CIVIL PROCEDURE—1958

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As in previous years, numerous cases dealing in Civil Procedure have been decided in 1958 by the Supreme Court. Most of these cases, however, did not principally involve procedural law questions but dealt primarily with civil law principles and the rulings in Civil Procedure that have evolved from these decisions were but incidentally, yet unavoidably, brought about by touching upon remedial questions. Majority of the pronouncements of our Court in 1958 are but reiterations of previous decisions and only a few are cases of first impression, but it will certainly benefit a student of procedure to review and know exhaustively all the rulings handed down up to date.

JURISDICTION

Jurisdiction over labor cases—In *Lakas ng Pagkakaisa sa Peter Paul, et al. v. Hon. Judge Victoriano, et al.*[1] it was held that where it appears that in addition to the labor dispute involved in a case brought before the Court of First Instance there were other labor cases pending between the same parties before the Court of Industrial Relations which had been instituted prior to the filing of the case before the CFI, the CFI has no jurisdiction to try the case for the same is already involved in those cases which have been submitted to the industrial court for adjudication. This step is necessary in order to avoid multiplicity of suits. In the present case the Peter Paul Co. filed a complaint before the CFI seeking to enjoin the petitioners in this case from committing some acts of violence after they have called a strike for failure of the company to grant their demands. The petitioners moved to dismiss the case on the ground that the court has no jurisdiction because the issue involved grow out of a labor dispute. The lower court denied said motion and on appeal the Supreme Court held that it was error for the lower court not to grant the same for the foregoing reasons.

In another case, *Benguet Consolidated, Inc. & Balatoc Mining Co. v. Babok Lumber Jack Association*,[2] decided jointly with *Benguet Balatoc Workers Union v. Babok Lumber Jack Association, et al.*[3] the Court decided that, considering that certification proceedings are investigatory in nature and taking into account that the conduct of such proceedings has been entrusted specifically to the Court of Industrial Relations[4] and that they should be expedited as much as possible, there should be no interference with the discretion and judgment of that specialized tribunal in connection with such proceedings, at least in the absence of clear and patent abuse. The Court, therefore, refused to take jurisdiction over the petitioners' case.

Jurisdiction over a case arising from a dispute as to right of possession of a homestead.—A homestead entry having been permitted by the Director of Lands, the homestead is segregated from the public domain. In case therefore

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[1] G.R. No. L-2990, January 14, 1958.
[2] G.R. No. L-11065, May 23, 1958.
[3] G.R. No. L-11029, May 23, 1958.
[4] Republic Act No. 875, sec. 12.

that an action is brought to determine who of the two contending parties has a better right to the possession, it cannot be successfully maintained that the Court of First Instance is without jurisdiction over the subject matter; the Director of Lands, already divested of control and possession except if the application is finally disapproved and the entry annulled, cannot be pretended to possess the power to so adjudicate the case.[5]

Attorney's fes affect jurisdiction.—In determining the jurisdictional amount in a case brought before the court, atorney's fees should be included.[6] This ruling was reiterated in the case of *Manila Blue Printing Co. Inc. v. Teachers' College Inc.*[7] A complaint was filed praying that defendant be ordered to pay plaintiff the sum of ₱1,547.72 with interest representing the unpaid accounts for purchase of school, office and engineering supplies and ₱500.00 for damages representing attorney's fees. Upon motion of defendant the case was dismissed on the ground that the court of first instance has no jurisdiction since the claim was for amount less than ₱2,000.00 exclusive of interest and attorney's fees.

The Supreme Court ruled that the attorney's fees should be included in the amount that is determinative of the jurisdiction, hence it was error for the lower court to grant the motion to dismiss.

In *C. N. Hodges v. Respulo, et al.*[8] the defendant-appellant maintains that this case was not within the jurisdiction of the lower court because plaintiff Hodges alleged in his complaint three causes of action one involving ₱860.00, another involving ₱1,400.00 and the third, ₱27.40. There is no merit in this pretense, for a court of first instance has original jurisdiction "in all cases in which the demand exclusive of interest amounts to more than two thousand pesos."[9] The demand in the case at bar is the sum total of the amount claimed in the three causes of action which is over two thousand pesos, not in each cause of action separately from the other.[10]

Forcible entry and detainer cases.—It is patently erroneous for the Court of First Instance to reverse a decision of the municipal court in an unlawful detainer case on the ground that it has no jurisdiction since there was controversy as to whether the lease contract had already expired or not and such controversy was a "matter not capable of pecuniary estimation" and therefore within the jurisdiction of the Court of First Instance. Section 88, paragraph 2 of the Judiciary Act of 1948 clearly provides that the jurisdiction of the justice of the peace and the judge of the municipal court shall not extend to civil action in which the subject matter of litigation is not capable of pecuniary estimation, *except in forcible entry and detainer cases.* This is the holding in the case of *Cruz, et al. v, Hon. Judge Ycasiano, et al.*[11]

When state immunity not applicable.—It is a general principle of law that a state cannot be sued without its consent. However there are exceptions to the rule. Thus when a sovereign state enters into a contract with a private person the state can be sued upon the theory that it has descended to the level of an individual from which it can be implied that it has given consent to be sued under the contract.[12] In the case of *Harry Lyons, Inc. v. The United States of America*[13] it appears that defendant entered into a contract for steve-

[5] Diaz, *et al.* v. Macalinao, *et al.*, G.R. No. L-10747, January 31, 1958.
[6] Tolsa v. Panlilio, 50 O.G. 6, 2505; Bing It v. Ibañez, G.R. No. L-52-16, March 16, 1953; Soriano v. Omila, 51 O.G. 7, 7465.
[7] G.R. No. L-10911, March 21, 1958.
[8] G.R. No. L-10878, April 16, 1958.
[9] Republic Act No. 296, sec. 44.
[10] Gutierrez v. Ruiz, 50 O.G. 2410.
[11] G.R. No. L-10278, March 28, 1958
[12] Santos v. Santos, 48 O.G. 4815.

doring services at the U.S. Naval Base, Subic Bay, Philippines, the contract to terminate on June 30, 1956. Said contract was entered into pursuant to the provisions of Sec. 2(c) of the Armed Services Procurement Act of 1947 (Public Law 413, 80th Congress) of the United States of America. Plaintiff brought an action before the CFI of Manila to collect several sums of money arising from said contract. The defendant contends that the court has no jurisdiction because the United States of America cannot be sued without its consent. *Held:* The doctrine of state immunity could not apply. It has descended itself into the level of a private individual. However the case was dismissed for failure of the plaintiff to follow the procedure laid down in the Act regarding the prosecution of its action against the United States Government, i.e., the exhaustion of administrative remedies against the contracting Officer and the Secretary of Navy.

Jurisdiction of Court of Appeals.—In *Victoria D. Mialhe, et al. v. Rufino*,[14] it was ruled that the Court of Appeals erred in holding that it has jurisdiction to entertain a petition in which the amount involved in the main judgment is P77,400.00. This is beyond the jurisdiction of the Court of Appeals and the appeal therefrom is cognizable only by the Supreme Court, so it can have no jurisdiction to issue a writ of certiorari to enjoin execution thereof pending appeal.[15] Otherwise, the issuance thereof by said Court would be in "aid of an appellate jurisdiction that does not exist."

Pursuant to the provisions of the Judiciary Act of 1948, the Court of Appeals has jurisdiction where the amount involved is less than fifty thousand pesos. The Supreme Court therefor in *Salvador F. Pablo, et al. v. Ledda*,[16] dismissed the appeal and directed that it be filed with the Court of Appeals.

