SUPREME COURT DOCTRINES

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CIVIL LAW

Applicability of Article 144 N.C.; Liability for damages of non-registered owner

The issues thus to be resolved are as follows: (1) Whether or not Article 144 of the Civil Code is applicable in a case where one of the parties in a common-law relationship is incapacitated to marry, and (2) Whether or not Rosalia who is not a registered owner of the Jeepney can be held jointly and severally liable for damages with the registered owner of the same.

It has been consistently ruled by this Court that the co-Ownership contemplated in Article 144 of the Civil Code requires that the man and the woman living together must not in any way be incapacitated to contract marriage. Since Eugenio Jose is legally married to Socorro Ramos, there is an impediment for him to contract marriage with Rosalia Arroyo. Under the aforecited provision of the C.C., Arroyo cannot be a co-owner of the Jeepney. The Jeepney belongs to the conjugal partnership of Jose and his legal wife. There is therefore no basis for the liability of Arroyo for damages arising from the death of, and physical injuries suffered by, the passengers of the Jeepney which figured in the colision.

Rosalia Arroyo, who is not the registered owner of the Jeepney, can neither be liable for damages caused by its operation. It is settled in our jurisprudence that only the registered owner of a public service vehicle is responsible for damages that may arise from consequences incident to its operation, or may be caused to any of the passengers therein. (Juaniza V. Jose G.R. No. 50127-28, March 30, 1979)

CHANGE OF NAME

It appears from respondent's Exhibit 3-A and 3-B that the name Li Kan Wa was given in the title, and the name John Sotto was not mentioned. Omission in the title of the petition of the name asked for is fatal, and the court did not acquire jurisdiction over the case. Noncompliance with the rules did not vest the court with authority to act on the petition and therefore, the questioned decision is null and void. (Republic v. Aquino G.R. No. L-32779, May 25, 1979)

CONTINGENT FEE FOR COUNSEL

A contract for a contingent fee is not covered by Article 1491 because the transfer or assignment of the property in litigation takes effect only after the finality of a favorable judgment. In the instant case, attorney's fee of Atty. Fernandez, consisting of one-half (1/2) of whatever Maximino Abarquez might recover from his share in the lots in question, is contingent upn the success of the appeal. Hence, the payment of the attorney's fees, that is, the transfer or the assignment of one-half (1/2) of the property in litigation will take place only if the appeal prospers. Therefore, the transfer actually takes effect after the finality of a favorable judgement rendered on appeal and not during the pendency of the litigation involving the property in question. Consequently, the contract for a contingent fee is not covered by Article 1491. (Director of Lands Vs. Ababa, G. R. No. L-26096, February 27, 1979).

CREDIBLE WITNESS TO A WILL

Under the law, there is no mandatory requirement that the witness testify initially or at any time during the trial as to his good standing in the community, his reputation for trustworthiness and reliableness, his honesty and uprightness in order that his testimony may be believed and accepted by the trial court. It is enough that the qualifications enumerated in Article 820 of the Civil Code are complied with, such that the soundness of his mind can be shown by or deduced from his answers to the questions propounded to him, that his age (18 years or more) is shown from his appearance, testimony, or competently proved otherwise, as well as the fact that he is not blind, deaf or dumb and that he is able to read and write to the satisfaction of the Court,and that he has none of the disqualifications under Article 821 of the Civil Code. We reject petitioner's contentions that it must first be established in the record the good standing of the witness in the community, his reputation for trustworthiness and reliableness, his honesty and uprightness because such attributes are presumed of the witness unless the contrary is proved otherwise by the opposing party. (Gonzales V. C.A. G.R. No. L-37453, May 25, 1979)

PAYMENT OF INTEREST; ESTOPPEL

In Robles vs. Rimario (107 Phil 80), the court ruled that it is beyond the power of the courts to issue a writ of execution for the payment of the principal obligation with interest thereon, when the judgment contains no provision on the interest to be paid on the

judgment credit. Considering that in the instant case the order of December 4, 1974, ordering the payment of ₱108,000.00 to the private respondent, did not provide for the collection of interest on the said amount, the order of April 3, 1975, directing the issuance of a writ of execution against the petitioner for the amount of ₱108,000.00 plus legal interest thereon on December 4, 1974, was clearly made without or in excess of jurisdiction.

