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SUGGESTED AMENDMENTS TO THE PROPOSED REVISED RULES OF COURT

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RULE 2

Rule 2, Section 3. — This section provides that "a party may institute only one suit for a single cause of action." This proposed provision seems to take the place of the present Rule 2, Section 3 which reads "single cause of action cannot be split up into two or more parts so as to be made the subject of different complaints." If we are after clarity, the present provision is clearer and more penetrating.

Furthermore, the proposed provision may easily be misunderstood because if only one suit may be instituted for a single cause of action it may be thought that when there are several causes of action there should be several suits. And this is contrary to section 5 of the same rule which allows under certain circumstances a single suit for several causes of action.

Probably the proposed provision would be clearer as follows: "A party may institute not more than one suit for a single cause of action" that is, by substituting the word "only" for "not more than." But, as above stated, I still believe that the present provision has more penetrating clarity, and there is no sufficient reason for abandoning it.

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Rule 2, Section 5. — The first paragraph of the proposed section 5 is a backward departure from the liberal spirit of our present procedure. Under the present provision contained in Rule 2, Section 5 of the present Rules of Court, a party may join all the causes of action he may have against an opposing party, subject only to the rules regarding venue and joinder of parties. Under the proposed provision a party may join all his causes of action against an opposing party subject not only to the rules regarding venue and joinder of parties, but subject also to two additional restrictions, namely, (1) the causes of action that are joined should arise out of the same contract, transaction or relation between the parties; (2) that the causes of action are all for money. So that if plaintiff has two claims against the defendant, one to collect a promissory note and another to recover a jewel, and these two causes of action arose from completely unconnected transaction, they may not be joined under the proposed provision, but they may under the present provision.

With respect to the second and third paragraphs of the same section 5, it is my feeling that they are provisions on jurisdiction and not on mere procedure. But supposing these provisions to be procedural, I suggest that they be redrafted in such a way as not to restrict the present liberal joinder of causes of action. I submit the following redraft:

"RULE 2 SECTION 5.—Joinder of Causes of Action.—Subject to rules regarding venue and joinder of parties, a party may in one PLEADING state, in the alternative or otherwise, as many causes of action as he may have against an opposing party.

WHEN THE CAUSES OF ACTION JOINED ARISE OUT OF THE SAME CONTRACT, TRANSACTION OR RELATION BETWEEN THE PARTIES, OR WHEN THE CAUSES OF ACTION ARE ALL FOR MONEY, THE ACTION SHALL BE FILED IN THE COURT HAVING JURISDICTION OVER THE TOTALITY OF THE DEMAND, BUT WHEN THE CAUSES OF ACTION JOINED ARISE OUT OF DIFFERENT CONTRACTS, TRANSACTIONS OR RELATIONS BETWEEN THE PARTIES, OR THEY ARE SEPARATELY OWNED BY, OR DUE TO, DIFFERENT PARTIES, THE ACTION SHALL BE FILED WITH THE COURT HAVING JURISDICTION OF EACH OF THE CAUSES OF ACTION THUS JOINED."

This redraft is a reconciliation of the doctrine laid down by the Supreme Court in the following cases:

Go et al. v. Go et al., 50 O.G. 3071.
Campos Rueda Corporation v. St. Cruz Timber Co., 52 O.G. 1387.
Argonza et al. v. International College, G.G. L-3884, Nov. 29, 1951.
Rosario v. Justice of the Peace et al., 52 O.G. 5157.
Villasenor v. Erlanger and Galinger, 19 Phil. 554.

Rule 2, Section 7. — This proposed provision which appeared in our old Code of Civil Procedure is of substantive character for it extends in a way the periods of limitation of actions as provided in the Civil Code.

RULE 3

Rule 3, Section 2. — I have several observations to make on this provision. It deals on joinder of parties, plaintiffs and defendants, a matter that is covered by sections 6, 7, 8, 9 and 10, hence it seems to be unnecessary.

Upon the other hand, if for purposes of clarification this provision should be deemed convenient, it should not suppress the original idea involved in the present provision which reads "every action must be prosecuted in the name of the real party in interest."

The present provision contains two requirements that are absent in the proposed provision. The first requirement is that a party to be qualified to bring an action, must be a real party in interest, that is, a party having real interest. And by real interest is meant a **present substantial interest,** as distinguished from a mere **expectancy** or **future contingent interest** or a mere **consequential** or **subordinate interest** on the subject matter. (67 CJS, p. 891; Garcia v. David, 67 Phil. 279.) This notion is absent in the proposed provision, which speaks of "an interest" in general, and this may be misunderstood to be any kind of interest, whether actual or contingent, present or subordinate, etc.

Furthermore, the proposed provision is concerned with "joinder of parties" founded on community of interest, but says nothing of the condition which may qualify the original plaintiff to bring the action.

The second requirement contained in the present provision is that the action must be prosecuted in the name of the real party in interest, a requirement that is not expressed in the proposed provision. In other words, the action must be brought not only by the real party in interest, but in the name of the real party in interest, and not in the name of a representative, unless this is expressly authorized by law. This notation is also absent in the proposed provision.

The real party in interest rule is in force in most jurisdictions in the United States and it has already a well defined meaning in Philippine jurisprudence. And to suppress it is to suppress all our jurisprudence on the matter.

I suggest, therefore, that section 2 be redrafted in the following manner:

"SEC. 2.—*Parties in Interest.*—Every action must be prosecuted in the name of the real party in interest. ALL PERSONS HAVING AN INTEREST IN THE SUBJECT MATTER OF THE ACTION AND IN OBTAINING THE RELIEF DEMANDED SHALL BE JOINED AS PLAINTIFFS. ALL PERSONS WHO CLAIM AN INTEREST IN THE CONTROVERSY OR THE SUBJECT MATTER THEREOF ADVERSE TO THE PLAINTIFF, OR WHO ARE A NECESSARY PARTY TO A COMPLETE DETERMINATION OR SETTLEMENT OF THE QUESTIONS INVOLVED THEREIN SHALL BE JOINED AS DEFENDANTS".