ACTIONS AND PARTIES

Lack of Cause of Action.—It is elementary that lack of cause of action as ground for dismissal must appear on the face of the complaint and that to determine the sufficiency of the cause of action only the facts alleged in the complaint and no other should be considered.[17] In the case of *CONVETS, Inc. v. National Development Co., et al.*[18] the lower court in holding that the plaintiff's complaint did not state a cause of action against the defendant took into account the documents attached to the complaint as annexes A to F and inferred therefrom that the sale in question was a direct transaction between the management of the NDC and the Joseph Behn & Sons Co. The Supreme Court held that it was erroneous. To determine whether the complaint states a cause of action one must accept its allegation as true. One may not go beyond and outside the complaint for data or facts.[19]

In an action for reconveyance of a parcel of land, *Nebrada v. Heirs of Felix Alivio*,[20] the findings of the trial court that there was no cause of action was affirmed. In order that the heirs of Cobalan may claim reconveyance of the property in their favor there is need for them to show that they are the owners thereof and that they have been deprived of its ownership and possession through fraud practiced by the defendants. The complaint did not show nor claim that they are owners of the property for it merely alleges that their

[14] G.R. No. L-11786, September 26, 1958.
[15] G.R. No. L-12646, April 16, 1958.
[16] Sec. 70, Republic Act No. 296, as amended.
[17] G.R. No. L-8726, November 28, 1958.
[18] I MORAN, RULES OF COURT, 140 (1957 ed.).
[19] G.R. No. L-10232, February 28, 1958.
[20] World-Wide Insurance Surety Inc. v. Manuel, *et al.*, 51 O.G. 6214.
[20] G.R. No. L-11650, June 30, 1958.

father applied for the property as homestead from the Bureau of Lands and that after complying with the requirements of the law an order was issued directing the issuance of the patent. These allegations were not sufficient to state a cause of action. Hence, the action was dismissed. In another case, *Simbre, et al. v. Agustin, et al.*,[21] the action for annullment of an allegedly fraudulent sale was dismissed for lack of cause of action in that there was no allegation of liquidation of conjugal partnership nor of prejudice to the heirs who were plaintiffs in the case.

Parties in Interest.—Every action must be prosecuted in the name of the real party in interest.[22] In *Lim Siok Hucy v. Lapiz, et al.*,[23] an action was filed to recover damages by plaintiffs who were heirs of the deceased who died in an accident. The action was dismissed because it was not brought by the proper party in interest. The plaintiffs were all citizens and residents of Communist China and notwithstanding the fact that they have been informed of the death of the deceased they did not send any communication to anyone in the Philippines giving authority to take whatever actions may be proper to obtain indemnity, other than two letters supposedly sent by his sister and his mother which do not contain any intimation nor authorization for the filing of the present action. The action was initiated by plaintiffs represented merely by their counsel and the question arose as to whether the latter had authority to represent the former in view of the fact that they are all residents of a foreign country. A lawyer is presumed to represent any cause in which he appears,[24] but in this case this presumption had been destroyed and overcome by the very evidence presented by counsel himself. It is true that one Chua Pua Tam was appointed guardian *ad litem* of the two plaintiffs who allegedly are minors to represent them in the prosecution of the present action, but while this representation may only benefit the minors and not the other plaintiffs yet the same would not suffice to meet the requirements of the rule which provides that every action must be instituted in the name of the real party in interest.

The case of *Sto. Domingo, et al. v. Sto. Domingo* [25] is an instance where a minor was sued through his guardian.[26] With the approval of the court it was held that the guardian *ad litem* can bind the minor in any transaction with regard to his estate including the settlement of a claim against it.

Where the plaintiffs are not the original party plaintiffs as they were required by section 17 of Rule 3 it cannot be contended that they have no capacity to sue unless joined by their respective husbands, because they are the real party in interest in representation of their father.[27]

An action may be dismissed for the reason that the agent instead of the pricipal was made party defendant.[28] In the case of *Lorca v. Dineros* [29] a deputy sheriff, all the time acting in the name of the Sheriff and without committing any misfeasance, sold the property of the plaintiff pursuant to a writ of execution. Since he was only acting as agent, it is the sheriff that should have been made the defendant. And in answer to the contention of the plaintiff-appellant that the complain should have not been dismissed since the court could have included the sheriff as party defendant in line with section 11 of

[21] G.R. No. L-11071, October 30, 1958.
[22] Rule 3, sec. 2, RULES OF COURT.
[23] G.R. No. L-12289, May 28, 1958.
[24] Rule 127, sec. 20, RULES OF COURT.
[25] G.R. No. L-10886, April 18, 1958.
[26] Rule 3, sec. 7, RULES OF COURT.
[27] Cadiz, *et al.* v. Nicolas, G.R. No. L-9198, February 18, 1958.
[28] Macias & Co. v. Warner Barnes, 43 Phil. 165.
[29] G.R. No. L-10919, February 28, 1958.

Rule 3, the court said: However, what should have been done was not inclusion or exclusion under said section. It was substitution of the deputy by the sheriff. Any way the word "may" in said section implies discretion of the court and we are shown no reason indicating abuse thereof.

Joinder of Parties.—All persons in whom or against whom any right to relief in respect to or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, may, except as otherwise provided in the Rules of Court, join as plaintiffs or be joined as defendants in one complaint, where any question of law or fact common to all such plaintiffs or to all such defendants may arise in the action; but the court may make such orders as may be just to prevent any plaintiff or defendant from being embarrassed or put to expense in connection with any proceedings in which he may have no interest.[30]

Where plaintiffs have common interest against defendant, joinder of parties is permissible.[31] In the case of *Abrasaldo v. Compania Maritima*[32] plaintiffs presented to the municipal court of Manila a complaint alleging partial nonpayment of wages by their employer, the Compania Maritima. Plaintiffs have been employed in the steward and deck departments of the vessels of defendant from August 1951 to June 1955. The complaint contained a table listing the nature of work, period of employment, monthly salary and total claim for underpayment of each plaintiff. It concluded with a prayer that defendant be ordered to pay the total claim for underpayment of each plaintiff. *Held:* There can be permissible joinder of parties. There was a series of transaction involving a common question of fact and law. Plaintiffs have a common interest against the defendant.

Substitution of Parties.—After a party dies and the claim is not thereby extinguished the court shall order upon proper notice the legal representative of the deceased to appear and to be substituted for the deceased within a period of thirty days or within such time as may be granted.[33] This provision was not properly followed in the case of *Ferreria et al. v. Manuela Ibarra vda. de Gonzales, et al.*[34] In this case there had been no court order for the legal representative of the deceased defendant to appear nor had the complainant ever procured the appointment of such legal representative, nor had the legal representative of the deceased ever asked to be allowed to be substituted. It cannot therefore be said that there was a valid substitution and any judgment rendered in the case is not binding upon the legal representative.

