REMEDIAL LAW

CIVIL PROCEDURE

Commencement of actions; in an action for breach of promise, plaintiff must show actual, clear and positive promise on the part of the defendant.

FACTS: Action to recover damages for an alleged breach of promise to employ. On May 31, 1946, plaintiff was appointed exclusive dealer for defendant's International trucks and their attachments. His employment as such was to expire in one year, but defendant reserved to itself at its discretion and without need of giving its reasons therefor. On Dec. 5, 1948, defendant advised plaintiff of the termination of his temporary appointment and warned him that a new agreement would be available to him only if he would show progress in establishing the required facilities in his territory, which condition was not complied with by plaintiff agent.

HELD: The evidence shows that plaintiff-appellant was never appointed a permanent dealer and was never made to believe so. In order that his action for breach of promise may succeed, nothing short of an actual, clear, and positive promise on the part of the defendant must be shown by him by competent evidence. His unjustified hopes, perhaps inspired by courteous dealings of the other party, do not constitute promise, the breach of which is actionable at law. (GIL EXCONDE *vs.* INTERNATIONAL HARVESTER CO. OF THE PHILIPPINES, G. R. No. L-4096, November 5, 1952.)

Commencement of action; dismissal of action for recovery of debt does not bar claim on a promissory note representing balance of such debt.

FACTS: EB filed in the intestate proceedings of the deceased DC a claim for ₱1,502. On the same day, EB filed a separate civil action against LR (petitioner) in her own capacity and as administratrix, in which EB prayed that LR be ordered to vacate certain properties alleged to have been sold with right of repurchase to EB

and to pay the sum of ₱5,691 as rentals. The CFI dismissed EB's complaint in this separate civil action.

The facts are not disputed. After a liquidation of the accounts of the deceased DC orignally amounting to ₱5,691, it was determined that the unpaid balance due from him to EB was ₱1,502 and this amount is covered by a promissory note executed by DC.

The subject-matter of the dismissed complaint in the civil case was the original debt of ₱5,691, although the complaint alleged that said amount represented unpaid rentals. In view of the final decision in said civil case, LR insists that EB's claim for ₱1,502 is barred, being merely the balance of the accounts of LR in favor of EB in the civil case; and that the respondent court could not split his cause of action.

HELD: LR's contention is untenable. The institution of the civil case for the collection of ₱5,691 might have been unfounded, but this circumstance did not affect the virtuality of the promissory note executed by the deceased DC as a separate and distinct source of obligation. (LEONCIA REYES *vs.* ENRIQUE BAUTISTA, G. R. No. L-4876, December 29, 1952.)

Parties to civil actions; who may bring action for annulment of ax delinquency sale of public land.

While under Section 101 of C. A. No. 141, all actions for the eversion to the government of lands of the public domain . . . shall e instituted in behalf of the Republic of the Philippines, however, here the complaint is mainly to annul tax delinquency sale of ublic land executed by the provincial treasurer, the prayer for rever- on being merely a necessary incident to the main action for annul- ent, the Director of Lands being the officer in charge of the dis- osition and management of public lands is the proper party plaintiff. THE DIRECTOR OF LANDS *vs.* ZACARIAS LIM ET AL., G. R. No. L-4372, pril 30, 1952.)

Parties to civil actions; material interest in the subject of the tion, without privity of contract, is sufficient to justify a joinder; rmissive joinder of parties; section 6, Rule 3.

FACTS: Plaintiff GL was authorized by defendants to negotiate e sale of a parcel of land, and having met his co-plaintiff LM, a l estate broker, both of them agreed to work together for the e of defendants' property. They found a willing and able buyer o accepted defendants' price and terms, but defendants without

any justifiable reason, refused to carry out the sale. As a consequence plaintiffs failed to receive the commission which they were entitled to receive. Hence, this action. Defendants presented a motion to dismiss the complaint as to LM on the ground that he has no cause of action against defendants. This motion having been granted, LM appealed.

HELD: LM has a cause of action against the defendants. Objection to the complaint is that LM cannot join in this action and enforce therein his rights directly against defendants because defendants never dealt with LM directly or indirectly, or, in other words, that both LM and his services were not known to them.

Plaintiff LM clearly falls under section 6, Rule 3 of the Rules of Court. He is entitled to be paid his commission out of the very contract of agency between GL and the defendants; GL and he acted jointly in rendering services to defendants under GL's contract, and the same questions of law and fact govern their claims. The rules do not require the existence of privity of contract between LM and the defendants as required under the common law; all that they demand is that LM has a material interest in the subject of the action, the right to share in the broker's commission to be paid GL under the latter's contract, which right GL does not deny. This is sufficient to justify the joinder of LM as a party plaintiff, even in the absence of privity of contract between him and the defendants.[1] (L. G. MARQUEZ *vs.* FRANCISCO VARELA and CARMEN VARELA, G. R. No. L-4845, December 24, 1952.)

Parties to civil actions; entity named party to an action and preventing the contract in question from being carried out is a necessary party.

Where an entity has been named party to an action and has in fact been trying to prevent a contract from being carried out, there is no denying that it is a necessary party; injunction may lie against it. (UNITED WORKERS OF THE PHIL. *vs.* BISAYA LAND TRANS. CO. ET ALS., G. R. No. L-4111, March 31, 1952.)

Parties to civil actions; death of a party; duty of surviving party.

FACTS: The plaintiff and the defendant entered into a partnership in the year 1918. On March 3, 1937 the plaintiff filed an action to compel the defendant as industrial partner to render an accounting of his management from 1929 to 1937. The defendant in his answer alleges that in the year 1932 the partnership was dissolved and the defendant delivered all its properties and assets to the plaintiff. Hence the defendant prays for the dismissal of the complaint.

[1] Four justices subscribed to this opinion. Mr. Chief Justice Ricardo Paras concurred on the ground that "for all practical purposes LM may be considered an intervenor." Three justices dissented.

The plaintiff died in 1938 and on September 1939, he was substituted by his administrator, Solomon Lota. On November 26, 1939 the defendant also died and the court ordered the plaintiff to amend the complaint by substituting for the deceased defendant the administrator or his legal representative. The administrator Solomon Lota procured the appointment of an administratrix in the person of Marta Sadiasa, the surviving spouse of the defendant but these proceedings were dismissed for failure of the administratrix to file a bond and to take her oath. No other action was taken by the defendant.

On April 6, 1949 almost ten years later, the plaintiff filed a motion praying that the deceased defendant be substituted by his heirs as parties defendants in this case. Defendants object on the ground of prescription.

HELD: In an action for accounting of the partnership against the defendant, it is the duty of the plaintif upon the death of the defendant partner to procure the appointment of administrator of the deceased partner. And in case of failure of the administrator to qualify, the plaintiff partner must procure the appointment of another administrator. Inaction for almost 8 years, after the issuance of letters of administration, on the part of the appellant-plaintiff, sufficiently implies indifference to or desistance from his suit.

In order to recover a sum of money as damages against a deceased partner as manager of the partnership resulting from his misappropriation of the funds or from his wrongful acts, action would be prosecuted against his estate in administration. And when it appears that property of the partnership is in the possession of the deceased partner, the surviving partners may make an application with the court having charge of the administration to require the administrator to surrender such property. (URBANO LOTA *vs.* IGNIGNO TOLENTINO, G. R. No. L-3518, February 29, 1952.)

Parties to Civil Actions; an order of account requiring the plain-

tiff to procure appointment of representative of deceased defendant, without first requiring the legal representative of the deceased to appear, is null and void.

FACTS: Jacoba Buyet, mother of defendants herein mortgaged a parcel of land to Juan Reis, who assigned his rights to Julian Barrameda, the father of the herein plaintiffs. Defendants brought suit against Julian. After the answers Julian died. The court, informed of the death, order the plaintiffs to amend their complaint so as to substitute the legal representatives of Julian Barrameda as defendants. Subsequently, counsel for Julian filed a motion for dismissal in Julian's name, on the ground that the plaintiffs failed to amend their compliant. The case was dismissed. Defendants in the former case then filed the present case against the former plaintiffs. The trial court rejected the answer on the ground that the prior dismissal was a final adjudication of the case. Hence, this appeal.

HELD: After the death of the defendant it shall be the duty of his attorneys to inform the court of his death and the name and residence of his legal representatives. They must first order the legal representative of the deceased party-defendant to appear, and an order of the court requiring the adverse party plaintiff (surviving) to procure the appointment of the legal representative of the deceased party without requiring first the legal representative of such deceased defendant to appear is null and void. Non-compliance with such order by the surviving plaintiff cannot be treated as lack of interest to prosecute the action. (Rule 3, Secs. 16 and 17.) (BARRAMEDA *vs.* BARBARA, G. R. No. L-4227, January 28, 1952.)

Venue in inferior courts: Art. 88 of R. A. 296 (Judiciary Act) not in conflict with section 2, Rule 4 of Rules of Court.

FACTS: Plaintiff-appellant filed a complaint for the recovery of ₱1,470 in the JP court of Tanauan, Batangas, the municipality where she resided. Defendant-corporation filed a motion to dismiss on the ground of improper venue inasmuch as section 1, rule 8, of the Rules of Court provides that the action should be brought at the JP court of defendant's residence. The case was dismissed.

In her appeal plaintiff contends that Art. 88 of the Judiciary Act empowers the plaintiff to bring the action in the municipal court of her place of residence and that art. 1, Rule 8 of the Rules

of Court is incompatible with this later law and should therefore be deemed repealed.

HELD: Art. 88 of the Judiciary Act (Rep. Act 296) which prescribes the original jurisdiction of the JP and municipal courts in cases where the value of the demand does not exceed ₱2,000 exclusive of interest and costs is not incompatible with the provision of Section 2, Rule 4 of the Rules of Court which provides for the venue. The former prescribes the value of the subject matter of the litigation, while the latter prescribes the place where the action may be instituted. (TENORIO *vs.* BATANGAS TRANS., G. R. No. L-4803, February 20, 1952.)

Venue in CFI; where defendants have residence in P.I., action must be brought in said residence, not where they may be found.

FACTS: Plaintiff's complaint alleges that they reside in Leyte and Manila, respectively and that defendants reside in Manila and Leyte, respectively. One of the defendants however was then usually found in Samar, and so the action was brought in that place. The case was dismissed by the CFI of Samar on the ground of improper venue.

HELD: A civil action for the recovery of a sum of money in the CFI may be commenced and tried where the defendants or any of them resides or may be found or where plaintiffs or any of the plaintiffs resides, at the election of the plaintiff. But where defendants have a residence in the Philippines as appears in the complaint, action may not be brought where defendants may be found, otherwise, complaint may be dismissed on the ground of improper venue. (CASILAN *vs.* TOMASSI, G.R. No. L-4294, Jan. 31, 1952.)

Complaint; test on sufficiency of facts in the complaint is whether judgment can be rendered against defendant thereon.

FACTS: The only question is whether paragraph 5 of complaint which reads as follows:

> "That on May 27, 1949 at about 11:30 o'clock in the morning, while the deceased Filomeno Managuit was on board the M/S "Pilar II", as such seaman, he jumped into the water to retrieve a 2-peso bill belonging to him, and as consequence of which, he was drowned;"

is sufficient to constitute a cause of action to collect compensation under Act No. 3428, known as the Workmen's Compensation Act, as amended by Act No. 3812.

HELD: The test on sufficiency of the facts alleged in a complaint is whether upon such facts a judgment may be rendered against the defendant. To entitle the plaintiff, the mother of the deceased seaman who was wholly dependent upon him, to a compensation award, it is at least essential to aver that the seaman was engaged in the work assigned to him on board the M/S "Pilar II" owned, run and operated by the defendant and while at such work he dropped the 2-peso bill belonging to him and to retrieve it he leaped into the sea and was drowned. Lack of such averment in the complaint renders it insufficient to constitute a cause of action. The order appealed from dismissing the complaint is affirmed, without prejudice to the right of the plaintiff to file an amended complaint. (ELENA AMEDO *vs.* RIO Y OLABARRIETA, INC., G. R. No. L-4466, promulgated October 30, 1952.)

Complaint; allegation that defendants are occupying portion of land described in the complaint is sufficient in an action for recovery of possession of land.

Where, in a plenary action for the recovery of possession of two (2) parcels of land against 49 defendants, the complaint alleges that the defendants are occupying approximately 4,000 sq. m. of the land described in the complaint without the knowledge and consent of the plaintiff, such allegation sufficiently apprises the defendants of the nature of the complaint to enable them to prepare their defense. (REMEDIOS M. VDA. DE MIRANDA *vs.* URBANO LEGASPI ET AL., G. R. No. L-4917, November 26, 1952.)

Complaint; purpose of action is gathered from allegations in complaint, not from claims of the party.

FACTS: Defendants through fraud succeeded in having plaintiff execute a deed of sale of the lot in question in defendant's favor. Fraud was discovered in 1941 but complaint was filed only on February 20, 1950. Lower court held that action had prescribed; plaintiffs appealed.

HELD: Judgment affirmed. The action is clearly to annul a fraudulent deed of sale which prescribes in four years and not to recover title and possession as alleged by plaintiffs. Purpose of action is gathered from the complaint itself, not from the party's claim. (ESPIRIDION RONE, CLAUDIA AGOZAR, DIONISIA GORDOLAN, GUILLERMO VENTURA and AMABLE VENTURA *vs.* VICTOR CLARO and

SIMEON BAQUIRING, G. R. No. L-4472, Prom. May 8, 1952.)

Complaint; possession by the vendee in an oral contract of sale of land must be alleged in the complaint to avoid defense of statute of frauds.

FACTS: Plaintiff and defendant verbally agreed on the sale of a parcel of land. Defendant refused to comply with agreement; hence this action. Action was dismissed on the ground that the contract was oral and unenforceable. Plaintiff appealed contending that statute of frauds is not applicable because he already took possession of the land and made improvements thereon as a result of the agreement.

HELD: The case having been dismissed on a motion to dismiss, the merits of the order can only be gauged upon a consideration of the allegations appearing in the complaint. The contention of plaintiff would be tenable if it appeared in the complaint, but inasmuch as the requisite allegations do not appear, the order appealed from is affirmed. (RAMON PASCUAL *vs.* REALTY INVESTMENT, INC., G. R. No. L-4002, Prom. May 12, 1952.)

Motion to dismiss; res adjudicata.

FACTS: This is an appeal from an order of the Court of First Instance of Negros Occidental dismissing plaintiff's complaint on the ground that plaintiff's action is barred by a prior judgment. The complaint was filed on June 3, 1950 and alleges that plaintiff's father was the registered owner of Lot No. 1019 of the Bago cadastre and had sold said lot to defendant with pacto de retro for ₱800; that plaintiff's father is now dead and he has bought the rights and interests of his co-heirs therein; that defendant refused to show the deed to plainiff, and afterwards caused the cancellation of the title in the name of plaintiff's father and the issuance of another title in his own name; that the deed of sale was intended by the parties thereto as a contract of mortgage.

Plaintiff's complaint prays that the contract be declared as a mortgage and defendant be compelled to reconvey it to plaintiff, with damages.

Defendant filed a motion to dismiss on the ground that the same action was filed on March 30, 1944, by plaintiff under Civil Case No. 54 of the Court of First Instance of Negros Occidental and

judgment was rendered therein on May 5, 1944. Court granted the motion to dismiss holding that there was a prior judgment, and that under Section 30 of Act No. 3110, as it was possible to have reconstituted the judicial record and plaintiff did not choose to do so, he should suffer from his neglect and may not be permitted to file the action anew. Against this, the plaintiff has prosecuted this appeal.

HELD:

1) There is no doubt that Civil Case No. 54 of the Japanese military occupation and the present one are identical. There is identity of parties, identity of subject matter, and identity of cause of action. But the rule of estoppel by judgment cannot apply because the judgment rendered in the previous case had not become final, because it was appealed to the Court of Appeals in Cebu.

2) The duty to ask for reconstitution lies upon both parties and in case the parties interested in a destroyed record fail to petition for the reconstitution thereof within the six months next following the date on which they were given notice in accordance with section two hereof, they shall be understood to have waived the reconstitution and may file their respective actions anew without being entitled to claim the benefits of section thirty-one hereof (Sec. 29, Act No. 3110). (JUAN CLARIDAD *vs.* ISABEL NOVELLA, G. R. No. L-4207, October 24, 1952.)

Motion to Dismiss; res judicata and prescription.

FACTS: Action for partition and reconveyance of a parcel of land. Defendants moved to dismiss the complaint on the grounds of res judicata and prescription.