Rule 3, Section 3. — This provision as proposed in the draft suppresses "a party with whom or in whose name a contract has been made for the benefit of another." The reason, perhaps, for this suppression is that the provision thus suppressed is embraced in "a trustee of an express trust."

There are, however, situations in which a party with whom or in whose name a contract has been made for the benefit of another, can hardly be considered as a trustee. For instance, if a person sells his property by yearly installments with the stipulation that the vendee shall pay each and every installment to a vendor's friend, who is residing in a foreign country for curative purposes, under the suppressed clause the vendor may bring an action against the vendee upon the latter's non-performance of his obligation, but it is doubtful whether he may under the proposed provision. Of course, under the second paragraph of Article 1311 of the Civil Code, the third party, after the acceptance of the stipulation benefiting him **may demand** the fulfillment of the obligation. But this provision is merely permissive and does not preclude the vendor from bringing the action himself, he being a party to the contract from whom the consideration had passed. Yet, he can hardly be considred as a trustee in the true sense of the word. And to avoid possible doubts, in many jurisdictions of the United States, after the provision giving a trustee of an express trust authority to bring an action, a further provision is made necessary to clarify that "a trustee of an express trust within the meaning of such provision shall be construed to include 'a person with whom or in whose name the contract was made for the benefit of another.' " (39 Am. Jur., p. 878.)

Thus, in volume 67 CJS, p. 914, we find the following statements:

"By virtue of an express exception to the requirement that civil actions be instituted, maintained, or prosecuted in the name of the real party in interest, a trustee of an express trust is permitted to bring an action relative to the subject matter of the trust in his own name without joining the beneficiary. By virtue of a further provision, persons with whom or in whose name a contract is made for the benefit of another may sue, frequently as trustees of an express trust."

As an illustration, we have section 113 of the Code of Civil Procedure of New York which reads as follows:

"An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust within the meaning of this section shall be construed to include a person with whom, or in whose name a contract is made for the benefit of another."

I suggest, therefore, that the proposed section 3 be redrafted in the following manner:

SEC. 3. REPRESENTATIVE PARTIES [Trustee].— A trustee of an express trust, INCLUDING a party with whom or in whose name a contract has been made for the benefit of another, a guardian, executor or administrator, or a party authorized by statute, may sue or be sued without joining the party for whose benefit the action is presented or defended; but the court may, at any stage of the proceedings, order such beneficiary to be made a party. AN AGENT ACTING IN HIS OWN NAME AND FOR THE BENEFIT OF AN UNDISCLOSED PRINCIPLE MAY ALSO SUE OR BE SUED WITHOUT JOINING THE PRINCIPAL EXCEPT WHEN THE CONTRACT INVOLVES THINGS BELONGING TO THE PRINCIPAL. (3-3,a).

I do not think the additional words suggested can do any harm tc the provision.

Rule 5, Section 5. — In the second paragraph of this section, I suggest that the words "in writing" be inserted after the word counterclaim in the second line. The reason is that, although in the first paragraph it is provided that the answer must be in writing, a counterclaim is not a part of the answer, although it may be pleaded in the answer.

In the third paragraph of the same section 5, Rule 5, I suggest that the words "a cross-claim" be inserted after the verb file in the first line. There is no reason why the defendant may not file a cross-claim in an Inferior Court. It is true that according to section 19 of Rule 5, section 7 of Rule 6 is made applicable in Inferior Court and therefore by that applicability a cross-claim may be filed in an Inferior Court; but section 6 of the same Rule 6 also is made applicable in Inferior Courts by the provision of section 19, Rule 5 and yet a counterclaim is expressly mentioned in Rule 5, section 5 as a

pleading that may be filed in Inferior Courts. So a cross-claim must be mentioned also expressly as a pleading that may be filed in Inferior Courts.

Rule 5, Section 6. — This section deals with a motion by defendant to dismiss or for judgment on the pleadings. But the amendment contained in the last proviso of this section allows a motion for judgment on the pleadings on the grounds specified in Rule 19; but this Rule 19 has reference to a motion for judgment on the pleadings by the plaintiff not by defendant. I suggest, therefore, that the proviso be eliminated and the whole section 6 of former Rule 4 be restored without amendment.

Rule 5, Section 15. — This section allows notice to be made either personally or by registered mail. It is believed that ordinary mail may be allowed also specially where there is no registry service, by analogy with Rule 13, section 5.

Rule 5, Section 17. — In this provision, the amount of the claim is raised to ₱200, where claimants may come to Inferior Courts with no written pleadings, no fee, and no costs **"Whether the parties be paupers or not."**

The Supreme Court held in Cabangis v. Almeda, 70 Phil. 443, that this provision on minor matters has always been intended for the poor and that only poor litigants may avail themselves thereof. This ruling was prompted by the fact that when the rules were approved containing the provision on minor matters, a flood of minor claims stated in long list coming from big and rich corporations invaded the municipal court of Manila for collection against their numerous small debtors, and it was evident that if such practice were allowed the Inferior Courts would become collection agencies for big corporations. The idea the Supreme Court had in mind in approving this provision on minor matters was to provide servants earning small salaries with a simple remedy when they are abused by their masters who refuse to pay them without justification. It is believed, therefore, that the amount of ₱200 fixed in the revised provision seems to be excessive, while the new clause "whether the parties be paupers or not" is unjustified and may affect the efficient administration of justice in Inferior Courts.

The second paragraph of this section 17, provides that in case of appeal, written pleadings shall be filed in the Court of First Instance as in cases originally instituted therein. Perhaps it would be better if the claim and the defense as noted by the justice of the peace in his docket be deemed reproduced on appeal so that the summary

character of the procedure may continue till the end. After all a certified copy of the docket entries must be elevated to the Court of First Instance in case of appeal according to section 5, Rule 38.

