SURVEY OF CASES IN CIVIL PROCEDURE OF 1964

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The year 1964 is to be remembered as a landmark in the law of Civil Procedure, if only because it was the year when the Revised Rules of Court took effect.

The Revised Rules were to govern all cases brought after January 1, 1964, and also all further proceedings in cases then pending, except to the extent that in the opinion of the court their application would not be feasible or would work injustice. This is so provided in Rule 144.

The full impact of the revision, it would seem, is yet to be reflected in the decisions of the Supreme Court in the years to succeed this survey year. Most of the cases that were decided in 1964 by the Supreme Court had been pending before the effectivity of the Revised Rules, and in many of these, the court had elected to apply the provisions of the former procedure. This is indicated by the frequent reference in these decisions to sections of the former Rules of Court.

In the cases where the provisions of the former Rules had been applied, the counterpart provisions of the New Rules are given in the footnotes.

CONSTRUCTION

Rules liberally construed

Section 2, Rule 1 of the Revised Rules of Court reads:

> 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.

This provision was relied upon in arriving at the decision in the case of People's Homesite and Housing Corporation v. Tiongco.[1] In that case, the Supreme Court declared that "the rules should receive a liberal interpretation in order to promote their object and to assist the parties in obtaining a just, speedy, and inexpensive determination of every action. Procedural technicality should not

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[1] G.R. No. L-18891, November 28, 1964.

be made a bar to the vindication of legitimate grievance. When such technicality 'deserts from being an aid to justice,' the courts are justified in excepting from its operation a particular case."

JURISDICTION AND VENUE

Function of courts

In *Lao Yap Han Diok v. Republic of the Philippines*,[2] the Supreme Court said that courts of justice exist for the settlement of justiciable controversies, which imply a given right, legally demandable and enforceable, an act or omission violative of said right, and a remedy, granted or sanctioned by law, for such breach of right. Consequently, it was held in that case that the court may pass upon and make a pronouncement relative to the status of the parties, but only as an incident of the adjudication of the rights of the parties to a controversy. Otherwise, such pronouncement is beyond judicial power. Thus, no action or proceeding may be instituted for a declaration to the effect that plaintiff or petitioner is married, or single, or a legitimate child, although a finding thereon may be made as a necessary premise to justify a given relief available only to one enjoying said status.

Hence, where the declaration by the lower court that the petitioners are Filipino citizens was unnecessary, such action is beyond its judicial power and cannot be upheld.[3]

Jurisdiction of the Court of Appeals

The Judiciary Act of 1948, as amended, in its Section 30, provides for the original jurisdiction of the Court of Appeals, authorizing said Court to issue writs of mandamus, prohibition, injunction, certiorari, habeas corpus, and all other writs in aid of its appellate jurisdiction.

The appellate jurisdiction of the Court of Appeals is limited to civil cases in which the value in controversy does not exceed two hundred thousand pesos or, in cases involving title to or possession of real estate, where the value of such property does not exceed two hundred thousand pesos.[4]

In a contest for administration of an estate, the value of the assets of the estate is the amount in controversy for the purposes of appeal.[5] Thus, it has no jurisdiction on appeal over proceedings in

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[2] G.R. Nos. L-19107, 19108, 19109, September 30, 1964.

[3] Lao Yap Han Dick, et al. v. Republic of the Philippines, *supra*, citing Paralan v. Republic, L-15047, January 20, 1962.

[4] Section 17, Judiciary Act of 1948.

[5] 4 CJS, cited in Fernandez v. Maravilla, G.R. No. L-18799, March 31, 1964.

probate where the value of the estate is more than two hundred thousand, and does not also have the original jurisdiction to grant writs of certiorari and prohibition, which are merely incidental to the probate proceedings. The contention that appeals in special proceedings, as distinguished from ordinary civil cases, are within the exclusive jurisdiction of the Court of Appeals since they are not included in Section 17 of the Judiciary Act, which enumerates the appellate jurisdiction of the Supreme Court, is not tenable, because Section 2, Rule 72 of the Revised Rules of Court, provides that the rules on ordinary civil actions are applicable in special proceedings where they are not inconsistent with, or when they serve to supplement the provisions relating to special proceedings.[6]

Socco v. Leary[7] involved the question of jurisdiction of the Court of Appeals to take cognizance, by certiorari, of an order of the trial court issuing a writ of execution. Objection to the jurisdiction of the court was based on the ground that the writ sought in the Court of Appeals would not be in aid of its appellate jurisdiction, because the decision of the lower court had already become final and executory, and that the order of execution is not appealable, and even if it were appealable, it would involve pure questions of law which are within the exclusive jurisdiction of the Supreme Court. *Held:* Although ordinarily, no appeal is allowed from an order of execution of a final and executory judgment, where, as in this case, the order of execution would substantially vary the terms of the judgment, the same is appealable.[8] Moreover, questions of fact are involved in the case, because the order made a finding that stock certificate No. 220 represented shares belonging to third persons and that its transfer to Carlos Barretto was not authorized. This presented a factual question which could be raised on appeal to the Court of Appeals.

Jurisdiction of the Court of First Instance

Section 44 of the Judiciary Act, as amended by Republic Acts Nos. 2613 and 3828, confers upon Courts of First Instance original jurisdiction in all cases in which the demand, exclusive of interest, or the value of property in controversy amounts to more than ten thousand pesos.

Where several causes of action may be joined, the action shall be filed in the inferior court unless any of the causes joined falls

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[6] Fernandez v. Maravilla, *Ibid.*
[7] G.R. No. L-19461, October 31, 1964.
[8] Castro v. Surtida, 87 Phil. 166; Manaois v. Natividad, L-13927, February 29, 1960 (Cited in Socco v. Leary, *supra*, note 7).

within the jurisdiction of the Court of First Instance, in which case it shall be filed in the latter court. Such joinder may be made if the causes of action arise out of the same transaction, contract or relation between the parties, or are demands for money, or are of the same nature and cause.[9]

The case of *Sapico, et al. v. Manila Oceanic Lines, Inc.*,[10] involved an application of the foregoing rules. The complaint in that case contained three causes of action: (1) to collect ₱24,570.76 representing unpaid wages of officers and crew of the vessel per contract; (2) moral damages at the rate of ₱10,000.00 for the Master, ₱5,000.00 for each marine officer, and ₱2,000.00 for each crew member, or a total of ₱111,000.00; and (3) ₱5,000.00 for attorney's fees. Opposition to the jurisdiction of the Court of First Instance was premised on the ground that the amount claimed, totalling ₱140,570.76, if divided among the 38 members and officers of the crew, would result in each demanding only ₱3,699.23, which amount is outside the jurisdiction of the Court of First Instance. In holding that the case was properly brought in the Court of First Instance, the Supreme Court pointed out that the second cause of action alleged that the Master demanded ₱10,000.00 as damages, plus the amount of his salary. This was sufficient to bring the case within the jurisdiction of the Court of First Instance.

A compulsory counterclaim may bring case within the jurisdiction of the Court of First Instance

In *Ago v. Buslon*,[11] the jurisdiction of the Court of First Instance over the action, which was for the recovery of not more than ₱10,000.00 and therefore, within the jurisdiction of the inferior courts, was sustained on two grounds, either of which would have been sufficient: (1) the fact that plaintiffs premised their right of action upon their alleged title to the land described in the complaint, and the defendant contested such allegation, thus putting the title to the land in issue, the determination of which is within the exclusive original competence of courts of first instance; and (2) the filing by the defendant of a counterclaim for ₱37,000.00, the Court declaring that, although the original claim involved less than the minimum amount, jurisdiction can be sustained if the counterclaim which is compulsory in character exceeds the jurisdictional amount.

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[9] Section 5, Rule 2.
[10] G.R. No. L-18776, January 30, 1964.
[11] G.R. No. L-19631, January 31, 1964.

Over claims for laborers' reinstatement

In *Tamayo v. San Miguel Brewery, Inc.*,[12] the Supreme Court reiterated its ruling in several cases [13] that a mere claim for reinstatement, unaccompanied by any allegation that the employee's dismissal was due to an unfair labor practice or that the case involves a claim under the Minimum Wage Law or the Eight-Hour Labor Law, does not bring a case within the jurisdiction of the Court of Industrial Relations.

No need to exhaust administrative remedy when the law so provides

Under Commonwealth Act No. 137, as amended by Republic Act No. 746, the question of ownership affecting an adverse claim must be determined by the competent court before the administrative action could proceed to its termination. This being so, the court may take jurisdiction of an action where the issue of such ownership is directly raised, regardless of whether the Director of Mines had not as yet acted on the adverse claim filed in his office. The trial court erred in dismissing the complaint on the ground that plaintiffs had not exhausted their administrative remedies.[14]

Jurisdiction of Court of First Instance not affected by R.A. 1401 until the organization of the Juvenile and Domestic Relations Court

The enactment of Republic Act No. 1401 on September 9, 1955, which provided in its Section 1 for the organization of a Juvenile and Domestic Relations Court with "exclusive and original jurisdiction to hear and decide . . . cases involving custody, guardianship, adoption, paternity and acknowledgment" presented the question whether such cases, even before the actual organization of the Juvenile and Domestic Relations Court on June 1, 1956. The Court held that it did not, calling attention to section 2 of said Act, providing that "upon the organization of the Juvenile and Domestic Relations Court, the Secretary of Justice shall cause all cases pending before the municipal court and the Court of First Instance of Manila properly cognizable by such court to be transferred thereto," which, in effect, deferred the operation of Section 1 until the organization of such court. Otherwise, from September 9, 1955, to June 1, 1956, there would have been no judicial body in Manila competent to hear the cases specified in Section 1 of such Act.[15]

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[12] G.R. No. L-17749, January 31, 1964.

[13] Barranta v. International Harvester of the Philippines, G.R. No. L-18198, April 22, 1963; Arraullo v. Monte de Piedad, et al., G.R. No. L-17840, April 23, 1963. See also Perez v. Court of Industrial Relations, G.R. No. L-18182, February 27, 1963.

[14] Rullan v. Valdeo, G.R. No. L-12003, November 28, 1964.

[15] Lagdameo v. Lao, G.R. No. L-19943, December 24, 1964.

CFI has no authority to issue writ of certiorari against Social Security Commission

In the case of *Poblete Construction Co. v. Social Security Commission*,[16] the question was raised as to whether or not a Court of First Instance has authority to issue writs of injunction, certiorari, and prohibition against the Social Security Commission. The Supreme Court held that under R.A. 1161, as amended, the decision of the Social Security Commission is reviewable both under law and facts by the Court of Appeals, and if the appeal is only on questions of law, the review shall be made by the Supreme Court. From these provisions, it is clear that the Commission, in exercising its quasi-judicial powers, ranks with the Public Service Commission and the Courts of First Instance. As the writs of injunction, certiorari and prohibition may be issued only by a superior court against an inferior court, board or officer exercising judicial functions, it follows necessarily that the CFI has no jurisdiction to entertain a petition for certiorari against the Social Security Commission.

Venue of Actions in the Court of First Instance

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.[17]

In *Torres v. J. M. Tuason & Co., Inc.*,[18] the complaint alleged that the predecessor-in-interest of Alquiros bought from Tomas Deudor a part of a large parcel of land in Quezon City. Subsequently, Alquiros acquired said portion, 690 sq. m. of which was bought by plaintiff from Aliquiros. There was some controversy as to the ownership of the land between Alquiros and the heirs of Tomas Deudor, on one hand, and the J. M. Tuason & Co., Inc., on the other. Alquiros and the Deudors entered into a compromise with J. M. Tuason & Co., whereby in consideration of ₱1,201,063.00, they ceded in favor of the Tuason & Co., any right of title that they had over the property, including the 690 sq. m. sold to plaintiff. The compromise stipulated that previous buyers from Deudor had the right to buy the lot occupied by them upon payment to the Tuason & Co., of the current price, less what had already been paid Deudor. Plaintiff prayed that defendant Tuason & Co., be ordered to execute a deed of sale in favor of the plaintiff upon the latter's payment of the

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[16] Poblete Construction Co. v. Social Security Commission, G.R. No. L-17605, January 22, 1964.

[17] Section 2, Rule 4.

[18] G.R. No. L-19668, October 22, 1964.

difference between the current price and what had already been paid, in accordance with a previous decision of the Supreme Court in the case of *Evangelista v. Deudor* to the effect that the aforementioned compromise created "a sort of contractual relation" between Tuason & Co. and the purchasers of land from the Deudors, among whom is plaintiff. The complaint was filed in the Court of First Instance of Manila, on the theory that it was an action for specific performance and, therefore, personal and transitory. *Held:* The fact that plaintiff asked that a deed of sale of such parcel of land be issued in her favor and that a Transfer Certificate of Title be issued to her shows that the primary objective and nature of the action is to recover the land itself. To execute in favor of plaintiff the conveyance prayed for, there is need to make a finding that he is the owner of the land, which in the last analysis, resolves itself into an issue of ownership. Hence, the action must be commenced in the province where the property is situated, pursuant to Section 3, Rule 5.[19]

The case of *Cerbo v. Montejo*,[20] involved an interpretation of Section 51 of the Workmen's Compensation Act. The Court held that such section, in providing that "any party may file in any court of record in the jurisdiction of which the accident occurred . . . .," clearly uses the word "jurisdiction" to refer to the place where the proceedings should be instituted, and not to jurisdiction as such. And since the question of wrong venue was not raised during the trial, it can no longer be entertained on appeal.