The plea of estoppel is without merit, for estoppel cannot validate a void order, issued without jurisdiction since jurisdiction exists as a matter of law, and may not be conferred by the consent of the parties or by estoppel. Besides, it cannot be said for certain that petitioner had acquiesced to the payment of interest on the amount of ₱108,000.00 in view of the petitioner's claim for the refund of the amount collected by private respondent in excess of the amount of ₱108,000.00 (Villamayor vs. Hon. Leonor Ines Luciano, et al G.R. No. L-44886, January 31, 1979)

RIGHT OF A THIRD PERSON TO ASSAIL A CONTRACT

As a rule, a contract cannot be assailed by one who is not a party thereto. However, when a contract prejudices the rights of a third person, he may file an action to annul the contract. In this case, the plaintiffs-appellees were prejudiced in their rights by the execution of the chattel mortgage over the properties of the partnership "Isabela Sawmill" in favor of Margarita G. Saldajeno by the remaining partners, Leon Garibay and Timoteo Tubungbanua.

Hence, said appelles have a right to file the action to nullify the chattel mortgage in question. (Singson v. Isabela Sawmill, G.R. No. L-27343, February 28, 1979)

CRIMINAL LAW

RAPE

Nor can there be any weight accorded to the observation made in the brief that complainant apparently failed to manifest any resistence to the sexual abuse committed on her person. Thus in People vs. dela Cruz, this court, through Justice Aquino, stated: "Appellant's attempt to discredit complainant's story by observing that she had made no outcry during the commission of the crime or immediately thereafter does not deserve serious consideration. In the rape of a girl below twelve years of age, force or intimidation need not be present." Again, through the same ponente, there is this holding in the subsequent case of People vs. Gonzales. The crime committed by Gonzales is simple-rape without the attendance of any of the qualifying circumstances, mentioned in Article 335 of the RCP. Its basic element is the carnal knowledge of a girl twelve years of age.

In providing for the statutory crime of rape, where the victim is a young girl of tender years, consent on her part, is not a defense. The law is a reflection of the deep concern of the state for the well-being of the child.

In the last two cases, People vs. Baylon and People vs. Cawili, it was noted that the obligation of the state embraced in the concept of "parens patria" justifies such an approach in its penal laws. (People vs. Conchada, G.R. Nol. L-39367-69, February 28, 1979)

ROBBERY WITH HOMICIDE

Although the killing of Evaristo Ruvera was perpetrated after the consummation of the robbery and after the robbers had left the victim's house, the homicide is still integrated with the robbery or is regarded as having, been committed "by reason or an occasion" thereof, as contemplated in Article 294 (1) of the Revised Penal Code.

There is robo con homicido even if the victim killed was an innocent bystander and not the person robbed. The law does not require that the victim of the robbery be also the victim of the homicide.

In the instant case, the robbery spawned a fight between the robbers and the neighbors of Lazaro, the robbery victim. The killing of Evaristo Tuvera resulted from that fight. Hence, it was connected with the robbery. (People vs. Barut G.R. No. L-42666, March 13, 1979)

COMMERCIAL LAW

BINDING DEPOSIT RECEIPT, PERFECTION OF INSURANCE CONTRACT, CONCEALMENT

Clearly implied from the aforesaid conditions is that the binding deposit receipt in question is merely an acknowledgment, on behalf of the company, that the latter's branch office had received from the applicant the insurance premium and accepted the insurance company, and that the latter will either approve or reject the same on the basis of whether or not the applicant is "insurable on standard rates". Since petitioner Pacific Life disapproved the insurance application of respondent NGO HING, the binding deposit receipt in question had never become in force at any time.

