SURVEY OF 1955 CASES IN CIVIL PROCEDURE

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The following survey represents the annual addition made by the Supreme Court last year to our jurisprudence in civil procedure. Cases in provisional remedies and special civil actions are likewise included. This survey is mainly expository in nature, being neither a critical nor analytical appraisal of the 1955 cases, a task hitherto performed in the issues of this Journal published last year.

CIVIL ACTIONS

I. JURISDICTION AND PARTIES.

A. SUBJECT MATTER OF ACTION.

The subject-matter of any given case is determined, not by the nature of the action which the party is entitled under the facts and the law to bring, but by the nature and the character of the pleadings and issues submitted by the parties to the court for trial and judgment. The trial court's opinion as to the action which the plaintiff is entitled to bring under the facts proven in the course of the trial does not control or determine the nature or character of the case under trial, for it is the pleadings that do so. Thus if it should develop in the trial that in the face of the facts and the law, the plaintiff is entitled to a different remedy, the court should make a finding to this effect and dismiss the action or absolve the defendant therefrom. But it cannot under the pleadings declare that it has no jurisdiction of the subject matter.[1]

B. JURISDICTION OVER SUBJECT MATTER.

Courts of First Instance have original jurisdiction in all cases "in which the demand, exclusive of interest, or the value of the property in controversy, amounts to more than two thousand pesos." [2] Justice of the peace courts and municipal courts have exclusive original jurisdiction in all civil actions "where the value of the subject matter or amount of the demand does not exceed two thousand pesos, exclusive of interests and costs." [3]

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* LL.B. (U.P.) 1956; Recent Decision Editor, Student Editorial Board, *Philippine Law Journal*, 1955-56.

[1] Soledad Belandres v. Lopez Sugar Central Mill Co., Inc., G.R. No. L-6869, May 27, 1955. Compare with Azajar v. Ardales, G.R. No. L-7913, Oct. 31, 1955.

[2] Rep. Act No. 296 (Judiciary Act of 1948), § 44.

[3] *Id.*, § 88.

The meaning of the phrase "amount of the demand" as used above was explained in the case of *Soriano v. Omilia.*[4] Justice Labrador, speaking for the Supreme Court said that under the law now, as previously, the jurisdiction of the court is made to depend, not upon the value or demand in *each single cause of action* contained in the complaint, but upon the *totality of the demand* in all causes of action. This is especially so in the light of the provisions of the Rules of Court permitting joinder of causes of action.[5] Where, therefore, the plaintiff has several claims against the same defendant and in a single suit seeks to recover them, it is always the sum total of the plaintiff's claims that is determinative of the jurisdiction of the court and not each single cause of action.

Dissenting Opinion: Justice Bautista Angelo disagreed with the majority. He said that the totality of the demand can only be the test for purposes of jurisdiction if the amounts aggregating the same arise out of the same transaction; otherwise each amount is determinative of jurisdiction.[6]

In this case the plaintiff brought an action in the court of First Instance to recover on four causes of action, to wit: (1) ₱300 for a promissory note executed by the defendant in favor of the plaintiff; (2) ₱700 for another promissory note; (3) ₱3,000 as moral damages for the derogatory remarks made against the personality of the plaintiff; (4) ₱600 as attorney's fees.

C. JURISDICTION OF COURT DETERMINED BY LAW IN REPUBLIC ACT NO. 1125.

The jurisdiction of the court is determined and conferred by law and may not be taken away, modified or even qualified by the parties. The latter may enter into valid contracts in reference to some of their rights, including those conferred by remedial laws and such contracts may affect the wisdom of the judicial action relative thereto, but not the jurisdiction of the court thereon.[7]

While Courts of First Instance are courts of general jurisdiction,[8] the Congress may under its constitutional authority to define, prescribe and apportion the jurisdiction of the various courts [9] take away from said courts their jurisdiction over certain matters. Accordingly Republic Act No. 1125 has taken away the power of the

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[4] G.R. No. L-7112, May 21, 1955.
[5] Rule 2, § 5; See also § 1, Rule 6.
[6] See Go v. Go, G.R. No. L-7020, June 30, 1954.
[7] Atok-Big Wedge Mining Co., Inc. v. Castillo, et al., G.R. No. L-7518, May 27, 1955.
[8] II MORAN, COMMENTS ON THE RULES OF COURT 971 (rev. ed. 1952).
[9] See Art. VIII, § 3, Constitution.

Manila CFI to review decisions of the customs authorities in any case of seizure. A petition to review the actuations of the proper customs authorities, cannot be entertained by the courts of first Instance.[10]

D. JURISDICTION OF CFI ON APPEAL.

To determine its jurisdiction on appeal, the CFI has to rely on the allegations of the complaint in the municipal court, reproduced in the CFI. Hence if the municipal court should render judgment declaring that the action is not one for illegal detainer but an action falling within the original exclusive jurisdiction of the CFI, the appellate jurisdiction of the CFI cannnot be successfully assailed on the ground that the lower court did not have original jurisdiction over the subject-matter of the action. The reason is that on appeal to the CFI, the judgment of the municipal court is vacated. As far as the CFI is concerned, said decision does not exist because the case is to be tried *de novo*.[11]

E. PARTIES TO THE ACTION.

1. Alternative Defendants.

The Rules of Court [11a] specifically permits the plaintiff to sue several defendants in the alternative, when he is uncertain against whom of them he is entitled to relief with a view to ascertaining who among them is liable. And under this rule it has been held that "in an action on a contract or transaction brought about by an agent, the agent may be joined as defendant with the principal for relief against him in case it should be shown that he acted without authority.[11b]

2. Proper Parties.

It was held in one case [11c] that where the validity of an order of the Department of Health is questioned, the Secretary of Health must be made a party to the proceedings to give him a chance to be heard.

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[10] Millarez v. Amparo and Lim Hu, G.R. No. L-8364, June 30, 1955; Millarez v. Amparo and Nepomuceno, G.R. No. L-8365, June 30, 1955; Millarez v. Amparo and Seree Investments Co., G.R. No. L-8351, June 30, 1955.

[11] Consuelo Roxas, et al. v. Juan Ysmael & Co., Inc., G.R. No. L-7559, Sept. 27, 1955.

[11a] Rule 3, § 13.

[11b] Amador Pajota v. Maximo Jante, et al., G.R. No. L-6014, Feb. 8, 1955.

[11c] Gorospe, et al. v. Hon. J. de Veyra and Angara, G.R. No. L-8408, Feb. 17, 1955.

II. Pleadings and Other Papers.

A. COMPLAINT.

To avoid the summary dismissal of a complaint or petition, the doctrine laid down in the case of *Cañete v. Wislezenus* [12] requiring parties to plead all the facts necessary to establish the cause of action and not merely to refer to the exhibits appended thereto, leaving it to the court to search for and glean the operative facts from the mass of exhibits and appendices, must be strictly adhered to.[13]

In order to determine whether or not a complaint states a cause of action the allegations of said complaint must be accepted as true and correct [14] and any apparent contradiction between said allegations and statements and recitals contained in a document or exhibit attached to and made a part of the complaint should not be held to affect or refute said allegations, unless such statements in the said document are basic or ultimate facts and not merely recitals or claims by one of the parties in the said instrument.[15]

B. MOTION TO DISMISS.

1. Duty of court to pass upon motion to dismiss.

When a motion to dismiss is filed, the movant is entitled to have the court pass upon such motion. Not until after the motion to dismiss has been decided can the court proceed further in the proceedings with respect to which the motion was filed. Thus without the motion to dismiss being resolved, the defendant cannot be required to file an answer and it would be improper for the court to declare the defendant in default for failure to file his answer. This was held in *Epang v. de Leyco.*[16] Neither may the court, it was ruled in *Nieto v. Ysip,*[17] in condemnation proceedings, issue an order of condemnation without having previously overruled a motion to dismiss.

2. Prescription of Action.

The basis of a motion to dismiss may or may not appear on record.[18] In connection with the hearing of a motion to dismiss, the parties may be allowed to present evidence if they so desire and the evidence should be taken down, except when the motion is based on the ground that the complaint does not state a cause of action. This

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[12] 36 Phil. 429 (1917).

[13] Protacio Rubios and Salvador Muñoz v. Andres Reolo, et al., G.R. No. L-7803, April 22, 1955.

[14] Lucio Dimayuga v. Antonio Dimayuga, G.R. No. L-6740, April 29, 1955.

[15] World Wide Insurance & Surety Co., Inc. v. Gonzalo Manuel, G.R. No. L-8042, Nov. 29, 1955.

[16] G.R. No. L-7574, May 17, 1955.

[17] G.R. No. L-7894, May 17, 1955.

[18] See Rule 123, § 100.

was the ruling in *Torres, et al. v. Terrencio, et al.*[19] It was there further held that when the basis of the motion to dismiss does not appear on record and such basis or ground is one other than the failure of the complaint to state a cause of action, the procedure to be followed is Rule 123, Section 100. Hence if a motion to dismiss is filed on the ground that plaintiff's cause of action has prescribed but the facts from which the prescription of the action arose do not clearly appear in the pleadings, the trial court should receive evidence first before ruling on the motion to dismiss.[20]

3. No Cause of Action

On the other hand, when the ground for dismissal is that the complaint states no cause of action, the rules provide that its sufficiency can only be determined by considering the facts alleged in the complaint and no other.[21] One may not go beyond and outside the complaint for data or facts, especially contrary to the allegations of the complaint, to determine whether there is a cause of action.[22] If the court finds the allegations to be sufficient but doubts their veracity, it must deny the motion to dismiss and require the defendant to answer and then proceed to try the case on the merits.[23] For instance, it was ruled that when in an action to recover possession of a parcel of land, a motion to dismiss is filed on the ground that there is a condition in the lease contract which would entitle the defendant to the possession of the land upon the expiration of said contract but which condition does not appear in the complaint, the rule is that no evidence may be allowed on the motion to dismiss.[24]

In *World Wide Ins. & Surety Co. Inc. v. Manuel*[25] it was observed that there are cases where there may be a conflict or contradiction between the allegations of a complaint and a document or exhibit attached to and made a part of it. In that case, instead of dismissing the complaint, defendant should be made to answer the same so as to establish an issue and then the parties will be given an opportunity: the plaintiff to reconcile any apparent conflict be-

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[19] G.R. No. L-7540, May 31, 1955.

