SURVEY OF 1957 SUPREME COURT DECISIONS IN CIVIL PROCEDURE

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For the year 1957, the Supreme Court promulgated a relatively few novel rulings on civil procedure. Majority of the cases merely reiterated previous doctrines handed down by the Supreme Court. Nevertheless, the rulings contained in these decisions are important for the attainment of well-defined laws on procedure or formalities before the court.

LIBERAL CONSTRUCTION OF THE RULES OF COURT

According to sec. 2 of Rule 1 of the Rules of Court, these rules shall be liberally construed in order to promote their object and to assist the parties in obtaining just, speedy and inexpensive determination of every action and proceeding. In the case of *Buena v. Judge Surtida, et al.*,[2] the Supreme Court held that the order of the lower court extending the period for perfecting appeal was not null and void although it was rendered after the expiration of the prescribed period. Motion for extension was filed on Jan. 5, 1954 or before the expiration of 30 days from the judgment which was promulgated on Dec. 8, 1953; hearing on said motion was held on Jan. 9 and the court, on Jan. 11 granted 15 days extension within which to file the appeal bond and the record on appeal. The Supreme Court said that the rule upholding the validity of the extension is in consonance with the provision on the liberal construction of the Rules of Court.

JURISDICTION AND VENUE

Jurisdiction over the subject matter may not be waived—Jurisdiction is conferred by law; it can not be acquired by the court by consent or submission of the parties. This is the ruling in *Enriquez, et al. v. Atienza.*[2] In the original cadastral case, Atienza prayed for the confirmation of her right under sec. 112 of Act 496 over certain parcels of land registered in the name of the petitioners therein. Registration was opposed. Subsequently, petitioners questioned the jurisdiction of the land registration court to determine the rightful owner of the land.

In deciding the issue of whether or not jrisdiction has been acquired by the lower court, the Supreme Court said that the proceedings under sec. 112 are summary in nature and allowed only when the issues need not be tried because they are so patently un-

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[1] G. R. No. L-9438, May 17, 1957.

[2] G. R. No. L-9986, March 29, 1957.

substantial as not to be genuine issues; they are filed in the original case in which the decree of registration was entered.[3] In the instant case only jurisdiction over the person was acquired, but not over the subject matter. The latter may not be waived.

Attorney's fees affect jurisdiction—Courts of First Instance shall have original jurisdiction in all cases in which the demand, exclusive of interest, of the value of the property in controversy amount to more than two thousand pesos.[4] While interest and cost do not affect jurisdiction, attorney's fees do.[5] Thus, in *Reyes v. Judge Yatco, et al.*,[6] where each separate action sought to recover ₱3,500, representing ₱2,000-promissory note, the rest for moral damages and attorney's fees, the Supreme Court sustained the jurisdiction of the CFI.

Venue of real action—Actions affecting title to, or for recovery of possession, or for partition or condemnation of or foreclosure of mortgage on real property shall be commenced and tried in the province where the property or any part thereof lies.[7] So that, in *Velarde, et al. v. Paez, et al.*[8] where the parcels of land subject matter of the action were located in Nueva Ecija, it was held that the venue of the complaint filed in the CFI of Manila was improperly laid. Even assuming that the action is *in personam*, and therefore must be commenced where the defendant or any of the defendants resides or may be found, or where the plaintiff or any of the plaintiffs resides, at the election of the plaintiff, still, the Nueva Ecija court has jurisdiction because both plaintiffs and defendants are residents of that province.[9]

Venue in inferior courts—Civil actions (except forcible entry and detainer actions regarding real property) in inferior courts shall be brought in the municipality where the defendant or any of the defendants resides or may be served with summons, when the place of execution of the written contract sued upon does not appear therein, or the action is not upon a written contract.[10] It appears in *Bautista v. Piguing, et al.*,[11] that a certain Lim sold on installment to a Mrs. Buencamino several furniture and dinner sets under the condition that ownership of the property will not pass to the vendee until the purchase price had been fully paid. Subsequently, Bautista brought an action against Mrs. Buencamino for a sum of money and her property, including the furniture in question was attached. Bautista posted a bond undertaken by the First National Surety & Assurance Co., to answer for any damages that the third party claimant (Lim) may suffer. A later decision in favor of Lim for the possession of the furniture could not be executed because it turned out that the personal property was already sold to Bau-

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[3] Citing Casilan v. Espartero, G. R. No. L-6902, Sept. 16, 1954.
[4] Sec. 44(c) R.A. 296 (Judiciary Act of 1948).
[5] Carlos v. Kiener Construction, Ltd., G. R. No. L-9516, Sept. 29, 1956.
[6] G. R. No. L-11425, Feb. 27, 1957.
[7] Sec. 3, Rule 5, Rules of Court.
[8] G. R. No. L-9208, April 30, 1957.
[9] Sec. 1, Rule 5, Rules of Court.
[10] Sec. 2(c), Rule 4, *id.*
[11] G. R. No. L-10006, Oct. 31, 1957.

tista in a public auction. Hence Lim filed an action in Quezon City for damages due to wrongful attachment. The petitioners moved to dismiss on the ground that venue was improperly laid because the indemnity bond was executed in Manila and therefore the respondent Judge of Quezon City had not acquired jurisdiction over them.

According to the Supreme Court, in as much as the action was not based on the indemnity bond nor in any contract between Lim and Bautista, venue was properly laid, because one of the defendants is a resident of Quezon City.

ACTIONS, PARTIES AND TRIALS

Splitting cause of action—A single cause of action cannot be split up into two or more parts so as to be made the subject of different complaints.[12] *Landahl v. Monroy*,[13] was held not to be falling within the prohibition of this rule. In this case, the defendant received from the plaintiff several articles for sale on different dates with the obligation to pay their value within a period of 30 days. An action was previously brought before the municipal court for the recovery of the account on the third set of articles. The present action is for the recovery of the two previous accounts. The defendant's contention that this is barred by the previous action was held to be without merit because the obligations are subject of different transactions.[14] It is significant that the Court relied on the findings that when the first action was instituted, vouchers covering the accounts involved in the second action have not yet been found and said vouchers became available after the institution of the first cause of action.

Joinder of causes of action is subject to rules on venue—Causes of action of one party against another may be joined but same is subject to the rules regarding venue and joinder of parties.[15] *In Mijares, et al. v. Piccio, et al.*,[16] the real properties subject matter of the action for annulment are situated in two different provinces, namely, Negros Occidental and Cebu; the sale and donation which were sought to be annulled were made to two different persons and there is nothing from which it may be inferred that the two defendants have common interest that may be joined in one cause of action. The Supreme Court ruled that there was a misjoinder of causes of action not only as regards venue but also regarding parties.

Joinder of causes of action to avoid multiplicity of suits—While the rule on joinder of causes of action was very strictly construed in the *Mijares* case, it was very liberally construed in *Monte v. Judge*

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[12] Sec. 3, Rule 2, Rules of Court.

[13] G. R. No. L-6991, Nov. 29, 1957.

[14] It should be noted that the Court did not categorically rule to be without merit the opinion of Moran (I MORAN, COMMENTS ON THE RULES OF COURT 19 (1952) that if upon the filling of the complaint, several obligations have already matured, all of them shall be considered as integrating a single cause of action and must all be included in the complaint, otherwise those that are not thus included are barred forever.

[15] Sec. 5, Rule 2, Rules of Court.

[16] G. R. No. L-10458, April 22, 1957.

Moya.[17] The plaintiff filed a complaint of replevin against certain Ortega and Caceres for an alleged impounding of certain trucks. To justify said impounding, the Fiscal filed a criminal charge. The accused were acquitted on ground of reasonable doubt. Monte now moved to include the Fiscal in the replevin case alleging as a second cause of action that the Fiscal filed the criminal charge upon inducement by the two defendants in order to evade responsibility. It was held that there is an intimate relation between the causes of action, namely, illegal impounding of the truck and malicious prosecution to justify the illegal impounding; both causes of action may be threshed out in a single proceeding in order to avoid multiplicity of suits.

Parties to an action; only natural or juridical persons may be parties in a civil action—In Recreation and Amusement Asociation of the Philippines v. City of Manila,[18] the plaintiff sought to restrain the Mayor of the City of Manila from enforcing ordinance 3628 limiting the operation and maintenance of a certain kind of machine on the ground that said ordinance is unconstitutional. Subsequent inquiries from the Securities and Exchange Commission and the Bureau of Commerce disclosed that the plaintiff is not registered and does not appear in the files of said office. So that, the plaintiff, not being a corporation created in accordance with law is not a juridical person and therefore does not have the capacity to sue.