Rule 5, Section 19. — This provision specifies the procedures applicable in Courts of First Instance that may be applied in Inferior Courts. I suggest that Rule 129 et al. on Evidence be made applicable also in Inferior Courts.

RULE 6

Rule 6, Section 2. — This section does not mention "cross-claim or a counterclaim" as pleadings that may be allowed contrary to present Rule 15, section 1. The reason for this exclusion may be that there is a provision to the effect that cross-claim or counterclaim may be alleged in the answer. But, this provision which is permissive does not preclude defendant from alleging his cross-claim or counterclaim in a separate pleading, because a cross-claim or a counterclaim is not part of the answer.

Section 4 of Rule 6 defines what an answer is, by stating that it is a pleading containing the negative or affirmative defenses upon which the defendant relies. There is no provision to the effect that a cross-claim or a counterclaim is considered as affirmative or negative defense. There is, therefore, no provision that may prevent the defendant from filing a pleading separate from the answer, containing only a cross-claim or a counterclaim.

Therefore, I suggest that in Rule 6, Section 2, cross-claim and counterclaim must be inserted after the word "answer" in the second line.

Rule 6, Section 12. — After this provision, the provision of Rule 10, Section 9 of the present rules must be added. It reads as follows:

"Sec. 9. *Bringing new parties.* — When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants, if jurisdiction of them can be obtained."

The non-inclusion of this provision in the proposed revised rules may cause confusion for it may be construed as an abandonment which, it is believed, is not the intention of the Court.

It is true that there is a general rule regarding joinder of necessary parties appearing in Rule 3, Section 8 of the proposed revised rules, but this provision alone may not be sufficient to clarify the

doubt as to whether in a counterclaim or a cross-claim new parties may be joined, because a counterclaim is defined (Rule 6, Sec. 6) as a claim against the opposing party and cross-claim (Rule 6 of Sec. 7) as against the co-party. And thus, it may be thought, as under the old procedure, that there is an implied prohibition to join parties who are not the opposing party or a co-party, respectively. To avoid this doubt is the purpose of an express provision to that effect as the one appearing in Rule 10, Section 9 of the present rules.

RULE 8

Rule 8, Section 4. — This provision changes the provision of Rule 15, Section 11, wherein it is provided that "it is not necessary to aver the capacity of a party to sue or be sued..." whereas in the proposed provision of Rule 8, Section 4 it is stated that "facts showing the capacity of a party to sue or be sued . . . must be averred." It is my opinion that this change is unnecessary. Our present provision has been in our Rules for about twenty years and nothing wrong has been found in it till now. The present provision tends to return to the old system of compelling allegations of unnecessary facts.

Except in very few instances a corporation represented by an attorney would not dare file a complaint unless it is really a corporation. And when a corporation is sued, the plaintiff who is represented by an attorney would not file the suit unless the defendant is really a corporation. Upon the other hand, all corporations are registered and they are of public knowledge.

The same may be said in connection with a natural person who sues or is sued. It is not necessary to allege his legal capacity to sue or be sued, that is, that he is not insane, or that he is in the full possession of his civil rights, because this is presumed.

RULE 9

Rule 9, Section 2. — The section 6, Rule 10 referred to in this provision must be section 5, Rule 10.

Rule 9, Section 4. — This provision contains an amendment which bars also a cross-claim that is not set-up when it "arises out of or is necessarily connected with the transaction or occurrence that is the subject matter of the . . . co-party's claim."

This is not easy to understand.

A claim against a co-party's claim is a counterclaim but not a cross-claim. There seems to be no case for the amendment.

RULE 10

Rule 10, Sections 1, 2, 3 and 4. — These four sections on the matter of amendment are intended to supersede sections 1 and 2 of Rule 17 of the present rules. The proposed section 2 of Rule 10 is exactly the same as section 1 of the present Rule 17. Therefore, sections 1, 3 and 4 are the proposed provisions intended to abrogate the present section 2 of Rule 17. I have read carefully these three sections and with all due respect, I can find nothing important in them which is not already provided concisely in the present Rule 17, section 2. I will now attempt to make a brief analysis of the proposed three sections to find whether there is in them anything that is lacking in the present provision of Rule 17, section 2.

In section 1 of the proposed Rule 10, there is a statement of different amendments which may be made to pleadings; but since there is an infinity of amendments that can be made, their individual naming can never be complete and thus it has to be supplemented at the end with a general statement of any other matter that may be amended. Upon the other hand, this attempted specification does not seem necessary or practical in connection with amendments before services or responsive pleadings, for according to both the proposed and present provisions, all kinds of amendments may be made as of right at that stage of the proceedings.

It is my feeling that the specification may become necessary and practical only in connection with amendments after service of responsive pleadings, because they are the discretionary amendments that may be allowed only with leave of court, and they require some description for the guidance of Courts and counsel. And the description should not be, in my opinion, a mere giving of example of each of the different amendments that can be made, for this can never be complete and is impractical, but a simple and clear definition of their nature and character, so that it may serve at the same time as a statement of policy that will govern the discretion of the Courts.

It is for these reasons that in the present Rule 17, Section 1, dealing on amendments as of right before service of responsive pleading, there is no specification on particular amendments that may be made because all kinds of amendments may be made as of right under that section. The specification is made in Section 2, Rule 17 dealing on discretionary amendments, which is a clear and concise

description of their nature and character, that at the same time may guide the trial court in the exercise of its discretion. Section 1 of Rule 17 is a copy of Article 15, subsection (a) of the Federal Rules of Civil Procedure, whereas Section 2 of Rule 17 is a copy of Article 18, Section 2 of the Rule of Civil Procedure by the American Judicature Society. We found these sections concise, flexible and broad enough to meet all the known doubts and difficulties existing when the present Rules were drafted by the Court in 1939.