[20] *Ibid.*

[21] Lucio Dimayuga v. Antonio Dimayuga, *Supra.* The Court cited the case of Paminsan v. Costales, 28 Phil. 487 (1914) wherein it was held that the "test of the sufficiency of the facts alleged in a petition to constitute a cause of action, is whether or not, admitting the facts alleged, the court could render a valid judgment upon the same in accordance with the prayer of the petition."

[22] Word Wide Insurance & Surety Co., Inc. v. Gonzalo Manuel, G.R. No. L-8042, Nov. 29, 1955.

[23] I MORAN, COMMENTS ON THE RULES OF COURT 170 (rev. ed. 1952).

[24] Lucio Dimayuga v. Antonio Dimayuga, *supra.*

[25] See note 22 *supra.*

tween the allegations of the complaint and a document attached thereto to support the same, and the defendant an equal opportunity to refute the allegations of the complaint and to show that the conflict between its allegations and the document attached to it is real, material and decisive.

The complaint in this case alleged that defendant was being held liable in his individual capacity because he signed for a company which had no legal existence or juridical personality. However, a copy of the agreement of counter-guaranty mortgage as incorporated in the complaint apparently shows on its face that defendant signed as president of the GLM Productions. The trial court investigated and on the basis of the records of the case decided that the defendant was not liable in his individual capacity. This was error on the judge's part.

4. Another action pending between same parties for same cause.

In the case of *Olayvar v. Olayvar*,[26] it was held that the wife cannot successfully prosecute an action asking for support for herself and her children where she is a defendant in an action for legal separation previously filed by the husband. The complaint for support may be dismissed under Rule 8, Section 1(d).[27] In order, the Court said further,[28] that an action may be dismissed on the ground that "there is another action pending between the same parties for the same cause" the following requisites must concur: (1) identity of parties or at least such as representing the same interests in both actions; (2) identity of rights asserted and relief prayed for, the relief being founded on the same facts; (3) the identity in the two cases should be such that the judgment that may be rendered in one would, regardless of which party is successful, amount to *res judicata* in the other.

5. Res Judicata.

In *Visaya, et al. v. Suguitan*,[29] *A* sold his homestead to *B* and *C*. spouses. After *B's* death, *A* brought suit against widow *C* for the repurchase of the homestead under section 119 of Commonwealth Act No. 141. A compromise, subsequently approved by the court, was agreed upon whereby *C* agreed to reconvey the land. The children of *B* and *C* sought to have the compromise and judgment thereon

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[26] G.R. No. L-8088, Nov. 29, 1955.

[27] "Defendant may within the time for pleading, file a motion to dismiss the action on any of the following grounds: . . . (d) that there is another action pending between the same parties for the same cause." Rule 8, § 1(d).

[28] Citing I MORAN, *op. cit. supra* note 23, at 169.

[29] G.R. No. L-8300, Nov. 18, 1955.

set aside in so far as it affects their half interest inherited from their father. It was held that since the children upon the death of their father immediately acquired his interest in the homestead, which interest was independent of that of their mother *C*, *A* should have filed his original suit against all of them. Not having done so, the compromise as well as the judgment by consent that terminated the case cannot operate as *res judicata* against the action of the heirs who were not parties to the suit.

An action to recover a parcel of land on the ground that the transaction between the parties was a loan with mortgage is *res judicata* to a subsequent action brought by the heirs of the plaintiff in the first case, demanding accounting of the produce of the land on the ground that the transaction in question was a combination of mortgage to secure the payment of the said loan and antichresis. The causes of action in both cases are fundamentally identical: the lands had not been sold.[30]

The fact that the main issue in the later case was only a secondary question in the prior proceeding does not detract from the conclusive effect of the previous adjudication.[31]

Where an order of the Court, wherein it was stated that certain property had been the subject of partition among the heirs, was based only on a mere assumption of facts, it cannot have the effect of *res-judicata* with respect to a later action for partition covering the same property.[32]

C. ANSWER.

1. Interruption of Period to File Answer.

Since a motion to dismiss interrupts the time to plead,[33] when the defendant files a motion to dismiss, he is entitled to have that motion resolved before being required to answer. Unless the court has already decided the motion it is incorrect to declare the defendant in default, and to hold the trial of the case on the merits in his absence without notice to him of the day of hearing is a denial of due process.[34]

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[30] Besilario v. Zulueta, G.R. No. L-8196, Dec. 28, 1955.

[31] Tolentino v. Lim and Viduya, G.R. No. L-6333, May 10, 1955.

[32] Torres, et al. v. Terrencio, et al., *supra* note 19. The court's order issued in connection with a petition for letters administration was made merely on the basis of the allegations made in the pleadings. The agreement between the parties was not to consider said allegations as facts but merely to make use of them as a basis for the ruling of the court on the petition and the conclusions it had reached were made in view only of said allegations.

[33] Rule 8, § 4, Rules of Court.

[34] Epang v. De Leyco, G.R. No. L-7574, May 17, 1955.

Where in a case against two defendants, the latter filed two separate motions to dismiss and the court issued an order of denial leaving room for doubt which of the two motions to dismiss was denied, a motion made by the defendants praying for clarification to resolve the doubt has the effect of suspending the period for filing an answer. The defendants could not fairly be expected to file their answer before the uncertainty was removed.[35]

2. Motion to Dismiss Treated as Answer.

In *Epang V. de Leyco* [36] the suit was originally filed in the justice of the peace court wherein the parties appeared and filed pleadings, but was subsequently endorsed by that court to the Court of Industrial Relations, where no new complaint was filed. The Supreme Court ruled that it was unnecessary for the defendant to refile in the CIR his appearance and motion to dismiss. Furthermore the motion to dismiss should have been treated as an answer since it raised issues that went into the merits of the case.

3. Prescription of Action to Enforce Judgment.

According to the Rules of Court, affirmative defenses as would raise issues of fact not arising upon the preceding pleading must be specifically pleaded in the answer.[37] And generally defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived.[38] However, not in all instances, are affirmative defenses deemed waived should they not be pleaded in the answer. The case of *Chua Lamko v. Dioso, et al.*[39] illustrated the exception to the general rule of waiver. In this case there was attempt to enforce a judgment more than ten years after its entry. The adverse party failed to allege in his answer the defense of prescription of action to enforce judgment. The Supreme Court ruled that waiver applies only with respect to defenses of prescription "that raise issues of fact not appearing upon the preceding pleading." It was not necessary to specifically plead prescription in this case because the pleading of the party seeking to enforce the judgment disclosed that the judgment had been rendered in March 7, 1939 and it was assered only in March, 1950. No issue of fact was involved by the claim of

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[35] *In re* Susano A. Velasquez (Supreme Court Resolution), April 29, 1955.

[36] Epang v. De Leyco *supra*.

[37] Rule 9, § 9, which provides: "All such grounds of defense as would raise issues of facts not arising upon the preceding pleading must be specifically pleaded, including fraud, statute of limitations, release, payment, illegality, statute of frauds, estoppel, former recovery, discharge in bankruptcy and all other matter by way of confession and avoidance."

[38] Rule 9, § 10.

[39] G.R. No. L-6923, Oct. 31, 1955.

prescription; those two dates were not denied. There was therefore, no waiver.

4. Specific Denial Under Oath of Allegation of Usury.

Allegations of usury must be denied specifically under oath otherwise they are deemed admitted.[40] In *Matel, et al. v. Rosal, et al.*[40a] it was ruled that the denial is sufficient when made by the party's counsel under oath. Although it is not stated in the denial that counsel makes it on his own personal knowledge, neither did he say that his denial was based on his mere information or belief.[41] While the rule is that only a person having personal knowledge may validly make the specific denial under oath, in this particular instance it may be presumed that the denial made by counsel for plaintiffs was based on his own personal knowledge.

D. COUNTERCLAIMS.

It is well-settled that if in an action for the recovery of real property, the defendant failed to set up a counterclaim for the improvements, such counterclaim is forever barred.[42] In *Maclan v. Garcia*[43] it was also held that a counterclaim for repairs and necessary expenses not set up is likewise barred. Such a counterclaim is necessarily connected with the action to recover the real property. Said connection is substantially identical with that which exists between an action for the recovery of a parcel of land and the claim for improvements therein made by the defendant in said action.

E. INTERVENTION.

Intervention is never an independant proceeding but is ancillary and supplemental to an existing litigation. Its purpose is not to obstruct nor unneccessarily delay the placid operation of the machinery of trial, but merely to afford one not an original party, yet having a certain right or interest in the pending case the opportunity to appear and be joined so he could assert or protect such right or interest.[44] Accordingly, where an importer intervenes merely to assist the consignee in securing the reversal of the decision of the

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[40] Rule 9, § 8.

[40a] G.R. No. L-7095, April 25, 1955.

[41] The denial ran thus: "That it denies the allegations of usury adduced as a special defense in defendant's Amended Answer, the truth being that the true loan is ₱2,000.00 as alleged in said Amended Answer."

[42] Bautista v. Jimenez, 24 Phil. 111 (1913); Berses v. Villanueva, 25 Phil. 473 (1913); Lopez v. Gloria, 40 Phil. 26 (1919); Bedtran v. Balbuena, 53 Phil. 697 (1927); Galit v. Ginoea, 62 Phil. 451 (1935).

