from the order, but the Supreme Court deemed this move useless because there existed sufficient reasons for sustaining the removal.

Attorney's Fees. As a rule, reasonable expenses for the services of an attorney which have benefited the estate may be charged against the estate *subject to the approval of the court.*[38] Thus, the

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[34] Rule 83, § 2, Rules of Court.

[35] G.R. No. L-6363, Sept. 15, 1955. See Notes, *Recent Decisions*, 30 PHIL. L.J. 845-47 (1955).

[36] Ribaya v. Ribaya, 74 Phil. 254 (1943).

[37] The court may remove him or permit him to resign. See Rule 83, § 2, Rules of Court.

[38] Dacanay v. Hernandez, 53 Phil. 824 (1928).

attorney in the case of *Grey v. Insular Lumber Co.*[39] could not simply ask the defendant-debtor to issue a separate check to him in payment of his contingent fee of 25% of the amount of the judgment against said defendant. He had to prove before the court the contract with the deceased for the contingent fee and that it was "unpaid, reasonable and just." The probate court has to approve any payment of attorney's fees by the estate.

Claims Against the Estate. All money claims against the decedent have to be filed in the settlement proceedings of his estate otherwise they are barred.[40] The executor or administrator may interpose any available defense against such claims.[41] In the case of *Mina, et al. v. De Rivero,*[42] the administrator put up the defense of prescription. The Court sustained the claim because it appeared that the running of prescription was interrupted due to the acts of the heirs of the deceased which consisted of the payment of part of the accrued interests and the sending of two letters acknowledging the debt to the creditors by one of the heirs. Citing *Veloso v. Fontanosa,*[43] the Court adhered to the view that the period of prescription of action against a deceased debtor may be interrupted by the act of his surviving heirs, which interruption operates against all the other heirs alike.

The rule states "money claim."[44] This, according to the case of *De Paula v. Escay,*[45] refers to a "debt or money claim incurred by the deceased during his lifetime and collectible after his death." Consequently, an ordinary claim for the payment of the balance of an account due under a lease contract entered into by the administrator under the approval of the court does not fall under section 5 of Rule 87, and the filing of such claim beyond the time limited cannot be held to have been barred.

The question was presented as to how such ordinary claim not falling under Rule 87, section 5 may be enforced—by a simple motion in the administration proceedings or by an ordinary action? The question was disposed of by the Court saying that the "claimant is not prohibited from filing an independent action to recover the claim but the existence of such remedy is not a bar to the remedy (filing a

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[39] G.R. No. L-7777, Oct. 31, 1955. See Notes, *Recent Decisions,* 30 PHIL. L.J. 1032-34 (1955).

[40] Rule 87, § 5, Rules of Court.

[41] Rule 87, § 10, *id.*

[42] G.R. No. L-7534, Sept. 27, 1955. See Notes, *Recent Decisions,* 30 PHIL. L.J. 977-78 (1955).

[43] 13 Phil. 79 (1909).

[44] See note 40 *supra.*

[45] G.R. No. L-8559, Sept. 28, 1955. See Notes, *Recent Decisions,* 30 PHIL. L.J. 836-38 (1955).

motion) that he had pursued in the case at bar." This is because the demand has a relation to an act of administration and in the ordinary course thereof—all under the supervision of the probate court. Moreover, the movant (claimant) submitted himself to the court's jurisdiction by filing his claim. This brings us to the differentiation made by the Court that "when the demand is in favor of the administrator and the party against whom it is enforced is a third party, not under the court's jurisdiction, the demand cannot be by mere motion by the administrator."

Distribution and Partition of the Estate. The last stage in the settlement of estate is the distribution and partition of the residue [46] of the estate to the lawful heirs. The court alone makes the distribution [47] although it may make the same in accordance with the project of partition the administrator (executor) and heirs may present. Once the project of partition is accepted by the probate court, it is said to be given the "stamp of judicial approval and as a matter of principle and policy, its regularity must be sustained in the absence of a ground for invalidity." Thus held the Court in *Go Chi v. Co Cho*,[48] where "fraud, collusion and connivance" were alleged as grounds for the annulment of the order approving the project of partition. The rule is that "fraud is not presumed. As fraud is criminal in character, it must be proved by clear preponderance of evidence." The allegation of fraud in the case at bar became doubtful because the action to annul the order was brought long after the death of the person who presented the project of partition and after all the judicial records of the proceedings had been destroyed.

