

# **Law of Civil Procedure II**

**Teaching Material**

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## **Introduction**

As you remember from your previous study on part one of Civil Procedure Law, it was stated that the whole course is designed to be delivered in two semesters. By now, you have already covered the first part of the study and the second part is to be conducted at this semester, and it which covers a total of five major chapters.

The first chapter deals with the Pre-Trial Proceedings. Under this chapter, the role of the court in hearing the parties to the suit, in determining the issues and preparing the case for trial or adjudicate it with out trial will be discussed thoroughly.

The second chapter mainly deals with the procedure to be followed on the production of evidence and how judgments and decrees are rendered.

Following the judgment and decree, there could be a party who is not satisfied by the decision of the court. In that case, the procedure for reviewing judgment will be important and these will be discussed under the third chapter.

The forth chapter is concerned with how decrees will be executed. The last two chapters then will discuss the issues related with Res judicata and splitting of claims and other procedural matters.

## **COURSE OBJECTIVES**

The Course is designed to equip students with a comprehensive understanding of the conceptual issues underpinnings civil procedure, and, thereby enable them engage in a wide range of skill enhancing factual activities.

Upon completion of the Course, the students will, among other things, be able to:

- determine the power of the court in hearing suits;
- understand the effect of non appearance of parties to litigation;
- identify cases that can be adjudicated with out the need for full scale trial;
- discuss how evidences will be produced to the court of law;
- explain the rules on review of judgment; and identify the types, proper procedure and requirements for reviewing the judgment of the lower court;
- identify the court which has the jurisdiction to execute the decree;
- list down different possibilities for execution of judgment.
- differentiate what ordinary and special procedures are.
- discuss the effects of failure to appear in a court when ordered, explain procedural problems before trial;
- describe the procedural issues that must be solved before a proceeding is transferred to the trial stage;
- identify when to raise an objection and give response;
- apply the technique of raising objections and give responses;
- differentiate between the advantages of going to trial and discontinue a suit before trial; and
- apply the procedures by balancing the interest of the parties and the system

## **Introduction**

As it stated above, the first chapter of this Material deals with the Pre-Trial Proceedings. Under this chapter, the role of the court is mainly hearing the parties to the suit, determining the issues and preparing the case for trial. However, there are possibilities whereby the court may adjudicate the case with out trial. Hence, the discussion of this chapter will revolve around those issues.

Besides, we would like to remind you that the discussion in this material is entirely dependent on your previous studies of the civil procedure. So, you need to refer once again to your material to recapitulate and to easily understand it.

### **Objectives:**

After you have completed studying this chapter, you will be able to:

- determine the power of the court in hearing suits;
- explain the effects of appearance and non-appearance of a party;
- list down procedural problems before trial;
- understand the effect of non appearance of parties to litigation;
- identify when to raise an objection;
- discuss the effect of failure to raise such objections in the first hearing;
- describe the procedural issues that must be solved during the first hearing;
- identify cases that can be adjudicated with out the need for full scale trial; and
- differentiate between the advantages of going to trial and discontinue a suit before trial.

# **CHAPTER ONE**

## **PRE -TRIAL PROCEEDINGS**

### **1.1. The First Hearing**

#### Overview

Under this topic, we are going to discuss the procedural steps that will be applicable during the first hearing. In the first hearing, parties to litigation, mainly, party plaintiff and party defendant, are expected to appear. If both parties appear as ordered by the court, the court then will examine them. This is to clearly identify the controversial point of the dispute. If the defendant has raised objections, the court will give a ruling on the objection and if the objection will not result in striking out or dismissal of the suit, it will proceed and frame the issues. However, some times, one or both of the parties may fail to appear in the court of law at first hearing. In such cases, the court will order based on the procedure.

In general, at first hearing, the court reads the statement of defense, examines both parties to determine their respective positions, rules on any preliminary objections, and frames the issues for trial. In certain circumstances, the court may adjudicate the case at the first hearing without requiring a full-scale trial. If the proceeding is transferred to the trial stage, the court sets a date for the trial and at the trial it hears evidence and decides the issues. Here under, we are going to discuss the procedural steps to be applied during first hearing.

#### **1.1.1. Non -Appearance of parties**

As we have seen above, if a defendant appears in the first hearing with his statement of defense, will the court holds what is called the first hearing. However, a question like the following one may arise: “what will happen where a party does not appear before the court at the required time?” The problem of non-appearance may arise throughout the proceeding and the provisions may be applicable to all stages of the proceedings. i.e. the



first hearing, the trial and review. But the problem of non-appearance usually happens at the first hearing.

An appearance involves coming before the court so that the court can adjudicate the case or take any other action it deems necessary. A party to a suit is not mandatorily required to appear personally at the hearing.

A party may appear through an agent or pleader. However, the court may require that the party should appear in person, and if a party who has been ordered to appear fails without good cause, it is considered as if there was no appearance. Where there are several plaintiffs or defendants, anyone of them may be authorized to appear on behalf of them all. (Art.66 (1). Such authority must be in writing and signed by the party giving it, and filed in the court (Art. 66(2)). Where persons are sued as partners in the name of the firm, each must appear individually in his own name. But subsequent proceedings will continue in the firm name. So, if a partnership is sued in the firm name, all the partners must appear individually at the first hearing (Art. 67). Where a body corporate is sued, the court may require the personal appearance of the secretary, any director or other principal officer who can answer questions relating to the suit (Art. 68(1)). The same is true with government employees who may be able to answer questions in a suit involving to government (Art 68(2)). In other words, while a personal appearance is not ordinarily required, the court has the power to compel the personal attendance of parties or agents where it concludes that such attendance is necessary for the determination of the questions in the suit. Where a party appears through a pleader, the pleader must be able to answer such questions or be accompanied by a person who can.

#### Action upon Non-appearance

The Civil Procedure Code is strict on the requirement of appearance. Of course, it has its own rational. If one of the parties ordered by the court fails to appear and if the court does not take immediate action, then the case would be delayed and the court would

adjourn the case to a later date. This will create a lot of problems to the parties, and to the court. This is not permitted under the code. Hence, if a party is ordered by the court to appear on a certain date, he has to appear. Non appearance results in affirmative action on the part of the court depending on who appears or who fail to appear the court will either struck out, dismiss, adjourn or proceed to hear the case in the absence of the non-appearing party.

In the following, section we are going to see these different rules applied during non-appearance of a party.

a. Action Upon non-appearance of both parties

Where both parties, i.e., party plaintiff and party defendant fail to appear in court of law, when the suit is called on for hearing, the court shall make an order that the suit be struck out, or in case of appeal, that the appeal be dismissed. (Art. 69(2))

Heres the court has no discretion to adjourn the case. However, this is not the case in the Indian code of Civil Procedure. According to order IX, rule 3 of the Indian code of Civil Procedure, the court has a discretionary power to adjourn the case instead of dismissing it.

*Question 1:* which one of these different approaches do you think is more appropriate? Why?

b. Action where defendant does not appear

If a plaintiff appears and the defendant does not appear, when the suit is called on for hearing, the court does not simply take action with out having enough information about the non-appearance. This is because such non-appearance may be due to the fact that the defendant did not receive notice of the proceedings. Hence, where the defendant does not appear, the first question the court must ask is whether he/she was duly served or not. Then, it is up to the plaintiff to convince the court that he/she has duly served the defendant.

If the court is satisfied with the mode of service to the defendant, it automatically orders *Ex-parte proceeding*. (Art.70 (a)). However, we have to understand the distinction between *Ex-parte proceeding* made according to Article 70 of the Ci.Pr.C and *Default proceeding* made based on Article 233 of the Ci.Pr.C. On this point, the Federal Court of Cassation Division has made a very interesting interpretation under file15835.

The very interpretation of the court is, when the court should order *Ex-parte proceeding* and *Default proceeding*, what is the effect of those orders. Articles 70(a) and 233 of the code says:

**Art. 70 Defendant failing to appear**

Where the plaintiff appears and the defendant does not appear **when the suit is called on for hearing:**

- (a) if it is proved that the summon was duly served, **the suit shall be heard ex-parte;**

**Art. 233. - Service of statement of claim**

Where there are no reasons for rejecting a statement of claim under Art. 231, the court shall cause the statement of claim and annexes to be served on the defendant together with a summons requiring him to appear with his statement of defence on a day to be fixed in the summons and informing him that **the case will proceed with notwithstanding that he does not appear** or that he appears without his statement of defence.

According to the Federal Court of Cassation Division interpretation, first we have to clearly differentiate the date for submitting statement of defence and the date of hearing. If the hyphen happened on the date which is fixed for submission of statement of defence, and if it is proved that the defendant is duly served with the summon, the court should order *Default proceeding* based on Article 233 of the Ci.Pr.C. Whereas, if the hyphen of the defendant is on the date which is fixed for hearing, the order of the court will be *Ex-parte proceeding*. We will see the effect of both proceedings later.

On the other side, if it is proved that the defendant failed to appear in court of law on the date which is fixed for hearing because he was not duly served or the summons was not served on him in any of the modes of service that is sufficient to notify him, the court will order *Second summon* to be served on the defendant.

The third possibility with regard to non-appearance of defendant is, in case where the summons was served on him in so short time that he may not be able to appear. In such cases the defendant will be served with the summons but the summons might have not been served in sufficient time, in which case the court will *adjourn* the hearing so that the defendant will have sufficient time to consider the allegations of the statement of claim and able to appear at the day fixed with his/her defense. But despite the fact that the defendant has not been served, if he/she appears in that day, the suit will continue.

*Question 2:* What do you think is the fate of the defendant who appears at the adjourned date and fails to demonstrate good cause for his previous non-appearance?

c. Action where plaintiff does not appear

Where the defendant appears and the plaintiff does not, when the suit is called for hearing, the court shall make an order that the suit be dismissed, unless and otherwise the defendant, in his/her statement of defense, admits all or part of the claim. If there is admission, even though the plaintiff fails to appear, the court shall pass a decree based on that admission. If no admission by the defendant, the dismissal is mandatory, and the defendant cannot demand the suit to continue. But, sometimes the defendant may assert a claim of counterclaim or set off. In such a case, the court will proceed to hear that part of the case, since as to such counterclaim or set-off, the defendant occupies the position of plaintiff, and the rules relating to the non-appearance of the defendant apply. Here, we can also see the interpretation of the law made by the Federal cassation court interpretation under file14184, so that we can see the difference between the date that is

fixed for submission of statement of defence, in which the suit should not be dismissed and the date that is fixed for hearing, in which dismissing of suit is appropriate.

The problem of non-appearance may also arise in the case of multiple parties. Suppose that two plaintiffs have joined; or two defendants have been joined, and one does not appear. This situation is governed by Art. 75 of the Civil Procedure Code.

When does Art. 75(1) apply? Remember that the non-appearing plaintiffs have joined in the suit and are parties of record. The non-appearance does not affect the power of the court to enter a decree involving their rights. Striking out or dismissing the suit as to them would also require such action with respect to the appearing plaintiffs, since the suit cannot proceed in the absence of indispensable parties. This would be unfair to the appearing plaintiffs, and since the court may enter a decree as to non-appearing plaintiffs, it should proceed with the suit.

Non-appearance of one of the several defendants has also the same effect. Where one or more of the several defendants, although duly served, has failed to appear, the suit will proceed against all defendants or the suit may proceed as ex-parte against the non-appearing defendant.

*Question 3:* Here above we have seen when court order *Dismissal* and *Struck-out* a case. Do you think there is a difference in between the two? Explain.

1. Effect of Non-appearance

We will now consider the effect of non-appearance. Where there has been non-appearance, depending on who has failed to appear, four things can happen:

1. The suit may be *struck out*; (Art. 69(2) or 70(d))
2. The suit may be *dismissed*; (Art. 73, 69(2) (2) 70(d) or 73)
3. The court may proceed *ex-parte*; (Art. 70(a))
4. The court may issue a *default Proceeding*; (Art. 233).

In the above discussion, we have already discussed when the court pass the above different types of orders. Following this we will also strictly focus on their respective effects. Each of those orders has their own distinct effect. To begin with, the effect of struck out, where the case is struck out; the plaintiff may as of right bring a fresh action on the payment of full court fees. On the other hand, if he satisfies the court that there was a sufficient cause for his/her non-appearance, the original suit may continue and the plaintiff is relieved from payment of court fee.

**Question 4:** what is the distinction between continuing the existing suit and filing a fresh suit?

Where the plaintiff's suit has been dismissed, he/she will be precluded from bringing a fresh suit in respect of the same cause of action. However, if the plaintiff can show good cause for his non-appearance within one month from the dismissal, the court may, after giving notice of application to the opposite party, order setting aside the dismissal upon such terms and costs as it thinks fit. Accordingly, the court shall appoint a day for proceeding with the existing suit.

On the other hand, we have said that where the defendant, while he is duly served, does not appear on the date which is fixed for hearing, the court may proceed ex-parte (Art. 70(a)). The very effect of such order is not default decree. Rather, the court will proceed to adjudicate the suit in the absence of the non-appearing party. In effect, the non-appearing party will not have the right to participate in the process of litigation. Whereas, if a third party defendant does not appear, the court enters a default decree.

However, the defendant against whom an order made ex-parte or third party defendant against whom a decree is passed may, within one month from the day he became aware of such action, apply to have it set aside. Article 78 Civil Procedure Code governs this situation.

You have to note here that the plaintiff seeking to have an order of dismissal set aside must apply within *a month from the date of the order*. But a defendant seeking to have an ex -parte decree set aside has *one month from the time he was aware of the decree*. There is a possibility that the defendant may not be aware of the decree until the plaintiff tries to enforce it against him, i.e., at the execution stage.

If the defendant does not apply within that time, or if the court finds that the summon was duly served and that there was not sufficient cause for non-appearance, the decree is valid and it will be enforced against the defendant notwithstanding that he never presented his defense. He had the opportunity to appear and cannot have the case responded to give him another chance.

A problem may arise where there are multiple defendants, and an ex-parte decree was given against all or some of them and is set aside only as to some. Suppose there are two defendants, neither of them appeared. Both defendants applied for the setting aside of the decree and the ex-parte decree against one of them was set aside but not against the other. Or, one appeared, judgment was entered against him, an ex-parte decree was entered against the other, which the later has applied to set aside.

Under such circumstances, if the decree is such that it cannot be set aside only against the non-appearing defendant entitled to have it set aside, it may be set aside against the other defendants also. The court is doing this because the defendants are indispensable parties. In such case a decree against some alone cannot stand. However, the decree against the other defendant or defendants should be set aside only where the decree is necessarily

indivisible. Where separate judgments can be entered against each defendant, there is no need to set aside the decree against the others.

The last but not the least effect of non-appearance is related with default proceeding. As we have seen above, if the defendant, while he is duly served, failed to appear in court of law on the date which is fixed for submitting his statement of defence, the court shall order default proceeding based on Article 233 of the Ci.Pr.C. The effect of such order is not equal to ex-parte proceeding. In ex-parte proceeding, the party whom an order is made against him will not have the right to be involved in the litigation proceedings following the order. Whereas in default proceeding, the non-appearing party, i.e; the defendant, should not be refused to be a party to the litigation. The only effect of such order is that he will be precluded to exercise the procedural rights that should be exercised on the date of his non-appearance. For example, he cannot exercise his right to submit his written statement of defence. In other words, in default proceeding, the non-appearing party can exercise his right to be a part to the litigation from the date he appears in court of law, but he loses to be benefited from those procedural rights that should be exercised during his non-appearance.

## 2. Sufficient Cause

Once the court has ordered following the non-appearance of a party, it does not mean that it is final and there is no ground for reviewing it. A party whose interest is affected due to the order up on non -appearance may apply to the court to set aside the order, provided that he has sufficient reason to justify his/her non appearance. If the court is satisfied that the non- appearing party was prevented due to sufficient reason, it may order to set aside the order and the case will continue to proceed. However, the following questions may be raised here:

- What are the elements of sufficient cause?
- Whether the criteria for justifying sufficient cause would be the same in all cases?



When reading the provisions that have reproduced to you in the previous sub-sections, we hope you have observed the term "*sufficient cause*" mentioned in different contexts. The Code uses "*sufficient cause*" in more than one context. Where the suit has been struck out, Art 71(2) provides that the plaintiff may continue the suit without paying the court fees if there was "sufficient cause for his non-appearance. Where the suit has been dismissed, Art. 74(2) provides that the plaintiff or appellant may have the order of dismissal set aside if he shows that there was, "sufficient cause" for his non-appearance when an "ex-parte" decree has been passed against a defendant or a default decree against a third party defendant. Under Art 78(2), the decree may be set aside if the defendant shows that he was prevented by sufficient cause from appearance. Should "sufficient cause" when used in Art. 71 (2) mean the same as when it is used in Art. 74(2) and 78(2)? If we consider the effect of a finding of "sufficient cause", the answer should clearly be no.

### **1.1.2. Examination of Parties**

If the issue of appearance is decided and the case can be proceeded, the next task of the court in the first hearing will be examination of parties. Where the parties appear in person, the court verifies their identity. It then reads the pleadings and asks the parties on the pleadings. The question is whether each party or his pleader admits or denies the allegations of fact in the pleading of the other party that have not otherwise been denied. You remember that we have said when we discuss pleadings that every allegation of fact in the statement of claim that is not denied in the statement of defense is deemed to be admitted. However, the court has the power to examine the parties at the first hearing and record whatever is not said in the statement of claim or the statement of defense. If the court sees that the defendant has not denied or expressly admitted a particular allegation, of the statement of claim, it gives him a second chance, to speak. The court will specifically ask him whether he intended to admit that allegation is deemed denied. The court records all admissions and denial, and they form part of the record. Where a party makes an admission at the first hearing, that admission is conclusive, and no issue will be

framed as to that matter. In other words, the defendant may deny or admit the allegations in his statement of defense or at the examination. See Article 241 and 242 of the Cv.Pr.C

The examination of the plaintiff at this time is particularly important since the plaintiff file a responsive pleading to the statement of defense that he received in writing. Secondly, the defendant might have raised affirmative defenses, e.g., Force majeure. The case may be decided in whole or in part on the basis of the admissions made by the parties.

By examining the plaintiff, the court determines whether he admits or denies the facts constituting such defenses. Suppose that the defendant has admitted the contract but said that he had paid what plaintiff is claiming. The plaintiff could deny that the defendant had paid, in which case there would be an issue on this point. Or, plaintiff could say that what defendant had paid is some other payment not the debt claimed in the suit. Then, the court would frame an issue on whether the payment has already discharged the claim or not.

The main purpose of the examination at the first hearing is to help the court clarify and develop the issues for trial. The court examines each party, or where the party does not appear, the person accompanying the pleader for the purpose of answering such questions. Since the examination must be conducted by the court and only for this purpose it would not be proper for the court to put a party on the stand, examine him on the entire case and allow the other party to cross-examine him. The examination is simply to determine what admissions and denials are made by the defendant which assists the court in framing the issues. It must be conducted with reference to the allegations in the pleadings and only supplements the pleadings in developing the issue for trial.

If a party admits in the pleadings or on the oral examination, the other party may apply to the court for such judgment or order as he may be entitled to as a result of the admissions made by the parties. See Article 242 of the Cv.Pr.C

The defendant may admit that he is liable, but deny that the plaintiff suffered the damages he claimed. The court would issue a judgment to the effect that the defendant is liable to the plaintiff in an amount to be determined at the trial, which would then be limited to deciding the question of what damages the plaintiff suffered.

### **1.1.3. Ruling on Preliminary Objections**

After the court has examined the parties, it proceeds to decide any preliminary objections that have been raised. A preliminary objection may be defined as an objection not going to the merits of the case that is, not involving the question of whether the defendant is liable to the plaintiff under the substantive law.

As you can remember from the discussion on part one of the civil procedure course, we have considered some objections that may be raised by parties to litigation. Art 244 (2) also sets forth certain preliminary objections. So, when such objections are raised the court is to proceed in accordance with the provisions of Art. 245. Under this Article, the court will hear the opposite party, order the production of such evidence as may be necessary and render a decision on the objection.

*Question 5:Justify* Whether the preliminary objections listed under Art. 244(2) are exhaustive or not?

Now, we are going to see the contents of Art. 244(2) on preliminary objections.

*Art. 244 (2) – The provision of Art. 245 shall apply where either party states that:*

- a. the court has no jurisdiction*
- b. the subject matter of the suit Res Judicata*
- c. the suit is pending in another court*
- d. the other party is not qualified for acting in the proceedings;*

- e. *prior permission to sue has not been obtained, when this is required by law;*
- f. *the suit is barred by limitation; or*
- g. *the claim is to be settled by arbitration or has previously been made the subject of a compromise or scheme of arrangement*

As we can understand from the contextual meaning of the provision, the list of preliminary objections provided under Art. 244(2) are not exhaustive. None of these preliminary objections go to the merits of the case. In other words, they do not relate to the question whether the defendant is liable to the plaintiff under the substantive law or not. They should be disposed of as soon as possible, since it would be a waste of time for the court to examine the parties and frame issues for trial only to discover that due to the non-merits objection, a trial will not be necessary.

Therefore, Art. 244(3) provides that any preliminary objection not raised at the earliest possible opportunity, i.e., at the time the court call for the first hearing, is deemed waived unless the ground of objection is due to reasons such as to prevent a valid judgment from being given. This means, some preliminary objections, like lack of material jurisdiction, even if not raised at the first hearing may be taken as issues throughout the proceeding because their existence prevents the court from giving a valid judgment.

Generally, the acceptance of an objection has two effects. In other words, if a court sustains an objection, the effect on the suit may be dismissal of the suit or the suit may only be struck out.