Same; indispensable parties must be joined—According to the facts of *Cebu Port Labor Union v. States Marine Corp., et al.,*[19] a resolution dissolving the defendant corporation was duly registered in the Securities and Exchange Commission on Oct. 17, 1952. On Sept. 12, 1953, this petition for injunction was filed to stop the States Marine Corporation from awarding to another labor union the exclusive stevedoring contract entered into with Elizalde & Co. (former owner of the ship). The respondent questioned the jurisdiction of the court over its person because at the time of the action the vessel was already owned by Royal Lines, Inc. The Court ruled that the proper substitution or amendment of parties should have been made in order to conform to the provisions of secs. 1 and 2 of Rule 3.[20]

Even granting that the petitioner seeks to enforce the agreement entered into with Gotianuy (manager of Royal Lines, Inc. and also was the manager of States Marine, Corp.), the Royal Lines being indispensable should have been made a party to the action. Sec. 7 of Rule 3 provides that parties in interest without whom no final determination can be had of an action shall be joined either as plaintiffs or defendants.

The necessity of including the real party in interest was also emphasized in *Cruzcosa, et al. v. Hon. Concepcion, et al.*[21] In an

[17] G. R. No. L-10754, April 23, 1957.
[18] G. R. No. L-7922, Feb. 22, 1957.
[19] G. R. No. L-9350, May 20, 1957.
[20] Sec. 1 provides that only natural or juridical persons may be parties in a civil action; sec. 2 requires that every action must be prosecuted in the name of the real party in interest.
[21] G. R. No. L-11146, April 22, 1957.

action for ejectment brought by the respondent Mendoza, the petitioners who were co-owners of the building sought to be ejected from the lot in question, were not included as parties. In that case judgment was rendered in favor of the plaintiff and against the petitioners. It was held that because of the failure to include the petitioners as parties ,the petitioners are not bound and can not be affected by the judgment rendered against their co-owners.[22] To execute the judgment would divest them of their property without due process of law.

An *obiter dictum* on the necessity of including indispensable parties was rendered in *Angara v. Gorospe*,[23] where it was said that the City of Baguio should have been made a party to the case before it could be ordered to pay the salary in controversy.

Class suit—A class suit is one where one or more may sue for the benefit of all. It is necessary, however, that the court shall have the opportunity to make sure that the parties actually before it are sufficiently numerous and representative so that all interests are fully protected.[24] Where everyone appears to be a party in interest and the petition from the beginning was made to appear to be instituted by all the petitioners, the counsel can not make a last minute claim that the suit was brought in the character of a class suit.

Counsel cannot be made a party in a counterclaim—A counterclaim is any claim which a party may have against the opposing party.[25] The provision is clear that the counterclaim should be directed against the opposing party. Hence, when the defendant in his counterclaim sought damages from the plaintiff's lawyer because of the intemperate language used in the complaint and other pleadings, the Court ruled that such counterclaim is not proper. The appearance of a lawyer as counsel does not make him a party to the action. The remedy against the counsel would be to cite him for contempt of court or other administrative measures but certainly not for moral damages.[26]

Remedy of a party after judgment in default in the inferior court—Quirino v. Phil. National Bank[27] is a very controversial case on the remedy of a party who has been adjudged in default by an inferior court. The petitioner Quirino was one of the defendants in a previous complaint filed by the PNB in the justice of the peace court. On Feb. 15, 1955, he was declared in default and on Feb. 18, judgment was rendered against him. On Feb. 25, Quirino filed a petition in the CFI to lift the order of default. In affirming the ruling of the CFI that relief under Rule 38 is not the proper remedy,[28] the Supreme Court said that before the judgment became final, the JP still had jurisdiction and there is no reason for the

[22] Tayzon v. Ycasiano, G. R. No. L-2283, May 31, 1949; Galang v. Uy Tiepo, G. R. No. L-5011, April 11, 1952; Pobre v. Blanco, 17 Phil. 156 (1910).
[23] G. R. No. L-9230, April 22, 1957.
[24] Sec. 12, Rule 3, Rules of Court.
[25] Sec. 1, Rule 10, *Id.*
[26] Borja v. Borja, et al., G. R. No. L-6622, July 31, 1957.
[27] G. R. No. L-9159, May 31, 1957.
[28] Citing the case of Veluz v. Justice of Peace, 42 Phil. 557 (1921).

law requiring the aggrieved party to go to CFI dragging the winning party to unnecessary expense and loss of time when same relief could be obtained in the JP. To party adjudged in default, the remedy available is not only sec. 14 of Rule 4[29] but also sec. 16[30] of the same Rule.

A very-well reasoned dissent was marked by Justice A. Reyes ..and concurred in by Justice J. B. L. Reyes. According to them, relief from default in the JP is governed by sec. 14 of Rule 4. After two hours, the defendant in default can not ask for a new trial under sec. 16 because this section does not speak of default but specifically refers to a case where an appeal may be perfected and is therefore not applicable where appeal is not allowed as in this case, because it is already a settled doctrine that a defendant in default loses his standing in court and has no right to appeal from the judgment on the merits.[31] "To apply sec. 16 of Rule 4 to the present case is to make a mockery of the time-honored doctrine and make a dead letter of sec. 14 of said rule.

Effect of failure to file bill of particulars—A party may file a motion for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity.[32] Upon refusal of a party to obey the order of the court to file a bill of particulars, the court may strike out the pleading to which the motion was directed or make such other order as it deems just.[33] In the case of *De Bautista v. Teodoro*,[34] the Supreme Court upheld the dismssal of an action by the lower court after the plaintiff failed to comply with the court's order to file a bill of particulars within a certain period. It was also stated that dismissal of an action is discretionary upon the court;[35] it will not be reversed on appeal in the absence of abuse.

Non-compliance with the order of the court may mean failure to prosecute—Failure to prosecute as a cause for dismissal of actions may consist of failure 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.[36] This was given efect in *Cruz v. City of Manila*,[36] Cruz, a member of the Police Dep't. was charged with extortion in 1941. A cash bail bond for

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[29] "*Vacating dismissals and defaults.*—Within two hours after the entry of a dismissal or default, as provided in the last two preceding sections, the court may set aside such entry and allow the party against whom such dismissal or default had been entered to have a trial upon the merits of the cause, if such party appears and makes it manifest to the court that his failure to appear at the time and place designated in the summons was by reason of fraud, accident or mistake."

[30] "*New trial.*—Within the time provided for perfecting an appeal from a judgment rendered by an inferior court and before an appeal is so perfected, the court may grant a new trial to correct an error or injustice it may have committed."

[31] Citing Lim Toco v. Fay, 80 Phil. 166 (1948); Tecson v. Melendres, G. R. No. L-3824, May 16, 1951).

[32] Sec. 1, Rule 16, Rules of Court.

[33] Sec. 3, *Id.* 8894, May 31, 1957.

[34] G. R. No. L-8894, May 31, 1957.

[35] See sec. 3, Rule 30, Rules of Court.

[36] G. R. No. L-10807, May 30, 1957.

[37] Sec. 1, Rule 6, Rules of Court.

₱500 for his provisional liberty was deposited in the Manila Police Dep't. The war broke out without the case having been heard or tried. In 1946, reconstitution proceedings was dismissed because the records could not be found. Cruz filed an action for the refund of ₱500. Action for such refund had been twice dismissed. On the third time of the bringing a complaint, the Judge ordered the plaintiff to submit a written reply to the motion to dismiss. The plaintiff failed to do so, and so the case was dismissed. The third complaint as held to be dismissed after due consideration and adjudication and therefore subsequent action for the same cause is barred.

PLEADINGS, MOTIONS AND OTHER PAPERS

Complaint; its contents—The complaint is a concise statement of the ultimate facts constituting the plaintiff's cause or causes of action, and shall specify the relief sought.[37] Whether or not the facts alleged in the complaint constitute a cause of action, the test is, may the court render a valid judgment upon the facts alleged therein?[38] In *Wise & Co., Inc. v. City of Manila,*[39] the plantiff claimed for a refund of an amount already paid to the defendant under ordinance no. 2991 (approved on Nov. 23, 1946) charging a fee for inspection of meat coming from territories outside Manila; said ordinance was declared void in an opinion of the Secretary of Justice on Jan. 11, 1951. The City of Manila appropriated a certain sum for the refund of the fees illegally collected under said ordinance. It was held that the allegations in the complaint state a sufficient cause of action.

Actionable document—Whenever an action or defense is based upon a written instrument or document, the substance of such instrument or document shall be set forth in the pleading, and the original or a copy thereof shall be attached to the pleading as an exhibit, which shall be deemed to be a part of the pleading, or said copy may with like effect be set forth in the pleading.[40] So that when plaintiffs in a detainer case alleged to be a lessor but failed to attach in the complaint the contract of lease upon which they base their action for detainer, as required by sec. 7 of Rule 15, of every pleader on actionable document, it was held that there can be no conclusive presumption of the relation of tenant and lessee.[41]

Conditions precedent must be alleged—Averment of the performance or occurence of all conditions precedent is necessary;[42] failure to do so will render the pleading defective, and dismissal of the action is proper. This was followed in *Johnston Lumber Co., Inc. v. Court of Tax Appeals*[43] where the plaintiff failed to file with

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[38] Paminsan v. Costales, 28 Phil. 487; (1914); Blay v. Batangas Transportation Co., 45 O. G. No. 9(S) p. (1948); De Jesus v. Belarmino, 50 O. G. 3064 (1954); Dimayuga v. Dimayuga, 51 O. G. 2397 (1955).