It is my view that the description of discretionary amendments contained in Section 2 of Rule 17 is complete and broad enough that it may be allowed to remain unamended. That description is as follows: "to amend any pleading, process, affidavit, or other document in the cause **to the end that the real matter in dispute and all matters in the action in dispute between the parties may**, as far as possible, **be completely determined in a single proceeding.** But such order or leave shall be refused if it appears to the Court that the motion was made with intent to delay the action." (underline ours).

Turning now to sections 3 and 4 of the proposed Rule 10, a distinction is made therein between substantial and formal amendments, the former being the subject of Section 3, and the latter of Section 4. In section 3 it is provided that substantial amendments may be allowed upon motion with notice to the adverse party and it contains two prohibitions (1) that substantial amendments cannot be allowed if they are intended to delay the action (this is present in Rule 17, Sec. 2); or (2) they change the cause of action or defense or the theory of the case. (this does not appear in Rule 17, Sec. 2). It appears, therefore, that Section 2 provides what substantial amendments shall be disallowed, but contains no provision as to what substantial amendments may be allowed. This section has eleminated the description and statement of policy contained in the present Rule 17, Section 2 to the effect that after service of responsive pleading, etc., "the court may upon motion or at any stage of an action and **upon such terms as may be just**, order or give leave to either party **to alter or amend any pleading, process, affidavit or other document in the cause, to the end that the** matter in dispute and all matters between the parties **may, as far as possible, be completely determined in a single proceeding.**" (underline ours).

Upon the other hand, in the proposed Section 4 of the revised Rule 10 which deals with formal amendments, there is no provision as to whether the amendments may be allowed upon motion with notice to the adverse party or whether they may be allowed ex-parte. It provides that the formal amendment may be allowed "summarily" without describing the summary procedure that is meant.

However, it provides that the summary correction may be made if "no prejudice is caused thereby to the adverse party." This is an implied statement that a formal amendment may also cause prejudice to the adverse party. But the possibility of prejudice to the adverse party cannot in many instances be predetermined unless the adverse party is previously notified and heard. So I presume that the procedure intended by Section 4 is that before formal amendment may be allowed there must be a motion with notice to the adverse party. And this is as it should be, because after the issues are joined, no alteration, whether substantial or formal, should be made in the pleadings without previous notice to the adverse party, and that the leave of court may be given summarily or otherwise, according as to whether prejudice is or is not shown by the adverse party.

In other words, in both formal or substantial amendments there must be a motion with notice to the adverse party, and the leave of Court may be given summarily or with terms, according as to whether there is or there is no prejudice caused thereby to the adverse party. An amendment may be substantial but if no prejudice is thereby caused to the adverse party, it may be allowed without terms. The amendment may be formal but if it may change the identity of some parties and the adverse party may be misled thereby, it may be allowed with terms. Accordingly after the issues are joined there must be no distinction between formal or substantial amendments as to the procedure and policy to be followed. This is the reason why in the present Rule 17, Section 2, no such distinction is made.

Furthermore, the proposed provision of Section 3, Rule 10 allows amendments to pleadings only, whereas the present provision of Rule 17, Section 2 allows amendment not only to pleadings but also to any "process, affidavit, or other document which is the cause." Sometimes a pleading is accompanied by affidavits and other supporting papers and sometimes thru mistake, inadvertence or excusable neglect there are errors or inaccuracies committed in any of said affidavits or supporting papers. The pleading in itself is correct and need not be amended, but the affidavits or supporting papers being erroneous may be amended with leave of Court.

There is an innovation contained in Section 3 which is an absolute refusal to allow an amendment which changes substantially the cause of action or defense or the theory of the case. There is no such flat refusal in the present provision of Rule 17, Section 2. It is because there must be no inflexible rule on that matter.

In Torres vs. Tomacruz, 49 Phil. 913, the amendment disallowed by the Court of First Instance was one changing substantially the cause of action, but was applied for after trial, and if the Supreme Court affirmed the ruling it was because "a large discretion is vested in the trial Judge, (and) we are unable to say that abuse of discretion on the part of the trial judge has been demonstrated..." (915.) Thus the Supreme Court impliedly recognized that the Court of First Instance had discretion in allowing or disallowing an amendment even if it changes the cause of action. In the language of the Supreme Court "the rule allowing amendments to the pleading is subject to the general, **but not inflexible**, limitation that the cause of action or defense should not be substantially changed or the theory of the case should not be altered."

This court time and again had been insisting on the policy that the rules of procedure must be construed liberally, and that cases must be tried on the merits as far as this is possible, without allowing them to go off on mere matters of procedure. If, for instance, in an action upon tort, the plaintiff, immediately after the defendant had answered, files an amended complaint changing the cause of action into one ex-contractu, but the relief sought in both the original and amended complaint is the same, that is, recovery of the same parcel of land, there may be sufficient justification in allowing the amendment upon such terms as may be just by giving the defendant ample time to prepare a new pleading and more evidence. Particularly is this so, when the circumstances are such that the mistake committed in the first complaint may be justified by equitable circumstances. By allowing the amendment, not much prejudice would be caused to the defendant who had just answered and who may be given all the time he may need to prepare an amended answer. But if the amendment is disallowed, plaintiff's case would be dismissed upon a technical matter or upon a mere question of procedure. And this is abhorred by the Rules of Court.

The same may be said of a substantial change of a defense. Before the trial the defendant may be allowed, upon such terms as may be just, to change a defense alleged in the original answer, when it is not intended for delay and there are justifiable reasons to allow it, to the end that the real matter in dispute may be determined in a simple proceeding. Plaintiff may be given all the time he may need to prepare his evidence to meet the change.

With due respects, I suggest that section 2, Rule 17 be left unamended.