In case of any transfer of interest the action may be continued by or against the original party unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.[35] This provision was applied in the case of *NARIC v. Fojas, et als.*[36]

The first three respondents in the case of *Negado v. Castro, et al.*[37] have ceased to hold their respective positions but plaintiff failed to make substitution of parties pursuant to section 18 of Rule 3 of the Rules of Court. However, in view of the resultant ruling in the case adverse to the plaintiff the

[30] Rule 8, Sec. 6, RULES OF COURT.
[31] International Colleges Inc. v. Argonza, G.R. No. L-8884, November 29, 1951; Soriano v. Jose, 47 O.G. No. 12, supp., 156.
[32] G.R. No. L-11918, July 31, 1958.
[33] Rule 3, Sec. 17, RULES OF COURT.
[34] G.R. No. L-11567, July 17, 1958.
[35] Rule 3, Sec. 20, RULES OF COURT.
[36] G.R. No. L-11517, April 30, 1958.
[37] G.R. No. L-11089, June 30, 1958.

court deemed it unnecessary to require compliance with said procedural step. In an ejectment case, *Pastor Domingo v. Hon. Nicasio Yatco*,[38] a judgment in default was ordered set aside and case reopened so that the fact of the alleged death of Emilia Enriquez, the respondent, prior to the institution of the action could be duly established, in which case her estate could be adequately represented and given its day in court.

When the action is for the recovery of money, debt, or interest thereon and the defendant dies before final judgment in the Court of First Instance it shall be dismissed to be prosecuted in the manner especially provided in the Rules of Court.[39] The defendant in the case of *Villegas, et al. v. Zapanta, et al.*[40] died before the hearing of the case. In accordance with section 17, Rule 3 of the Rules of Court, the court decreed that he be substituted by his children. One of the plaintiffs also died and in due course she was substituted by her surviving husband who thereby become the sole plaintiff. The trial court absolved the defendants' children from liability for the debts sought to be recovered because according to the terms of the foregoing section the claims should be submitted in the corresponding estate proceedings. This ruling is affirmed by the appellate court.

PLEADINGS AND MOTIONS

Amendment of Pleadings.—A party may amend his pleading once as a matter of course at any time before a responsive pleading is served, or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within ten days after it is served.[41] The Court may, upon motion at any stage of an action, and upon such terms as may be just, order or give leave to either party to alter or amend any pleading, process, affidavit, or other document in the cause, to the end that the real matter in dispute and all matters in the action in dispute between the parties may, as far as possible, be completely determined in a single proceeding. But such order or leave shall be refused if it appears to the court that the motion was made with intent to delay the action.[42] The motion to amend the pleading is addressed to the discretion of the court as held in the case of *Avecilla v. Hon. Yatco*.[43] The court may grant leave upon such terms as it may deem just and as the circumstances may warrant. The rule is not mandatory. The rule is further subject to the limitation that if the amendment is allowed, the cause of action should not be substantially changed, or the theory of the case altered to the prejudice of the other party.[44]

In *Lerma v. Reyes*[45] it appears that appellants asked permission to amend their answer so as to include therein the allegation of payment of usurious interest only after plaintiff had already presented his evidence and rested his case The lower court did not abuse its discretion when it refused to allow the proposed amendment, because to do so would have had the effect of unnecessarily prolonging the trial, there being no reason why the defense of usury was not pleaded in the original answer.

Service of Pleadings:—Completeness of service and service to attorneys.—Service by registered mail is complete upon actual receipt by the addressee,

[38] G.R. No. L-11874, June 27, 1958.
[39] Rule 3, Sec. 21, RULES OF COURT.
[40] G.R. No. L-11956, December 26, 1958.
[41] Rule 17, Sec. 1, RULES OF COURT.
[42] Rule 17, Sec. 2, RULES OF COURT.
[43] G.R. No. L-11678, May 14, 1958.
[44] Torres Vda. de Neri v. Tomacruz, 49 Phil. 913.
[45] G.R. No. L-12081, May 30, 1958.

but if he fails to claim his mail from the post office within five days from the date of first notice of the postmaster, the service shall take effect at the expiration of said time.[46] In *Roullo v. Lumayno*,[47] judgment was rendered against defendant for a sum of money. Plaintiff moved for reconsideration for additional damages but it was dismissed on the ground that it was filed after the decision has become final. Plaintiff proved that he actually received on May 24 the copy of the decision sent by registered mail and according to the first part of the above rule his time to move for new trial or reconsideration began on that date. The defendant contended that plaintiff's time began earlier, i.e. at the expiration of five days after notice by the postmaster. The Court ruled that it was defendant's duty to prove the date when such first notice had been given. In default of such proof, May 24 must be deemed the starting point. From May 24 to June 22 less than thirty days had elapsed so that on the later date when the motion was filed the decision had not yet become final and the lower court had jurisdiction to act upon plaintiff's motion for reconsideration.

The case of *Visayan Surety & Insurance, Corp. v. Central Bank, et als.*[48] reiterates the ruling in *Chainavi v. Tancinco, et al*,[49] that where a party has appeared by an attorney, service upon him should be made upon his attorney unless service on the party himself was ordered by the court; a notice given to the client and not to his attorney is not notice in law. It is immaterial or unimportant that the party volunteered to get the copy because the purpose of section 2 of Rule 27 is obviously to maintain a uniform procedure calculated to place in competent hands the orderly procesution of a party's case. In this case the service of the order denying a motion for reconsideration was made upon the party and not upon the attorney of record. Such service was improper and inadequate and does not have the effect of starting the running of the period to appeal.

Service of the papers may be made either personally or by mail. Personal service may be made by delivering personally a copy to the party or his attorney or by leaving it in his office with his clerk or with a person having charge thereof. If no person is found in his office or his office is not known, then by leaving the copy between the hours of eight in the morning and six in the evening, at the party's or attorney's residence, if known, with a person of sufficient discretion to receive the same.[50] This was not followed in *Ferreria et al. v. Gonzeles, et al.*[51] in giving the notification of an order for substitution and it was ruled accordingly that there was no valid service and consequently the court did not acquire jurisdiction over the substitute.

A motion to set aside the order of dismissal was filed by the plaintiffs in *Valeriano v. Kerr, et al.*[52] on the ground that they were not properly notified. The court refused to grant the motion holding that plaintiffs, inasmuch as they were represented by a counsel, had been properly served notice because notice was given to their counsel. If a final order or judgment can be reopened every time a party alleges that he was not been previously aware thereof and that his attorney on a mistaken motion or without authority, has failed to appeal, the end of litigations would be speculative, if not dependent upon the will of the parties, said the Court in part.

[46] Rule 8, Sec. 8, RULES OF COURT.
[47] G.R. No. L-11444, May 30, 1958.
[48] G.R. No. L-12129, September 17, 1958.
[49] G.R. No. L-4782, February 29, 1952.
[50] Rule 27, Secs. 3 & 4, RULES OF COURT.
[51] G.R. No. L-11565, July 17, 1958.
[52] G.R. No. L-10657, May 16, 1958.