[43] G.R. No. L-7622, May 27, 1955.

[44] Garcia, et al. v. David, et al., 67 Phil. 279, 282 (1939).

Commissioner of Customs so that the goods seized may be released to said consignee, the proceedings in connection with the seizure of said shipment being left entirely to the discretion of the consignee, its intervention is subordinate and ancillary to the appeal of the consignee. As such its right to continue has to yield once the appeal is dismissed.[45]

F. MOTIONS.

An adverse party who does not make a verbal or written opposition to a motion is not guilty of laches and estoppel if the court did not have jurisdiction to entertain the motion because the adverse party had the right to assume that the court would realize it had already lost jurisdiction—the judgment having become final and executory.[45a] Anyway mere silence on the part of one party could not confer on the lower court jurisdiction, that it had already lost to amend its judgment.

G. DEPOSITIONS.

The policy of the Rules of Court is to make the right to take deposition almost unrestricted and to impose limitations only on the right to use them.[46] The case of *Cojuangco v. Caluag, et al.*,[47] affords an instance where the taking of deposition may be prohibited. The ground alleged by the witness for not wanting to testify at the trial was her lack of financial means. The witness was claiming to be the natural daubhter of a decedent whose estate was the subject of settlement proceedings. Considering, the Supreme Court said, that the ground alleged for the taking of the deposition is not sufficient and that this ground was obviated by the voluntary offer and deposit made by the adverse party of sufficient money for her expenses and considering the judge's desire to see the witness testify and to cross-examine her, the issuance of the court's order prohibiting the taking of the desposition was not improper. Moreover where, as in this case, the deposition would result needlessly in staining the moral character of the deceased and in merely annoying and embarrasing the widow and children of the said deceased, all of which could be avoided if the witness were to testify personally in court, the courts could in the exercise of their discretion stop such a move.

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[45] Reliance Commercial Enterprises Inc. v. Board of Tax Appeals, G.R. No. L-6697, Nov. 18, 1955.

[45a] Visayan Surety & Insurance Corporation v. Lacson, et al., G.R. No. L-7541, April 29, 1955.

[46] I MORAN, *op. cit.* note 23, at 417.

[47] G.R. No. L-7952, July 30, 1955.

H. REQUEST FOR ADMISSION.

Request for admission is a mode of discovery devised for the purpose of compelling parties to confine themselves to the facts controverted actually by them with a view to diminishing the expenses of litigation and expediting the administration of the law.[48] The party upon whom the request for admission is served, is bound to serve upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either deny or admit those matters, otherwise failure to do so will operate as an implied admission of such matters.[49]

III. ACTIONS, ORDERS AND JUDGMENTS.

A. DISMISSAL OF ACTION FOR FAILURE TO PROSECUTE.

When the plaintiff fails to appear at the time of the trial, or to prosecute his action for an unreasonable length of time, or to comply with the Rules of Court or any order of the court, the action may be dismissed upon motion of the defendant or upon the court's own motion.[50] The plaintiff must exert reasonable efforts to have his case expeditiously tried and determined. In the cases of *Elser Inc., et al. v. Macondray & Co. Inc.*,[51] and the *Automobile Ins. Co. v. Macondray & Co. Inc.*,[52] it was held that while the deputy clerk of court has the duty to set cases for trial *motu propio* under the Rules of Court,[53] yet the plaintiffs in these cases are not relieved from their obligation to exercise due diligence in having said cases set for trial. When four years have elapsed from the time of the institution of the cases without efforts from the plaintiffs to have the cases disposed of, the dismissal of said cases is proper for failure to prosecute.

B. ADJOURNMENTS.

The matter relative to the postponement of a trial lies generally within the discretion of the court and such discretion should not be interfered with unless a grave abuse of discretion is shown to have been committed. In the case of *Dimayuga v. Dimayuga*,[54] it was

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[48] I MORAN, *op. cit.* note 23, at 536.
[49] Motor Service Comp., Inc. v. Yellow Taxicab Co., Inc., et al., G.R. No. L-7063, March 29, 1955.
[50] Rule 30, § 3, Rules of Court.
[51] G.R. No. L-5325, Jan. 19, 1955.
[52] G.R. No. L-5326, Jan. 19, 1955.
[53] Rule 31, §§ 1-3.
[54] G.R. No. L-6740, April 29, 1955.

held that a party moving for postponement should be in court on the day set for trial if the motion is not acted upon favorably before that day. He has neither the right to presume that his motion for postponment would be granted nor the right to rely on the liberality of the court or on the generosity of the adverse party.

Likewise in *Gayan v. Ubaldo and Ubaldo* [55] it was ruled that the defendants had no right to assume that their motion for continuance would be granted, for continuances are granted for good cause alleged and proved and not merely at the will of either or both of the parties to the case. The court is not guilty of abuse of discretion for refusing to grant continuance where it appears that there had already been two prior postponements granted both at defendants own instance and that the last motion for postponement, though sent five days before the date set for trial, did not conform to the Rules and gave no notice to the adverse party or counsel and that on the third motion for postponement the only ground alleged therein was that the parties were on their way to an amicable settlement the truth of which the opposing counsel denied.

C. CONSOLIDATION OF CASES.

The power of the court to order the consolidation of cases involving a common question of law or fact is inherent [56] as well as discretionary. The Supreme Court said in the case of *Philippine Air Lines, Inc., et al. v. Teodoro, et al.*,[57] that when separate cases are pending before different branches of the same court, although they may involve the same questions of law or of fact, mandamus will not lie to compel one judge to transfer the case before him to the other judge for joint hearing. In the first place Section 1 of Rule 32 of the Rules of Court [58] grants discretion to the judge. In the second place said action must be understood to refer to the consolidation of hearing of two or more cases which are before the same judge, not when the cases are pending before different courts or different branches of the same court. In the latter contingency, none of the judges involved has control over the case or cases pending before the other court or judge. Similarly, neither of them may, in effect, impose, upon the other judge or court the duty to hear and

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[55] G.R. No. L-7650, Dec. 28, 1955.

[56] I MORAN, *op. cit.* note 23, at 655.

[57] G.R. No. L-6698, Aug. 30, 1955.

[58] § 1, Rule 32 says, "When actions involving a common question of law or of fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

decide the case pending before the latter, jointly with the case originally belonging to the former.

D. HOW JUDGMENTS AND ORDERS RENDERED.

In the case of *Padilla v. Jordan* [59] the trial judge issued an order granting a motion to dismiss in general terms without making any finding of facts. The order was attacked on the ground that it did not state findings of fact, thereby violating the Constitution.[60] It was ruled that this contention is unmeritorious for the Constitutional provision applies only to decisions as distinguished from orders or resolutions.[61] Besides, observed the Court, the order having been issued on a motion to dismiss, it is assumed that the facts are those related in the complaint, plus those alleged in the motion which are impliedly or expressly admitted by plaintiff or are judicially noticed. And the applicable legal principles are obviously those cited in the carefully prepared motion of the defendants.

The Court has ruled in *Del Rosario v. Villegas* [62] that a judgment should state the precise amount for which it is rendered and not leave it to be ascertained by calculation; that a judgment for a sum to be thereafter ascertained by a ministerial officer is erroneous, except where the reference is merely to calculate and state an amount already definitely fixed by the data given in the judgment. Accordingly, the judgment of the lower court in the case of *Rubios and Muñoz v. Reolo, et al.*[63] which directs the sheriff to levy "70% of the harvest," is defective. The judgment requires the reception of evidence as to the total amount of the harvest (which the decision does not state) and the use of judicial discretion in passing upon the merits of such evidence. Being judicial in nature, such process lies outside the powers of the sheriff.

E. JUDGMENT BY DEFAULT.

The statutory period for the filing of an answer in the Courts of First Instance is within 15 days after service of summons.[64] Nevertheless, an answer filed out of time may still be admissible dep-

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[59] G.R. No. L-8494, Dec. 22, 1955.

[60] Article VIII, § 12 which provides: "No decision shall be renedered by any court of record without expressing therein clearly and distinctly the facts and the law on which it is based."

[61] Rule 35, § 1, contains a similar provision requiring all judgments determining the merits of cases to state clearly and distinctly the facts and the law on which it is based.

[62] 49 Phil. 634 (1935).

[63] G.R. No. L-7803, April 22, 1955.

[64] Rule 9, § 1; Rule 12, § 4. In the case of a defendant foreign corporation, the period is within thirty (30) days after receipt of summons.

ending on the circumstances of each case. Thus in the case of *Castañeda v. Pestaño*,[65] although the answer was filed 52 days after service of summons, sufficient facts were found to exist warranting its admission. In that case, the defendant was prevented by illness from consulting a lawyer about her case within the period fixed by law for answer. As soon as she got well she wasted no time in putting her case in the hands of an attorney who in turn filed an answer promptly enough. The plaintiff, on the other hand, was not particularly diligent in the exercise of her rights. She moved to have defendant declared in default only more than a month after the statutory period for the filing of the answer had expired; defendant filed her answer the very next day after plaintiff's motion for default. Hence no prejudice could have been caused to plaintiff by the admission of defendant's answer, since the latter had not yet been declared in default and plaintiff had not yet presented her evidence on the merits. In addition, it appears that defendant had a good and valid defense to plaintiff's action, so that the lower court should have been liberal in admitting her answer.