It bears repeating that through the intra-company communication of April 30, 1957, Pacific Life disapproved the insurance application on the ground that it is not offering the twenty-year endowment insurance policy to children less than seven years of age. What it offered instead is another plan known as the Juvenile Type Action, which private respondent failed to accept. In the absence of a meeting of the minds between petitioner and private respondent and with the non-compliance of the conditions stated in the disputed binding deposit receipt, there could have been no insurance contract duly perfected between them.

Private respondent had deliberately concealed the state of health and physical condition of his daughter Helen Go. When private respondent supplied the required essential data for the insurance application form, he has fully aware that his one-year old daughter is typically a mongoloid child. Such a congenital physical defect could never be

ensconced nor disguised, nonetheless, private respondent, in apparent bad faith, withheld the fact material to the risk to be assumed by the insurance company. (GREPALIFE vs. C.A., G.R. No. L-31845, April 30, 1979).

RIGHT OF A CORPORATION TO DISQUALIFY A PERSON FROM BECOMING A MEMBER OF THE BOARD OF DIRECTORS

1. It is an accepted rule of procedure that the Supreme Court should always strive to settle the entire controversy in a single proceeding, leaving no root or branch to bear the seeds of future litigation. It is settled that the doctrine of primary jurisdiction has no application where only a question of law is involved. (In the instant case, whether or not the amended by-laws of the respondent corporation are valid is purely a legal question, which public interest requires no resolve).

2. The validity or reasonableness of a by-law of a corporation is purely a question of law. Whether the by-law is in conflict with the law of the land, or with the charter of the corporation, or is in a legal sense unreasonable and therefore unlawful is a question of law. This rule is subject, however, to the limitation that where the reasonableness of a by-law is a mere matter of judgment, and one upon which reasonable minds must necessarily differ, a court would not be warranted in substituting its judgment instead of the judgment of those who are authorized to make by-laws who have exercised their authority.

3. It is recognized by all authorities that "every corporation has the inherent power to adopt by-laws for its internal government, and to regulate the conduct and prescribe the rights and duties of its members towards itself and among themselves in reference to the management of its affairs". In this jurisdiction, under Section 21 of the Corporation law, a corporation may prescribe in its by-laws "the qualifications, duties and compensation of directors, officers and employees".

4. Under Section 22 of the same law, the owners of the majority of the subscribed capital stock may amend or repeal any by-law or adopt new by-laws. It cannot be said, therefore, that petitioner has a vested right to be elected director, in the face of the fact that the law at the time such right as stockholder was acquired contained the prescription that the corporate charter and the by-law shall be subject to amendment, alteration, and modifications.

5. Although in the strict and technical sense, directors of a private corporation are not regarded as trustees, there cannot be any doubt that their character is that of fiduciary in so far as the corporation and the stockholders as a body are concerned as agents entrusted with the management of the corporation for the collective benefit of the stockholders "they occupy a fiduciary relation, and for this sense the relation is one of trust."

6. It is a settled state law in the United States, according to Fletcher, that corporations have the power to make by-laws declaring a person employed in the service of a rival company to be ineligible for the corporation's Board of Directors. An amendment which renders ineligible, or if elected, subjects to removal, a director if he also be

director in a corporation whose business is in competition with, or is antagonistic to the other corporation is valid. This is based upon the principle that where the director is so employed in the service of a rival company, he cannot serve both, but must betray one or the other. Such amendment "advances the benefit of the corporation and is good."

7. In the case at bar, considering that the foreign subsidiary (San Miguel International, Inc.) is wholly owned by respondent San Miguel Corporation and, therefore, under its control it would be more in accord with equity, good faith and fair dealing to construe the statutory right of petitioner as Stockholder to inspect the books and records of the corporation as extending to books and records of such wholly owned subsidiary which are in respondent corporation's possession and control.