Venue of action for revocation of adoption

The Supreme Court, in one case,[21] had occasion to declare that the venue of an action for revocation of adoption need not be the same court in which the decree of adoption was issued. It held: "The doctrine that no court has the power to interfere by injunction with the judgments or decrees of a court of coordinate jurisdiction, is not applicable in an action for the revocation of adoption. In such a case, there is no interference with the decree of adoption issued by the other court, since the validity or effectiveness of such decree is not in question, nor is it sought to be enjoined or its execution restrained. What is sought is its revocation because of circumstances subsequently supervening which render the continuation of the adoptive relationship unjustified and impractical. The venue, therefore, was properly laid."

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[19] Now Section 2, Rule 4.
[20] G.R. No. L-19881, January 31, 1964.
[21] De la Cruz v. De la Cruz, G.R. No. L-19391, September 29, 1964.

Jurisdiction of the court over the persons of the parties

Jurisdiction over the persons of the parties may be acquired by the voluntary appearance of the plaintiff, and, with respect to the defendant, by the service of summons upon him or by his voluntary appearance.

Two cases [22] were decided by the Supreme Court, allowing a non-resident to maintain personal action in the Philippines, the fact that plaintiff had never been able to enter the Philippines notwithstanding. By filing his complaint, the plaintiff submitted voluntarily to the jurisdiction of the court, and the latter acquired such jurisdiction. It is not indispensable for him to establish residence, nor need he be physically present in a state of which he is neither a resident nor a citizen in order that he may initiate or maintain a personal action against a resident or citizen of that state for rights of action arising in, or for violations of laws committed within the territorial jurisdiction of that other state.

Defendant filing a motion for reconsideration submits to jurisdiction of court

In *Soriano v. Palacio*,[23] the defendant was declared in default for failure to answer. Judgment was declared against him in November, 1959. Four months thereafter, on March 14, 1960, he filed a motion for reconsideration, alleging that the court never acquired jurisdiction over him because he was never served with summons. On June 30, 1960, he reiterated his previous motion, which was again denied. The case was brought to the Supreme Court on certiorari. In denying the petition for certiorari, the Court said that even assuming that the trial court did not acquire jurisdiction over the petitioner through the service of summons, he submitted to such jurisdiction when he filed his first motion for reconsideration and for annulment of the previous proceedings. The denial of that motion was binding upon him, and he could have appealed therefrom. Having failed to appeal, such order became final and executory, and the lower court, therefore, had no alternative but to deny the second motion filed on June 30, 1960.

CAUSE OF ACTION

A cause of action is an act or omission of one party in violation of the legal rights of the other; and its essential elements are: legal

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[22] Sharruf v. Bubla, G.R. No. L-17020, September 30, 1964 and Dilmeg v. Philipps, G.R. No. L-19596, October 30, 1964.

[23] G.R. No. L-17469, November 28, 1964.

right of the plaintiff, correlative obligation of the defendant, and an act or omission of the defendant in violation of said right.[24]

Prescription of action only from accrual of cause of action

Where it was only on October 31, 1960, that plaintiffs' right to the land was violated and their ownership thereof questioned, when a second sale of the land was made, and the complaint was filed on January 17, 1961, prescription does not obtain. Prescription of an action is counted from the time an action may be brought,[25] and no action could be brought before the second sale in 1960, as there was then no cause of action in favor of the plaintiffs. A cause of action requires not only a right but an act or omission in violation of said right.[26]

One suit for a single cause of action

Section 3, Rule 4, provides that a party may not institute more that one suit for a single cause of action. And if two or more complaints are brought for different parts of a single cause of action, the filing of the first may be pleaded in abatement of the other or others, and a judgment upon the merits in any one is available as a bar in the others.[27] In other words, a single cause of action cannot be split up into two or more parts so as to be made the subject of different complaints.[28]

In *Lawsin v. Escalano,*[29] one of the respondents filed separate proceedings, one for the correction of election returns, and another for the recount of votes. It was held that by so doing, he was guilty of splitting one and the same cause of action. The operative facts were the same in the two cases filed, to wit, the averred discrepancy between the tally sheet and the copies of the election returns, whereby petitioner was allegedly credited with more votes than he obtained. Upon that single cause of action, the respondent could seek either a correction of returns or a recount, but not make it the subject of two or more suits, either simultaneously or successively. Consequently, in accordance with Section 4, Rule 2, the judgment in the correction case should be a bar to the other suit for recount.

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[24] Ma-ao Sugar Central Co. v. Barrios, 79 Phil. 666.
[25] Art. 1150, New Civil Code.
[26] Calma v. Montuya, G.R. No. L-18674, citing Ma-ao Sugar Central, *supra,* and I Moran, Comments on the Rules of Court, p. 91.
[27] Section 4, Rule 2.
[28] I Moran, Rules of Court, 1963 ed., p. 95.
[29] G.R. No. L-22540, July 31, 1964.
[30] I Moran, Rules of Court, 1963 ed., p. 96.

Different grounds do not make distinct causes of action

The singleness of a cause of action lies in the singleness of the delict or wrong violating the rights of one person,[30] and the fact that the cause of action may be based on several grounds does not mean that a separate action may be brought on each issue.

This was the ruling of the Supreme Court in the case of *de Goma v. de Goma,*[31] decided on December 28, 1964. In that case, a judgment was rendered against Rosario de Goma in favor of one Beatriz Mendoza. Execution was issued and levied on a certificate of public convenience in the name of Rosario for the operation of several transportation units in Manila, and subsequently sold at public auction. Rosario sued for the annulment of the sale, claiming that a certificate of public convenience is not property that may be subjected to execution. Silvino de Goma joined his wife as party-plaintiff in the action which, however, was dismissed by the court. Seven months later, Silvino de Goma instituted another action, as administrator of conjugal properties of which, according to him, the certificate of public convenience formed part, and prayed for the annulment of the sale, this time on the ground that Rosario could not bind conjugal properties without his consent, and no consent was given by him when she contracted the debt in favor of Beatriz Mendoza. In dismissing the second case, the Supreme Court held that the dismissal of the first case constituted a bar to the filing of the second case, since the cause of action in the first and second cases was identical, there being only one legal wrong alleged, namely, the nullity of the sale, though cases were based on different grounds. Different grounds do not make for distinct causes of action.

But single cause of action may give rise to several enforceable rights

When there is only one delict or wrong, there is but a single cause of action, regardless of the number of rights that may have been violated belonging to one person. And the rule is that all such rights should be alleged in the complaint, otherwise those that are not therein included cannot be the subject of subsequent complaints, for they are barred forever.[32]

Applying this doctrine, the Supreme Court held, in one case,[33] that a complaint for unlawful detainer based on lessee's non-compliance with the terms of the lease, may include a demand for liquidated damages, where it is stipulated in such contract that failure to pay any of the installments confers on the lessor the right to termi-

[31] G.R. No. L-18739.
[32] I Moran, Rules of Court, 1963 ed., p. 95.
[33] Gozon v. Barrameda, L-17473, June 30, 1964.

nate the contract and obligates the lessee to pay ₱5,000.00 as liquidated damages in case of court action. From that breach of contract, constituting a single cause of action, the lessor derived several enforceable rights. As a single cause of action cannot be split, the complaint for unlawful detainer properly included the demand for liquidated damages.

PARTIES TO CIVIL ACTION

The State or its government cannot be sued without its consent, and this principle has its root in the juridical and practical notion that the state can do no wrong.[34] With respect to government corporate entities, in general, they are or are not immune from suit, depending upon their respective charters.

Under its charter, the Central Bank is authorized to sue and be sued. A suit may, therefore, be brought against it for the recovery of payment made to it as Special Excise Tax, notwithstanding that the amounts involved had already been turned over to the national treasury. It cannot set up the defense of the immunity of the state from suit, because consent had been given by the State in authorizing the Central Bank to sue and be sued under its Charter. In suits for refund of such taxes, the Central Bank is the proper party-defendant, under Republic Act No. 601, which provides that the refund of taxes pursuant to sections 2 and 3 of said Act shall be made by the Central Bank.[35]

Wife should be made party-defendant in suit involving her paraphernal property

Section 2, Rule 3, provides that "every action must be prosecuted and defended in the name of the real party in interest."

In the case of *Plata v. Yatco*,[36] it was held that the wife should be made a party-defendant in an action for unlawful detainer instituted against her alleged husband, involving her paraphernal property, of which she remained in possession despite the extrajudicial foreclosure of a mortgage constituted thereon by her and her alleged husband. The Court held that the judgment obtained against the alleged husband alone for unlawful detainer ran neither bind nor affect the wife's possession of her parapherna. Hence, since she was not made a party-defendant to the suit, she could validly ignore

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[34] Santos v. Santos, 48 O.G. 4815.

[35] Olizon v. Central Bank of the Philippines, L-16524, June 30, 1964, citing Central Azucarera San Pedro v. Central Bank, L-7713, September 29, 1958.

[36] G.R. No. L-20825, December 28, 1964.

the judgment therein entered, and her continued refusal to vacate the property was not a contempt of court, as the writ of execution was not lawful against her.

Admission by defendant of plaintiff's personality to sue

Under Section 69 of the Corporation Law,[37] a foreign corporation cannot maintain any suit for the recovery of debt, claim, or demand whatever, unless it shall have a license to transact business issued by the Securities and Exchange Commissioner. Consequently, a foreign corporation transacting business in the Philippines must have a license for such purpose, and unless it has the license required by law, shall not be permitted to maintain any suit in the local courts.[38]

However, where a foreign insurance company instituted an action against the carrier to recover what the former had paid the shipper for loss of certain cargo, and the attorney of the carrier admitted in open court that plaintiff is a foreign corporation doing business in the Philippines with a personality to file the action, it was held that such company could maintain the suit without proof of its personality to do so.[39]

Class suit

A class suit may be brought when the subject-matter of the controversy is one of common or general interest to many persons, and the parties are so numerous that it is impracticable to bring them all before the court, in which case one or more may sue or defend for the benefit of all. But in such case the court shall make sure that the parties actually before it are sufficiently numerous and representative so that all interests concerned are fully protected.[40]

In any suit, before the case proceeds to trial, it is the duty of the court to see that all parties having interest in the subject must be joined, in order that the results of the suit would be binding on all. This is necessary in order to prevent multiplicity of suits, or prevent other persons claiming the same rights as the plaintiffs to institute another action and molest the defendants in their rights. The trial court, therefore, has the authority to determine whether sufficient representative parties have been joined.[41]

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[37] Act No. 1459, as amended.

[38] Pineda and Carlos, Law on Private Corporation and Corporate Practice, 1960 ed., p. 262.

[39] Compania Maritima v. Insurance Company of North America, G.R. No. L-18965, October 30, 1964.

[40] Section 12, Rule 3.

[41] Niembra v. The Director of Lands, G.R. No. L-20084, July 17, 1964.

Executor not party to deed of conveyance cannot be sued

In *Ozaeta v. Palanca*,[42] the defendant Sebastian Palanca executed with his co-heirs a deed of assignment over his participation in the estate of his father Carlos Palanca in consideration of the adjudication and transfer to him of certain properties. After the court had approved the deed, plaintiff, as Executor of the estate of Carlos Palanca, executed a deed of conveyance on the said properties. Subsequently, plaintiff, as executor, brought an action against Sebastian Palanca, who set up as a counterclaim plaintiff's alleged failure to convey said properties free from liens and encumbrances. The Court, in dismissing the counterclaim because there was no cause of action against the plaintiff who was not a party to the deed of assignment, said that defendant's remedy lies only against the persons with whom he contracted.

Substitution of transferee by transferor not essential

Section 20, Rule 3, provides:

> 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.

The Supreme Court applied this provision in the case of *Galace v. Bagtas*,[43] stating that it is not usually essential for the transferee to be substituted. Neither can the opposite party insist on such substitution, it being ordinarily permissible to continue the case in the name of the original party. Whether or not the transferee should be substituted for, or should be joined with the original party, is largely a matter of discretion of the court.

The above-mentioned provision of Section 20, Rule 3, refers to transfers made *pendente lite*. Where the transfer is made prior to the commencement of the action, the transferee or assignee is the real party in interest and, therefore, the transferor or assignor having ceased to be the real party in interest, may not sue or be sued.[44]

Where there is no transfer or assignment of rights

This doctrine that the transferor before the commencement of the action loses his personality to sue, has no application where, by the terms of the contract, the parties had not intended a transfer of assignment of rights, as held in the case of *M. S. Galutera v.*

[42] G.R. No. L-17455, August 31, 1964.
[43] G.R. No. L-15400, August 31, 1964.
[44] Oria Hermanos v. Gutierrez Hermanos, 52 Phil. 156.

Maerk Lines.[45] There, plaintiff brought an action to recover the value of merchandise which was lost through the fault of defendant. Said merchandise was insured, and pursuant to an agreement with the insurance company, the plaintiff received from the insurer the sum in dispute, but merely as a loan "repayable to the extent of any recovery" she could make from the party responsible for the loss. One of the issues raised by the defense was the lack of standing of the plaintiff to sue, on the theory that by the delivery of the amount in question, the insurance company had been subrogated to plaintiff's right and was, therefore, the real party in interest. *Held:* Whether payment should be made to the plaintiff or to the insurance company is a technicality which should be overlooked, because the receipt by the plaintiff of the amount from the insurance company was, pursuant to their agreement, not a "payment" of the loss, but merely a loan which was repayable. Since the terms of the agreement do not make for a subrogation of the insurer to the rights of the insured, such agreement did not divest the plaintiff of her right to file the suit. Recovery should be allowed plaintiff to avoid unnecessary delay and multiplicity of suits in the enforcement of an undisputed liability on the part of the defendant.

Duty of attorney upon death of party represented

Section 3, Rule 16, reads:

> "Whenever a party to a pending case dies, becomes incapacitated or incompetent, it shall be the duty of his attorney to inform the court promptly of such death, incapacity, or incompetency, and to give the name and residence of his executor, administrator, guardian, or other legal representative.