1. Distinguished from judgment after ex parte trial.

A judgment by default is one that is rendered under Section 6 of Rule 85, if the defendant fails to answer within the time specified in the Rules. A defendant who answered but fails to appear at the trial cannot be declared in default but the trial may proceed without him.[66] And where a party is duly notified of the trial and fails to attend it without sufficient cause, he cannot thereafter claim that he was deprived of his day in court.[67] Where, however, the notice of hearing was furnished the party within such time that the party cannot properly prepare for trial, an order dismissing the case for failure of the party to appear is null and void for the party is deprived of his day in court.[67a]

F. SUMMARY JUDGMENTS.

Summary judgment is one of the methods devised for a prompt disposition of civil actions wherein there exists no genuine controversy [68] and the moving party is entitled to a judgment as a matter of law.[69] A summary judgment should not be granted unless the

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[65] G.R. No. L-7623, April 29, 1955.

[66] Go Chanco v. Roldan Sy Changco, 18 Phil. 405 (1911); Cababan v. Weissenhagen, et al., 38 Phil. 804 (1918); Villar v. Paderanga, G.R. N. L-7687, Sept. 28, 1955; Santos v. Manila Elec. Co., G.R. No. L-7735, Dec. 29, 1955.

[67] Villar v. Paderanga, *supra* note 66.

[67a] G.R. No. L-8446, Sept. 19, 1955.

[68] I MORAN, *op. cit. supra* note 23, at 727.

[69] Rule 36, § 3.

facts are clear and undisputed, and if there should be any controversy upon any question of fact there should be a trial of the action upon its merits.[70] In *Ibañez, et al. v. North Negros Sugar Co., Inc., et al.*,[71] it was ruled that a motion for summary judgment can only be entertained where there are no questions of fact at issues or where the material allegations of the pleadings are not disputed. It is erroneous for the trial court to render summary judgment in the face of an opposition to such motion where the issues involved are controversial in nature and the allegations in the pleadings remain without support.

Ordinarily the motion for summary judgment must be accompanied by supporting affidavits.[72] Where, however, the motion for summary judgment is under oath, and a party by his failure to answer his opponent's request for admission had admitted all the material facts necessary for judgment against him the necessity for accompanying affidavits becomes superflous and the motion cannot be considered fatally defective. For depositions or admissions of parties are still better than and may be used instead of affidavits.[73]

G. NEW TRIAL.

May new trial be granted on the ground that the trial court delegated the reception of evidence to the clerk of court? Not necessarily so, said the Supreme Court in *Gayon v. Ubaldo and Ubaldo*.[74] Where no showing has been made that the clerk of court committed any error in the performance of the work entrusted to him or that the court did not make a correct appreciation of the evidence because it was received by another person, the error alleged is non-prejudicial[75] and should be no ground for a re-trial.

In *Nicholas and San Jose v. Castillo and Nael*,[76] a petition for certiorari was applied for to annul the decision of respondent Court of Industrial Relations on the ground that said decision is based only on a portion and not in the entirety of the evidence on record. In denying the writ prayed for the Court explained that it is a settled doctrine that where the relief sought for is obtainable only by application in the court of the original proceedings and it has not there

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[70] I MORAN, *op. cit. supra* note 23, at 737-38.

[71] G.R. No. L-6790, March 28, 1955

[72] Rule 36, §§ 1 & 2.

[73] Motor Service Co., Inc. v. Yellow Taxicab Co., Inc., et al., G.R. No. L-7063, March 29, 1955, citing I MORAN, *op. cit.* 727.

[74] G.R. No. L-7650, Dec. 28, 1955.

[75] To entitle a party to a new trial, the causes for new trial enumerated in § 1 of Rule 37 must have materially affected the substantial rights of said party.

[76] G.R. No. L-8129, July 25, 1955.

been applied for, the writ shall be denied. This means that the attention of the lower court should first be called to the supposed error and its correction asked for on a motion for reconsideration.[77] No motion for reconsideration was ever filed by petitioners in the court below, calling its attention to the alleged errors and irregularities now raised in this petition, to give it an opportunity to correct such errors and irregularities, if indeed any were committed.

In *Valerio v. Hon. B. Tan*,[77a] it was held that where the judgment or order subject of a motion for reconsideration is null and void as when the party has been deprived of his day in court through no fault or negligence on his part and because no notice of hearing was furnished him in advance so as to enable him to prepare for trial, no showing of merit is necessary to support the motion for reconsideration. An affidavit of merit is not needed.

H. RELIEF FROM JUDGMENTS.

1. When petition filed.

A petition to set aside a judgment, order or other proceeding must be filed within sixty days after the petitioner learns of such judgment, order or proceeding to be set aside and not more than six months after such judgment or order had been entered or such proceeding taken.[78] According to the case of *Gana v. Abaya and Gana*,[79] these periods are not extendible. Although the petition for relief is filed within 60 days after petitioner learned of the order, judgment or proceeding complained of, if it is filed outside of the six-month period, the petition shall be denied.

And according to *Rafanan v. Rafanan*,[79a] a motion for reconsideration of an order complained of does not suspend the running of the sixty-day period within which a petition for relief against such order may be filed under Rule 38. Considering the purpose behind it, it was explained, the period fixed by Rule 38 is never interrupted and never subject to any contingency or condition. "The remedy allowed by this Rule is an act of grace, as it were, designed to give the aggrieved party another and last chance. Being in the position of one who begs, such party's privilege is not to impose conditions, haggle or dilly-dally, but to grab what is offered him." [80]

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[77] A motion for reconsideration is a motion for new trial, for it can have no basis other than the grounds for new trial. I MORAN, *op. cit.*, *supra* note 23, at 766.

[77a] G.R. No. L-8446, Sept. 19, 1955.

[78] Rule 38, § 3.

[79] G.R. No. L-3106, Dec. 29, 1955.

[79a] G.R. No. L-7795, Dec. 24, 1955.

[80] Citing Palomares v. Jimenez, G.R. No. L-4513, Jan. 31, 1955.

Justice Moran says that if the ground of complaint is lack of notice, the proper remedy is to seek relief under Rule 38.[81] But in the case of *Lagula v. Casimiro* [82] where a motion to set aside an order of the lower court on the ground of lack of authority to issue it, was filed more than 10 months after the order was issued, the Supreme Court overruled the objection to the motion. Rule 38, it said, is inapplicable to the movants for the reason that they had never been made parties to the proceedings. That Rule applies only when the one deprived of his right is a party to the case. It does not apply to one who was never made a party for lack of the requisite notice.

2. When remedy not available.

May relief from judgment of an inferior court be obtained in the Court of First Instance under Rule 38, section 1, if that same relief was already denied in the inferior court and no appeal was taken from the order of denial? This was the point at issue in *Santos v. Manila Electric Co.*[83] In this case, defendant's counsel who had previously appeared to file a motion for a bill of particulars but who failed to appear on the date set for hearing filed a motion in the municipal court to have that court's judgment set aside; the motion was denied. Defendant's counsel instead of appealing the case, allowed the period for appeal to elapse and then filed a petition for relief in the Court of First Instance.

Held: The remedy under Rule 38 is of equitable character and is allowed only in exceptional cases: where there is no available or other adequate remedy. Here, appeal from the adverse judgment of the municipal court was an adequate remedy of which petitioner could have availed himself. It was a more expeditious remedy since it would have immediately and without much ado vacated the judgment of the municipal court with petitioner free to do in the Court of First Instance what they omitted to do in the inferior court including the presentation, in the trial *de novo*, of evidence that was not there presented due to their failure to attend trial. To sustain the instant petition would result in reviving the right of appeal which was lost, not because of any excusable negligence, but because of an error of law on the part of counsel. As to the contention that the counsel was misled into believing that appeal was not available by reason of the fact that the municipal judge styled his judgment as one of default [84] this was disposed of by the Supreme Court by saying

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[81] I MORAN, *op. cit.* note 23, at 775, citing Ongsiako v. Natividad, 45 O.G. 229 (1949).

[82] G.R. No. L-7852, Dec. 17, 1955.

[83] G.R. No. L-7735, Dec. 29, 1955.

[84] The defendant could not be declared in default because he appeared before the muncipal court to present a bill of particulars. The judgment rendered by this

that the fact that a party was prevented from making his defense at law or by a mistake of law or by reason of mistaking or misunderstanding his rights in the premises constitutes no ground for equitable relief and this is true even when the mistake is due to an erroneous statement made by the trial judge. Likewise relief will not be granted where the loss of the remedy at law was due to a mistaken mode of procedure.

Parenthetically, it should be noted in connection with the foregoing case, that because of his lawyer's previous appearance defendant was not in default and therefore appeal was available to him.

In *De la Paz v. Biring, et al.*,[85] it was likewise ruled that if the adverse party does not appeal from the order denying a motion to have the judgment set aside, he is precluded from questioning the validity of said judgment and he cannot bring an action to annul the same.

3. Excusable negligence and affidavit of merit.

The granting of a petition to set aside a judgment or order on the ground of mistake or excusabble negligence is addressed to the sound discretion of the court.[86] Whether or not excusable negligence exists to afford relief from a judgment, order or proceeding depends mainly on the impressions on the court created by the facts of the case. Thus where it appears that the employee who was commissioned one morning to file the answer which the attorney for the defendant had prepared on time was suddenly taken ill at home early in the afternoon of that day and though she failed to file the answer as directed she did not inform the attorney about it until it was too late, the petition for relief may be granted. The attorney's omission to make inquiry whether the answer was filed or not may be regarded as mere inadvertence or at most an excusable negligence, for as he had no knowledge of the employee's sickness, he was justified in assuming that the employee had filed the answer as directed. Furthermore the verified petition shows that the defendant has a meritorious defense.[87]

On the other hand, the fact that the defendant's counsel was appointed Undersecretary of Foreign Affairs nineteen days after receiving notice of the hearing and the fact that the days that followed were such busy days because of the voluminous important

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court was one made after an *ex parte* trial in the absence of the defendant who did not appear for the trial.

[85] G.R. No. L-6625, March 31, 1955.

[86] Tecson v. Benjamin, et al., G.R. No. L-5233, Sept. 30, 1953; Bustamante v. Alfonso, G.R. No. L-7778, Dec. 24, 1955; Palileo v. Cosio, G.R. No. L-7667, Nov. 28, 1955.