8. Our corporation law allows a corporation to invest its funds in any other corporation or business or for any purpose other than the main purpose for which it was organized provided that its Board of Directors has been so authorized by the affirmative vote of stockholders holding shares entitling them to exercise at least two thirds of the voting power. If the investment is made in pursuance of the corporate purpose it does not need the approval of the stockholders. It is only when the purchase of shares is done solely for investment and not to accomplish the purpose of its incorporation that the vote of approval of the stockholders holding shares entitling them to exercise at least two-thirds of the voting power is necessary (Gokongwei, Jr. vs. Securities and Exchange Commission, G.R. No. L-45911, April 11, 1979)

LABOR LAW

COLLECTION OF ATTORNEY'S FEES FROM NON-UNION MEMBERS

In affirming the grant of attorney's fee against the non-union members, this court considered it pertinent that "the general policy of the law is to encourage unionism to enable employees to bargain with the employer upon a more or less equal footing." The court has the view that exemption of the non-union members who benefitted from the award would run counter to this policy because it tends to encourage a substantial portion of the employee force of any corporation not to affiliate with the union that has a CBA with the company, and sit idly while the union members are fighting to secure benefits that are later extended not only to them but also to all other empooyees of the company. This rationale does not apply in the case at hand where the employees sought to be taxed with attorney's fees are all supervisors, junior executives, and confidential employees, and therefore, would never become members of the union who originally obtained benefits. (Pascual vs. Court of Industrial Relations, G.R. No. L-27856-57, February 28, 1979)

CONTRACT BAR RULE

"The only issue to be determined in the instant case is whether or not the renewed CBA forged between the respondent company and petitioner union constitutes a bar to the holding of a certification election. The record shows that the old CBA of petitioner ATU-KILUSAN with respondent Synthetic Marketing and Industrial Corporation was to expire on October 31, 1977. However, five months and twenty-one (21) days before its expiry date or on May 10, 1977, ATU-KILUSAN renewed the same with the consent and collaboration of the management. The renewed CBA was then submitted to the Bureau of Labor Relations for certification of July 8, 1977, or approximately three (3) months prior to the expiration of the outgoing CBA. In the meantime, on September 13, 1977, (48 days before the expiration of the old CBA on October 31, 1977) a petition for certification election was filed by respondent under the Federation of Free Workers. Meanwhile, the renewed CBA between petitioner ATU-KILUSAN and respondent company was certified on October 3, 1977 or twenty-eight (28) days before their old CBA was to expire. From the foregoing facts, it is quite obvious that the renewed CBA cannot constitute a bar to the instant petition for certification election. In the first place, the said CBA was certified after the instant petition for certification had been filed by herein respondent union, and its certification was conditioned upon the fact that there was no pending petition for certification election with the Bureau of Labor Relations. In the second place, the new CBA was entered into during the lifetime of the old CBA which was to expire on October 31, 1979. Hence, said new CBA was to become effective on November 1, 1977, and this, if no representation issue had arisen in the meantime, which is not the case. Clearly, therefore, the contract-bar rule does not apply to the case at the bar. Finally, it is indubitably clear from the facts heretofore unfolded that management and petitioner herein proceeded with such indecent haste in renewing their CBA way ahead of the "sixty-day freedom period" in their obvious desire to frustrate the will of the rank-and-file empooyees in selecting their collective bargaining representative. To countenance the actuation of the company and the petitioner herein would be violative of the employees constitutional right to self-organization. (ASSOCIATED TRADE UNIONS vs. Hon. Carmelo Noriel, G.R. No. L-48367, January 16, 1979) etc., et al.

CONTROL TEST

While this court upholds the control test under which an employer-employee relationship exists "where the person for who the services are performed reserves a right to control not only the end to be achieved but also the means to be used in reaching such end," it finds no merit in petitioner's arguments as stated above. It should be borne in mind that the control test calls merely for the existence of the right to control the manner of doing the work , not the actual exercise of the right. Considering the finding of the hearing examiner that the establishment of Dy Keh Beng is "engaged in the manufacture of baskets known as

Kaing" it is natural to expect that those working under Dy would have to observe, among others, Dy's requirements of size and quality of the Kaing. Some control would necessarily be exercised by Dy as the making of the Kaing would be subject to Dy's specifications Parenthetically, since the work on the basket is done at its establishments, it can be inferred that the proprietor Dy could easily exercise control on the men he employed.