RULE 11

Rule 11, Section 3. — The amendment introduced in this section, appearing in capital letters "OR FROM THE SERVICE OF THE COURT ORDER ADMITTING THE SAME" is unnecessary, because such provision already appears in the last part of the section, i.e., "within 10 days from notice of admission of the amended complaint." An amendment to the complaint may be made prior to the filing of the answer and hence, without leave of court and, in such a case, which is the subject of the first sentence of this section, the time to file and serve the answer must run from the service of the amended complaint, and the proposed amendment has no application. An amendment made after the answer, must be made with leave of court, and that is the subject of the second sentence of this section, the time to answer being "within 10 days from notice of admission of the amended complaint." Thus the proposed amendment is unnecessary because there is already such provision in the second sentence of section 3.

FORMER RULE 12

Former Rule 12, Sections 5, 6, 7 and 8. — These sections do not appear in the proposed revised rules. They refer to the amendment of the complaint, when there is a third party defendant (sec. 5); the the effect of adjudication of third party plaintiff's liability (sec. 6); third party complaint by plaintiff (sec. 7); fourth parties (sec. 8).

RULE 13

Rule 13, Section 1. — The amendment contained in this section appearing in capital letters "or by sending them by registered mail" may cause the doubt as to whether or not filing may be made by sending the paper by ordinary mail.

Rule 13, Section 10. — Under this section, proof of service by registered mail shall consist of the registry receipt and the registered return card, but such receipt and card cannot prove the kind of paper enclosed in the envelope that was sent by registered mail. Hence there must be an affidavit to that effect, similar to the affidavit provided for in section 22 of Rule 14, regarding proof of service of summons by registered mail.

RULE 16

Rule 16, Section 1(a) and (b). — This proposed provision is as fol-

lows: "Within the time for pleading a motion to dismiss the motion may be filed on any of the following grounds:

(a) that the court has no jurisdiction [of] OVER the person of the defendant or [of] OVER THE SUBJECT [subject-matter] of the action or suit;

(b) that the court has no jurisdiction over the subject-matter of the action or suit".

The present provision of Section 1(a) of Rule 8 is as follows: "defendant may, within the time for pleading file a motion to dismiss on any of the following grounds:

(a) that the court has no jurisdiction of the person of the defendant or of the subject-matter of the action or suit".

Thus the difference between the present and the proposed provision is that in the latter there is added the lack of jurisdiction **over the subject** of the action or suit, aside from lack of jurisdiction over the subject matter of the action or suit, as if **subject** and **subject matter** were different things. The words **subject** and **subject matter** are synonymous and have always been used interchangeably.

"The terms 'subject of the action' and 'subject matter of the action' are ordinarily regarded as synonymous, and have been defined as the facts constituting the cause of action; the property or thing, or the primary right, for which the action is brought.

"The terms 'subject of action' or 'subject of the action,' and 'subject matter of the action,' have been distinguished, in that the subject matter of an action is the abstract subject of judicial inquiry, whereas the subject of an action, in its strict sense, is the subject matter applied to a particular case. Ordinarily, however, they are regarded as synonymous, "subject of the action" being a code term for what was formerly known as the "subject matter of the action". Many attempts have been made to formulate satisfactory definitions of these terms, but, owing to the various connections and variety of context in which they are used, they are not readily susceptible of exact definition, and the decisions, even in the same jurisdiction, are widely at variance as to their proper meaning and application; and while some of the definitions hereafter stated might be sufficient for a particular purpose, they are not sufficiently general for all". (I CJS, 959)

Undoubtedly in the proposed revision the **subject of the action** is intended to refer to the thing litigated in cases of actions against non-resident defendants, but the proposed provision contains no indication to that effect; and in the second place, with or without such indication, the **thing litigated** can hardly be considered only as

subject of the action distinct and separate from the **subject matter of the action.**

I think the thing litigated must always be considered as included in the phrase **subject matter of the action** so that when it is said that the Court has no jurisdiction over the **subject matter** it may include the thing litigated in actions against nonresident defendants. This is the reason why in other jurisdictions their Rules of Procedure including their Model Rules, make no mention of jurisdiction **over the subject of the action** as distinct and separate from **jurisdiction over the subject matter.** They mention only the latter undoubtedly as embracing the former. Thus Article 12(b) of the Federal Rules of Civil Procedure contains in part the following provisions: "... except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction on the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, and (6) failure to state a claim upon which relief can be granted."

The Model Code of Procedure Article 16, Section 3 is as follows:

"*Other objections.* — Incapacity of a party, lack of jurisdiction over the person or the subject matter, venue, service, and other matter of abatement, shall be dealt with by motion to dismiss the action or vacate the services or other proceeding as the case may be".

Therefore, the addition contained in the proposed revised provision seems to be unnecessary.

Section 1(i) of the present Rule 8 reads as follows: "that the cause of action did not accrue against the defendant because of his infancy and other disability." This is eliminated in the revised rules. This ground for dismissal is a simple question of fact which may be substantiated briefly by simple evidence. I believe that this ground for motion to dismiss must be preserved.

Rule 16, Section 4. — I suggest two additions to this provision, so that the whole section shall read as follows:

"Section 4. — *Time to plead.* — A motion under this rule suspends the time to plead. HOWEVER, IN CASE OF DEFERMENT AS AUTHORIZED IN THE PRECEDING SECTION, MOVANT SHALL FILE HIS ANSWER WITHIN THE PERIOD PROVIDED BY THESE RULES, TO BE COMPUTED FROM NOTICE OF DEFENDANT. NO GROUND FOR DISMISSAL OR DEFENSE IS WAIVED BY BEING JOINED WITH ONE OR MORE OTHER

GROUNDS FOR DISMISSAL OR DEFENSES IN A MOTION OR RESPONSIVE PLEADING".