In *Sarmiento v. Ortiz,*[46] the plaintiff died on January 25, 1960. His counsel informed the court of that fact on February 24, 1960, explaining that he did not know whether a legal representative had been appointed or who the legal heirs were, but that he had been making inquiries and would transmit the information to the court. The Court held that such action by the lawyer of the deceased party was a substantial compliance with Section 3 of Rule 16, and the judge should have waited for counsel to relay the information or to name the heirs of the deceased, or ordered counsel to furnish the name and residence of the legal representative of the deceased. If counsel failed to give the name of the legal representative, or the latter, after having been ordered, failed to appear, then the judge should have ordered the adverse parties to procure the appointment of a legal representative to appear in behalf of the deceased.

[45] G.R. No. L-15056, May 30, 1964.
[46] G.R. No. L-18583, January 31, 1964.

Non-survival of action based on a promissory note secured by mortgage

When the action is for recovery of 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.[47]

An action on a promissory note secured by mortgage on personal property, where the plaintiff did not seek to foreclose the mortgage as inferred from the absence of any description of the mortgaged property in the complaint and from the prayer which unmistakably appears to be for recovery of money, does not survive after the death of the defendant.[48] The reason for the rule on non-survival of money claim, as stated in the same case, is to grant a proportionate share in the estate of the deceased debtor to all his creditors in case the estate is insufficient to pay fully the debts that the deceased had contracted in his lifetime.

PLEADING AND MOTIONS

Sufficiency of complaint

As a rule, the complaint should contain allegations of ultimate facts constituting the plaintiff's cause of action. And to determine the sufficiency of a cause of action, only the facts alleged in the complaint and no other should be considered.[49] The sufficiency of a complaint is tested on whether a competent court could render a valid judgment upon the facts alleged therein if said facts were admitted or proved. If it could, then the allegations are sufficient.[50]

This test was applied by the Supreme Court in the case of *Calma v. Montuya*.[51] The complaint filed in that case alleged, among other things, that one-half of a parcel of land was sold in 1922 to plaintiff's predecessor-in-interest; that the vendee of 1922 and his successors have possessed such land; that the vendor and his co-defendants, claiming ownership thereof, sold the same portion to the other defendant; and that all the defendants acted in bad faith and with knowledge of the previous sale. Under these allegations, the Supreme Court held that the complaint clearly set forth a cause of action for declaration of ownership as against the defendants, to the portion of land in litigation.

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[47] Section 21, Rule 3.
[48] Macondray & Co., Inc. v. Dungao, G.R. No. L-18079, May 26, 1964.
[49] Dalandan v. Julio, G.R. No. L-19101, February 29, 1964.
[50] Raquiza v. Ofilada, G.R. No. L-17182, September 30, 1963.
[51] G.R. No. L-18674, September 30, 1964.

Action cannot be dismissed on motion of plaintiff where there is a compulsory counterclaim

A counterclaim is any claim for money or other relief which a defaulting party might have against an opposing party.[52] A counterclaim is termed compulsory if it is barred if not set up, and permissive, if not barred even if not set up. It is barred if not set up when it arises out of, or is necessarily connected with the transaction or occurrence that is the subject-matter of the opposing party's claim and does not require for its adjudication the presence of third persons of whom the court cannot acquire jurisdiction, according to Section 4, Rule 9.[53]

Section 2, Rule 17, provides that if a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.

Thus, where the counterclaim contained in the answer is for damages, which cannot remain pending for adjudication by the court independently of the complaint, being one which arises from, or is necessarily connected with, such action, the court may not dismiss the case over the objection of the defendant.[54]

Counterclaim raised at period for oral argument denies plaintiff full protection of his rights

Ordinarily, a counterclaim which a party may have at the time of filing the answer and which he wishes to claim against the opposing party should be filed with the answer. And a counterclaim which either matured or was acquired by a party after serving his pleading may be presented with leave of court as a counterclaim by supplemental pleading before judgment.[55] Although it has been held that courts should be liberal in the admission of counterclaims, especially of compulsory counterclaims which may be barred unless so interposed,[56] nevertheless, if such counterclaim is raised only at the time memorandum is submitted in lieu of oral argument, the counterclaim should not be allowed because it would deny to the other party the full and complete protection of his rights, since by then, the proceedings in the court have practically terminated, and the party upon whom the counterclaim is demanded would hardly have time to defend himself from the countersuit.[57]

[52] Section 6, Rule 6.
[53] I Moran, Rules of Court, 1963 ed., pp. 198-9.
[54] Ynotorio v. Lina, G.R. No. L-16677, November 27, 1964.
[55] Sections 8 and 9, Rule 6.
[56] Ledesma v. Morales, 47 O.G. Supp (12) 383.
[57] Olizon v. Central Bank of the Philippines, *supra*, note 35.

Note should be made of the fact that the counterclaim in the *Olizon* case which the defendant sought to file was merely of a permissive character.

Crossclaim must allege that subject matter thereof arose out of the transactions that is the subject matter of the original action

A crossclaim is any claim by one party against a co-party arising out of the transaction or occurrence that is the subject-matter either of the original action or of a counterclaim therein.[58]

In *Malinao v. Luzon Surety Co., Inc.*,[59] Escudero & Co. sued Malinao and Luzon Surety for recovery of the sum of ₱23,748.28, the value of vehicle spare parts allegedly sold on credit to Malinao. Malinao asked the court to allow him to file a crossclaim against the surety on the ground that the surety took possession of his hardware store on the understanding that the surety would apply the proceeds of the merchandise to the payment of Malinao's obligation, but that after applying the proceeds, surety failed to return the balance of ₱58,776.00. *Held:* The cross-claim is improper. The cross-claim must contain an allegation that the subject thereof, the transaction between the cross-claimant and the cross-defendant, arose out of the transaction between the original plaintiff and defendant in order to justify the allowance of a cross-claim.

Where cross-defendant is not prejudiced, cross-claim may be allowed even after judgment

In *de Peralta v. Mangusang*,[60] the defendant Mangusang sold a jeepney to the cross-defendant Costales, without the transfer thereof having been approved by the Public Service Commission. The jeepney was involved in an accident, resulting in injuries to de Peralta, who sued for damages for breach of contract against Mangusang, Costales, and the driver of the jeepney, one Mendoza. At the start of the trial, the case was dismissed as against Costales and the driver, the dismissal being predicated on the ground that an action on a breach of contract would not lie against the two. Mangusang was found liable for breach of contract and sentenced to pay de Peralta ₱500.00 for damages and attorney's fees. Mangusang did not appeal, but filed instead a cross-claim against Costales on the theory that the latter, being the real owner of the jeepney, should ultimately be held liable for damages to the plaintiff. The trial court allowed the cross-claim, and after trial, rendered an "Amending Decision" declaring Costales liable to Mangusang for

[58] Section 7, Rule 6.
[59] G.R. No. L-16082, February 29, 1964.
[60] G.R. No. L-18110, July 31, 1964.

any payment the latter might have to make to the plaintiff, it appearing that he was the actual owner of the jeepney at the time of the accident. The cross-defendant Costales questioned the propriety of the allowance of the cross-claim after judgment had already been rendered. It was held that while the defendant should have filed her cross-claim during the pendency of the action, or at least should have filed an independent civil action against the cross-defendant, where it appears that cross-defendant had been given his day in court and the result would be the same, it was not error to allow defendant to file her cross-claim at that stage. The Court invoke the doctrine that the Rules of Court should be liberally construed to secure substantial justice to the parties, to justify its ruling.

Affirmative defense of res judicata must be specifically pleaded

In the case of *Philippine Coal Miners' Union v. Cebu Portland Cement Co.*,[61] CEPOC filed an answer to the petition by the petitioner Union, interposing, among other defenses, that "under the facts and the law, petitioners are not entitled to the relief prayed for." Judgment was rendered against CEPOC, and on appeal, claimed that under the averment above-cited, *res judicata* had been alleged as a defense. The Supreme Court held that under Section 9, Rule 9 of the former Rules of Court,[62] all such grounds of defense as would raise issues of facts, must be specifically pleaded. The allegation "petitioner is not entitled to the relief prayed for" is vague, not specific, and comprehends almost all defenses under the sun. Not having interposed the defense of *res judicata*, either in a motion to dismiss or in its answer, such defense is deemed to have been waived and cannot be pleaded for the first time at the trial or on appeal.

Failure to object seasonably to unverified opposition in registration proceedings constitutes waiver

In *Miller v. Director of Lands*,[63] a parcel of land in Masbate was applied for registration in the Court of First Instance. Twenty-eight oppositors filed written but unverified oppositions to the application, failing to comply with the requirement in Section 34 of Act 496, that an opposition shall be signed and sworn by the person claiming an adverse interest or by some person in his behalf. However, applicants did not object to the lack of verification in the oppositions until after they had presented their evidence and rested their case, and after the first witness of the oppositors had given his testi-

[61] G.R. No. L-19007, April 30, 1964.
[62] Reproduced substantially in Section 5, Rule 6, Revised Rules of Court.
[63] G.R. No. L-16761, October 31, 1964.

mony and cross-examination thereof made by counsel for the applicants, at which stage a motion to dismiss was made based on such defect. The trial court dismissed the unverified oppositions. The Supreme Court, in reversing the order of dismissal of the trial court held that when the applicants proceeded with the trial, presented their evidence, and rested their case, and did not object to the unverified oppositions until after the first witness of the oppositors had been called and had finished with his testimony, they are deemed to have waived such objection by failing to do so seasonably.

Amended and supplemental pleadings

Pleadings may be amended by adding or striking out an allegation or the name of any party, or by correcting a mistake in the name of a party or a mistaken or inadequate allegation or description in any other respect.[64] After the case has been set for hearing, substantial amendments may be made only upon leave of court, but such leave may be refused if it appears to the court that the cause of action or defense is substantially altered.[65]

Consequently, a complaint cannot be amended so as to confer on the court in which it is filed jurisdiction over the case, if the cause of action originally set forth was not within the court's jurisdiction.[66] However, if the original complaint was dismissed for failure to state a cause of action alone, and an amendment to the complaint is made which merely corrected a defect in the allegations of plaintiff's cause of action, and not for the purpose of conferring jurisdiction on the trial court, such amendment may be admitted.[67]

Mangayao v. Lasud[68] was an action brought to recover a parcel of land in Zamboanga alleged to have been sold by the plaintiffs, illiterate non-Christian Subanos, to the defendants. The original complaint averred that possession of the land had been transferred to defendants as security for a loan of ₱5,000.00, but that defendants refused to allow redemption thereof. The complaint was subsequently amended to aver that plaintiffs were deceived into signing a contract of absolute sale of the realty in question, upon defendants' fraudulent representation that the deed was one of mortgage, and that the deed was null and void for lack of approval by the Provincial Governor. The issue was whether the lower court erred in admitting such amendment, the defendants premising their objection on the

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[64] Section 1, Rule 10.
[65] Section 3, Rule 10.
[66] Campos Rueda Corporation v. Bautista, G.R. No. L-18452, September 29, 1962.
[67] Tamayo v. San Miguel Brewery, Inc., G.R. No. L-17749, January 31, 1964.
[68] G.R. No. L-19252, May 29, 1964.

ground that the amendment involved a change of theory, since the nullity of the deed was not originally pleaded. In upholding the decision of the trial court, the Supreme Court pointed out that the original complaint specifically averred that vendors were "illiterate non-Christian Subanos," and that annexed to the complaint was a deed of sale showing no approval thereof by the Provincial Governor. These averments sufficed to put in issue the validity of the sale under the Administrative Code of Mindanao and Sulu. The allegations of invalidity in the amended complaint, therefore, did not constitute a change of theory, even if they did not present the issue in a more explicit and formal manner.

Section 5, Rule 10, provides that when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Section 2, Rule 9, provides that defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived; except the failure to state a cause of action which may be alleged in a later pleading, or by motion for judgment on the pleadings, or at the trial on the merits; but in the last instance, the motion shall be disposed of as provided in Section 5 of Rule 10, in the light of any evidence which may have been received.

These provisions were applied in the case of the *City of Manila v. Bacay*,[69] which was an ejectment case filed by the City of Manila against defendants for alleged non-payment of rentals. It was proven during the trial that the defendants were, in fact, up-to-date in the payment of rentals. Defendants moved to dismiss the complaint on the ground that plaintiff had no cause of action. However, during the trial, a letter was presented in evidence by the plaintiff without objection on the part of the defendants, which informed them that the lots leased by them were urgently needed by the plaintiff, and demanding that they forthwith vacate the lots. It was held that the result of the admission of the letter in evidence without objection on the part of the defendants is that such exhibit supplied the defective allegations of the complaint, and by such admission, the allegations in the complaint were *ipso facto* amended by inclusion of the allegation that the city needed the lots, and that defendants forthwith vacate the same.

Section 4, Rule 15, provides:

> Notice of a motion shall be served by the applicant to all parties concerned, at least three (3) days before the hearing thereof, together with a copy of the motion, and of any affidavits and other papers ac-

[69] G.R. Nos. L-19358-9, March 31, 1964.

companying it. The court, however, for good cause may hear a motion on shorter notice, specially on matters which the court may dispose of on its own motion.

The probable effect of the failure to comply with the first sentence of this provision was intimated in *Siy v. Tan Gun Ga*,[70] where it was held that if the oppositor of a petition is not given three-days, but only one-day notice, the order appealed from is subject to reconsideration.

The second sentence of the section reproduced above was applied in the case of *Socco v. Leary*,[71] where objection to a motion on the ground that it was served without the required three-day notice was overruled on the authority of Rule 15, Section 4, the Court declaring that considering the urgency of the motion, it could be heard on shorter notice.