HELD: The lot in question was awarded to Macaria Suñga and her spouse FB (predecessor in interest of the defendants) in previous cadastral proceedings.

Since 1929, defendants have been in possession of the land, enjoying the fruits thereof exclusively. Assuming that the plaintiffs had once been co-owners of the land, the defendants have acquired title by prescription over the land by reason of their adverse and exclusive possession from the year 1929, or very much longer than ten years before the filing of the complaint in 1948. (MACARIO MALLARI ET AL. *vs.* MACARIA SUÑGA ET ALS., G. R. No. L-5043, December 17, 1952.)

Motion to Dismiss; prescriptive period of action for annulment of contract commences from date of discovery of fraud.

FACTS: CFI, on October 31, 1950, sustained the motion to dismiss filed by defendant on the ground that the facts alleged in plaintiff's complaint as regards the second cause of action showed that the action of plaintiffs had already prescribed it appearing that more than 10 years had elapsed since the execution of the deed of sale Annex "B".

HELD: This is an action for the annulment of sale of real property based on fraud and not an action for specific performance. The purpose of the action is not to enforce the sale but to rescind or annul it, and as such the basis to be taken for the accrual of the action should be not the date of the execution of the contract but the date of the discovery of the fraud. The fraud was discovered only on November 27, 1946, and the complaint was filed on August 21, 1950. Hence, period of four years within which the action should be brought has not yet expired. (VIRGILIO VILLANUEVA *vs.* FIDEL VILLANUEVA, G. R. No. L-4594, March 25, 1952.)

Answer; general denials; effect of the Rules of Court upon general denials in an answer filed before the effectivity of said Rules.

FACTS: In this case, defendant-appellant filed, in July, 1939, his answer to the complaint interposing a general denial. The case was pending when on July 1, 1947 the plaintiffs filed a motion for judgment on the pleadings, invoking sections 6-8, Rule 9 of the Rules of Court. The court sustained the motion and rendered judgment against the defendant-appellant.

HELD: Under the Rules of Court, effective July, 1940, when the answer contains merely a general denial, on motion of the plaintiff, the court must render judgment on the pleadings. But, appellant's answer was sumbitted *in July,* 1939 when general denials were in use and did not have the disastrous effect provided by the Rules.

While Rule 133 prescribes that the Rules of Court shall govern all further proceedings in cases pending in July, 1940, and the motion for judgment on the pleadings was filed after July, 1940, such Rule 133 could not, and did not, operate to make improper

or defective defendant-appellant's answer.[1] (FELIPA PACHO ET AL. *vs.* LUIS UY ICO, G. R. No. L-4624, April 18, 1952.)

Answer; failure to allege defense in the answer bars defendant from setting it up in an interpleader.

FACTS: V.M. filed action in the municipal court against J.A. for commission for services rendered on the latter's war claim. J.A. filed his answer, stating that his two sons who helped prepare the claim papers were entitled to the commission and not V.M. Judgment for plaintiff. On appeal to the Court of First Instance J.A. repeated the same answer and moved to file a third party complaint to order plaintiff and his two sons to interplead and litigate their claims because his two sons demanded their commission. Motion granted. V.M. petitioned for certiorari to annul the order of the respondent judge on the ground that respondent judge abused his discretion in granting the motion.

HELD: When the municipal court decided the case, J.A. answered that his two sons were entitled to the commission. But in the Court of First Instance he moved to file a third party complaint to order plaintiff and his two sons to interplead. While the case was in the municipal court, he did not allege that his two sons demanded payment from him. This was alleged only on appeal. This is but an eleventh hour scheme to defeat plaintiff's claim. Furthermore, a petition for interpleading is tantamount to a new defense not set up in the court of origin because its purpose is to see that the commission subject of the complaint be paid not to the plaintiff but to the two sons of defendant. This defense was never raised in the municipal court, it cannot be raised for the first time in the Court of First Instance under the well-known principle that in cases appealed from an inferior court to a CFI, parties can neither change the cause of action or defenses they pleaded in the inferior court nor add new ones in their pleadings even if the case is to be tried de novo. (VALENTIN MALINAO *vs.* JUDGE JUAN BOCAR ET ALS., G. R. No. L-4708, June 30, 1952.)

Counterclaim; when there is no need to answer thereto; Section 7, Rule 10, Rules of Court.

[1] The Supreme Court however ordered that "to avoid all further questions, and in the interest of a better administration of justice, the defendant-appellant shall file within such time as the court below may fix, an amended answer to be governed by the present Rules of Court."

HELD: Where, in an action for the reconveyance of a parcel of land, the subject-matter of the counterclaim set up therein refers to certain damages alleged to have been suffered by defendant because of certain acts committed by one DB in connivance with the plaintiffs consisting in taking possession of certain products of the land in litigation, which damages relate to the possession of the property and are but a direct consequence of the issue in controversy, said counterclaim partakes of the nature of a special defense which, if not specifically challenged by plaintiffs in a reply, is deemed controverted. (VICENTE ROSARIO and MARIA GOMEZ *vs.* HON. SEGUNDO MARTINEZ ET AL., G. R. No. L-4473, September 30, 1952.)

Defenses; when Moratorium Law must be pleaded; when defense is deemed waived.

FACTS: In a suit for the recovery of a monetary obligation, judgment was rendered by the lower court against defendant-petitioners. The Court of Appeals and the Supreme Court confirmed this judgment. At no time during the appeal did the defendant-petitioners invoke the Moratorium Law as a defense and neither did they invoke said law in their motion for reconsideration. In this special civil action for certiorari and mandamus with preliminary injunction, defendant-petitioners seek to prevent execution by invoking the Moratorium Law.

HELD: Although the obligation is covered by the Moratorium Law, such fact cannot be interposed as a defense after the petitioners have waived it by their failure to plead the Moratorium Law at any time during the appeal or in their motion for reconsideration or at any time before the order of dismissal of the motion for reconsideration. (ARIZABAL & BUENO *vs.* JUGDE ABAYA ET AL., G. R. No. L-5076, January 30, 1952.)

Answer; defenses; when benefits granted by Moratorium Law, deemed waived.

FACTS: Action was brought against the respondent Irene Zafra e Aguilar and decision rendered ordering the latter to pay to plaintiff the sum of ₱810.00. After judgment, defendant pleaded for the benefits of the Moratorium Law which was granted by the court when it denied plaintiff's petition for execution.

HELD: After considering the matter we find that the petitioners

who are the plaintiffs in the original case, are undoubtedly in the right. The case had been pending since June, 1948. Up to Feb. 15, 1950, when the decision was rendered, defendant never mentioned the Moratorium Law. Under the circumstances that defense must be deemed waived. (JESUS Z. VALENZUELA ET AL. *vs.* C.F.I. OF LA UNION, G. R. No. L-4808, March 18, 1952.)

Counterclaim; when bringing in third parties is proper.

FACTS: Respondents surnamed V. sought to recover three parcels of land and the value of its products from petitioner K. K. answered and in counterclaim alleged that the V's sold two parcels of land they believed to be theirs to the spouses A.M. and S.M. which was really owned by K; now asks for delivery. Vs answered the counterclaim: they are no longer interested in the land because A.M. and S.M. are the present owners—asked to dismiss the counter claim.

In the third amended answer K moved that the M spouses be made parties to the action. Respondent judge ruled: the V's are not interested in the land owned by the M spouses therefore, are not liable to the counterclaim; that the M spouses should not be included in the case because they had no interest in the case between the V's and K. K petittioned for mandamus to compel respondent judge to bring in the M spouses as third party defendants.

HELD: To admit the counterclaims of K and to include the M spouses as parties would lead to a complete and final determination of all questions involved as to the ownership of the two parcels of land between the parties herein and the M spouses. It is true that an independent action could be filed against the M spouses. If so, M spouses would call the V's in the original case to answer for warranty and eviction. Consequently the same parties would again figure in that separate action. The inclusion of the M spouses would avoid said independent action and also the trouble, expenses and loss of time it would entail. The M spouses are also interested in V's title to said two parcels because if the Vs as vendors had none, they (M spouses) could not have acquired any. One can readily see that the Vs and the M spouses have a common interest in the counterclaim. (MARCELO KARAAN *vs.* HON. EDILBERTO SORIANO ET AL., G. R. No. L-4819, July 22, 1952.)

Thirty Party Complaint; effect of granting motion to file third party complaint on date set for trial.

FACTS: Plaintiff Principe sued Defendant Eria and his son-in-law Maningas on a promissory note signed by the two supposed to embody a joint and several obligation and which stated that either one may be made to pay the whole amount. After the clerk of court had set the case for hearing on December 13, 1949, defendant on December 3, 1949, filed a petition for leave to file a third party complaint against Maningas, at the same time filing said complaint. On December 7, because the plaintiff did not object, the court admitted the third party complaint and gave Maningas the required time to answer said complaint. But before Maningas could answer, the case was heard on December 13, the date set, in the absence of defendant and his counsel. Plaintiff was allowed to present evidence. On December 29, 1949, defendant's counsel filed a petition for relief and new trial on the ground that with the admission of the third party complaint and the giving to third party defendant the reglamentary time to answer, the third party complaint autocatically cancelled the original date of hearing. Petition denied. Motion for reconsideration also denied. Appeal.

ISSUE: Legality of action of court in proceeding with the trial before third party defendant had filed his answer.

HELD: Where a motion to file a third party complaint was granted by the lower court, such court cannot validly try the case before the answer of the third party defendant is filed. Neither can the court validly order a separate trial because it did not know nor was it in a position to know if third party defendant had any claim, cross-claim or counterclaim against either the plaintiff or the defendant or both. (MARCIANO PRINCIPE *vs.* ANTONIO ERIA & LEONCIO MANINGAS, G. R. No. L-3788, January 22, 1952.)

Intervention; allowance of motion for intervention discretionary upon court.

FACTS: In an action between plaintiffs and defendants to enforce a promise to sell two parcels of land, appellants sought to intervene on the ground that said lands were already sold to them. Lower court denied the motion inasmuch as the case had already been submitted for decision and thus the motion came too late. Upon denial of motion for reconsideration, intervenors appealed.

HELD: Allowing or disallowing motion for intervention is dis-

cretionary upon the court, but such discretion must be exercised properly. Motion for intervention would not have unduly delayed the disposition of the case nor substantially impaired the rights of the original parties and lower court should have allowed appellants to intervene. Further, appellants were never notified of the proceedings and only came to know of the same when the case was submitted for decision. (PASCUAL FALCASANTOS and LORETO MARCELINO *vs.* TIBURCIO FALCASANTOS, G. R. No. L-4627, Prom. May 13, 1952.)

Service and filing of pleading and other papers; when period for filing motion for new trial commences; exception.

The 30-day period within which to file a motion for new trial is counted from the day the petitioner's attorney received a copy of the decision and not from the date the petitioner himself received such copy of the decision where petitioner is represented by an attorney unless the court orders that service of copy be made upon the party himself. The fact that the petitioner himself volunteered to receive a copy is of no consequence because the purpose of the rule (Rule 27, Sec. 2, Rules of Court), is to maintain a uniform procedure calculated to place in competent hands the orderly prosecution of a party's case. "Every written notice" used in Rule 27, Sec. 2, includes a decision. (B. S. CHAINANI *vs.* JUDGE TANCINCO, G. R. No. L-4782, February 29, 1952.)

Service and filing of pleadings and other papers; service of notice upon defendant who signed the answer with another attorney.

Where the defendant filed and signed his answer jointly with another attorney as counsel for and in his own behalf, the notice sent to him (defendant) by the clerk of court was patently in conformity with section 2 of Rule 27 (Rules of Court) requiring that if a party has "appeared by an attorney or attorneys, service upon him shall be made upon his attorneys or *one* of *them.*" (BENJAMIN DUZON *vs.* HIEROTEO VILLAROSA, G. R. No. L-5183, December 29, 1952.)

Service and filing of pleadings and other papers; three notices delivered at attorney's address sufficient compliance with Section 2, Rule 27 of Rules of Court; Sec. 3, Rule 31 not in conflict with Sec. 2, Rule 27.

FACTS: An action for forcible entry was commenced by plaintiff against defendants. Notice of date of trial was sent to defendant's counsel Apolonio D. Anato at his address of record by registered mail. Three notices from the Post Office were delivered at said address but the said attorney was away from the province. On the date set for trial neither defendants nor their attorney appeared. Defendants were declared in default. Judgment was rendered against them in favor of plaintiff. Defendants filed a motion to set aside said judgment. Motion was denied. Hence this appeal on the ground that notice of trial should have been sent to them also and not only to their attorney.

HELD: The provision of Rule 31 Sec. 3 requiring the clerk of court to cause a notice to be served upon the parties is not inconsistent with the provision of Rule 27, Sec. 2 which requires notice to be served upon an attorney, because the latter provision applied to a situation where the party is represented by an attorney and the excuse that the attorney did not stay in one place permanently, cannot be accepted inasmuch as an attorney owes it to himself and his clients to invariably adopt a system whereby he can be sure of receiving promptly all judicial notices during his absence from the address of record. (CONCHITA MARTINEZ *vs.* SATURNINA MARTINEZ, G. R. No. L-4075, January 23, 1952.)

Dismissal of actions; dismissal of the case with or without prejudice for failure to prosecute discretionary.

FACTS: On the date set for the trial, counsel for plaintiff appeared and manifested to the court that for reasons that he could not then explain, neither his principal witness nor his client arrived, and consequently he is not prepared to enter into trial. On motion of the appellant's attorney, the lower court dismissed the case without prejudice and without pronouncement as to costs. Appellant contends that the dismissal should have been with prejudice and with costs against the plaintiff. Hence this appeal.

HELD: The dismissal of a case with or without prejudice is discretionary. We do not believe that the court *a quo* abused its discretion in reserving to the plaintiff the right to bring a new action upon the same subject matter. Indeed, the court would not have abused its discretion had it granted the motion for adjournment instead of dismissing the case, in which case, the appellant would be in no better position than where he now finds himself.

Similarly, the courts have ample discretion to tax or not to tax costs. Order affirmed. (ALEGRE *vs.* GONZALES Y IBARRA, G. R. No. L-3933, Prom. May 28, 1952.)

Dismissal of actions; court may dismiss action motu propio on failure of plaintiff to prosecute for unreasonable length of time.

FACTS: The herein appellant secured a writ of preliminary injunction in the lower court to prevent the Mayor of Manila from granting one of the market stalls to another. After the filing of the answer by the Mayor, the herein appellant failed to prosecute his action until after more than one year. The lower court dismissed the action in accordance with section 3, rule 30 of the Rules of Court.

HELD: The court may dismiss the action *motu propio* upon plaintiff's failure to prosecute the action for an unreasonable length of time. And failure to prosecute after 1 year, 4 months, and 4 days is an unreasonable length of time which justifies the court to dismiss *motu propio*, the action. (SEE CHUAN *vs.* HON. MANUEL DE LA FUENTE, et al., G. R. No. L-4070, February 26, 1952.)

Calendar and adjournments; adjournments and postponements of trials discretionary on Court.

FACTS: In an action for partition between plaintiffs and defendants, counsel for plaintiff filed motion for indefinite postponement. Both parties took for granted that motion would be granted and did not appear at trial, except counsel for plaintiffs. Motion was denied, and the action dismissed for non-appearance. After denial of a motion for reconsideration and new trial, parties appealed.

HELD: Adjournments and postponements of trials lie within the sound discretion of the courts and such discretion will not be interferred with unless a grave abuse is shown. Judgment affirmed but a new action may be filed in the interests of justice. (GENEROSA TORREFIEL and JUAN TORREFIEL *vs.* ANASTACIO TORIANO ET AL., G. R. No. L-4007, January 23, 1952.)

Judgments, Orders and Entry Thereof; Plaintiff Cannot be Declared in Default for Failure to Answer Counterclaim; Condemnation Proceedings.

FACTS: Plaintiff-corporation has since 1945 been using a road

running across defendant's property for the transportation of its machinery. Defendant demanded rental which plaintiff refused to pay though it continued to use the road. Defendant threatened to close the road, hence this action for condemnation. Defendant filed a counterclaim of rental of ₱0.10 per sq. meter from November, 1946 to October, 1948 plus ₱1,000 damages. Plaintiff did not answer reply to this counterclaim. On defendant's motion, court declared plaintiff in default. Plaintiff moved for reconsideration and was denied. Hence this appeal on the ground that plaintiff was under no obligation to answer the counterclaim which counterclaim the defendant had no obligation to file.