[39] G. R. No. L-9156, April 29, 1957.

[40] Sec. 7, Rule 15, Rules of Court.

[41] Andres v. Judge Soriano, et al., G. R. No. L-10311, June 29, 1957.

[42] See sec. 10, Rule 15, Rules of Court.

[43] G. R. No. L-9292, April 23, 1957.

the defendant a claim for refund of the tax sought as required by sec. 306 of the Internal Revenue Code. Failure to do it is fatal and bars action for recovery as this requisite is mandatory.[44] A condition precedent should be averred as an essential allegation.[45]

Amendment of pleadings—The purpose of allowing amendment of pleadings under Rule 17 is to completely determine as far as possible in a single proceeding the real matter in dispute and all matters in the action in dispute between the parties. During the trial, when the amendment is not merely a matter of form, amendment of the pleadings depends upon the court's discretion. The appellate court will not reverse such discretion unless there is a clear showing that there is an abuse in the exercise thereof. In *Arches v. Villaruz and Visayan Surety & Insurance Corp.*,[46] the complaint alleged that the plaintiff supplied the defendant contractor with various sums of money for the construction of Iwisan bridge. The Surety under the bond is liable only for the unpaid labor or materials supplied to the contractor; it therefore moved for dismissal of action against it. The plaintiff moved to amend the complaint so as to aver that not only money but also materials were supplied to the defendant. It was ruled that the lower court's denial of amendment was erroneous. Although it was discretionary upon the court to refuse or grant the leave for amendments sought for, yet in the present case, judicial discretion should have been exercised favorably.

But when the amended answer was filed beyond the period set by the court and it was found out that the amended answer sought to be admitted was sham and frivolous and intended merely for purposes of delay, the court was correct in denying it.[47]

Telegram is not sufficient compliance with form of motion—All motions shall be made in writing except motions for continuance made in the presence of the adverse party, or those made in the course of a hearing or trial.[48] It was enunciated in *De Los Reyes v. Capule*,[49] that a telegram asking for postponement of the trial is not a sufficient compliance with the prescribed requirement of form of motion.

Rule on "filing with the court by mail" is not applicable to other government offices—The innovation introduced by the Rules of Court in determining the date of filing of pleadings with the court is contained in sec. 1 of Rule 27, thus: "The date of the mailing of motions, pleadings, or any other papers or payments or deposits, as shown by the post-office registry receipt, shall be considered as the date of their filing, payment or deposit in this court."[50] *Repub-*

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[44] Wee Poco v. Posadas, 64 Phil. 640 (1937); Bermejo v. Collector, G. R. No. L-3029, July 25, 1950; Kiener v. David, G. R. No. L-5163, April 22, 1953.

[45] Gov't. v. Inchausti & Co., 24 Phil. 315 (1913).

[46] G. R. No. L-7452, Dec. 1957.

[47] Phil. Bank of Communications v. Guitar Match Manufacturing Co., G. R. No. L-9139, Sept. 27, 1957.

[48] Sec. 2, Rule 26, Rules of Court.

[49] G. R. No. L-8022, Nov. 29, 1957.

[50] See Caltex (Phil.) Inc. v. Katipunan Labor Union, G. R. No. L-7496, Jan. 31, 1956.

lic v. Luzon Industrial Corp. & Manila Surety & Fidelity Co.,[51] is authority for the rule that this provision does not apply to other government offices under the executive department in charge of tax receipts or collections. The defendant here was obliged to pay sales tax on coconut for the amount of ₱36,232.93 payable on or before April 20, 1948. On that date a check was issued and was sent through the messenger to the City Hall. As it was almost 4 p.m., the messenger mailed the check and the same was actually received two days later, so that a surcharge of 25 was being imposed. The Internal Revenue Code has no provision on when to consider the date of receipt, but there is a regulation in the Bureau of Internal Revenue to the effect that tax remittances are deemed to have been received on the day they were mailed. The provisions of the Rules of Court could not be invoked.

Contents of notice of motion—The notice shall be directed to the parties concerned, and shall state the time and place for the hearing of the motion.[52] But in *Sun Un Giok v. Matusa*,[53] where counsel for the defendant in addressing the notice of a motion to dismiss to the clerk of court requested that said motion be submitted for the "consideration of the Hon. Court and soon thereafter as counsel can be heard" and at the same time certifying that he had sent a copy of the motion to counsel for the plaintiff, same was held to be substantial compliance with the requirements of sec. of Rule 26. The Court also observed that what the law prohibits is not the absence of previous notice, but the absolute absence threof and lack of opportunity.[54]

Service of judgment on the defendant

Where a party in a case filed her own answer without any appearance of a lawyer as counsel, the service to her of judgment was sufficient.[55]

Where a party has two attorneys, notice to one is sufficient—Under the Rules of Court, where a party has more than one attorney, notice to one of them is notice to such party.[55] So that in *Secretary of Agriculture v. Judge Fernandez*,[56] notice to a certain Atty. Marfori representing the Solicitor-General who appeared for the petitioner was considered to be the notice which determines the start of counting period for appeal, although the Fiscal also appeared for the petitioner and a copy of the decision was given him.

Notice of lis pendens; *its effects*—In an action affecting real property, a notice of the pendency of the action may be recorded in the register of deeds of the province in which the property is situated; from the time only of filing such notice for record shall a purchaser, or incumbrancer of the property affected thereby be

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[51] G. R. No. L-7992, Oct. 30, 1957.
[52] Sec. 5, Rule 26.
[53] G. R. No. L-10304, May 31, 1957.
[54] Borja v. Tan, G. R. No. L-6108, May 25, 1953; Embate v. Penolio, G. R. No. L-4943, Sept. 23, 1953.
[55] Sec. 2, Rule 27, Rules of Court.
[56] G. R. No. L-10823, May 28, 1957.

deemed to have constructive notice of the pendency of the action.[57] This rule was applied in the case of *RFC v. Morales,*[58] Morales bought from a certain Agoncillo a parcel of land under the agreement that the necessary transfer certificate of title will be issued as soon as Agoncillo had fully paid the installments due to Araneta, Inc. But without the knowledge of Morales, Agoncillo mortgaged the land to the Rehabilitation Finance Corporation. So an action was brought against RFC and Agoncillo and at the same time a notice of *lis pendens* was recorded. Subsequently, the mortgage was foreclosed and in a public auction the land was sold to RFC as highest bidder. The Supreme Court in denying the petition of the RFC to cancel the notice of *lis pendens* relied on sec. 24 of Rule 7,[59] and said that the notice did not affect the mortgage but it affected the sale which was made subsequent to the notice.

When the action or the judgment is merely for a sum of money and does not concern any particular realty, notice of *lis pendens* is not proper.[60] *Garchitorena v. Register of Deeds*[61] may be considered as an interesting case on notice of *lis pendens.* Respondent Asuan instituted an action for specific performance of an alleged promise of Garchitorena to give him 1/3 of whatever compensation the promissor might receive from a Robert E. Manly for keeping 3 trunks of valuable documents during the Japanese occupation; the promissor received real property. A notice of *lis pendens* was filed by Asuan. The Supreme Court refused to order the cancellation of the same because the action is one affecting title and possession of real property. It is worthy to note that the Court considered claim to the 1/3 of the land to be claim on a particular realty.

Proof of service of judgments—Final orders or judgments shall be served either personally or by registered mail.[62] If the service is by mail, proof thereof shall consist of an affidavit of the person mailing, together with the registry receipt issued by the mailing office if the letter has been registered. The registry return card shall be filed immediately upon receipt thereof by the sender, or in lieu thereof the letter unclaimed together with the certified or sworn copy of the notice given by the postmaster to addressee.[63]

Tested by the above rules, the Court found two defects in the

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[57] See sec. 24, Rule 7, Rules of Court.

[58] G. R. No. L-10064, April 23, 1957.

[59] "*Notice of lis pendens.*—In an action affecting the title or the right of possession of real property, the plaintiff, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may record in the office of the registrar of deeds of the province in which the property is situated a notice of the pendency of the action, containing the names of the parties and the object of the action or defense, and a description of the property in that province affected thereby. From the time only of filing such notice for record shall a purchaser, or incumbrancer of the property affected thereby, be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names."

[60] Somes v. Government, 63 Phil. 43. (19).

[61] G. R. No. L-9731, May 11, 1957.

[62] Sec. 7. Rule 27, Rules of Court.