The reason for the first addition is that in cases of deferment the defendant may not feel himself bound to file his answer, his motion to dismiss being still pending, for it is deferred until the trial. Upon the other hand, if the defendant does not file his answer there is no way of going into the trial. A case cannot be set for trial unless the issues are joined, and the issues cannot be joined unless the defendant answers. A defendant who files a motion to dismiss cannot be compelled to answer before denial of his motion to dismiss. The motion is not denied when it is deferred until the trial, so there must be a way of compelling the defendant to file his answer after deferment and before denial of his motion to dismiss. And this is the purpose of the suggested addition.

Without this additional provision, a mere order of the Court directed to the defendant to answer after deferment would seem to find no authority in the Rules.

The reason for the second suggested addition is to dispel the doubt as to whether the defendant in his answer may allege defenses which may be construed as a waiver of the objections alleged in his motion to dismiss. For instance, under the former procedure there was a rule to the effect that when the defendant objects to the jurisdiction of the Court over his person, such objection is deemed waived if he joins another objection such as res adjudicata or statute of limitations. To abandon this Rule expressly and to accord the defendant freedom of alleging any defenses in his answer while his motion to dismiss is pending is the purpose of the second suggested addition. This is taken from Rule 12(b) of the Federal Rules of Civil Procedure.

RULE 17

Rule 17, Section 1. — I suggest that at the end of the first sentence of this section, after the words "before service of the answer" in the fourth line, the following be added "or of a motion for summary judgment whichever first occurs." The reason for this addition is that a motion for summary judgment may be filed instead of an answer. In which case, a dismissal after the motion for summary judgment is filed, cannot be made without an express order of the court.

Rule 17, Section 4. — If the amendment suggested to section 1 is approved, then it must be extended to section 4, by adding in the line preceding the last and after the word "pleading" the following words: "or a motion for summary judgment."

RULE 18

Rule 18, Section 4 is as follows: **"Judgment when some defendants answer, and others make default.** — When a complaint states a common cause of action against several defendants, some of whom answer, and the others FAIL TO DO SO, [make default] the court shall try the case against all upon the [answers thus filed and render judgment upon] evidence presented [by the parties in court]. The same procedure applies when a common cause of action is pleaded in a counterclaim, cross-claim and third party claim. (35-7)

The first amendment ("fail to do so" instead of "make default") may be accepted though unnecessary. The second and third amendments leave the provision vague or ambiguous. For instance, the words "the court shall try the case against all upon the evidence presented" do not seem clear. And the sentence is cut after the words "evidence presented" leaving the thought vague. "Presented" by whom?

With all due respects, with the exception of "fail to do so" all the other words suppressed should be restored and the provision would be clearer.

RULE 19

Rule 19, Section 1. — "Judgment on the pleadings. — Where an answer fails to tender an issue, or otherwise admits the material allegations of [the adverse party's] a pleading, the court may, on motion of [that] THE ADVERSE party, direct judgment on such pleading. BUT [except] in actions for annulment of marriage or FOR LEGAL SEPARATION [divorce] the material facts alleged in the complaint shall always be proved. (35-10, a)."

This Rule contains only one section **regarding judgment on the pleadings.** I do not think the matter is so important as to deserve becoming a single subject of a whole Rule. This provision may well be included in Rule 9.

Furthermore, the amendment to the second sentence is correct but the amendment to the first is at least doubtful. For instance, the words "or otherwise admits the material allegations of a pleading"; whose pleading? Since this is not specified, it may be the pleading of a a co-party. In such case, the adverse party may not

RULE 20

ask for judgment on the pleadings. I suggest that the first sentence be left unamended.

Rule 20. — When the present Rules were approved by the Court way back in 1939, the pretrial procedure was made discretionary on the part of Judges, for it was new in the Philippines and some Judges did not seem to agree with it. There was no doubt as to the practical and decisive utility of the pretrial procedure in relieving the trial Courts of their heavy load of cases. At the same time it was evident that pretrial procedure could be productive of good results only if it could be implemented by Judges with patience, tact and wisdom. How far our Judges were willing to accept this new task was not then well known at that time. But since then twenty years have passed. Now there must be enough information as to how Judges are handling this practical procedure in their respective Courts. At any rate, it is worth trying to make it compulsory, since this High Court has always in its hands the remedy to correct any anomaly that may happen in its implementation.

RULE 21

I think that Rule 21 regarding suspension of action is covered by Rule 20 on pre-trial which is now mandatory.

RULE 22

Rule 22, Section 6. — I suggest that a copy of the statement referred to therein be furnished the Supreme Court also aside from the Secretary of Justice, as a means by which the Supreme Court may acquire information as to how the rules of court are being complied with by the trial judges.

RULE 24

Rule 24, Section 11. — The last sentence of this provision is a repetition of clause (b) of the same provision.

RULE 29

Rule 29, Section 1. — The only amendment to this section appears in the eighteenth and nineteenth lines consisting of "to answer and further require the refusing party or the..." This amendment, which apparently is intended for clarification, varies substantially the meaning of the sentence thus amended. As amended the sentence would order the refusing party to answer if the refusal is found to have been made without substantial justification. Without the amendment the sentence would mean that even if the refusal is with substantial justification, if it is wrong, the motion would be granted, and therefore, the refusing party would be ordered to answer. In other words, the finding that the refusal is **without substantial justification** is not a prerequisite to an order to answer, according to the present provision. If the refusal is wrong and the motion is correct, that is all that is necessary for granting it and ordering the party refusing to answer. But, if aside from the error of the refusal and the correctness of the motion, it is found that the refusal was made without substantial justification, the refusing party may be ordered not only to answer but to pay reasonable expense for obtaining the order.

With due respect, I believe that the amendment must be withdrawn.

Rule 29, Section 5. — The amendment regarding payment of reasonable expense including attorney's fees has no application on failure to answer interrogatories submitted under Rule 25.