In the Socco case, objections was also made to the same motion, for alleged non-compliance with the provisions of Section 5, Rule 15, that the notice shall state the time and place for hearing of the motion. The Supreme Court said that the time and place of hearing were substantially indicated in the notice which asked for "immediate consideration of the motion by the 'Court of First Instance of Manila.' "

In *Cabatit v. Court of Agrarian Relations*,[72] the notice of a motion for reconsideration was mistakenly sent by the petitioner to another attorney, not to the true counsel of record of the adverse party. The Court held that inasmuch as petitioner's motion for reconsideration had not been served upon the adverse party, the motion could not be entertained, and its filing did not interrupt the running of the period to appeal from the decision which became final and executory.

Grounds for motion to dismiss

a. Lack of jurisdiction over the subject matter

Section 2, Rule 9, provides that "whenever it appears that the court has no jurisdiction over the subject-matter, it shall dismiss the action."

In *Ace Publications, Inc. v. The Commissioner of Customs*,[73] the Supreme Court said:

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[70] G.R. No. L-19096, February 29, 1964.
[71] G.R. No. L-19461, October 31, 1964.
[72] G.R. No. L-19756, May 25, 1964.
[73] G.R. No. L-16761, October 31, 1964.

> "Courts are bound to take notice of the limits of their authority, and they may, by their own motion, even though the question is not raised by the pleadings, or not even suggested by counsel, recognize the want of jurisdiction and act accordingly by staying the pleadings, dismissing the action, or otherwise noticing the defect, at any stage of the proceedings".

Thus, where the complaint, on its face, showed indubitably that it was a matter beyond the cognizance of the respondent (Court of Industrial Relations) it should have dismissed the cause outright instead of deferring the determination of petitioner's motion to dismiss until the trial.[74] However, it is well-settled that the Court of Industrial Relations has ample discretion to defer its action upon a motion to dismiss based on lack of jurisdiction until after the parties have introduced all of their evidence and submitted the case for decision on the merits.[75]

b. Prescription

Under Section 10, Rule 9, if petitioner fails to plead prescription in his motion to dismiss, or as a defense in his answer, he is deemed to have waived such defense.[76]

c. Failure to state a cause of action

A motion to dismiss, based on failure to state a cause of action, should be deemed to have admitted the truth of the facts alleged in the complaint.[77]

However, in *Dalandan v. Julio*,[78] the Supreme Court held that where the allegation in the complaint is a mere legal conclusion, the same cannot be deemed admitted by the filing of a motion to dismiss. In that case, plaintiff alleged in his complaint, among other things, that what was on its face a *pacto de retro* sale was in reality an equitable mortgage, because the vendor a retro expressly waived the 10-year redemption period, and because it could be inferred from the contract that the real intention of the parties therein was that the transaction was only a security for the payment of a debt. The defendants filed a motion to dismiss on the ground that the complaint did not state any cause of action. Plaintiff contends that by filing a motion to dismiss, the defendants thereby admitted the allegation of equitable mortgage. *Held:* Such allegation of equitable

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[74] Philippine Association of Free Labor Union v. Bognot, G.R. No. L-19420, January 31, 1964, citing Administrator of Hacienda Luisita Estate v. Alberto, G.R. No. L-12133, October 31, 1958.

[75] Serrano v. Serrano, G.R. No. L-19562, May 23, 1964.

[76] Commissioner of Internal Revenue v. Priscila Estate, Inc., G.R. No. L-18282, May 29, 1964.

[77] Lim v. de los Santos, G.R. No. L-18137, August 31, 1963.

[78] G.R. No. L-19101, February 29, 1964.

mortgage found in the complaint is a mere conclusion of plaintiff and is not a material allegation, and as such, is not deemed admitted by the defendants by filing their motion to dismiss.

Motion for intervention

Section 2, Rule 12, provides:

> "A person may, before or during a trial, be permitted by the court, in its discretion, to intervene in an action, if he has legal interest in the matter in litigation, 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. . . . In allowing or disallowing a motion for intervention, the court, in the exercise of discretion, shall consider whether or not the intervenor's right may be fully protected in a separate proceeding.

In *Pfleider v. Britanico,*[79] one Hodges sought to intervene in an action for rescission of a contract of lease between plaintiff-lessor and defendant-lessee, pleading that if the lower court orders the delivery of the possession of the properties, which are admittedly registered in Hodges' name, then the order will render ineffective the decision of the same court in another case and the writ of execution issued therein ordering the delivery of the parcels of land to Hodges by Pfleider. The lower court denied the motion to intervene because of the pendency in another branch of the same court of another case for interpleader, filed by Britanico against Pfleider and Hodges, where the issues were practically the same. The Supreme Court held that the rule on intervention allows the trial court the exercise of discretion, and no showing had been made that such discretion had been abused. At any rate, the court said, there is a valid ground for denying the intervention, inasmuch as the rights of the intervenor were fully protected in the interpleader case then pending.

However, in the case of *Lacuna v. Board of Liquidators,*[80] the Supreme Court, invoking the interest of justice, not only reversed the ruling of the lower court denying a motion for intervention, but also directed the allowance of the intervention after the order denying such intervention had already become final. In that case, one Damian was granted authority by the Philippine Air Force to repair certain buildings for which he was to be paid in surplus properties. He assigned his rights to receive such properties from Lacuna, who forthwith notified the Philippine Air Force of such assignment. Subsequently, Damian wrote to the Philippine Air Force, informing

[79] G.R. No. L-19077, October 30, 1964.
[80] G.R. No. L-18621, November 28, 1964.

the latter that the deed of assignment in favor of Lacuna had been revoked for failure of consideration. Lacuna filed a complaint against the Philippine Air Force, based on the deed, without including the assignor Damian as a party-defendant. Damian filed a motion to intervene, which motion was denied by the trial court. No appeal was taken by him from the order of denial. Eventually, the complaint was dismissed, from which order of dismissal, affirmed by the Court of Appeals, Lacuna filed a petition for certiorari in the Supreme Court. The Supreme Court, in ordering the case to be remanded to the trial court with instructions to allow the assignor's intervention, held that the assignor is an indispensable party to the suit. The failure to hear his side would result not only in an injustice to him, but would likewise prevent a fair and just review of the case. And although the assignor did not appeal from the order denying his motion for intervention, his intervention should be allowed, in the interest of justice.

SERVICE AND FILING OF PLEADINGS

Section 2, Rule 13, provides that service upon any party who has appeared by an attorney shall be made upon his attorney, unless service upon the party himself is ordered by the court.

In *People's Homesite and Housing Corporation v. Tiongco*,[81] the Supreme Court explained the reason behind and the limits of this section. It said:

> "Normally, notice to counsel is notice to parties, and such doctrine has beneficient effects upon the prompt dispensation of justice. Its application in a given case, however, should be looked into and adopted, according to the surrounding circumstances; otherwise, in the court's desire to make a short cut of the proceedings, it might foster, wittingly or unwittingly, dangerous collusions to the detriment of justice. It would be easy for one's lawyer to sell one's right down the river, by just alleging that he just forgot every process of the court affecting his clients, because he was so busy. Under this circumstance, one should not insist that a notice to such irresponsible lawyer is also a notice to his clients.

Substantial compliance with service of notice of hearing

Where the records show that petitioner had a registered address in the record of the case at which repeated notices of trial were addressed to him, and it also appears that the court reset the trial of the case several times and directed the plaintiff's counsel to exert efforts to notify the petitioner, the defendant cannot question the

[81] G.R. No. L-19891, November 28, 1964.

judgment of the court based on the evidence of the plaintiff on the ground of lack of notice of trial served upon him.[82]

Substituted service of summons should be made at defendant's dwelling house

Under Section 8, Rule 14, substituted service of summons may be made if the defendant cannot be served personally within a reasonable time, by leaving copies of the summons at the defendant's dwelling house or residence with some person of suitable age and discretion then residing therein, or by leaving the copies at defendant's office or regular place of business with some competent person in charge thereof.

In *J. M. Tuason & Co., Inc. v. Fernandez*,[83] it was held that where the house at which the service was made, though owned by the defendant, was then leased to another who was not authorized to receive any paper or pleading in defendant's behalf, the service of summons thereat is not valid under the principle of substituted service, which presupposes service "by leaving copies of the summons at the defendant's dwelling house or usual place of abode," in accordance with Section 8, Rule 7 of the former Rules of Court.[84]

JUDGMENTS

Dismissal for failure to prosecute constitutes res judicata unless otherwise provided

Under Section 3, Rule 17, if plaintiff fails to appear at the time of the trial, or to prosecute his action for an unreasonable length of time, the action may be dismissed on motion of the defendant or upon the court's own motion, and such dismissal has the effect of an adjudication upon the merits, unless otherwise provided by the court.

The case of *Caladiao v. Blas* [85] called for the application of this rule. In that case, one Prudencio Limpin sold to Simeon Blas an unregistered fishpond in 1932 under a sale with *pacto de retro* for a period of one year from date. Vendee took possession of the property, and upon his death, the land was awarded to his widow, the respondent. In 1934, Limpin secured an Original Certificate of Title from the Register of Deeds of Pampanga. In 1952, respondent applied for registration of land, which was opposed by the petitioners.

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[82] Sharruf v. Bubla, G.R. No. L-17029, September 30, 1964.
[83] G.R. No. L-19556, October 30, 1964.
[84] Now Section 8, Rule 14.
[85] G.R. No. L-19063, April 29, 1964.

The Court adjudicated the land to respondent on the ground of Limpin's failure to repurchase. During the pendency of the application, the petitioners filed a complaint against the respondent for the return of the land and the annulment of the sale, but it was unqualifiedly dismissed for failure to prosecute. The petitioners brought another action for reconveyance. *Held:* The superiority of respondent's right over those of petitioner had been settled by final dismissal of the first civil case. While the dismissal was for failure to prosecute, the same had the effect of an adjudication upon the merits, and operates as *res adjudicata,* the court not having provided otherwise.

Judgment by default

In Philippine National Bank v. Monroy,[86] the Supreme Court ruled that judgment upon default is limited to the allegations of the complaint which are sustained by the proofs of the plaintiff. In that case, plaintiff asked for the revival of the court's judgment of May, 1949, requiring defendant to pay plaintiff the amount of ₱12,000.00. The complaint was filed in March, 1961. Defendant did not answer and was declared in default. Plaintiff proved its allegations as to judgment and non-payment. Nevertheless, the court *motu propio* dismissed the suit on the ground of prescription, more than ten years having elapsed from 1949 to 1961. On appeal, the Supreme Court declared that the trial judge erred in drawing the conclusion of prescription from the fact that more than ten years had elapsed from the time the judgment was rendered in May, 1949, until the time the action to revive judgment was commenced. In such actions, the ten-year period of prescription is to be counted from the day the judgment became final. Since the complaint made no allegation as to the date the judgment became final, the court could not declare that the action had prescribed. The Supreme Court did not find it necessary to decide the question whether the court could dismiss the action of the ground of prescription where the defendant has been declared in default and, therefore, incapable of raising such defense.

Section 3 of Rule 18 provides the procedure to obtain relief from an order of default. Said section reads:

> A party declared in default may at any time after discovery thereof and before judgment file a motion under oath to set aside the order of default upon proper showing that his failure to answer was due to fraud, accident, mistake or excusable negligence, and that he has a meritorious defense. In such case, the order of default may be set aside on such terms and conditions as the judge may impose in the interest of justice.

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[86] G.R. No. L-19374, June 30, 1964.

The case of *Eduque v. Court of Appeals* [87] illustrates the circumstances under which relief may be granted from an order of default.

In that case, a complaint was filed against Eduque, and he was given up to February 1, 1960, within which to answer. On February 6, he was declared in default. He filed his answer on February 12, and on February 15, filed a motion to set aside the order of default. It appeared that the failure of the counsel of Eduque to file the answer was due to the following circumstances: his wife was taken to the hospital on January 25, 1960, and delivered by means of a cæsarian operation; he had to be beside his wife in order to purchase medicine for the treatment of his wife; his wife developed high blood pressure about five days after delivery; on February 2, 1960, he took out his wife from the hospital, but that two days thereafter, he had to take her back inasmuch as she developed a high fever; and that his wife was discharged only on February 1, 1960. Moreover, it did not appear that counsel for petitioner Eduque had associates in the practice of law whom he could have asked to file a motion for extension of time. It was held that, under the circumstances, the negligence of counsel for petitioner was excusable, and the lower court should have granted the motion to set aside the order of default.

Opposition was also made to the petition for relief in the *Eduque* case on the ground that it was not accompanied with affidavits of merit. The Court held that there was sufficient compliance with the requirements, by the allegation contained in the petition that petitioner "has a meritorious defense . . . as shown in the answer filed on February 12, 1960," and that petitioner had satisfactorily shown, in his motion, by reference to the answer which he had filed, that he had a good and substantial defense which he may prove if the petition were granted.

Judgment on the pleadings

In *Villamor v. Lacson,*[88] the Supreme Court intimated that a party praying for a judgment on the pleadings admits the truth of the material and relevant allegations in the adverse party's answer, as well as the legal implications therein. It declared:

> A party who prays for judgment on the pleadings, without offering proof as to the truth of his own allegations, and without giving the opposing party an opportunity to introduce evidence, must be understood to admit the truth of all material and relevant allegations of the opposing party, and to rest his motion for judgment on these allegations,

[87] G.R. No. L-19389, March 31, 1964.
[88] G.R. No. L-15945, November 28, 1964.

> taken together with such of his own as are admitted in the pleadings (Evangelista v. de la Rosa, 76 Phil. 115; Falcasantos v. How Suy Ching, L-4229, May 29, 1952; Fabella v. Provincial Sheriff of Rizal, L-8090, November 27, 1953, cited in IV Republic of the Philippines Digest, p. 309). Consequently, in filing a motion for judgment on the pleadings, petitioners are deemed to have admitted the truth of the material and relevant allegations in respondents' answer and their legal implications.