HELD: In condemnation proceedings where defendant files an answer containing a counterclaim against the plaintiff, the latter cannot be declared in default for failure to answer the counterclaim because the defendant owner need not file an answer or counterclaim as he is always free to prove them before the commissioners appointed by the court; and the default for failure to answer a complaint refers to ordinary pleadings and not to condemnation proceedings where a motion to dismiss shall be filed in lieu of an answer. (PHILIPPINE OIL DEVELOPMENT CO., INC. *vs.* ADELESO GO, G. R. No. L-4367, Prom. May 2, 1952.)

Judgments, Orders and Entry Thereof; Lifting Order of Default within Sound Discretion of Court.

FACTS: Defendant Maria Lao executed a deed of sale of a certain real property of the estate of A. de los Santos in favor of defendant F. Dee. The deed of sale was signed by plaintiff-administratrix. Despite the objection of plaintiff, Domingo Lao as one heir of the estate, the probate court approved the sale. Domingo Lao elevated the case by certiorari to the Supreme Court which affirmed the order of the probate court. Domingo made several motions for reconsideration to the Supreme Court. All were denied. Plaintiff brought action to annul the order of the probate court. Defendants filed motion to dismiss, which motion was granted. Plaintiffs appealed with the following assignment of errors: (1) The lower court erred in lifting the order of default against Francisco Dee; (2) That plaintiffs have no legal capacity in this case because the lower court considered them as heirs of the deceased who have no legal capacity until after the partition. Defendant Dee failed to answer within the required period and was declared in default. However, he

proved to the satisfaction of the lower court that his failure to answer was due to mistake or excusable negligence.

HELD: The lifting of the order of default against defendant for his failure to file an answer within the reglamentary period is addressed to the sound discretion of the court and in the absence of showing abuse of discretion, the lower court's order will not be disturbed by the Supreme Court.

The plaintiffs as heirs have no cause of action against the executor or administrator for the recovery of the property left by the deceased, before distribution is made or before the residue is known.

And where no appeal is interposed from an order of the lower court denying a motion for reconsideration to annul a sale of property left by the deceased, made by the executor or administrator, such order of the probate court becomes res judicata, there being identity of parties and of subject matter. (IGNACIO LAO *vs.* FRANCISCO DEE and MARIA LAO, G. R. No. L-3890, January 23, 1952.)

New Trial: When motion to be allowed to present evidence is in Reality Motion for New Trial.

FACTS: Respondent Phil. Sugar Estate Dev. Co., Inc., brought action for ejectment against petitioner and 36 other persons. After presentation of evidence by plaintiff, defendants upon their own motion were granted 7 days to submit a formal motion for dismissal. Motion to dismiss was denied and court ordered the ejection of the defendants from the land in dispute. Defendants later filed a "Motion to Set Aside Decision and To Allow the Defendants to Present Their Respective Evidence". Denial of said motion is assailed as arbitrary and a deprivation of the defendant's right to be heard.

HELD: The clear import of the defendant's action and the court's order was that the defendants would rest their cases on the sufficiency or insufficiency of the plaintiff's proof and on the theory that the court had no jurisdiction. Under these circumstances the respondent judge did not abuse his discretion in rejecting the defendant's request to be allowed to produce evidence. The parties having submitted the cases for decision and the decision having been entered, the defendant's motion to be allowed to present evidence was in reality one for new trial. Regarded as a motion for new trial, the motion did not contain enough showing to deserve favorable action. (GRACIANO ENDERES ET AL. *vs.* HON. JUDGE PRODENCIO ENCOMIENDA, G. R. No. L-4506, March 17, 1952.)

New Trial: Granting and Denial of a Motion for New Trial Discretionary and Shall Not be Disturbed Unless There is a Clear Showing of Abuse of Discretion.

FACTS: When this case was called for hearing, neither defendants nor their counsel, appeared, whereupon the court allowed the plaintiff to present her evidence. Subsequently, the court rendered judgment in favor of plaintiff. Five days thereafter, defendants filed a motion praying that the decision be set aside and a new trial ordered alleging that their failure to appear at the trial was due to inadvertence or mistake of one Dominador Villafuerte, the stenographer and filing clerk of their counsel, as fully explained by him in the affidavit attached to their motion. The court denied this motion.

HELD: Appellants based their motion for new trial on section 1(a), of rule 37 of the Rules of Court. They have not predicated their motion on rule 38 which gives to an aggrieved party the right to obtain relief when for similar reasons he has been unjustly deprived of a hearing. In any event, we consider immaterial the remedy pursued by the defendants for in our opinion both remedies have the same purpose.

The reasons advanced to obtain relief are valid and justifiable and are enough to warrant a reopening of the case specially so, when the failure of the defendants to appear took place on the first day, the case was called for trial. But, the granting or denial of a motion for a new trial is, as a general rule, discretionary with the courts, whose judgment should not be disturbed unless there is a clear showing of abuse of discretion. And we find that the lower court did not abuse its discretion. The lower court deemed it wise to deny the motion because it considered futile and unsubstantial the defenses set up by the defendants which, even if proven, could not have the effect of altering the nature of the decision. We agree with the trial court. (REMEDIOS M. VDA. DE MIRANDA *vs.* URBANO LEGASPI ET ALS., G. R. No. L-4917, November 26, 1952.)

Relief from Judgments: Relief available when parties found in default mailed their reply to a counterclaim.

FACTS: For their failure to answer a counterclaim, VR & MG

(petitioner herein) were declared in default. Subsequently, petitioners filed a petition for relief under Rule 38, Rules of Court. This petition was denied. Hence this petition for certiorari.

HELD: The lower court erred in denying the petition for relief. The only reason why the court declared the petitioners in default is because they failed to reply to the counterclaim set up by the defendant (respondent herein) and this conclusion was merely predicated upon the fact that the record of the case does not show that such reply has been filed. But in the affidavit of merit filed in support of the petition, petitioners claim they mailed their reply thereto to the clerk of court, as well as to the opposing party, but that the reply may have been lost in the mails or it was miscarried. This is disputed by defendant-respondent in his opposition, but the latter was not supported by any affidavit. At any rate, the issue raised is one of fact and the lower court should have given the plaintiffs an opportunity to prove it. (VICENTE ROSARIO and MARIA GOMEZ *vs.* HON. SEGUNDO MARTINEZ ET AL., G. R. No. L-4473, September 30, 1952.)

Relief from Judgments: Right of Heirs of deceased legatee to file petition for Relief.

FACTS: On February 14, 1939, Manuel Cuison filed in the C.F.I. of Negros Occidental a petition for the probate of the last will and testament of Leodegaria Villanueva. One of the heirs instituted was Reynaldo Cuison. On January 10, 1949 the trial court denied the petition for probate. On August 16, 1949, Elisa, Ricardo, Josefina, Luis, Hermenegilda, all surnamed Cuison, for the first time entered this case, claiming to be legitimate brothers and sisters of Reynaldo Cuison, one of the heirs in the will. Claiming that Reynaldo Cuison died intestate two months after the death of the testatrix, leaving no legitimate nor natural acknowledgment children, they were consequently his only heirs and entitled to relief under Rule 38 of the Rules of Court, from the order of January 10, 1949 denying probate of the will. The trial court denied the petition; hence this appeal.

HELD: Upon the death of the legatee without issue, the petitioners as brothers and sisters of said legatee succeed to all the rights and obligations of said legatee because the rights to the succession are transmitted from the moment of death. And since the legatee died two months after the death of the testatrix, said petitioners do not represent the legatee in the estate of the testatrix but succeed the legatee in his own right. Consequently, said petitioners upon the death of the legatee, had an interest in the will and have a right to file a petition for relief under Rule 38 from order of the court denying the probate of a will. (IN THE MATTER OF THE ESTATE OF THE LATE LEODEGARIO VILLANUEVA, G. R. No. L-3932, February 29, 1952.)

Relief from Judgments: When counterclaim cannot be decided without plaintiff's claim, court must allow plaintiff to present evidence on his claim before rendering decision on counterclaim; failure to do so entitles plaintiff to Relief.

FACTS: This is a petition for certiorari with preliminary injunction seeking to set aside the decision rendered by respondent Judge ordering the plaintiff, now petitioner, to pay to the defendant, one of the respondents herein, the sum of ₱1,780.00 with legal interest from the filing of defendant's answer, and ₱200.00 as attorney's fees. The preliminary injunction requested was granted. This case stems from an action filed by petitioner in the municipal court of Manila against respondent Lacsamana to recover the sum of ₱2,000.00 as balance of the purchase price of a house sold by petitioner as respondent. The case was decided in favor of petitioner and respondent appealed in due time to the CFI. The appeal having been given due course, respondent filed an answer with a counterclaim as required by the rules. Because of failure of petitioner to file his reply to the counterclaim within the reglamentary period, upon petition of the respondents, on May 10, 1951, the court declared petitioner in default, and allowed respondent to present his evidence. Respondent correspondingly presented his evidence, and on November 27, 1951, the court decided the case, not only on the counterclaim, but on the main case. Petitioner received copy of this decision on December 3, 1951, and nine days thereafter, or on December 12, 1951, he filed a petition for relief under section 3 rule 38 of the Rules, seeking the nullification of the decision; but, notwithstanding the lack of opposition on the part of respondent, the court denied the petition, and, furthermore, ordered the immediate execution of the decision rendered on November 27, 1951. Having no other plain and adequate remedy to obtan relief, petitioner filed the present petition for certiorari.

HELD: It is apparent that the counterclaim of defendant is directly interwoven with the claim of plaintiff in the sense that one

cannot be decided without the other. Nevertheless, evidence was received on the counterclaim and without waiting for evidence of plaintiff on the main case, the court rendered decision on the merits. Naturally, plaintiff lost. Considering the petition which shows that plaintiff has a good and meritorious defense, and it appearing that petition was filed within the reglamentary period (section 3, rule 38), we are of the opinion that the court erred in not re-opening the case, if for no other purpose, to give an opportunity to the plaintiff to present his evidence on the main case. (JUAN ALCASID *vs.* BENJAMIN LACSAMANA and HON. DEMETRIO B. ENCARNACION, Judge, CFI of Manila, G. R. No. L-5540, promulgated October 31, 1952.)

Relief from Judgments: Filing petition for certiorari does not suspend period for filing motion for relief; reason.

FACTS: Petitioner filed a motion for relief four months after his writ of certiorari to question the order of execution was denied and more than fifteen months after judgment in the principal case had been taken. The court denied the motion. The petitioner now appeals on the ground that the filing of the writ of certiorari stops the running of the period within which a motion for relief can be prayed for.

HELD: The filing of the petition for certiorari in the Supreme Court does not suspend the period for the filing of a motion for relief under Rule 38 of the Rules of Court because the application for certiorari was an independent action, not a part or continuation of the trial which resulted in the rendition of the judgment complained of. And an independent action does not interrupt the course of a cause unless there be a writ of injunction stopping it. The period fixed in Rule 38 is non-extendible and is never interrupted. (PALOMARES *vs.* JIMENEZ, G. R. No. L-4513, January 31, 1952.)

Execution, satisfaction and effect of judgments: a part of a judgment which needs no further proceedings may be executed.

FACTS: Upon a stipulation of facts the CFI of Laguna rendered judgment . . . ordering the partition of the parcels of land between the plaintiffs and the defendants and the latter to pay the former the sum of ₱1,000, the value of ½ of the harvest of the lands in possession of the defendants from 1940 to 1949, together with lawful

interest, and the sum of ₱100 every year thereafter from 1950 until after partition thereof shall have been made. On February 13, 1951 Rosario Arive was notified of the judgment and two days later, or on the 15th, she filed a notice of appeal but failed to perfect it. On April 3, 1951 the plaintiffs prayed for a writ of execution as to that part of the judgment directing the defendant to pay to them the amount of ₱1,000 with legal interest and ₱100 yearly from 1950 until after partition shall have been carried out, with costs. This was granted. Hence this petition is for a writ of certiorari and preliminary injunction filed by the defeated party.

HELD: No appeal having been perfected within the reglamentary period, the judgment referred to became final and executory. A part of the judgment which needs no further proceedings, such as the payment of a sum of money awarded by the court as damages, may be executed after the judgment had become final and executory. (ROSARIO ARIVE *vs.* HON. FILOMEN IBAÑEZ, as Judge of the CFI of Laguna, FLORENCIO CRISOSTOMO and the PROV. SHERIFF of Laguna, G. R. No. L-4809, prom. November 19, 1952.)

Execution, satisfaction and effect of judgments; execution of judgment during period for appeal; how stayed.

FACTS: The city of Baguio obtained a judgment against petitioners to collect certain additional fees by virtue of Baguio city Ordinance Nos. 83 and 118. Pending approval of the record on appeal, the city of Baguio filed a motion for execution. Said motion was denied but the court required the defendants (petitioners herein) to file a bond to guarantee the payment of the amounts awarded in the petition with a warning that failure to do so will cause a writ of execution to immediately issue. Defendants appealed contending that the court exceeded its jurisdiction and committed a grave abuse of discretion in requiring the defendant to put up the bond above mentioned.

HELD: Rule 39, Section 2, of the Rules of Court provides:

"Sec. 2. *Execution discretionary.*—Before the expiration of the time to appeal, execution may issue, in the discretion of the court, on motion of the prevailing party with notice to the adverse party, upon good reasons to be stated in a special order. If a record on appeal is filed thereafter, the special order shall be included therein. Execution issued before the expiration of the time to appeal may be stayed upon the approval by the court of a sufficient supersedeas

bond filed by the appellant, conditioned for the performance of the judgment or order appealed from in case it be affirmed wholly or in part."

Defendants (petitioners herein) were insincere when they made the court to believe that they deposited with the bank the various amounts being claimed by the city of Baguio when the truth was that they did not. These facts may be deemed "good reasons" within the meaning of the above quoted Rule 39, Section 2 of the Rules of Court. (JOSE DE LA ROSA ET AL. *vs.* CITY OF BAGUIO ET AL., G. R. No. L-4955, August 1, 1952.)

Execution, satisfaction and effect of judgments; third party claim filed on time if sheriff still has properties levied upon in his possession.

FACTS: A writ of execution was issued in favor of petitioner ordering the sheriff to sell certain properties levied upon. Three days prior to the sale, a third party claim was filed by GV with the sheriff over the properties about to be sold. The petitioner was notified of this third-party claim and an indemnity bond was demanded from him by the sheriff if he wanted the sale to proceed. Petitioner refused to file any bond, and insisted that the sheriff carry out the sale, contending that the third-party claim was filed too late. As the sheriff desisted from selling the property, the petitioner instituted a petition for mandamus to compel the sheriff to proceed with the execution sale. From a decision of the lower court, dismissing the petition, the petitioner appealed.

HELD: It is contended for the appellant that the third-party claimant should have filed her claim with the sheriff before the latter had made a return of the writ of attachment. This contention is clearly without merit. The provincial sheriff was plainly correct in requiring the appellant to file an indemnity bond, because the third-party claim was filed with the sheriff while he had possession of the properties levied upon, this being the only time limit fixed in said provision. Decision affirmed. (MANGAOANG *vs.* PROVINCIAL SHERIFF, G. R. No. L-4869, Prom. May 26, 1952.)

Execution, satisfaction, and effect of judgments; redemption; who may redeem; Rule 39, *section* 25(*b*).

FACTS: The JP issued in civil case No. 80 an order of attachment against all the properties of the defendant De Guzman. Three days later, the CFI of the province in turn issued in criminal case No. 1096 an order of attachment against all the properties of the accused De Guzman (the defendant in civil case No. 80). Five months later, judgment was rendered in the aforementioned civil case No. 80 against defendant De Guzman, and by virtue of a writ of execution, the dwelling house of De Guzman already levied upon, was sold at public auction. Petitioner (Republic of the Philippines) now seeks to redeem said dwelling house of De Guzman alleging that it was a creditor having a lien by attachment subsequent to that under which the property was sold.

HELD: It is contended for the respondent De Guzman (who was not yet convicted in the criminal case against him at the time the petitioner exercised the right of redemption), that the lien in favor of the petitioner is inchoate, depending upon the result of criminal case No. 1096, since said lien might become effective only in case De Guzman shall have been convicted. Section 25 (b) of Rule 39, however, makes no distinction, the only requirement being that there be a lien by attachment. We should not thus discriminate in favor of an ordinary creditor who sues out an attachment and against a plaintiff in a criminal case who levies upon the property of accused by attachment, because the liens in both cases are inchoate in the sense that they are dependent upon the success of the creditor's civil suit and upon the conviction of the accused in the criminal case.