[63] Sec. 10, *Id.*

service of judgment in the case of *Delgado v. Judge Ceniza, et al.*[64] They are: (1) there was no affidavit of the person mailing, and (2) there was no registry return card or a certified or sworn copy of the notice given by the postmaster to the addressee. It was held therefore that the date when the defendant should be considered to have been served with the decision is not on the date of such defective service but on the date when the defendant actually learned of the decision.

Effect of alleging "without knowledge or information sufficient to form a belief"—In *PNB v. Lacson*,[65] the defendant's answer was that she was "without knowledge or information sufficient to form the belief as to the truth of the basic allegations" of the complaint which was for the recovery of ₱114,000 loaned to the deceased husband of the defendant. It was ruled that such answer was in effect a denial,[66] and therefore it tendered an issue. Judgment on the pleadings is not proper.

Grounds for a motion to dismiss—Sec. 1 of Rule 8 enumerates nine grounds for a motion to dismiss. An action may be dismissed for lack of proper venue as held in *Velarde v. Paez*.[67] An action may also be dismissed on the ground that the plaintiff has no legal capacity to sue,[68] or that the action is barred by prior judgment,[69] or that there is no cause of action.[70]

Intervention is not compulsory—A person's intervention in an action may be granted at the discretion of the court, when the person has the legal interest in the matter in litigation, or in the success of either of the parties, or an interest against both, or when he is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.[71] Perhaps the fact that intervention is granted only at the court's discretion prompted the Supreme Court to render a ruling in the case of *Cruzcosa v. Judge Concepcion*,[72] that although the petitioners had legal interest in the matter in litigation, they had no duty to intervene in the proceedings because intervention in an action is not compulsory or mandatory but optional and permissive.

Effect of failure to attach affidavit of merits—When the motion for new trial is based on fraud, accident, mistake or excusable negligence which ordinary prudence could not have guarded against, affidavit or affidavits of merits should be attached to the motion.[73]

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[64] G. R. No. L-10463, June 18, 1957.

[65] G. R. No. L-9419, May 29, 1957.

[66] See sec. 7, Rules 9, Rules of Court.

[67] G. R. No. L-9208, April 30, 1957.

[68] Sec. 1 (c), Rule 8, Rules of Court, as invoked in Recreation and Amusement Association of the Philippines v. City of Manila, et al., G. R. No. L-7822, Feb. 22, 1957.

[69] Sec. 1 (e), Rule 8, Rules of Court; Lapid v. Lawan, G. R. No. L-10686, May 31, 1957.

[70] Sec. 1 (f), Rule 8, Rules of Court; Johnston Lumber Co. v. CTA, G. R. No. L-9292, April 23, 1957, note 43, *supra*.

[71] See sec. 1 to 3, Rule 13, Rules of Court.

[72] Cruzcosa v. Judge Concepcion, G. R. No. L-11146, April 22, 1957 see note 21 *supra*.

[73] Sec. 2, Rule 37, Rules of Court.

Failure to do so is sufficient cause for denial of the motion. It was so held in *Bufete v. Victorino, et al.*,[74] and *Cementerio v. CFI of Iloilo*,[75] because unsworn allegation is of doubtful veracity. In the former case, aside from the fact that there was a failure to attach an affidavit of merit, the Court also observed that the distance of the residence from the court is not sufficient to constitute excusable negligence as ground for new trial. In the *Cementerio* case, the Court noted that the defendant's motion for postponement partakes of the nature of a petition for a new trial, and therefore needs an affidavit of merits.

Just like a petition for new trial, a petition for relief under Rule 38 must be accompanied with affidavits showing the fraud, accident, mistake, or excusable negligence relied upon, and the facts constituting the petitioner's good and substantial cause of action or defense, as the case may be.[76] The indispensability of affidavit of merits was emphasized in *Villanueva v. Alcoba*[77] where the Court said that affidavit of merits should state the evidence available to the petitioner to establish its alleged cause of action or defense; said evidence must be such as to warrant the reasonable belief that the result of the case would probably be otherwise if relief were not granted.

It was held that there was no compliance with this rule in *Manila Surety & Fidelity Co., Inc. v. Del Rosario, et al.*,[78] where the "motion for reopening" (which may be deemed for relief under Rule 38) sworn to and filed by the attorney merely stated that the defendant had a good and valid defense. It is necessary that the facts constituting the movant's or petitioner's good and substantial defense, which he should prove if his petition should be granted must be pleaded under oath.

Although the Court advocates strict compliance with the requirement of affidavit of merits, exceptions to the rule are also admitted as in the case of *Republic v. De Leon and Asendido*.[79] Asendido, an emergency laborer of the Bureau of Public Works was afflicted with active pulmonary tuberculosis. The Workmen's Compensation Commissioner awarded the claim of the laborer against the Bureau of Public Works which was represented by a counsel. Petition for relief was denied by the lower court. The Solicitor General's contention that in as much as the case involves liability against the Government, the proper party should have been the Republic of the Philippines was upheld by the Supreme Court. Among the exceptions to the strict rule that affidavit of merits must be attached is when there is no jurisdiction over the defendant. Justice Felix,

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[74] G. R. No. L-10103, March 28, 1957.

[75] G. R. No. L-9571, April 29, 1957.

[76] Sec. 3, Rule 38, Rules of Court.

[77] G. R. No. L-9694, April 29, 1957; citing: Combs v. Santos, 24 Phil. 446 (1913); Daipan v. Sigabu, 25 Phil. 184 (1913); Mapua v. Mendoza, 45 Phil. 424 (1923); McGrath v. Del Rosario, 49 Phil. 330 (1926); Bank of P.I. v. Roster, 47 Phil. 594 (1925); Baron v. Sampang, 50 Phil. 756 (1927); Phil. Guaranty Co. v. Belendo, 53 Phil. 410 (1929); Pas v. Inandan, 75 Phil. 608 (1945).

[78] G. R. Nol L-10056, April 30, 1957.

[79] G. R. No. L-9868, June 28, 1957.

speaking for the Court, said: "An attack on the jurisdiction of the court is given such primary recognition in our jurisprudence that this defense can properly be raised on appeal. Certainly, an affidavit of merit which essentially deals with facts constituting petitioner's defense and/or basis of such defense has no place in a pleading that advances an argument that goes down to the very root of the proceeding."

Period for filing petition for relief from judgment—A petition for relief must be filed within 60 days after the petitioner learns of the judgment, order, or other proceeding to be set aside, and not more than 6 months after such judgment or order was entered, or such proceeding was taken.[80] These two periods must concur. In *Bodiongan v. Ceniza*,[81] the petition for relief was denied because it was filed after 9 months from the time the decision sought to be set aside was rendered.

JUDGMENTS, ORDERS AND EXECUTION

JP court has authority to revive its own judgment—A judgment may be executed on motion within five years from the date of its entry. After the lapse of such time, and before it is barred by the statute of limitations, a judgment may be enforced by action.[82] The issue in the case of *Torrefrance, et al. v. Albiso*,[83] was whether this rule applies to a judgment of the inferior courts. On March 22, 1950, a judgment was rendered by the JP court in favor of the plaintiff in a forcible entry and detainer case. The judgment remained unsatisfied for more than 5 years. On Oct. 22, 1955, the plaintiff brought an action to have it revived. The defendant's contention that the JP has no jurisdiction to revive its own judgment, was rendered unmeritorious by the Supreme Court, citing sec. 19 of Rule 4 which maks Rule 39 one of the rules applicable to the inferior courts in cases falling within their jurisdictions and so far as they are not inconsistent with the provisions of Rule 4. Furthermore, the Judiciary Act of 1948 gives the JP courts the power to issue all "process necessary to enforce their orders and judgments".

As a matter of fact some authorities are of the opinion that notwithstanding the express enumeration contained in sec. 19 of Rule 4, all the rules in the Rules of Court are also applicable to inferior courts, provided that the facts and circustances permit their application.[84]

Extent of relief to be awarded; construing confirmatory decisions—When the defendant is not in default, the judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded in his pleadings.[85] This rule was enunciated in *Siari Valley Estates, Inc. v. Lucasan*[86]

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[80] Sec. 3, Rule 38, Rules or Court.
[81] G. R. No. L-8333, Dec. 28, 1957.
[82] Sec. 6, Rule 39, Rules of Court.
[83] G. R. No. L-11114, Dec. 27, 1957.
[84] *BENGZON, MARIO, LECTURES IN REMEDIAL LAW* 40 (1951).
[85] See sec. 9, Rule 35, Rules of Court.
[86] G. R. No. L-11805, Oct. 31, 1957.

where the lower court ordered the defendant "to allow the Siari Valley Estate to round up all the buffaloes that may be found in his cattle ranch" although the plaintiff never claimed the buffaloes in its amended complaint, but the relief granted was supported by evidence.

In the same *Siari Valley case,* the dispute was the execution of the lower court's decision which was previously affirmed by the Supreme Court. The confirmatory decision omitted the clause containing "the defendant is hereby ordered to allow the Siari Valley Estate to round all the buffaloes that may be found in his cattle ranch". The judgment was concluded with "is hereby affirmed". It was held that the omission does not evince any intention to modify the judgment of the lower court.[87] It was further ruled that in construing confirmatory decision of the appellate courts, the practice is to regard the whole of the appealed judgment to have been upheld even if several points hereof have not been discussed nor touched upon in such confirmatory decision.