JUDGMENTS

Judgment on the Pleadings.—Where an answer fails to tender an issue, or otherwise admits the material allegations of the adverse party's pleadings, the court may, on motion of that party direct judgment on such pleading, except in actions for annulment of marriage or divorce wherein the material facts alleged in the complaint shall always be proved.[53] In *Warner Barnes & Co. Ltd. v. Reyes* [54] an action was filed for foreclosure of mortgage. The defendants alleged in their answer that they admit the first paragraph of the complaint, that the defendants are without knowledge or information sufficient to form a belief as to the truth of the material averments of the remainder of the complaint, and that they reserve the right to present an amended answer with special defenses and counterclaim. But they never filed any amended answer and plaintiffs move for judgment on the pleadings on the ground that the answer failed to tender an issue. The trial court granted the motion and rendered judgment in plaintiffs' favor stating that the denial by the defendants of the material allegations of the complaint under the guise of lack of knowledge is a general denial so as to entitle the plaintiff to a judgment on the pleadings. On appeal the question raised was whether such allegation of want of knowledge or information as to the truth of the material averments in the complaint amounts to a mere general denial, thus warranting judgment on the pleadings, or whether it is sufficient to tender a triable issue. *Held:* This is foreclosure suit and it is alleged that defendants are indebted in the sum of ₱9,906.88 secured by mortgage. A copy of the mortgage deed was attached to the complaint. There are also allegations of partial payments and defaults in payments of outstanding balance and covenants to pay interest and attorney's fees. It is hard to believe that appellants could not have had knowledge or information as to the truth or falsity of any of said allegations. It was easy for them and within their power to determine and so specifically allege whether or not they had executed the mortgage. They could be aided in the matter by an inquiry or verification as to its registration in the registry of deeds. "Unexplained denial of information and belief of a matter of records, the means of information concerning which are within the control of the pleader, or are readily accessible to him, is evasive and is insufficient to constitute an effective denial." [55] It is noteworthy that the answer was filed after an extension granted by the lower court and while a reservation was made to file an amended answer, no such pleading was presented. If this show anything, it is that the appellants obviously did not have any defense or wanted to delay the proceedings. The form of denial adopted by them although allowed by the Rules of Court must be availed of with sincerity and good faith, certainly not for the purpose of confusing the adverse party as to what allegations of the complaint are really put in issue nor for the purpose of delay.[56]

In *Navarro, et al. v. Bello, et al.*[57] it was held that where the issues of the counterclaim are so inseparable from those of the complaint and answer in such a manner that the counterclaim partakes of the nature of a special defense it is deemed controverted even if not specifically challenged by plaintiffs in a reply.

To the allegation in the complaint "4. that sometime during 1942 in his dwelling defendant succeeded in cohabiting with plaintiff; 5. x x x was con-

[53] Rule 35, Sec. 10, RULES OF COURT.
[54] G.R. No. L-9581, May 14, 1958.
[55] 41 AM. JUR. 399, citing Dahlstrom v. Germander, 92 NE 106.
[56] Nieman v. Long, 31 Fed. Supp. 30, 31.
[57] G.R. No. L-11647, January 31, 1958.

ceived during the cohabitation." defendant answered in this manner: "4. that defendant denies the averment contained in paragraphs 4 and 5 of the complaint." This was accepted by the court as a sufficient specific denial as to raise a triable issue.[58]

Defendant in *Worcester v. Lorenzana*[59] made capital of the fact that the reply to his counterclaim was in the form of a general denial which according to him constitute an admission of the averment in said counterclaim that he had incurred damages as a consequence of the "malicious and unjustified" institution of the present action. *Held:* While the rule is that the material allegation in the complaint other than those as to the amount of damages shall be deemed admitted when not specifically denied,[60] it is to be noted that the counterclaim for damages in the present action is based on a supposition that the action was malicious and unjustified which is a mere conclusion unsupported by the facts alleged in the counterclaim. Needless to say, that conclusion cannot be deemed admitted even when not specifically denied.

Summary Judgments.—A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory relief may, at any time after the pleading in answer thereto has been served, move with affidavits for a summary judgment in his favor as to all or any part thereof.[61] Distinction should be made between a summary judgment and a judgment on the pleadings. The latter is a judgment on the facts as pleaded, while the former is a judgment on the facts as proven summarily by affidavits, depositions or admissions.[62] In an action for a sum of money, *Go Leting & Sons, et al. v. Leyte Land Transportation Co.*,[63] the appellants had expressly admitted the material allegations of the complaint, without in their answer tendering any genuine issue of fact. It was ruled that summary judgment was in order. As pointed out by the appellee and admitted by the court appellants counterclaim was based merely on the allegations referred to in the special defenses which were found to be untenable.

Dismissal of Action for Failure to Prosecute.—When plaintiff fails to appear at the time of the trial or to prosecute his action for 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. This dismissal shall have the effect of an adjudication upon the merits unless otherwise provided by the court.[64] The dismissal pursuant to this rule rests upon the sound discretion of the court and will not be reversed on appeal in the absence of abuse.[65] In *Benares Montelibano v. Benares*[66] the hearing of the case had been postponed not less than five times at the instance of the plaintiffs. Twice the court had warned that each postponement was the last, nevertheless on February 9 plaintiffs filed another motion for postponement (the date for the hearing was set for February 18 and 19). On February 13 the court heard the motion but did not act upon it because the defendant had not yet received the notice thereof and upon receipt he might object to the motion for continuance. On February 18 neither the plaintiffs nor their counsel appeared, so the court dismissed the case. In affirming the dismissal the Supreme Court stated that the fact that plaintiff had filed a motion for con-

[58] Constantino v. Court of Appeals, G.R. No. L-10579, March 22, 1958.
[59] G.R. No. L-9485, July 31, 1958
[60] Rule 9, Sec. 8, RULES OF COURT.
[61] Rule 36, Sec. 1, RULES OF COURT.
[62] I MORAN, *op. cit.*, 501 (1057 ed).
[63] G.R. No. L-8887, May 28, 1958.
[64] Rule 30, Sec. 3, RULES OF COURT.
[65] Matias v. Teodoro, G.R. No. L-8894, May 31, 1958.
[66] G.R. No. L-10824, February 28, 1958.

tinuance and that the court did not act upon it immediately did not entitle the plaintiffs to presume that their motion would be granted. Such motion is left to the sound discretion of the trial court. A court does not abuse its discretion when it defers the resolution of a motion for postponement of the hearing of the case and denies it on the day set for such hearing.

However, it is error for the court to dismiss a case for failure of the plaintiff to appear at the trial when such failure is due to the fact that his counsel had another case in another court at the same day set previously. Such is the holding in *Valerio v. Sec. of Agriculture and Natural Resources*.[67] Moreover it appears that the notice for trial set for August 3 at one p.m. was received by plaintiff only on Aug. 2 at 3:40 p.m. and this was no sufficient notice to give the parties opportunity to prepare for trial. The dismissal clearly deprived the plaintiff of his day in court through no fault or negligence on his part. When a party without malice, fault or inexcusable negligence is not really prepared for trial the court would be abusing its discretion if a reasonable opportunity is denied him for preparing therefor and for obtaining due process of law.[68]

In *Republic of the Philippines v. Villarosa*,[69] the dismissal of an action for failure to prosecute was held to be without prejudice because plaintiff's delay for failure to pursue his case is due to a compromise he entered into with the defendant. In *Masiglat v. City Mayor of Pasay, et al.*[70] plaintiff's case was dismissed for failure to prosecute his action for an unreasonable length of time.

Judgment by Default.—In justice of the peace courts, if the defendant does not appear at the time and place designated in the summons, he may be declared in default, and the court shall thereupon proceed to hear the testimony of the plaintiff and his witnesses, and shall render judgment for the plaintiff in accordance with the facts alleged and proved.[71] Where summons was duly served upon the defendant requiring him to appear and answer on February 25 and on said date he appeared but only to move for postponement and the hearing was reset to March 8, but defendant failed to show up on the later date, it is error for the justice of the peace court to declare him in default. This happened in *Doctor v. Justice of the Peace of Camiling, Tarlac.*[72] In *Gangcayco, et al. v. Hon. Emilio Bautista*[73] defendants were also held not in default because they appeared and answered the complaint against them and filed a motion to dismiss although on the day set for hearing they did not appear.