Counsel for the respondents also urges that the petitioner could not redeem under section 25 (b) of Rule 39, because the order of attachment in criminal case No. 1096, dated May 31, 1949, is anterior to the decision rendered in civil case No. 80 on June 3, 1949. In answer, suffice it to state that, while the attachment in criminal case No. 1096 was issued on May 31, 1949, the attachment in civil case No. 80 was issued on May 28, 1949, with the result that the lien by attachment of the petitioner is subsequent to the lien arising from the attachment in civil case No. 80. (REPUBLIC OF THE PHILIPPINES *vs.* MARIANO NABLE ET AL., G. R. No. L-4979, April 30, 1952.)

Execution, satisfaction, and effect of judgments: no amendment of judgments permitted once they become final.

There can be no amendment of judgments which have become final, no matter how erroneous they may be. (JULIA RABACAL *vs.* PAULINO BERIÑA, G. R. No. L-3776, March 31, 1952.)

Execution, satisfaction, and effect of judgments: Customs Commissioner may not modify final decisions of court.

FACTS: Smuggled jewelry was appraised and a fine imposed by Customs Commissioner in an amount equal to three times the appraised value. On appeal, the CFI of Manila, and later the Supreme Court, affirmed the decision. After promulgation of the Supreme Court decision, Commissioner ordered, upon petitioner's request, a second appraisal which resulted in an amount very much lower than the first appraisal. Order for the execution of the decision based on the first appraisal was issued. Petitioner filed motion for reconsideration calling attention to the second appraisal. Motion was denied and present petition for certiorari and/or prohibition with preliminary injunction was filed.

HELD: Petition denied. Customs Commissioner may not modify final decisions of court. To change the appraisal would necessarily change the amount of fine and consequently modify the final decision. This is not a compromise because litigation has ended. Further, Commissioner has no authority to remit fines and forfeitures. (TRANQUILINO ROVERO *vs.* HON. RAFAEL AMPARO ET AL., G. R. No. L-5482, Prom. May 5, 1952.)

Execution, Satisfaction and Effect of Judgments: What Judgment is Deemed to Include; Mere declaration of ownership does not include possession of property adjudicated.

FACTS: In action for ownership of land filed by Uytem against Jabon, lower court adjudged Uytem the owner of part of said land. Upon finality of decision, writ of execution was issued ordering Jabon to vacate portion adjudicated to Uytem. Defendant refused and plaintiff asked court to declare them in contempt. Lower court denied motion on the ground that the writ was not in accord with dispositive part of decision. More than one year after the decision became final, plaintiff moved that dispositive part of said decision be amended by including order for vacation of premises. Respondent judge entered order amending decision. Question is whether a decision which has become final and executory can still be amended by adding thereto a relief not originally included.

HELD: Rule 39, Sec. 45 provides that "that only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." Mere declaration of ownership does not necessarily include possession of property adjudicated. Person may be declared owner but may not be entitled to possession. Possession may be in the hands of another either as lessee or tenant. (JUAN JABON ET ALS. *vs.* HON. HIPOLITO ALO ET ALS., G. R. No. L-5094, August 7, 1952.)

Appeals: Failure of Appellant to appear at resumption of trial does not operate as a withdrawal of the appeal.

FACTS: This is an action for detainer and collection of rentals due and unpaid. After trial judgment was rendered for the plaintiffs. Defendant filed an appeal setting up illegality of rentals sought to be collected and of the assessed value of the leased premises. Attorney for plaintiffs filed a motion praying for the dismissal of the case for the reason that defendant had vacated the premises on 19 January, 1949 and because she and her attorney failed to appear at the resumption of the trial of the case on 21 January. The court entered an order holding that "her failure to appear and prosecute her appeal is tantamount to a withdrawal of said appeal", and that "the appeal is considered withdrawn, the judgment of the Municipal Court is deemed revived."

HELD: When the defendant or her attorney failed to appear at the resumption of the trial on 21 January, 1949, the court could not dismiss the appeal because it was not authorized to do so, but was in duty bound to hear the evidence of the plaintiffs and render judgment thereon unless for good reasons it deemed it justified to postpone the hearing of the case. The failure of the defendant or her attorney to appear at the resumption of the trial of the case could not be deemed a withdrawal of her appeal. And as there are no findings of facts upon which a judgment may be based and rendered, the order of 21 January, 1949 is not, and cannot be deemed a judgment of the case on the merits.

As the appellant did not withdraw the appeal, there was no withdrawal thereof. The appellees could not ask for the withdrawal of the appeal because it was not their appeal and could not ask for the dismissal of the case because, if granted, they would have been left without a judgment. (EUGENIO EVANGELISTA and SIMEON EVANGELISTA *vs.* BRIGIDA SORIANO, G. R. No. L-4625, October 29, 1952.)

Appeals: Appeal from an Order of the Municipal Court Denying

Defendant's Motion to Quash the Order of Execution; When Order Is Deemed Final.

FACTS: After the defendant answered plaintiff's complaint, both parties agreed to a stipulation of facts upon which the court rendered its decision. The court granted the plaintiff's petition for execution of judgment. Defendant moved to quash the writ of execution alleging it was improperly issued. Motion denied. From this order of denial, defendant perfected his appeal to the Court of First Instance, Manila. Plaintiff moved to dismiss the appeal contending that said order of denial is unappealable. Motion granted. Defendant appealed after his motion to reconsider was denied.

HELD: The only question is: does an appeal lie from an order of the municipal court denying defendant's motion to quash the order of execution? Sec. 1, Rule 40, Rules of Court: Who may appeal—"Either party to an action may appeal from a judgment rendered by an inferior court to the C.F.I. of its province where the judgment was rendered". In Monte de Piedad vs. Dagonoy, 40 O. G. 1456, June 20, 1941 we held that an appeal may lie not only from a final *judgment* of an inferior court, but also from an *order,* if it is final in character. An order is deemed final when it finally disposes of the pending action so that nothing can be done with it in the lower court; a final order is that which gives an end to the litigation. In our opinion the order denying the defendant's motion to quash the writ of execution is final because it leaves nothing to be done in the inferior court with respect to the merits of the case. Hence it is appealable. (CLEMENTE REYES under trade name of Phil. Auto Supply Co. *vs.* DE LEON under trade name of Tropical Auto Supply, G. R. No. L-3720, June 24, 1952.)

Judgment on One of Two Petitions for Review Involving the Same Parties and Same Cause Renders the Other Moot; Defense of Moratorium may be Waived.

FACTS: In an action for damages against defendants, CFI of Manila rendered judgment in favor of plaintiff. Judgment was affirmed by Court of Appeals. Subsequently, two defendants filed separate petitions for review and given due course separately. The first petition was affirmed in *toto,* and a subsequent motion for reconsideration was denied. Petitioner herein alleges that there is final judgment against him yet because his (second) petition for review was still pending in Supreme Court, and also invoked defense of moratorium.

HELD: It appearing that the judgment of the Court of Appeals was affirmed in *toto* in one of two petitions, the other petition is now moot. With regard to moratorium, petitioner already waived the same, inasmuch as said petitioner never invoked the privilege during all the time its appeal was pending in this Court, or for a period of two years. (LUZON SURETY COMPANY, INC. *vs.* HON. POTENCIANO PECSON, MACARIO OFILADA, and CASIMIRO TAMPARONG, G. R. No. L-4416, Prom. May 12, 1952.)

Appeals: Effect of failure to perfect appeal during prescribed period.

FACTS: This is an appeal by certiorari from an order of the Court of Appeals dated June 11, 1951, denying the motion filed by appellee wherein it is prayed that the appeal interposed by appellant in said case be dismissed on the ground that the same was not perfected within the period of appeal.

HELD: Although the filing of a record on appeal in this case is not necessary inasmuch as the original record of the case is the one to be transmitted to the appellate court, the fact remains that the appeal was perfected out of time, and such failure takes the case out of the jurisdiction of the court as can clearly be inferred from section 13, rule 41, which provides that when the appeal is not perfected within the reglamentary period, the appeal shall be dismissed.

The claim that the motion to dismiss the appeal filed by petitions in the Court of Appeals comes too late, while his failure to file it in the court of origin before the transmittal of the record to the appellate court constitutes a waiver on his part to interpose such objection, is untenable. The requirement regarding the perfection of an appeal within the reglamentary period is not only mandatory, but jurisdictional. Such failure has the effect of rendering final, the judgment of the court, and the certification of the record on appeal thereafter, cannot restore the jurisdiction which has been lost.

This dismissal can be effected even after the case has been elevated to the Court of Appeals (section 1(a), rule 52).

The resolution of the Court of Appeals entered on June 11, 1952, is set aside. (ALFREDO MIRANDA, Petitioner *vs.* DAVID GUANZON ET AL and COURT OF APPEALS, G. R. No. L-4992, October 27, 1952.)

Appeals: when supersedeas bond has been filed, execution is stayed, except when compelling reasons justify execution.

FACTS: This is a special civil action of certiorari to annul and set aside an order for immediate execution, petitioners contending, that after the filing of the supersedeas bond, the execution of the judgment could not be justified by the reason expressed in the order, i.e. that the property could be better preserved or protected in the possession of the plaintiff. It is against this order that the present action is filed.

HELD: The execution of a judgment is stayed by the perfection of an appeal. While provisions are inserted in the Rules to forestall cases in which an executed judgment is reversed on appeal, the execution of the judgment is the exception, not the rule. And so execution may issue only "upon good reasons stated in the order." It follows, that when the court has already granted a stay of execution, upon the adverse party's filing a supersedeas bond, the circumstances justifying execution in spite of the supersedeas bond must be paramount; they should outweigh the security offered by the supersedeas bond. In this last case, only compelling reasons of urgency or justice can justify the execution.

The good reason stated in the order is the preservation of the property, but the court could not understand how and why they should be better preserved if in the hands of the administrator.

The judgment shows that the lands are in the hands of possessors in good faith having already titles thereto.

The court ruled that the execution of the judgment, after giving of the supersedeas bond, cannot be justified, there being no urgent or compelling reasons for granting the same, and therefore the execution was granted with grave abuse of discretion.

Petition granted. (ROBUSTIANO CARAGAO *vs.* HON. CIRILO C. MACERON, G. R. No. L-4665.)

Appeal from Public Service Commission: principle of non-interference.

The principle of non-interference by the Supreme Court with findings of fact by Public Service Commission unless there is no evidence to support reasonably said findings was reaffirmed. (ZAMBOANGA TRANS. ET AL. *vs.* ERNESTO FARGAS, G. R. No. L-4604, March 28, 1952.)

Appeals: Questions of Unconstitutionality of an Act or Law Cannot be Raised for the First Time on Appeal.

FACTS: Plaintiff filed an action on January 16, 1947 to compel the PNB to redeem some circulating notes in his possession for actual legal currency. After hearing, the lower court rendered on August 11, 1948, a decision dismissing the complaint, without prejudice to the right of the plaintiff to present such bills in his possession to the city treasury of Cebu as may be redeemable in accordance with the provisions of Republic Act No. 211. From this decision, the plaintiff appealed and assailed the constitutionality of the said Republic Act No. 211.

HELD: The question of constitutionality cannot be raised for the first time on appeal. It is true that at the time the complaint was filed, and during the trial, Republic Act No. 211 was not yet in existence, but the appellant could have attacked its constitutionality in a motion for reconsideration or new trial in the lower court, especially because the appealed decision was solely based thereon. Decision affirmed. (ALONSO *vs.* PNB, G. R. No. L-4132, Prom. May 23, 1952.)

Appeals: Where Appeal Involves Both Questions of Fact and Law.

FACTS: Appellants filed application in Court of First Instance of Baguio for registration of a parcel of land. Director of Lands and city of Baguio opposed on ground that land was part of the public domain and inside the Baguio townsite which was declared public land in a previous decision rendered by same court. Application denied. Applicants appealed claiming lower court erred in holding that land applied for was not all cultivated and that Wakat Suello lost his right to the land for failure to apply in due time for the reservation of his right, despite the fact that there was no evidense to show that notice, as required by Act 926, was served personally on him.

Appellants claim that their predecessor in interest had open, public and adverse possession as owners of land in question continually since 1895 to the present; that they had planted, fenced, and used the land. Government however claims there is no evidence to show appellant's public and continuous possession under *bona fide* ownership since July 26, 1894.

HELD: Land applied for being inside the Baguio townsite which

was declared public land in previous decision of the lower court, there was need under Sec. 3 of Act 627 of filing a claim for such land within six months from notice to be served personally by the clerk of court upon the claimant. Appellant claims such notice was not served. Government claims it was.

Questions involved in this appeal being both of fact and law, the case is remanded to the Court of Appeals. (ANGIN CANDO ET AL. *vs.* BUREAU OF LANDS, G. R. No. L-3948, August 18, 1952.)

PROVISIONAL REMEDIES

ATTACHMENT

Right of Attaching Creditor is not Affected by Repurchase, after the Period for Repurchase, by the Vendor a retro.

FACTS: Delfina Tria bought from Alano parcels of land under pacto de retro which would be redeemed within four years. He failed to repurchase within the period. After the period had elapsed petitioners secured an attachment of all the property of Tria. Subsequently, respondent repurchased the lands in question from Tria. Respondent refuses to deliver the possession of said property to petitioner, hence this action. The lower court denied the petition. The Court of Appeals affirmed this decision.

HELD: The resale of the attached property or other disposition by the vendee to the vendor a retro after the expiration of the period of repurchase and subsequent to the attachment does not affect the rights of the attaching creditor for the reason that the purpose of the attachment is to prevent the disposition of the property during the pendency of the case. (CIRIACO CHUNACO *vs.* MAMERTO ALANO, G. R. No. L-4046, January 23, 1952.)

INJUNCTION

Lawful possession, not mere physical or material possession must be alleged in a complaint for preliminary injunction.

FACTS: Plaintiff filed a complaint alleging that he is entitled to the possession of certain lots of the Dinalupihan Estate and that the defendant has been illegally leasing said lots to certain persons. However, plaintiff failed to allege the manner of the acquisition of his alleged right to possession. Defendant in its answer attached a copy of the Torrens title covering said parcels of land, issued in the name of the Monte de Piedad and Savings Bank, which sold said lots to the defendant. Defendant likewise filed a motion to dismiss, which the plaintiff opposed. The judge ordered the plaintiff to amend his complaint or, if he failed to do so the complaint would be dismissed. Plaintiff failed to amend his complaint.

HELD: In a complaint for preliminary injunction, it is not sufficient to allege that the plaintiff is in actual physical or material possession of certain parcels of land and that his possession has been or is disturbed by defendant, in order to entitle the plaintiff to have such possession be protected by the court. Plaintiff must further allege that he is in lawful possession of the parcels of land. If the plaintiff predicates his right upon acquisition of title to a parcel of land by adverse possession, he must allege such adverse possession in the complaint. But adverse possession cannot be pleaded in complaint if the land is covered by a Torrens title in the name of another because land covered by a Torrens title cannot be acquired by adverse possession. Such lawful possession may be enjoyed by the owner, tenant, usufructuary, usuary, emphyteuticary, antichretic creditor, the creditor in a contract known as *foros*, guardian, trustee, executor, administrator of the estate of a deceased or absentee, or by a person to whom the possession of the land was lawfully transferred. (RUFINO DIMSON *vs.* RURAL PROGRESS ADMINISTRATION, G. R. No. L-3783, January 28, 1952.)

Injunction may issue against third party defendant to prevent him from intrusion into property disputed by plaintiff and defendant.

FACTS: Plaintiffs filed an action for the reconveyance of a parcel of land. Defendant filed a third-party complaint praying that one DB be made party defendant because of the fact that he is illegally interfering with the possession of the property and asking that a writ of preliminary injunction be issued against him. The court issued the writ. Plaintiffs ask for the dissolution of the writ of preliminary injunction issued by the court for the reason that it has been improperly issued. This is denied by the court.

HELD: The preliminary injunction is directed not against the

plaintiffs but against one DB. Upon the strength of the allegations both of the complaint and the answer, the possession of the property seems to be disputed only by plaintiffs and the defendant, so that DB appears to be merely an intruder. Such being the case, we are of the opinion that the lower court acted properly when it issued the preliminary injunction now disputed by the plaintiffs, it being a well-known rule that the purpose of this provisional remedy is to preserve the *status quo* of the things subject of the action or the relation between the parties, in order to protect the rights of the plaintiff respecting the subject of the action during the pendency of the suit. (VICENTE ROSARIO and MARIA GOMEZ *vs.* HON JUDGE SEGUNDO MARTINEZ ET AL., G. R. No. L-4473, September 30, 1952.)