There is such a thing as estoppel in partition. According to one case,[49] "a party cannot, in law and in good conscience, be allowed to reap the fruits of a partition agreement or judgment and repudiate what does not suit him." In the case of *Ortega v. Heirs of Maria Concepcion Ortega*,[50] the Court emphasized that if an heir is not satisfied with the share awarded to her, that some properties were omitted, or that the order for accounting was erroneous, the matter may and should be ventilated in said first probate proceeding."

II. GUARDIANSHIP.

Where to Institute Proceedings. Section 1 of Rule 93 provides for the venue of guardianship proceedings the CFI of the province where the minor or incompetent resides, and if he resides in a foreign

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[46] See Rule 91, § 1, Rules of Court.
[47] Camia de Reyes v. Reyes de Ilano, 63 Phil. 629 (1936).
[48] G.R. No. L-5208, Feb. 28, 1955.
[49] De Borja v. Encarnacion, G.R. No. L-4681, July 31, 1951.
[50] G.R. No. L-8023, Nov. 29, 1955.

country, the CFI of the province where his property or part thereof is situated.

The Judiciary Act of 1948 [51] grants jurisdiction over the same proceedings to the court of first instance. This law was later modified by giving the justice of the peace court and municipal court concurrent jurisdiction with the court of first instance "in matters within their respective jurisdiction." [52] In the case of *Morales v. Maiquez*,[53] the jurisdiction of the municipal court over guardianship proceedings involving the custody of the person of the minor alone was assailed. It was argued that the phrase "in matters within their respective jurisdiction" limits the jurisdiction of the municipal court to guardianship proceedings in which the amount of the property is two thousand pesos or less and that where no property of the minor is involved, only the CFI has jurisdiction. The Supreme Court held otherwise and interpreted the phrase as referring to the territorial limits or boundaries of the respective courts. To hold otherwise would render the phrase of no possible application because there are no guardianship proceedings over which justice of the peace courts have jurisdiction. If the justice of the peace court or municipal court can take cognizance over adoption cases, they should also be qualified to take cognizance over guardianship cases where custody alone is involved and which proceedings are temporary in nature.[54]

Selling and Encumbering Property of the Ward. When it is shown that the sale or mortgage of the property of the ward is proper and necessary for his interest,[55] the court of competent jurisdiction shall make an order directing the next of kin of the ward and all persons interested in the estate to show cause why the sale or mortgage should not be allowed.[56]

According to the case of *Daclan v. Ponce*,[57] since "next of kin" of the ward has been interpreted to mean "those relatives whose re-

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[51] Rep. Act No. 296, § 44(e).

[52] See Rep. Act No. 296, § 90, as amended by Rep. Act No. 643, § 1; Rep. Act No. 296, § 86, as amended by Rep. Act No. 644, § 1. Also Rule 93, § 1, Rules of Court, as amended by Act No. 643, § 2.

[53] G.R. No. L-7463, May 27, 1955. See Notes, *Recent Decisions*, 30 PHIL. L.J. 697-99 (1955).

[54] Guardianship is always or almost invariably understood to be temporary. While one is a minor or is incompetent, a guardian is appointed; but where minority has passed or incapacity has ceased, guardianship also terminates. Colis v. Cafuir, G.R. No. L-3352, June 12, 1950.

[55] See Rule 96, § 1, Rules of Court.

[56] *Id.*, § 2.

[57] G.R. No. L-8488, Nov. 21, 1955.

lationship is such that they are entitled to share in the minor's estate as distributees," [58] a step great grandmother has absolutely no interest in the ward's estate. She would not even be a remote heir of the ward not being related by blood to the latter.[59]

III. TRUSTEESHIP.

The case of *Angela Tuason de Perez v. Caluag* [60] is a case on testamentary trust. The Supreme Court made the following rulings:

(1) An intention to create a trust on the part of the testatrix is established even though the word "trust" is not mentioned.[61] This is because the terms of the legacy to the children of the petitioner could not have been carried out immediately since it is not definitely determined that the petitioner would cease to bear offspring.

(2) Only when the testatrix has omitted in her will to appoint a trustee may the court appoint one.[62]

In the case at bar, the Court was satisfied that the testatrix intended to appoint Antonio Araneta, trustee, even if the will did not expressly designate him to be such. "She appointed him administrator but with the powers of a trustee."

(3) Although Antonio Araneta has a testamentary trustee, by his appointment by the court he is in part a judicial trustee and the court has jurisdiction and supervision over the trust and the trustee.[63]

(4) When an express trust has been created, the powers of the trustee shall be determined by the trust instrument itself. In the case above, the trustee was said to be given *"amplios poderes de vender los mismos"* and *"los poderes mas amplios permitidos por la ley."*

(5) " '. . . Where discretion is conferred upon the trustee with respect to the exercise of a power, the court will not interfere with

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[58] Lopez v. Judge Teodoro, 47 O.G. Supp. to 12, 138 (1950).