Judgment on the pleadings—Judgment on the pleadings may be rendered (except in actions for annulment of marriage or divorce) where the answer fails to tender an issue, or otherwise admits the material allegations of the adverse party's pleading, on motion of that party.[88] In *Republic of the Phil. v. Acoje Mining Co., Inc.,*[89] the defendant admitted the material allegation in the complaint seeking recovery of ₱152,339.58 as alleged value, including 5% compensating tax, of surplus properties obtained by the defendant from different bases and depots of the defunct Surplus Property Commission, judgment on the pleadings was held to be proper as the answer tendered no issue.[90]

Scope of "judgment for specific acts"—If a judgment directs a party to execute a conveyance of land, or to deliver deed or other documents, or to perform any other specific act, and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some person appointed by the court and act when so done shall have like effect as if done by the party.[91] Construing this provision, the Supreme Court in *Francisco, et al. v. National Urban Planning Commission,*[92] ruled that instead of directing the specific act to be done by some other person appointed by the court, the court itself may do the specific act. In this case, despite the order of the court, the National Planning Commission refused to approve the subdivision of the petitioner's land. To effect the termination of the co-ownership of the land in question, the lower court itself approved the subdivision plan. The Supreme Court upheld the action, thus: "if the

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[87] In Contreras v. Felix, 44 O. G. 4306 (1947), it was ruled that final judgment as rendered is the judgment of the court irrespective of all seemingly contrary statements in the decision).

[88] Sec. 10, Rule 35, Rules of Court.

[89] G. R. No. L-9870, Dec. 19, 1957.

[90] Citing Gibson Oil Co. v. Hayes Eqpt. Mig. Co., 88 ALR 104; 163 Okla. 134, 21 Pac. (2) 17.

[91] Sec. 10, Rule 39, Rules of Court.

[92] G. R. No. L-8465, Feb. 28, 1957.

trial judge may direct approval of said plan by any other person, there is no reason why the court could not do it by itself, specifically taking into consideration that Branch IV of the CFI of Manila has supervision over the Land Registration Commissioner and the Director of Lands in matters relating to registered properties."

Res judicata; *judgment conclusive between parties and their successors in interest.*—By *res judicata* is meant that a judgment, order or proceeding rendered by a court against the same parties involving the same subject matter and involving the same cause of action cannot again be litigated and raised in court.[93] The principle of conclusiveness of judgment is a part of the principle of *res judicata* applied to judgment. Under sec. 44 (b) a judgment shall be conclusive between the parties and their successors in interest by title subsequent to commencement of the action. So that, in *Bustamante, et al. v. Azarcon, et al.*,[94] where the action for the ownership and possession of certain accessories was instituted on June 7, 1950 and judgment in favor of the plaintiffs was rendered on Dec. 6, 1951, it was held that the petitioners who bought the accessorias from the defendant on Dec. 24, 1950 are bound by a judgment against his predecessor in interest.[95]

Order of court is not retroactive—It was ruled in *Borbon, et al. v. Manarang*,[95a] that the proceedings in the CFI before the restraining order issued by the Court of Appeals cannot be held null and void because the said subsequent order is not retroactive; when the appealed decision was rendered no restraining order had yet been actually issued.

Rule on execution by motion or by independent action applies only to final judgment—A judgment may be executed on motion within five years from the date of its entry. After the lapse of such time, and before it is barred by the statute of limitations, a judgment may be enforced by action.[96] *Miciano*, et al. *v Watiwat*, et al.[96a] is authority for the view that the judgment contemplated of in this section is a final judgment. On May 17, 1941, the lower court rendered a decision declaring some of the properties in question as conjugal and the other as exclusive property of the widow, and requiring at the same time the porties to submit within a period of 30 days a project of partition in accordance iwth law, and stating that in the absence thereof, the court will appoint commissioners. War broke out and nothing has been done on the case until Dec. 23, 1945 when plaintiffs moved to appoint commissioners who submitted their report on Feb. 8, 1949. The defendants questioned

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[93] It is already well-settled for *res judicata* to apply that the following requisites must be present: (1) there must be a final judgment or order; (2) the court rendering the same must have jurisdiction over the subject-matter and over the parties; (3) it must be a judgment or order on the merits; and (4) there must be between the two cases, identity of cause of action, identity of subject matter, and identity of parties.

[94] G. R. No. L-8939, May 28, 1957.

[95] Fetalino v. Sans, 44 Phil. 691 (1923); Baguinguito v. Rivera, 56 Phil, 423 (1931) Barretto v. Cabanguis, 37 Phil. 98 (1917); I MORAN, COMMENTS ON THE RULES OF COURT 870 (1952).

[95a] G. R. No. L-8331, Feb. 28, 1957.

[95a] G. R. No. L-8769, Nov. 21 1957.

[96] Sec. 6, Rule 39, Rules of Court.

the validity of the writ of execution of Dec. 6, 1949 on the ground that more than five years had elapsed from May 17, 1941 and therefore the judgment can no longer be executed unless it is revised by an action. To this, the Court said that judgment of 1941 has not acquired such finality as to make it executory, because the parties were given 30 days to submit a project of partition or the court would appoint commissioners. And the judgment can only become final when the report of the commissioners was approved on Aug. 27, 1949.

Injunction under sec. 41 of Rule 39 is not stayed by appeal—The general rule of procedure is that an appeal stays the execution of a judgment. Exception to this, aside from the execution pending appeal, is sec. 4 of Rule 39 which provides that unless otherwise ordered by the court, a judgment in an action for injunction or in a receivership action, or judgment in an action for infringement of letters patent, shall not be stayed after its rendition and before an appeal is taken or during the pendency of an appeal.

In *Araneta & Villadolid v. Judge Gatmaitan,* et al.,[97] a certain number of fishermen who were prohibited by executive orders to use trawl as a means of fishing, petitioned the lower court for an injunction to restrain the Secretary of Agriculture and the Director of Fisheries from enforcing said orders. One of the many issues in that case is the propriety of the issuance of aninjunction. According to the Court, there are only two requisites for injunction to issue: (1) the existence of the right sought to be protected, and (2) acts against which the injunction is directed are violative of such rights.[98] The enforcement of the injunction is justified notwithstanding pendency of appeal.

Execution pending appeal—The provision allowing execution of a judgment during the pendency of the appeal is contained in sec. 2 of Rule 39. This was devised to remedy delay in the administration of justice because appeals usually entail unavoidable delays. But good reasons must be alleged for the petition.[99] The order of the lower court to execute the judgment pending appeal was upheld in the case of *National City Bank of New York v. Tiaoqui,* et al.[100] The petitioner Bank had a junior encumbrance in some of the properties of Cu Unjieng who was the defendant in a case instituted by Tiaoqui. A judgment in favor of the plaintiff was rendered against the properties of the defendant or against "the bonds that were filed in lieu of said properties so attached as were sold at public auction to the National City Bank of New York subject to the plaintiff's first attachment lien". Execution was held proper because of the special reasons alleged therefor.

Same; not enforceable against one who is not a party—In *City of Bacolod,* et al. *v Judge Enriquez,* et al.,[101] the lower court rendered a judgment ordering the City Mayor and Treasurer of

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[97] G. R. No. L-8895 & 9191, April 30, 1957.
[98] Citing the case of North Negro Sugar Co. v. Hidalgo, 63 Phil. 664 (1956).
[99] Western Lumber Co., Inc. v. CIR, et al., G. R. No. L-8158, Sept. 23, 1955.
[100] G. R. No. L-9770, March 29, 1957.
[101] G. R. No. L-9775, May 29, 1957.

Bacolod City to reinstate the plaintiffs as policemen of Bacolod City and pay their salaries during the period of their ouster in addition to moral and exemplary damages. Before the perfection of the appeal, the CFI, at the instance of the plaintiffs ordered the immediate execution of the judgment. Held: As the City of Bacolod was not made a party, (the action was directed against the City Mayor and City Treasurer) the execution pending appeal cannot be enforced against one who has yet had his day in court.[102]

Same; extent of liability of surety—Where the surety bound itself "for the performance of the judgment or order appealed from in case it be affirmed wholly or in part", it can not be held liable when there had been no appeal and the judgment had never been affirmed by the appellate court. That is the rule laid down in *Luzon Surety Co., Inc. v. Judge Teodoro, et al.*[103]

In this case, a judgment was rendered in the previous case of *Nolan v. Rubin* for the rescission of a contract of lease. Steps were taken by the defendant but the plaintiff applied for immediate execution which was granted; so the defendant filed a motion for the stay of execution attaching a supersedeas bond subscribed by the Luzon Surety Co., Inc. A negotiation was reached to the effect that execution will be suspended but the defendant shall pay a certain sum and deliver 100 cavans of palay. Upon defendant's failure to comply with the stipulation, execution against the bond was sought. The Supreme Court said that sec. 3 of Rule 39[104] is not applicable.