Where the main issue is ownership and possession, prayer for injunction is not proper before such issue is decided; injunction proper after plaintiff is declared entitled to possession and ownership.

FACTS: Respondents brought action to recover possession of land from petitioner and asked for a writ of preliminary injunction to restrain petitioner from tilling the land. Judgment on the merits was rendered in favor of respondents and granting the writ, although the judgment was not yet final because petitioners were appealing. Hence this petition for certiorari.

HELD: The rule that a preliminary injunction should not be granted to take property out of the possession of one party to place it in the hands of another whose title has not been clearly established applies to a situation where the main issue is the ownership and possession of the property and the relief was prayed for before the issue had been decided on the merits; but does not apply to a case in which injunction is issued after plaintiffs have been declared to be entitled to the possession and ownership of the property. (TRANQUILINO CALO *vs.* JUDGE ORTEGA, G. R. No. L-4673 and 4675, January 25, 1952.)

Injunction not proper if it would prevent corporation meetings and transaction of business.

Injunction does not lie to restrain the voting of majority shares if such injunction would prevent a corporation from holding meetings and transacting its business. (TALISAY-SILAY MILLING CO., *INC. vs.* [illegible] ET AL., G. R. No. L-4579, March 31, 1952.)

RECEIVERS

Obligations entered into by receiver without approval of court not valid.

A receiver, like an administrator or a guardian, cannot function independently of the court. Obligations incurred are subject to the control of courts; without their approval or authority, he cannot perfect any contract.

Sec. 7 (3 and 4), Rule 61, Rules of Court applied. (IGNACIO CRUZ ET AL. *vs.* HON. DEMETRIO ENCARNACION ET AL., G. R. No. L-4709, August 29, 1952.)

DELIVERY OF PERSONAL PROPERTY

Return of property; counterbond; sufficiency thereof when filed by the Government.

HELD: A certificate of the municipal treasurer making available a certain sum of money (in lieu of a counterbond) to satisfy the judgment that may be rendered in favor of the plaintiff is a substantial compliance with the rule with the particularity that the undertaking involves a cash liability affecting public fund. Moreover, this suit is in effect a suit against the Insular Government, involving as it does insular funds, and under the law the government is exempt from filing a bond. (QUINTIN CHAN *vs.* HON. FIDEL VILLANUEVA ET AL., G. R. No. L-5420, April 30, 1952.)

Return of Property; Time within which defendant may require return; computation of period.

FACTS: Petitioner filed an action against respondent MF in his capacity as Acting District Engineer, for the delivery by the latter to the former of certain chattels with a prayer for the issuance of a writ of preliminary attachment. Bond having been put up by petitioner, the writ was issued directing the provincial sheriff to take into his custody the chattels subject of the controversy. This was done on December 27, 1951, after serving copy of the writ on respondent MF. At 4:45 p.m. on January 2, 1952, respondent MF filed a motion for the return of the property to him attaching thereto

a certificate of the municipal treasurer of municipality A in lieu of the counterbond required by the Rules of Court. Petitioner opposes this motion.

HELD: Petitioner contends that respondent failed to put up the required counterbond within the period of five (5) days fixed by the Rules of Court. (Sec. 6, Rule 62 in collection with Sec. 5)

Ordinarily, the 5-day period counted from December 27, 1952 should end on January 1, 1952, but as the latter day was a legal holiday, the legal period has to be extended to the next succeeding day, or January 2, 1952 as required by law (sec. 29, 31, Rev. Adm. Code).

It is true that the counterbond put up by the defendant was filed with the clerk of court only at 4:45 in the afternoon of January 2, 1952, i.e. after the closing of the official hours observed in the government service. But, this is of no moment considering that under the law a day shall be understood to have 24 hours, or up to 12:00 o'clock at night (Art. 13, Rev. Adm. Code; art. 13, new Civil Code). (QUINTIN CHAN *vs.* HON. FIDEL VILLANUEVA ET AL., G. R. No. L-5420, April 30, 1952.)

CONTEMPT

Effect of appeal from order of court on failure to comply with such order; nature of power to punish for contempt; how exercised.

FACTS: Petition for certiorari with injunction with habeas corpus. In a previous action, herein petitioner was adjudged to comply with the court order within 24 hours, to which order said petitioner had appealed. Upon failure to comply, he was committed to jail, hence, this petition.

HELD: Respondent judge committed an abuse of discretion. Petitioner believed in good faith that he was not duty bound to comply because he had appealed. Court should be slow in jailing people for non-compliance with their orders. Only in cases of clear refusal to obey should this power be exercised because such power is drastic and extraordinary in nature. It should be exercised on the preservative and not on the vindictive principle. (PEDRO GAMBOA *vs.* HON. JOSE TEODORO, JOSE AZCONA, and GERONIMO FLORES, G. R. No. L-4893, Prom. May 13, 1952.)

Failure to appear on the date set for trial due to unavoidable circumstances not "willful disrespect of the court's order" as to constitute contempt.

FACTS: This is an appeal from an order of the Court of First Instance of Negros Occidental declaring the defendant-appellant guilty of constructive contempt for failure to appear at the trial of a case set on July 16, 1948. Defendant explained that he took a plane for Manila on the morning of July 13th with the intention of returning to Bacolod on the day of the trial but was unable to come back in time for said trial; that he had sought audience with the President of the Philippines, but failed to see the latter on the afternoon of the 15th, and was, therefore, compelled to see him on the morning of the 16th, the date of the trial in Bacolod, which explanation the trial court found unsatisfactory and declared the defendant in contempt.

HELD: Failure of defendant to appear was not motivated by a desire to disobey willfully the court's order, or to disregard or despise its authority, but was due to unavoidable circumstances arising from his desire to pursue certain legal remedies with a view to getting what he considered a more impartial judge to hear his case. Judgment reversed. (PEOPLE *vs.* RIVERA, G. R. No. L-3646, Prom. May 26, 1952.)

SPECIAL CIVIL ACTIONS

CERTIORARI

Certiorari an independent action: certiorari does not interrupt period for filing motion for relief from judgment.

FACTS: Petitioner filed a motion for relief four months after his writ of certiorari to question the order of execution was denied, and more than 15 months after judgment in the principal case had been taken. The court denied the motion. The petitioner now appeals on the ground that the filing of the writ of certiorari stops the running of the period within which a motion for relief can be prayed for.

HELD: The filing of the petition for certiorari in the Supreme

Court does not suspend the period for the filing of a motion for relief under Rule 38 of the Rules of Court because the application for certiorari was an independent action, not a part or continuation of the trial which resulted in the rendition of the judgment complained of. And an independent action does not interrupt the course of a cause unless there be a writ of injunction stopping it. The period fixed in Rule 38 is non-extendible and is never interrupted. (PALOMARES *vs.* JIMENEZ, G. R. No. L-4513, January 31, 1952.)

Denial of motion to present evidence of want of intent to defraud creditors, after issuance of writ of attachment, an abuse of discretion.

FACTS: The herein petitioner-corporation filed in the lower court a motion to discharge the writ of attachment issued against it on the ground that the proposed sale of petitioner's oil well as advertised in the newspapers was in order to prevent its being deteriorated. The motion was denied, and so was the motion for reconsideration which was subsequently filed by petitioner. In this petition for certitiorari petitioner contends that the respondent judge erred in not allowing the corporation at least to prove at a preliminary hearing, its want of intent to defraud its creditors.

HELD: The respondent judge having issued the writ of preliminary attachment and denying the motion of petitioner to present evidence that the facts stated in the respondent's affidavit are false, abused its discretion and therefore certiorari will lie against the respondent judge. The advertisement in the newspaper of the sale of petitioner's property to prevent deterioration is proof of absence of intent to defraud petitioner's creditors. (NATIONAL COCONUT CORPORATION *vs.* JUDGE PECSON, G. R. No. L-4296, February 25, 1952.)

Negligence in Filing of Petition for Certiorari; Legal Presumption that Official Duty has been Regularly Performed.

FACTS: In February, 1946 Civil Case No. 46 was tried by the Court of First Instance of Camarines Sur with Judge P.L. presiding. Judge P.L. was transferred to Court of First Instance, Albay without having decided the case. Upon plaintiff's motion, former Judge P.L. returned the records of the case containing his decision dated June 27, 1946. On September 12, 1946, defendant moved to vacate the judgment and prayed for new trial. Motion denied November, 1946. In 1951 defendant petitioned for certiorari to set aside the

judgment of Judge P.L. and the subsequent order of execution issued by the new judge. Petitioner's theory: P.L. was no longer the judge of Camarines Sur and his appointment was rejected by the Commission on Appointments on July 9, 1946.

HELD: Administrative Order No. 127 of the Department of Justice of June 6, 1946 authorized judge P.L. to hold court from June 25 to 30, 1946. Apart from the legal presumption that the official duty had been regularly performed, the accuracy of the certification, that the decision in question was signed by judge P.L. and was promulgated on June 27, 1946, has been unassailed by the petitioner. Moreover, there was too much negligence or indifference on the part of the petitioner when he filed his petition for certiorari and prohibition about five years after his motion of Sept. 12, 1946 was denied. (VICENTE FLORDELIZA *vs.* BERNABELA FLORDELIZA, G. R. No. L-4987, June 30, 1952.)

PROHIBITION

Petition for Prohibition Dismissed when Petitioner has Another Remedy; Section 2, Rule 67, Rules of Court.

FACTS: CM (petitioner) applied for a homestead patent over a parcel of land. The respondents opposed. The Director of Lands overruled the opposition and adjudged the land to CM. The respondents then appealed to the respondent Department Head who dismissed the appeal. Subsequently, upon application of the respondents, the respondent Department Head reinstated the appeal and decided the same by ordering the Director of Lands to have the case re-investigated and to decide the case anew. Hence, this petition to prohibit the respondent Department Head and his subordinates from proceeding further in the case.

HELD: The official acts of the respondent Department Head came within the purview of the administrative rule of the Department of Agriculture and Natural Resources which provides that a party may be relieved from a "decision . . . taken against him through his mistake, inadvertense, surprise, feature, this rule is a neglect; . . ." In its equitable feature, this rule is a counterpart of Rule 38 of the Rules of Court affording relief against fraud, accident, mistake, or excusable neglect.

The petitioner knows, or ought to know, that when relief is granted under Rule 38 by an inferior court, no appeal lies to this court, nor is certiorari permissible inasmuch as the aggrieved party may still appeal, should he finally lose in the new hearing which the order, granting relief, directs. In other words, such aggrieved party has another remedy. With reference to the instant case, the "other" remedy of petitioner is to appear at the re-investigation, protect his interests therein, and thereafter, if the Director of Lands decides against him, to appeal to the Department. (CUSTODIO MARI *vs.* SECRETARY OF AGRICULTURE AND NATURAL RESOURCES ET ALS., G. R. No. L-5622, December 29, 1952.)

MANDAMUS

Action not based on contractual relation but in duty imposed by law is that of mandamus; mandamus will not lie where duty imposed by law is discretionary.

HELD: The action cannot be for specific performance because it is not based on any contractual relation. It is in effect predicated on a legal duty imposed by law and is properly designated as a special civil action of mandamus because R.D. seeks to compel the R.F.C. to accept his backpay certificate in payment of his debt. But mandamus will not lie because the duty imposed by the Backpay Law upon the R.F.C. as to the acceptance or discount of backpay certificate is neither clear or ministerial, but discretionary merely, and that mandamus does not issue to control the exercise of discretion of a public officer. (RAMON DIOKO *vs.* REHABILITATION FINANCE CORPORATION, G. R. No. L-4712, July 11, 1952.)

EMINENT DOMAIN

Damages caused before commencement of condemnation proceedings must be included in such proceedings; effect of failure to include.

All claims for compensation based on damages caused before the commencement of the suit for condemnation may be included in the condemnation proceedings themselves, otherwise the filing of separate suits for said past damages, especially by numerous real property owners, would result in a great multiplicity of suits. (PHIL. OIL OEVELOPMENT CO., INC. *vs.* ADELESO GO, G. R. No. L-4007, January 23, 1952.)

Expropriation: Testimonies as to mere offers of purchase as evidence of value not admissible.

FACTS: In an expropriation proceedings, the commissioners admitted testimonies on alleged offers of purchase as evidence of value. Both plaintiff and defendant objected to the commissioner's report as to the value of the property sought to be expropriated. Plaintiff filed a motion to set aside the commissioner's report and to have a new set of commissioners appointed. Denying the plaintiff's motion, the court rendered judgment, modifying the report of the commissioner. Contending that the lower court erred in repudiating the report of the commissioners and substituting its own criterion without any showing that the commissioner had committed a palpable error, the defendant appealed.

HELD: The criticism is groundless. The commissioners made an obvious mistake in giving weight to the testimony on alleged offers of purchase as evidence of value which are not admissible in expropriation proceedings. (CITY OF DAVAO *vs.* DACUDAO, G. R. No. L-3741, Prom. May 28, 1952.)

FORECLOSURE OF MORTGAGE

Act 3135 *as amended by Act* 4118*; Remedy of creditor who purchases mortgaged property sold at foreclosure of mortgage.*

FACTS: Upon the failure of the mortgagor to pay the debt on time, the mortgagee requested the sheriff to sell the house given as a chattel mortgage. At the sale, the mortgagee bought the house. The redemption period expired but mortgagor refused to surrender possession. Mortgagee petitioned the Court of First Instance praying that the provincial sheriff be authorized to place her in possession, invoking Act 3135 as amended by Act 4118. The mortgagor opposed, alleging that the Act invoked refers to real estate mortgage

not chattel and even if it were a real estate mortgage, the sale by the sheriff is invalid because the mortgage did not authorize the mortgagee to sell the house extra-judicially.

HELD: The undertaking was a chattel mortgage. Mortgagee made a mistake in considering it under Act 3135 as amended by Act 4118 when she requested the sheriff to sell it extra-judicially. Act 3135 refers only to real estate mortgage and is intended to regulate the extra-judicial sale of mortgaged property if the mortgagee is authorized to do so. These conditions do not obtain here because the mortgage was not a real estate mortgage, nor does it authorize the mortgagee to sell extra-judicially. But the sale is valid under Chattel Mortgage Law, Act No. 1508. Sec. 14 of Act 1508 allows the mortgagee to have the mortgaged property sold at public auction. Supposing the law was complied with, if the debtor-mortgagor refuses to give up possession, the remedy is to bring an ordinary action for recovery of possession. The creditor cannot merely file a petition for writ of possession. An ordinary action for recovery of possession must be filed to afford the debtor the opportunity to be heard not only regarding possession but also as regards the obligation covered by the mortgage. (JOSE A. LUNA *vs.* JUDGE DEMETRIO ENCARNACION ET ALS., G. R. No. L-4637, June 30, 1952.)

PARTITION OF REAL ESTATE

Partition in accord with terms of compromise agreement and not in conflict with the judgment or the law.

Where the proposed partition is in accordance with, and carries out tht intent of the parties as agreed upon in a compromise, and does not either conflict with the judgment or with provisions of laws, it should be approved. (JULIA RABAGAL *vs.* PAULINO BERIÑA, G. R. No. L-3776, March 31, 1952.)

FORCIBLE ENTRY AND DETAINER

Nature of ejectment cases; effect of judgment thereon on strangers to the action.

In forcible entry and detainer cases or cases over the possession of property, the action is *in personam;* as such, judgment cannot affect strangers to the action, as a possessor in good faith of the property in question. Sec. 44 (b), Rule 39, Rules of Court, applied. (CATALINO GALANG ET AL. *vs.* MANUEL UYTIEPO and PEDRO GAMBOA, 48 O. G. No. 12, 5256, December 17, 1952.)

An ordinary action cannot be converted into a suit for ejectment by defendant merely by asking for possession in his counterclaim.

FACTS: Petitioner JF brought this action to have a deed of sale of a shipyard, executed by him in favor of the Japanese Imperial Navy, declared null and void and the shipyard transferred to him upon payment of the sum tendered by him. Answering the complaint, defendants, in their second counterclaim, asked for the possession of the said shipyard.

HELD: Although the case between JF and the defendants naturally and eventually involves possession, still, the real and immediate question in issue is ownership of the shipyard. JF insists that he exercised his right of option and so became the owner of the shipyard, and that since he also insists that the deed of sale of his rights to the shipyard to the Japanese Imperial Navy should be declared null and void because it was involuntary, he is still the owner of the shipyard, subject to the completion of the purchase price of which, according to him, he had made valid tender.