The Court also said that even if it were to be held that the petitioners did admit the conclusions of law contained in the answer, there was sufficient basis in the record to affirm the decision dismissing the case.

The ruling in the case of *Benavides v. Alabastro* [89] was to the effect that where the defendant's answer tenders an issue not only denying the material allegations of the complaint, but also sets up certain special and affirmative defenses, the nature of such answer calls for presentation of evidence, because judgment on the pleadings can only be rendered when the pleading of the party against whom the motion is directed does not tender an issue.

Judgment for support does not become final

Judgment for support does not become final. The right to support is of such nature that its allowance is essentially provisional; for during the entire period that a needy party is entitled to support, his or her alimony may be modified or altered, in accordance with his increased or decreased needs, and with the means of the giver. It cannot be regarded as subject to final determination.[90] Once the needs of the plaintiff arise, she has the right to bring the action for support, for it is only then that her cause of action accrues. The right to ask support is demandable from the date on which plaintiff was in need of the same.[91]

CALENDARS AND ADJOURNMENTS

In the assignment of cases to the different branches of a Court of First Instance, or their transfer from one branch to another whether by raffle or otherwise, the parties or their counsel shall be given written notice sufficiently in advance so that they may be present therein if they so desire.[92]

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[89] G.R. No. L-19762, December 23, 1964.

[90] Gorayeb v. Hashim, 47 Phil. 87; Gonzales v. Gonzales, 43 O.G. 4691, cited in Advincula v. Advincula, *infra*, note 91.

[91] Advincula v. Advincula, G.R. No. L-19065, January 31, 1964, citing Marcelo v. Estacio, 70 Phil. 215.

[92] Section 7, Rule 22.

In Commissioner of Immigration v. Reyes,[93] it was held that this section does not require that assignment of cases be made exclusively through raffle. It provides merely that the parties be notified in writing, sufficiently in advance to enable them to be present in the assignment of cases to the different branches of a Court of First Instance. Consequently, since the motions of the plaintiffs to assign the case to Branch VI, on the ground that there were pending in that sala two cases involving similar facts, were set for hearing, and sufficient notice given to the parties, the order granting said motions cannot be set aside on a petition for certiorari. The Court of First Instance of Manila has administrative control of all matters affecting the internal operations of the court. No justifiable reason exists for the Supreme Court to interfere with the internal policy of the court in the assignment of its cases.

MODES OF DISCOVERY

Production of books and documents may be required in connection with any material matter:

Section 1 of Rule 27 provides:

> Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (a) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody or control. . . ."

This section was applied in the case of *Pangasinan Transportation Co. v. Legaspi*[94] where the issue involved was whether, in an action for damages for breach of contract of carriage, proof of the defendant's financial standing is necessary so as to justify a request for the production of its financial statements. In that case the respondents, heirs of deceased passengers of a Pantranco bus, asked the court to order the Pantranco office manager to produce in court the company's general ledgers and financial statements for the respondents to inspect, examine or photograph. The motion was opposed on the ground that petitioner's financial capacity was not in issue. The lower court granted respondent's motion. In upholding the lower court's order, the Supreme Court cited Article 2206 of the Civil Code fixing the minimum indemnity for death at ₱3,000, which

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[93] G.R. No. L-23838, December 28, 1964.
[94] G.R. No. L-20916-17, December 23, 1964.

may be increased according to the circumstances, and Section 1 of C.A. 284 providing that "the civil liability for the death of a person shall be fixed by the competent court at a reasonable sum, upon consideration of the pecuniary situation of the party liable." Evidence of the petitioner's financial standing is, therefore, material and Rule 27, Sec. 1 may be availed of by the respondents.

TRIAL

When reason for suspension ceases to exist, trial should be allowed to proceed

In *Samia v. Garcia*,[95] the trial in an ejectment case was suspended because the land subject of the complaint was sought to be expropriated and condemnation proceedings were filed. The expropriation proceedings were subsequently dismissed. It was held by the Supreme Court that the trial of the ejectment case should be allowed to proceed after the dismissal of the action for the expropriation inasmuch as the basis for the order of suspension no longer existed.

TRIAL BY COMMISSIONER

Clerk of Court may be designated Commissioner

The defendant in the case of *Wassmer v. Velez* [96] sought to have the judgment set aside as null and void, having been based on evidence adduced before the clerk of court. The Supreme Court, in rejecting defendant's contention held that the procedure of designating the clerk of court as commissioner to receive evidence is sanctioned by Rule 33.[97]

NEW TRIAL

Newly discovered evidence:

Rule 37, Sec. 1 provides, as one of the grounds for granting a new trial:

> ". . .
>
> (b) Newly discovered evidence, which he could not, with reasonable diligence, have discovered, and produced at the trial, and which if presented would probably alter the result."

It is not enough that the evidence is newly discovered; two additional requisites must be complied with: (1) that, even with the

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[95] G.R. No. L-19020, April 30, 1964.
[96] G.R. No. L-20089, December 26, 1964.
[97] citing Pangasinan v. Palisoc, G.R. No. L-16510, October 30, 1962.

exercise of reasonable diligence, it could not have been discovered and produced at the trial, and (2) that such evidence is of such a nature as to alter the result of the case if admitted.[98]

A motion for new trial is, therefore, correctly denied, where what is sought to be introduced in evidence is not newly discovered evidence within the contemplation of the rules but "forgotten evidence," its admission being within the discretion of the court.[99]

To the same effect was the ruling laid down in *General Enterprises v. Liamga Bay Logging Co.*,[100] that a motion for new trial, on the ground of newly discovered evidence, will be denied if the contract alleged to be the newly discovered evidence had been presented as an exhibit and had been referred to in the brief.

Grant of motion for new trial is discretionary

In *Sharruf v. Bubla*,[101] the Supreme Court recognized the discretionary power of the trial court to entertain or dismiss a motion for new trial. As was held in that case, the granting or denial of a motion for new trial is a matter addressed to the sound discretion of the trial court. Since the petitioner's motion was not supported by any affidavit of merit and the rule as to proof of mistake or excusable neglect was not satisfied, the trial court committed no error in denying the motion.

Order denying motion for new trial will not be disturbed if there is no abuse of discretion

In the case of *Villa-Rey Transit v. Bello*,[102] the pertinent facts are as follows: The petitioner was declared in default for failing to file his answer. He then filed a "motion for new trial or to set aside judgment," but before the lower court could act on the motion, he filed a petition for certiorari in the Supreme Court contesting the order of default. The Supreme Court dismissed the petition for certiorari because it was premature, and moreover, the lower court did not commit any abuse of discretion in issuing the order of default. Petitioner then filed with the lower court a "Motion To Reset Hearing of Motion To Lift Order of Default and Motion for New Trial or to Set Aside Judgment." This was denied. The petitioner brought this petition for mandamus and certiorari. Held: We discern no abuse, much less a grave abuse of discretion in the actua-

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[98] II Moran, *Rules of Court*, 1963 ed., p. 208.
[99] Ilustre v. CAR, G.R. No. L-19654, March 31, 1964, citing I Moran Rules of Court, 1957 ed., p. 508.
[100] G.R. No. L-18487, November 28, 1964.
[101] G.R. No. L-17029, September 30, 1964.
[102] G.R. No. L-21399, January 31, 1964.

tions of the trial judge. The orders complained of therein were not issued in excess of jurisdiction or with grave abuse of discretion, and were legal and valid. Petitioner in filing a premature petition for certiorari simply wanted to gamble. Having lost, in this move, the petitioner tried to ask the help of the court whose resolution on the orders it refused to await. Petitioner should not be permitted to take two courses of action at one time, with the end in view that if it loses in one, it would still have the other.

Motion for Reconsideration; When Not Pro-Forma

A motion for reconsideration, when based on any of the grounds for a motion for new trial, will be considered as a motion for new trial, and, unless it is *pro-forma,* will like a motion for new trial, suspend the period for perfecting an appeal.[103]

In *Roa v. Pasicolan,*[104] there was a motion of reconsideration on the grounds that: (1) the judgment was contrary to law; and (2) it was also contrary to the evidence. The said motion specified the law alleged to be violated, Article 776 of the Civil Code. It likewise pointed out the evidence alleged to be contrary to the judgment. The Supreme Court held that the motion deserved to be ruled upon on the merits and not simply dismissed as *pro-forma,* and that it also had the effect of suspending the period for bringing an appeal.

RELIEF FROM JUDGMENTS

Petition for relief may be made within 60 days

In the case of *Commissioner of Internal Revenue v. Olimpo,*[105] the petitioner Commissioner's petition for relief was granted inasmuch as he presented it within the prescribed period. His petition to defer the closing of the testate proceedings until the proper amounts of the estate and inheritance taxes determined was filed within sixty days from the order of the court closing the proceedings.

Petition for relief granted in the interest of justice

In *PHHC v. Tiongco,*[106] the Supreme Court interpreted Rule 38 liberally in favor of the petitioner. That case was for recovery of possession of a certain parcel of land. The counsel for the defendants failed to inform his clients of the hearing as well as the decision rendered therein. Notice of the decision was received by said counsel

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[103] II Moran, *Rules of Court,* 1963 ed., pp. 210 & 214; Calma v. Cabangon, G.R. No. L-18664, March 31, 1964.
[104] G.R. No. L-18482, January 31, 1964.
[105] G.R. No. L-19849, May 25, 1964.
[106] G.R. No. L-18891, November 28, 1964.

on March 7, 1961. The defendants came to know of it only on May 12, 1961 when the Sheriff served upon them a copy of the writ of execution ordering them to vacate the premises. Failing to contact their counsel, the defendants engaged the services of another lawyer, and on May 19, 1961 filed a petition for relief. This was opposed on the ground that it was filed beyond the 60-day period reckoned from notice of judgment. The Supreme Court, in granting said petition, held that, although, strictly speaking, the petition was sled out of time, the Rules should be liberally construed to promote their object. In this case, the conduct of defendant's counsel in failing to give the least significance to the process of the court deprived the defendants of their day in court.

Affidavit of merits must state facts, not conclusions

Section 3 of Rule 38 provides that the petition for relief:

> ". . . 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."

For failure to comply with the aforementioned requirements, the Supreme Court in *Wassmer v. Velez*,[107] sustained the lower court's denial of the petition for relief. The defendant in that case filed a petition for relief from a judgment of default, alleging in his affidavit of merit that "he has a good and valid defense against plaintiff's cause of action, his failure to marry the plaintiff as scheduled having been due to fortuitous event and/or circumstances beyond his control". In refusing to grant the petition, the Supreme Court held that the affidavit of merits must state facts constituting a valid defense and that mere conclusions or opinions are not sufficient.[108]

EXECUTION AND SATISFACTION OF JUDGMENTS

Execution pending appeal available only if there are special reasons therefor

Section 2 of Rule 39 reads:

> "On motion of the prevailing party with notice to the adverse party the court may, in its discretion, order execution to issue even before the expiration of the time to appeal, upon good reasons to be stated in a special order."

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[107] G.R. No. L-20089, December 26, 1964.

[108] citing Cortes v. Co Bun Kim, G.R. No. L-3926, October 10, 1951; Vaswani v. Tarachand, G.R. No. L-15800, December 29, 1960.

In *Puzon v. Barcelona*,[109] respondent, who was in a contract of partnership with the petitioner, obtained an immediate execution of the judgment in the former's favor. The execution was issued against the retention fund of the Bureau of Public Highways, with which the petitioner had contracts for the construction of roads and bridges. The Supreme Court, in reversing the order of immediate execution, held that there was no special reason for its issuance.

What supersedeas bond answers for

The defendant in the case of *Priames v. Henson*,[110] was sentenced to support the plaintiff in the sum of ₱250 monthly until the age of majority. To stay the execution of the judgment, the defendant and a surety company filed a supersedeas bond in the sum of ₱10,000. On appeal, the monthly pension was decreased to ₱100. The surety moved to fix its liability on the bond to ₱4,000, the accrued support at the time the bond was filed. It was held that this case was governed by Section 3 of Rule 39, which states that the purpose of the supersedeas bond is the performance of the judgment appealed from in case it be affirmed. Since the judgment was for the defendant to give monthly support to the minor until she reaches the age of majority, and since the total amount involved could not be less than the amount of the bond, the Supreme Court ruled that the lower court did not err in holding the surety answerable on its bond for the whole amount.

Effect of reversal of executed judgment

In *Esler v. Ellama*,[111] judgment in an unlawful detainer case was rendered in favor of the plaintiff. Pending appeal in the Court of First Instance, an order of execution was issued. Subsequently, the CFI ordered the dismissal of the action on the ground that it was the CAR that possessed jurisdiction over the case. The question was whether, after the order of dismissal had become final, the court could still order the return of the property to the defendant. The Supreme Court held that, as a matter of principle, courts should be authorized at any time to order the return of the property erroneously delivered to one party, if the order was found to have been issued without jurisdiction. The Court cited as authority Section 5 of Rule 39, which provides:

> "Where the judgment executed is reversed totally or partially on appeal, the trial court, on motion, after the case is remanded to it, may issue such orders of restitution as equity and justice may warrant under the circumstances."

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[109] G.R. No. L-19624, April 30, 1964.
[110] G.R. No. L-14250, November 28, 1964.
[111] G.R. No. L-18236, January 31, 1964.

Execution by motion

If the defendant fails to pay the plaintiff what is due the latter under the judgment, the plaintiff's remedy is to ask for the execution of the decision, which can be effected by filing a motion for execution,[112] provided, of course, the motion is made within five years from the date of the entry of the judgment or of its finality, as provided by Rule 39, Section 6.