[87] Bustamante v. Alfonso, *supra* note 86.

official business he had to attend to that the date of the trial escaped his memory, do not sufficiently warrant the granting of relief. Considering the stature, ability and experience of defendant's counsel and the fact that he was given almost one month's notice before the date set for trial, the negligence cannot be considered excusable.[88]

In one case [89] the defendant filed a motion for reconsideration and new trial, alleging that its failure to answer was due to excusable neglect and that it had a cross-claim against its co-defendant. The motion was denied by the lower court because it did not contain an affidavit of merit showing that if a new trial were granted the defendant would have a good defense against the plaintiff. The surety company (defendant) subsequently filed another motion for reconsideration, this time alleging that it had a good defense against the plaintiff. *Held:* The two motions even when taken together cannot be considered as a petition for relief under Rule 38 because of the fatal defect of lack of an affidavit of merit. It is necessary that a petition for relief under said rule must be accompanied by an affidavit of merit showing that petitioner has a valid cause of action or defense. The first motion did not comply with this requisite, because although supported by an affidavit explaining its failure to answer, it contained no sworn allegation of a valid defense against the plaintiff. The fact that defendant had a cross-claim against its co-defendant does not necessarily mean he has a good defense to the plaintiff's cause of action. As to the second motion for reconsideration it contains an allegation that it has a valid defense against the plaintiff but the allegation is not verified.

Since the spirit of the Rules of Court is that all available grounds for relief should be invoked at once [90] the petition for relief shall be denied if the petitioner did not set up in his previous motion for reconsideration the ground of excusable negligence[91] or the fact that he has a valid defense which was already in existence and available.[92]

I. EXECUTION, SATISFACTION AND EFFECT OF JUDGMENTS.

1. Execution pending appeal.

In *Western Mindanao Lumber Co., Inc., v. CIR, et al.*,[93] it was explained that it is due to the unavoidable delays met in appeals that

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[88] Palileo v. Cosio, *supra* note 86.

[89] Price Stabilization Corp. v. Judge of CFI, et al., G.R. No. L-7959, May 30, 1955. For a case where an affidavit of merit is not necessary, See Valerio v. Tan, *supra* note 77a.

[90] Sawit v. Roda, 73 Phil. 310 cited in Rafanan v. Rafanan, G.R. No. L-7795, Dec. 24, 1955.

[91] Rafanan v. Rafanan, *supra* note 90.

[92] Price Stabilization Corp. v. Judge of CFI, et al., *supra* note 89.

[93] G.R. No. L-8158, Sept. 23, 1955.

the law has devised the execution pending appeal provision,[94] a positive remedy against the delay of justice. The Court pointed out that in ordinary litigations not involving the daily bread or the means of livelihood of litigants, immediate execution of judgment is expressly authorized in the discretion of the judge.[95] A reinstatement of a laborer by its very nature requires immediate execution both for the welfare of the laborer, whose daily bread comes from his daily labor and for the employer so that he may promptly adjust his business to the new situation created by the reinstatement.

There is no abuse the Court said in *People's Bank & Trust Co., Inc. v. Judge of the CFI, et al.*,[96] in ordering the immediate execution of an order directing the continuance of the payment of monthly allowances for the necessary support of a widow pending appeal from such order, particularly if it is alleged that she needs the money being sick.[97] "The element that gives validity to an order of execution is the existence of the good reasons if they may be distinctly found somewhere in the record," and "the filing of bond by the successful party is a good reason for ordering execution." [98]

In *Sambrano, et al., v. De Castro, et al.*,[99] appellants filed a motion to lift the writ of execution issued pending appeal. The lower court granted the motion to lift the execution on the condition that the petitioners file a ₱28,000 bond. Notwithstanding the fact that the first bond which was filed was defective and the subsequent bond contained false statements, the Supreme Court held that the lower court committed a grave abuse of discretion in not suspending the execution proceedings under the writ of execution. It should have suspended the same, the reasoning went along, knowing that it had granted stay of execution on the filing of a supersedeas bond in the amount required by it, and although the petitioners thrice failed to file a satisfactory bond, it was perfectly possible and feasible for them to file one to the satisfaction of the court. What is more important, when the trial court granted the lifting of the writ of execution, said writ was set aside or at least suspended so that there was no execution valid and effective under which the certificate of

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[94] § 2, Rule 39.

[95] § 2, Rule 39; § 8, Rule 72; Art. 1674 Civil Code.

[96] G.R. No. L-7692, April 29, 1955.

[97] The matter involved, it was observed, is not really execution of orders pending appeal. The order to pay monthly allowances to the widow has long ago become final. The appeal interposed by the administrator herein referred to poses the question whether the allowances should be discontinued. Its petition to discontinue having been denied it should not be heard objecting to the continued enforcement of a final order by invoking regulations on execution of judgments pending appeal.

[98] The Court cited I MORAN, *op. cit. supra* note 23, at 792-93.

[99] G.R. No. L-7959, May 30, 1955.

convenience levied upon could be lawfully sold. While there was no error, the Court went further, in disapproving the supersedeas bonds, nevertheless, instead of being levied on execution said certificate of public convenience could well have been attached, for while the sale thereof would result in the paralysis of the company's operations, mere attachment would enable the owner to operate and even make money which may later on be levied upon.[100]

In *Antonio del Rosario v. Carlos Sandico, et al.*,[101] it was ruled that where an appeal is taken from the taxation for costs made by the clerk of court, the writ of execution for the payment of costs cannot be enforced until the appeal is finally disposed of. It is true that the decision wherein said costs were awarded had already become final, but this is not so with regard to the costs for the payment of which the law requires that certain steps be taken first, such as the assessment by the clerk of court and the appeal, if any, from that assessment to the court.[102] Unless these steps are taken the judgment as to costs cannot be executed.

Rule 41, Section 9, provides that "upon the filing of the notice of appeal and the approval of the appeal bond and the record on appeal, the appeal is deemed perfected and the trial court loses its jurisdiction over the case . . ." Accordingly, in *Abrasaldo, et al., v. Fernandez and Tagum Tillers' Co., Inc.*,[103] it was ruled that after approval of the record on appeal the lower court cannot order the execution of the judgment pending appeal. The former rule to the effect that, even after the perfection of an appeal, the trial court may, under certain circumstances, order the execution of the judgment upon the theory that trial courts notwithstanding an appeal retain jurisdiction to issue any such orders as may be necessary for the preservation of the rights of the parties and which do not affect the issues involved in the appeal and the execution of the judgment does not ordinarily change such issues, has been abandoned.[104]

2. Property exempt from execution.

Property which is being held by an officer of the court subject to its orders and specifically covered by an express order of the court is property in *custodia legis* and to reach them by alias writs of exe-

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[100] A certificate of public convenience is included in the term "property" in the broad sense of the word and is liable to execution (Raymundo v. Luneta Motor Co., 32 O.G. 565 cited in I TOLENTINO, COMMERCIAL LAWS OF THE PHILIPPINES 469 (rev. ed. 1952).

[101] G.R. No. L- 7077, July 30, 1955.

[102] See Rule 31, § 8.

[103] G.R. No. L-7940, May 30, 1955.

[104] The Court cited I MORAN, *op. cit. supra* note 23, at 796.

cution, it is necessary to secure permission from the court which holds them under custody.[105]

8. Third Party claim.

The Rules of Court provide that a purchaser of real property at an execution sale shall be substituted to and acquire all the rights, title, interest and claim of the judgment debtor thereto.[106] It follows said the Court in the case of *Potenciano, et al. v. Dineros and Sheriff* [107] involving land registered under the Torrens System, that if at the time of the sale the judgment debtor had no more right to or interest in the property because he had already sold it to another, then the purchaser acquires nothing. Such appears to be the case here, since the property had already been sold to plaintiff herein with the deed of sale having been properly registered in accordance with the Land Registration Act.

With respect to personal property the Rules provide that the sale thereof conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied.[108] In *Lara v. Bayona, et al.*[109] the following question was resolved: May the mortgagee object to the sale of the property, subject matter of a valid chattel mortgage, under a subsequent writ of execution? The answer is he cannot. The mortgagee has no ground for complaint inasmuch as the sale of the property could not affect his rights since the buyer acquires the property subject to such liens or encumbrances as existed thereon at the time of the execution or attachment. The contention that the trial court has no jurisdiction to quash the third party claim because said claim was filed with the sheriff and not with the court is untenable. The sheriff is an officer of the court who acted as such when he received the third party claim. In other words, insofar as necessary for the exercise of the inherent power of the court "to control, in furtherance of justice, the conduct of its ministerial officers" [110] and "to do all things reasonably necessary for the administration of justice," [111] said third party claim may be considered as filed with the court itself.

The third party claimant whose claim has been quashed is not entitled to a writ of certiorari or prohibition, since he has another plain, speedy and adequate remedy pursuant to Section 15 of Rule

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[105] Perez and Miranda v. Phil. Ready-Mix Co., Inc., et al., G.R. No. L-8370, May 28, 1955.
[106] Rule 39, § 24.
[107] G.R. No. L-7614, May 31, 1955.
[108] Rule 39, § 22.
[109] G.R. No. L-7920, May 10, 1955.
[110] Rule 124, § 5(d).
[111] III MORAN, COMMENTS ON THE RULES OF COURT 642 (rev. ed. 1952).

39 which states that nothing contained therein shall prevent the claimant from vindicating his claim to the property by any proper action. And in the two cases cited above, it was likewise ruled that the order dismissing the third party claim does not constitue a bar to the reinvidicatory action which said section 15 reserves to the claimant, and this is so although no appeal [111a] was taken from the order of dismissal.