[59] See Arts 887(2) and 985, Civil Code.

[60] G.R. No. L-6182, April 13, 1955.

[61] "To create a trust by will the testator must indicate in the will his intention so to do by using language sufficient to separate the legal from the equitable estate, and interest in the trust, the purpose or object of the trust, and the property or subject matter thereof. Stated otherwise, to constitute a valid testamentary trust, there must be a concurrence of three circumstances: (1) sufficient words to raise a trust; (2) a definite subject; (3) a certain or ascertained object; statutes in some jurisdictions expressly or in effect so providing. (69 C.J. 705-706)." Lorenzo v. Posadas, 64 Phil. 353 (1937).

[62] See Rule 99, §§ 1 and 2, Rules of Court.

[63] The Court cited Hoskyns v. National City Bank of New York, 47 O.G. 2885 (1949).

him in his exercise or failure to exercise the power so long as he is not guilty of an abuse of discretion. (Scott on Trusts, Vol. 2, sec. 187).'"

IV. HABEAS CORPUS.

A person deprived of his liberty or deprived of the rightful custody of another by an illegal confinement or detention is entitled to a writ of habeas corpus.[64] Thus it has been held to be the proper remedy of parents to regain the custody [65] of their minor child.[66] The same relief was readily granted by the Court in the case of *Banzon v. Alviar* [67] to Maria Banzon, being the mother of a nine-year old son who was alleged to have been entrusted to the respondents by Col. Banzon, the father of the minor and even though the latter was being "cared for and reared in a manner that befits the son of a colonel." [68]

A convict who has served his sentence is entitled to a release by a writ of habeas corpus if still confined upon the expiration of his term. So that in the case of *Curiano v. CFI of Albay*,[69] habeas corpus did not lie, the convict not having in fact completed the service of his sentence as claimed by him.[70]

V. APPEALS IN SPECIAL PROCEEDINGS.

An order appointing an administrator but not a special administrator [71] of an estate of a deceased person constitutes a final determination of the rights of the parties thereunder and is therefore appealable.[72] The order of appointment of a co-administrator is likewise appealable. This was the holding in the case of *De Borja v. Tan*.[73] The appointee contended that a co-administrator is not a regular administrator and his duties and functions partake those of

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[64] Rule 102, § 1, Rules of Court.

[65] Art. 311, Civil Code: "The father and mother jointly exercise parental authority over their legitimate children who are not emancipated . . . ."

Art. 316: "The father and the mother have, with respect to their unemancipated children:

(1) The duty to support them, *to have them in their company*, educate and instruct them in keeping with their mean . . . ." (Italics supplied.)

[66] Salvaña v. Gaela, 55 Phil. 620 (1938).

[67] G.R. No. L-8806, May 25, 1955.

[68] "Her husband being unable to exercise parental authority in view of his mission abroad in the service of the Republic."

[69] G.R. No. L-8104. April 15, 1955.

[70] Alvarez v. Director of Prisons, 45 O.G. 2881 (1948).

[71] Rule 105, § 1(c), Rules of Court.

[72] Sy Hong Eng v. Sy Lioc Suy, 8 Phil. 594 (1907).

[73] G.R. No. L-6476 Nov. 18, 1955.

a special administrator, consequently his appointment is not subject to appeal. The Supreme Court ruled the contrary in that a co-administrator "performs all the functions and duties and exercise all the powers of a regular administrator, only that he is not alone in the administration."

The order held appealable in the case of *De Tengco v. Hon. San Jose* [74] was one made by the probate court which denied a petition to annul two orders granting attorney's fees. The order in question would constitute a final determination of the rights of the parties with respect to the payment of the sums. It was stated that "even assuming that it was a mere interlocutory order, and so not appealable under Rule 41, section 2, nevertheless it has been held in *Dais v. Gardeño* [75]. . . that this rule is not applicable to probate proceedings." Orders granting attorney's fees are "accidental to probate proceedings and are merely interlocutory" and so long as the probate proceedings are still open, the probate court is the most "logical tribunal" to consider and grant the remedy asked by the petitioner, i.e., to set aside said orders on the ground of fraudulent representations.

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[74] G.R. No. L-8162, Aug. 30, 1955.
[75] 49 Phil. 169 (1926).