RULE 31a

Rule 31a, Section 1. — I think the provincial or city fiscal must take the place of the Clerk of Court in the preparation of the list of assessors. I think also that the provincial or city fiscal must be heard before striking out from the list the name or names of assessors because of unfitness. The provincial or city fiscal will render more assistance than the Clerk of Court who after all is always at the service of the Court.

RULE 33a

I would suggest an addition to this Rule to make it complete. It should read as follows:

> Effect of Judgment on Demurrer to Evidence.—After the plaintiff has completed the presentation of his evidence, the defendant without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. However, if the motion is granted and the order of dismissal is reversed on appeal, the movant loses his right to present evidence in his behalf.

The first sentence is taken from Rule 41-D of the Federal Rules of Civil Procedure.

RULE 34

Rule 34, Section 2. — The second paragraph of Section 2 of this Rule 34 does not seem to belong to that Rule, for it deals on execution of judgments. I suggest that it be moved as a last sentence of Section 1, Rule 37. This additional sentence may read as follows: If the judgment has been duly appealed, execution may issue as a matter of right from the date of the issuance of the notice provided in Rule 49, Section 11.

RULE 36

Rule 36. — This proposed Rule 36 is the present Rule 38 providing for a relief from a judgment of Inferior Courts or from a judgment or proceeding of Courts of First Instance, rendered against a party through fraud, accident, mistake or excusable negligence, the time fixed for the filing of the corresponding petition being "within 60 days after the petitioner learns of the judgment, order or proceeding to be set aside, and not more than 6 months after such judgment or order was entered or such proceeding was taken."

It seems that there is something lacking in this Rule. Suppose an action is dismissed on the merits upon stipulation signed by counsel of the plaintiff and counsel for defendant. Nine months thereafter, the plaintiff learned of the dismissal and moved to set aside the same on the ground that the stipulation had not been authorized by him. No question of fraud is involved since counsel for plaintiff acted seemingly thru a mere misunderstanding. Under our present Rule 38, no relief can be granted to the plaintiff, more than 6 months having elapsed from the date of the order of dismissal. But under Rule 60b of the American Federal Rules Procedure, relief can be granted because of a provision that is absent in our present Rule 38. Rule 60b of the Federal Rules of Civil Procedure reads as follows:

RULE 60. *Relief from judgment or order.*

(b) *Mistake; Inadvertence; Surprise; Excusable Neglect.* On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, the motion shall be made within reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in section 57 of the Judicial Code, U.S.C. Title 28, section 117, a judgment against a defendant not actually personally notified. (Fed. Rules of Civ. Proc.)

It should be observed that this Rule, as expressly provided therein, does not limit the power of the Courts (1) to entertain an action to relieve a party from judgment order or proceeding or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U.S.C., Title 28, section 118, a judgment obtained against a defendant not actually personally notified.

In Preveden v. Hahn, 4 Fed. Rules Serv. 60b. 51, Case 1: 36 F. Supp. 952, the district court of New York said that Rule 60b reserves to the Court the inherent power to vacate judgment improperly entered and preserves for litigant the old remedies of bill of review in equity and bill of error "coram vobis" or "coram nobis" at law. (Cf. 3 Moore, Fed. Prac. ss 60.01, 60.03 and 60.04.)

In United States v. Mayer, 235 U.S. 55, 67, Mr. Justice Hughes (later Chief Justice) writing for the Court, after referring to the general principle that the Court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, said.

> "There are certain exceptions. In the case of courts of common law .. the court at a subsequent term has power to correct inaccuracies in mere matters of form, or clerical errors, and, in civil cases, to rectify such mistakes of fact as were reviewable on writs of error "coram nobis" or "coram vobis", for which the proceeding by motion is the modern substitute... These writs were available to bring before the court that pronounced the judgment errors in matters of fact which had not been put in issue or passed upon and were material to the validity and regularity of the legal proceeding itself..."

This would solve the problem above propounded. But in the Philippines, aside from the authority given to Courts by the present Rule 38, there are no other powers provided by the present Rules which Courts may exercise to grant reliefs from orders or judgments which have already become final and executory, except an action to annul judgment upon the ground of lack of jurisdiction or extrinsic fraud. But in the problem given above, there is no question of jurisdiction nor extrinsic fraud.

In our former procedure (Act 190) there was section 513 providing for a relief from a jugment of default rendered against a party unjustly deprived of a hearing by fraud, accident, mistake or excusable negligence. The time provided therein within which the corresponding petition could be filed in the Supreme Court was "within 60 days after he first learned of the rendition of such

judgment and not thereafter." This period of time is elastic having no maximum period of limitation. A similar provision exists in section 57 of the Judicial Code, U.S.C., Title 28, section 118 granting relief from a judgment obtained against a defendant not actually notified, provided the petition is filed within one year after final judgment is entered.

But these two provisions (Sec. 513 of Act 190 and Sec. 57 of U.S. Judicial Code) are intended to protect defendants in default or similarly situated, and not plaintiffs against whom judgment or order is rendered without actual notice. Upon the other hand, the writs of coram nobis or coram vobis are intended to bring before the Court that pronounced the judgment all errors "in matters of fact which had not been put in issue or passed upon and were material to the validity and regularity of the proceeding itself." In other words, the scope of the first two provisions is too restricted, while the third is too broad. In my opinion, what is needed is a provision granting relief to any party, either plaintiff or defendant, unjustly deprived of a day in Court, without any fault on his part, when the period of six months is no longer available. One example claiming a provision of this kind is the one already given above of a plaintiff whose case has been dismissed without his knowledge. Another example is the following: In an action to recover real property, the defendant dies or becomes insane or disappears from home by abduction or the like, before judgment is rendered against him. Thus, all notices sent to him by his attorney were useless. The attorney exercising usual diligence acquired no knowledge of the fact until after one year from the date of judgment. Under the present Rules, or under the proposed Revised Rules, the heirs of the deceased, or the legal representative of the insane, or the abducted man himself upon recovery of his freedom has no ground for relief against the judgment rendered by the Court.