4. Sale and right of redemption.

It was held in *Villar v. Paderanga,*[112] that section 19 of Rule 39 which provides that in sales of several known real properties under execution, said lots should be sold separately, does not apply to foreclosure of mortgages. A mortgage voluntarily constituted by the debtor on two or more parcels of land being one and indivisible the mortgagee has the right to have either or both parcels, jointly or singly, sold to satisfy the claim.

The principle was reiterated therein, that in foreclosure of mortgages under Rule 70, there is generally no *right of redemption* after the judicial sale is confirmed. There is only the *Equity of Redemption* consisting of the right to redeem the mortgaged property within the ninety-day period from the service of the order of foreclosure or even thereafter but before the confirmation of the sale.

5. Estoppel by judgment.

The effect of a judgment in personam or final order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing and under the same title and in the same capacity.[113] There is estoppel by judgment when there is identity of parties and subject-matter although the causes of action are different.[114] The following cases illustrate the principle of estoppel by judgment:

Samahang Magsasaka, Inc., v. Crua Guan, et al.[115] In an action for mandamus to compel the corporation to transfer certain shares of stock in its books, the Supreme Court made a finding that as between the mortgagee of several shares of stock and attaching creditors, the latter had priority of right. In a subsequent action for interpleader, involving the same shares of stock, the trial court declared that the mortgagee had the better right. On appeal to the

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[111a] No appeal is allowed. See Potenciano v. Dineros and Sheriff, *infra* note 139.

[113] G.R. No. L-7687, Sept. 28, 1955.

[113] Rule 39, § 44(b).

[114] I MORAN, *op. cit. supra* note 23, at 869.

[115] G.R. No. L-7252, Feb. 25, 1955.

Supreme Court the following questions arose: Can the Supreme Court make a ruling contrary to what it made in the previous case which involves the same facts, issues and subject matter? Can the lower court disregard said ruling, in disposing of the interpleader case? The answer to both questions is no. The decision in the mandamus action has the effect of law upon at least the same parties to both cases (the corporation and the mortgagee) and as such they cannot now oppose or dispute the effect and the validity of said decision by virtue of the principle of estoppel by judgment. With respect to the attaching creditors, parties in the second case, the same principle applies for though they were not parties in the original action, they were in effect made so because their different attachments were given as the main reason why the corporation refused the request to make the transfer of the shares on its books.[116]

Bancairen, et al. v. Diones, et al.[117] An action for reconveyance of real property on the ground of fraud was brought by A and B. The dismissal of this action based on the lack of cause of action and prescription may have the effect of estoppel with regard to A and B under the theory of prior judgment but the same cannot have that effect with respect to the other heirs who were not made parties in the first case and who came to know of the fraud sometime after the dismissal of the first case.

Pasilan v. Villagonza.[118] A final order denying a motion to set aside a judgment based on the ground of error on the movant's part bars the allegations of lack of authority to render the judgment and fraud from being raised in a subsequent action to annul said judgment under the principle of estoppel by judgment enunciated in par. (b) of section 44 of Rule 39.

6. What Deemed Adjudge.

That only is 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.[119] Where it appears that a motion to set aside a judgment on the ground of error was denied by an order of the court which expressly passed upon the allegation of error, this order constitute an express adjudication that the averred error did not exist.[120]

If in an action to recover a parcel of land on the ground that the contract between the parties was a true sale with *pacto de retro,*

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[116] Since the first decision is favorable to them the creditors do not oppose it.
[117] G.R. No. L-8013, Dec. 20, 1955.
[118] G.R. No. L-7331, May 6, 1955.
[119] Rule 39, §45.
[120] Pasilan v. Villagonza, *supra* note 118.

the inadequacy of the price was not then raised, it was a matter which could have been raised in such litigation and was necessarily included therein.[121]

7. Judgment by Consent.

In the case of *Manila Railroad Co. v. Arzadon*,[122] it was explained that "a judgment by consent of the parties is more than a mere consent *in pais;* having the sanction of the court and entered as its determination of the controversy, it has all the force and effect of any other judgment, being conclusive as an estoppel upon the parties and their privies."

The effect of this kind of judgment was further explained in *Miranda v. Tiangco, et al.*[123] The Court said it is a final judgment on the merits and is conclusive between the parties, not only as to the questions on which the parties made stipulattion but also as to any other possible issue which the parties could have raised in the case.[124] Said judgment is conclusively presumed as well.[125] Any party to the case wherein that judgment was rendered may not therefore impugn it in a subsequent action brought for the purpose of annulling said judgment.

8. Power of Court to Amend Judgment.

Another point was raised in this case contained in the contention that after the judgment has become final, the parties may not enter into another agreement in relation thereto. This contention, the Court said, is the result of confusing the jurisdiction over the judgment and jurisdiction over the case. There is a difference between these two concepts in the law of procedure: jurisdiction of the court over its judgment. to change, alter or modify it and its jurisdiction over the case to enforce said judgment. The former terminates when the judgment becomes final; the latter continues even after the judgment has become final for the purpose of the execution and enforcement of the judgment. The former is governed by Rule 39, Section 1; the latter by Rule 39, Section 6.

Furthermore, as was held in *Ocampo v. Sanchez and Uy*,[126] which reiterated the principle laid down in *De la Costa v. Cleofas*,[127] when after judgment has been rendered and the latter has become final, facts and circumstances, such as the dealings and agreement

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[121] Besilario v. Vda. de Zulueta, G.R. No. L-8196, Dec. 28, 1955.
[122] 20 Phil. 452 (1911).
[123] G.R. No. L-7044, Jan. 31, 1955.
[124] Rule 39, § 44(b).
[125] Rule 123, § 68(d).
[126] G.R. No. L-6933, Aug. 30, 1955.
[127] 67 Phil. 686 (1939).

of the parties subsequent to the judgment, render its execution impossible or unjust, the court has the power to modify or alter the judgment so as to harmonize it with justice and the facts upon petition of the interested party.

9. Mutual Quit Claim of Judgment.

In *Escarilla v. Hon. R. Ibañez*,[128] a mutual quit claim or renunciation deed was purported to have been entered into between the parties respecting a judgment on a cross-claim. In refusing to recognize the validity of this quit claim deed the Supreme Court reasoned that since it was entered into long before there was a final judgment, the releasing party was not in a position to know, exactly what he was supposedly releasing the adverse party from and they were therefore merely speculating on what the final decision would be. Courts do not look with favor on that kind of transaction, especially when the parties thereto later expect and call upon the courts to enforce them. However, under ordinary circumstances there can be no objection to parties litigants entering into transactions, agreements or compromises regarding a final judgment, for or against them, especially when they are appraised of the terms of said decisions.

IV. APPEALS.

A. PERIOD OF APPEAL.

In the case of *Garcia v. Santico*,[129] the Court ruled that it is erroneous for the trial court to count the date of the period within which to perfect an appeal from the date of the denial of the motion for reconsideration filed by the appellants. In accordance with section 3 of Rule 41 the period of appeal begins to run from the notice of the judgment, deducting therefrom the time during which the motion for reconsideration was pending.

However in *Valerio v. Tan*,[130] it was said that a motion for reconsideration or to set aside a judgment on the ground that the evidence was insufficient to justify the decision, or that it is against the law, if it is merely *pro forma*, does not interrupt the period of appeal; whereas a motion for reconsideration which is not *pro forma* suspends such period for appeal. It has been held that a motion for reconsideration is *pro forma* when it does not specify the findings or conclusions in the judgment which are not supported by the evi-

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[128] G.R. No. L-7710, June 30, 1955.
[129] G.R. No. L-7383, May 27, 1955.
[130] G.R. No. L-8446, Sept. 19, 1955.

dence or which are contrary to law, but merely makes reference to the contents of a memorandum that had already been considered by the respondent court before rendering its judgment.[131]

Neither is the period for appealing interrupted by a second motion for reconsideration when the new ground alleged therein already existed, was available and could have been alleged when the first motion to reconsider was filed.[132]

B. JUDGMENT OR ORDERS SUBJECT TO APPEAL.

No interlocutory or incidental judgment or order shall be the subject of appeal until final judgment or order is rendered for one party or the other.[133] An order or a judgment is final when it puts to an end the litigation [134] finally disposing of the same so that nothing more need be done with it in the trial court.[135] On the other hand, an order or a judgment which does not dispose of the case completely but leaves something to be done upon the merits, is merely interlocutory.[136]

Respecting this matter the following rulings are pertinent: An order denying a petition seeking to set aside a court order on the ground of fraud, the denial being based on the ground that the petition is filed beyond the period required by Rule 38 is appealable.[137]

Only final orders of the Court of Industrial Relations are appealable. Although the law permitting appeals to the Supreme Court from "any order" of the Court of Industrial Relations does not in any line employ the word "final," it is reasonable to suppose that Congress did not intend to disregard such well-known rule of orderly procedure which is based partly upon the convenience of the appealing party itself, in the sense of forestalling useless appeals.[138]

A resolution of the CIR *in banc* setting aside the decision of one of the members thereof on the ground that said decision was premature and staying rendition of judgment on the matter until

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[131] Arnaldo, et al. v. Judge Bernabe, et al., G.R. No. L-2995, Sept. 22, 1950. See I MORAN, *op. cit.*, 905-906; also Rule 37, § 2.

[132] Mallare and Pañgilinan v. Panahon, G.R. No. L-8094, Dec. 22, 1955.

[133] Rule 41, § 2.

[134] Olsen & Co. v. Olsen, 48 Phil. 238 (1925).

[135] Mejia v. Ammurong, 4 Phil. 572 (1905); Insular Gov't. v. The Roman Catholic Bishop of Nueva Segovia, 17 Phil. 487 (1910); People v. Macaraig, 54 Phil. 904 (1929).

[136] I MORAN, *op. cit. supra* note 23, at 895.