As to the contention that Solano was not an employee because he worked on piece basis, this court agrees with the Hearing Examiner that "circumstances must be construed to determine indeed if payment by the piece is just a method of compensation and does not define the essence of the relation. Units of time, and units of work are, in the establishments like respondent's (sic) just yardsticks whereby to determine rate or compensation, to be applied whenever agreed upon. We cannot construe payment by the piece where work is done in such an establishment so as to put the worker completely at liberty to turn him out and take in another at pleasure." (Dy Keh Beng vs. International Labor and Marine Union of the Phils., G.R. No. L-32245, May 25, 1979)

DISMISSAL OF EMPLOYEES

While respondent company, under the maintenance of membership provision of the CBA, is bound to dismiss any employee expelled by PAFLU for disloyalty, upon its written request, this undertaking should not be done hastily and summarily. The company acted in bad faith in dismissing petitioners workers without giving them the benefit of a hearing. It did not even bother to inquire from the workers concerned and from the PAFLU itself about cause of the expulsion of the petitioner workers. Instead, the company immediately dismissed the workers on May 30, 1964 after its receipt of the request of PAFLU on May 29, 1964 — in a span of only one day — stating that it had no alternative but to comply with its obligation under the security agreement in the CBA thereby disregarding the right of the workers to due process, self organization, and security of labor. (Liberty Cotton Mills, Inc., G.R. No. L-33987, May 31, 1979)

STRIKE

It is admitted by petitioner that it accepted the invitation of Baylon for a grievance conference on October 5, 1962. Yet, two hours after it accepted the letter or invitation, it dismissed Baylon without prior notice and/or investigation. Such dismissal is undoubtedly an unfair labor practice committed by the company. Under the facts and circumstances, Baylon and members of the union had valid reasons to ignore the scheduled grievance conference and declare a strike. When the union declared a strike in the belief that the dismissal of Baylon was due to union activities, said strike was not illegal. It is not even required that there be in fact an unfair labor practice committed by the employer. It suffices if such a belief in good faith is entertained by labor. The strike declared by the Union in this case cannot be considered a violation of the "no strike" clause of the Collective Bargaining

Agreement because it was due to the unfair labor practice of the employer. Moreover, a no strike clause prohibition in a Collective Bargaining Agreement is applicable only to economic strikes.

The strike cannot be declared as illegal for lack of notice. In strikes arising out of and against a company's unfair labor practice, a strike notice is not necessary in view of the strike being founded on urgent necessity and directed against practices condemned by public policy, such notice being legally required only in cases of economic strikes. (Philippine Metal Foundries, Inc. vs. Court of Industrial Relations, G.R. Nos. L-34948-49, May 15, 1979)

LAND TITLES & DEEDS

ANNULMENT OF TITLES

The acquittal of the private respondents in the criminal case for falsification is not a bar to the civil cases to cancel their titles. The only issue in the criminal cases for falsification was whether there was evidence beyond reasonable doubt that the private respondents had committed the acts of falsification alleged in the information. The factual issues of whether or not the lands in question are timber or mineral lands and whether or not private respondents are entitled to the benefits of R.A. 3872 were not in issue in the criminal cases. (Lepanto Consolidated Milling Co. vs. Dumyung, G.R. No. L-31666 April 30, 1970)

POWER OF THE LAND REGISTRATION COURT

The jurisdiction of the lower court as a land registration court to adjudicate the land for purposes of registration cannot, as petitioners try to do, be questioned. The applicants and oppositors both claim rights to the land by virtue of their relationship to the original owner, the late Vicente Montoya. The court is thus necessarily impelled to determine the truth of their alleged relationships, and on the basis thereof, to adjudicate the land to them as the law has prescribed to be their successional rights. The law does not require the heirs to go to the probate court first before applying for the registration of the land, for a declaration of heirship. This would be a very cumbersome procedure, unnecessarily expensive and unreasonably inconvenient, clearly adverse to the rule against multiplicity of suits. (Belamide vs. C.A., G.R. No. L-34007, May 25, 1979)