I submit a draft of an additional provision to be Sec. 9 of the proposed Revised Rule 36, which is as follows:

Sec. 9.—*SPECIAL PETITION TO COURT OF APPEALS OR SUPREME COURT.* When a judgment or order is rendered or a proceeding is taken in a Court of First Instance against a party unjustly deprived of a hearing without any fault whatsoever on his part as evinced by facts that had not been put in issue or passed upon and are material to the validity or regularity of the proceeding itself, and the period allowed by Section 3 of this Rule has expired, a petition may be filed by the injured party either in the Court of Appeals or in the Supreme Court, whichever has appellate jurisdiction on the issue involved in the principal case, within sixty days after he had first learned of the judgment, order or proceeding, praying that the same be set aside.

The petition must be verified and accompanied with affidavits showing the facts relied upon as well as the facts constituting petitioner's good and substantial cause of action or defense as the case may be.

The Court shall then proceed in accordance substantially with the provisions of Sections 4, 5, 6 and 7 of this Rule.

The new trial or further proceedings that may be ordered by the Court shall be conducted by the Court of origin to which the case shall be remanded.

RULE 37

Rule 37, Section 23. — I suggest the insertion, after the word "bid" in the 3rd line, of the words "if there is no third party claim thereon and". This is in accordance with the ruling in Matias v. the Prov. Sheriff of Nueva Ecija, 74 Phil. 326.

Rule 37, Section 28 (b). — This paragraph (b) of Rule 37, amends paragraph (b) of Sec. 25 of present Rule 39 by substituting the words "that under which" for "the judgment". This change, I believe, is not deliberate but merely clerical, for it alters, without justification, the substance of the provision, and is contrary to the rulings of this court. For instance, in an action, a levy was made on the properties of the defendant. Subsequently, another action by a different plaintiff is filed against the same defendant without levy on the latter's properties, but a judgment is rendered therein against the defendant earlier than the judgment rendered in the first case. It was held that the judgment creditor in the second case is a redemptioner although his judgment has priority in point of time to the judgment rendered in the first case, but it is subsequent to the levy made in the first case. (see Kuenzle et al v. Villanueva, 41 Phil. 611; Chua Pua Hnos. v. Register of Deeds of Batangas, 50 Phil. 670, 673). This ruling is not in harmony with the proposed amendment. I suggest, therefore, that the provision be left unamended.

Rule 37, Section 29. — In the fifteenth and sixteenth lines of this section, there is a sentence which begins as follows: "property so redeemed may again be redeemed . . . " The former provision was "if the property be so redeemed by a redemptioner". In the revision the words "by a redemptioner" are suppressed, perhaps for the sake of brevity. But such suppression is misleading because it may convey the idea that if the property is redeemed by any one as by the judgment debtor, for instance, a further redemption may still be allowed, which is wrong. There is no harm in leaving the words "by a redemptioner" in the provision for purposes of clarity.

Rule 37, Section 45. — In line four of this section the words "in his docket or" are suppressed. This must be a clerical error.

RULE 38

Rule 38, Section 3. — The word "fixed" in the second line must be "filed".

Rule 38, Section 5. — I suggest that at the end of this section the following words be added: "or in lieu thereof the postal money order or certificate of deposit of the municipal treasurer".

Rule 38, Section 6. — At the end of the third line of this section, I suggest that the following words be added "to collect postal money order within 5 days or".

Rule 38, Section 7. — The amendment appearing in the last sentence of this section is as follows: "If the defendant had filed no written answer he must answer within the time prescribed by the rules of the appellate court, counted from the receipt of the clerk of court's notice of the docketing of the appeal". All answers in inferior court must be in writing now according to Rule 5, section 5, except in procedure on minor matters. If no written answer has been filed in the inferior courts, none will be deemed reproduced in the Court of First Instance upon the docketing of the appeal therein. And to allow the defendant to file a new answer is to allow him to present in the Court of First Instance defenses that had not been pleaded in the inferior courts, and this is contrary to our rules of jurisprudence.

RULE 41

Rule 41, Section 1. — I suggest that the following be added at the end of this section "In the computation of the period of thirty (30) days above mentioned, the time during which a motion for reconsideration on substantial grounds has been pending must be deducted."

Rule 41, Section 3.—Is it wise to make the decisions of the Auditor General appealable only on questions of law? Is it prudent to make those decisions absolute on questions of fact?

Under the law (Com. Act No. 146, Section 35), the decisions of the Public Service Commission may be reviewed on the ground that they find no support in the evidence. Unless this ground be considered as a question of law, Sec. 31 of Rule 41 would be an amendment to the law.

RULE 42

Rule 42, Section 1. — I suggest that in section 1 it should be made clear that only **final** awards, orders or decisions may be appealed from.

Hence instead of the word "an" in the second line of this section, the words "a final" must be inserted.

Furthermore, I suggest that at the end of the second paragraph of section 1, the following words be added "In the computation of the period of time herein provided, the time during which a motion for reconsideration on substantial grounds has been pending shall be deducted."

RULE 43

Rule 43, Section 1. — I suggest that the amendment "within 15 days from notice of judgment or of the denial of his motion for reconsideration" be changed with the following: "within 15 days from notice of judgment excluding therefrom the time during which a motion for reconsideration has been pending." The purpose of this suggestion is to make the procedure uniform in all appeals.

Rule 43, Section 6. — The last words "within the same period provided in this Rule" do not seem to be sound. If the Court of Appeals acted without jurisdiction over the subject matter, lapse of time cannot validate its proceedings. I suggest that said words be suppressed, to be substituted by "upon the grounds therein specified."