Issuance and contents of a writ of execution

It is settled that the writ of execution must conform to the judgment which is to be executed, as it may not vary the terms of the judgment it seeks to enforce.[113] Thus it follows that if the decision appealed from is affirmed in all its respects but one, the appellee is entitled to obtain execution of so much of the decision as was affirmed. This was the ruling in the case of *Klepper v. American President Lines.*[114] The plaintiff in that case obtained a judgment in the CFI ordering the defendant to pay ₱6,729.50 as the value of the damaged goods, ₱500 as sentimental value, and ₱1000 as attorney's fees. On appeal, the Supreme Court modified the judgment in that the value of the damaged goods should be limited to ₱500 but affirmed the decision in all other respects. It was held that the plaintiff could obtain execution both as to the sentimental value and the attorney's fees.

Certificate of sale and writ of possession limited to its express terms

When a parcel of land with a mining claim thereon is sold at execution, is the mining claim deemed included in the sale? The Supreme Court in the case of *Comilang v. Delenela* [115] answered this question in the negative when it held that since neither the writ of possession nor the certificate of sale included the mining claim, then it could not be deemed to have been included in the transfer of ownership.

Rule 39, Section 17 construed

In the case of *Santos v. Mojica,*[116] the issue was whether a third person who claimed ownership of a parcel of land subject of a writ of execution in a partition case could file a motion in said case for a recall of the writ. The Supreme Court ruled that, since the plaintiffs had filed a bond to answer for damages resulting from the

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[113] II Moran, Rules of Court, 1963 ed., p. 256.
[112] Pascua v. Perez, G.R. No. L-19354, January 31, 1964.
[114] G.R. No. L-19004, June 30, 1964.
[115] G.R. No. L-18897, March 31, 1964.
[116] G.R. No L-19618, February 28, 1964.

execution, the third person could not ask for a recall of the writ. His remedy was to vindicate his title in a separate and independent action making as parties defendant therein the sheriff and the persons responsible for the execution.

EFFECT OF JUDGMENTS

Res judicata

For the doctrine of *res judicata* to apply, four elements must be present:

(1) there must be a final judgment or order;

(2) the court rendering the same must have jurisdiction of the subject-matter and of the parties;

(3) the judgment or order must be on the merits;

(4) there must be between the two cases identity of parties, identity of subject-matter, and identity of causes of action.[117]

Where these elements are present, the judgment is conclusive to the parties not only as to the subject-matter in controversy in the action upon which it is based but also in all other actions involving the same question, and upon all matters involved in the issues which might have been litigated and decided in the case, the presumption being that all such issues were met and decided.[118] The issue in the Rivas case was whether the plaintiffs could file an action for damages arising from the deprivation of possession of property, when the question and amount of damages had already been adjudicated in a prior case. The Supreme Court, applying the principle of *res judicata*, held that the second action of the plaintiffs was barred.

To the same effect was the ruling in *Soriano v. Sahagun*,[119] where it was held that the plaintiff's claim for rent in arrears could no longer be entertained inasmuch as it was already denied in a prior action which the plaintiff had allowed to lapse to finality. *Res judicata*, according to the Court, had already set in.

In *Manila Underwriters Insurance Co. v. Tan*,[120] the facts are as follows: In a civil case entitled "Tumambing v. Borja" the court, upon application of the plaintiff therein, issued a writ of preliminary attachment against the properties of the defendant, upon a bond executed by petitioner Manila Underwriters, conditioned for the pay-

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[117] III Moran, Rules of Court, 1963 ed., p. 323.

[118] Rivas v. Alas, G.R. No. L-16930, July 31, 1964, citing Pua v. Lapitan, G.R. No. L-14148, February 25, 1960 and cases cited therein.

[119] G.R. No. L-17847, March 31, 1964.

[120] G.R. No. L-17445, November 27, 1964.

ment of such damages as defendant in that case might suffer. The court dismissed the complaint, granted defendant's counterclaim, dissolved the writ of attachment, and maintained the bond filed by the plaintiff. Petitioner was neither impleaded nor given any kind of notice in relation to the counterclaim. When a motion for a writ of execution was filed by defendant Borja against the petitioner, the latter opposed the motion alleging that it had never been notified of such counterclaim. The Supreme Court in that prior case exonerated the petitioner from liability. Subsequently, defendant moved again to require the petitioner to show cause why it should not be made liable under its bond. Held: The question of whether petitioner could still be held liable upon its bond must be deemed finally settled by the prior decision of the Supreme Court and any attempt to hold petitioner liable upon the bond must be considered as an improper attempt to reopen a case already finally adjudicated.

In the case of *Frances v. Nicolas*,[121] the Supreme Court again had occasion to reiterate the doctrine of *res judicata*. The conveyances of certain parcels of land were in a prior case nullified and the appellees were required to refund the purchase price to the appellants. Thereupon the appellees filed a motion stating that the said price was ₱2,500, which they offered to pay. The motion was granted. After four years, appellants instituted this action to recover the sum of ₱13,700 which they claimed was the true purchase price. The Supreme Court held that this question had already been definitely settled in the previous action and could not thus be raised again.

Res judicata applicable to decisions of administrative bodies

The principle of *res judicata* bars an action for certiorari against the Land Tenure Administration, when the decision of the LTA which is complained of was not appealed on time to the Office of the President.[122]

Similarly, in *Republic v. Manila Port Service*,[123] it was held that an assessment of the Commissioner of Internal Revenue which is not appealed to the Court of Tax Appeals within thirty days from receipt thereof, becomes final and executory and can no longer be disturbed or disputed.

When res judicata does not apply

Failing one of the four elements above enumerated, the doctrine of *res judicata* cannot apply.

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[121] G.R. No. L-19855, October 31, 1964.
[122] Cuneta v. Castañeda, G.R. No. L-20025, January 31, 1964.
[123] G.R. No. L-18208, November 27, 1964.

When a case is dismissed and in the order of dismissal there is no statement that the dismissal is with prejudice, it shall be deemed to be without prejudice and the principle of *res judicata* will not apply to a subsequent action on the same cause of action.[124]

When there is no identity of subject matter, the defense of *res judicata* fails, as where the judgment in the first case covered a tract of land which is not shown to be the same tract involved in the second case.[125]

Likewise, if the causes of action are different, the second action cannot be barred. In *Bumanglag v. Baraoidan*,[126] it was held that there was no *res judicata* because the issue in the prior case was exclusively possession while the issue in the second was ownership.

Conclusiveness of judgment

In the case of *Hollero v. Court of Appeals*,[127] a parcel of land was adjudicated to several persons as heirs of one Paz Hollero. The petitioners claimed that it was error to award part of the land to two of the awardee because in a previous action for ejectment filed by the petitioners against them, the latter had expressly acknowledged the petitioners' ownership of the land in question and, by virtue thereof, were ejected from the land. It was held that the outcome of that prior case barred the two awardees concerned from laying any claim to the land.

APPEALS

Rule 40, Section 11 construed

Rule 40, Section 11 provides:

> "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 Court of First Instance in the exercise of its original jurisdiction, may try the case on the merits if the parties therein file their pleadings and go to trial without any objection to such jurisdiction."

In *Gelardez v. Rodriguez*,[128] where the case was brought to the CFI on appeal from the inferior court which was found to have no jurisdiction over the case, it was held that the CFI could not take cognizance of it either because the petitioners raised the ques-

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[124] Advincula v. Advincula, G.R. No. L-19065, January 31, 1964.
[125] Villanueva v. Misamis Lumber Co., G.R. No. L-16076-77, November 28, 1964.
[126] G.R. No. L-16018, March 31, 1964.
[127] G.R. No. L-16579, June 29, 1964.
[128] G.R. No. L-17064, November 9, 1964.

tion of jurisdiction seasonably, not only in the court of origin, but also in the Court of First Instance. Hence, the second sentence of the above-quoted section was inapplicable.

But if, as in *Evangelista v. Reyes*,[129] the petitioners filed an answer in the CFI after an appeal had been perfected by the opposing party from a decision of the inferior court, the petitioners are deemed to have withdrawn any objections to the CFI's taking cognizance of the case pursuant to its original jurisdiction. Once they assent to the exercise of the CFI's jurisdiction, the petitioners are not thereafter permitted to alter the situation voluntarily chosen. Section 11 of Rule 40 was held to be properly applicable.

What determines finality

Only final judgments or orders shall be subject to appeal. No interlocutory or incidental judgment or order shall stay the progress of an action, nor shall it be the subject of appeal until final judgment or order is rendered for one party or the other.[130]

What really determines whether a judgment or order is final or merely interlocutory is whether it puts an end to litigation [131] or leaves something to be done therein on the merits.[132] The case of *Cruz v. Plaridel Surety* [133] was a reiteration of the aforementioned rulings. The facts of that case are as follows: In the intestate proceedings of the deceased Maria de la Cruz, the appellee filed a motion for an order requiring appellant, as surety for a debtor of the estate, to pay the latter's liability. The motion was denied. The question was whether the order of denial acquired finality so as to bar any remedy on the part of the appellee. It was held that the order was final in character because it was a final disposition of the matter involved in the aforesaid motion. Appellee should have appealed from said order.

Similarly, in *Malinao v. Luzon Surety*,[134] it was held that orders striking off a cross-claim and denying a subsequent motion to file a cross-claim are not merely interlocutory but final orders, inasmuch as they dispose of defendant's motion and leave nothing else to be done. An appeal, therefore, would be the proper remedy.

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[129] G.R. No. L-20416, January 30, 1964.
[130] Rule 41, Section 2.
[131] Olsen v. Olsen, 48 Phil. 238.
[132] Hodges v. Villanueva, G.R. No. L-4134, October 25, 1951; Gequillana v. Buenaventura, 48 O.G. 63.
[133] G.R. No. L-16483, April 30, 1964.
[134] G.R. No. L-16082, February 29, 1964.

Appeal bond not required if appellant is the government

Since the appellant in the case of *Commissioner of Immigration v. Romero* [135] was the Commissioner of Immigration, there was no need for an appeal bond.

Period for bringing an appeal starts running from the date of the amended decision, not the original one

Where, as in the case of *Magdalena Estate v. Caluag,*[136] the court *a quo* amended its decision so as to amount to a material alteration thereof, the period for bringing an appeal must be reckoned from the date of the amended decision.

Non-service of cash appeal bond

In the case of *Cumplido v. Mendoza,*[137] it was held that the circumstance of non-service of a cash appeal bond upon the adverse party does not affect the perfection of an appeal, provided such appeal bond is presented within the prescribed period.[138]

Effect of non-compliance with the requirements of Record on Appeal

In *Foley v. Sison,*[139] the caption of the Record on Appeal did not state the full names of the parties. Neither was there an index. It was held that these deficiencies constituted a clear violation of section 6 of Rule 41 and were sufficient for a *motu propio* denial of the Record on Appeal.

Likewise, where some of the pleadings related to the appealed judgment are not included in the Record on Appeal, like the answer and the motion for leave to amend answer, such an omission constitutes a violation of section 6 of Rule 41 and the inclusion of said omitted pleadings may be ordered.[140]

Effect of perfection of appeal

The Supreme Court in *Commissioner of Immigration v. Romero* [141] reiterated the ruling in a long line of decisions applying Section 9 of Rule 41 to the effect that upon the perfection of an appeal the trial court loses its jurisdiction over the case except to issue orders for the protection and preservation of the rights of the parties which do not involve any matter litigated by the appeal, to approve compromises offered by the parties prior to the transmittal

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[135] G.R. No. L-19782, January 31, 1964.
[136] G.R. No. L-16250, June 30, 1964.
[137] G.R. No. L-20265, June 30, 1964.
[138] citing Espartero v. Ladaw, 49 O.G. 1439; Gammad v. Arranz, G.R. No. L-6079, April 29, 1956.
[139] G.R. No. L-22626, September 28, 1964.
[140] Philippine Rock Products v. Mayon Mining Corp., G.R. No. L-19602, October 30, 1964.
[141] G.R. No. L-19782, January 31, 1964.

of the Record on Appeal to the appellate court, and to permit the prosecution of pauper's appeals.

Order Approving on Appeal may be set aside before transmittal to appellate court

In the case of *Cabungcal v. Fernandez*,[142] the Record on Appeal had been approved but before its transmittal to the Supreme Court, the respondent filed an urgent motion for reconsideration of the order approving the Record on Appeal, on the ground that it contained numerous errors. The lower court set aside its previous order of approval. The petitioner contended that the order setting aside the prior approval was void since the lower court had jurisdiction over the case upon the perfection of the appeal. Held: Although the general rule is that the trial court loses jurisdiction over the case once the appeal is perfected, this rule does not apply to a case where the order complained of does not vacate the judgment nor affect issues involved in the appeal. If, according to Sections 13 and 14 of Rule 41, the trial court may, before the transmittal of the record, dismiss an appeal if the notice of appeal, appeal bond, or record on appeal is not filed on time, then, *a fortiori*, the trial court may also set aside its order approving the Record on Appeal with a view to further inquiring into the matter of whether said Record on Appeal is complete or contains errors or not.

Appeal barred through inexcusable negligence

An appeal that was brought three days out of time was not entertained for the reason that the failure to bring a timely appeal was caused by the negligence of the appellant's postal mail clerk who neglected to transmit the decision promptly to the appellant's legal department.[143] Similarly, in *Cumplido v. Mendoza*,[144] the appeal was dismissed because the petitioner was negligent in not ascertaining from the clerk of court the status of her motion for extension. Had she done so, she would have learned that there was no judge to act on it and she could have availed herself of the remedies indicated by the Judiciary Act.