POLITICAL LAW

APPOINTMENT

It is well settled that the determination of the kind of appointment to be extended lies in the official vested by law with the appointing power and not the Civil Service Commission. The Commissioner of Civil Service is not empowered to determine the kind or nature of the

appointment extended by the appointing officer. When the appointed is qualified, as in this case, the commissioner of Civil Service has no choice but to attest the appointment. Under the Civil Serivce Law, P.D. No. 807, the Commissioner is not authorized to curtail the discretion of the appointing official on the nature or kind of the appointment to be extended. (Re: Appointment of Elvira C. Arcega as Deputy Clerk of Court, CFI of Bulacan, Branch VII Adm. Matter No. 2993-CFI April 10, 1979)

REMEDIAL LAW

CHANGING DESIGNATION OF AN INFORMATION

It is not disputed that herein respondent, after conducting a preliminary investigation in criminal case No. 684, motu proprio and over the objection of the prosecution changed the designation of the crime charged from Grave Slander to Slight Slander. Respondent judge justified his action by insisting that he is possessed with such power and that the same was done for the speedy administration of justice. This Court, however, is not prepared to sustain this view for Sec. 13, Rule 110, Rules of Court is clear that the matter of changing designation of the appropriate crime in an information or complaint is vested in the prosecution and not in the trial judge, and in the instant case, the change may be done by the prosecution even without leave of court since the defendant or accused has not as yet entered his plea. The law providing that the information or complaint may be amended in substance of form without leave of court at any time before defendant pleads lodges a discretionary power in the prosecuting officer. So, the person authorized to amend the complaint or information is only the prosecuting officer and not the trial judge. The contention of the respondent judge that he had the right to amend the designation of the crime in a preliminary investigation which is not the trial is untenable. The purpose of the preliminary investigation is primarily to determine whether there is a reasonable ground to believe that an offense has been committed and accused is probably guilty thereof, so that a warrant of arrest may be issued and the accused held for trial. It is not within the purview of the preliminary investigation to give the judge the right to amend, motu propio, the designation of the crime. When the crime comes within its jurisdiction, he shall try the case, and only after trial may he convict for a lesser offense. In a case coming within the original jurisdiction of the CFI, he should elevate the case as it is, even if in his opinion, the crime is less than that charged. (Bais Vs. Hon. Mariano C. Tugaoen A.M. No. 1294-MJ, March 23, 1979)

DEATH OF A PARTY

The need for substitution is based on the right of a party to due process. Since Rule 3, Section 17, Revised Rules of Court uses the word "shall", one infers that substitution is indeed a mandatory requirement in actions surviving the deceased. It has been held that in "statutes relating to procedure . . . every act which is jurisdictional or of the essence of the proceeding, or is prescribed for the protection or benefit of the party affected, is mandatory." (Vda. de la Cruz vs. Court of Appeals, G.R. No. L-41107, February 28, 1979)

FILING OF NEW INFORMATION

With the resolution of this petition, it should be clear to all and sundry that the provisional dismissal of a criminal case does not call for the filing of a new information, if, as in this case, the parties are clearly made aware in such order of provisional dismissal, that it is lacking the impress of finality and therefore could be revived and reinstated. (La Uchengco vs. Hon. Jose P. Alejandro, G.R. No. L-49034, January 31, 1979)

INFORMATION

The issue is whether Lontok, over his objection, can be tried by the municipal court on an information charging the complex crime of damage to property in the sum of ₱780 and lesiones leves through reckless imprudence.