No Justification for Granting Motion to Dismiss.—The trial court in *Valencia v. Layug et al.*[74] was found to have improperly granted a motion to dismiss. It appears that plaintiff filed an action in the municipal court of Manila against Herminia Layug and her husband to recover the commission for the sale of property of Herminia in accordance with a brokerage contract. The defendant filed an answer with a counter-claim. Judgment was later rendered in plaintiff's favor. On appeal to the CFI defendant filed a motion to dismiss on the ground that the complaint failed to state a cause of action. The theory behind the motion was that the property sold belong to the conjugal partnership and only her husband as administrator has authority to enter into the contract

[67] G.R. No. L-12880, September 23, 1958.
[68] So v. Tan, 58 Phil. 487.
[69] G.R. No. L-11782, April 30, 1958.
[70] G.R. No. L-11839, August 21, 1958.
[71] Rule 4, Sec. 18, RULES OF COURT.
[72] G.R. No. L-11595, September 29, 1958.
[73] G.R. No. L-11885, October 30, 1958.
[74] G.R. No. L-11060, May 23, 1958

of agency. The trial court dismissed the action but the Supreme Court reversed it. It was noted that nowhere in the complaint does it appear that the property is conjugal. On the contrary the agency contract referred to the property as her own. There is no justification for the dismissal of the complaint. It was done not on the basis of any evidence adduced by the parties nor on the result of a trial on the merits because there had been neither a trial nor any presentation of evidence but only a motion to dismiss. If the property is really conjugal it is a matter of defense for the defendant to prove it in the regular trial. The test of the sufficiency of facts alleged in the complaint to constitute a cause of action is whether or not, admitting the facts alleged, the court could render a valid verdict in accordance with the prayer of said complaint.[75]

In *Cu Unjieng et al. v. Go Oh Chu, et al.*[76] it appeared that the ground on which a motion to dismiss a complaint in intervention is not indubitable as to warrant an outright dismissal of the complaint. The Supreme Court observed that it would have been more proper for the trial court to defer the determination of the motion until after trial on the merits for it may still be proven that the intervenor has really a valid cause for intervention.[77]

Res Judicata as a Bar to Another Action.—Numerous cases have been dismissed by the Supreme Court because of the *res judicata* effect of previous cases. In order that a prior judgment may be conclusive upon a subsequent litigation, the following requisites should be met: (1) it must be a final judgment or order, (2) the court rendering it must have jurisdiction over the subject matter and the parties, (3) it must be a judgment or order on the merits, and (4) there must be between the two cases identity of subject matter, identity of parties, and identity of causes of action.[78] This rule was applied in *Aguilar v. Gamboa.*[79] Here the wife of the deceased, Jose Aguilar, mortgaged several lots belonging to his estate. In Civil Case No. 2335 a foreclosure of the mortgage was decreed and the sale of the lot was ordered. The administrator of the estate filed a complaint in a separate civil case questioning the validity of the mortgage as affecting properties of the estate and challenging the efficacy of the foreclosure and sale. His attempt failed because the action was definitely dismissed for failure to appear at the hearing. Subsequently another administratrix, the plaintiff herein, was appointed. She seeks to avoid the execution of the foreclosure judgment on the same ground raised by the original administrator. Defendants moved to dismiss the case on the ground of *res judicata*. Plaintiff admits the existence of the first three requisites but maintains that the fourth is not present because there is no identity of parties. It was ruled that this point has no merit. In both cases the plaintiff is the administrator or administratrix of the deceased and it makes no difference that Gamboa is defendant with others in the first case because if he had been sued alone in the first case and he is now sued with others the defense of res judicata would be decisive just the same.[80] "Where both the parties offering a judgment as an estoppel and the party against whom it is so offered were parties to the action in which the judgment was rendered it is no objection that the action included some additional parties who are not joined in the present action."[81]

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[75] Paminsan v. Cortales, 28 Phil. 48; Blay v. Batangas Transportation Co., 80 Phil. 378; De Jesus v. Belarmino, 50 O.G. No. 7, p. 3064.
[76] G.R. No. L-10570, Nov. 14, 1958.
[77] Rule 8, Sec. 3, RULES OF COURT; I MORAN, *op. cit.*, 150 (1957 ed.).
[78] I MORAN, *op. cit.*, 60 (1957 ed.), citing San Diego v. Cardona, 70 Phil. 282, 283.
[79] G.R. No. L-10187, March 25, 1958
[80] Aquino v. Sanvictores, G.R. No. L-3397, July 27, 1951.
[81] 50 C.J.S. 801.

A judgment upon the merits bars a subsequent suit brought in a different form of action and a party therefore cannot by varying the form of action or adopting a different method of presenting his case escape the operation of res judicata.[82] Thus in *Roa v. de la Cruz*[83] the administrator was not allowed to bring an action to annul the judicial sale ordered by the probate court and which was executed by the sheriff according to law and duly approved by the probate court, on the ground that the sale was irregular and shocking to the conscience, because it appears that a prior suit based on the same ground was filed before the probate court and the same was dismissed. It is clear that the validity of such sale was already settled in the probate court and the same cannot be assailed in a separate civil action brought in the ordinary court.

Between the same parties with the same subject matter and cause of action a final judgment on the merits is conclusive not only on the question actually contested and determined, but upon all matters that might have been litigated and decided in the former suit, that is, all matters properly belonging to the subject of the controversy and within the scope of the issue.[84] In *Jalandoni v. Martir-Guanzon*[85] an action for partition was brought by plaintiffs asking among others for the accounting and delivery of their shares in the crops obtained during the agricultural years from 1941 to 1947. A decision was rendered by the CFI in 1955 and it having become final the plaintiffs instituted the present action seeking recovery from defendant of some shares in the product of the property from 1947 to 1955 when the action for partition was decreed. The case was dismissed upon motion of the defendast because it did not state a cause of action. On appeal it was held by the Supreme Court that the value of the plaintiffs' share during the time that the former action was pending cannot be recovered for such recovery is now barred by the previous judgment. Even the claims for damages which was only a result of the original action cannot prosper for these damages could have been claimed in the first action either in the original or else by supplemental pleading. To allow them to recover by subsequent suit would be a violation of the rule against multiplicity of suits and the rule against splitting causes of action since these damages spring from the same cause of action that was pleaded in the former case between the same parties.[86]

The defense of res judicata did not prosper in *Marbella v. Kilayko, et al.*[87] The appellants maintain that aside from the fact that they were already declared heirs of the deceased Matias Morin by an order of the lower court which has long become final and therefore can no longer be the subject of a subsequent action tending to reopen the matter adjudicated therein, the present action was filed almost one year after the intestate proceedings were finally closed so that plaintiff had already lost whatever she may have by reason of abandonment or laches. The order sought to be reopened adjudicated the properties to appellants who are not entitled to the inheritance in view of the existence of appellee's superior right. Under section 4, Rule 74 of the Rules of Court it is reviewable and subject to readjustment within two years so that it could not have the effect of barring a subsequent action by the rightful heir for the recovery of the properties belonging to the estate of Morin. "A judicial

[82] Francisco v. Blas, *et al.*, G.R. No. L-5078, May 4, 1954.
[83] G.R. No. L-10877, February 28, 1958.
[84] Peñalosa v. Tuazon, 22 Phil. 312; NAMARCO v. Macadaeg, 50 O.G. 182.
[85] G.R. No. L-10423, January 21, 1958.
[86] Blossom & Co. v. Manila Gas Corp., 55 Phil. 226; Santos v. Moir, 36 Phil. 350; Pascua v. Sideco, 24 Phil. 26.
[87] G.R. No. L-11627, June 27, 1958.

partition in probate proceedings (and the same thing can be said of partition in intestate proceedings) does not bind the heirs who are not parties thereto." [88]

In *De los Reyes v. Coronet, Inc.*[89] the Supreme Court held that the CFI of Manila erred in sustaining the plea of res judicata. This was a complaint for breach of contract and for damages. Defendant alleged that the complaint is a mere reproduction of defendant's counterclaim in a civil case in the municipal court of Manila and he therefore moved for the dismissal on the ground of res judicata. The record showed however that the municipal court of Manila dismissed the counterclaim because the same was already the subject matter of a separate complaint between the same parties. The dismissal was made without trial on the merits for there could not have been a trial inasmuch as the counterclaim involved an amount of ₱20,000 which is beyond the jurisdiction of the municipal court.