Strict compliance with the necessary steps for taking an appeal is required and the perfection of an appeal in the manner and within the period laid down by law is not only mandatory but jurisdictional. Thus, when the appellant is guilty of inexcusable negligence, his appeal will be dismissed.[145]

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[142] G.R. No. L-16520, April 30, 1964.
[143] De Jesus v. PNB, G.R. No. L-19299, November 28, 1964.
[144] G.R. No. L-20265, June 30, 1964.
[145] Tan Ching v. Geraldez, G.R. No. L-17954, April 30, 1964, citing Caisip v. Cabangon, G.R. No. L-14684-86, August 26, 1960 and Alvero v. de la Rosa, 76 Phil. 428.

Consequently, if not all of the required steps are taken within the reglamentary period, as when only one-half of the docket fee was deposited, no appeal is deemed perfected.[146]

No Record on Appeal necessary in appeals in special civil actions

The action in which the appeal was made, being one for prohibition and mandamus, the appellant in *Commissioner v. Romero* [147] was not required to file a Record on Appeal.

Direct appeal to Supreme Court only on questions of law

Findings of fact made by a lower court cannot be reviewed by the Supreme Court when the decision is appealed directly to it. All findings of fact made by the trial court are deemed to have been admitted by the appellant and only questions of law may be raised.[148]

Conversely, when the notice on appeal plainly averred that questions of law and fact would be raised, the Court of Appeals has jurisdiction to entertain the appeal and the appellee does not have the right to limit the issues on appeal.[149] To the same effect was the ruling laid down in *Lacsamana v. Cabangon,*[150] and in *Tubera v. Fernando.*[151]

Effect of failure to file notice of appeal in an appeal from the WCC

The Supreme Court does not acquire appellate jurisdiction over a case decided by the Workmen's Compensation Commission where no notice of appeal was filed with the Commission as required by Section 1, Rule 43. Such failure is fatal and has the effect of defeating the petitioner's right of appeal.[152]

Findings of CAR will not be disturbed if supported by evidence

Paragraph 2 of Section 3, Rule 43 reads:

> "Decisions of the Court of Agrarian Relations may, in the discretion of the Court, also be reviewed upon proper showing that the findings of fact are not supported by substantial evidence."

Consequently, when the decision of the CAR is supported by the evidence, the Supreme Court is loath to disturb its findings. In

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146 Lee v. Republic, G.R. No. L-15027, January 31, 1964.
147 G.R. No. L-19782, January 31, 1964.
148 Comilang v. Delenela, G.R. No. L-18897, March 31, 1964; citing Jacinto v. Jacinto, G.R. No. L-12313, July 31, 1959.
149 Commissioner of Immigration v. Fernandez, G.R. No. L-22696, May 29, 1964.
150 G.R. No. L-19473, November 28, 1964.
151 G.R. No. L-18492, March 31, 1964.
152 Ammen v. WCC, G.R. No. L-20219, November 28, 1964; citing Martha Lumber v. Lagrante, G.R. No. L-7599, June 27, 1952.

the case of *Villaviza v. Panganiban*,[153] the Supreme Court, in upholding the findings of the CAR, observed that the decision of the CAR contained recitals of the testimonies of the witnesses. That the CAR believed the evidence for the respondents rather than those for the petitioners is the tenancy court's prerogative and the Supreme Court will not weigh anew the evidence. All the Supreme Court is called upon to do is to find out if the conclusion of the CAR is supported by substantive evidence, and the present case is. The task of an appellant in agrarian cases to set out the evidence in support of the findings made by the CAR and show how no reasonable person would be willing to accept it as adequate proof.[154]

Opinions of Auditor-General not proper subject of appeal

In *Cheng v. Auditor General*,[155] it was held that an opinion rendered by the Auditor General for guidance of the Foreign Department of the Central Bank and not in connection with a specific claim for refund is not appealable under Section 1 of Rule 44.

Grounds for Appeal from PSC

As in the case of the CAR, the Public Service Commission will not be reversed on appeal if some evidence reasonably supports its findings.[156]

Questions not raised in the lower court cannot be raised on appeal

Section 18 of Rule 46 allows the raising only of such questions on appeal as have been raised in the court below and which are within the issues framed by the parties. Accordingly, in the case of *Hautea v. Magallon*,[357] the Supreme Court refused to entertain the allegation of the appellant that the original complaint for illegal detainer was insufficient for not stating that a demand had been made. It was held by the Court, in not permitting the allegation, that since the appellant had never brought it up in the lower court, he could not bring it up for the first time on appeal.

Repeated change of counsel does not constitute sufficient reason to get several extensions

Rule 46, Section 15 provides:

> "Extension of time for the filing of briefs will not be allowed, except for good and sufficient cause, and only if the motion for extension is filed before the expiration of the time sought to be extended."

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153 G.R. No. L-19760, April 30, 1964.
154 Ilustre v. CAR, G.R. No. L-19654, March 31, 1964.
155 G.R. No. L-18354, March 31, 1964.
156 West Leyte Transportation Co. v. Salazar, G.R. No. L-15418, September 30, 1964; citing Ammen v. Desuyo, G.R. No. L-10372, May 14, 1958.
157 G.R. No. L-20345, November 28, 1964.

In the case of *Allam v. Acosta*,[158] the reason for each of the four extensions given was change of counsel. The Supreme Court declared that such reason did not seem to constitute a good and sufficient reason to justify the extensions granted. Notwithstanding such insufficiency, however, it refused to set aside the order of the Court of Appeals allowing the filing of the brief because, according to it, the situation did not warrant the dismissal of the appeal.

Dismissal of appeal if question has become moot

In an appeal from a CIR judgment directing "the parties to negotiate on wages as stipulated in the Agreement", the Supreme Court held that the expiration of the term of the collective bargaining agreement had made the question involved in the appeal a moot one and, accordingly, dismissed the appeal.[159]

To the same effect was the ruling laid down in *Besa v. Castellvi*.[160]

PROVISIONAL REMEDIES

Attached property ceases to be subject to specific lien upon filing of bond

Attachment is a writ issued at the institution or during the progress of an action, commanding the sheriff or other proper officer to attach the property, rights, credits, or effects of the defendant to satisfy the demands of the plaintiff.[161]

Under Section 12, Rule 57, an attachment may be discharged upon the giving of a counterbond. In the case of *Macondray & Co. v. Dungao*,[162] it was held that while an attachment levied on some properties of the defendant might constitute an exception to the general rule on claims that do not survive upon the death of the defendant, as provided for in Section 21 of Rule 3, nevertheless after the discharge of the attachment upon the filing of a bond, the property attached becomes free from any specific lien and reverts to its previous condition.

Bond filed to secure discharge of attachment continues to answer for judgment in probate proceedings

In the same case,[163] it was held that the bond filed to secure the discharge of a writ of attachment on the properties of the defendant

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158 G.R. No. L-20242, January 31, 1964.
159 Pan American World Airways v. PTGWO, January 30, 1964.
160 G.R. No. L-18421, September 28, 1964.
161 III Moran, Rules of Court, 1963 ed., p. 2, citing Bourvier's L.D.
162 G.R. No. L-18079, May 29, 1964.
163 *Ibid.*

before his death to answer for any money judgment that may be rendered against him, is deemed to subsist or continue to answer for any money claim that may be allowed by the probate court in the probate proceedings for the settlement of the estate of the deceased debtor. The Supreme Court said that the dismissal of the action after the death of the defendant is directed by the Rules of Court, and the filing of the money claim in the probate proceedings is merely a continuation of the action brought by the plaintiff to collect the sum of money owed to it by the defendant.

Creditor cannot attach property forfeited by the Government

The Collector of Customs, in the case of *Collector of Customs v. Arca,*[164] declared forfeited in favor of the government tobacco illegally imported. A creditor of the importer applied for a writ of attachment of the property, basing his claim on a contract for compensation of services rendered by him in connection with the tobacco. It was held that a writ of attachment cannot be issued, because the creditor's right is not a real right over the property, but merely a personal right for compensation against the importer, and after the seizure proceedings resulting in the forfeiture of the tobacco had been terminated, such importer had lost all rights to the goods.

Property exempt from execution cannot be reached by garnishment

Garnishment is an attachment by means of which plaintiff seeks to subject to his claim property of the defendant in the hands of a third person or money owed by such third person to defendant.[165]

In *Avendano v. Alikpala,*[166] a judgment was rendered by the Court of First Instance against Marta Avendano for a certain sum. In accordance with such decision, a writ of garnishment was issued on the salaries of Marta Avendano with the Manila Railroad Company, where she was employed. It was proved that the salary of Marta was ₱200.00 a month, and her share in the monthly maintenance of her family should be at least ₱200.00. Her salary, therefore, is exempt from execution, under Section 12, Rule 39.[167] Being exempt from execution it should not also be reached by garnishment.

It was also held in the same case that money in the hands of public officers, although it may be due government employees, is not subject to garnishment. Moneys sought to be garnished, as long

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[164] G.R. No. L-21389, July 17, 1964.
[165] III Moran, Rules of Court, 1963 ed., p. 5.
[166] G.R. No. L-21189, November 29, 1964.
[167] Section 12, Rule 39, declares as exempt from execution, among others, "so much of the earnings of the debtor for his personal services within the month preceding the levy as are necessary for the support of his family."

as they remain in the hands of the disbursing officer of the Government, belong to the latter, although the defendant may be entitled to a specific portion thereof. Every consideration of public policy forbids such property from being subjected to garnishment.

Preliminary injunction

A preliminary injunction is an order granted at any stage of an action prior to the final judgment, requiring a person to refrain from a particular act. It may also require the performance of a particular act, in which case it shall be known as a preliminary mandatory injunction.[168] It is a provisional remedy to which parties litigant may resort for the preservation or protection of their rights or interest, and for no other purpose, during the pendency of the principal action.[169]

Consequently, where a decision on the merits of the case had already been rendered, dismissing the petition, the preliminary injunction originally issued therein, the maintenance of which was ordered only pending the final disposition of the main case, has become *functus oficio* as the purpose thereof had already been attained.[170]

In the case of *Deportation Board v. Santos*,[171] it was held that where the principal was brought to restrain the commission or continuance of the act complained of, the provisional remedy of preliminary injunction is proper to preserve the status quo of things, in order not to render ineffective any decision or belief that may be subsequently rendered therein.

However, it had also been held that a writ of preliminary injunction normally should not issue to restrain the prosecution of criminal offenses.[172]

May a citizen or an inhabitant claiming to be a citizen, who is being required to register as an alien by administrative officers of the Government in compliance with the rulings of their superiors, be entitled to the remedy of injunction to prevent such officers from requiring him to register as alien? The foregoing question was answered in the affirmative in the case of Lim v. de la Rosa,[173] the Court saying:

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[168] Section 1, Rule 58.

[169] Calo v. Roldan, 76 Phil. 445, cited in III Moran, Rules of Court, 1963 ed., p. 54.

[170] Canlas v. Judge of the Court of First Instance of Tarlac, G.R. No. L-19733, November 28, 1964.

[171] G.R. No. L-20239, February 29, 1964.

[172] In the matter of the application for a writ of habeas corpus with application for Temporary Restraining Order or Ex-Parte Preliminary Injunction Jesus Lava, petitioner, G.R. No. L-23048, July 31, 1964.

[173] G.R. No. L-17790, March 31, 1964.

> If the person claiming to be a citizen who is being required or compelled to register as alien can show, establish, or prove that he is such citizen, the remedy of injunction to prevent the officers from requiring or compelling him to register as alien is certainly the proper and adequate remedy to protect his right.

Necessity of hearing to determine party entitled to possession of property under receivership

The procedure regarding the determination of who among several claimants is entitled to an order for delivery of property under receivership was extensively discussed in Ventosa v. Fernan.[174] Petitioner entered into a contract of lease in that case with the La Paz Ice and Cold Storage Co., Inc., by virtue of which all of the properties of the corporation were leased to the petitioner. Subsequently, in an action against the corporation by one Hodges and one Canda praying for the appointment *ex parte* of a receiver for the properties of the corporation, a receiver was appointed, who entered into possession of the Ice plant. The petitioner filed a motion for intervention in the case in which the receiver was appointed, applying for a restraining order to direct the receiver not to interfere with the management of the corporation which he claimed was under lease to him. The Court refused to issue a restraining order, on the ground that the validity of the lease was being contested. Thereupon, petitioner brought the case to the Supreme Court on a petition for certiorari, alleging that the judge committed a grave abuse of discretion in denying the motion for a restraining order. *Held:* Having submitted himself to the jurisdiction of the court, petitioner necessarily became a party to the civil case, and he must lay his cards on the table for adjudication and determination. The Court went on to say:

> "After the appointment of a receiver, claimants of the property or any interest therein may enforce their claim only by permission of the court appointing the receiver. Such a claimant may be made a party to the suit in order to establish his claim; or he may, by express permission of the courts bring a suit for the possession, care being taken to protect the receiver. But a receiver will not be ordered to deliver the property to a claimant until his right is established in one of these three modes" (23 RCL, p. 55 and cases cited therein). "The procedure in the presentation of claims against a receivership is either by motion or petition in the same preceding, *or by way of intervention.* But whichever procedure is to be followed, all parties in interest must be notified of each claim, which shall be determined not in a summary manner, but after regular hearing." (Po Pauco v. Siguenza, et al., 52 Phil. 241; China Banking Corp., et al. v. Michelin & Cie., 58 Phil. 261, cited in II Moran's Comments on the Rules of Court, 1957 ed., pp. 99-100). It is

[174] G.R. No. L-14946, January 31, 1964.

> also held that property under receivership is property in *custodia legis* which should remain under the administration and control of the receivership court, through its creation, the receiver, for the purpose of preservation and for the benefit of the party who may be adjudged entitled to it; that the effect of the appointment of a receiver is to remove the parties to the suit from the possession of the property.

Consequently, the court held, there must be a hearing of some form or a regular trial of the issues between the claimants to the property so as to determine the party who is legally entitled to the possession and control of the property in question; and until such party is adjudged that right, the property must remain under the control of the court, through its receiver.