Where the court sustains an objection on the ground that the subject matter of the suit is *res judicata* (that the suit has already been decided by a court previously) or the suit is barred by limitation, the suit will be dismissed. Even though the objection does not go to

the merits of the case, the suit will be disposed once these objections are sustained. Because, if a case is said to have previously been seen and decided or if the claim of the plaintiff is said to have been barred by limitation, there is no chance for the suit to be instituted afresh. That is, there is no opportunity for the plaintiff to file a fresh suit.

In other cases, the order that sustains the objection would ordinarily result in striking out the suit. For example, if the court sustains an objection on jurisdiction, plaintiff has the opportunity to file a fresh suit in a court that has local or material or judicial jurisdiction. On the other hand, where the court sustains an objection on pendency, the suit will be struck out and the plaintiff would continue the prior suit.

The striking out of the suit shall not of its own force preclude the institution of a fresh suit with respect to the same cause of action and the court shall, in appropriate cases, inform the plaintiff that he may sue in the court having jurisdiction or in the court in which the previously instituted suit is pending.

Where a suit is dismissed on the ground of want of jurisdiction, the prescribed portion of the court fee paid on the filing of the statement of claim shall be refunded. More specifically, the Amharic version of Article 245(4) of the Civil Procedure Code stated that the court might reduce, based on the regulation, certain amount of court fee to be refunded for the plaintiff.

To sum up, the court has, first, to decide on preliminary objections, before proceeding with the next step proceeding, i.e. framing of issue, if defendant has raised any. The court when making a ruling on preliminary objections has to give a chance to the plaintiff to respond on the objection raised by defendant. The court has to hear evidence if it is necessary to preliminary objections rose. Then, it will give ruling. If the ruling sustains the objection, the suit may be struck out or dismissed. Whereas, if it is overruled, the court will proceed on the suit.

#### **1.1.4. Framing of Issues**

After preliminary objections, if any, have been decided, the court shall ascertain upon what material propositions of *fact or of law* the parties are a *variance*, and shall thereupon proceed to *frame and record the issues* on which the right decision of the case appears to depend. However, if the defendant, at the first hearing of the suit, makes no defence the court will not be compelled to frame and re-cord issues. An issue is something on which the right decision of the case appears to depend. This may be framed based on the material proposition of fact or of law affirmed by one party and denied by the other. Material propositions are those propositions of fact or of law, which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

Where issues both of fact and of law arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until the issues of law have been determined.

In framing the issues, the court considers the allegations in the pleadings, the contents of the documents produced by either party, and the oral allegations made by the parties or their pleadings or persons present on their behalf. See Cv.Pr.C Article 248

The very advantage of framing issues is to limit the scope of litigation of the parties during the trial proceedings. Hence, the court must frame the correct issues, in order for the trial to proceed expeditiously and the parties will be prepared to produce evidence on those issues. Otherwise, if the court fails to do that, delay and inconvenience are likely to result.

## **1.2. Adjudication without Trial**

### Overview

Under this Section, we will discuss the disposition of cases after issues have been formed and before building a full-scale trial. One of the purposes in requiring clear and precise pleading and holding a first hearing is, whenever possible, to decide the case, in whole or in part, without holding a trial.

As you can remember from the previous discussions, we have already discussed instances where the court disposes of a case before requiring a full-scale trial or without sometimes even requiring the opposite party to respond. Some of those are where the court examines the legal sufficiency of the statement of claim and the statement of defense.

Where the statement of claim fails to state a cause of action, the court will dismiss the suit. Secondly, we have seen that at the first hearing, the court may give judgment, in whole or in part, on the basis of the admissions that the parties have made in their pleadings or on the oral examination.

The Civil Procedure Code provides three other devices by which a case may be adjudicated in whole or in part, without a full-scale trial and these will be discussed as follows.

### **1.2.1. Agreement on Issue**

In the above discussion, we have seen how a court will frame an issue. However, some times, parties by themselves may agree as to the question of fact or law to be decided between them. In such a case the civil procedure code Art. 252. says:

**Art. 252: - Questions of fact or law may be stated in form of issues**

**Where the parties agree as to the question of fact or of law to be decided** between them, they may state the same in the form of an issue,

and **enter into an agreement in writing** that, upon the finding of the court in the affirmative or the negative of such issue:

- (a) a sum of money specified in the agreement or to be ascertained by the court, or in such manner as the court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement: or
- (b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or
- (c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.

You have to note here that agreement on an issue plays a great role in facilitating the trial proceeding of the suit. Because, in doing that, parties will have the opportunity to compromise on some issues of the litigation and point out those issues which needs the decision of the court. Normally, Issue can be legal or factual. Some times, the issues framed by the parties could only be issue of law. If it is a legal issue, there will be no trial. In such cases, the court may render judgment at the pre trial stage.

### **1.2.2. Parties Not at Issue**

The primary purpose of the pleadings and the first hearing or proceedings prior to trial is to develop the issues for trial. As a result of such proceedings, there do not appear to be any such issues; the court may pronounce judgment at the first hearing. This rule is provided under Art. 254 of the Civil Procedure Code.



As we have said earlier, issues arise when a material proposition forwarded by one party is denied by the other in the suit. So, if plaintiff has forwarded his propositions, which are found to be legally sufficient, the defendant is required to admit or specifically deny the allegations of the plaintiff. If the defendant admits the allegations or the material propositions of the plaintiff, there is no issue to be disposed by the court. In other words, where a party admits the material proposition of the other, the parties are not at issue and the court will, at once, pronounce judgment in favor of plaintiff.

Finally, we would like to remind you that the parties may not be at issue on some points, but may be at issue on others. In such cases, the court has to conduct a trial to decide on matters where the parties are at issue.

### **1.2.3. Deposition of issues at the First Hearing**

Unlike what we have seen above, some times parties may be at issue but their issue could be adjudicated with out the need for full-scale trial. i.e., it may be easy to dispose the issue at the first hearing. This happens where the court is satisfied that the issues framed for trial can be determined with out argument or evidence other than that which the parties can at once produce, and that no injustice would result from proceeding in this manner; the court is authorized under Art. 255 to determine the issues at the first hearing, and pronounce judgment accordingly.

*Question 6:* Differentiate the concepts entertained under Articles 254 & 255.

The other opportunity to dispose issue at first hearing is where the issue or issues framed are issues of law. In this case, the court may adjourn the hearing to enable the parties to martial their legal arguments, but it should not set a trial. This is because no evidence will be introduced. The same will be true on issues, which can be resolved entirely based on the documentary evidences, which are already delivered to the court. However the court should be careful to decide on whether the issue is solely dependent on the documentary evidences which are submitted to the court at the first hearing. If there is a need for

further evidences, which includes witnesses, the case will necessarily be adjourned to trial.

In general, in determining whether the issue may be resolved at the first hearing, the crucial question is whether all the evidence that both parties can produce on that issue is available at that time. The court should ask the parties whether they have further evidence of other witnesses to be produced at the trial and decide accordingly.

### **1.3. Compromise and withdrawal**

The fact that the issue will have been formulated prior to trial may have the effect of persuading a party that he is not likely to prevail if the case comes to trial. The plaintiff might then decide that he wishes to discontinue the suit. Or, the parties might decide to compromise the case. This may happen not only before trial is conducted, but it may also be raised after trial is conducted and before judgment is rendered. Following this we will deal with issues related with Compromise & withdrawal.

#### **1.3.1. Compromise**

Compromise is basically an agreement reached by parties to a dispute. Parties who are involved in dispute could settle it by agreement before taking the case to court or after the case is taken to court and before judgment is rendered.

*Art. 3307 of the civil code defines compromise as a contract whereby the parties, through mutual concessions, terminate an existing dispute or prevent a dispute arising in the future.*

Art. 274(1) of the civil procedure code also defines compromise as follows:

*The parties may by compromise agreement relating to all or some of the matters in issue terminate a dispute with respect to which a suit has been instituted.*

This indicates that while the civil code defines compromise broadly; which includes agreement before the institution of the suit, civil Procedure code is restricted only on the compromise that will be made after the suit has been instituted. It does not include compromise that will be made before the institution of the suit.

If the parties have compromised the dispute, and; nonetheless, files a suit, the defendant may assert the compromise as a defense. He can do so by filing a preliminary objection on this ground at the first hearing. In such case, the court will consider whether a valid compromise has been effected in accordance with the civil code, and if it finds that such a compromise has been effected, it should enter a judgment in terms of the compromise. The judgment will be Res Judicata and will prevent a further suit by the plaintiff on the claim.

Valid requirements of compromise agreement: (Art. 276)

- The name and place of the court in which the suit is pending
- The title of the action and the number of the suit
- The name, description, place of residence and address for service of the parties;  
and
- The matter to which the agreement relates

It may also settle accessory matters such as costs, damages and execution.

### **1.3.2. Withdrawal of suit**

In the above discussion, we have already seen how parties to the litigation settle their disputes through compromise agreement. In cases where such compromise agreement made out of the court, we have already said that plaintiff must notify the court that he has withdrawn the suit. However, the code did not simply put compromise as the only means of discontinuance of the proceedings of civil litigation. A case may also be discontinued

by a party by way of withdrawal or abandon any of his claim against any or all defendants. Following this we are going to discuss on these issues.

Ordinarily, a party may withdraw the suit or abandon any of his claims against any or all defendants. Such withdrawal of suit can be made with the permission of the court or out of court permission. Hence there are two types of withdrawal of suit; namely, *withdrawal with leave* and *withdrawal with out leave*.

While the case is pending, the plaintiff may for different reasons decide to withdraw or abandon the suit. In such cases he/she may ask leave of the court to withdraw the suit. In such cases, the court will analyze whether the reason forwarded for withdrawal is satisfactory or not. The criteria for satisfaction of the court to permit the party to withdraw the suit are stated under Art. 278(2)(a)&(b).

These are: if a suit must fail by reason of some formal defect; or that there are other sufficient grounds for allowing the plaintiff to institute a fresh action for the subject matter of a suit or part of a claim, it may grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh action in respect of the subject matter of the suit. Therefore, for the court to permit withdrawal of suit with leave, the exception should be strictly construed. Otherwise if the court simply allows such permission for those who could possibly continue with the proceedings but are interested to initiate the suit in some any other time, which is convenient for them, the other party may be imposed to incur unnecessary expenses and inconveniencies.

However, once the court permits the plaintiff to withdraw or abandon with leave to institute fresh action on the subject matter of the suit, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

On the other side space, a party may withdraw a suit with out leave for two reasons. The first reason is incase the reason he/she suggested to the court for permission to withdraw fail to satisfy and the party decide to withdraw regardless of the decision of the court on it. The other reason is also if the party simply withdraws the suit with out asking any permission to the court on that issue. Therefore, the ultimate outcome of withdrawal without leave to file a fresh suit is clear i.e., he/she can not institute a fresh suit in respect to the cause of action. However, according to Art. 279 of the civil procedure code, the plaintiff may institute a fresh suit against the defendant on the same subject matter with different claim.

### Review Questions

1. List down the actions a court could take during non-appearance of party/parties.
2. Describe the procedural issues that must be solved before a proceeding is transferred to the trial stage.
3. Define what preliminary objection is and discuss its effect when there is failure to raise it during the first hearing
4. List down the sources used for framing of issues.
5. Explain the basic procedures envisaged by the civil procedure code before a proceeding is transferred to the trial stag.
6. Discuss the conditions, advantages and disadvantages, if any, of discontinuance of a suit before trial.
7. Explain in brief the differences and similarity of compromise and withdrawal vis-à-vis their role in adjudication of cases.

## **CHAPTER TWO: THE TRIAL AND OTHER PROCEDURES**

All that has gone at the first hearing culminates in the trial. At the trial stage the issues developed at the first hearing would be resolved, and then judgment and decree would be passed. To this effect, the trial essentially involves the introduction of evidence and the consideration of that evidence by the trier of fact. The Civil Procedure Code regulates:

1. the production of evidence, that is, how witness and documentary evidence are brought before the court,
2. the conduct of trial, and
3. the giving of the judgment and passing the decree.

Since the rules determining what evidence can be considered by the trier of fact will be found in the Evidence Code, when one is enacted, in this part we will be concerned only with those aspects of the trial governed by the Civil Procedure Code, that is, more emphasis will be given to the procedure to be followed at the trial of the case rather than with the evidence the court can consider.

### **Objectives:**

After studying this chapter, You will be able to:

- Verify what oral testimony is;
- Comprehend the difference between eye witness and expert witnesses;
- Pin point the procedure of summoning a witness;
- Grasp the respective duties of the parties and witnesses during production of evidence;
- Appreciate the procedure of examination of witnesses by a commissioner;

- Identify when to examine (one need) or to conduct examination thorough a commissioner;
- Define what burden of proof is and identify when it shifts form one party to the other;
- Describe the order of the proceeding of evidences;
- Explain the manner of giving evidence under the procedural law and the power of the court in examining witnesses;
- Understand what judgment and decree are all about;
- Comprehend what judgment in consensus and judgment in majority are;
- Verify the difference between judgment and decree;
- Explain how to reduce the operative part of judgment to decree;
- Identify what arrest and attachment before judgment are and verify its rationale behind;
- Comprehend what temporary injunctions, interlocutory orders, and appointment of receivers are;
- Grasp what Summary and accelerated procedures are;
- Pin point the difference and similarity between and among Summary and accelerated procedures, and ordinary trials.

## **2.1 Ordinary Proceedings**

### **2.1.1 Production of Evidence to the Court**

#### Overview

The law of evidence is concerned with one of the most complex undertakings in the entire litigation process. This complex undertaking is the reconstruction of past events to arrive at the truth. Truth is not sought in an absolute sense. Evidence is produced to prove factual allegation/s that is/are affirmed by one party and denied by the other. Since the

trial stage is basically the stage where oral testimony and documentary evidence are examined, it is necessary to have a procedure by and through which all necessary oral and documentary evidence can be brought before court. To this effect, in this section, we will first consider the procedure for obtaining the attendance of witness and oral testimony and then the procedure for obtaining the production of documents.

Before we directly embark on the essence of the production of evidence, it is good to have a clear image on the purpose of Civil and Criminal Procedure Codes; accordingly let us have a bird's eye view on the following purposes:

1. Entrenching expedite trial by eliminating worthless evidence. This approach would ultimately enable the courts not to waste their time by receiving worthless information.
2. The second purpose is exclusion of prejudicing and inherently unreliable information from trial. Accordingly, if a piece of evidence, though relevant, could endanger or prejudice the trial of fact, it would not be admitted as evidence.
3. The third purpose of procedural law is protecting the privacy of the parties on learning the truth for purposes of litigation. Thus, some evidence, although valuable and non- prejudicial, will be inadmissible eventhough its exclusion might result in an incorrect factual determination at the trial. There are several kinds of privilege, which contributed for the exclusion. The most common privileges that are incorporated in our laws are the so- called communication privileges that protect conversations between individuals who are in a special relationship.

Generally, the law does not exclude the relevant testimony of any person who has the capacity to observe and remember the matters on which that person testifies, the ability to communicate this knowledge and an understanding of the obligation to tell the truth. However, when any of these factors are in doubt, it is up to the judge to admit or exclude such whiteness.



***What does a plaintiff or a defendant do when he files his pleading?***

According to Art. 223[1][a] and 234[1], when a party files his pleading, he includes a list of witnesses to be called at the trial, together with their address and the purpose for which they are to be called. Presumably, those witnesses will voluntarily appear at the trial, and they may testify without any further formalities. However, when some witnesses so named will not appear voluntarily or when subsequent to the filing of the pleadings, a party discovers another person who can give testimony. In such a case, the court will issue a summon to that witness requiring him to appear, and if the hearing has already begun, it may adjourn the hearing so that the person summoned can appear.

In this regard, in order to render a proper decision, when the court is convinced that the witness may give valuable testimony and the summons is not sought merely to delay the case, the court should have all the evidence before it even at the expense of further prolonging the case.

At this juncture, it is important to note that since the parties have primarily responsibility for presenting their cases, the court shall issue the summons in its own motion only in exceptional circumstances, that is, only where a witness who is likely to be able to give crucial testimony has not been called by either party. See Article 264 of Cv.Pr.C

Accordingly, on the basis of Art. 112[1] where the summons is issued at the request of a party, before the summons granted with in period to be fixed, he shall pay into court a sum of money as it appears to the court to be sufficient to defray the travelling and other expenses of the witness for one day's court attendance.

Where the court finds that the sum is not sufficient to cover the expenses or that the witness must be detained for more than one day, the court will order the party who has requested the issuance of the summons to pay an additional sum in to the court. If he does not do so, the court may discharge the witness or order the required sum to be levied from

the attachment and sale of the party's movable property or may order both the levy and the discharge.

The summons must specify the time and place at which the witness is required to attend and whether his attendance is required for the purpose of giving evidence or producing a document, or both. So, if a person is said to have in his possessions a marriage certificate or a contract to marriage, or a will etc, the summons should mention the type of the document that this person should produce.

According to Art. 118[1]:

1. *Where a witness who has been summoned fails to appear at the appointed time, the court must first determine whether the summons has been duly served.*
2. *Where the court sees reason to believe that the evidence to be given or document to be produced by such witness is material:*
  - A. *if the court is satisfied that the summons has not been duly served, it may order the issue of a fresh summons on such terms as the costs or otherwise as it thinks fit;*
  - B. *if the court is satisfied that the witness has without good cause failed to comply with such summons or has intentionally avoided service, the court may make such order, including the issue of a warrant with or without bail for the arrest of such person, as it considers necessary for the attendance of such person.*

Good cause should only refer to a situation where the witness was prevented from attending due to physical conditions beyond his control, for example, illness or unavailability of transportation. As it is clearly indicated under Article 118 of the Civil

Procedure Code, it is important to note that a witness who fails to appear when summoned may also be subject to criminal prosecution

Unless the court otherwise directs, in line to Art. 120 of the Civil Procedure Code, witness who has been summoned shall attend each hearing until the suit has been disposed of, and the court may require a witness in attendance to execute a bond that he will attend until the suit is disposed of.

Up to now, we have been considering the attendance and summons of witnesses. The whole purpose of summoning witnesses is to examine them what they testify as to what they know. The witnesses could be any person who has a witness when a document is signed or who might have seen a certain accident or factual situation that gives rise to action. The witness could be an expert witness who the court summons him so as to hear his expert opinion on a given subject. Both types of witnesses are summoned and testified in the court. The parties and the court may examine them.

But, there are circumstances where a witness whose testimony is necessary and cannot be brought before the court. This often happens when the witness may be physically incapable to attend the court proceeding or he may be far from the jurisdiction of the court or he may be about to depart from the jurisdiction of the court before the hearing.

Where a witness is not in a position to testify in court because of physical incapacity or because of other causes, Article 122 provides that such witness may be examined on commission.

An examination on commission is the examination of a witness by a person specifically authorized to examine the witness. Where the witness is not resident within the local limits of the court's jurisdiction or is about to leave those limits, the commission may be issued to any court within the local limits of whose jurisdiction the witness resides or will be present to any other person the court issuing the commission may appoint.

In this regard, the court before issuing summons may require a sum for expenses to be paid by the party at whose request or for whose benefit the commission is issued. And, like the summons to the witness, the commission shall specify some particulars, and give orders to all concerned, i.e., the parties and the commissioner. On this basis, the parties are required to appear before the commissioner in person or through their representatives. According to article Art .125(1) of the Ci.Pr.C, the provisions of the code applicable to the summoning, attendance and examination of witnesses, and to the remuneration of and impositions of penalties to be imposed upon witnesses shall apply to persons required by the commissioner to give evidence or to produce documents. Besides, it assumes the commissioner as a civil court.

Where the witness resides outside the local limits of the court issuing the commission, the commissioner may apply to any court within the local limits of whose jurisdiction the witness resides for the issuance of process against that witness, and that court shall issue such process against that witness, and that court shall issue such process as it finds proper.

There is another way of hearing or admitting the testimony of a witness. This other way is that, if such witness is required by neither party to be examined, he may be permitted by the court to give his testimony by affidavit. This means that a witness may put what he knows about the fact in issue by an affidavit and submit the same to the court. However, if either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, affidavit may not be given. Note here that where evidence is given by affidavit, the witness is not present for cross-examination or examination by the court, the court or the parties would not have a chance to observe his demeanor and other factors that affect his credibility. So, the court should use its power of allowing a witness to testify by affidavit in rare and exceptional cases. [Art. 204]

Following the above procedural set up, Art. 205 of the Civil Procedure Code stipulate that affidavit shall be confined to such facts as the deponent is able by his own knowledge to prove, but on an interlocutory application, example on the application of a

temporary injunction, they may include facts that the deponent believes to be true. In such a case it must be made clear how much of the affidavit is based on the deponent's knowledge and how much is based on facts that he believes to be true. The sources on which his belief is based should also be disclosed.

So, affidavits can be employed in two situations. The first is that the party proved the facts to the best of his knowledge, and the second is that the party may prove some fact by affidavit where he believes that the facts are happening or will happen.

Examples:

- 1) A plaintiff who does not have sufficient money to pay court fee may apply to the court to sue as a pauper. He should support his application by an affidavit to prove that he does not have money, pursuant to Art.468 of the Civil Procedure Code. In such cases the deponent is stating the facts as he knows them and not mere belief.
- 2) A plaintiff is required to support his application by affidavit for an order of temporary injunction the attachment of the property of the defendant before judgment. In such affidavits that deponent, that is, the plaintiff is stating his belief that the other party is or will remove his property from the jurisdiction of the court or that the subject matter of the suit would be wasted.