APPEALS

Docket fee indispensable for the perfection of an appeal—There are 3 requisites for the perfection of an appeal from the inferior courts to the courts of first instance, namely, (1) notice of appeal, (2) certificate of the municipal treasurer showing that the appellant has deposited docket fee, and (3) bond.[105] These requisites must be filed within 15 days after notification to the party of the judgment complained of.[106] In *Bermudez v. Judge Baltazar and Bamba,*[107] the appellant filed on time the notice of appeal and the bond, but the docket fee was deposited 22 days after he received a copy of the appealed decision. The Supreme Court upheld the dismissal of the appeal.

Judgments or orders subject to appeal—Only final judgment

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[102] There is an obvious flaw in the reasoning of this decision. The Court ruled that execution pending appeal cannot be made because the City of Bacolod was not made party, but it also made statements to the effect that final judgment or the affirmed decision of the lower court may be executed against said City. As the City of Bacolod was not made a party, could it in any way be bound

[103] G. R. No. L-10710, May 29, 1957.

[104] "The bond given under the preceding section (execution discretionary) may be executed on motion before the trial court after the case is remanded to it by the appellate court."

[105] Sec. 2, Rule 40, Rules or Court.

[106] *Id.*

[107] G. R. No. L-10268, April 30, 1957.

or order is subject to appeal. Interlocutory or incidental judgment may not be subject of appeal. In *Elizalde v. Judge Teodoro and Levy Hermanos, Inc.*,[108] it was held that an order directing payment of a claim that had long been approved is appealable. It appears that in a special proceedings of the estate of the deceased Primitivo Elizalde, a claim of Levy Hermanos, Inc. for the sum of ₱2,910.48 was approved on May 14, 1932. On June 14, 1954, a motion for payment of said sum was filed. The administrator who was appointed only in 1947 alleged no knowledge of the same and that after the lapse of such a long time, the claim must have either been paid or it must have prescribed. The lower court ordered the payment of the claim. In overruling the appellee's contention that the order is not appealable, the Supreme Court said that assuming that the claim in question exists, the question of whether or not such claim has been approved, or it has already been paid or has prescribed would, if true, have the efect of extinguishing the creditor's right to enforce his final and executory claim.

A judgment has not acquired finality and does not cease to be an interlocutory where there are still matters left to be settled for its completion.[109]

Mere pro-forma *motion for new trial does not suspend time to appeal*—Appeal from the courts of first instance must be perfected within 30 days from notice of order or judgment appealed from.[110] But the time during which a motion to set aside has been pending shall be deducted.[111] The rule, then, is that when a motion for new trial is filed, the time during which such motion has been pending shall be deducted from the period for perfecting an appeal. However, a mere *pro-forma* motion does not suspend the running of the period.[112] This rule was followed in *Samudio v. Municipality of Camarines Sur.*[113]In this action for recovery and declaration of ownership of a piece of land, the lower court declared the defendant in default on Sept. 30, 1952, and set the case for Oct. 15. The Fiscal on Oct. 17, filed a motion for reconsideration of the order of default and for setting aside of the decision; the motion was denied on Nov. 11 and the defendant was notified thereof on Nov. 13. A motion for new trial was filed on Nove. 25; was denied on Jan. 12, 1953. On Jan. 15, the Fiscal filed a notice of appeal. The issue was whether the perfection of the appeal was filled within the reglamentary period. The Court held that the appeal was filed beyond the time allowed by law. The motion for new trial filed on Nov. 15 and denied on Jan. 12 did not suspend the running of the period for the perfection of the appeal because that motion is completely identical to the motion for reconsideration dated Oct. 17

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[108] G. R. No. L-10592, May 20, 1957.

[109] Miciano v. Watiwat, G. R. No. L-8168, Nov. 21, 1957.

[110] Sec. 3, Aule 41, Rules of Court.

[111] *Id.*

[112] 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 evidence 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. XXXI PHIL. L. J. 442 (1956).

[113] G. R. No. L-8990, Feb. 28, 1957.

and consequently it belongs to the category of a *pro-forma* motion for new trial. The appeal should have been perfected before Dec. 13, 1952.

When and how appeal should be taken—Appeal may be taken by serving upon the adverse party and filing with the trial court within 30 days from notice of order or judgment, a notice of appeal, an appeal bond, and a record on appeal.[114] In *Tiongko, et al. v. Judge Arca, et al.*,[115] a judgment against the defendants was served upon them on March 27, 1954. Ten days thereafter, or on April 6, they filed a motion for new trial, thereby suspending the time to appeal. Denial of the motion was served on Aug. 10. So that the remaining period of 20 days for appeal commenced to run anew on Aug. 11 and should expire on Aug. 30. On Aug. 13, petitioners filed their intention to appeal but only on Sept. 1 did they file their record on appeal and appeal bond.[116] It was held that dismissal of the appeal was proper because it was two days beyond the 30-day period allowed by law.[117]

This case is different from the case of *Buena v. Judge Surtida*, et al.,[118] where it was ruled that a petition for extension filed before the expiration of the period for appeal may be favorably acted upon after the expiration of such period for appeal.

Appeal by sublessor suspends execution against sublessee—The general rule on appeal where several defendants are involved is that where the liability of each of the defendants is several, and only one appeals, the judgment on appeal will not affect those who did not appeal.[119] But where the defendants are so connected that the rights of one cannot be determined without affecting the rights of the others, the trial court pending appeal by one defendant cannot take any step in the case against all the defendants. Hence, in an illegal detainer action against the lessee and the sublessee, the judgment was in favor of the plaintiff lessor, it was held that appeal by the lessee will have the effect of forestalling the execution against the sublessee. The right of the sublessee to hold possession is directly interwoven with the right of the lessee; so that if the court finds that the lessee still has the right to continue with the lease, the lessor would have no legal right to dispossess the sublessee.[120]

An appealed case tried by the CFI under its original jurisdiction—A case tried by an inferior court without jurisdiction over the subject matter shall be dismissed on appeal by the Court of First Instance. But instead of dismissing the case, the CFI in the exercise of its original jurisdiction, may try the case on the merits, if the parties therein file their pleadings and go to the trial without

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[114] Note 110 *supra*.

[115] G. R. No. L-8612, Nov. 29, 1957.

[116] Secs, 5 and 6 of Rule 41 set forth the contents of record on appeal and what constitutes appeal bond.

[117] Same ruling was laid down in Salva v. Judge Palacio, G. R. No. L-4247, Jan. 1952; Arcega v. Dizon, 76 Phil. 164 (1946).

[118] G. R. No. L-9439, May 17, 1957; not 1 *supra*.

[119] Municipality of Orion v. Concha, 50 Phil. 679 (1927).

[120] Castillo v. Judge Teodoro, et al, G. R. No. L-10486, Nov. 27, 1957.

any objection to such jurisdiction.[121] In a forcible entry case, the appellate court ordinarily does not have jurisdiction to pass upon the question of ownership. The exception was applied in *Buencamino v. Vengaso*,[121] where the Court said that granting the CFI could not in its appellate jurisdiction pass upon the issue of ownership for it would then be acting in excess of its jurisdiction, it can do so in the exercise of its original jurisdiction if the parties "file their pleadings and go to the trial without any objection to such jurisdiction."

Appeal in quo warranto preceedings—Appeal in certoriari prohibition, mandamus, quo warranto, workmen's compensation and employer's liability cases is distingueshed from an appeal in an ordinary civil case in that the former is perfected within 15 days, in the manner provided in appeal by pauper; instead of the record on appeal, the original record of the case in the Court of First Instance is deemed transmitted to the appellate court.[122]

In *Alba v. Judge Evangelista and Alajar*,[123] there was a dispute as to who was entitled to the office of the vice mayor of Roxas City: Alajar, who was appointed on Jan. 1, 1954, or Alba, whose appointment was made in November 1955. Alajar instituted a quo warranto proceedings. On the issue only whether the removal was legal or illegal, the lower court declared the petitioner Alajar entitled to the office. Alba appealed by filing a notice of appeal dated Feb. 3, 1956; four days later, Alajar prayed for immediate execution of the judgment.

The Supreme Court held that the advance execution of judgment is null and void because appeal in quo warranto proceedings is perfected by the mere presentation of the notice of appeal. From that moment, the trial court losses its jurisdiction over the case, except to issue orders for the preservation and protection of the rights not litigated in the appeal.

Dismissal of appeal for lack of specific assignment of errors—Sec. 1 of Rule 52 enumerates the grounds on which an appeal may be dismissed. One of them is want of specific assignment of errors in the appellant's brief.[124] In *Ubaldo v. Salazar*,[125] the Supreme Court upheld the dismissal of the appeal. The appellant's brief states merely: "The lower court erred in dismissing civil case 322 in the matter of the petition for writ of *habeas corpus* of Saturnina Ubaldo". It does not point out the error claimed to have been omitted by the lower court.