Provision in will that property be placed under receivership in case of foreclosure of mortgage should be respected

In *Liwanag v. Reyes*,[175] it was held that where the will of the deceased declared that in case of foreclosure of certain property mortgaged, the property be put into the hands of a receiver, such provision should be respected by the administratrix of the estate of the deceased. The cases cited by petitioner in favor of the theory that property in *custodia legis* cannot be given to a receiver were held not applicable, considering that the case was an action to enforce a superior lien on certain property of the estate, and the appointment of a receiver, which is very convenient means of preserving and administering the property, had been agreed upon by the contracting parties. Wide latitude is usually given to the trial courts in the matter of receivership, and unless that discretion is exercised arbitrarily, the Supreme Court is not to interfere.

SPECIAL CIVIL ACTIONS

Propriety of Remedy of Declaratory Relief

In a petition for correction of entries in the Civil Register, which is actually one which seeks a declaration of Philippine citizenship for some minor children, the remedy of declaratory relief is not available for the purpose of obtaining a judicial declaration of citizenship.[176]

Certiorari

Section 1 of Rule 65 reads:

> "Petition for Certiorari—When any tribunal, board or officer exercising judicial functions has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion and there is no appeal,

[175] G.R. No. L-10159, September 29, 1964.
[176] Reyes v. Republic, G.R. No. L-17642, November 27, 1964.

nor any plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings, as the law requires, of such tribunal, board or officer.

"The petition shall be accompanied by a certified true copy of the judgment or order subject thereof, together with the copies of all pleadings and documents relevant and pertinent thereto."

The following requisites for the writ of certiorari to issue are, therefore:

(a) that it is directed against a tribunal, board or officer exercising judicial functions;

(b) that such tribunal, board or officer has acted without or in excess of jurisdiction or with grave abuse of discretion; and

(c) that there is no appeal nor any plain, speedy and adequate remedy in the ordinary course of law.

In a number of cases decided last year, the Supreme Court had occasion to determine the existence of "grave abuse of discretion." In *Namarco v. Tan*,[177] it was held that the reasons and findings made by the lower court may be taken into consideration in determining whether or not a grave abuse of discretion has been committed by the trial court in issuing an order prior to the decision.

For there to be grave abuse of discretion there should have been a capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction.[178]

Merely postponing the scheduled execution sale,[179] or mere erroneous conclusions of fact or of law,[180] do not constitute abuse of discretion such as would be correctible by certiorari.

On the other hand, the acts of the Court of Appeals in granting repeated extensions in favor of the appellant in spite of his manifest lack of interest in the appeal, as evidenced by the latter's asking for reconsideration always on the last day, amounted to a grave abuse of discretion amounting to lack of jurisdiction.[181]

Certiorari Not Available if Recourse Could be had in Appeal

An action for certiorari requires as a condition precedent that petitioner should not have any "other adequate remedy in the ordi-

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[177] G.R. No. L-17074, March 31, 1964.

[178] People v. Marave, G.R. No. L-19023, July 31, 1964; Lingad v. Macadaeg, G.R. No. L-20184, July 31, 1964.

[179] JRS Business Corporation v. Imperial Insurance, G.R. No. L-19896, July 31, 1964.

[180] Villa-Rey Transit v. Bello, G.R. No. L-21399, January 31, 1964; Commissioner of Immigration v. Fernandez, G.R. No. L-22696, May 29, 1964.

[181] Soriano v. Abeto, G.R. No. L-19635, February 28, 1964.

nary course of law." [182] Consequently, the writ of certiorari may not be availed of to make up for the loss, through omission or oversight, of the right to appeal.[183]

However, the propriety or impropriety of a cross-claim can be the subject of certiorari because, while appeal is available, the same is not adequate and speedy as petitioners would have to wait until judgment was rendered not only in the principal action but also in the very cross-claim.[184]

Certiorari Improper if Question Involved Has Become Moot

In the case of *Lianga Bay Logging Co. v. Reyes*,[185] it was held that since the petition for certiorari questioning the order of the lower court granting a preliminary injunction is merely incidental to the main case which had already been decided by the Supreme Court declaring the preliminary injunctive writ permanent, the question as to the propriety of the issuance of the order of preliminary injunction has become moot and academic. The petition for certiorari was therefore, dismissed.

Motion for Reconsideration Need Not Preclude Certiorari When Need for Relief is Extremely Urgent

Although ordinarily, for certiorari to be proper, there must have been a motion for reconsideration, because, otherwise, there would be an adequate remedy, this ruling was relaxed in the case of *Socco v. Leary*.[186] In that case, the petitioner had obtained a judgment in the lower court ordering the respondent to deliver a number of shares of stock or to pay their par value. A question arose as to the ownership of the shares and the court issued a writ of execution against the supersedeas bond. Upon denial of respondent's motion to substitute the shares of stock, the respondent filed a petition for certiorari. The petitioner contested the propriety of the certiorari on the ground that respondent had not filed a previous motion for reconsideration. Held: The motion for reconsideration may be dispensed with in cases like this where execution had been rendered and the need for relief was extremely urgent.[187]

Prohibition:

According to Section 2 of Rule 65, prohibition may be had when the proceeding of any tribunal, corporation, board, or person, whether

[182] Cuneta v. Castaneda, G.R. No. L-20025, January 31, 1964.
[183] Ago v. Buslon, G.R. No. L-19631, January 31, 1964, citing cases; Santos v. Mojica, G.R. No. L-19618, February 28, 1964.
[184] Malinao v. Luzon Surety, G.R. No. L-16082, February 29, 1964.
[185] G.R. No. L-17069, September 28, 1964.
[186] Supra, Note 7.
[187] Citing Luzon Surety V. Marbella, G.R. No. L-16088, September 30, 1960.

exercising functions judicial or ministerial are without or in excess of its or his jurisdiction, or with grave abuse of discretion, and there is no appeal or any other plain, speedy, and adequate remedy in the ordinary course of law.

In *Deportation Board v. Santos*,[188] Bob Stewart's motion for dismissal before the Deportation Board of the charges preferred against him was denied. He then filed a petition for prohibition and prayed for preliminary injunction pending termination of the prohibition proceeding. Preliminary injunction was granted. The Deportation Board brought a petition for prohibition and certiorari, contending that the issuance of preliminary injunction was a grave abuse of discretion. The Supreme Court held that there was no abuse of discretion because the issuance of the injunction was proper. Prohibition was therefore, denied.

Mandamus

For mandamus to lie, the legal right of the petitioner must be well defined, clear, and certain; otherwise the petition for the issuance of such writ will be denied.[189]

Thus, in the case of *Villamor v. Lacson*,[190] mandamus was not granted because the petitioners had not shown that they were entitled to salaries during their suspension as a matter of right to enable them to bring a petition for mandamus. The petitioners in that case had been dismissed by the City Mayor and, on appeal, they were not exonerated by the President, but the order of dismissal was modified in that the period of their separation from work was deemed to be sufficient penalty. Under the circumstances, mandamus was held to have been improperly brought.

Quo Warranto Action Must Be Brought Within One Year After the Petitioner's Right to the Office Arose

The question of when an action of quo warranto must be instituted arose in the case of *Cui v. Cui*.[191] The petitioner claimed that he had been entitled to the contested office since 1932. The Supreme Court, in dismissing the petition, held that, since it was filed only in 1961, it was barred by lapse of time, because under Section 16 of Rule 66, this kind of action must be filed within one year after the right of the plaintiff to hold the office arose.

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[188] G.R. No. L-20239, February 29, 1964.
[189] III Moran, Rules of Court, 1963 ed., p. 172.
[190] G.R. No. L-15945, November 28, 1964.
[191] G.R. No. L-18727, August 31, 1964.

Unlawful Detainer

The only issue in forcible entry and detainer cases is the physical possession of real property—possession *de facto* and not possession *de jure*. If plaintiff can prove a prior possession in himself, he may recover such possession even from the owner himself.[192]

This ruling was reiterated in the case of *Prado v. Calpo*,[193] where the Supreme Court held that, since the evidence clearly showed that the plaintiffs had prior physical possession of the disputed property, the alleged circumstance that the defendant was the registered owner of the property did not detract from the plaintiffs' right of possession. When possession is the issue, an action for forcible entry or detainer is the proper remedy. To the same effect was the ruling in *Angcao v. Punzalan*,[194] where it was held that the petitioner's claim that the land in question is part of a communal forest did not detract from the fact that the respondent had been occupying the land.

A *sensu contrario*, therefore, when the real issue is not one of possession but of title, it is the Court of First Instance which has jurisdiction.[195]

Violation of Lease Contract Gives Rise to a Right of Action for Unlawful Detainer

In the case of *Hautea v. Magallon*,[196] the lessee devoted the thing leased to a use not stipulated and which deteriorated the same. The lessor then made a demand for the return of the premises. The Supreme Court held that the violation coupled with the demand rendered unlawful the lessee's further detainer of the land and entitled the lessor to eject the lessee.[197]

When Demand Necessary in Detainer Cases

Section 2 of Rule 70 provides:

> "No landlord, or his legal representative or assign, shall bring such action against a tenant for failure to pay rent or to comply with the conditions of his lease, unless the tenant shall have failed to pay such rent or to comply with such conditions for a period of fifteen (15) days, or five (5) days in the case of the building, after demand therefor, made upon him personally, or by serving written notice of such demand upon the person found on the premises, or by posting such notice on the premises if no persons be found thereon."

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192 III Moran, Rules of Court, 1963 ed., p. 277; citing Mediran v. Villanueva, 37 Phil. 752; Caballero v. Abellana, 15 Phil. 534.

193 G.R. No. L-19370, April 30, 1964.

194 G.R. No. L-20521, December 28, 1964.

195 Geraldez v. Rodriguez, G.R. No. L-17064, November 9, 1964.

196 G.R. No. L-20345, November 28, 1964.

197 citing Art. 1673 of the Civil Code and Canaynay v. Sarmiento, 79 Phil. 36.

The nature of the demand which should be made was explained in the case of *Casilan v. Tomassi.*[198] In that case, the Supreme Court observed that there was no allegation in the complaint that a demand to vacate the premises had been made. What allegation there was referred to a demand for payment of rentals. The Court held that such allegation was insufficient to confer jurisdiction upon the inferior court. It is the owner's demand for the tenant to vacate the premises and the tenant's refusal or failure to vacate, which make unlawful the withholding of possession.

Liquidated Damages in a Detainer Case

Can liquidated damages be awarded in an action for unlawful detainer? The Supreme Court answered this question in the affirmative in the case of *Gozon v. Barrameda.*[199] The plaintiff therein brought a complaint for unlawful detainer, praying for the recovery of the premises therein described and the sum of ₱5,000 as liquidated damages. The inferior court awarded both to the plaintiff. The defendant insisted that the inferior court had no jurisdiction to award the liquidated damages, since it could award only such damages as are equivalent to a reasonable compensation for the use and occupation of the premises. It was held that, although, as a rule, damages that can be awarded in ejectment cases are those equivalent to a reasonable compensation for the use and occupation of the premises, such rule was not pertinent to this instant case, because the damages sought to be recovered had previously been the subject of agreement between the parties.

Rule 70, Section 8 construed

Rule 70, Section 8 reads:

> "If judgment is rendered against the defendant, execution shall issue immediately, unless an appeal has been perfected and the defendant to stay the execution files a sufficient bond . . ."

The Supreme Court, in *Acibo v. Macadaeg,*[200] held this rule to be mandatory. Hence, since the petitioners did not file a supersedeas bond when they appealed, immediate execution had to be ordered. The duty of the court in this respect is ministerial and imperative.[201]

Rule 70, Section 8 further provides that "In the absence of a contract, he (the defendant) shall deposit with the court the reasonable value of the use and occupation of the premises for the preceding

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[198] G.R. No. L-16574, February 28, 1964.
[199] G.R.No. L-17473, June 30, 1964.
[200] G.R. No. L-19701, June 30, 1964.
[201] citing III Moran, Rules of Court, 1963 ed., pp. 303-304.

month or period at the rate determined by the judgment, on or before the tenth day of each succeeding month or period."

In the case of *Ampil v. Alvendia*,[202] the defendant had been ordered to pay within the first five days of each month. The Supreme Court held this order to be erroneous, inasmuch as there was no finding in the inferior court decision that the lease contract required the monthly rent to be paid within the first five days of the month. In the absence of such a provision in the lease contract, the defendant had a period of ten days within which to pay.

Contempt

The case of *Cruz v. Sison* [203] illustrates a prematurely filed petition for contempt in the city of Manila. The petitioner fiscal, upon the respondents' failure to appear and give evidence pursuant to a subpoena issued to them, filed a petition for contempt. It was held by the Supreme Court that the petition was prematurely filed inasmuch as the Revised Charter of Manila provides that city fiscals may issue subpoenas but that the attendance or evidence of an absent or recalcitrant witness may be enforced by application to the municipal court or the Court of First Instance. The fiscal in this case had not applied to the proper court for the enforcement of the subpoena.

Section 3, of Rule 71 gives the grounds for punishment for contempt and the last paragraph thereof reads:

> "But nothing in this section shall be construed as to prevent the court from issuing process to bring the accused party to court, or from holding him in custody pending such proceedings".

When, however, the person charged with contempt has filed, through counsel, a written answer explaining his behaviour, his personal appearance cannot be insisted upon. The aforequoted section can apply only if good reasons exist for its application. When the person charged has already tendered an explanation, no sufficient reasons exist to compel his personal appearance.[204]

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[202] G.R. No. L-19761, April 30, 1964.
[203] G.R. No. L-15902-3, December 23, 1964.
[204] Bakewell v. Lloren, G.R. No. L-20108, December 28, 1964.