It is not therefore necessary to produce other evidence or witnesses on matters that are to be proved by affidavits. This, however, does not mean that a fact proven by affidavit is irrefutable. In other words, it can be challenged and disproved.

As you know, documentary evidence is classified as real proof as opposed to oral testimony. Real evidence includes written documents and demonstrative evidence. Photographs, recordings, and tangible objects like the murder weapon or a broken glass would be classified as real proof. Most of the real proof introduced at trial is in the form of documents. There are generally two special rules that govern the admissibility of documents under the procedure code and the new evidence draft law.

The first is the rule of authentication. This rule requires a showing that a document, what its proponent claims it to be before it, will be admitted into evidence. In the ordinary situations this means only that the person offering the document must produce evidence that it was signed or prepared by the person who is claimed to have signed or prepared it.

The second rule related to documents that is provided in the Civil Procedure Code is the So-Called best evidence rule. The best evidence rule requires a party to introduce the original document or to establish that the original has been lost or destroyed before other evidence of the document's content are to be admitted. [Art 140 and 223 of the Civil Procedure Code.]

As it is clearly indicated above, each party must include with his pleading the original copy of any document in his possession on which he relies [read Art, 233(1), and 234(1)]. If a party alleges that a document is in the possession of another person, the court has the power to order the person who has possession of the document appear in court with it. Art. 264 (1) of the Civil Procedure Code provides that” *Any person present in court may be required by the court to give evidence or to produce any document then and there in his possession or power* “. Where a party to the suit who has been ordered to produce a document failed to do so, the court may pronounce judgment against him [Art.267 of the Civil Procedure Code]

As regards a person who is not a party to a suit and who is ordered to produce a document, we have said that the rules of summoning and attendance of witnesses is applicable.

Where a person is summoned for the sole purpose of producing a document, he may simply produce the document without personally appearing in court. The rules on the production of document by persons who are not parties to suits and who are not witnesses are provided under Art.115 and 119 of the Civil Procedure Code. So, if a person is

ordered to produce only the document under Art .114, he can cause the document to be produced. In other words, he can send the document to the court instead of appearing in court to produce the document under Art 115. The person in whose possession a document is alleged to exist has a duty to respect the order of the court in producing the document. This is provided in Art.119 of the Civil Procedure Code.

Note here that these rules are applicable to the production of other real proof, e.g. photograph and exhibit (Art 146). The court may also send for the record of any other suit or proceeding either from its own files or from the files of another court. Art 145(1) provides that *“the court may of its own motion or on the application of any of the parties to a suit, send for either from its own records or from any other court, the record of any other suit or proceeding, and inspect the same.”*

There are many instances where the record in a suit may be relevant and admissible in another suit. One such case is where one of the parties alleges that the case before them is res judicata.

Before we wind up this section let us discuss, the procedure of admission of documentary evidence by the court. The rules are provided in Arts.139-141 of the Civil Procedure Code.

Where document has been produced, the court endorses on it the number and title of the suit, the name of the person producing the document, and the date on which it was produced. This should be done irrespective of whether the court considers the document to be admissible in evidence, but where it is inadmissible the court must include a statement to the effect that the document has been rejected. On whose behalf the book or account is produced may furnish a copy of the entry, and the required particulars are endorsed on the copy. Where the book or account does not belong to the party seeking to introduce it, the court may require that party to furnish a copy. Where the court has

ordered the production of the book or account on its own motion, it may require either party to produce the copy. Whenever a copy has been furnished, the court shall compare the copy with the original, certify the copy to be accurate, and return the original to the person producing it. The court, however, may if it deems it necessary direct that any document be impounded for such period as it deems fit. In such a case, any person who has submitted an original document may receive back the original by substituting a copy and promising to produce the original if required to do so.

Note here that no document may be returned which by force of the decree has become void or useless. For example, in a suit on a negotiable instrument, the defendant contends that the instrument was obtained by duress. If the court sustains the contention and enters judgment for the defendant, it will not return the document to the plaintiff, since the document is not enforceable. This prevents his trial to file a suit on the instrument elsewhere. On the return of a document admitted in evidence, the person receiving it must give a receipt.

***When (at what stage of the proceedings) should documentary evidence be introduced?***

The party will presumably seek to introduce in to evidence the documents on which he is relying during the presentation of his case at trial. The code provides that the court may at any stage of the suit reject any document that it considers irrelevant or inadmissible. So the court would reject the document when filed with the statement of claim or presented at the first hearing. The court might rule on the admissibility of the documents at the first hearing. But, it is more likely that it will wait until the trial. At the trial, the proponent will seek to introduce his document into evidence, and any objection to the admissibility of the document can be considered at that time. Note that, the court has the duty to exclude or not to admit the document even if no objection is made. Where a document has been admitted, it forms part of the record; if it is not admitted, it does not form part of the record and is to be returned to the person who produced it.



In a nutshell, the code bestows the court broad powers to compel the attendance of witnesses and the production of documents and generally to obtain evidence that it considers necessary to enable it to decide the issues at hand in the suit. Primary responsibility for the attendance of witnesses and the production of documents rests with the parties. However, the court, in the exceptional circumstance, may by its own motion, demand the production of evidence.

### **2.1.2 Conduct of The Trial**

As we have seen before, at the trial each party introduces the oral and documentary evidence necessary to support his side of the issue. In this section, we will consider the rules governing how this evidence is to be introduced.

#### 1. Order of Proceeding

##### ***What is burden of proof?***

Burden of proof means the obligation to provide evidence necessary to establish a disputed fact or a degree of belief in the mind of the court. Two concepts are involved under burden of proof: burden of persuasion and burden of going forward with the evidence. Burden of persuasion is the ultimate burden of convincing the court of an issue, and it does not shift during the trial. The burden of going forward with the evidence is on the plaintiff at the start of the trial. But this burden may shift to the defendant if defendant admits the allegations of the statement of claim and has raised what we have called affirmative defences.

According to Art. 258[1] of the Civil Procedure Code:

*On the day fixed for the hearing of the suit, the plaintiff shall be entitled to begin unless the defendant admits the fact alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by*

*the defendant, the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant shall be entitled to begin.*

This reflects the general rule that the party who has the burden of proof has the right to begin. The plaintiff has the burden of proving that he has a cause of action, and the defendant has the burden of proof on the question of whether he has a valid defence.

Whenever the plaintiff has the burden of proof on one of the issues in the case, he has the right to begin. If for example, there is an issue as to the existence of the contract and an issue as to the existence of force majeure, the plaintiff has the right to begin, since he has the burden of proof on one of the issues in the case. However, if the defendant admitted the existence of a contract, his non performance and the damages claimed, but contended that his non performance was excused by force majeure, he would have the right to begin, since he has the burden of proof on the only issue in the case.

***Discuss what preponderance of evidence is?***

If, in a suit for breach of contract, the plaintiff fails to make out a case showing that there was a contract, there is no reason to proceed further: the burden is on the plaintiff to show that there was a contract, not on the defendant to show that there was not a contract.

with regard to statement and production of evidence, Art. 259 of the Civil Procedure Code stipulate that:

1. The party entitled to begin shall state his case, produce his evidence in support of the issues which he is bound to prove.
2. The other party shall then state his case and produce his evidence and may address the court generally on the whole case.
3. The party beginning the reply generally on the whole case.

At this juncture, it is worthy to note that the order of proceeding or burden of proof and shift of the burden of proof is based on the substantive law. It is clearly provided under Art. 2001 of the Civil Code that:

*The party who demands performance of an obligation shall prove its existence, and the party who alleges that an Obligation is void, has been varied or is extinguished shall prove the facts causing such nullity, Variation or extinction.*

According to Art. 260 of the Civil Procedure Code:

*(1) Where there are several issues, the burden of proving some of which lies in the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party.*

*(2) When evidence is reserved, the party beginning may produce such evidence after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning but the latter party shall then be entitled to reply : generally on the whole case.*

Now, let us see when plaintiff uses his option not to reserve evidence according to Art.260 (1).

Plaintiff sued defendant to recover damage for non-performance of contract. Defendant denied that there is a valid contract or alternatively that if a valid contract is found to exist, he has performed it or alternatively that if he is found not to have performed the contract, he was prevented by force majeure, and if force majeure is not found to exist and plaintiff has suffered no damages.

***What are the issues?***

We could have several issues in this case. Some of them are:

1. Is there a valid contract?
2. If there is a valid contract, does the defendant perform its duties or not?
3. If he has not performed the contract, was he really prevented by force majeure?
4. If there was not force majeure, has plaintiff incurred damages or not?

So, under this scenario the plaintiff has the right to begin and has the burden of proving the essential element of the suit, that is, the existence of the contract. To this effect, Art. 260(1) of the Civil Procedure Code gives the plaintiff the opportunity to produce all his evidence on all the four issues without waiting for the defendant to produce evidence on the issues he has the burden of proof, or reserve it by way of answer to the evidence produced by the other party.

In the first option, the plaintiff would not only be confined to prove the existence of the contract but he will also produce all his evidence that would prove that defendant has not performed it, that defendant was not prevented by force majeure and that plaintiff has incurred damage. Then the defendant will follow and will produce all his evidence on all the issues and will address the court. Lastly, the plaintiff will reply on the whole case.

In the second option, if the plaintiff has reserved his evidence, the following procedure is employed. The plaintiff produces his evidence on the issues as to which he has the burden of proof. Assuming that the evidence is sufficient, the defendant must produce his rebuttal evidence and the evidence on the issues as to which he has the burden of proof.. If defendant has introduced sufficient evidence on the issues as to which he has the burden of proof, the plaintiff must produce his evidence on those issues. Then the defendant replies specially on the evidence produced by the plaintiff and the plaintiff replies on the whole case.

To recapitulate, the above point it is clearly to the plaintiff's advantage to reserve evidence on the issues as to which the defendant has the burden of proof. If the defendant does not produce sufficient evidence to justify a finding in his favor on those issues, the plaintiff will not have to introduce any rebuttal evidence. Moreover, if the plaintiff has not reserved evidence, he will have to introduce his evidence on those issues without knowing precisely what evidence the defendant will introduce. He will be rebutting evidence before that evidence has been presented. However, depending on the nature of the issues and the evidence, it may be more convenient for the plaintiff to introduce his evidence on all the issues at one time, for example, he may seek to prove all the issues by the same witness, and he may introduce his evidence on all the issues at one time.

## 2. Production of Evidence by the Parties

The primary responsibility for the examination of witnesses rests with the parties, though as we will see, the court is also given broad power with respect to the examination of witnesses.

### *What is the manner of examining witnesses?*

#### *With what manner witnesses are examined?*

According to Art. 261 of the Civil Procedure Code, there are three stages to examination of witnesses. These are:

1. The examination-in-chief;
2. The cross-examination;
3. The re-examination

So much so that, the three stages of examination of witness are expected to be employed at different times, in different ways and for different purposes.

### *What is the purpose of these three stages?*

The plaintiff and the defendant ordinarily call the witnesses, and as to the witness he calls the party is the proponent. This means if plaintiff has called three witnesses to prove his case, he is the proponent and defendant is the opponent. In this regard, the proponent tries

to bring out the evidence that will support his version of the case and that evidence only, and the opponent then tries to destroy the testimony of the witness, and the proponent tries to rehabilitate that testimony.

The rationale behind is that, as a result of the process, everything the witness knows about the case will be brought to the attention of the court, and the court will be in a better position to determine whether or not the witness is telling the truth than if he merely testify in a narrative manner.

Thus, during the examination-in-chief, the proponent tries to develop the testimony of the witness in the light most favorable to him; during-cross-examination, the opponent tries to discredit that testimony; and during re-examination the proponent tries to minimize the effect of cross-examination.

In the production of evidence, the manner of giving evidence is clearly provided under Art. 261 of the Civil Procedure Code. According to this Article, the witness first and foremost takes the oath in the form provided in the Third Schedule to the code, and proceeds to answer the questions propounded by the proponent or his advocate.

Following this, Art. 263 of the Civil Procedure Code stipulate the form of questions as follows:

1. Questions put in examination-in-chief shall only relate to facts relevant to the issues to be decided and only to such facts of which the witness has direct or indirect knowledge.
2. No leading question shall be put to a witness with out the permission of the court.
3. Question put in cross-examination shall tend to show to the court what is erroneous, doubtful or untrue in the answers given in

examination-in-chief. Leading questions may be put in cross-examination.

4. No question shall be put in re-examination except for the purpose of clarifying matters, which have been raised in cross-examination.

***What are the legal requirements of examination-in-chief?***

***How do we differentiate leading questions from other forms of questions?***

The purpose of the rule forbidding leading questions on examination-in-chief [and by implication in re-examination] is to prevent a witness who is quick to adopt the suggestion of the examiner from saying something that he would not say otherwise. The testimony must be that of the witness and not the examiner; the examiner cannot put words in the mouth of the witness, so to speak. In other words, this is managed to limit the proponent in his examination of the witness and ensure that the testimony is genuinely of the witness. As what constitutes to leading question, there is no hard and fast rule. But, generally, it could be determined by the form of the question and the tone in which it is asked-it is only where the question itself suggests the answer which the examiner wishes to receive that it is considered to be leading. In this regard, the most common example of leading question is one where the examiner concludes with a positive suggestion such as “didn’t you?” or “weren’t you?”.

According to Art.263 [2] of the Civil Procedure Code, the court may at any time permit the asking of leading questions. In line with this Article, there are three situations where the court could do so. These are:

1. When the witness is being examined as to what are called introductory matters. The evidence of each witness shall start with his name, age, occupation and address, and to save time, the examiner can simply start “your name is....., isn’t it?” Obviously this is not objectionable, since the substance of the witness’s testimony is not involved.

2. The second situation is where the witness cannot remember some or all of the matters as to which the testimony is sought.
3. The third situation is to assist child witnesses who have difficulty in testifying.

In addition to every effort made to show that the witness has omitted facts or is not relating the facts correctly; there are methods of impeaching credibility. Some of these methods are: showing

1. That the witness is biased in favor of the proponent or against the opponent,
2. That he has made prior statements inconsistent with his testimony in court,
3. That he has a poor reputation for telling the truth,
4. That he has been convicted of certain criminal offences reflecting on his trustworthiness.

When we come back to documentary evidence, there are no express provisions of the Civil Procedure Code governing the introduction of the documents into evidence. However, according to Art.138 of the Civil Procedure Code:

The court at any stage of the suit rejects any document, which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

In this regard, the court might rule on the admissibility of the documents at the first hearing or could wait until the trial. Furthermore, at this juncture, on the basis of Art.142 of the Civil Procedure Code, it has the duty to exclude an inadmissible document even if no objection is made, and where a document has been admitted to incorporate it as part of the record.



### 3. Power of the Court during production of Evidence

Under the adversarial system of litigation, which our system of litigation has adopted, the role of the court is minimal with regard to the examination of witnesses. This role in the adversarial system is said to be minimal only when it is compared with the inquisitorial system of litigation. However, the Ethiopian Civil Procedure Code has given the courts broad power with respect to the examination of witnesses and the production of documents at the trial. Although Ethiopia has adopted the adversarial system of litigation and the principle of party presentation, this is modified by giving the judge a potential degree of control over the conduct of the litigation.

#### *Discuss what adversarial and inquisitorial systems of litigation are?*

The principle of party presentation which is one of the hallmarks of the adversarial system is modified in our code and the court has power to order amendment of pleadings on its own motion, and it has the power to frame issues for trial. With regard to the examination of witnesses, the court has the power to put a question to a witness at any time during the examination.

The court has also the power to call a witness even though he has not been called by the parties and may order any such person to produce any document that he has with him. Furthermore, according to Art. 266 of the Civil Procedure Code, the court has the power to recall any witness who has been examined and may put to him such questions as it thinks fit. In this regard, the parties have already examined him in the examination-in-chief, cross-examination and re-examination stages. The court is probably recalling a witness to clarify points or matters, which were not clear during the examination. So, it is only the court that examines the recalled witness and the parties do not have a further opportunity to question him although they may request that he may be called.

On the basis of Art. 267 of the Civil Procedure Code, where a party, without a lawful excuse, refuses to give evidence or produce a document in his power when required to do

so by the court, the court may pronounce judgment against him. However, the court may decide not to take such a step and may issue the same kind of order as it would against any recalcitrant witness. This means, if a person who is a party to a suit refuses to give evidence or to produce any document, the court may order, with or without a bail for the arrest of such person, as it considers the attendance of such person necessary. Note that this position is inferred from the very reading of Art. 268 in tandem with Art.118 [2] [b] of the Civil Procedure Code.

Where deposition is to be interpreted, Art. 262 of the Civil Procedure Code stipulate:

*Where evidence is to be given in a language other than the working language of a court, it shall be interpreted by the official interpreter or by such other person as the court may appoint for that purpose.*

***What do we mean by official interpreter?***

Art. 262 of the Civil Procedure Code is now applicable in a manner that is suitable to the Federal Arrangement of the FDRE Constitution. This means, every state is empowered to use its language as a working language of its courts. The Constitution also gives a right to individuals who do not know the language of the court to have an interpreter. So, currently, it is not only the inability to speak Amharic but also other working language of the court that will entitle to have interpreter.

***What do we mean by working language?***

To achieve the objective of justice, the interpreter takes an oath as provided in the Third Schedule and swears to interpret the evidence truthfully. Accordingly, the interpreter must repeat the questions and answers exactly as they have been given and cannot summarize. To achieve this objective, whenever possible, an official interpreter should be used. If this is not possible, the court must be satisfied that the interpreter is fluent in both languages; it should not simply ask whether there is someone present in court who can interpret, without satisfying itself as to that person's ability.

As to recording evidence, according to Art. 269 of the Civil Procedure Code:

1. *The evidence of each witness shall start with his name, age, occupation and address and an indication that he has been sworn or affirmed.*
2. *The evidence of each witness shall be taken down in writing by the presiding judge or, if he is for some reason unable to record, by a judge or clerk under his personal direction and superintendence.*
3. *The evidence shall be divided into examination-in-chief, cross-examination, and re-examination with a note as to where the cross-examination and re-examination begin and end.*
4. *The evidence shall ordinarily be taken down in the form of a narrative, but the presiding judge may in his discretion take down or cause to be taken down any particular question and answer.*
5. *When completed, the record shall be signed by the court.*

However, where there has been an objection to a question, which is overruled, on the basis of Art. 270 of the Civil Procedure Code, the court must record the question, the answer, the objection, the name of the person making it and the courts ruling. This is to enable the appellate court to determine whether the objection was properly overruled. Eventhough it is not required by the code, the court should follow the same procedure where an objection is sustained, again so that the appellate court can determine whether the sustainability ustaining of the objection is proper. It should also be noted that if a party does not object to a particular question at the trial, he cannot contend on appeal that the court should not have considered the evidence given in answer to the question

Where, after evidence has been recorded, there is a change in the composition of the court, e.g., when one of the judges is replaced, the suit continues on the basis of the evidence that has been recorded, and it is not necessary to hear that evidence over again.[Art. 271(1)]

***What is the justification behind court inspection?***

As to power of inspection, according to Art. 272 of the Civil Procedure Code:

*The court may at any stage of the suit inspect any property or thing concerning which any question arises and shall in such a case draw up a process-verbal of its proceedings which shall form part of the record.*

This is called a view, and it may help to ascertain what probably happened. It is just like the property itself were brought into court and introduced as real evidence.

To have a full-fledged understanding of the subject matter, the court may further appoint a commissioner to make a local investigation for the purpose of elucidating any matter in dispute or ascertaining the market value of property, or the amount of mesne profits or damages or annual net profit [Art.132]. This avoids the necessity of taking time at trial to determine such matters, and is particularly important where complicated financial questions are involved.

***Discuss what ‘open’ and ‘in camera’ trial are?***

A word should be said about the kind of evidence that the court may consider in arriving at its decision. In line to Art. 261[3], witnesses must give their evidence in open court, unless the court otherwise directs, for good cause to be recorded.

Where the evidence is not to be given in open court, it may only be heard in camera, that is, the judge will take evidence in chambers in the presence of the parties or their advocates.

***Which are the evidences on which the court has to base its decision?***

Finally, the court has to primarily base its decision on the evidence that has been presented in open court or in camera and the evidence presented on commission in

accordance with the provisions of the code. That is, the court may not base its decision on secret evidence that has not been presented in the presence of the parties or their advocates. Secondly, the judge may only base his decision on evidence that he believes to be competent and relevant. That is, he has the duty to reject any document that he considers to be irrelevant or otherwise inadmissible, and the same is true with respect to oral evidence.

### **2.1.3 Judgment and Decree**

On the basis of Art 273, we are coming closer to the culmination the life of a civil suit. That is, once we address issues with regard to pre-trial stage and trial stage; now we will embark on the final section which deals with judgment and decree.

According to Art 180 of the Civil Procedure Code, the court shall pronounce judgment in open court either at once or, as soon after as may be practicable, on some future day to be fixed by the court. Once the court renders judgment, the judgment shall be reduced to writing, signed by the member or members of the court and be pronounced by the judge or, where there are more than one judge, by the presiding judge.

#### ***Who should pronounce judgment/ how should it be pronounced?***

As it is clearly indicated under Art. 181[2], where a case has been heard by more than one judge, the decision of the majority shall be the judgment of the court: provided that any judge dissenting from the decision of the majority shall state in writing the decision which he thinks should be made together with the reason therefore.