A defendant in a case like the present involving title to property, may not convert it into a suit for ejectment or illegal detainer by merely asking for possession of the property by means of a counterclaim. (JOSEPH FELDMAN *vs.* HON. DEMETRIO B. ENCARNACION, RAMON L. CORPUS, ET ALS., G. R. No. L-4494, September 24, 1952.)

Right of public land applicant to bring action; power of public lands department limited to disposition and alienation.

FACTS: Plaintiff filed an application for a parcel of public land. The Bureau of Lands acknowledged receipt of his application which was given due course for investigation. Thereupon, plaintiff constructed on the land a house and introduced other improvements upon the same. He placed one C in charge of the house, but, when C left it, defendant demolished the house and built on the land one of his own. Hence, this action of forcible entry. The Bureau of Lands had not yet made an award of, or authorized an entry into,

the public land. Defendant contends that as the administrative disposition and control of public lands is vested exclusively in the Lands Department, cognizance of the forcible entry action constitutes prejudicial interference with the said administrative functions, because there is an administrative case pending in the Bureau of Lands between the same parties over the same land.

HELD: The grant of power and duty to the Lands Department to alienate and dispose of public lands does not divest the courts of their duty or power to take cognizance of actions instituted by applicants against others to protect their respective possessions and occupations, more especially the actions of trespass, forcible entry, and unlawful detainer, and that the exercise of such jurisdiction is no interference with the alienation, disposition, and control of public lands. The power of the Lands Department is clearly limited to *disposition and alienation,* and while it may decide conflicts of possession in order to make proper award, the settlement of conflicts of possession which is recognized in the courts herein has another ultimate purpose, i.e., the protection of actual possessors and occupants with a view to the prevention of breaches of the peace.

Even pending the investigation of, and resolution on, an application by a *bona fide* occupant, such as plaintiff-appellee herein, by the priority of his application and record of his entry, he acquires a right to the possession of the public land he applied for against any other public land applicant, which right may be protected by the possessory action of forcible entry or by any other suitable remedy that our rules provide. (ANDRES PITARGUE *vs.* LEANDRO SORILLA, G. R. No. L-4302, September 17, 1952.)

Writ of execution in ejectment cases includes both possession and rents due.

FACTS: Plaintiff F. brought ejectment case against the Inler Southern Colleges. Municipal Court rendered judgment in plaintiff's favor. Defendant appealed. Subsequently, respondent judge issued of execution of judgment of lower court for failure to file a supersedeas bond and to pay the rentals that had accrued up to that date. On motion of defendant, respondent judge issued new order to the effect that the execution referred only to the delivery of possession to the petitioner and not to the collection of rentals in arrears.

HELD: Sec. 8 of Rule 72, does not limit execution to the possession of the property in question. It refers to the whole judgment,

both for possession and collection of the money judgment, rendered by the J.P. or the Municipal Court. (FRANCISCO R. VILLAROMAN *vs.* HON. JUDGE GAVINO S. ABAYA, G. R. No. L-4833, March 21, 1952.)

Immediate execution of judgment; Section 8, Rule 72.

FACTS: Plaintiff (petitioner herein) brought an action for detainer and recovery of rentals against the defendants (respondents herein). The municipal court rendered judgments in favor of the plaintiff. From said judgments, defendants appealed to the CFI. Subsequently, plaintiff filed in said appealed cases motions for execution on the ground that defendants failed to take the proper steps required by sec. 8, rule 72, Rules of Court, to stay the same. Defendants objected to the motions for execution on the ground that there was a pending action in the CFI for reimbursement of the value of improvements erected by them on the leased premises (subject-matter of the detainer case). The motions for execution were denied by the lower court (CFI) on the grounds advanced by defendants. Hence, this petition for certiorari. However, during the pendency of this case, the defendants filed a motion praying that the petition be dismissed on the ground that the CFI had dismissed the appealed detainer cases and rendered judgments for the defendants.

HELD: For failure of the defendants to comply with the provisions of sec. 8, Rule 72, Rules of Court, with respect to staying immediate execution of a judgment in an illegal detainer case, the plaintiff would be entitled to have the judgments rendered by the municipal court executed. Mandamus would lie to compel the Court to issue a writ of execution. But the detainer cases having been disposed of against the petitioner—the plaintiff herein—by the CFI on appeal, there is no legal way of annuling the order denying the motion for execution and of directing the respondent court to issue a writ of execution because the judgments for which execution was asked were reversed by a higher court on appeal. (JOHN F. GOTUACO *vs.* HON. HIGINIO MACADAEG ET AL., G. R. No. L-4512, September 30, 1952.)

Stay of Execution of Judgment Pending Appeal; Period within which to Pay the Rentals during the Pendency of an Appeal.

FACTS: In an action for forcible entry and detainer, judgment

was rendered by the municipal court against respondent-defendant ordering him to vacate plaintiff-petitioner's premises. Respondent appealed to the CFI and during the pendency of his appeal he deposited in court the required monthly rentals. Subsequently, petitioner filed a motion for execution of the judgment, alleging failure of the respondent to pay rents "in advance on or before the fifth day of each month" as stipulated under the lease contract he had with the petitioner.

HELD: To stay the execution of the judgment in an action for forcible entry and detainer pending an appeal, the defendant, among other things, must pay during the pendency of the appeal "the amount of rent due from time to time under the contract, if any, as found by the judgment of the justice of the peace or municipal court to exist, or, in the absence of a contract he pays to the plaintiff or into the court, on or before the tenth day of each month, the reasonable value of the use and occupation of the premises . . ." (Sec. 8, Rule 72, Rules of Court)

The judgment of the municipal court attached to the petition did not declare that a contract of lease existed between the parties. Neither did it declare that under the terms of such contract the rents were payable within the first five days of the month in advance.

Where the time for payment under the contract of lease is not specifically declared in the judgment of the justice of the peace or municipal court, the ten-day period must be followed. (YU PHI KHIM *vs.* TENG GIOK YAN ET AL., G. R. No. L-5441, November 29, 1952.)

SPECIAL PROCEEDINGS

SETTLEMENT OF ESTATE OF DECEASED PERSON

Summary Settlement of Estate. Sec. 1, Rule 74 not mandatory; heirs may institute administration proceedings in lieu of ordinary action for partition.

FACTS: This is a petition for certiorari seeking to nullify the order of respondent Judge wherein after overruling the opposition to the institution of the intestate proceedings of the late Flaviano Rodriguez, he appointed Abelardo Rodriguez (one of the heirs)

administrator of the estate. Petitioners objected to the appointment of the administrator, invoking Sec. 1, Rule 74 of the Rules of Court, which states that if the estate is free from obligations and the heirs are all of age, no administration proceedings shall be allowed.

HELD: Is the pattern laid down in section 1, Rule 74 of the Rules of Court, mandatory upon the heirs? Should the heirs be unable to agree on the settlement of the estate, do they have to resort necessarily to an ordinary action of partition? May they not chose to institute administration proceedings? Said section 1 does not preclude the heirs from instituting administration proceedings, even if the estate has no debts and obligations, if they do not desire to resort, for good reasons, to an ordinary action of partition. Said section is not mandatory or compulsory as may be gleaned from the use made therein of the word *may*. (FORTUNATA VDA. DE RODRIGUEZ ET AL. *vs.* HON. BIENVENIDO TAN, *Judge of the CFI of Rizal,* and ABELARDO RODRIGUEZ, G. R. No. L-6044, promulgated November 24, 1952.)

Allowance or disallowance of will; defect due to failure to comply strictly with law in taking deposition may be waived by adverse party.

The deposition of one of the instrumental witnesses was taken because he was then suffering from paralysis and was thus physically incapacitated to appear and testify in court and while the taking of the deposition was not made in strict compliance with the rule (Section 11, Rule 77), the deficiency, if any, has been cured by the waiver evinced by counsel for the oppositors which prevented the court from constituting itself in the residence of the witness. (In Re Petition for the Probate of the Will of the Deceased DA. LEONA SINGSON, G. R. No. L-4603, October 23, 1952.)

Special Administrator: A Special Administrator cannot be appointed when there is a regular Adminisrator except when the latter has a claim against the estate he represents.

FACTS: In a special proceeding case, petitioner was appointed administratrix of the testate estate of FR. Later on the court issued an order appointing RR as administrator in substitution of petitioner, from which order the latter appealed. During the pendency of the appeal, the court appointed the Equitable Banking Corporation as Special Administrator. Upon denial of her motion for

reconsideration, the petitioner instituted a petition for certiorari.

HELD: The respondent Judge exceeded his jurisdiction in appointing a special administrator. The cases in which a special administrator may be appointed as specified in Sec. 1 of Rule 81 and Sec. 8 of rule 87 of the Rules of Court are: when there is delay in granting letters testamentary or of administration occasioned by an appeal; or when the executor or administrator has a claim against the estate he represents. There is no pretense that the case at bar falls under either. Petition granted and the order of respondent Judge appointing a special administrator is set aside. (RELUCIO *vs.* SAN JOSE, G. R. No. L-4783, Prom. May 26, 1952.)

Claims against estate. Share of heir of deceased not subject to levy on execution before settlement of estate; When estate is settled.

FACTS: P.L. filed in the proceedings of the intestate estate of Agustin Montilla a motion praying that the interest, property, and participation of C.M., one of the heirs, be sold and out of the proceeds the judgment debt of C.M. in favor of P.L. be paid. The motion was denied, hence this appeal.

HELD: The shares of the heirs of a deceased person cannot be levied on execution to pay the creditors of such heirs until the settlement of the estate of such deceased person. And the estate of the deceased is settled and shares of the heirs are determined after payment of all the debts of the deceased and his estate. (INTESTATE ESTATE OF THE LATE AGUSTIN MONTILLA, SR., G. R. No. L-4170, January 31, 1952.)

Section 5 and 10 of Rule 87, Rules of Court; Availability of Defense of Moratorium; Effect of Failure of Administrator to File Answer within Reglamentary Period.

FACTS: W.B. & Co. filed a claim for money against the intestate estate of the deceased EJ. A copy of said claim was served on attorney for the administrator. A year later the Company filed a motion for the approval of its claim, calling attention to the fact that the administrator had not filed any answer thereto. A few days thereafter, the administrator filed an opposition, setting up the defense of moratorium.

HELD: The effect of the debt moratorium is merely to make a debt, even if matured, not yet demandable; but sec. 5 of Rule 87 (Rules of Court) covers a claim which is not due, and requires its presentation within the prescribed period, if it is not to be barred. The general objective of the Moratorium Law, which is rehabilitation of debtors, must give way to the more urgent necessity of settling the estate of a decedent and distributing its residue among his heirs as soon as possible, thereby minimizing, if not avoiding altogether, expenses of administration. Moreover, the defense of moratorium has been waived by the failure of the administrator to file an answer within five days from the service of copy of the claim in question, in accordance with sec. 10, Rule 87 (Rules of Court). (JANUARIO L. JISON *vs.* WARNER, BARNES & Co., Ltd., G. R. No. L-4079, September 24, 1952.)

When the estate has been settled so that nothing more is to be done except the distribution of the estate, a motion for accounting will not lie.

FACTS: When Rafael Reyes died, he left properties worth ₱50,000.00 and also the following forced heirs: Bernardina, Rosario, Remedios, Joaquin, Vincent and Jose. Jose Reyes took possession of the properties and administered them and enjoyed their fruits to the exclusion of the other heirs. Jose Reyes then executed a deed of sale of said properties in favor of his wife who secured from the Register of Deeds transfer certificates of title.

After the death of Jose Reyes, Bernardina Reyes was appointed administratrix of the estate of the late Rafael Reyes and she commenced an action to annul the deed of sale executed by Jose Reyes in favor of his wife. The court decided in favor of Bernardina Reyes. In December, 1950, Bernardina submitted a project of partition of the estate of the late Rafael Reyes. Later, she filed a motion to compel the widow and heirs of Jose Reyes to render an accounting of the fruits and income received by them from 1939 to 1948 to be deducted from the share the latter was to receive in the partition. Without acting upon said motion, the court issued an order directing Bernardina to submit a new project of partition. This order is now the subject of this petition for certiorari.

ISSUE: Did the probate court commit an abuse of discretion in disregarding the motion for an accounting?

HELD: The petition of the administratrix to set aside the order

of the respondent judge requiring her to submit a project of partition within 20 days and denying the said administratrix's petition to require the heirs of the deceased to account for the fruits and income of the properties during the time that said heirs are in possession, will not lie in this particular case for the reason that the estate has been liquidated and settled so that nothing more was to be done other than the distribution of the estate. And because the question of accounting for the fruits and accessions by the co-heirs was brought up in the case for the annullment of the fraudulent sale made by the co-heir but was not entertained by the court for lack of evidence, that decision is now final and can no longer be reviewed under the rule of *res judicata*. (REYES VDA. DE LUSPO *vs.* REYES & REYES THRU THEIR GUARDIAN AD LITEM JUDGE PICCIO, G. R. No. L-4781. February 27, 1952.)

GUARDIANSHIP

Selling and Encumbering Property of Ward; A Natural Guardian cannot encumber the property of the ward to guarantee a loan Secured for the Benefit of the Latter; Rule 96.

FACTS: FP signed a "Deed of Loan" wherein she declares having borrowed and received from AB, for the support of her minor children, rice, clothing and money, by way of loan which "will be paid in full as soon as the claim for pension in favor of her said minor children is approved."

HELD: FP, not being a judicial guardian of her minor children's property, has no power to encumber the said property to guarantee the loan secured or to bind for the payment of the loan the pensions that the minors may be entittled to receive thereafter. (U. S. VETERANS ADMINISTRATION *vs.* ADELA BUSTOS, G. R. No. L-4155, December 17, 1952.)

HABEAS CORPUS

Return. Need of pleading in avoidance of averments in return; effect of failure to deny.

There must be a denial or a pleading in avoidance in order that the averment of facts in the return in a petition for a writ of habeas corpus may not be deemed admitted and taken as true and conclusive. (MARCELO D. MONTENEGRO *vs.* GEN. MARIANO CASTAÑEDA and COL. EULOGIO BALAO, G. R. No. L-4221, August 30, 1952.)

EVIDENCE

Judicial notice by Appellate Court of judicial record not passed upon by trial court.

An appellate court cannot take notice of and take into consideration a judicial record upon which the trial court did not have opportunity to pass. (CITY OF MANILA *vs.* J. ANTONIO ARANETA, G. R. No. L-3858, March 14, 1952.)

Judicial notice of condition of morality after the war.

FACTS: Prosecution for murder. The wife of the deceased testified that previously, her deceased husband, having caught a carabao belonging to one of the accused, took the animal to the barrio lieutenant. The defense claims that this motive is insufficient for so grave a crime.

HELD: As the trial court has observed, in those days serious crimes were being committed for a futile cause as a result probably of the breakdown in morality brought about by the last war, the court having taken judicial notice of the fact that at the time the present crime was committed robberies and killings were rampant in the town. (THE PEOPLE OF THE PHILIPPINES *vs.* GAUDENCIO VILLAPA ET ALS., G. R. No. L-4259, April 30, 1952.)

Admission; implied admission; attempts to have a criminal case dropped.

Where the accused in a criminal case, with the help of influential people made a last-minute effort to have the case against them dropped by the deceased's relatives and although the matter was already in the hands of the fiscal and there was no probability that the defendants would have attained their objective even if the deceased's relatives had given in to pressure, the mere attempt was a strong indication of guilt. (THE PEOPLE OF THE PHILIPPINES *vs.* BENITO VALERIANO ET AL., G. R. No. L-4306, April 25, 1952.)

Admissibility of evidence; admissibility of testimony in preliminary investigations conducted by city fiscals of Manila.

FACTS: During trial of criminal case for malversation of public property instituted by petitioner as plaintiff against Eduardo Castillo, Pedro R. Peña, Gregoria E. Pura and Pablo Malasante before CFI of Manila, the former filed petition to allow Enriqueta V. Pascual or other material witnesses to prove, as direct evidence, certain admissions of confessions made by some of the defendants during preliminary investigation conducted by City Fiscal. Lower court denied petition on ground that it would violate sec. 38 of Republic Act No. 409 and Rules of Court, and that the declaration of a defendant in a preliminary investigation is privileged. Petitioner motion for reconsideration was denied; hence, the present petition for mandamus.