Dismissal for failure to file appellant's brief—The ground of failure of the appellant to file his brief may not be availed of in a motion to dismiss the appeal when the lower court allowed the appellant to rely on the co-appellant's brief; more so when the decision appealed from ordered the appellant to pay the petitioner's salary although said appellant was not made party to the case.[126]

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[121] G. R. No. L-9774, May 31, 1957.
[122] Sec. 17, Rule 41, Rules of Court.
[123] G. R. Nos. L-10360 & 10433, Jan. 17, 1957.
[124] Sec. 1 (f), Rule 52, Rules of Court.
[125] G R. No. L-10444, June 29, 1957.

Interest on surety bond may be recovered as part of the damage from filing of the complaint—When the judgment rendered by the Court of Appeals is upon an interest-bearing claim, it shall bear the same rate of interest; when upon a non-interest-bearing claim, it shall bear the legal rate of interest.[127] This provision was applied in the case of *Plaridel Surety & Insurance Co., Inc. v Galang Machinery Co., Inc.*[128] In this case, the principal failed to comply with the obligation to deliver and sell to the plaintiff machinery company 2,500 board feet of peale and veneer log. The Surety was adjudged liable jointly and solidarily for the sum of ₱30,600 with legal interest thereon from the filing of the complaint plus 15% as attorney's fees and costs. The issues was whether a surety could be held liable for more than his undertaking in the bond. The Supreme Court in ruling that a surety could be held liable for the interest, relied on the provisions of the Civil Code,[129] and sec. 6 of Rule 53. "The theory is that interest is allowed only by way of damages for delay upon the part of sureties in making payment after they should have done so. In some states, interest has been charged from the date of the judgment of the appellate court. Here, we follow the general practice that interest is to begin from the filing of the complaint."

PROVISIONAL REMEDIES

Attachment; claim against surety bond must be filed before trial or before entry of final judgment.—A party who is applying for the order of attachment is required to file a bond to pay for the costs which may be adjudged to the other party and all the damages which may be sustained by reason of the attachment.[130] An order of attachment may be discharged upon application of the defendant for an order discharging the attachment by filing a counter bond to secure the payment to the plaintiff of any judgment he may recover in the action.[131] The rule is well-settled that application for recovery from the surety of damages arising from wrongful attachment must be filed "before trial" or at the latest "before entry of final judgment".[132] The Supreme Court had the occasion to reiterate this rule in *Port Motors, Inc. v. Raposas and Alto Surety & Insurance Co., Inc.*[133] Raposas purchased from the plaintiff a car on installment basis; a chattel mortgage was executed on the car. Upon defendant's failure to pay, the plaintiff filed a bond for the immediate delivery of the car; defendant filed a counter bond undertaken by the Alto Surety. On Jan. 8, 1951, judgment for a certain sum was rendered in favor of the plaintiff. On March 25, 1952, a writ of execution was issued, but it was returned un-

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[126] Angara v. Gorospe, et al., G. R. No. L-9230, April 22, 1957.
[127] Sec. 6, Rule 53, Rules of Court.
[128] G. R. No. L-9542, Juan. 11, 1957.
[129] Art. 2209.
[130] Sec. 4, Rule 59, Rules of Court.
[131] See sec. 12, Rule 59, *id.*
[132] Del Rosario v. Nava & Alto Surety, G. R. No. L-5513, Aug. 18, 1954; Facundo v. Tan, 47 O. G. (6) 2912; Brodett v. Dela Sora, 44 O. G. (3) 872 (1946).
[133] G. R. No. L-8645, Jan. 23, 1957.

satisfied. On July 28, 1952, a motion was filed to hold the surety liable.

It was held that the motion was filed out of time. Justice Felix, speaking for the Court, said that this particular case is governmed by sec. 10 of Rule 62,[134] and not by sec. 20 of Rule 59 because the latter deals with recovery of damages. However, in both instances, the procedure to be followed is the same. The requirement that the application must be filed before trial, or in the discretion of the court, before entry of final judgment, is couched in clear, unequivocal and mandatory terms that require no further interpretation.

Mandatory injunction; to issue only after hearing—Injunction is a writ commanding a person to refrain from doing a particular act. Provisions on injunction are contained in Rule 60. Mandatory injunction which is a mandate to do a positive act so as to establish a pre-existing continuing relationship is not expressly provided in the Rules; however, mandatory injunction has been upheld in previous cases. As mandatory injunction tends to do more than maintain the *status quo,* it has been generally held that it should not issue prior to final hearing; exception is in cases of extreme urgency.[135] It was held in *Bautista v. Hon. Barcelona, et al.,*[136] that petitioners should have been heard first before issuing the preliminary mandatory injunction requiring them to remove a stone wall 3 meters wide. Although before the erection of said wall, the other respondents were making use of a passageway, the claim of the respondents to the right of way does not appear indubitable.

Preliminary injunction; "grave or irreparable injury"—Preliminary injunction will not be granted unless it shall appear from facts by affidavits or by the verified complaint that great or irreparable injury would result.[137] In one case, [138] the recital in the verified complaint to the effect that "defendants with the aid and active cooperation of persons referred to in the preceding paragraph again threaten and are about to re-enter, repossess and re-occupy the land to the grave damage and prejudice of the plaintiff" was held to be sufficient ground for issuance of injunction.

Receiver merely represents interest of owner—The case of *Abella v. Co Bun Kim and Carpio*[139] is authority for the view that the obligation of the owner may be enforced against the receiver because the latter as custodian merely represents the interest of the owner.

The lower court in that case rendered a judgment for unpaid rentals of a certain lot in favor of the plaintiff-lessor and against

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[134] *Judgment to include recovery against sureties*—The amount, if any, to be awarded to either party upon any bond filed by the other in accordance with the provisions of this rule, shall be claimed, ascertain, and granted under the same procedure as prescribed in sec. 20 of Rule 59".

[136] Manila Electric Railroad & Light Co. v. Del Rosario, 22 Phil. 433 (1912).

[136] G. R. No. L-11885, March 29, 1957.

[137] Sec. 5, Rule 60, Rules of Court.

[138] Ramos et al. v. Hon Arranz et al., G. R. No. L-9578, July 30, 1957.

[139] G. R. No. L-9205, Feb. 28, 1957.

the defendants Co Bun Kim (as lessee) and Carpio (as trustee of Co's buildings on the lot in question). The defendants were ordered to pay the rentals jointly and severally. The trustee now claimed that he was not a party to the deed of lease and neither the contract nor the law make him solidarily liable for the rentals in dispute. The Supreme Court said that the judgment against the appellant-trustee for the rentals due, merely enforces an obligation of the owner Co Bun Kim to whom said funds belong and that the liability of the appellant under the decision is nothing but the very same liability of the owner. "The rules concerning joint obligations and solidary obligations require a plurality of subjects (creditors, debtors, or both) and have no application, when there is only one creditor and one debtor, even if payment of the debt is to be made by several individuals, representing one and the same interest of debtor."

Appointment of a receiver during the pendency of appeal—Although the rule is that once appeal is perfected, the trial court loses jurisdiction over the case, orders for the protection and preservation of the rights of the parties which do not involve any matter litigated by the appeal, may still be issued.[140] Apointment of a receiver after judgment to preserve the property during the pendency of an appeal is expressly allowed.[141] In *Acuña v. Judge Caluag, et al.*,[142] a writ of possession of the mortgaged piece of land was rendered by the lower court in favor of the mortgagee. The mortgagor appealed. The trial Judge, in the meantime appointed a receiver. The Supreme Court upheld the propriety of such appointment. The appointment of the receiver does not touch upon a matter litigated by the appeal because it does not decide upon the question of physical possession. It only means that pending appeal, and to preserve the property and keep the rents, the trial court through its officer, the receiver, would take possession.

Appointment of a receiver is merely an interlocutory order—The rule is already settled that the appointment of a receiver is an interlocutory matter.[143] This was reiterated in *Garcia v. Judge Flores, et al.*,[144] wherein the provision that the trial court may discharge a receiver already appointed when convinced that such appointment was procured without sufficient cause[145] was also followed.

Alimony "pendente lite"; penalty for contempt may be imposed for refusal to pay alimony—Should the defendant in an action for alimony *pendente lite* appear to have means to pay alimony and refuses to pay, either an order of execution may be issued or a penalty for contempt may be imposed, or both.[146]

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[140] Sec. 9, Rule 41, Rules of Court.

[141] Sec. 1(d) Rule 61; Velasco v. Go Chuico, 28 Phil. 39 (1914); Jocson v. Presbiterio et al., G. R. L-7684, May 10, 1955.

[142] G. R. No. L-10736, April 30, 1957.