[137] Julieta Tambunting de Tengco v. Hon. R. San Jose, et al., G.R. No. L-8162, August 30, 1955; Buenaflor v. De Leon and Olaguer, G.R. No. L-7583, May 25, 1955.

[138] Phil. Long Distance Telephone Employee's Union v. Phil. Long Distance Telephone Co., et al., G.R. No. L-8138, Aug. 20, 1955.

the presentation of further evidence respecting a supplemental motion, is merely interlocutory and therefore not appealable.

In the case of *Potenciano v. Dineros and Sheriff*,[139] it was held that an appeal from the order of the court dismissing a third party claim to property levied on execution is not proper. The appeal that should be interposed if the term appeal may properly be employed is a separate reinvidicatory action against the execution creditor or the purchaser of property after sale at public auction or complaint for damages to be charged against the bond filed by the judgment creditor in favor of the sheriff.[140]

C. SUFFICIENCY OF APPEAL; RECORD ON APPEAL.

To take an appeal there must be served upon the adverse party and filed with the trial court within thirty days from notice of order or judgment, a notice of appeal, an appeal bond and a record on appeal.[141] The rule is well-setlled that the failure to file the appeal bond on time is fatal to the appeal even if the notice of appeal and record on appeal were filed on time.[142]

The Rules provide that the notice of appeal shall specify, among other things, the court to which the appeal is taken.[143] This rule is merely directory so that the failure of appellant to mention in his notice of appeal the court to which the appeal was being taken, is not fatal to the appeal. As an error in the court to which an appeal is made is not fatal to the appeals, so should failure to designate the court in the notice of appeal.[144]

Although Rule 41, Section 7 speaks of the power of the court to direct the amendment of the record on appeal by inclusions only, the authority of the court to order the exclusion from the record on appeal, of matter that is immaterial and unnecessary has been recognized as well.[145] And in the exercise of this power to direct the amendment of an appeal record by means of exclusion, trial courts have been warned to be cautious and sparing. In the case of *Jai-Alai Corp. v. Court and Luis Ching Kiat Being*,[146] the Supreme Court had occasion to repeat this warning. Matters which at first sight, it said, appear to be irrelevant, may in the course of the argument on appeal be found to be of value in the determination of the questions at

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[139] G.R. No. L-7614, May 31, 1955.
[140] See note 111a *supra*.
[141] Rule 41, §3.
[142] Mallare and Pañgilinan v. Panahon, *supra* note 132.
[143] Rule 41, §4.
[144] Valerio v. Hon. B. Tan, et al., G.R. No. L-8446, Sept. 19, 1955.
[145] Castro v. Court of Appeals, 42 O.G. 1821 (1946).
[146] G.R. No. L-7972, Jan. 24, 1955.

issue. The fear that the inclusion of the rejected pleadings and motions may cause the determination of the appeal to be unnecessarily involved, should yield to the advantage of enabling the reviewing court to have before it all matters necessary to a just determination of the questions submitted to it, thereby obviating possible remands or new trials.

D. PROCEDURE IN THE COURT OF APPEALS.

1. When Decision of Court of Appeals Becomes Final.

When does the decision of the Court of Appeals become final? This was the question raised in the case of *Cueto v. Collantes, et al.*[147] Once a decision is rendered by the Court of Appeals, the Court said, a party may appeal therefrom by certiorari by filing with the Supreme Court a petition within 10 days from the date of entry of such judgment.[148] The entry of judgment is made after it has become final, i.e., upon the expiration of 15 days after notice thereof to the parties. But as Chief Justice Moran has said, "such finality is subject to the aggrieved party's right of filing a petition for certiorari under this section" which means that "the Court of Appeals shall remand the case to the lower court for the execution of its judgment, only after the expiration of 10 days from the date of entry of such judgment, if no petition for certiorari is filed within that period." [149] It would therefore, the Court concluded, appear that the date of entry of the judgment of the Court of Appeals is suspended when a petition for review is filed to await the final entry of the resolution or decision of the Supreme Court. In this case the original decision provided that the appelle's right of redemption may be exercised within 90 days from the date said decision becomes final and the same was appealed to the Court of Appeals where it was affirmed and final judgment was entered on July 8, 1953. Within the reglamentary period a petition for review was filed with the Supreme Court which was dismissed and entry of final judgment was made on August 7, 1953. The period of redemption began to run from August 7, 1953 and not from July 8, 1953.

2. Period for Filing of Briefs.

The general rule is that extensions of the time for the filing of briefs will not be allowed.[150] The Court of Appeals passed a resolution adopting the policy of allowing only one extension of time for the filing of briefs.[151] In *Rago, et al. v. Court of Appeals and Rago,*

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[147] G.R. No. L-7483, July 25, 1955.
[148] Rule 46, § 1.
[149] I MORAN, *op. cit. supra* note 123, at 950.
[150] See Rule 48, § 16.
[151] Resolution of the C.A., dated June 27, 1951.

et al.,[152] the Supreme Court ruled that this resolution is only directory and not mandatory. Moreover, Section 16 of Rule 48 (which applies both to the Court of Appeals and the Supreme Court) indicates that the court may grant as many extensions as may be asked if good and sufficient reasons are shown.

E. PETITION FOR REVIEW.

In a petition for review, only question of law may be looked into upon the theory that the findings by the lower court on the weight of the evidence are conclusive except when such findings are not supported by substantial or credible proof.[153] It is necessary, therefore, for the Court of Industrial Relations, to state the facts on which its rulings are based for unless this is done, the reviewing court cannot properly fulfill its duty of applying the law as may be warranted by the real facts.[154]

F. OTHER RULINGS.

In *Montilla v. Montilla*,[155] it was held that where both questions of law and of fact are raised on appeal in an election contest, the proper appellate court is the Court of Appeals and not the Supreme Court. The appellant is not bound by the orders of the court *a quo* given to the clerk of court, to transmit the records to the Supreme Court and he may move the Supreme Court to remand the appeal to the Court of Appeals even after the records of the case has been received by said court.

In *Tabiolo, et al. v. Marquez*,[156] it was ruled that the petitioners' negligent failure to file a motion for reconsideration in due time forfeited their right to question the findings of fact of the Court of Industrial Relations.

The case of *Secretary of Agriculture & Natural Resources, et al. v. Judge et al.*[157] holds that an appeal may be taken from the decision of the Secretary of Agriculture to a court of justice within 30 days from receipt of notice of the decision. In this jurisdiction, a motion for reconsideration filed with the Secretary merely suspends the period for appeal.[158] The period of appeal does not begin to run

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[152] G.R. No. L-7016, May 30, 1955.

[153] Rodriguez and Pizarro v. Mariano, G.R. No. L-6253, Jan. 31, 1955; Flores v. Pingol, G.R. No. L-7497, April 16, 1955; Tabiolo v. Marquez, G.R. No. L-7035, March 25, 1955.

[154] Rodriguez and Pizarro v. Mariano, *supra* note 153.

[155] G.R. No. L-5616, March 30, 1955.

[156] *supra* note 153.

[157] G.R. No. L-7752, May 27, 1955.

[158] This conclusion was arrived at by construing § 4 R.A. 739 with § 3, Rule 41 of the Rules of Court. For the interpretation of the latter provision see I MORAN, *op. cit.*, 907.

from the date of the denial of the motion for reconsideration on the principle that all administrative remedies must first be exhausted before recourse to the courts can be had against orders or decisions of administrative bodies. The right to appeal from the decision of the Secretary of Agriculture being statutory right, it can be invoked only in accordance with the manner which the Legislation has provided for the purpose.

This principle of exhaustion of remedies, according to the case of *Santiago v. Cruz* [159] applies only to an action taken by an administrative officer concerning public lands and not when it concerns private property.

PROVISIONAL REMEDIES

I. ATTACHMENT.

The party applying for an attachment must give a bond executed to the defendant that the plaintiff will pay all the costs which may be adjudged to the defendant and all damages which he may sustain by reason of the attachment if the court should finally adjudge that the plaintiff was not entitled thereto.[160] In the case of *Rocco v. Meads* [161] the plaintiff and the defendant attached each other's property, the latter upon his counter-claim. The defendant wanted to proceed against the attachment bond of the plaintiff for the satisfaction of the costs awarded in his favor which were in the nature of sheriff's fees for guarding plaintiff's property attached by defendant. In holding that the attachment bond was not liable, the Court gave the following reasons: Firstly, the liability attaches if the "plaintiff is not entitled to the attachment because the requirements entitling him to the writ are wanting" or "if the plaintiff has no right to the attachment because the facts stated in his affidavit, or some of them, are untrue." [162] But there is no finding in the decision of the court *a quo* or in that of the Court of Appeals, that the plaintiff was not entitled to the attachment. Without a finding to this effect no liability can be imposed upon the bondsman because his liability cannot extend beyond that which the law has fixed for him. Secondly, these costs represent the expenses that the defendant himself had incurred to enforce his counterclaim. They were not costs sustained by the defendant *by reason of the attachment* within the meaning of section 4, Rule 59. The phrase "by reason of the attachment" in this section applies to the costs as well as to the damages. Thirdly, when a surety

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[159] G.R. Nos. L-8271-72, Dec. 29, 1955.
[160] Rule 59, § 4.
[161] G.R. No. L-7750, April 29, 1955.
[162] Citing II MORAN, *op. cit. supra* note 8, at 21.

on an attachment bond executes the bond therefore, he does not guarantee that the plaintiff's cause of action is meritorious and covenant that he will be responsible for all the costs adjudged against his principal in case the action fails.[163]

II. INJUNCTION.

Following the general rule that a writ of injunction is not proper where its purpose is to take property out of the possession or control of one person and place the same in the hands of another, whose title has not been clearly established,[164] the Supreme Court in *Coronado v. Hon. B. Tan, et al.*,[165] ruled that it is improper to issue a writ of injunction on the strength of a legal proposition which is debatable. Therefore, the issuance of the writ of mandatory injunction transferring the right to operate a ferry to one person on the ground that he has a valid contract of lease and that the contract of lease of the opponent is null and void, which ground has not been clearly established, constitutes an abuse of discretion.