We hold that he should be tried only for damage to property through reckless imprudence, which, being punished by a maximum fine of ₱2,340, a correctional penalty, is a less grave felony. As such it cannot be complexed with the light offense of lesiones leves through reckless imprudence which, as correctly contended by Lontok, had already prescribed since the crime prescribed in sixty days. (Lontok, Jr. vs. Hon. Alfredo Gorgonio, G.R. No. L-37396, April 30, 1979)

JURISDICTION

It is contended by the appellants that the Court of First Instance of Negros Occidental had no "jurisdiction over Civil Case No. 5343 because the plaintiff sought to collect sums of money, the biggest amount which was less than ₱2,000.00 and therefore, within the jurisdiction of the municipal court.

This contention is devoid of merit because all the plaintiffs also asked for the nullity of assignment of right with chattel mortgage entered into by and between Margarita G. Saldajeño and her former partners Leon Garibay and Timoteo Tubungbanua. This cause of action is not capable of pecuniary estimation and falls under exclusive jurisdiction of the CFI. Where the basic issue is something more than the right to recover a sum of money and where the money claim is purely incidental to or consequence of the principal relief sought, the action is not capable of pecuniary estimation and is cognizable exclusively by the CFI.

In determining whether an action is one the subject matter of which is not capable of pecuniary estimation, this court has adopted the criterion of first ascertaining the nature of the principal action or remedy sought. If it is primarily for the recovery of a sum of money, the claim is considered capable of pecuniary estimation, and whether jurisdiction is in the municipal courts or in the courts of First Instance

would depend upon the amount of the claim. However, where the basic issue is something other than the right to recover a sum of money, where the money claim is purely incidental to, or a consequence of, the principal relief sought, this court has considered such actions as cases where the subject of the litigation may not be estimated in terms of money, and are cognizable exclusively by the Court of First Instance. (Singson vs. Isabela Sawmill, G.R. No. L-27354 February 28, 1979)

LIABILITY OF SURETY

We hold that the trial court has jurisdiction to pass upon Fernando's application for the recovery of damages on the surety's replevin bond. The reason is that Fernando seasonably filed his application for damages in the Court of Appeals. It was not his fault that the damages claimed by him against the surety, were not included in the judgment of the C.A. affirming the trial court's award of damages to Fernando payable by the principal in the replevin bond. The peculiar factual situation of this case makes it an exception to the settled rule that the surety's liability for damages should be included in the final judgment to prevent duplicity of suits or proceedings. (Sec. 20 Rule 57) (Malayan Insurance Co., Inc. vs. Salas G.R. No. 48820, May 25, 1979)

MOTION FOR RECONSIDERATION

In the case at bar, the petitioners alleged in their motion for reconsideration that the issues raised in the pleading were not passed upon, considered and determined in the decision; that the decision does not conform to the pleadings and proofs; and that the said decision is not in accordance with the law. They failed, however, to point out specifically the findings and conclusions of law in the decision which are not supported by the evidence or which are contrary to law. A motion for reconsideration which does not specify the findings or conclusions in the decision, which are not supported by the evidence or which are contrary to law, is pro forma, intended merely to delay the proceedings, and as such, it is a mere scrap of paper that cannot stay the period for taking an appeal. (Dineros vs. Roque, G.R. No. L-38837, February 27, 1979)

PRE-TRIAL CONFERENCE

As will be seen, pre-trial is mandatory and the Court has uniformly ruled that the parties, as well as their counsel, who are required to appear thereat, must be notified of the same. The records of this case however, show that the defendants were not properly notified of the pre-trial conference since the notice of pre-trial were sent to their counsel and not upon them so that the order declaring them in default for non-appearance at the pre-trial conference is null and void. The only instance wherein the parties were notified separately of the holding of a pre-trial conference was on July 8, 1975. This notice, however, cannot be considered to have fully satisfied the requirements of the law because the said notice of pre-trial conference was issued before the last