An action for damages based on the ground that defendants took an active part in the illegal preparation and execution of the indemnity agreement which was declared null and void in a previous civil case was filed in *Estioco et al. v. Hamada.*[90] The previous case was instituted by present plaintiff against Alto Surety and Insurance Co. for annulment of an indemnity agreement. The court dismissed the present suit on the ground that in the previous case it must have been claimed and proven that said indemnity agreement was executed and prepared because of the active participation of present defendant who took advantage of the ignorance and good faith of plaintiff for which reason the court declared such agreement void and without effect. The issue involved in the two cases are therefore connected and interrelated and could have been threshed out only in one case. For this reason the court *a quo* said that "after a study of the same the actions for damages in all the causes of action are in the nature of a counterclaim necessarily connected with the main cause of action in the prior case. The failure to set them up in said case bars their being brought up in a separate action. On appeal this finding of the lower court was upheld.

Although appellant was not properly a party in the earlier case but he substituted his interest in the property in litigation to and for consideration of the court, he thereby placed himself in privity with one of the parties and a judgment on the case is binding on him. This happened in *Valdez v. Valdez* [91] where the father executed in favor of his son a "deed of anticipated inheritance" which was duly introduced in the case for the purpose of negating the defense of ownership set up by the other party. He is thereby estopped by the judgment in that case to bring the present suit.

The question of res judicata was likewise raised and involved in the cases of *De Guzman v. De Guzman,*[92] *Sto. Domingo v. Sto. Domingo,*[93] *Butuagan v. Aguid Construction Co.,*[94] *and Raymundo, et al. v. Afable, et al.*[95]

Prescription as ground for dismissal.—An action may be dismissed on the ground that it is barred by the statute of limitations.[96] But where the ground on which prescription is based does not appear indubitable the court may do well to defer decision on the motion to dismiss until after trial on the merits

[88] Lajom v. Viola, 73 Phil. 563.
[89] G.R. No. L-10718, April 30, 1958.
[90] G.R. No. L-11079, May 21, 1958.
[91] G.R. No. L-11327, October 31, 1958.
[92] G.R. No. L-11627, June 25, 1958
[93] G.R. No. L-10886, April 18, 1958.
[94] G.R. No. L-11266, April 18, 1958.
[95] G.R. No. L-10548, April 25, 1958.
[96] Rule 8, Sec. 1(e), RULES OF COURT.

in order to do justice to the plaintiff.[97] In *Cordova, et al. v. Cordova*[98] it appearing that the motion to dismiss the complaint for petition on the ground of prescription is not based on a clear averment of adverse claim of possession on the part of defendants that would give them an adverse title to the property by acquisitive prescription, the court held it an error for the lower court not to defer action on the motion.

A paragraph on a surety bond provides: "Furthermore it is hereby agreed and understood that the General Indemnity Co., Inc. will not be liable for any claim not discovered and presented to the company within three months from the expiration of the bond and that the obligee hereby waives his right to file any court action against the surety after the termination of three months above mentioned." The question was raised whether this three month period is a condition precedent or a limitation of action. It is merely a condition precedent as decided by the Supreme Court in *Wie v. Nomorosa, et al.*[99] Inasmuch as the plaintiff's claim had been present within the three month period the action may be filed any time within the statutory period of prescription which is ten years since the contract is in writing.

The Moratorium Law tolled the running of the statute of limitation from March 10, 1945 when said law took effect to July 26, 1948 when Republic Act No. 342 lifting the Moratorium Law, except as to debtors who had filed war damage claims, became effective.[100] This Moratorium Law was declared unconstitutional on May 18, 1953. Thus where judgment in an action for the payment of monetary obligations became final and executory on May 20, 1941 and the action to revive judgment was made on March 21, 1953, such action was still filed within the period of ten years provided for in section 6, Rule 29, Rules of Court and Art. 1444 of the Civil Code.[101]

In a civil action for damages based on physical injuries, the lower court granted the motion to dismiss on the ground of prescription. Inasmuch as the offended party in a separate criminal case neither expressly waived the civil action nor reserved his right to institute it separately, the civil action for recovery of civil liability was deemed impliedly instituted in said case.[102] Under article 1155 of the Civil Code, the institution of the criminal action interrupted the running of the prescription during the time that the case was pending in court. The period again containued to run when the criminal action was dismissed and considering this interruption it is apparent from the computation that the period of prescription had not yet expired. It was therefore error to dismiss the action.

Motion for Reconsideration and New Trial. In *Fortune Enterprise, Inc. v. General Finance Corp., et al.*[103] an action of replevin was instituted by plaintiff. On October 17, 1955 the case was dismissed for plaintiff's failure to introduce evidence. On November 2, 1955 plaintiff who has received notice of the decision on October 22, 1955 filed a "motion for reconsideration and/or to reopen trial". It was denied on November 11, 1955 and a copy of such denial was served on November 19, 1955. On December 3, 1955 plaintiff filed a "motion for new trial", upon the ground of "mistake or excusable negligence which ordinary prudence could not have guarded against and by reason of

[97] Nico v. Blanco, 81 Phil. 218.
[98] G.R. No. L-9986, January 14, 1958.
[99] G.R. No. L-10292, February 28, 1958.
[100] Bachrach Motor Co. v. Chua Tua Hian, G.R. No. L-7929, April 24, 1957; PNB v. J. A. de Aboitiz, G.R. No. L-9500, April 11, 1957.
[101] Magdalena, *et al.* v. Benedicto, G.R. No. L-9105, February 28, 1958.
[102] Rule 107, Sec. 9, RULES OF COURT.
[103] G.R. No. L-10859, May 14, 1958.

which plaintiff had been impaired in his rights."[104] The court denied the motion for the reason that it was a second motion for new trial, the filing of which did not interrupt the running of the period to appeal and that the decision became final on December 7, 1955. This ruling was affirmed on appeal. *Held:* Inasmuch as mistake and excusable negligence are specified in Rule 37, sec. 1 as ground for motion for new trial, it results that the motion of December 3, 1955 was the second motion for new trial filed by the plaintiff. Moreover, the ground thereof existed when the first motion was filed on November 2, 1955. Accordingly the second motion did not interrupt the running of the period to appeal.[105]

One argument of petitioners in *Manansala v. Heras, et al.*[106] was that no hearing was held on the motion for reconsideration. The Supreme Court decided that no rule provides that actual hearing is necessary on such a motion. The practice before the courts is that a movant in such kind of a motion sets forth all the grounds in his written motion and does not ordinarily need another hearing in court where personally he or his counsel would expound his reasons on the grounds for reconsideration. Such actual hearing is not considered in practice essential to due process.