#### ***What do we mean by decision by majority?***

As to the contents of the judgment, it shall contain the points for determination, the decision thereon and the reasons for such decision. And, in case where several issues have been framed, the court shall state its decision on each separate issue unless the decision on any one or more issues is sufficient for the decision of the case.

***What should judgment contain?***

At this juncture, it is important to note that the court may not give judgment on any matter not specifically raised by the parties. Note, however, that the court has the power to frame additional issues, and if it believes that there is an issue that has not been raised and should have, it may frame that issue, require the parties to give evidence on it, and render judgment in light of its decision on the issue.

***Which are the issues on which judgment should be given?***

Since the judgment itself cannot be executed, it is necessary that the court, after delivering the judgment, reduce the operative part of the judgment. Accordingly, the decree must contain:

1. The number of the suit,
2. The names and description of the parties,
3. The particulars of the claim,
4. A clear order to do or to abstain from doing something or to pay a definite sum of money or to deliver a particular thing or surrender or restore immovable property.
5. The amount of costs incurred, and by whom or out of what property they are to be paid,
6. Such particulars as are necessary to render the decree susceptible of execution; and
7. Where the decree can be executed by the personal obedience of the judgment debtor, the time within which it shall be executed.

If the judgment was for the defendant, it would seem that the decree should state matters (1), (2), (3) and (5) and that the judgment in the suit was for the defendant.

***What is the significance of reducing judgment into decree?***

Once the operative part of all judgments is reduced to the form of decree, it must be signed and dated by the judge or judges who passed it, exclusive of any dissenting judge.

The very reading of Art 185 of the Civil Procedure Code envisages that a decree for the delivery of movable property shall also state the amount of money to be paid as an alternative if the property cannot be delivered.

***How decree should be enforced?***

Where the decree is for the payment of money, the court may, for sufficient reason, postpone the payment of the amount decreed or permit payment to be made in installments, with or without interest. This is a very salutary provision, enabling the judgment debtor to make payment without suffering execution.

E.g. Payment by Wage Earner could depend on the amount of his wage, and the interval of payment. Similarly payment by farmer could depend on season of harvest.

Where the suit is for the recovery of immovable property together with rent or mesne profits, on the basis of Art. 187 of the Civil Procedure Code, the decree should be for the possession of the immovable together with the rent or mesne profits, which have accrued prior to the suit and until the delivery of possession to the decree holder.

***How should the amount be determined?***

In certain suits, an accounting or division of property may be necessary. In such cases there should be a preliminary order and a final decree. To this effect, the court shall, before passing decree, order such account to be taken and give such other directions as it thinks fit. That is, after the accounting has been made, it will issue a final decree, stating the amount of money that is to be paid to the decree-holder.

Where a set-off is allowed, the decree shall state what amount is due to each party and shall be for the recovery of any sum, which appears to be due to either party.

***Is a party entitled to get a copy of the judgment and the decree?***

Lastly, on the basis of Art 184(1) of the Civil Procedure Code, after the decree has been passed, certified copies of the judgment or decree or both shall be furnished to the parties on application to the registry of the court which passed it and the date be mentioned thereon.

**Summary**

On the basis of Art 273 the stage of judgment and decree is the culmination of the life of a civil suit. That is, once issues addressed with regard to pre-trial stage and trial stage; it is inevitable to embark on the final section which deals with judgment and decree.

According to Art 180 of the Civil Procedure Code, the court shall pronounce judgment in open court either at once or, as soon after as may be practicable, on some future day to be fixed by the court. Once the court renders judgment, it shall be reduced into writing, signed by the member or members of the court and be pronounced by the judge or, where there are more than one judges, by the presiding judge.

As to the contents of the judgment, it shall contain the points for determination, the decision thereon and the reasons for such decision. And, in case where several issues have been framed, the court shall state its decision on each separate issue unless the decision on any one or more issues is sufficient for the decision of the case

Since the judgment itself cannot be executed, it is necessary that the court, after delivering the judgment, reduce the operative part of the judgment. Once the operative part of all judgments is reduced to the form of decree, it must be signed and dated by the judge or judges who passed it, exclusive of any dissenting judge.



Lastly, on the basis of Art 184(1) of the Civil Procedure Code, after the decree has been passed, certified copies of the judgment or decree or both shall be furnished to the parties on application to the registry of the court which passed it and the date be mentioned thereon.

## **2.2 Special Proceedings**

Generally, summary procedure refers to a procedure by which the plaintiff may prosecute his claim without the necessity of instituting a full-scale suit. Similarly, accelerated procedure provides for the immediate hearing of certain kinds of cases speedily and without a full-scale suit, because the nature of the case requires and renders suitable an immediate disposition. Although the procedures are different and applicable in different kinds of cases, they are related in the sense that the questions involved in both kinds of cases may be determined without full-scale suit.

### **2.2.1 Summary Procedure**

Where summary procedure is available, the plaintiff has the option to employ it, but he/she is not obliged to do so.

In Ethiopia, on the basis of Art 284 of the Civil Procedure Code, summary procedure is available where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant and arising:

1. Upon a contract, express or implied such as on a bill of exchange, promissory note or other simple contract debt, or
2. On a bond or contract written for payment of a liquidated amount of money, or
3. On a guarantee where the claim against the principal is in respect of a debt or liquidated amount.

Therefore, a procedure is provided by which the plaintiff may recover the claim without the expense attendant upon bringing an ordinary suit. The crucial question is the liquidated amount of the debt. The plaintiff must be entitled to recover a specific sum of money ascertained at the time of suit. If the defendant accepted goods under a contract, but refused to pay the price, a summary suit for the price would be proper, since the amount claimed is liquidated.

Example: Suppose that A executes an instrument by which he promises to pay B Eth. \$ 5,000 if he does not deliver certain goods within six months. The instrument is not a bill of exchange, promissory note or cheque, since the obligation is conditional upon A's failure to deliver the goods, but the case should be considered to involve a simple contract of debt for a liquidated sum. If the contract has been breached by A's failure to deliver the goods, B is entitled to recover Eth. \$.5,000, a simple contract of debt and summary procedure would be authorized on that ground.

As it is clearly indicated under the last paragraph of Art 284 of the Civil Procedure Code, where the plaintiff wishes to employ the summary procedure, he endorses his statement of claim "Summary Procedure" and submits an affidavit, prepared by him or any other person who can swear positively to the facts, verifying his cause of action and the amount claimed, and stating that in his belief there is no defence to the suit.

In a nutshell, as we have discussed, summary procedure is designed for cases where the defendant is not likely to have any defence to the plaintiff's claim, and before instituting suit under this procedure, the plaintiff should be required to swear that he believes this to be so. The statement of claim is not served on the defendant. Instead the court serves a special summons in the form set forth in the Second Schedule No 17 or in such other form to be prescribed. The summons advises him that he has been sued for a sum of money on a specified obligation and that he must obtain leave to defend the suit. He may not appear and defend unless he applies and obtains such leave from the court. If the defendant or one of the several defendants fails to make such an application within the

time fixed by the summons, the plaintiff is entitled to a decree for an amount not exceeding the sum claimed in the statement of claim together with interest if any, and costs against the defendant or such of the defendants as have failed to apply for leave to defend.

The purpose of the procedure is to enable the plaintiff to avoid a full-scale suit, and this has been accomplished. Once the judgment has been entered in favor of the plaintiff, the court should be able to pass the same kind of decree as in any other case.

In line with Art 286 of the Civil Procedure Code, an application for leave to appear and defend is to be supported by an affidavit, which states whether the defence alleged goes to the whole or part only and, if so, to what part, of the plaintiff's claim. The plaintiff must be served with notice of the application and with a copy of the defendant's affidavit.

Following the application, the court will hold a hearing, at which time the defendant may be examined on oath and required to produce relevant deeds, books, documents and the like. The plaintiff must be served with notice of the application and a copy of the defendant's application.

Then after, in line with Art 287 of the Civil Procedure Code:

*Where, after hearing an application by a defendant for leave to appear and defend the suit, the court refuses to grant such leave, the plaintiff shall be entitled to judgment as against such defendant.*

Art 288 of the Civil Procedure Code governs the scenario when there is judgment for part of the claim. According to this Article, if the court is in doubt whether the defence is bona fide, but is not convinced that it is not, it should grant the leave, but should make it conditional. If the defence applies only to part of the claim or part of the claim is admitted, the court enters a judgment for the plaintiff in the amount of the admitted claim

of such terms as to suspending execution or the payment of any amount realized by attachment, or taxation of costs as it may think fit. The defendant is then given leave to appear and defend as to the balance of the claim.

In the case of multiple defendants, where not all are entitled to leave to appear and defend, the court is to grant leave only to a defendant who has defence to the claim of the plaintiff. As to the others, the plaintiff is entitled to a decree on which he may obtain execution without prejudice to his right to proceed with the suit against the defendant or defendants given leave to appear and defend.

Where leave, whether conditional or unconditional, is given, the court may make orders with respect to the filing of pleadings, framing of issues and the like, or may order the case to be heard immediately. If the issues are clear, it should order an immediate hearing, since the purpose of the summary procedure is to enable the plaintiff to have his claim determined as soon as possible. Once the court allows the defendant to defend the case, the summary proceeding will be turned to ordinary proceeding and the case will be handled as any other ordinary cases.

Finally, on the basis of Art 292 of the Civil Procedure Code, if the court has entered judgment for the plaintiff, but subsequently discovers that the service of the summons was not effective or that there is good cause for doing so, it may set aside the decree in favor of the plaintiff and give the defendant leave to appear and defend, if it seems reasonable to do so. The court may also stay or set aside execution and impose terms as it sees fit.

### **2.2.2 Accelerated Procedure**

Accelerated procedure is available for the hearing of certain kinds of applications, and in our legal system there are directions for the disposition of these applications.

To have a full-fledged understanding of the subject matter, first and foremost let us discuss how an application for having the case heard under accelerated procedure must be made, and then we will consider what kind of matters may be dealt by and through this procedure.

As it is clearly indicated under Art 301 of the Civil Procedure Code, a party entitled to have his case heard under accelerated procedure must file a written, dated and signed application within the period fixed by law for the making of such applications, or where no period is fixed, within fifteen days from the occurrence of the facts on which the application is based. Furthermore, the application must specify the capacity in which the applicant acts and must indicate the provisions of the law under which it is made; it must also be supported by an affidavit stating the reason of it. In addition, it has to include the required documentary evidences as the applicant wishes to submit.

At this juncture, you have to note that, the proceeding at this point is ex-parte, and the defendant is not served with notice. In this regard, if the applicant is not qualified to act in the proceedings or if it is not in the proper form or not filed within the prescribed time, or if the court considers that the subject matter of the application cannot be properly disposed of under the accelerated procedure, the application will be dismissed.

However, a dismissal of the application does not operate as res judicata as to the subject matter of the application, but a fresh application may not be made on the same ground to be dealt by and through accelerated procedure.

Whereas, where the application is allowed, on the basis of Art 303 of the Civil Procedure Code:

- 1. the court shall make its decision in accordance with the provisions of the following Articles and such decision shall be written in the*

*form of judgment or written order, as the nature of the case may require.*

2. *unless otherwise provided in this chapter or the law under which the application is made, the court shall make its decision on the basis of the application.*
3. *nothing in sub Art (2) shall prevent the court from requiring the production of such evidence or additional evidence as may be necessary, on such terms, in such manner and within such time as the court shall direct.*

Furthermore, in line with the above stipulation, Art 304 of the Civil Procedure Code provides that:

1. *Any decision under this chapter shall be made or given on such terms as to costs or otherwise as the court thinks fit.*
2. *No decision under this chapter shall be a bar to the making of such further orders as may or must be made pursuant to the law under which the application is made, or as may appear expedient in the circumstances.*

At this stage, you have to note that in a number of cases, there is no provision by which an interested party has the opportunity to appear and oppose the granting of the application. However, a number of cases in which an application is authorized involve only one party, and where another party would be interested, he could move the court to modify or set aside its order granting the application. In the civil procedure code, it is specifically provided that the court may always make a further order when necessary.

As to the right to appeal, Art 306 of the Civil Procedure Code provides that unless otherwise provided by the law under which the application is made, no appeal shall lie

from any decision under this chapter other than a judgment under Arts 309-311. And, where an appeal lies, from a judgment given under this chapter it shall be made within ten days from the giving of such judgment and such judgment shall not be enforced until the period for appeal has expired or the appeal has been decided.

The scope of application of accelerated procedure is provided under Art 300 of the Civil Procedure Code. On the basis of this Article, the code refers to specific applications and contains directions to be followed in the disposition of such applications. However, you have to note that, if the court concludes that a case could properly be disposed of in accelerated procedure, applications other than those expressly referred to in the code may be heard under accelerated procedure.

Having the above facts in mind, now let us proceed to discuss some points with regard to issues of certificate. According to Art 305 of the Civil Procedure Code:

1. On making its decision in favor of the applicant, the court shall, where he so requires, provide him with a dated and signed certificate stating in a concise form the contents of such decision.
2. The provisions of sub-Art (1) shall apply in particular in matters concerning change of name (Arts 42 and 43 of Civil Code), withdrawal of interdiction (Arts 377 Civil Code), opposition to marriage (Art 592 Civil Code), widowhood (Art 596 Civil Code) as well as in cases of applications to consult or to be issued with certain powers or documents or to be authorized to depart from certain instructions (Arts 129, 209, 239, 287, 523, 528, 535 and 630 Civil Code)
3. Where an application is made for the correction or cancellation of records or entries in the registers (Arts 121, 127, 1623 and 1630 Civil Code) or for approval or confirmation (Arts 146, 628, 633, 749, 763, 766, 767 and 804 Civil Code and Art 441

Commercial Code) or registration or certification, the court may, without further proceeding, but after having ordered such investigations as may be necessary, give such directions as are appropriate in the circumstances, or issue a certificate evidencing approval, registration or certification or endorse the fact of approval, registration or certification on the relevant document, as the case may be, together with the date and number thereof where appropriate.

In a nutshell, you have to understand that, the provisions discussed in this section are designed to facilitate the disposition of cases where the claim is not likely to be disputed or where the nature of the claim is such that an immediate decision is required and feasible. They provide an expeditious remedy in appropriate cases and avoid full-scale proceedings where such proceedings are unnecessary and perhaps undesirable.

### **2.3 Other Procedural Matters**

In this section, we will discuss a number of other procedural matters. They are not the major problems of procedure but for the most part they consist of technical rules or special procedures. A few are more complex and are not essentially procedural in nature. However, all of these matters have been designed to give students a picture of the extent of coverage of the Civil Procedure Code, and to familiarize them with its contents. To address the above objectives, the subject matter will be discussed in the following manner. These procedures come when a proceeding is initiated by the plaintiff and the plaintiff and the defendant demand a temporary relief until the case is disposed. The life of such relief depends on the original claim.

#### **2.3.1 Arrest and Attachment before Judgment**

The provisions that we are going to discuss here under are different from those providing for arrest and attachment as part of the proceedings in *execution*.



This section is different because it involves arrest and attachment prior to the time a judgment has been rendered.

To have coherence, we will first consider the arrest of the defendant [what is called security for appearance], and then consider security for the production of property.

### **2.3.2 Arrest before Judgment**

Before we embark on the essence of the subject matter, notice that these rules are applicable only to suits not involving immovable property. If the suit involves immovable property, the defendant's interest in such property may be considered sufficient security for his appearance.

In line with Art 147 of the Civil Procedure Code, to bring about the legal penetration of this law, first and foremost a warrant of arrest may be issued against the defendant where the court is satisfied that the defendant:

- 1) With intent to delay the case or avoid the process of the court or obstruct or delay execution of any judgment that may be entered against him, has left or is about to leave the local limits of the court's jurisdiction or has disposed of or removed property from such limits; or
- 2) Is about to leave Ethiopia under circumstances affording a reasonable probability that the plaintiff may be obstructed or delayed in the execution of any decree that may be passed against the defendant.

Where the contention is that the defendant is about to leave or has left the limits of the court's jurisdiction, a clear intent must be shown. But, where the contention is that the defendant is about to leave Ethiopia, a warrant may be issued irrespective of a show of intent so long as the circumstances under which he is about to leave afford a reasonable

probability that any decree passed against him will be obstructed or delayed in execution. For example, it may be shown that the defendant is planning to stay abroad indefinitely.

The application may be made at any stage of the suit, that is, before or after it has come to trial, so long as a judgment has not been rendered, and the application may be supported by affidavit or other evidence on oath. The court should be satisfied that in addition to the conditions discussed above, the plaintiff has a colorable claim and that unless action is taken, the defendant will remove himself from the powers of the court. Where the court is so satisfied, it issues a warrant to arrest the defendant and bring him before the court to show the cause why he could not furnish security for his appearance.

Note that the purpose of these provisions is to require the defendant to furnish security rather than to detain him. The defendant may avoid arrest by paying the officer entrusted with the execution of the warrant the sum specified in the warrant, sufficient to satisfy the plaintiff's claim, which is a sum specified in the warrant, sufficient to satisfy the plaintiff's claim, which sum will be held by the court until the suit is disposed of or until further order.

Assuming that the defendant is arrested, he may show the cause why an order requiring the depositing of security should not be entered. The court may find that he has no intent to act improperly or that he is not about to leave the court's jurisdiction or leave Ethiopia, as the case may be. If he has not shown good cause, the court must order him to either deposit in court money or other property sufficient to satisfy the claim against him or to furnish security for his appearance by way of a surety. The security must be for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him. The surety must bind him to pay, in default of the defendant's appearance, such sum of money as the party may be ordered to pay in the suit.

On the basis of Art 150 of the Civil Procedure Code, in case of refusal to furnish security:

*In case of refusal to comply with an order under Art 148 or 149(4) the court may order the defendant to be detained in the civil prison until he complies with the order or until the decision of the suit or where a decree is passed against the defendant, until the decree satisfied: Provided that the defendant may not be so detained for more than six months.*

Application by surety to be discharged is provided under Art 149 of the Civil Procedure Code. Accordingly, a surety for appearance may at any time apply to be discharged. He has an absolute right to be discharged upon request, and when he is discharged, the defendant must find another surety. If the defendant is unable to find another surety, the court will order him to deposit in court money or other property sufficient to satisfy any decree that may be passed against him, if he is able to do so. Once he has found a surety and that surety has been discharged, he is only required to find another surety or deposit property if he can. Where he has been ordered to deposit property and has failed to do so, he may be detained in prison, as discussed previously.

### **2.3.3 Attachment before Judgment**

The rules related to security for production of property are designed to prevent the defendant from disposing of or removing his property so as to prevent execution. Under this procedure, in line with Art 151 of the Civil Procedure Code, the action is taken entirely against the property, and it is applicable to all suits, including those involving immovable property. Such action is to be taken where the court is satisfied that the defendant, with the intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of the whole or any part of his property or is about to remove such property from the local limits of the court's jurisdiction.

At this juncture, the crucial question is the defendant's intent. The court must be satisfied that the defendant has the intent to obstruct or delay execution of the decree, and the

decision will depend on the state of mind of the particular defendant. Nevertheless, this state of mind may be inferred from his acts with respect to the property. However, the fact that the defendant attempted to sell a small portion of a large estate would not warrant the inference that he intended to delay or obstruct execution.

Furthermore, you have to note that only the present conduct of the defendant is relevant. The fact that sometime in the past he mortgaged or disposed of property would not per se constitute sufficient ground for attaching his property. In other words, what matters more is his present intention or attempt to dispose or remove property.

The application may be made at any stage of the suits, and the allegations may be proved by affidavit or otherwise. The plaintiff must, unless the court otherwise directs, seek the attachment of specific property, and in his application, he must indicate that property and its estimated value. Where the court is satisfied that the property might be disposed of or removed, it may either direct the defendant to furnish security of a specified amount, or to produce the property or its value or a portion as may be sufficient to satisfy the decree, or it may order that he appear and show cause why he should not furnish security. Thus, the court may order him to furnish security or produce the property directly without giving him the opportunity to show cause. It would seem, however, that where the court issued an order requiring him to post security or produce the property, he could show that the conditions for the application of the rule were not present, that is, he was not about to dispose of or remove the property with the intent to obstruct or delay execution, and the court would set aside the order. The court may also order conditional attachment of property.

When we come back to the attachment of property, according to Art 152 of the Civil Procedure Code:

- 1. Where the defendant fails to show good cause why he should not furnish security, or fails to furnish the security required, within the time fixed by*

*the court, the court may order that the property specified, or such portion thereof appears sufficient to satisfy any decree which may be passed in the suit, be attached.*

2. *where the defendant shows such cause or furnishes the required security after the property specified or any portion of it has been attached, the court shall order the attachment to be withdrawn, or make such other order as it thinks fit.*

However, you have to note that on the basis of Art 153 of the Civil Procedure Code, in any event, the court will order the attachment to be withdrawn whenever the defendant furnishes the security required together with security for the costs of the attachment, or when the suit is dismissed.

It is provided, moreover, under Art 153(5) of the Civil Procedure Code that where property has been attached prior to judgment and a decree is subsequently passed in favor of the plaintiff, it is not necessary for him to apply for reattachment of the property. But note that an application for execution must still be made, and if the application for execution is not made within the limitation period, the attachment is ineffective. Also, when execution is sought with respect to property that has been attached prior to judgment, the ordinary rules governing execution apply, so that the fact the property need not be reattached does not prevent it from being subject to ratable distribution.