pleading had been filed. Construing the term "Last Pleading", the court in a case said: "under the rules of pleading and practice, the answer is the last pleading, but when the defendant's answer contains a counterclaim, plaintiff's answer to it is the last pleading. When the defendant's answer has a cross claim, the answer of the cross-defendant to it is the last pleading. Where the plaintiff's answer to a counterclaim contains a counterclaim against the opposing party or a cross claim against a co-defendant, the answer of the co-defendant to the crossclaim is the last pleading. And where the plaintiff files a reply alleging facts in denial or avoidance of one matter by way of defense in the answer such reply constitutes the last pleading. (Francisco The Revised Rules of Court, Vol. II pp. 2-3) Following this rule, the "Last Pleading" is the answer to the counterclaim of the defendant Luis T. Peggy on September 16, 1976. Obviously, the calling of a pre-trial conference on August 8, 1975 was premature. (Peggy vs. Hon Lauro L. Tapucar, G.R. No. L-45270 February 28, 1979)

SERVICE OF SUMMONS

In the case at bar, the summons were served by registered mail, which is not among the modes of service under Rule 14 of the RRC. Besides, under Sec. 5 of aforesaid rule, the summons "may be served by the sheriff or the proper office with the province in which the service is to be made, or for reasons by any person especially authorized by the judge of the court issuing the summons." The postmaster of Bato, Leyte, not being a sheriff or court officer, or a person authorized by the court to serve the summon cannot validly serve the summons. The petitioners, therefore, were not duly served with the summons in Civil Case No. L-674. (Olar V. Cura G.R. No. L-47935, May 5, 1979)

WRIT OF PRELIMINARY MANDATORY INJUNCTION

The last remaining issue is whether the order of the city court requiring either petitioner Martha Feranil or Primitivo Villegas to remove whatever improvements introduced in the premises after the issuance of the writ of preliminary mandatory injunction but before trial of the main action is proper.

The effect of the preliminary mandatory injunction is to restore the plaintiffs to the possession of the lot in question after the defendants have allegedly forcibly entered into it. The possession, once restored, entitles them to the full enjoyment thereof, in the same manner and to the same extent as they had before the possession had been disturbed by the defendants. The recognition of such right as was in existence in favor of the plaintiffs, or at least in favor of Feranil, to the exercise of which the aforementioned injunction restored them, is perfectly in accordance with the acknowledged legal effect of an injunction which naturally varies, depending on whether the injunction is prohibitory or

mandatory. It should be obvious that with a mandatory injunction, unlike a prohibitory one, the party in whose favor it is issued, is placed in the same situation he was before the commission of the illegal act complained of, as if said act has never been committed. In a prohibitory injunction, the specific act sought to be enjoined has not yet been performed, and is one alleged to be illegal by the pleader. It is enjoined because it would cause irreparable injury if allowed to be committed to the prejudice of the party asking for the issuance of the injunction. The situation before the issuance of the prohibitory injunction is thus preserved in status quo. The status quo to be restored in the case of a mandatory injunction is the situation in which the pleader is before the act already committed and complained of. In the present case, the status quo is plaintiff Feranil being in actual possession of her own lot is free to exercise rights of ownership and possession. (Feranil vs. Hon. Gumensindo Arcilla, G.R. No. L.-44353, February 28, 1979)

TAXATION

REFUND OF TAXES

We agree with petitioner. Protest is not a requirement in order that a taxpayer who paid under a mistaken belief that it is required by law, may claim for a refund. Section 54 of C.A. 470 does not apply to petitioner which would conceivably not have been expected to protest a payment it honestly believed to be due. The same refers only to the case where the taxpayer, despite his knowledge of the erroneous or illegal assessment still pays and fails to make the proper protest for in such case, he should manifest and unwillingness to pay, and failing so, the taxpayer is deemed to have waived his right to claim a refund.

Solutio indebiti is a quasi-contract and the instant case being in the nature of solutio indebiti, the claim for refund must be commenced within 6 years from date of payment pursuant to Act. 1145 (2) of the New Civil Code. (Ramie Textile, Inc. vs. Hon. Ismael Mathay, Sr. G.R. No. L-32364, April 30, 1979)