Two motions for reconsiderations were filed by plaintiff in *Dy Piao v. Paz Ty Sin.*[107] The first motion for reconsideration alleged excusable negligence as ground in that counsel came to know of the notice of hearing only on November 26 and the hearing was set for December 1, that defendant's counsel did not serve copy of his motion to set the hearing, and that plaintiff failed to appear at the date of hearing because of illness. In the second motion for reconsideration plaintiff alleged fraud as its ground in that defendant's counsel procured the hearing of the case fraudulently, with stealth and strategy. Defendants contended that these two motions are identical because the fraud averred in the second motion must have already existed when the first was filed. The Court decided that this contention of the defendants is not warranted for the first motion merely alleged excusable negligence while the second relied upon fraud. This charge necessarily injected a new fact not theretofore averred in the first motion. In matters of fraud the cause of action arises not upon the commission of the deception but upon its discovery by the injured party and this principle applies in the peculiar circumstances of the present case. There is nothing in the record to show that the fraud had been discovered at the filing at the first.

Petition for Relief.—The petition for relief provided for in Rule 38 of the Rules of Court could only be availed of as a last and ultimate remedy under special circumstances and is not supposed to suspend the runing of the period within which to appeal from a judgment or order. This principle found application in *Commissioner of Customs, et al. v. Court of Tax Appeals.*[108]

A petition for relief must be accompanied with affidavits showing the fraud, accidents, mistakes, 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, which he may prove if his petition be granted.[109] In *Nuguid & Nuguid v. Cariño,*[110] it appears that in its motion for reconsideration on the ground of excusable negligence or accident no affidavit of merit was incorporated therein although on the date for the hearing of said motion plaintiff filed an

[104] Rule 27, Sec. 1(a), RULES OF COURT.
[105] Rule 37, Sec. 4, RULES OF COURT.
[106] G.R. No. L-10582, April 30, 1958.
[107] G.R. No. L-10549, February 28, 1958.
[108] G.R. No. L-11528, May 28, 1958.
[109] Rule 38, Sec. 3, RULES OF COURT.
[110] G.R. No. L-12379, July 31, 1958.

affidavit of merit stating their valid defenses against defendant's contention. Upon presentation of said affidavit, the defendants offered no objection. For the reason that the affidavit of merit did not accompany the motion the lower court dismissed the motion. It held that the subsequent filing of the affidavit on the date of the hearing of the motion without defendant's objection and before the court could pass upon the same may be considered to have "accompanied" the motion for reconsideration and may therefore be treated as substantial compliance of the requirement of the law. The word "accompany" has been variably defined as "to cause to be attended by or as by a companion; to go along with; to consort with"[111] and it has been judicially defined in the cases involving varied facts one of which is—a motion based on answer already deposited with the clerk of court is accompanied by copy of answer. In the light of the foregoing definitions and considering that the affidavit of merit was presented for incorporation before the court could determine and pass upon the merit of the same, and presumably with the assent of defendant, the filing of said affidavit of merit may be considered for all legal intents and purposes as having "accompanied" the motion for relief involved therein.

EXECUTION OF JUDGMENT

When Execution Shall Issue.—Execution shall issue upon a final judgment or order upon the expiration of the time to appeal when no appeal has been perfected.[112] This is a fundamental rule of procedure. But the filing of a motion for reconsideration of such decision or order suspends the running of the period of its finality. In the case of *Villaroman, et al. v. Sta. Maria, et al.*,[113] the defendants were notified of the decision on July 19, 1956 and the motion for reconsideration was filed on August 7 of the same year or presented 19 days after receipt of said decision. Considering that the order denying the motion for reconsideration was received by defendant on August 20, 1956, and that the reglamentary period within which to perfect an appeal continued only to run on that date, the court found that defendants had eleven days more to perfect their appeal. The writ of execution issued by the court on August 24, 1956 pursuant to the motion of respondent who appeared to have been notified of and furnished a copy of said motion for reconsideration, was made twenty-three days after the promulgation of the decision but before the expiration of the period within which defendant can appeal. It was therefore premature for the court to grant the writ of execution.

"Successor in interest" in redemption of properties sold in execution.—Property sold subject to redemption as provided in Rule 39 Rules of Court may be rendered by the judgment debtor, or his successor in interest or by creditor having a lien by attachment, judgment, or mortgage in the property sold.[114] Following the rule in *Magno v. Viola and Sotto*,[115] that "under the law which permits a successor in interest to redeem the property sold on execution, the term 'successor in interest' includes one to whom the debtor has transferred his statutory right of redemption; one to whom the debtor has conveyed his interest in the property for the purpose of redemption; or one who succeeds to the interest of the debtor by operation of law; or one or more joint debtors who were joint owners of the property sold; or the wife as regards her husband's homestead by reason of the fact that some portion of her husband's title passes to her," the claimant of the right to redeem the property involved in the case

[111] Webster, New International Dictionary (2nd ed.) as cited by the Court.
[112] Rule 39, Sec. 1, RULES OF COURT.
[113] G.R. No. L-11248, January 30, 1958.
[114] Rule 39, Sec. 25, RULES OF COURT.
[115] 61 Phil. 80.

of *Evidente v. Lagniton* [116] was held by the court to have such right. In that case the right of redemption arose from the fact that a judgment debtor permitted and consented to his son's effecting the redemption. There is no prohibition against a judgment debtor, whose property is levied on execution, to transfer his right of redemption to anyone whom he or she may desire. By such permission to redeem or by the grant of such right, the son became a successor in interest within the meaning of said paragraph and he is entitled to effect the redemption.

Execution pending appeal.—Under section 2 of Rule 39, before the expiration of the time to appeal the trial court is vested with the discretion to issue a writ of execution pending appeal. However, once the record of appeal has been forwarded to the appellate court the trial court no longer has jurisdiction either to issue a writ of execution or to dissolve a writ of execution already issued before the perfection of the appeal.[117] In the case of *Aguirre v. Hon. Macadaeg* [118] and *LVM Transportation Co. et al. v. Hon. Fernandez, et al.*[119] the writ of execution was issued several days after the records on appeal had been approved and supposedly been forwarded by the clerk of court to the appellate court.

APPEALS

Perfection of the appeal.—An appeal from the CFI shall be perfected by filing notice of appeal, appeal bond and record of appeal within the time prescribed by law,[120] In *Cruz et al. v. Hon. Enriquez* [121] the petitioners filed on time a notice of appeal, appeal bond, and a record of appeal; but the record of appeal was not immediately approved for the court first ordered its correction. Later the same was allowed and the clerk of court was directed to certify and elevate it to the Court of Appeals. However, five days later respondent judge ordered the disapproval of the appeal bond after discovering, according to him, that the same consisted merely of the signatures of two lawyers. Upon motion of the defendants, on the ground that it was filed out of time the judge dismissed the appeal. The Supreme Court held that the judge committed an abuse of discretion if not an excess of jurisdiction. When he approved the record on appeal, there was an implied approval of the original appeal bond and there is no reason why after such approval he had to disapprove said bond and dismiss the appeal on the allegation that the new bond was filed out of time. Furthermore, granting that the first bond was really defective, justice demands that the petitioners as appellants in that case be given an opportunity to cure the defects by filing, as they did, another bond. In dismissing the appeal respondent judge has overlooked the fact that the new bond was not original but merely a correction of the first one supposedly defective.