[143] Claudio v. Zandueta, 64 Phil. 812 (1937); Sanson v. Barrios, 63 Phil. 198 1936); Borja, v. Tan, G. R. No. L-6476, Nov. 18, 1956.

[144] G. R. No. L-10382, June 28 1957.

[145] See sec. 4, Rule 61, Rules of Court.

[146] Sec. 6, Rule 63, *id.*

In *Torres v. Judge Teodoro, et al.*,[147] the petitioner Torres was, in a previous litigation, proved to be the illegitimate father of the 3 minor children who were plaintiffs in that case. Alimony was awarded by the court for the sum of ₱100 a month. The petitioner failed to comply with the order of the court, so he was declared guilty of indirect contempt. The petitioner's contention was that the order of incarceration was unnecessary and improper because the judgment for support could have been satisfied through petitioner's property. The Supreme Court declared this contention unmeritorious because under sec. 6 of Rule 63, "either an order of execution may be issued or penalty for contempt may be issued or both."

Direct contempt is punished summarily—A person guilty of misbehavior in the presence of or so near a court or judge as to interrupt the administration of justice, including disrespect toward the court or judge, offensive personalities toward others, or refusal to be sworn or to answer as a witness or to subscribe an affidavit or deposition when lawfully required so to do, may be summarily adjudged in contempt by such court or judge and may be punished by a fine or imprisonment, or both.[148] In the same *Torres* case the petitioner was held guilty of direct contempt when after ordered by the court to pay alimony, and at about 6-meter distance from the sala of the respondent Judge, he assaulted the counsel representing his 3 illegitimate children. This act of the petitioner caused commotion which disturbed the proceedings of the court.

SPECIAL CIVIL ACTIONS

Certiorari will not lie when appeal is available—Petition for certiorari may be availed of only when there is no appeal, nor any plain, speedy, and adequate remedy in the ordinary course of law.[149] In *Nocon v. Judge Geronimo, et al*,[150] where the defendant's motion to dismiss was overruled, it was held that instead of filing a petition for certiorari, the defendant should have submitted herself for trial and then appeal from the decision if she were not satisfied with the outcome of the case. The lower court had jurisdiction to pass upon and decide the motion to dismiss submitted by the petitioner herself and where there is jurisdiction over the subject matter, the decision or order on all other questions arising in the case is but an exercise of that jurisdiction,[151] and errors which the court may commit in the exercise of such jurisdiction are merely errors of judgment.[152] Errors of jurisdiction may be reviewed in a certiorari proceeding; error of judgment, by appeal.[153]

In *Reyes v. Judge Yatco*,[154] where the complaints were dismissed by the lower court alleging lack of jurisdiction, the Supreme Court

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147 G. R. No. L-10356, April 30, 1957.
148 Sec. 1, Rule 64, Rules of Court.
149 Sec. 1, Rule 67, *id.*.
150 G. R. No. L-11201, May 31, 1957.
151 Herrera v. Berretto, 25 Phil. 245 (1913.
152 See Bimeda v. Perez, G. R. No. L-5588 Aug. 26, 1953.
153 Arvisu v. Vergara, G. R. No. L-1834, Dec. 28, 1951.
154 G. R. No. L-11425, Feb. 27, 1957.

allowed the petitioners to make use of the remedy of certiorari. In this case, Justice Bengzon dissented and said that certiorari is proper only when the Judge "acted without or in excess of his jurisdiction". Oddly enough, the petitioners alleged that the respondent judge had jurisdiction. The existence of the remedy by appeal is a bar to the writ of certiorari.[155]

Certiorari not proper against an order granting or denying a motion to quash—In *Mill v. People*,[156] the accused, after having pleaded, moved to quash on the ground of double jeopardy.[157] In ruling that certiorari will not lie, the Court state that in the first place, the order appealed from is not a final judgment and therefore not appealable. Neither certiorari nor prohibition lies against an order of court granting or denying a motion to quash an information. If the courts have jurisdiction to take cognizance of the cases and to decide the motion to quash, appeal in due time is the *obvious and only remedy* for the prosecutor or the accused as the case may be.[158]

The rules on certiorari proceedings apply also to surety. It was so held in *Plaridel Surety & Insurance Co., Inc., v. Judge Montesa, et al.*[159]

Mandamus is premature when administrative remedies are still available—The petition for mandamus may be availed on when any tribunal, corporation, board or person unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station or unlawfully excludes another from the use and enjoyment of a right or office to which such other is entitled, and there is no other plain, speedy, and adequate remedy in the ordinary course of law.[160]

The well-settled rule that no recourse to courts can be had untill all the administrative remedies have been exhausted[161] was reiterated in *Peralta v. Salcedo*.[162] The petitioner, a fourth year law student, had illicit relations with the complainant who later gave birth to a baby boy. Because of the petitioner's refusal to marry the girl, a complaint for immorality was filed with the Director of Private Schools; his graduation was held in abeyance and he was recommended for expulsion from his school. This petition for mandamus was filed to compel the respondent to issue a certificate showing his having completed the required studies of law as required for candidates for bar examinations.

The Supreme Court held that mandamus is still premature. The recommendation by the Director of Private Schools to the Secretary of Education has not been acted upon. Until and after the decision by the latter, the courts can not act on the matter. Special

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155 Silvestre v. Torres, 57 Phil. 885 (1933).

156 G. R. No. L-10427, May 27, 1957.

157 Citing Ricafort v. Fernan, G. R. No. L-9789, May, 1957; Archer v. Beldia, et al., G. R. No. L-2414, May 27, 1949.

158 G. R. No. L-10153, April 30 1951.

159 Sec. 3, Rule 67, Rules of Court.

160 De la Paz v. Alcaraz, 52 O. G. No. 6 p. 3037 (1956); Miguel v. Reyes, G. R. No. L-4851, July 31, 1953.

161 G. R. No. L-10771, April 30, 1957.

162 Ang Tuan Kai v. Import Control, G. R. No. L-3327, April 21, 1952.

civil actions are not entertainable if superior administrative officers could grant relief.[163]

Forcible entry and detainer; when to bring an action for detainer; meaning of "demand"—An action for unlawful detainer must be brought within one year from the date of the demand to return the possession of the property.[164] In *Manotok v. Guinto*,[165] it was clarified that the demand contemplated by the Rules of Court is not the notice giving the defendant the alternative either to pay the increased monthly rental or vacate the land. After said notice, as the defendant elected to stay, he merely assumed the obligation of paying the new rental and could not be ejected until he defaulted in said obligation and necessary demand was first made.

Same; when immediate execution may be availed of; deposit in court of reasonable amount of rental—In a detainer action, sec. 8 of Rule 72 providing for immediate execution of judgment applies. However, where there is no immediate urgency for the execution because it is not justified by the circumstances, immediate execution will not issue.[166] In *De los Reyes v. De Castro*,[167] 5 years had already elapsed before execution of judgment was asked. there were reasonable grounds to believe that the alleged contract of sale is one of mortgage; and there was a pending action in the CFI on question of title to property. It was accordingly held that immediate execution would not apply. Immediate execution may be available *only if no question of title is involved and the ownership and the right to the possession of the property is an admitted fact.*

The same sec. 8 of Rule 72 provides that the defendant may stay execution if he files a sufficient bond to pay the rents, damages, and costs down to the time of the final judgment in the action and that during the pendency of the appeal he pays to the plaintiff or to the CFI the amount of rent due from time to time under the contract if any, or in the absence of a contract, the reasonable value of the use and occupation of the premises. The Supreme Court followed this provision in deciding the case of*Tiangco, et al. v. Judge Concepcion, et al.*,[168] where the CFI, instead of ordering the immediate execution of the judgment of the JP to pay a monthly rental of ₱400, reduced the amount to ₱150. It was proved that the petitioner agreed to accept the monthly rental of ₱150 only on condition that the premise will be vacated on or before July 1, 1954; the contract is deemed terminated on that date. The payment of reasonable amount of rentals—which in the instant case is ₱400—must start from the termination of the contract and not from the termination of the ejectment proceedings. After the termination of the agreement on July 1, 1954, it is deemed that there is no contract and therefore reasonable value for the use and occupation of the premises at the rate determined in the judgment shall be deposited in the court.

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[163] Sec. 1, Rule 72 as applied in Gonzalez v. Salas, 49 Phil. 1 (1926); Rorado v. Virina, 34 Phil 263 (1916); Caridad Estates v. Santero, 71 Phil, 114 (1940); Barredo v. Judge Santiago, G. R. No. L-11035, Sept. 30, 1957.

[164] G. R. No. L-9540, April 30, 1957; XXXII PHIL. L.J. 571 (1957).

[615] Peñalosa v. Tuason, 22 Phil. 303, 315-317, (1912) as cited in II MORAN, COMMENTS OF THE RULES OF COURT 286-289 (1952).

[166] G. R. No. L-8960, Jan. 31, 1957.

[167] G. R. No. L-10035, Aug. 30, 1957.