HELD: It is true that Sec. 2465 of Rev. Administrative Code as amended by C. A. 537 provided that no testimony elicited from a witness during the preliminary investigation conducted by the City Fiscal could be used against such witness in any prosecution pending or thereafter instituted against him. But chapter 60 of Rev. Administrative Code was expressly repealed by Sec. 102 of Republic Act 409 (known as New Charter of the City of Manila, and in sec. 38 of said R. A. 409, dealing with the office of City Fiscal). There is no provision similar to that of Sec. 2465 of the Rev. Administrative Code. Hence, testimony of witness given in a preliminary investigation conducted by City Fiscal of Manila may be used against such witness. (PEOPLE OF THE PHILIPPINES *vs.* OSCAR CASTELO ET ALS., G. R. No. L-4662, August 18, 1952.)

Expert Evidence; Genuineness of a hand-writing; when proved by comparison; standards of comparison in handwriting analysis; Section 18, *Rule* 123.

FACTS: Probate of a will. The genuineness of the testatrix's signature is contested. The oppositor presented expert witness "A" who made a comparative analysis of the signatures appearing in the will in relation to some genuine signatures of the testatrix of prior date. The opinion of "A" is that the signatures on the will are not genuine. The proponent of the will presented expert witness "B" who, having made a similar comparative analysis with other signatures of the testatrix of later date, concluded that the signatures in the will are genuine.

HELD: The opinion of expert witness "B" deserves more weight and credence because the standards of comparison used by "B" are more reliable. The standards used by "B" in making his comparative study bear dates much closer to that of the disputed signatures in the will. The authorities are of the opinion that in order to bring about an accurate comparison and analysis, the standards of comparison must be as close as possible in point of time to the suspected signature. (DN. JUAN L. REYES *vs.* DA. DOLORES ZUÑIGA VDA. DE VIDAL, G. R. No. L-2862, April 21, 1952.)

Agreements evidenced by writing; Statute of Frauds; when not applicable.

FACTS: Defendant conveyed by virtue of a deed of sale with right to repurchase within 5 years a parcel of unregistered land, and it was agreed between her and the vendee (plaintiff herein) that the defendant would remain in possession of said land by virtue of a contract of lease. It was a further condition of the sale that as soon as the certificate of title over said land is secured by the vendor, said title shall be delivered to the plaintiff. It was later on agreed verbally that the vendor would be given 3 successive five-year extensions of the period of redemption. For failure to comply with the conditions of the sale, plaintiff brought this action.

HELD: The statute of frauds embodied in Section 21, Rule 123 of the Rules of Court apply only to executory contracts and only to their enforcement and not to extensions of the period of repurchase and extensions of leases which are no longer executory because they have already been performed.

The period of prescription of action commences not from the time the right of action arose but from the time the same is discovered. (CONSOLACION COCJIN *vs.* AGRIPINA LIBO, G. R. No. L-4250, August 21, 1952.)

Agreements evidenced by writing; filing application with Treasury Department of U. S. for purchase and sale of property frozen under Trading with Enemy Act, satisfies requirements of Statute of Frauds.

FACTS: Action for partition of the property known as Crystal Arcade situated in the City of Manila. Defendant claims the right of preemption over the ⅓ share of plaintiff and a stipulated irrevocable option to purchase the same at the seller's price. Defendant

further avers that in January, 1946, plaintiff fixed the sum of ₱200,000.00 as the selling price to defendant, which offer was accepted, and for the payment of said price plaintiff gave defendant a period of time. Defendant now asks for specific performance. Plaintiff filed a reply that the transaction (of sale) referred to by defendant is not supported by any note or memorandum subscribed by the parties, for which reason the transaction falls under the statute of frauds.

HELD: It appears that right after liberation of the Philippines, both Ernest Berg and K. H. Hemady (Magdalena Estate, Inc) were accused of collaboration for which reason the treasury Dept. of the U. S. ordered the freezing of their properties under the Trading with the Enemy Act. Under the provisions of this Act, both Berg and Hemady could not sell or dispose of their properties without first securing the permit required by it; and so to comply with this requirement, both Berg and Hemady filed separately an application with said Department for the purchase and sale of the property in litigation. These applications are the ones marked as exhibits "3" and "4". The court is of the opinion that the applications marked exhibits "3" and "4", whether considered separately or jointly, satisfy all the requirements of the statute of frauds as to contents and signature and, as such, they constitute sufficient proof to evidence the agreement in question. And we say so because in both applications all the requirement of a contract are present, namely, the parties, the price or consideration, and the subject matter. (ERNEST BERG *vs.* MAGDALENA ESTATE, INC., G. R. No. L-3784, prom. October 17, 1952.)

Parol Evidence Rule: Verbal assurance to Refund Check if dishonored is a collateral agreement and may be admitted under certain conditions.

FACTS: On appeal, Seeto claimed that parol evidence was incompetent to show that one who signs a check as an endorser is not merely an indorser but also a surety and guarantor of the drawer.

HELD: The verbal assurance of Seeto to refund the amount of the check if dishonored being a collateral agreement parol evidence thereof is admissible provided it does not vary obligations attached by law to the indorsement. (PHILIPPINIE NATIONAL BANK *vs.* BENITO SEETO, G. R. No. L-4388, August 13, 1952.)

Parol Evidence Rule: Parol evidence of "execution," and not of contents, of document admissible.

FACTS: In 1943 R.A. and P.H. sold their property to a Japanese firm, the N. D. Co., Ltd. The Philippine Alien Property Administration took over the property under the U. S. Trading with the Enemy Act as amended by the Philippine Property Act of 1946 and Executive Ordinance 9818. P.H. and R.A. filed action for ejectment and damages against P.A.P.A. The Philippine Republic came into the litigation as intervenor as the transferee of the property. Dr. N.J. filed a complaint in intervention because he alleged that he cancelled his mortgage credit over the property inasmuch as he was afraid of Japanese reprisal if he did not accept payment in Japanese notes. All but the unsigned copy of the deed of sale were lost during liberation. Plaintiffs contend that the deed of sale was a forgery. Three witnesses for the defendant testified that plaintiff "could have signed the document". The trial judge disregarded all parole evidence by which the defendant attempted to establish the genuineness of the deal reasoning that the loss of the original and the signed copies should be satisfactorily established before secondary evidence can be admitted to prove the contents of the lost document, especially if the supposed document is contested to be falsified or forged. (Dir. of Lands vs. Abasolo, 46.283.)

HELD: Parole evidence of the execution of document can be allowed. It is the contents which may not be proved by secondary evidence if the instrument itself is accessible. Proofs of the execution are not dependent on the existence or non-existence of the document; such proofs precede proofs of the contents; due execution besides the loss has to be shown as a *foundation* for the introduction of the secondary evidence of its contents. (HERNAEZ *vs.* MCGRATH, 48 O.G. 2686.)

Identification of Private Document: When Identification not Necessary.

FACTS: J. Y. claims that the trial court erred in admitting a private document, Exhibit "E", without its being properly identified.

HELD: Exhibit "E" was properly allowed only as part of defendant J.Y.'s testimony. J.Y. on the witness stand, admitted that he had furnished the information set forth in Exhibit "E". (MARIANO J. CASTAÑEDA *vs.* JOSE V. YAP, G. R. No. L-5379, August 22, 1952.)

Evaluation of Conflicting Versions; Co-extensive Liabilities of Accused.

FACTS: Accused who were policemen of Candelaria, Quezon, were prosecuted and convicted for double murder and frustrated murder. Accused claimed self-defense.

HELD: It is hard to believe that on the very morning of the town fiesta, five visitors would attempt to commit rape or unchaste abuses upon women they never knew before. It is improbable that one of the deceased and his companions would attempt to escape, knowing full well that the three policemen were armed with guns. It is even more improbable that, after escaping, the young men would stop to face and engage in a gun duel the three fully armed policemen. The criminal responsibility of the two defendants for the fatal consequences of the affair is equal and co-extensive. Both must share full responsibility as authors of the crime described in the information. (PEOPLE OF THE PHILIPPINES *vs.* TIMOTEO OLGADO ET AL., G. R. No. L-4406, March 31, 1952.)

Lack of Motive of Prosecution Witnesses to lie; Effect thereof.

FACTS: Accused was prosecuted and convicted of the crime of treason. Appellant's uncorroborated testimony is that he was arrested by the Japs; that while confined in the garrison he was ordered to help the cook by carrying firewood from the stock file to the kitchen; and that he did not do any of the acts imputed to him by the witnesses for the prosecution.

HELD: The witnesses for the prosecution had no motive to point to the appellant as one among those who participated in the treasonable acts attributed to him, if he really took no part therein. Judgment appealed from confirmed. (PEOPLE OF THE PHILIPPINES *vs.* CRISPULO PREDILLA, G. R. No. L-4407, March 31, 1952.)

Two-Witness Rule; Agreement on the same overt acts, without complete corroboration between witnesses is sufficient compliance with the Rule.

FACTS: Defendant was prosecuted for the crime of treason. Defendant contends that there was no complete corroboration between the required number of prosecution witnesses on all the points testified to by them.

HELD: But the fact is that their testimonies agree on the overt acts of treason committed by the accused in actively participating in the arrest of persons connected with the guerrillas. And this, as the court has already held, is a sufficient compliance with the two-witness rule. (PEOPLE OF THE PHILIPPINES *vs.* ROMEO GOLEZ, G. R. No. L-4618, March 28, 1952.)

Circumstantial Evidence; Corpus delicti Established by Circumstantial evidence.

FACTS: Prosecution for murder. SB was taken from his house by 4 armed men and thereafter he was never again seen or heard from. The prosecution witnesses point to the accused as one of the 4 individuals who not only took SB from his house to the Bato Lake, illtreating him all the way, but upon reaching there, took him for a boat ride and while sailing, continued to ill-treat him.

HELD: In a case of murder or homicide, it is not necessary to recover the body or to show where it can be found. There are cases like death at sea, where the finding or recovery of the body is impossible. It is enough that the death and the criminal agency causing it be proven. There are even cases where said death and the intervention of the criminal agency that caused it may be presumed or established by circumstantial evidence.[1] (THE PEOPLE OF THE PHILIPPINES *vs.* EMETERIO SASOTA ET ALS., G. R. No. L-3544, April 18, 1952.)

Circumstantial Evidence; Sufficiency Thereof; Weight of Accused's Attempts to Conceal a Crime.

FACTS: FM was shot dead early in the morning of June 17, 1949 in his home where he lived with his wife, Valentina. Valentina is now accused of parricide for the death of her husband.

HELD: The only question to decide is the identity of the criminal. The prosecution was not able to produce an eye-witness to the crime. Yet the circumstances clearly and positively point to Valentina as the author of her husband's death. (1) The death-dealing slug which was recovered under the house, proceeded from the pistol of the deceased which had always been kept in the family wardrobe. Of course such firearm was available only to FM and Valentina. (2) At the time of the shooting only two adult persons were in the house with FM: the accused and her sister, but the latter was as-

[1] Citing Wharton's Criminal Evidence, Vol. 2, sec. 871, pp. 1505-1506 and Francisco, Criminal Evidence: Vol. III, sec. 27, p. 1517.

leep. (3) Valentina at first said her husband had died of heart attack. Later she declared he had died of tuberculosis. And when she learned that the body would be examined, she swore he had committed suicide. (4) All the time before the burial she took measures to hide the wounds and the blood. (5) She tried to prevent the exhumation. (6) She hid the clothes her husband had worn in order to avoid discovery of the bullet holes and bloodstains. (7) She changed the bamboo slat that had been smashed by the bullet—again in order to prevent discovery of signs of violence. (8) There is evidence she knew how to handle a pistol. (9) There is also a rumor in town that she had illicit relations with a person named De Dios; the sickly condition of her husband and the disparity in their ages, she was 25, he was 40—lend color to such rumor. (10) She had gone with such man on excursion to Baguio.

Confronted with all this damning evidence, Valentina chose to declare nothing in court.

The most important indication of guilt is the accused's attempts to conceal the crime. (THE PEOPLE OF THE PHILIPPINES *vs.* VALENTINA VILLANUEVA ET AL., G. R. No. L-4110, November 26, 1952.)

CRIMINAL PROCEDURE

Court's jurisdiction over criminal case is determined at time of institution of action.

FACTS: In accordance with the Motor Vehicle Law, offenses of serious physical injuries through reckless imprudence are cognizable only in the Courts of First Instance, whereas under the Revised Penal Code said offenses may be adjudicated by the JP courts. Fiscal in this case claimed that the matter decided upon by the JP court was beyond its jurisdiction because of the Motor Vehicle Law. Accused on the other hand contended that although at the time of the institution of the action the Motor Vehicle Law was in force, nevertheless this law was superseded during the pendency of the case by Republic Act No. 587 which revived the Revised Penal Code thereby giving jurisdiction to the JP courts, and consequently his trial in the CFI for the same offense would put him in double jeopardy.

HELD: The jurisdiction of a court to try criminal cases is to be determined by the law in force at the time of instituting the action. Therefore, since the law in force at the time of the institution of the action is the Motor Vehicle Law, the trial of the case in the JP court is a nullity and appellant cannot invoke the defense of double jeopardy. (PEOPLE OF THE PHILIPPINES *vs.* ROMUALDO, G. R. No. L-3686, January 31, 1952.)

Where separate civil action deemed waived.

Where the offended party files a complaint without mention of civil liability and court renders judgment without civil award, the separate civil action is deemed to have been waived. (MIGUEL SAN JOSE *vs.* DEL MUNDO ET AL., G. R. No. L-4450, April 28, 1952.)

Where right to civil action is preserved.

Where the prosecution filed the information prematurely without giving the offended party an opportunity to present proof of damages, the latter should not be deprived of the right to claim a separate action for indemnity for injury suffered. Art. 100, 103, 104 of Rev. Penal Code, applied. (MIGUEL SAN JOSE *vs.* DEL MUNDO ET AL., G. R. No. L-4450, April 28, 1952.)

Reservation of the right to file a separate civil action; res judicata.

FACTS: Two employees of the defendant S.V.O. Co., were acquitted of the charge of arson through reckless imprudence, the C.F.I. ruling: their negligence was not proven and the fire was due to an unfortunate accident. A.T. sought damages from the defendants including the two employees. Case was dismissed in view of the acquittal of the two employees. A.T. elevated the case to this court.

HELD: As regards the two employees: since A.T. did not reserve her right to file a separate civil action under Rule 107, Sec. 1a, and the accused were acquitted of the criminal charge, she is barred from filing this action against the employees.

Rule 107, 1d: "extinction of the penal action does not carry with it the extinction of the civil, unless the extinction proceeds from a final judgment that the fact from which the civil might arise did not exist". The declaration of the C.F.I. in acquitting the accused of arson fits into the exception of the rule which excepts the two employees from liability. The principle of *res judicata* cannot be applied to the two defendant companies because, not being included

among the co-accused in the criminal case, they cannot enjoy from the benefit resulting from the acquittal of the accused. (ANITA TAN *vs.* STANDARD VACUUM OIL CO., JULITO STO DOMINGO, IGMIDIO RICO and RURAL TRANSIT CO., G. R. No. L-4160, July 29, 1952.)

Suspension of civil action upon filing of criminal action.

FACTS: Petitioner filed suit against the Philippine Air Lines for the recovery of damages for the death of her husband in a plane crash. After presentation of direct evidence by plaintiff, defendant moved for the suspension of the hearing on the ground that a criminal action has been filed based on the same act. Motion was granted. Hence, this petition for certiorari.

HELD: But it cannot be denied that the present civil case is directly interwoven with the criminal case in the sense that the main issue involved in both cases is the determination of the failure of Richard Parker to reach safely his destination or the determination of the cause of his death. And this is the main reason that guided the lower court in postponing the hearing of the civil case until final judgment in the criminal case has been rendered. Inasmuch as the power to grant or refuse continuances is inherent in all courts unless expressly limited by statute, and there is no showing that the lower court has abused its discretion in suspending the hearing, we find no merit in this petition for certiorari. (ASUNCION PARKER *vs.* HON. JUDGE ALEJANDRO PANLILIO and PHILIPPINE AIR LINES, G. R. No. L-4961, March 5, 1952.)

When civil action need not be reserved.

FACTS: Petitioner contends that her cause of action in the civil case is based on *culpa contractual* and not on the civil liability arising from the offense involved in the criminal case. Respondents, however, contend that inasmuch as petitioner had failed to expressly reserve her right to institute the civil action separately, she may not now institute another action under Articles 1902-1910 of the Civil Code based on the act or omission complained of in the criminal action.

HELD: The civil case is based on alleged *culpa contractual* incurred by respondent PAL, Inc. because of its failure to carry safely the late Richard Parker to his place of destination, whereas the criminal action involves the civil liability of the accused, who bear no relation whatsoever with said entity, and are complete strangers to it.