Record on appeal.—One of the causes of action in *Bagobo, et al. v. Hon. Fernandez* [122] was that at the instance of plaintiff in a civil case the respondent judge had by an order required petitioners to amend the record on appeal by adding certain pleadings and documents which petitioners consider to be unnecessary. In the petition for certiorari and mandamus the Supreme Court agreed with petitioners in this regard. The pleadings filed in behalf of one of the plaintiffs were amended more than once and naturally the defendants

[116] G.R. No. L-11491, May 28, 1958.
[117] Syquia v. Concepcion & Palma, 60 Phil. 186.
[118] G.R. No. L-12387, July 31, 1958.
[119] G.R. No. L-9136, May 31, 1958.
[120] Rule 41, Sec. 3, RULES OF COURT.
[121] G.R. No. L-10301, February 28, 1958.
[122] G.R. No. L-11539, May 19, 1958.

were obliged to amend their answer. Petitioners then claimed and apparently with reason that there is no need for including in the record on appeal the original pleadings which were later amended. Also the pleadings as to the Philippine National Bank, which is an additional party have no place in the record on appeal for the reason that said bank to which the properties in litigation had been encumbered has lost interest in the case because the obligation secured by said encumbrance was already liquidated.

Appeal in certiorari.—Appeal in certiorari should be perfected within fifteen days as provided for in Rule 41, section 17. The thirty day period provided for in section 3 of the same Rule refers to ordinary civil action and not to special ones.[123]

Interlocutory order.—An order of the lower court denying the motion to dismiss an action for ejectment and suspending the procedings of said case for two years or until further order of the court is interlocutory and therefore cannot be reviewed by petition for certiorari. Said order merely suspended the proceedings without touching on the merits of the case or disposing of the issues involved therein.[124]

POWER OF THE COURT OF APPEALS TO AMEND ITS OWN RESOLUTION

After a resolution has become final, no amendment is allowed except to correct clerical errors. This point was brought up and resolved in *Potenciano v. Court of Appeals.*[125]

Alfredo Benipayo instituted a civil action for the recovery of money against Conrado Potenciano. After duly hearing the evidence the lower court dismissed the action. Alfredo appealed and while the appeal was pending defendant died and Victor Potenciano, the duly appointed special administrator of the estate of the deceased, filed a petition to *dismiss the case* without prejudice to the plaintiff's filing his claim with the probate court. The motion was granted but in the resolution granting the same instead of stating that the *case is dismissed* the Court of Appeals said "upon motion filed by defendant for the *dismissal of the appeal,* the Court resolve to grant" the same. Accordingly, Benipayo presented his claim in the probate court. Potenciano opposed the introduction of evidence to support his claim on the ground that for the probate court to render decision based on such evidence it would amount to a review of the civil case which was already passed upon and decided by a court of equal jurisdiction. The probate court issued a resolution holding that the claim of Benipayo could not be allowed because the Court of Appeals dismissed the *appeal.* So Benipayo filed with the Court of Appeals a petition praying for a clarification of its order. The Court of Appeals issued a resolution and stated that the *case was dismissed.* Potenciano filed a motion for reconsideration and the same was denied; hence a petition for certiorari was filed with the Supreme Court on the ground that the Court of Appeals acted without or in excess of its jurisdiction in issuing the clarifying resolution since the first resolution has reached its finality. *Held:* It is an elementary rule of procedure that after a decision, order, or ruling has become final the court loses its jurisdiction over the same and can no longer be subjected to any modification or alteration except to correct misprints or clerical mistakes. In this case the Court of Appeals granted the motion filed by appellee for the dismissal of the case. The Court of Appeals could not have dismissed the *appeal* which was not asked for, because although a court

[123] Sarabia v. Sec. of Agriculture and Natural Resources, G.R. No. L-11107, July 25, 1958.
[124] Manalang, *et al.* v. Rickard, G.R. No. L-11986, July 31, 1958.
[125] G.R. No. L-11769.

may grant a relief allowed by law, said prerogative is limited by the cardinal principle that it cannot grant anything more than what is prayed for by the movant. Certainly the relief to be dispensed cannot rise above its source. Under the circumstances of the instant case the resolution in question should properly refer to the motion as one for *dismisal of the case* as prayed and not of the *appeal* alone. The inclusion of the word "appeal" is to our mind a clerical mistake on the part of the Court of Appeals which could be corrected even after it had become final.

PROVISIONAL REMEDIES

Injunction.—The surety filing a bond to answer for damages which may be sustained by reason of the injunction should the court finally decide that the petitioner is not entitled thereto, is not liable to execution on its bond if it is not made a party to the case so far as the award of damages is concerned. In *Riel v. Lacson et als.*,[126] the surety was not notified of the decision nor of the application of the respondent in the injunction case for award of damages suffered by her by reason of the injunction. The case is covered by section 9 of Rule 60 and section 20 of Rule 59. It will be observed that under section 20 of Rule 59 the surety which filed the bond for damages should be notified of the application. The reason for this is that the surety must be given an opportunity to cross-examine the witnesses testifying on said damages and to question any evidence presented in connection with the same. If there is no such notice no judgment for damages may be entered and executed against the surety without giving the latter opportunity to be heard as to the reality or reasonableness of the alleged damages. Otherwise fraud may be perpetrated against the surety.[127] To the same effect is the holding in *People's Surety & Insurance Co. Inc. v. Hon. Bayona, et al.*[128]

Receivership.—Just as a writ of preliminary injunction should not be issued to put a party in possession of the property in litigation and to deprive another party who is in possession except in a very clear case of evident usurpation, so also a receiver should not be appointed to deprive a party who is in possession of the property in litigation. This is the ruling in the case of *Municipality of Camiling v. Hon. de Aquino.*[129]

SPECIAL CIVIL ACTIONS

Eminent Domain. Under Rule 69 section 7, the commissioners shall assess the consequential damages to the property not taken and to deduct from such the consequential benefits to be derived by the owner from the public use of the property taken, but in no case shall the consequential benefits assessed exceed the consequential damages assessed, nor shall the owner be deprived of the actual value of his property so taken. The fact that an agricultural land is susceptible of conversion to a residential site does not affect or change its nature, however such factor should be considered in determining its value at the time of expropriation.[129a]

Forcible Entry and Unlawful Detainer. Rule 72 of the Rules of Court requiring the occupant of the property where the decision is adverse to him, to make a deposit of the rental adjudged by the court contemplates of instances

[126] G.R. No. L-9863, September 29, 1958.
[127] Visayan Surety & Insurance Corp. v. Pascual, *et al.*, G.R. No. L-2981, March 23, 1950.
[128] G.R. No. L-10498, March 28, 1958.
[129] G.R. No. L-11476, February 28, 1958.
[129a] Municipal Government of Sagay v. Jison, G.R. No. L-10484, December 29, 1958.

where defendant is still in possession of the property subject of the litigation, the purpose being to compensate the owner for having been deprived of such possession of his premises. Otherwise, the reason behind such deposit ceases. To require the defendant to continue depositing in court the rental for the use of the property when he is no longer in occupancy of the same does not only run counter to the spirit of the law but is also unfair and unreasonable.[130]

Where defendant has been unlawfully possessing the property for more than one year before the commencement of an action for recovery of possession, plaintiff should bring the action before the CFI. The action is not one of forcible entry but *acción publiciana* for the recovery of possession of realty which is a plenary action.[131]

[130] Mayon Trading Co., Inc. v. Co Bun Kim, G.R. No. L-1151, July 31, 1958.
[131] J. M. Tuason Co., Inc. v. Villanueva, *et al.*, G.R. No. L-10522, September 30, 1958.