A claim for damages suffered by reason of the issuance of a preliminary injunction may be awarded only upon application in the principal action filed before the trial, or, in the discretion of the Court before entry of final judgment with due notice to the plaintiff and his surety or sureties, and after proper hearing and shall be included in the final judgment.[166] The remedy is exclusive and by failing to file a motion for the determination of the damages on time and while the judgment is still under the control of the court, the claimant loses his right to such damages.[167] In *Visayan Surety & Insurance Corp. v. Isaac Lacson, et al.*, it was held that if the judgment dissolving a writ of preliminary injunction contains no pronouncement against the surety for damages caused by the issuance of such writ, the defendant or the injured party, may ask for (and be given) opportunity to prove damages against the surety, provided such surety is notified and the decision has not yet become final.

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[163] The Court distinguished the instant case from the case of Macondray & Co. v. Bernabe and Ferrer, 67 Phil. 658 (1939) thus: In the first place, the costs in that case were being enforced against the defendant himself, whereas in the case at bar, the payment of the costs is being enforced not against a party (plaintiff) but against his bondsman, whose responsibility is limited to the terms and conditions of the bond. In the second place, the issuance of the attachment writ in this case was not found by the court to have been unlawful or without cause; there is no finding of fact that plaintiff was not entitled to the attachment prayed for.

[164] Asombra v. Dorado 36 Phil. 883 (1917); Wagan v. Sideco, 60 Phil. 685 (1934).

[165] G.R. No. L-6530, March 31, 1955.

[166] Rule 59, § 20, in connection with Rule 60, § 9.

[167] II MORAN, *op. cit. supra* note 8, at 81.

III. RECEIVERS.

Upon the perfection of an appeal the trial court loses its jurisdiction over the case, except to issue orders for the protection and preservation of the right of the parties which do not involve any matter litigated by the appeal.[168] The case of *Jocson v. Presbiterio, et al.*,[169] holds that although the case has been appealed and the appeal perfected, the Court of First Instance still has the power to hear and decide an application for the appointment of a receiver. The case may be regarded as yet pending in the lower court for the purpose of an application for a receiver. Although this does not mean that the court in which the main case is pending on appeal may not appoint a receiver [170] (it may in appropriate cases) such court should not exercise the authority if it is not provided with adequate resources and machinery for dealing with the situation presented by the appointment of a receiver and all the details connected therewith.

The procedure for the recovery of damages is similar to that in attachment, injunction, receivership and replevin proceedings.[171] Damages on account of the appointment without cause of a receiver, must be recovered in the same action in which the receiver was appointed and the question should be determined in the final judgment. In *Visayan Surety & Insurance Corp. v. Hon. B. Aquino*,[172] where the plaintiff filed a motion, only after the judgment of the Supreme Court had already become final, praying for opportunity to prove damages that had been caused them by the non-appointment of a receiver, said plaintiff had lost their right to such damages. A supplemental complaint in the Court of First Instance and an application in the Supreme Court should have been filed before the judgment in either court was rendered or had become final, for the damages (in the nature of rentals) which fell due while the case was pending in those courts, so that the damages that may be awarded could have been included in their judgment. Section 17 of Rule 59 [173] which plaintiffs invoke is applicable to attachment bonds only and has not been made applicable in case of receivership.

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[168] I MORAN, *op. cit. supra* note 23, at 915.

[169] G.R. No. L-7684, May 10, 1955.

[170] "One or more receivers of the property, real or personal, which is the subject of the action, may be appointed by the judge of the CFI in which the action is pending, or by a justice of the Court of Appeals, or of the Supreme Court . . ." Rule 61, § 1.

[171] Santos v. Moir, 36 Phil. 350 (1917).

[172] G.R. No. L-8107, April 29, 1955.

[173] Rule 59, § 17 provides, "If the execution be returned unsatisfied in whole or in part, the surety or sureties on any bond given pursuant to this rule to secure the payment of the judgment shall become finally charged on such bond, and bound

SPECIAL CIVIL ACTIONS

I. DECLARATORY RELIEF AND CERTIORARI.

A. DECLARATORY RELIEF IMPROPER REMEDY FOR DETERMINING CITIZENSHIP.

A person may resort to courts to compel the officials concerned to allow him to exercise his rights of citizenship but his citizenship cannot be determined in an action for declaratory relief or judgment. It is not the proper remedy or proceeding.[174] The petition does not involve any actual controversy or assert adverse claims, or present an actual issue which was ripe for judicial determination for there was nothing alleged therein that petitioners were being the subject of any action on the part of any government agency or official in connection with any claim, ordinance or statute. The proper procedure would have been to file a petition for naturalization with an alternative prayer for a declaration of their status as Filipino citizens.[175]

B. CERTIORARI.

The general rule is that certiorari will not be entertained where there is a remedy by appeal. However, exceptions have heretofore been made in several instances wherein the lower court acted without jurisdiction.[176]

II. QUO WARRANTO AND EMINENT DOMAIN.

A. QUO WARRANTO.

In *Gorospe et al. v. V. J. de Veyra and Angara,*[177] it was held that where the pleadings and the facts before the Court of First Instance disclose no prima facie case for quo warranto, and all the proper parties are not before the court, a preliminary writ of injunction restraining the respondent from discharging the duties of the office is improper as issued in abuse of discretion and excess of jurisdiction.

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to pay to the plaintiff upon demand the amount due under the judgment which amount may be recovered from such surety or sureties after notice and summary hearing in the same action."

[174] Azajar v. Ardales, G.R. No. L-7913, Oct. 31, 1955. In this case the petitioner applied for a parcel of land of the public domain which was opposed on the ground of citizenship disqualification. Hence, this petition.

[175] Pablo y Sen, et al. v. Republic, G.R. No. L-6868, April 30, 1955.

[176] Visayan Surety & Insurance Corp. v. Lacson, et al., G.R. No. L-7541, April 29, 1955.

[177] G.R. No. L-8408, Feb. 17, 1955.

B. EMINENT DOMAIN.

A cursory reading of Sections 4, 5 and 6 of Rule 69 discloses the steps to be followed, one after another, in condemnation proceedings from the institution thereof. The first step is the presentation of defendants of their objections and defenses to the right of the plaintiff to take the property for the use specified, which objections and defenses shall be set forth in a motion to dismiss. The second is the hearing on the motion and the unfavorable resolution thereon by the court. An adverse resolution on the motion to dismiss, if objections and defenses are presented, is required because the rule authorizes the court to enter an order of condemnation only if the motion to dismiss is overruled, or if no motion to dismiss had been presented. The second step includes the order of condemnation, which may be embodied in the resolution overruling the motion to dismiss. The third is the appointment of commissioners to assess the just compensation for the property. That the above steps must follow one another is evident from the provisions of the Rules as well as from the interrelation between the steps and the dependence of one upon the previous step. Thus no order of condemnation may be entered if the motion to dismiss has not been passed upon and overruled, and no assessment should be undertaken unless and until an order of condemnation has already been entered. The appointment of the commissioner without an order of condemnation having been previously entered is a deviation from the steps indicated by the rules and constitutes an irregular exercise of the judicial power amounting to an abuse of discretion.[178]

III. ILLEGAL DETAINER.

Under the law the justice of the peace courts and municipal courts have exclusive original jurisdiction over all cases of recovery of possession brought within one year from the unlawful deprivation or withholding of possession.[179] The case of *Rosario, et al. v. Carandang, et al.*[180] reiterates the well-settled rule that said courts have exclusive jurisdiction over forcible entry and detainer cases irrespective of the amount claimed therein as damages. It was also held that, on the principle that the allegations of the complaint and not the prayer determine the jurisdiction of the court, the prayer in the complaint asking that plaintiffs be declared owners of the land in

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[178] Nieto v. Hon. B. Ysip, G.R. No. L-7894, May 17, 1955

[179] Suarez and Suarez v. Giok Hong Que and Sandangan, G.R. No. L-7927, Nov. 18, 1955.

[180] G.R. No. L-7076, April 28, 1955.

question could not convert the action from one of forcible entry to an action for a declaration of ownership or quieting of title.

It was observed in the case of *Santos v. Vivas et al.*[181] that a demand is a pre-requisite to an action for unlawful detainer when the action is for failure of payment due or to comply with the conditions of his lease and not when the action is to terminate the lease because of the expiration of its term. A demand to vacate under Rule 72, Section 2 is indispensable in order to determine whether the tenant's possession has become illegal and the complaint is filed within one year after said demand. Such demand is jurisdictional and if none is made, the case falls within the jurisdiction of the Court of First Instance. But, as was held in *Price, Inc. v. Hon. E. Rilloraza, et al,*[182] the tenant would not be in default even in case of non-payment of the rentals, if the lessor had not fulfilled his obligations under the contract of lease. If such obligations of the lessor is the subject of a pending action for specific performance the justice of the peace should at least defer the hearing and determination of the unlawful detainer case until after rendition of judgment in the action for specific performance.

In *Chung Ben v. Co Bun Kim et al.*[183] it was ruled that although the trial court in its judgment may make no mention of a contract between the parties, if, from the record of the case, such a contract appears to exist, then said contract shall govern the time for payment of the rentals pending the appeal brought by the defendant. Unless payment is made according to the terms of the contract, the plaintiff shall be entitled to an immediate execution.

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[181] G.R. No. L-5910, Feb. 8, 1955.
[182] G.R. No. L-8253, May 25, 1955.
[183] G.R. No. L-7033, Nov. 29, 1955.