As we will clearly discuss under the section of execution, objections to the attachment of the property may be preferred by a third party on the ground that the property belongs to him or by the judgment debtor on the ground that the property is exempted from attachment. So, too, where property has been attached prior to judgment, the third party may prefer his claim, and it will be investigated in the same manner as a claim made to property attached in execution of a decree for the payment of money. The defendant also may claim that the property attached prior to judgment is exempted, although his failure

to assert the claim at that time should not bar him from doing so after a decree has been entered and an application for execution filed. As a practical matter, the objection is not necessary until that time.

Most significantly, attachment before judgment does not affect the rights existing before the attachment of persons not parties to the suit, nor does it bar any person's holdings a decree against the defendant from applying for the sale of the property under attachment in execution of his decree against the defendant. Under this rule, if the defendant becomes insolvent prior to the rendering of the decree, the property would pass to the receiver.

Finally, you have to grasp in mind that the plaintiff who obtained attachment of property prior to the decree should not be in a better position as regards execution than any other plaintiff. The fact that the Code refers to the rights of the parties in an attachment before judgment should not mean that after judgment the attachment gives the plaintiff greater than other decree-holders. Therefore, until proceedings in execution have been instituted, prior rights of third parties in the attached property should not be affected.

#### **2.3.4 Temporary Injunctions, Interlocutory Orders and Appointment of Receiver**

Since litigation may and frequently does take some time to be finally decided, it is necessary to make provision for the protection of the parties and the maintenance of the property in dispute pending the final determination of the case

The court has extensive power to insure that the purpose of bringing suit will not be defeated by action that occur during the pendency of the case and that the property in dispute will be preserved.

To achieve the objective of litigation, the following three remedies, that we are going to discuss hereunder, should be employed in the right manner.

### **2.3.5 Temporary Injunctions**

An injunction is an order restraining a party from doing a particular act or requiring him to do such an act; and the plaintiff may ask for injunctive relief as part of the final decree. A temporary injunction is issued during the pendency of the suit to prevent certain action from taking place that would prejudice the other party to the suit. The Code authorizes the issuance of a temporary injunction in two kinds of situations:

- 1) Where action taken with respect to property will prejudice the other party;
- 2) Where, in a suit to restrain the breach of a contract or the commission of an act, the defendant is threatening to breach the contract or do the act pending litigation.

We will first consider the issuance of a temporary injunction to prevent dealing with property. In this regard, an injunction may be granted if the court is satisfied that:

- 1) The property in dispute is in danger of being wasted, damaged or alienated by a party to the suit;
- 2) The property in dispute is in danger of being wrongfully sold in execution of a decree, or;
- 3) The defendant threatens or intends to remove or dispose of this property with a view to defraud his creditors.

In such cases, on the basis of Art 154 of the Civil Procedure Code, the court may grant a temporary injunction to restrain the act or may make any other order as it thinks fit. And, the order is effective until the disposal of the suit or further order.

The court should determine that the applicant has a prima facie case, that protection is necessary so that the applicant will not suffer from irreparable injury before his right can be established, and that the inconvenience or harm –likely to result to the applicant if the injunction is not granted is greater than the inconvenience that is likely to arise to the other party if the injunction is granted. In view of the nature of immovable property and its importance in Ethiopia, an injunction should ordinarily be granted where the court is satisfied that there is a danger to the property pending the suit. In case of movable property, the court should consider whether any injury to the property can adequately be compensated for by way of damages. If it can, there is no reason to issue the injunction.

You have to be clear that, while a party may apply for a temporary injunction, although the suit was not brought to obtain injunctive relief, the fact that the suit was originally brought to obtain such relief may be significant in determining whether a temporary injunction should be granted. This is because the failure to grant a temporary injunction may mean that the plaintiff will be unable to obtain the relief he sought.

For example, the plaintiff sues to obtain an injunction prohibiting the defendant from entering the plaintiff's land to demolish a structure. While the suit is pending, the defendant threatens to demolish it. The court should issue a temporary injunction restraining the defendant from entering the plaintiff's land demolishing the structure. If it does not do so, the plaintiff will be deprived of the right claimed in the suit-to keep the structure intact-and his purpose in bringing the suit would be defeated. The broad test is whether the status quo should be preserved until the suit is disposed of, and if the court is of the opinion that it should be, it will grant a temporary injunction.

Furthermore, where there is the danger that the property may be wrongfully sold in execution of a decree, the injunction may be issued against the decree-holder, even though he is not a party to the suit.



Example: Suppose that A attaches property allegedly belonging to B in execution of a decree he holds against him. C, claiming to be the owner of the property, sues A and B for a declaration of ownership. He may obtain a temporary injunction restraining A from selling the property in satisfaction of the decree, since if C is found to be the owner, the property will have been wrongfully sold in execution of the decree. It would also seem that the injunction could be issued against A even if he were not a party to C's suit; the Code simply says wrongfully sold in execution of a decree. There is the possibility that the attachment will have been levied after the institution of the suit involving the property, and a temporary injunction should be issued in such a case.

The provision authorizing the issuance of a temporary injunction where defendant intends to remove or dispose of his property in fraud of his creditors should be construed to be applicable only where a creditor on a pre-existing obligation is suing to prevent such conduct, and the threatened removal or disposal might take place before the claim is litigated. Where the plaintiff is suing to recover on an unascertained claim, he should proceed by way of attachment, since that will ensure that property is available to satisfy any decree that may be rendered in his favor.

Where the contention is that property is in danger of being wasted, damaged or alienated, the injunction may be issued only against a party to the suit who is threatening to do such act. However, for these purposes, the Party should be construed to include anyone who would be bound by the judgment, for example, a person who has acquired his title to the property from a party after the suit has begun or the representative of a party.

Where the plaintiff has brought suit to restrain the defendant from committing a breach of contract or other act prejudicial to him, a temporary injunction to restrain the breach or the commission of the act may be granted. The defendant will be restrained from

breaching the contract or committing the act pending the determination of the plaintiff's claim.

Of course, if the suit was brought to restrain the defendant from committing an act with respect to property, and he threatened to commit the act, a temporary injunction would be authorized under the provisions of Art.154, discussed previously. The code makes it clear, however, that a temporary injunction may be issued even where the threatened act does necessarily involve property which is the subject matter of the suit.

In determining whether a temporary injunction against the breach of a contract or the commission of an act should be granted, the court must consider whether, assuming that the plaintiff's claim will be proved, he would be entitled to an injunction as final relief in the suit.

But, there may be cases where at the time the temporary injunction is sought, it is not clear whether the plaintiff will be entitled to specific performance or an injunction as part of the final decree. As long as it appears that the plaintiff may be entitled to such relief if his allegations are found to be true, the court would be justified in issuing a temporary injunction.

The point is that where it is clear that, even assuming the allegations of the plaintiff to be true, he would not be entitled to specific performance or an injunction as part of the final decree, the court should not issue a temporary injunction restraining the defendant from breaching the contract or committing the threatened act.

Note that on a motion for a temporary injunction, the court does not determine the merits of the plaintiff's claim. This must await the trial. It merely determines whether if the plaintiff can prove his allegations at trial, he might well be entitled to an injunction as

part of the final decree. If this is so, and the defendant is threatening to do the act which the plaintiff is seeking to prevent, the court will issue a temporary injunction to prevent him from doing so until the plaintiff's claim is finally heard and decided.

with regard to injunction to restrain repetition or continuance of breach, Art 155 of the Civil Procedure Code provides that:

1. *in any suit for restraining the defendant from committing a breach of contract or other act prejudicial to the plaintiff, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the institution of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or act complained of, or any breach of contract or act of a like kind arising out of the same contract relating to the same property or right.*
2. *the court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as it thinks fit.*
3. In such a case the party seeking a temporary injunction must make a motion to the court and the facts necessitating the injunction may be proved by affidavit. Where the injunction is to restrain the breach of a contract or the commission of an act, the motion may also be made after final judgment has been rendered.

Ordinarily, as it is clearly indicated under Art 157 of the Civil Procedure Code, notice of the application should be given to the opposite party but if the object of the injunction would be defeated by the delay in giving notice, that is, there is the immediate danger that the party will do the act unless restrained, the injunction may be issued ex parte.

But, in line with Art 158 of the Civil Procedure Code:

*Any order for an injunction may be discharged, or varied, or set aside by the court, on application made thereto by any party dissatisfied with such order.*

Where the injunction has been granted against a body corporate, on the basis of Art 159 of the Civil Procedure Code, it is binding on the corporation as well as the members and officers whose personal action it seeks to restrain. This means that in case of disobedience, the property of the corporation may be attached.

On the basis of Art 156(1) of the Civil Procedure Code, ultimately violation of an injunction may be punished in two ways: by the attachment of the property of the person or by contempt proceedings under article 449 of Criminal Code.

Finally you have to note that on the basis of Art 156 (2) of the Civil Procedure Code, where property has been attached, the attachment remains in effect for a maximum of one year, and if the disobedience or breach continues, the property is sold, and out of the proceeds the court awards such compensation to the other party as it thinks fit.

#### Interlocutory Orders

On the basis of Art 165 of the Civil Procedure Code, an interlocutory order may be broadly defined as any order that the court considers necessary or expedient to be made pending the determination of the suit. The court may at any time make such orders upon application by one party and notice to the other; this includes orders for the custody of a minor and the payment of alimonies. In addition, the Code considers certain provisions regarding specific kinds of interlocutory orders, which we will see hereunder.

As it is clearly indicated under Art 160 of the Civil Procedure Code, where movable property which is involved in the suit or which has been attached before judgment is

subject to speedy or natural decay or otherwise should be sold at once, the court may order the sale of the property, in such manner and on such terms as it thinks fit. The suit is then over the proceeds realized from the sale. Under this rule, the court may order the sale of securities where market conditions indicate that a drop in value is likely. Furthermore on the basis of Art 161(1) (b) of the Civil Procedure Code, the court may order for the detention, preservation or inspection of property, it may authorize any person to enter upon or into any land or building or samples to be taken observations made or experiments tried so that full information or evidence may be obtained.

From the very reading of Art 162 of the Civil Procedure Code, an application for an order of sale or for the detention, preservation or inspection of property may be made by the plaintiff after notice to the defendant at any time after the suit has been instituted. The defendant may make the same application, after notice to the plaintiff, at any time after he has made an appearance.

As to suspension of sale, Art 163 of the Civil Procedure Code stipulates that where the suit involves land or tenure in land and the party in possession fails to pay taxes due to the government or rent due to the lessor of the tenure, as a result of which the land or tenure is ordered to be sold, the other party, claiming to have an interest in the land or tenure, may upon payment of the revenue or rent due, and prior to the sale apply to the court to suspend the sale, and the court may grant the application on such terms as it thinks fit. The court may in its decree award against the party in possession the amount paid by the other party with interest at such rate as the court thinks fit, or may charge the amount paid in any adjustment of accounts directed in the decree.

Finally, where the subject matter of the suit is all about deposit in court, Art 164 of the Civil Procedure Code provides:

*Where the subject matter of the suit is money or some other property capable of delivery, and any party thereto admits that he holds the money*

*or property as a trustee for another party or that it belongs or is due to another party, the court may order the same to be deposited in court or delivered to such last-named party with or without security, subject to further direction of the court.*

So, if A sues B to recover Eth. \$ 5,000, and B admits owing Eth. \$4,000, A may apply to the court for an order that B deposit the Eth. \$4000. Thus, the party to whom the money or property is admittedly due may have possession while the other questions involved in the suit are being litigated.

#### Appointment of a Receiver

In order to preserve the subject matter of the suit pending a determination of the rights of the parties, the court may appoint a receiver to deal with property during the pendency of the suit. On the basis of Art 166 of the Civil Procedure Code the court may appoint a receiver whenever it appears to be just and convenient both before and after the decree.

To achieve its objective, in considering whether a receiver should be appointed after an application to that effect is made, the court is directed to consider:

- 1) The amount of the debt claimed by the applicant;
- 2) The amount which may possibly be obtained by the receiver when dealing with the property and;
- 3) The probable cost of his appointment.

In this area, the court has a good deal of discretion, but it must be exercised in light of the above criteria.

The removal by the defendant of a substantial amount of property under suspicious circumstances during the pendency of a suit involving ownership of that property would be a good ground for the appointment of a receiver.

Also where the mortgagee, entitled to enter in possession on default of payment, sues to recover on the mortgage, it would be possible to appoint a receiver to prevent any dealing with the property by the mortgagor during the pendency of the suit.

Where the decree awards maintenance and imposes a charge on specific property to secure payment of the allowance, the appointment of a receiver for that property may facilitate execution, since if the allowance is not paid, the receiver will sell the property and pay the allowance out of the proceeds.

However, the court should not appoint a receiver unless the party seeking the appointment has made a prima-facie case entitling him to the property in question.

Although most cases will involve the situation where the property as to which the appointment of a receiver is sought is the subject matter of the suit, the court is authorized to appoint a receiver of any property, and in appropriate circumstances it might appoint a receiver of property not involved in the suit.

Suppose that the defendant owned but one piece of property, which he was wasting, and if he continued to do so, the property would be worthless. Since the plaintiff would not be able to realize anything on his decree if such wastage continued, the court might conclude that it was proper to appoint a receiver for the property.

In such authorization, on the basis of Art 166 of the Civil Procedure Code, the receiver may be given broad powers. The court by its order may authorize him to exercise control over the property to the extent of bringing and defending suit, realizing, managing, protecting, preserving, and improving the property, collecting the rents and profits and disposing of them, and executing documents as owner. His powers will be specified in the order of appointment, and he should be deemed to possess those powers until discharged by the court, even after the decree has been issued.

In this arena, since the receiver is an officer of the court, property in his hands may not be attached without leave of the court that appointed him. So, too, he may not sue or be sued with respect to that property without leave of the court unless the order of appointment specifically provided for such suit.

Where a receiver was only authorized to collect and preserve the assets of a firm, it was held that he did not have the power to mortgage the firm's property. As to remuneration, on the basis of Art 167 of the Civil Procedure Code:

*The court may by general or special order fix the amount to be paid as remuneration for service of the receiver.*

After a receiver has been appointed, on the basis of Art 168 of the Civil Procedure Code, he must furnish such security as the court may direct, account for what he receives from the property, submit his accounts as directed by the court, and pay the amount due as the court directs. Furthermore, the receiver is expected to take reasonable measures to preserve the property.

However, on the basis of Art 169 of the Civil Procedure Code, if he has caused damage to the property by willful default or gross negligence, the court may direct that his property be attached and apply the proceeds to make good any amount due from him or any loss or damage. In such a case, the fact that the receiver has dealt improperly with the property does not affect the rights of the other parties in that property.

### **2.3.6 Habeas Corpus**

Off course, we can see that different countries may have different meaning on the meaning and form of the phrase Habeas Corpus. But generally, we can say that they agree on the source of the word Habeas Corpus. It is literally a Latin word. In Latin, Habeas is to mean, "You have the body". Prisoners often seek release by filing a petition for a writ of Habeas Corpus. A writ of Habeas Corpus is a judicial mandate to a prison official ordering that an inmate be brought to the court so it can be determined whether or



not that person is imprisoned lawfully and whether or not he should be released from custody.

A Habeas Corpus petition is a petition filed with a court by a person who objects to his own or another's detention or imprisonment. The petition must show that the court ordering the detention or imprisonment made a legal or factual error.

According to Article 15(2)i of the Ci.Pr.C, we can see that the High Court is given an exclusive jurisdiction to try suits regarding to Habeas Corpus. On the other hand, the Federal Courts Proclamation No. 25/1996 in its Article 5(10) clearly stated that the power of adjudication to application for Habeas Corpus is vested on the Federal Courts. Furthermore, inferring from the cumulative understanding of Articles 11 & 14 of the proclamation, we can understand that the material jurisdiction is given to the High court of the Federal.

*Question:* Do you think that State High Courts, based on the Ci.Pr.C, could exercise a jurisdiction to try applications to Habeas Corpus or not.

Once we have made clear as to which court have the jurisdiction, the next important issue related with the procedure is how is this application being entertained by the court of law. The procedure is governed by Articles 177-179 of Ci.Pr.C of Ethiopia. According to article 177 of the code, an application for Habeas Corpus may be made by the person restrained otherwise than in pursuance of an order duly made under the Ci.Pr.C or the Criminal Procedure Code. If such person is unable to make the application, any person on his behalf can do so.

Following the application, the High Court immediately issues a summons directing the person having custody over the restrained person to appear before the court together with person restrained on day to be fixed in the summons and to show cause why the restrained person should be released. On such day, the court investigates the truth of the

application and check whether the restraint is unlawful. If it is proved that it is unlawful the court then must order the immediate release of the person under custody.

### **2.3.7 Procedure in Arbitration and conciliation**

Arbitration is a dispute resolution process in which the disputing parties present their case to a third party intermediary (or a panel of arbitrators) who examine all the evidence and then make a decision for the parties. This decision is usually binding. Like court-based adjudication, arbitration is adversarial. The presentations are made to prove one side right, the other wrong. Thus, the parties assume that they are working against each other, not cooperatively. Arbitration is generally not as formal as court adjudication, however, and the rules can be altered to some extent to meet the parties' needs.

Arbitration is most commonly used for the resolution of commercial disputes, particularly in the context of international commercial transactions. Arbitration can be either voluntary or mandatory and can be either binding or non-binding.

Arbitration have both advantages and disadvantages. There are several practical reasons for favoring arbitration over going to court. Generally speaking, it takes less time going through arbitration than going to court, although critics like to point to arbitration cases that have been drawn out and expensive. Of course, the key to keeping the process timely is effective oversight and management of the process.

Arbitration is also favored because it is private—there is no official court record to be made public. If you have a dispute with another party with whom you may need to do business again, this is a major advantage.

Generally, we can say that Arbitration has many advantages. For the parties, the informal setting of a conference room instead of the courtroom may help preserve the business

relationship and increases the level of confidentiality. The streamlined procedures, such as limitations on pretrial proceedings and discovery, and the ability to schedule a reliable hearing date, generally save time and money. The overwhelming advantage of arbitration, however, is the ability to select a decision-maker with requisite levels of experience, knowledge and skill.

However, it is also true to say that Arbitration has some drawbacks. Arbitration is adversarial, thus it generally does nothing to create win-win solutions or improve relationships. Often it escalates a conflict, just as court-based adjudication is likely to do. In addition, arbitration takes decision-making power away from the parties. This results in a resolution of the current conflict, but does nothing to help the parties learn how to resolve their own conflicts more effectively in the future, as does mediation. Other people also fault arbitration for being too informal and potentially unjust. Only the courts, with their carefully regulated procedures can provide justice, some observers believe.

Having said some thing about the advantages and disadvantages of Arbitration, it is better to look for the Civil Procedure Code of Ethiopia on how it has been entertained. We have said that Arbitration can be made voluntarily or mandatorily to solve civil dispute. On the other hand, it is important to understand that there are issues that are not subject to arbitration. Article 315(2) of the Ci.Pr.C of Ethiopia clearly states that: administrative contracts as defined in Art. 3132 of the Civil Code or in any other case where it is prohibited by law are not subject to Arbitration.

Therefore, once we have identified the issue is subject to arbitration, the next step will be about the procedure. According to Art. 316 of the Ci.Pr.C, the court may appoint an arbitrator, if the law requires it. Once the arbitrator is assigned, the procedure to be followed by arbitration tribunals will be governed by art. 317 of the Ci.Pr.C.

**Art. 317.- Procedure before arbitration tribunal**

1. The procedure before an arbitration tribunal, including family arbitrators shall, as near as may be, be the same as in a civil court
2. The tribunal shall in particular hear the parties and their evidence respectively and decide according to law unless, by the submission, it has been exempted from doing so.
3. Summonses may be issued for the attendance of witnesses who may be sworn: Provided that, where a witness fails to appear in answer to the summons, either party may apply to the court for the issue of summons. In which case the provisions of Arts. 111-121 shall apply.
4. When a party, who has been given the opportunity to be heard and produce his evidence, fails to do so, the tribunal may give its award in default.

**2.3.8 Cost**

It is obvious that court litigation requires cost. This cost includes all expenses which the court litigation requests. This could be related with payment of court fee, attorney fee, transportation fee, clerical expenses and other costs, which are directly related with the very existence of the litigation. Normally, it is the judgment creditor who claims for recovering the costs of litigation. However, it is not all the time that the judgment creditor succeeds to get what he claimed. According to Art. 462 of the Ci.Pr.C of Ethiopia, it is the discretionary power of the court to decide as to whom or out of property and to what extent such costs are to be paid.

However, if the judgment debtor is ordered to pay the costs, judgment creditor shall prepare an itemized bill of costs showing the expenses he has incurred in the suit. The court then fixes the cost to be paid, after giving the other party to challenge the claim. This judgment, like the judgment is appealable.

## **Summary**

The law of evidence is concerned with one of the most complex undertakings in the entire litigation process. This complex undertaking is the reconstruction of past events to arrive at the truth. Truth is not sought in an absolute sense. Evidence is produced to prove factual allegation/s that is/are affirmed by one party and denied by the other. Since the trial stage is basically the stage where oral testimony and documentary evidence are examined, it is necessary to have a procedure by and through which all necessary oral evidence and documentary can be brought before court.

At this juncture, it is important to note that, since the parties have the primary responsibility for presenting their cases, the court shall evidence in its own motion only in exceptional circumstances, that is, only where a witness/es or document/s who is/are likely to be able to prove the alleged fact has not been called or mentioned by either party.

Accordingly, on the basis of Art. 112[1] where the summons is issued at the request of a party, before the summons granted with in period to be fixed, he shall pay into court a sum of money as it appears to the court to be sufficient to defray the travelling and other expenses of the witness for one day's court attendance. Where the court finds that the sum is not sufficient to cover the expenses or that the witness must be detained for more than one day, the court will order the party who has requested the issuance of the summons to pay an additional sum in to the court

Unless the court otherwise directs, in line with Art. 120 of the Civil Procedure Code, a witness who has been summoned shall attend each hearing until the suit has been disposed of, and the court may require a witness in attendance to execute a bond that he will attend until the suit is disposed of.