The failure, therefore, on the part of the petitioner to reserve her right to institute the civil action in the criminal case cannot in any way be deemed as a waiver on her part to institute a separate civil action against the respondent company based on the contractual liability, or on *culpa contractual* under Articles 1902-1910 of the Civil Code. (ASUNCION PARKER *vs.* HON. JUDGE ALEJANDRO PANLILIO and PHILIPPINE AIR LINES, G. R. No. L-4961, March 5, 1952.)

Suspension of civil action upon filing of criminal action does not deprive court of authority to issue preliminary and auxiliary writs.

FACTS: An information for grave coercion was filed against Babala at the instance of Patricio Canela on January 26, 1951. On the same date, Canela filed a civil action against said Babala for damages based on the information and prayed for a writ of preliminary mandatory injunction. In the civil case, Babala insisted on the suspension of the civil case during the pendency of the criminal case. The court suspended the civil case but set for hearing the petition for preliminary injunction. Babala instituted this petition of certiorari and prohibition.

ISSUE: Does the suspension of the civil case also suspend the the hearing on the writ of preliminary injunction?

HELD: Although the civil action is suspended until final judgment in the criminal case, the court is not deprived of its authority to issue preliminary and auxiliary writs such as preliminary injunction, attachment, appointment of receiver, fixing amounts of bonds and other processes of similar nature which do not go into the merits of the case, otherwise, there is no sense in the rule providing only for suspension, when its effect is to kill the action. (PEDRO BABALA *vs.* HON. MAXIMO ABAÑO ET AL., G. R. No. L-4600, February 28, 1952.)

Accused is not a party in interest in a criminal action where accused has waived or reserved his right to civil action.

FACTS: On July 18, 1950, the jeepney owned and operated by Juan Reyes, Jr. and driven by Jose Capistrano, hit a tree while passing along the National road in Tayabas, Quezon. Two passengers were injured. Jose Capistrano was charged in the J. P. court of Tayabas in 2 Criminal Cases. Capistrano was convicted in Criminal Case No. 140 from which judgment he appealed to the C.F.I. of Quezon. In the meantime Criminal Case No. 139

was elevated to the C.F.I. of Quezon where the provincial fiscal filed an information against Capistrano for violation of the Motor Vehicle Law.

Previously, on August 10, 1950, Trinidad Elento filed in the C.F.I. of Quezon a civil action for damages against Juan Reyes, Jr. and Capistrano as owner and driver, respectively, of the said jeepney, based on the two criminal actions.

In the C.F.I. of Quezon, Capistrano, as accused in the criminal case for violation of the Motor Vehicle Law, filed a motion to quash on the ground of double jeopardy because he was convicted by the J.P. of Tayabas for the same accident of July 18, 1950. The C.F.I. of Quezon sustained the motion and Trinidad Elento brought this appeal.

ISSUE: May a party to a civil action based on a Criminal action, appeal from a decision on the criminal action?

HELD: Where the offended party has waived his right to institute the civil action or has reserved his right to file a civil action separately, he has no right to appeal from an order of the CFI dismissing the criminal action on ground of double jeopardy, because the offended party has no special interest in the prosecution of the criminal action. (Rule 107, Sec. 1, par. (d).) (PEOPLE OF THE PHILIPPINES *vs.* CAPISTRANO, G. R. No. L-4449, February 27, 1952.)

What constitutes substantial compliance with the requirements of preliminary investigation.

FACTS: Petition for certiorari. Petitioners ask for the dismissal of the case against them on the ground that the court had issued the order for their arrest without previously conducting a preliminary investigation as required by Sec. 1 of Rule 108.

HELD: It is stated in the Order of the CFI appealed from that the petitioners-appellants saw or "admitted having seen respondent J.P. confer with the witnesses for the prosecution" evidently meaning before the issuance of the order of arrest. The judge of the CFI held that "under the circumstances, there is every reason to presume that the J.P. had made such finding of probable cause before issuing its warrant for the accused's arrest, unless the contrary is proven, for the regularity of official commitments is presumed." There was therefore, a substantial compliance with the requirements of the rules with regard to the preliminary investigation prior to the issuance of the order or arrest. (BENJAMIN SILAO ET AL. *vs.* HON. JUDGE JUAN L. BAGANO, G. R. No. L-5185, March 28, 1952.)

Preliminary investigation; failure of the justice of the peace to conduct a preliminary examination and to issue a warrant of arrest.

FACTS: On October 5, 1948, a complaint was filed in the JP court against the accused for theft of large cattle. The accused was already under custody before any warrant of arrest could be issued . A month later, the complaint was read to the accused who entered a plea of not guilty, and the court conducted a preliminary investigation. On November 24, 1948, a warrant of arrest was issued by the JP and served on the accused. It also appears that the accused filed the necessary bail bond. On December 15, 1948, the JP issued an order finding that there was a *prima facie* case against the accused and remanding the case to the CFI for trial on the merits. The CFI dismissed the case on the ground that the failure of the JP to conduct a preliminary examination and to issue a warrant of arrest, was fatal to the jurisdiction of the court.

HELD: The record of the JP contains the affidavits of several persons, all of which incriminate the accused. A JP is not prohibited by any law "from reaching the conclusion that probable cause exists from the statement of the prosecuting attorney alone, or any other person whose statement or affidavit is entitled to credit in the opinion of the judge" (U. S. *vs.* Ocampo, 18 Phil. 1). Furthermore, preliminary investigation is not an essential part of due process of law.

Moreover, it appearing that the accused had chosen to file a bond for his temporary release and had raised the objection for the first time after his arraignment before the CFI—almost two years after the filing of the complaint in the JP court, he must be deemed to have waived his right to the preliminary examination.

The issuance on November 24, 1948, of a warrant of arrest which was duly served on the same date upon the accused, has furthermore cured the previous failure to issue said warrant. There was reason not to issue the warrant upon the filing of the complaint because the accused was then under custody. (THE PEOPLE OF THE PHILIPPINES *vs.* AGAPITO OLANDAG, G. R. No. L-4797, November 26, 1952.)

Motion for specifications; motion to quash; when proper; effect of failure to file.

An accused who believes or feels he is insufficiently informed of

the crime charged against him and who is not in a position to defend himself properly can move for specifications or to quash. Failure to so move deprives him of the right to object to evidence lawfully introduced: Sec. 2, Rule 113, Rules of Court applied. (PEOPLE *vs.* EUGENIO GUTIERREZ, G. R. No. L-4041, August 30, 1952.)

Double jeopardy; plea is not available in case of illegal possession of explosives and illegal fishing with explosives.

FACTS: Defendants were arrested while fishing with explosives. They were tried and convicted for illegal fishing with explosives. Subsequently, they were prosecuted for illegal possession of explosives. Defendants pleaded double jeopardy on the ground that the bottles of explosives introduced were identical with those in the second. The court sustained the plea and dismissed the second case. The prosecution appealed.

HELD: The possession of explosives is distinct from their use for fishing purposes. A defendant may be tried for illegal possession of explosives without prejudice to a distinct trial for illegal fishing with explosives.

This is similar to the act of shooting a person. If the defendant had no justification for killing, he may be tried for homicide or murder. If he has no gun permit or license he may also be tried for illegal possession of firearms. (PEOPLE *vs.* TEODORO TINAMISAN et al., G. R. No. L-4081, January 29, 1952.)

No double jeopardy if a person convicted of homicide is subsequently charged with illegal possession of firearm used for perpetration of the homicide; gauge to determine if an offense is necessarily included in another.

FACTS: Gervasio Alger was charged in the CFI of Cebu with illegal possession of a rifle with three rounds of ammunition. Defendant made an oral motion to dismiss contending that, if it be continued, he would be placed in double jeopardy.It appears that defendant has been previously accused and convicted of a crime of homicide for the perpetuation of which he used the weapon which was made the subject of the present charge. The lower court issued an order sustaining the plea of jeopardy. Hence this appeal.

HELD: In order that a former conviction may be a bar to another prosecution, it is, important to determine if the accused is newly

prosecuted either for the same offense, or for any other offense which is necessarily included in the same offense charged. The situation does not here obtain. The record shows that the defendant has been previously charged and convicted of a crime of homicide whereas in the present case he is charged with illegal possession of a firearm. The two crimes are distinct from each other. The gauge to determine if an offense is necessarily included in another offense is whether the accused could be held liable and convicted of that offense. The defendant in this case could not have been convicted of illegal possession of firearm in the homicide case because of the failure to allege therein an essential element constituting that offense. (THE PEOPLE OF THE PHIL. *vs.* GERVASIO ALGER, G. R. No. L-4690, prom. Nov. 13, 1952.)

Res judicata; effect of an erroneous order of dismissal which has become final.

FACTS: The CFI dismissed a criminal case for serious physical injuries on the ground of double jeopardy. This dismissal was erroneous for actually there was no double jeopardy. But the fiscal failed to appeal from the erroneous order of dismissal and it became final. Some months later, a new case was initiated in the same CFI with the filing of a new information for serious physical injuries against the same accused. The accused moved to quash the new information on the ground that the order of dismissal abovementioned having become final and executory cannot now be set aside.

HELD: While it is true that the order of dismissal was erroneously entered, by the failure of the fiscal to appeal from the order, it became final and executory. Whether rightly or wrongly, said order stand and cannot now be set aside. That order is binding upon the parties. That order has the effect of *res judicata* upon the Government. (THE PEOPLE OF THE PHILIPPINES *vs.* PEDRO PETILLA, G. R. No. L-5070, December 29, 1952.)

Withdrawal of plea of guilty "discretionary on trial court".

FACTS: Defendants were prosecuted for profiteering and on a plea of guilty freely and spontaneously made, they were sentenced each to a fine of ₱5,000, with subsidiary imprisonment and costs, and with a recommendation that they be immediately deported. But before this sentence was promulgated, both accused, having been

made to understand that the court was not disposed to impose a light penalty, moved for permission to withdraw their plea of guilty in order to substitute it with a plea of not guilty. Motion denied.

HELD: The R.C. (Sec. 6, R 114), leave it to the discretion of the court to permit or not to permit the withdrawal of a plea of guilty.

Every accused must realize that he cannot attach a string to his plea of guilt. Truth is imminent and immutable; it is absolute and unconditional; it cannot be affected or converted into an untruth by any extraneous influence. Therefore, appellant's position—that he is guilty if the penalty for the crime is that recommended by the fiscal but not guilty if it is that actually imposed by the court—is untenable. (PEOPLE OF THE PHILIPPINES *vs.* Co HAP and TAN LAM, G. R. No. L-4271, March 31, 1952.)

Exclusion of witness from complaint.

FACTS: Defendant was charged with robbery in band with murder in the CFI of Ilocos Norte. After the prosecution rested its case, counsel for the accused moved for dismissal for lack of a *prima facie* case, and said motion was granted only as to the two other accused. The court found the appellant guilty of the crime of robbery with homicide. From this judgment, Severino Ganiban appealed claiming that the exclusion of Benjamin Ganut as one of the accused was contrary to section 9, Rule 115, of the Rules of Court.

HELD: The exclusion of Benjamin Ganut, one of the accused, was in accordance with Section 9, Rule 115 of the Rules of Court which provides that the discharge of the accused may be ordered at any time before the defendants have entered upon their defense. This section contemplates that the discharge can be effected at any stage of the proceedings from the filing of the information to the time the defense starts to offer any evidence and not before the commencement of the trial as contended by appellant. (THE PEOPLE OF THE PHILIPPINES, Plaintiff-Appellee, *versus* SEVERINO GANIBAN, ET ALS., Defendants, SEVERINO GANIBAN, Defendant-Appellant, G. R. No. L-4165, promulgated August 28, 1952.)

Motion for new trial; newly discovered evidence consisting of affidavits which are contradicted by testimony of movant given during trial.

Where a motion for new trial presented by one GV is based on alleged newly discovered evidence consisting of the affidavits of his two brothers executed after their arrest, in which affidavits these two confess having been with the group that forcibly took the deceased away from his home but assert that GV (movant) was not with them then, which statement contradicts the alibi put up by their brother (movant GV) that at the time the crime was committed he (GV) and his said two brothers were threshing rice in the farm of their landlord, it is not likely that if the two brothers (affiants) were allowed to testify at a new trial their testimony would affect the result of the case and hence, motion for new trial cannot be granted. (THE PEOPLE OF THE PHILIPPINES *vs.* GAUDENCIO VILLAPA, ET ALS., G. R. No. L-4259, April 30, 1952.)

Counsel de officio chosen by court may not on appeal admit, in behalf of the accused, facts found by the lower court.

FACTS: Counsel *de officio* in his brief does not dispute the correctness of the statement of facts in the judgment appealed from, therefore, the question involved being one of law and as such under the exclusive appellate jurisdiction of the Supreme Court, the Court of Appeals resolved to refrain from deciding the case and certified it to the Supreme Court for final determination, pursuant to Section 17(b) of Republic Act No. 296, otherwise known as the Judiciary Act of 1948.

HELD: The Court of Appeals is right in stating that counsel *de officio for* appellant means to raise only a question of law in this appeal. But may his counsel, specially not a hired lawyer selected and appointed by him, but an attorney *de officio,* not of his choosing but appointed by the court, now admit the facts found by the lower court, for him? We do not think so. Under similar circumstances, the appellant himself must make the admission of the trial court's findings of facts, specially those that are material and decisive, so as to confine the appeal to only questions of law for decision. As things stand we believe that the present appeal involves questions both of law and fact. Consequently, the Court of Appeals has jurisdiction over it. The case is hereby remanded to that Court. (THE PEOPLE OF THE PHILIPPINES *vs.* PABLO ISAAC *alias* JOSE DE JESUS, G. R. No. 6119-R, October 29, 1952.)

Appellate jurisdiction of Court of Appeals.

FACTS: Defendant and 2 others accused of robbery and rape. Subsequently court discovered that the complaint was not served by the offended party or her parents and in a resolution dismissed the case with respect to the crime of rape. After the decision rendered by the court in the crime of robbery, defendant alone appealed to the CA. The Court of Appeals certified case to Supreme Court on the ground that the offense committed by defendant is the indivisible crime of robbery accompanied by four rapes.

HELD: We are of the opinion that, no appeal having been taken or interposed by either party to the resolution of the court which decided the case with respect to the crime of rape and ordered prosecution to limit itself to present evidence with respect to the crime of robbery, as if the charge in the information were for simple robbery and not for robbery with rape, the CA has exclusive appellate jurisdiction. Hence, case is remanded to CA which is the court having appellate jurisdiction to revise the sentence of the trial court. (PEOPLE OF THE PHIL. *vs.* VICENTE PATOLTOL, G. R. No. L-2569-R, March 24, 1952.)

LEGAL AND JUDICIAL ETHICS

Judicial Ethics: Disqualification of judges.

Where the judge is a professor of law in a college owned by a party-litigant, he is not disqualified from hearing a case where only said party is involved. Sec. 1, Rule 126, Rules of Court, applied. (TALISAY-SILAY MILLING CO., INC. *vs.* HON. JOSE TEODORO ET AL., G. R. No. L-4579, March 31, 1952.)

Judicial Ethics: Disqualification of judges.

The canons of judicial ethics do not constitute legal grounds for the disqualification of judges but are addressed to their personal taste with a view towards the formulation of certain standards of judicial decorum. Sec. 1, Rule 126, Rules of Court, applied. (TALISAY-SILAY MILLING CO., INC. *vs.* HON. JOSE TEODORO ET AL., G.R. No. L-4579, March 31, 1952.)

Judicial Ethics: serious misconduct; remedy.

Where a judge wantonly disregards the dictates of good conscience and the rules of fairness to an extent sufficient to constitute serious misconduct or inefficiency, administrative remedies may be resorted to. (TALISAY-SILAY MILLING CO., INC. *vs.* HON. JOSE TEODORO ET AL., G. R. No. L-4579, March 31, 1952.)

Legal Ethics: Authority of attorneys to bind clients; laches.

FACTS: By virtue of a compromise signed by plaintiff's lawyer and the defendant, a forcible entry and detainer case was dismissed. Two years later the present action was brought in the Court of First Instance by the same plaintiff through a different counsel against the same defendant. Defense: the compromise is a bar to the suit. Plaintiff impugned the validity of the agreement.

HELD: This court has held that without special authority by the client an attorney cannot in his or her behalf, in or out of court, execute any act not necessary or incidental to the prosecution of the suit or accomplishment of its purpose, for which he was retained.