Where a witness is not in a position to testify in court because of physical incapacity or because of other causes, Article 122 provides that such witness may be examined by commission. Furthermore, where the witness resides outside the local limits of the court issuing the commission, the commissioner may apply to any court within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such court may, in its discretion, issue such process as it considers reasonable and proper.

As you know, documentary evidence is classified as real proof as opposed to oral testimony. Real evidence includes written documents and demonstrative evidence. Where a person is summoned for the sole purpose of producing a document, he may simply produce the document without personally appearing in court.

At the trial, each party introduces the oral and documentary evidences they think necessary to support their side of the issue. In this regard the party who initiates the case has the burden of proof to provide evidence necessary to establish a disputed fact or a degree of belief in the mind of the court. This reflects the general rule that the party who has the burden of proof has the right to begin. However, if the defendant raises a counter claim or any affirmative defence, the burden of proof for the existence of the claim (if not admitted) or such affirmative defence, will shift to the defendant. In all other cases, the plaintiff has the burden of proving that he has a cause of action, and the defendant has the burden of proof on the question of whether he has a valid defence.

According to Art. 261 of the Civil Procedure Code, there are three stages to examination of witnesses. These are:

1. The examination-in-chief;
2. The cross-examination;
3. The re-examination

So much so that, the three stages of examination of witness are expected to be employed at different times, in different ways and for different purposes.

The rationale behind this investigation is that as a result of the process, everything the witness knows about the case will be brought to the attention of the court, and the court will be in a better position to determine whether or not the witness is telling the truth than if he merely testify in a narrative manner.

Thus, during the examination-in-chief, the proponent tries to develop the testimony of the witness in the light most favorable to him, during cross-examination, the opponent tries to discredit that testimony, and during re-examination, the proponent tries to minimize the effect of cross-examination.

In this regard, the primary responsibility for the examination of witnesses rests on the parties, though as we will see, the court is also given broad power with respect to the examination of witnesses.

When we come back to the role of the court, under the adversarial system of litigation, which our system of litigation has adopted, the role of the court is minimal. Although Ethiopia has adopted the adversarial system of litigation and the principle of party presentation, this is modified by giving the judge a potential degree of control over the conduct of the litigation.

The principle of party presentation which is one of the hallmarks of the adversarial system is modified in our code and the court has the power to order amendment of pleadings on its own motion, and it has the power to frame issues for trial. With regard to the examination of witnesses, the court has the power to put a question to a witness at any

time during the examination. In addition to this, the court has the power to call evidence, which is not mentioned by either party.

Taking in to consideration the role of the court, at this juncture it is important to note that Art. 262 of the Civil Procedure Code is now applicable in a manner that is suitable to the Federal Arrangement adopted by the FDRE Constitution. This means, every state is empowered to use its language as a working language of its courts. The Constitution also gives a right to individuals who do not know the language of the court to have an interpreter. So currently, it is not only the inability to speak Amharic but also other working language of the court that will entitle to have interpreter.

With regard to the manner of production of evidence, a word should be said about the kind of evidence that the court may consider in arriving at its decision. In line with Art. 261[3], witnesses must give their evidence in open court, unless the court otherwise directs, for good cause to be recorded. If it is found necessary, evidence may only be heard in camera, that is, the judge will take evidence in chambers in the presence of the parties or their advocates.

Finally, the court has to primarily base its decision on the evidence that has been presented in open court or in camera and the evidence presented on commission in accordance with the provisions of the code. Secondly, the judge may only base his decision on evidence that he believes to be competent and relevant.

### Review Questions

1. Discuss what arrest and attachment before judgment are.
2. Identify the rationale, and significance behind arrest and attachment before judgment.
3. Compare and contrast arrest and attachment before judgment, and after Judgment.



4. What do we mean by temporary injunction, and interlocutory order?
5. Verify the rationale, and significance of temporary injunction and interlocutory order.
6. What is the purpose of appointment of receiver?
7. Who could be appointed as receiver?
8. What do we mean by Summary, and accelerated procedure?
9. What are the matters, which could possibly be addressed by and through Summary and accelerated procedure?
10. Pin point the similarity, and difference between Summary Procedure, and accelerated procedure.

## **CHAPTER THREE**

### **REVIEW OF JUDGMENTS**

So far, we have already covered the discussion on the over all procedure to be applied in civil litigation, starting from the institution of suit till rendering of judgment, on the first instance court. However, either of the parties to the litigation may not be satisfied by the decision of the first instance court. For that reason he/she/they may wish to find out the mechanism to review the judgment.

Basically, there are three ways of reviewing a judgment. These are reviewing before the court; which rendered the judgment, before an appellate court and before the court of cassation. We will now proceed to consider these three aspects of review in this chapter.

#### **3.1 Reviews by Court of Rendition**

The judgment rendered by the court of first instance court may sometimes be exposed to review for different reasons. Depending on the reason behind revision of the judgment, the court of rendition, the appellate court or the court of cassation may revise the judgment of the court of rendition. Following this we are going to see the conditions whereby the court of rendition revises its own judgment. Generally, there are three bases; namely, Procedural Irregularity, Newly Discovered Evidence and Opposition in which the court of rendition will revise its own decision.

##### **3.1.1 Procedural Irregularities**

Before we discuss the effect of procedural irregularity in reviewing the judgment, we need to have a clear understanding of what do mean by procedural irregularity. Here, you have to be conscious that a *procedural irregularity* is distinguished from what is called a *mistake*. The court may; on its own motion or on motion of the parties, correct any clerical or arithmetical *mistakes* in the summons, judgment, decree or order or any errors arising in those documents from any accidental slip or omission, and such mistakes or

errors do not constitute irregularities. Perhaps, the decree as rendered may not be in accordance with the judgment, e.g., the judgment stated that the defendant was liable for Eth. \$ 1000, and the decree reads Eth. \$ 100. Such error can easily be corrected and do not affect the validity of the proceedings.

However, procedural irregularity is quite different from mistake, both in its concept and effect. If the court, which rendered the judgment, understands that there were procedural irregularities, i.e., non-compliance with the provisions of the Code, and such irregularities have *substantially affected* the disposition of the case to the detriment of one of the parties, it may, on its own motion or on motion of either party, set aside the proceedings in whole or in part as irregular, amend them, or make such other order as may be appropriate.

Where such irregularity has occurred *prior to the taking of the preliminary objections or during the course of the proceedings*, the party affected must raise his objection at that time. Where it has *occurred subsequently*, the court may refuse to give judgment, or if it has *already rendered judgment*, it may set it aside.

If the court erroneously failed to grant a request for an adjournment, and the moving party was unable to present his case properly and that party has protested the failure to grant the adjournment, and the court subsequently realizes that its decision on the question was erroneous, it can set aside the proceedings, adjourn the hearing, and render its judgment after holding the new hearing.

So, the very existence of procedural irregularity by itself will not guarantee the revision of the judgment of the court of rendition. In order for the court of rendition to review its judgment; such irregularity must *substantially affect* the decision of the case on the merits. However, if the irregularity does not affect the court's decision on the merits, the proceedings will not be set aside.

On the other hand, also, even if the irregularity might have affected the judgment that was given, the proceedings will not be set aside if the irregularity can be corrected. Let us try to explain the idea with the help of illustration.

Illustration:

Assume that Mr. X as a defendant had raised a claim of set-off, in the case initiated by Miss Y. The court then after finding that the plaintiff was entitled to recover on his claim and the defendant to recover on the claim of set-off, failed to enter a judgment for the balance.

In this case, even though there is an error as to judgment, the proceedings should not be set aside. Because, the error can easily be corrected by entering a judgment for the balance

.

One important thing as far as setting aside of judgment is, concerned where the proceedings are set-aside in part, any step taken prior to the occurrence of the irregularity shall not be affected. For instance, if an irregularity occurred at the trial, the proceedings of the trial would be set aside, but those which took place at the first hearing will remain binding.

Another important point that we have to remind at this point is, unless an application to set aside the proceedings on grounds of irregularity has been made to the trial court, the occurrence of the irregularity may not be taken as a ground of appeal. The only exception would be an irregularity arising from an alleged lack of *material jurisdiction* or *one alleged to exist in the judgment or decree*.

☞ Any irregularity is deemed to have been validated where no appeal is taken from the judgment or where the judgment is confirmed by the appellate court.

### 3.1.2 Newly Discovered Evidence

The more common proceeding in the lower court will be one to obtain review of the judgment on the ground of newly discovered evidence. Per article 6 of Cvi. Pr. C, a party may apply for review of the judgment in the court of rendition on the ground of newly discovered evidence where:

1. no appeal has been taken from the judgment or no appeal lies;
2. subsequent to the issuance of the judgment, he discovers new and important matter such as forgery, perjury or bribery, which despite the exercise of due diligence, was not within his knowledge at the time of giving the judgment; and
3. had such matter been known at the time of giving the judgment, it would have materially affected the substance of the decree or order the review of which is sought.

Just like what we have seen in procedural irregularity, discovering of new evidence by itself is not enough for some one to claim for revision of the judgment of the trial court. There are three criteria that should be fulfilled, so that the court of rendition can review its own judgment.

These are:

- the evidence must be discovered *after the judgment is rendered*,
- the newly discovered evidence *must affect the decision*, and
- the evidence *must be of such nature as to suggest improper conduct*, which tainted the judgment with fraud. i.e., forgery, perjury, bribery or the like.
- 

The above stated three criteria are interrelated to each other. If one of the criterions failed, the court of trial will not be in a position to review the judgment. Following this, we can see some examples to that effect.

Illustration:

- *the evidence must be discovered after the judgment is rendered*

Suppose that the plaintiff has succeeded in a case against a defendant by producing evidence, which is forgery. In doing that, the defendant was aware of the fact that the plaintiff was producing a forgery evidence. However, since he was confident that he had very strong evidence, he fails to raise the wrongful act of the plaintiff.

Therefore, if things were found against his intention and the court is convinced by the evidence produced by the plaintiff, then the defendant will not be accepted even if he produced strong evidence which show that the plaintiff had produced a forged document to succeed in the trial court. This is because the first criterion, i.e., *the evidence must be discovered after the judgment* is rendered has failed.

Illustration:

- *the newly discovered evidence must affect the decision*

An example related with the second criterion is also, if the defendant, after the judgment is rendered, finds out the fact that the plaintiff had produced a bribed witness in the trial court, he may have the right to apply to the court of rendition for revision. However, if it is clear that the court had decided the case basically depending on the documentary evidences produced by the plaintiff, not on the testimony of such witness, the newly discovered evidence will not be accepted, because it could not affect the decision.

Illustration:

- *the evidence must be of such nature as to suggest improper conduct, which tainted the judgment with fraud. i.e., forgery, perjury, bribery or the like.*

Suppose that the plaintiff assumed that there were no witnesses to the transaction and the only witnesses at the trial were the plaintiff and the defendant. The court believed the testimony of the defendant and rendered judgment for him. Subsequently, the plaintiff discovers that there was an eyewitness of whose parties were unaware. He cannot obtain a review of the judgment on this ground, since the evidence does not show any improper conduct of the defendant affecting the judgment.

However, if the defendant concealed the identity of the witness when asked by the court knew of any witnesses to the transaction, review would be proper due to the fraudulent conduct of the defendant. Or, if the witness testified on behalf of the defendant, and the plaintiff later discovers that the witness was bribed to commit perjury, review would also be proper.

- Therefore, it should also be stressed that the evidence must not have been within the knowledge of the applicant at the time the judgment was given. Moreover, the evidence must be of the nature such as to materially affect the substance of the decree and the evidence must be such as to suggest improper conduct, which tainted the judgment with fraud. i.e., forgery, perjury, bribery or the like.

Finally, there are some important points that you should be aware of, as far as newly discovered evidence is concerned.

These are:

- An application for review by the court of rendition, on the ground of newly discovered evidence, cannot be filed if an appeal has been taken. In such a case,

the evidence could be brought to the attention of the appellate court, which would consider it in deciding the appeal.

- An application could not be filed even if the appeal were filed too late and were thus dismissed. This is because the party has the option of raising the question before the trial court or before the appellate court, and having chosen the latter option, he is bound by the disposition made by the appellate court, which here will refuse to consider the objection because the appeal was filed out of time.
- However, if an appeal was taken and dismissed on the ground that an appeal did not lay from the decision, an application for review could be filed, since such an application is authorized whenever an appeal cannot be taken.

**Question:** What do you think if the evidence is discovered after the case has been tried by the appellate court and this court affirmed the decision of the lower court? Is there a possibility of the case being reviewed by the appellate court or the court of rendition?

*Procedure to follow:*

- The application for review must contain the same particulars as a memorandum of appeal, and be supported by an affidavit containing strict proof that the new evidence relates to forgery, perjury, bribery and the like, and that the evidence was not, by the exercise of due diligence, within the knowledge of the applicant at the time of judgment.
- It must be filled within one month from the time the evidence, which was the basis of the application, was discovered.



- There is no period of limitation related to the discovery of the evidence, and an application for review party.
  
- If the court finds that the application for review should be granted, that is, that the applicant has evidence which satisfies the requirements for review, it gives notice to the opposite party so that he can appear and be heard in support of the decree. After hearing him, the court will make such order as the rehearing of the case as it thinks fit.
  
- No appeal lies from the order of the court granting or rejecting an application for review.

### **3.1.3 Opposition**

Here above, we have seen the two types of review that could be applied to the court of rendition. Following this we will also try to see the third type of review available in the court of rendition, i.e., opposition. Opposition can be raised by a person who, though not a party, is affected by the judgment. Any person who *should or could have been made a party to a suit* and *whose interests are affected* by a judgment in the suit may, if he was not a party to the suit, file opposition to the judgment before the judgment is executed.

Per article 358 of the Cv.Pr.C, there are three conditions required where by a party filing opposition should fulfill. These are:

1. He/she should or could have been made a party;
2. His/her interests are affected by the judgment rendered in his absence; and
3. He/she is filed prior to execution of the decree

If we go through those requirements, it would seem that three classes of persons would be able to file opposition; *indispensable parties*, persons who are the *real parties in interest*, and persons who, as a result of the decree, will be *liable for contribution or indemnity* to the unsuccessful party.

The purpose of the rule permitting the filing of opposition is to enable a person who is affected by the judgment, but who was probably unaware of it at the time of rendition, to prevent the interference with his interests that will result if the judgment is executed.

Suppose that despite the assignment, the assignor brings suit on the claim, and judgment is for the defendant. A subsequent suit by the assignee, who is the real party in interest, would be barred by *Res judicata*. He should have been made a party under Art. 40, his interests are affected by the judgment, and, therefore, he may file opposition and have his claim heard.

The same is true with respect to an indispensable party. Once his existence is known, he must be made a party, and by enabling him to file opposition, this can be accomplished.

If a person liable to make contribution or indemnity was aware of the suit, he could have intervened under Art. 41. If he was not aware of the suit, this provision enables him to come in after judgment, since he could have been made a party and his interests will be affected by the judgment.

### Question

☞ *What if such party was aware of the existence of such suit prior to judgment?*

Although there is no requirement to this effect in the Code, it is submitted that, except for indispensable parties, the application to file opposition should be rejected if the applicant was aware of the suit prior to judgment. This is because; this article is one of the provisions of the civil procedure code that cause the delay of court litigations. A party with interest knowing the proceeding purposely fails to act before the judgment. He or

she will wait until judgment is entered. After the judgment has entered, he or she will wait until the judgment reach to the point of execution. It will oppose the judgment when the judgment is about to be executed that nullifies the former proceeding.

However, it is also hard to deny a party with real interest which opposes the judgment of the court before it is executed because of two reasons. First, eventhough he or she was aware of the litigation, it is hard to prove its awareness of the litigation. Second, if it is found that he was aware of the proceeding, it is difficult to deny him opposition as the code does not deny him the to file opposition when he is aware of the litigation.

The person filing the opposition has the opportunity to raise objections to the judgment and may, if he so desires, introduce evidence. Per article 360 of the Cv.Pr.C, the court may then confirm, vary or set aside the judgment. Procedure for opposition sures that a person whose interests will be affected by the judgment in a suit to which he could have been made a party will have the opportunity to be heard before the judgment is executed.

To sum up, a judgment rendered by trial court, may be reviewed in three ways. Those are: by court of rendition, by appellate court or by court of cassation. The court of rendition may review its own judgment if it is proved that there was procedural irregularity, discovery new evidence and opposition.

### **3.2 Reviews by Appeal to a Higher Court**

The most common method of obtaining review of a judgment is by way of an appeal. An appeal may be defined as an application by a party to a higher, or as it is called, an appellate court, asking that court to set aside or revise a decision of a subordinate court. When an appeal has been taken, the appellate court reviews the decision of the subordinate court to determine whether that court committed such errors in its hearing and disposition of the case, which guarantee the appellate court to reverse the decision. If such errors were not committed, the decision of the subordinate court will be confirmed.

In some cases, the error is such that it can be corrected by varying the judgment, and the appellate court has the power to do so.

An appeal, then, means a review of the case and *not a retrial* of the case by the appellate court. Frequently, the grounds for appeal will involve errors of law allegedly committed by the subordinate court. As a rule, the appellate court does not hear additional evidence on the appeal, and where the introduction of additional evidence is permitted, it is limited to exceptional circumstances. It is important to carefully consider what an appellate court does and how an appeal differs from the original trial of the case. Following this, we will try to see those issues in detail.

### **3.2.1 Right of Appeal**

Either party may, in accordance with the provisions of the Code, appeal against any final judgment rendered by the subordinate court. The party taking the appeal is called the *appellant*, and the party against whom the appeal is lodged is called the *respondent*. On appeal, they are referred to by these designations.

It is also possible that both parties may be dissatisfied with the decision and if so, both may appeal. For example, the court may have entered judgment for the plaintiff, but may have awarded him a lesser amount of damage than he or she claimed. In such a case, the defendant may appeal from the decision on the issue of liability, and the plaintiff may appeal from the decision on damages.

Since the judgment on the issue of liability was for the plaintiff, his appeal is called a *cross-appeal*; as to that issue, the plaintiff would be the *cross appellant* and *the defendant would be the cross respondent*. However, if only the plaintiff appealed, he would be the appellant and the defendant would be the respondent.

Question: Whom do you think is the one who seeks appeal?

A party may only appeal where he has been adversely affected by the judgment, with which he is challenging the decision of the trial court. Thus, where the plaintiff proceeded on alternative theories of liability, and the court found in his favor on one theory, but not on the other, and gave him all the relief sought, he cannot appeal on the ground that one issue was decided against him. So too, if the defendant contended that there was no contract and alternatively that performance was prevented by force majeure, and the court found that there was a contract, but upheld the defendant's contention as to force majeure and entered a judgment in favor of him, he could not appeal against the court's decision as to the existence of the contract.

In multi-party litigation, any or all parties may appeal if they are adversely affected by the decision. The parties appealing need not make all the other parties respondents to the appeal.

Suppose that the defendant joins a third party defendant. The court finds for the plaintiff as against the defendant and for the third party on the defendant's claim against him. The defendant may appeal against the decision on third party liability, naming the third party as respondent, without appealing against the decision in favor of the plaintiff on his claim. The third party could also appeal from a decision holding him liable to the defendant.

The judgment appealed from is presumed to be correct, and the burden is on the appellant to show that it should be reversed or varied. Thus, where there was an appeal and a cross-appeal, the appellant would have the burden of showing that the portion of the judgment he was attacking was erroneous, and the cross-appellant would have the same burden with respect to that portion of the judgment which he was attacking.

Where an appeal lies, but a remedy is available in the court, which gave the judgment or order, no appeal may be lodged until such remedy has been exhausted. This would

include the situation, discussed previously, where procedural irregularities have occurred in the subordinate court .See article 320(2) of Cv.Pr.C

The party must make his application to set aside the proceedings in that court, and if his application is denied, he may then appeal. Under Art. 211(1), it is provided that an error in the judgment or decree may be made a ground of appeal, even though an application was not made to the subordinate court. However, since a remedy is available in the subordinate court, it would seem that the appellate court could not hear the appeal until that remedy was exhausted, so that even where the irregularity occurs with respect to the judgment or decree, an application would have to be made to the subordinate court before the appeal could be taken.

Where the unsuccessful party has discovered new matter that would entitle him to review in the court that rendered the judgment, as provided in Art. 6, he is not precluded from appealing, assuming that he has other grounds of appeal. Review under Art. 6 is authorized only where an appeal has not been taken, so where a party has taken an appeal, he could ask the appellate court to consider the new matter as additional evidence, which we will discuss subsequently. However, he could not appeal solely on the ground that he has discovered such new matter. The existence of that evidence does not render the judgment of the subordinate court subject to attack in the appellate court, and he would have to seek a review of the judgment in the subordinate court.

There is one appeal as of right. Where the case was tried in the First Instance Court, an appeal lies to the High Court in whose area of jurisdiction that the First Instance Court lays; where the case was tried in the High Court, an appeal lies to the Supreme Court. Where, on appeal, the appellate court confirms the judgment, a further appeal does not lie. If, however, the judgment is varied or reversed, a second appeal lies to the next highest court,

Example: if the High Court varies the judgment of the First Instance Court, an appeal lies to the Supreme Court, and if on appeal to the High Court from a case originally tried in the First Instance Court, the High Court varies the judgment, a further appeal lies to the Supreme Court.

*Question:* Do you think that there is a third appeal?

There is no provision for a third appeal. Suppose that the issue is the subject matter of a state which has Social court structure in which it is initially instituted in the Social Court, and the state and judgment was for the plaintiff. On appeal, the Woreda Court reverses and gives judgment for the defendant. Since the decision of the Social Court was reversed on appeal, a second appeal which lies to the High Court is possible. But, no matter how the High Court disposes of the case, i.e., whether it confirms or reverses the decision of the Woreda Court, a further appeal does not lie to the Supreme Court. Jurisdiction on appeal under the Civil Procedure Code thus differs from both the jurisdiction under the Criminal Procedure Code where two appeals are authorized as of right, and the jurisdiction under the prior rules where only one appeal was authorized in civil cases. Of course, an applicant who has exhausted his rights of appeal may petition to the court of Cassation for revision. We are going to discuss on this issue later on.

### **3.2.2 Types of Appeal**

As we have said earlier, one of the remedies for the party who is dissatisfied by the judgment of the court is review of judgment. This review could be made by the court of rendition, appellate court or court of cassation.

An application to the appellate court may be of two types. These are Appeal on Judgment and Appeal on Orders (Interlocutory Appeal).

#### **1. Appeal on Judgment**

As we have seen earlier, a case may be adjudicated in the first hearing or it may require full-scale trial. The judgment rendered by the court could also be on interlocutory matters or on the merit of the case. So, regardless of the length of the procedure, i.e., with out trial (at the first hearing) or after trial (full-scale trial), if the case is adjudicated on its merits, then any application for appeal on such judgment can be considered an appeal on Judgment. In other words, any application for review of orders made by the court at any level of the litigation is not considered as appeal on judgment unless it is proved that such judgment is on the merit of the case. Other wise, the application for review could be based on decisions rendered on interlocutory matters, which we are going to discuss below.

If, for example, the plaintiff claims the defendant for payment of compensation for the damage occurred due to non-performance of the contract and the court after certain procedure is applied decide the case in favor of the plaintiff, in which the defendant to pay the claimed amount of money, then we can say that an appeal against such judgment is Appeal on judgment.

## 2. Appeal on Orders (Interlocutory Appeal)

An interlocutory appeal is simply an appeal from an interlocutory matter, a matter on which the court has rendered a decision, but the decision does not finally dispose of the case.

Examples of interlocutory matters would be an order on a motion for adjournment, a decision on preliminary objections, a ruling on the admissibility of evidence and a decision on an application to sue as a pauper.

Under the Civil Procedure Code, interlocutory appeals are not permitted. No appeal lies from any decision or order of any court on interlocutory matters, but any such decision or order may be raised as a ground of appeal when an appeal is made against the final



judgment. Thus, there can be but one appeal that form the final judgment, and at such time all objections, both as to interlocutory matters and the final disposition, may be raised. See article 320(3) of Cv.Pr.C

However, a person may appeal from any order directing his arrest or detention, or transferring property from one party to another or refusing to grant an application for Habeas Corpus. See article 320(4) of Cv.Pr.C. Although such orders may be considered interlocutory in nature, they do involve restraint of a person or deprivation of property, and it was decided that a person should be entitled to an immediate ruling on the validity of the detention or transfer. These are the only exceptions permitted, and in all other cases the court must reject any appeal taken on an interlocutory matter.

It is necessary, therefore, to distinguish between a ruling on an interlocutory matter, which is not appealable, and the final judgment, from which, of course, an appeal lies. This is not as easy as it might first appear because depending on the circumstances, a ruling on a matter essentially interlocutory in nature may, in effect, be a final disposition of the case. Where the ruling does dispose of the case, it is a final judgment and appealable.

Consider the matter of dismissing the statement of claim on the ground that it does not disclose any cause of action. This would ordinarily be an interlocutory order, since the plaintiff may file a new statement of claim with respect to the same cause of action, and as we saw, the court may permit the plaintiff to file and to amend his statement of claim under Art. 91 instead of dismissing it.

However, suppose that the plaintiff does not choose to file a new statement of claim. He has set forth all the facts on which he is relying, and he contends that they do disclose a cause of action. Since, as a practical matter, he cannot plead over, the dismissal of the

statement of claim disposes of the case, and the order of dismissal constitutes a final judgment.

It must be stressed, however, that a decision constitutes a final judgment only where the decision itself finally disposes of the case or results the closing down of the case. Even though the decision denies a party the relief requested, it may not finally dispose of the case, and, therefore, it is not appealable.

On the other hand, a judgment may be final, even though something else remains to be done. In a suit for partition or separate possession of property, the court may, if the physical partition or separation cannot conveniently be made without further inquiry, declare the rights of the parties and give directions for the actual partition before passing the final decree.

The question is whether the decision declaring the rights of the parties can be appealed before the passing of the final decree. It is submitted that the appeal should be allowed. The rights of the parties in the controversy have been determined. If the court made an erroneous decision, it is desirable that the decision be reversed before the actual physical partition is made. Although something more remains to be done, it will not affect the result in the case. Since the result has been determined, an appeal should be allowed.

### **3.2.3 Grounds of Appeal**

In the memorandum of appeal, the appellant must set forth his grounds of appeal, the grounds on which he objects to the judgment from which the appeal is taken. They must be stated concisely and without argument; where there is more than one ground, each ground shall be set forth separately and numbered consecutively. It is very important that the appellant state all his objections to the decree in the memorandum of appeal. See Article 327 of the Cv.Pr.C.

However, the appellate court, in deciding the appeal, is not confined to the grounds of objection set forth in the memorandum of appeal or argued by leave of court. It may decide the case on any ground. Thus, in our example , the court could vary the decree on the ground that the lower court applied an incorrect measure of damages. Or, suppose that in a suit on a written contract, the court, over the objection of the defendant, permitted the plaintiff to introduce oral evidence inconsistent with the terms of the written agreement. This would be in violation of Art. 2005 of the Civil Code. But, the respondent must have been given the opportunity to contest the ground of objection on which the court is basing its decision. On the other hand, the subordinate court may have incorrectly applied the law, and no objection may have been made. The appellate court may decide the case on any rule of law it considers applicable, but it must give the party that may be affected the opportunity to present his arguments as to the new rule of law, which may result in a reversal, and should give the other party the same opportunity as per article 327(3) of the Cv.Pr.C.. The point is that, while the court may decide the case on any ground it thinks proper, the appellant may not ordinarily present arguments on a ground that he did not raise in his memorandum of appeal.

By the same token, except where the court permits the introduction of new evidence, the appellant may not raise any fact, which was not in evidence in the subordinate court. Fact in evidence should be construed to include any objection or issue that was not raised in the court below. See article 329 of the Cv.Pr.C. An objection or issue cannot be raised for the first time on appeal, and an appeal should be limited to a review of the questions decided by the lower court.

There are, then, two aspects to the rule. The first is that the appellant may not raise new issues for the first time on appeal. The trial is limited those issues framed at the first hearing or subsequently by amendment, and the only evidence introduced at trial relates to those issues. Once the issues are resolved, the decision of the trial court may be

reviewed by the appellate court, but it is too late to raise new issues with new evidence before the appellate court.

The same is true with respect to objections. We saw that certain objections are waived if not raised during the trial court, i.e., at the first hearing, and, of course, they cannot be raised on appeal. Moreover, where no objection was taken to procedural errors committed at the trial, such errors cannot be assigned as a ground of appeal. So too, as regards objections to the introduction of evidence. If the opponent does not object to the introduction of evidence at the time it is sought to be introduced, he cannot contend that the subordinate court committed error in considering the evidence. The point is that the review on appeal is to be restricted to the questions that have been decided in the subordinate court. It is the decision of the subordinate court on those questions that is being reviewed on appeal.

Where issues have been resolved against a party or his objections have been overruled, he is entitled to have those issues and objections reconsidered on appeal. But, he cannot obtain a review of the entire case, trying to find new reasons why the judgment should not have been for his opponent. He may only obtain review of the issues that were resolved against him and of his objections that were overruled by the subordinate court.

There are certain exceptions to the general rule. The clearest is the objection that the court lacked material jurisdiction. As we have repeatedly pointed out, the lack of *material jurisdiction*, which goes beyond the power of the court to proceed at all, may never be waived, and it is specifically provided that this objection may be raised on appeal, even though it was not raised in the court below. The same reasoning is applicable to the failure to join an *indispensable party*; since the absence of such a party affects the power of the court to hear the case, the objection may be taken at any time.

It has also been held that a party may make a new legal argument on appeal, even though this argument was not made in the court below. This refers to a legal argument on an issue that was decided there. It does not seem objectionable to

permit the raising of new legal arguments on appeal, since, as we have said, the appellate court, can decide the case on the basis of any rule of law it considers applicable. It cannot be said that the case is being retried, because different legal arguments to sustain a party's position on an issue are raised on appeal. What cannot be raised ordinarily are new issues and new objections to the action of the subordinate court. Apart from the exceptions noted, the grounds for appeal are to be limited to those issues resolved by the subordinate court and the objections raised at the trial.

### **3.2.4 Instituting Memorandum of Appeal**

#### 1. Memorandum of appeal

A party takes an appeal by filing in the registry of the appellate court memorandum of appeal signed by him or his pleader. Where there are multiple appellants, they may file one memorandum signed by all or by their pleader on behalf of all.

The memorandum of appeal must contain, the requirements stated under Art.327 of Civ. Pro. Code. The following are some of the requirements that should be fulfilled, in addition to the formal requirements:

1. the name of the court which gave the judgment appealed from, the date of the judgment in the number of the suit in which it was given,
2. the grounds of appeal, that is, the reasons for which the judgment should be reversed or varied, and
3. the nature of the relief sought, e.g., the appellant wants the judgment to be reversed or he wants it to be varied in certain respects.

If the appellant is permitted looking for to produce additional evidence on appeal, the memorandum must state whether the appellant bases his appeal entirely on the record of

the original hearing or whether he desires to produce additional evidence, in which case an application to call additional evidence must be attached to the memorandum.

The application must state the nature of the evidence, the names and addresses of the witnesses to be called, if any, and the reason why the evidence was not produced in the subordinate court. In addition, the appellant must submit sufficient copies of the memorandum for service on each respondent.

As you can remember in the first part of the course, the statement of claim must fulfill the technical and substantial requirements so that the court will order summons to the defendant. Lack of proper form has its own consequences. Here is too, where the memorandum is not in the proper form, it may be rejected or returned to the appellant for the purpose of being amended within a specified time, or it may be amended then and there. See article 330 of the Cv.Pr.C

The course of action the court takes should depend on the nature of the defects listed below:

- a. if the memorandum is completely inadequate, the appellant should be directed to file a new one;
- b. if some amendments are necessary or documents are missing, it is sound to fix a day for amendment; and
- c. if the error is a minor one, the memorandum can be amended at the time it is filed.

## 2. Time for appeal

The other important requirement to apply for reviewing of judgment in the appellate court is period of limitation. Normally, the memorandum must be filed within 60 days

from the time of the delivery of judgment. See article 323(2) of the Cv.Pr.C. However, this may not be true all the time. Some substantive laws may fix the period of limitation even less than 60 days. For instance, if we look at some of the provisions of the labour proclamation no. 377/2004, we can see the period of limitation for appeal is only 30 days.

Article 154(1) of the proclamation says:

*In any Labour dispute case an appeal may be taken to the Federal High Court by an aggrieved party on questions of law, **within thirty (30) days** after the decision has been read to, or served upon, the parties whichever is earlier.*

Article 138 (3) of the proclamation also says:

*The party who is not satisfied with the decision of the regional first instance court may, **within 30 days** from the date on which the decision was delivered, **appeal to the labour division of the Regional court**, which hears appeals from the regional first instance court*

*Question:* what is the effect of failure to apply the memorandum within the period of limitation?

Where an appeal is filed after the period of limitation, fixed by the appropriate law is already lapsed, the Registrar must refuse to accept the memorandum of appeal, and he will inform the appellant that he may within 10 days file an application for leave to appeal out of time See article 324(1) of the Cv.Pr.C. The time limit must be observed scrupulously, since it is in the nature of, a period of limitation.

The application for leave to appeal out of time is to be in writing and must show the cause why the appellant did not appeal within the prescribed period. It must be accompanied by such evidence as may be necessary to enable the court to decide whether

the appellant was prevented by good cause from appealing within the period. See Article 325 of the Cv.Pr.C

If the court is satisfied that the appellant was prevented by good cause from appealing in time, it records an order granting the application, and the appellant shall file his memorandum of appeal within 10 days of such order. It is provided that no appeal lies from a decision dismissing an application for leave to appeal out of time. See Article 326 of the Cv.Pr.C.

*Question:* Could we say that a party who is dissatisfied by the decision of the court which accepts an application for leave to appeal out of time is appealable.

### 3. Cross-objections

As we have said, either party may appeal from the decree. The party in whose favor judgment on the merits was entered may have certain objections to the decree, which he may want to raise in the appellate court, and if so, he may file what is called a cross-appeal. However, the objections may be such that he is unwilling to file an appeal in order to raise them; he is relatively satisfied with the judgment as it is. But, when the other party appeals from the decree, he may decide that he now wants to raise such objections. It is, therefore, provided that the respondent may, upon payment of the prescribed court fee, take any cross-objection to the decree or order which he could have taken by appeal notwithstanding that he did not appeal from any part of the order or decree. This is analogous to the provisions relating to counter-claim and set-off. Even though, the defendant did not desire to prosecute his claim, he may decide to do so when sued by the plaintiff

*Question:* can you identify the distinction between cross-objection and cross-appeal?



There is no substantive distinction between a cross-objection and a cross-appeal, and the same grounds of attack may be raised by both methods. The distinction refers solely to whether the successful party filed an appeal to challenge certain aspects of the decree, in such case i.e., cross-appeal or whether he made his attack only in response to an appeal filed by the other party, that is, by a cross-objection.

The cross-objections must be filed in the form of a memorandum of appeal within one month from the time when the respondent is served with the summons to appear and defend the appeal. A copy is to be served on every party who may be affected by the objection. The cross-objection may be heard and determined notwithstanding that the original appeal is not proceeded with (See Article 340 of the Cv.Pr.C). So, even if the appellant decides to withdraw the appeal, the court will hear the respondent's cross-objections and may modify the decree as a result. However, if the original appeal were not validly filed, there would be no opportunity for the respondent to present cross-objections. Suppose that the appellant's memorandum of appeal was rejected as being filed out of time. It is as if no appeal had been taken, and the respondent may not file cross-objections. As a practical matter, the respondent would never have been served with summons.

It is important to remember that the filing of a cross-objection is merely the device by which a respondent who did not file a cross-appeal may attack the decree after the unsuccessful party has taken his appeal. Once, cross-objections have been filed, the practical effect is the same as if he had taken a cross-appeal.

#### 4. Additional Parties

As you can remember from your previous knowledge, we considered the power of the trial court to bring in additional parties. The appellate court has the same kind of power with respect to persons who were parties to the original suit but who were not made

parties to the appeal. Where it concludes that such a person is interested in the result of the appeal, it may direct that he be made a respondent. See article 40(5) of the Cv.Pr.C

*Illustration:* If suit were brought against A and B as joint owners of property, and the plaintiff appealed only against A, the court should bring B in as a respondent; he is an indispensable party, and in his absence the appeal cannot proceed.

### 5. Stay of execution

The fact that an appeal has been taken does not operate to stay the proceedings or to prevent execution of the decree. Execution can be stayed only upon a showing that substantial loss will result if the stay is not granted and that appellant's furnishing security for the performance of the decree. A stay of execution may be ordered by the appellate court or by the court or by the president of the court, which rendered the decree if an application, is made to that court before the expiration of the time allowed for appeal. See article 332-334 of the Cv.Pr.C. Since both the appellate court and the subordinate court are authorized to grant stays, it seems implicit that the subordinate court should only order a stay if an appeal has not been taken. Once an appeal has been taken, any stay should be granted by the appellate court. By the same token, before an appeal has been lodged, the case is not within the jurisdiction of the appellate court, and it should not order a stay, even if the unsuccessful party assures the court that he plans to take an appeal.

Moreover, the rules authorize only the granting of a stay of execution, and do not authorize the setting aside of an execution that has already taken place. It follows that after the decree has been executed, an application for a stay of execution cannot be entertained. Where the case is before the appellate court, the president may grant a temporary stay for a period not to exceed 15 days, as may the president of the court, which passed the decree if an appeal, has not yet been taken.

The court or presiding judge may only issue a stay if satisfied that;

1. Substantial loss may result to the party applying for the stay unless the order is made;
2. the application has been made without unreasonable delay, and
3. money has been deposited, security given or a surety produced by the applicant, guaranteeing due performance of the decree as may ultimately be binding upon him. The parties must be heard on the application although the court may, on application supported by affidavit, make an ex parte order of stay pending the hearing of the application.

In summary, there are two approaches to the granting of a stay: granting a Stay as of course and granting a stay only in exceptional cases. The Civil Procedure Code adopts the latter approach. The fact that an appeal has been taken does not prevent execution of the decree, and it is only where the appellant demonstrates that substantial loss will result if execution is not stayed that the appellate court will interfere with the execution of the decree.

### **3.2.5 Procedure on Appeal**

#### **1. Hearing of Appeal**

As we have seen, the memorandum of appeal is filed in the appellate court, and it serves as the pleading that originates the appellate proceedings. Assuming that the appellant bases his appeal entirely on the memorandum of appeal and does not apply for permission to call additional evidence, the appellate court may decide the case solely on the basis of the grounds set forth in the memorandum of appeal. It fixes a day for hearing the appellant or his pleader, and following the hearing, it may dismiss the appeal without calling on the respondent to appear if it agrees with the judgment of the subordinate court. See article 337 of the Cv.Pr.C This procedure is analogous to dismissing a statement of claim for failure to state a cause of action. Where the appellate court believes that the appeal is groundless there is no reason to proceed further, and the court

is authorized to dismiss the appeal.

Where the appeal is not entirely dismissed, the appellate court is to cause the memorandum of appeal to be served on the respondent. Fix a day for the appeal and summon the respondent to appear, advising him that if he does not appear, the appeal will, nonetheless, be heard. See article 338 of the Cv.Pr.C. The respondent must be allowed sufficient time to prepare his reply and to appear and be heard.

On the day of the appeal, the appellant is to be heard first since he has the burden of proof on the appeal. If he has not made out a case justifying further argument, the court may dismiss the appeal at that time. If the court does not dismiss the appeal, the respondent is then heard in rebuttal, and the appellant is entitled to reply. The court may, however, require the respondent to submit a written reply to the memorandum of appeal and the appellant to submit a written counter-reply. See article 339 of the Cv.Pr.C

## 2.Framing of Issues

If, during hearing the appeal, the appellate court concludes that the subordinate court has omitted to frame or try an issue or to determine any question of fact which is necessary for the decision of the suit on the merits, the appellate court may frame those issues and refer them to the subordinate court, which is to take the evidence on those issues. The subordinate court does not review its decision in the case; it merely takes the evidence, makes findings, and submits the evidence and finding to the appellate court. See article 343 of the Cv.Pr.C. After they have been submitted, the appellate court proceeds to determine the appeal. By employing this procedure, the appellate court avoids the necessity of taking such evidence itself.

## 3.Additional Evidence

The most difficult question relating to the procedure to be followed on appeal is whether the appellate court should allow additional evidence to be produced. The general rule is

that the parties are not permitted to produce such evidence. All issues must be raised at the trial so that the court can render a final judgment on the merits.

However, there are three situations where the introduction of new evidence on appeal is authorized. These are where:

1. the subordinate court refused to admit evidence that ought to have been admitted;
2. the appellate court requires and document to be or any witness to be examined to enable it to pronounce judgment; or
3. there is 'substantial cause,' justifying the production of the evidence. See article 345 of the Cv.Pr.C

We will consider each of these situations separately.

#### 4. Review of Findings of Fact

Basically, there are two approaches on this issue. The first approach is, that the appellate court will be dependent on the findings of fact made by the subordinate court. The other approach is, the appellate court may determine on the findings of facts. In Ethiopia, the appellate court is not bound to accept all findings of fact made by the subordinate court, and there are no express provisions of the Code dealing with the effect that is to be given to such findings.

However, if the appeal is not to be a retrial of the case, it follows that to some extent, the appellate court must accept the subordinate court's findings of fact. Ordinarily the appellate court will not have heard the witnesses and must base its decision on the record and any documentary evidence. This factor is a crucial one in determining the extent to which the appellate court should be bound by the findings of fact made by the subordinate court.

Where the evidence is essentially undisputed, or all the evidence consists of documents, the question is what inferences should be drawn from that evidence, and the appellate court is in as good a position to draw those inferences as the subordinate court.

Where the evidence is primarily oral, and the decision depends on the court's resolution of conflicting oral testimony, the findings of fact made by the subordinate court should not ordinarily be disturbed. But where the findings rest on written evidence or undisputed oral evidence and the question is what inferences shall drawn from the evidence, the appellate court is in as good position to draw those inferences and should not be bound by the findings of the subordinate court.

The more difficult case is where the finding depends on both written and oral evidence. The following guides may be suggested. Where the evidence supporting the finding is primarily oral and involves the resolution of conflicting oral testimony, the finding of the subordinate court should ordinarily be accepted. Where the issue was decided entirely on the basis of written evidence, it may be reviewed fully by the appellate court.

Where, although there was conflicting oral testimony, it appears that the written evidence or undisputed oral evidence was such as clearly to outweigh the disputed oral evidence, the appellate court can disregard the findings in light of the written or undisputed oral evidence. The point is that the appellate court cannot retry the case. Where, as happens so often, there is conflicting oral testimony, the finding will depend on an assessment of the credibility of the witnesses. In such a case the finding of the subordinate court should be accepted by the appellate court, since that court is in the best position to determine matters of credibility.

### 3.2.6 Judgment on Appeal

#### 1. Reversal for substantial error

After the appellate court has heard the parties or their pleaders and has rented to such part of the proceedings, e.g., the record, as is considered necessary, it pronounces judgment. The judgment may confirm, vary or reverse the decree or order from which the appeal is taken. . See article 348 of the Cv.Pr.C

In considering whether the decree should be reversed or varied as a result of an error committed by the trial court, it is important to determine whether the error amounts to what is called a procedural irregularity. If the error is such as to amount to a mere irregularity, the Code directs the appellate court to correct it, but also provides that the decree may not be reversed on that ground. . See article 211 of the Cv.Pr.C It follows that the decree should only be reversed or varied if the subordinate court committed "substantial error," which affected its decision.

#### *Illustration;*

Suppose the statement of claim was not signed by the plaintiff, in violation of Art. 93. Despite the objections of the defendant, the court never required him to sign it. Obviously, this error does not necessitate a reversal of the decree, and the appellate court may correct the irregularity.

The same would be true as regards an erroneous ruling on the question of joinder of parties.

Suppose that the court permitted two plaintiffs whose claims did not arise from the same transaction to join, over the objections of the defendant. The case proceeded to trial, and it does not appear that the defendant was prejudiced by the court's having heard the two claims together. Even though an error was committed, it did not affect the substantial rights of the defendant and does not require a reversal.

It is only where the error substantially prejudiced the unsuccessful party that the judgment will be reversed or varied. Where procedural errors have been committed, the decree is not to be reversed unless the errors were such as to prevent a valid judgment from being given. In such a case the appellate court is directed to quash the proceedings and order a retrial.

The point to stress is that a decree should be reversed because of procedural errors only where those errors affected the power of the trial court to hear the case or denied a party a fair trial. Such errors prevent a valid judgment from being given, not be construed to have this effect, and even though committed, should not result in a reversal.

## 2 .Remand

One of the powers of the appellate court is to remand the suit to the trial court. Remand is a legal term which has two related but distinct usages. Its source is from the Latin *re-* and *mandare*, literally "**to order**." It evolved in Late Latin to *remandare*, or "**to send back word**." It appears in Middle French as *remander* and in Middle English as *remaunden*, both with essentially the same meaning, "**to send back**. Remand is, therefore, an action by an appellate court in which it remands, or sends back, a case to the trial court or lower appellate court for action

When an appellate court sends an appealed case back to the trial court for further action, the case is said to be remanded. This usually happens if the trial judge has made an error, which requires a new trial or hearing. For example, assume that a trial court refuses to allow a party to introduce certain evidence (believing it to be inadmissible). If the appellate court decides that the evidence should have been admitted and that the exclusion of the evidence was prejudicial to the party offering it, the appellate court would likely remand the case for new trial and order the evidence introduced.



According to article 341 of the Ci.Pr.C. of Ethiopia, the appellate court may, if it thinks fit, remand the case and may direct which issues shall be tried on remand. This happens if the subordinate court disposed of the case on a preliminary point and its decision on that point is reversed by the appellate court. It is because the decision was on a preliminary point and the substantive issues in the case have not yet determined. On the other hand, the appellate court may try those issues itself, in which case the parties will present their evidence to the appellate court.

For example, suppose the subordinate court dismissed the suit on the ground that it was barred by limitation. The appellate court concludes that the decision on the question of limitation was erroneous and reverses. The merits of the case remain to be tried. The appellate court may, if it thinks fit, remand the case and may direct which issues shall be tried on remand. Or it may try those issues itself, in which case the parties will present their evidence to the appellate court.

For these purposes "preliminary point" should be construed to mean not only objections not going to the merits, but any issue which rendered a decision on some remaining issue unnecessary.

Therefore, before the appellate court ordering remand, it must have concluded that the decision on preliminary point should be reversed. It must also conclude that the disposition of the case ,as a result of the decision on the preliminary point, was erroneous.

### 3. Powers of Appellate Court

The appellate court is given broad powers with respect to its disposition of case. Where the evidence on the record is sufficient to enable the appellate court to pronounce judgment, it may, after resettling the issues, if necessary, finally determine the case notwithstanding that its decision proceeds on a different basis than to decision of the subordinate court. . See article 342 of the Cv.Pr.C

The appellate court may pass any decree or order, which ought to have been made by the subordinate court and may make any order or decree that the case may require. It does not matter that such order was not requested by either party. In this connection, reference should be made to the court's power under Art. 40(5) to join as a respondent any person who was a party to the original proceedings, but who was not a party to the appeal. The court may join him as respondent and issue a decree or order affecting him.

*Illustration*

A sues B and C, claiming that one or the other is liable to him. He obtains a decree against B, but not C. B appeals, joining A and C as respondents. The appellate court finds that B is not liable to A, but C is. It will reverse the decree as to B and can issue a decree in favor of A against C.

The only limitation on the power of the appellate court to issue a decree is that it cannot take away from a party relief which he was granted by the subordinate court and which is not challenged on appeal nor inconsistent with the final decree to be rendered.

Finally, the court may reverse or vary the decree in favor of a person who is not a party to the appeal. Where there is more than one plaintiff or defendant and the decree appealed from proceeds on a ground common to all plaintiffs or defendants, any one of the plaintiffs or defendants may appeal from the whole decree, and if the appellate court finds that the decree should be reversed or varied, it may do so in favor of all plaintiffs or defendants, even though some were not parties to the appeal. The test is whether the decree appealed from proceeded on a ground common to all.

Therefore, the broad powers of the appellate court should always be kept in mind. The decision of the appellate court should dispose of the case in all its aspects, and the final decree should conclude the litigation once and for all. This is true even multiple parties are involved, and the Code gives the appellate court the power to settle the rights and liabilities of all parties to the controversy.

#### 4. Pronouncing of judgment

The provisions regarding the pronouncing of judgment, discussed in Chapter Two are equally applicable to the judgment of the appellate court. In addition, there are special requirements for the giving of a judgment of appeal. Among others, the judgment must contain the points for determination, i.e. the grounds of appeal as set forth in the memorandum of appeal and the further questions, if any, developed by the appellate court, the decision, and the reasons for the decision.

The appellate court should give its own reasons for deciding as it has even where it is confirming the judgment of the subordinate court. It is poor practice to confirm on the basis of the reasons set forth in the judgment from which the appeal is taken, unless they are discussed in the opinion of the appellate court. Where the decree is varied or reversed, the judgment of the appellate court must specify the relief to which the appellant is entitled.

As with the judgment of the subordinate court, the operative part of the judgment must be reduced to a decree. The decree may specify how and by whom the costs incurred in the suit are to be paid, and this would include both the costs in the original suit and on appeal.

With respect to execution, the appellate court may either give the necessary direction for execution itself or may delegate the execution to the subordinate court. See article 183(1) (f) of the Cv.Pr.C. Certified copies of the judgment or decree or both are to be furnished to the parties on application. A certified copy of the judgment and decree also are to be sent to the court, which passed the decree appealed from. There they must file with the original proceedings in the suit, and an entry of the judgment the appellate court will be made in the register of civil suits.

### 3.2.7 The Second Appeal

When we say second appeal, it is to mean that it is an appeal against the judgment of the appellate court, which **varied or reversed** the judgment appealed from. If the appellate court **confirmed** the judgment of the first instance court, although on a different ground, a second appeal does *not* lie. Therefore, to understand the concept, the application for reviewing the judgment of the first instance court, is considered here as first appeal.

The Civil Procedure Code as well as the Federal Court Establishment Proclamation 25/96 does not contain any specific provision regulating the second appeal, and the provisions applicable to the first appeal are therefore, as a general proposition, applicable to the second appeal.

On the second appeal, the party appealing is considered the appellant and the party, in whose favor the previous judgment was varied or reversed, is considered the respondent. The second appeal is to be a review of the decision of the first appellate court varying the judgment appealed from and not a review of the decision of the trial court. The question is whether the appellate court commits error in varying or reversing the judgment from which the appeal was taken. The second appeal should be limited to that aspect of the decision of the appellate court varying or reversing the judgment of the first court.

Suppose that the first court found for the plaintiff, and the defendant appealed contending that the court erred in finding that there was a contract and in rejecting the defendant's contention that performance was prevented by force majeure. The appellate court confirms the finding that there was a contract, but sustains the defendant's contention that performance was prevented by force majeure. The plaintiff appeals from the decision reversing the judgment in his favor. Since the decision as to the existence of the contract was confirmed by the appellate court, the defendant should not be able to cross-appeal, contending that the appellate court erred in confirming that decision.

### **3.2.8 Restitution**

As we saw, the taking of an appeal does not prevent execution of the decree unless a stay is ordered for sufficient cause. It may be, then, that the judgment in favor of one party will have been executed, and, on appeal, that judgment will have been reversed. In such a case the successful appellant is entitled to restitution, and he must make his application for restitution in the court of first instance. That court must cause such restitution to be made, as will, so far as possible, place the parties in the same position as they would have occupied but for the decree or part of the decree that has been varied or reversed. See article 349 of the Cv.Pr.C

In order to effect such restitution, the court may make any order, including one for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which a party is entitled to as a result of the variation or reversal. However, where the appellate court has required the respondent to post security for restitution, it would seem that the application for restitution should be made to the appellate court. In all other cases, it is to be made to the court of first instance. It has been held elsewhere that the decision of the court on the application for restitution is appealable, and since the Code contains nothing to the contrary, we may assume that it will be appealable in Ethiopia as well.

### **3.3 Revision in Court of Cassation**

You know that currently we do have two different court structures in Ethiopia. That is at Federal and State levels. According to Art. 80 (1) & (2) of the Federal Constitution of Ethiopia, the Federal Supreme Court and the State Supreme Courts have the highest and final judicial power over Federal and State matters, respectively. Besides, sub 3(a) of the same Article empowered the Federal Supreme Court to exercise *power of Cassation* over any final court decision containing a basic error of law. The State Supreme Court also has given the same power on State matters by Article 80(b) of the Constitution.

*Question:* Do you think that the power of Federal Supreme Court extends to exercise its power of Cassation over cases that are State subject matter? Should the State Supreme Court have power to exercise its court of Cassation?

We can see different views forwarded on this issue. While some said that the Federal Supreme Court should not have the power to exercise its court of cassation over state matters. For their argument, they cite the constitutional provision which indicates that the State Supreme Court has the *highest and final judicial power on state matters*.

The other argument which strongly suggests the exercise of power of Cassation by Federal Supreme Court against State matters also base its argument on the same constitutional provision which states that “the Federal Supreme Court has a power of cassation *over any final court decision ...*”; by broadly interpreting its meaning which includes the decision of the court of cassation of the State Supreme Court.

If we look at the Federal Proclamation no. 454/2005 also, it clearly defines that the decision made by the Federal Supreme Court on issues of law has a binding effect not only on Federal matters but also on State matters. This indicates that the Federal Supreme Court has a power to exercise its court of Cassation even on cases that are purely State matters.

In court of cassation both at Federal and State Courts, a party may take an application for revision in Court of Cassation, only after he/she has exhausted all his rights of appeal. More over, unlike the appellate court, the court of cassation only reviewed the decision of the lower courts if it has an *error of law*, not error of fact. The parties to the court of cassation are named as “applicant,” the one who claims reviewing of the judgment of the lower court, and “respondent,” the other litigant party.

When we go to the procedure to be followed: although, the Code does not so specify, presumably there is a hearing on the petition, and this hearing would be held before the

court of cassation. If the court believes that the petition is without merit, it will dismiss it. If it believes that it should be granted, the court of cassation declares the petition admitted and gives notice to the respondent by the method previously discussed.

The court of cassation then, upon appearance of the parties, on the date which is fixed by on summon already served to the respondent, give chance to the parties to argue orally. Finally, the court will render judgment on the issue. By its decision the court may confirm, vary or reverse the decision of the lower court decision.

## CHAPTER FOUR

### EXECUTION OF DECREES

So far we have discussed the proceedings on the trial court as well as the procedures to be followed to review the judgment rendered by the lower court. However, once the court has rendered the judgment, there will be a beneficiary of the decision as opposed to the one who is affected by the decision of the court. Both parties have different interests following the judgment. While the judgment debtor wishes to review the judgment by way of appeal, if there is such possibility, the judgment creditor becomes interested to execute the judgment, if there is some thing to be executed.

Generally, 'execution' may be defined as the process by which a *decree*, the operative part of the judgment, is enforced against a person who has failed to comply with its terms. Normally, the decree includes a clear order that the party against whom it is rendered shall do or refrain from doing something or shall pay a definite sum of money or shall deliver a particular thing or shall surrender or restore immovable property. It is such order that is enforced in the execution proceedings.

For that purpose, this chapter will be interested in discussing briefly on three important points, namely, jurisdiction in execution, procedure in execution, and attachment and sale of property.

#### **4.1. Jurisdiction in Execution**

It is important to remember that execution is essentially a separate proceeding. A decree can be executed either by the good will of the judgment debtor or by the order of the court. In most of the time, the judgment debtor is not willing enough to execute the decree. For that purpose the role of the court to execute the will be vital.



As you remember, if a person decided to institute a case in court of law, the first thing that such person should identify is which court has a jurisdiction to see and determine the issue. Like wise, if the beneficiary is interested in executing a decree, he has to appeal to that effect to the court, which has jurisdiction.

Normally, the court, which passed the decree, has a jurisdiction to execute such decree. However, in certain circumstances, it may be transferred for execution to another court. Following we will see the procedure to be followed in such cases.

#### **4.1.1 Transfer for Execution**

Ordinarily, the court which rendered the decree or to whom execution was delegated by the appellate court or referred by the court of cassation will execute it. But if execution by that court is not feasible, the court may, upon its own motion or application of the decree-holder, send the decree to another court for execution.

Per article 372 of Cv.Pr.C, such transfer is authorized where:

1. the judgment-debtor resides, carries on business or personally works for gain within the local limits of the jurisdiction of another court, to which the decree is sent for execution (the transferee court);
2. the judgment-debtor has sufficient property to satisfy the decree within the local limits of the jurisdiction of the transferee court, but not within such limits of the transferring court;
3. the decree directs the sale or delivery of immovable property situated within the local limits of the jurisdiction of the transferee court; or
4. the court which passed the decree considers, for any other reason to be recorded, that the decree should be executed by the transferee court. Such a transfer is not mandatory, and the court which passed the decree may execute it itself even in the circumstances just discussed.

Therefore, if the court, which has a jurisdiction to execute a judgment, decided to transfer its power to any other court, based on the above conditions, it shall send a copy of the decree, a certificate stating that “satisfaction of the decree has not been obtained by execution within its jurisdiction, or the extent of partial satisfaction.” See article 372 of Cv.Pr.C. Such transfer may be made without notice to the judgment-debtor, since he will be notified of the execution proceedings by the transferee court.

*Question:* Do you think that the court, which has no local jurisdiction, can execute a judgment? Explain.

Since the lack of local jurisdiction is waived if not raised and does not constitute grounds for reversal on appeal unless it has caused injustice, the transferee court should not refuse to execute the decree on that ground. So too, if the decree is clearly illegal, it would seem that the transferee court should be able to refuse to execute it. Except in these circumstances, the transferee court should execute the decree without further inquiry.

Other important thing that we should raise at this stage is, the transferee court cannot alter, vary or add to the terms of the decree. The only exception is where the decree is ambiguous. In such a case, the transferee court can resolve the ambiguity. Therefore, if the decree has been appealed and modified by the appellate court, the transferee court can execute it as modified by the appellate court. See article 374 of Cv.Pr.C

Hence, if the transferee court is directed to execute the decree, and in doing so, it has the same powers as if it had passed the decree itself. It retains the power to execute the decree notwithstanding that an appeal has been taken from the judgment in the suit. But as an exception, the transferee court may not transfer the decree for execution to still another court.

In general, the Code provides a convenient procedure by which the decree may be executed by another court. The court to which the decree is transferred for execution must execute the decree as passed and cannot vary or alter it. It can only refuse to execute the decree if it concludes that the transferring court lacked material jurisdiction to render it or that the decree is clearly illegal. It cannot suspend execution except to grant a temporary stay so that, an application for a stay can be made to the transferring court. It is bound by any order passed by the transferring court, although it may deal with property as to which it has issued an order of execution.

#### **4.1.2. Powers of the Court upon Execution**

The court can not execute a decree simply because it has a jurisdiction to that effect. Hence, an application by the decree-holder to the court which issued the decree is important. However, once an application is made the court executing the decree has complete control over the proceedings, and all questions arising between the parties in the suit in which the decree was passed concerning the execution, discharge or satisfaction of the decree must be determined by that court and not by a separate suit.

It is very important to remember that the proceedings in execution are analogous to a suit on the original claim. Just as all questions relating to a suit must be raised at that time, all questions concerning the execution, discharge or satisfaction of the decree must be raised before the court executing the decree and not by a separate suit. See article 375 of Cv.Pr.C.

Any question concerning the execution, discharge or satisfaction of the decree must be broadly construed in order to effectuate the purpose of the rule. A compromise intended to govern the liability of the judgment-debtor under the decree and to affect the time and manner of enforcement can be recorded and enforced under this rule, and a separate suit cannot be brought on the compromise agreement.

Following are some other examples of questions that must be raised before the court executing the decree:

1. Claim of compensation for damage caused by the judgment-debtor to property prior to surrendering possession;
2. Claim by the judgment-debtor that the decree-holder took in execution property not included in the decree or in excess of the decree;
3. Claim for refund or deficiency following execution on mortgaged property where an error in the amount of mortgage is subsequently discovered.

It does not apply to questions concerning the decree itself or matters unrelated to execution.

The decision of the court on execution is subject to appeal, but if no appeal is taken, the proceedings are final, and what happened in those proceedings cannot furnish the basis for a separate suit between the parties.

Finally, where a suit by the judgment-debtor against the decree-holder is pending in any court, the court which issued the decree may, on such terms as to security or otherwise as it thinks fit, stay the execution of the decree until the pending suit has been decided. Therefore, the court is given the discretion to stay execution until the pending suit has been decided. See article 377 of Cv.Pr.C. Note that the other suit may be pending in any court and need not be pending in the court which issued the decree. However, only the court, which issued the decree, may stay execution; execution may not be stayed by the court in which the other suit was filed.

#### **4.2 Proceedings in Execution**

Once an application for execution is instituted, the court that executes the judgment has to apply certain procedure. Following we are going to deal on those proceedings.

### 4.2.1 Application for Execution

#### 1. General provisions

As we have repeatedly saying an application for execution is the first step to proceeding for execution, in case the decree is not satisfied by the judgment-debtor. Note that he does not file a separate suit and that the general provisions applicable to the institution of suits are not applicable to proceedings in execution. In a sense the proceedings in execution are a continuance of the original suit, and the original suit is not finally closed until the decree is satisfied.

There is no fixed time stated for application. But the application may be made as soon as the judgment-debtor is in default. If he has been given time to satisfy the decree, the application may be made when the time has passed without the decree's having been satisfied; otherwise, it may be made upon the passing of the decree. See article 378 of Cv.Pr.C.

The application must contain the following information:

1. *the number of the suit;*
2. *the names of the parties;*
3. *the date of the decree;*
4. *whether an appeal has been preferred;*
5. *what payment or other adjustment, if any, has been made subsequently to the decree;*
6. *whether any previous applications for execution have been made, and if so, the dates and results of the applications;*
7. *the amount due upon the decree, with interest, if any, or other relief granted, together with the particulars of any cross-decree,*

*whether passed before or after the date of the decree sought to be executed;*

8. *the amount of costs awarded, if any;*
9. *the name of the person against whom execution is sought; and*
10. *The mode in which the assistance of the court is required.*

The application shall be in writing and signed and verified in the same manner as a pleading, and a certified copy of the decree sought to be executed shall be annexed.

Where the application seeks the attachment of movable property belonging to the judgment-debtor, it shall be accompanied by an inventory of the property containing a reasonable description of the same. See article 379(1) of Cv.Pr.C.

Where the application seeks the attachment of immovable property, it shall contain a description of the property in accordance with Art. 225(2) of the Civil Procedure Code and a specification of the judgment-debtor's interest in such property to the extent believed or ascertained by the applicant. If such a description is lacking, the application should be returned to the applicant with directions to furnish the description within a prescribed period of time. See article 379(2) of Cv.Pr.C.

*Question:* What do you think the effect of failure to comply with the formal requirements of application for execution be?

## 2. Application by holders of joint decrees

A decree may some time benefit more than one person. In such cases, any one of the beneficiaries may apply for the execution of the whole decree for the benefit of all, or where one has died for the benefit of the survivors and the legal representative of the deceased. See article 380(1) of Cv.Pr.C.

However, we have to make sure that the decree imposes no condition to the contrary. Where the court sees sufficient cause for allowing the decree to be so executed, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application. See article 380(2) of Cv.Pr.C.

If there are several parties, so that a representative class suit may have been justified under Civ. Pro. C., Art. 38, one holder of the joint decree should be able to file the application on behalf of the others. Or, if one of the decree-holders is outside of the jurisdiction, the other should be able to apply for execution.

### 3. Application by transferees

A right may be transferred to any other person for different reasons and at different times. Such transfer could be made by the operation of law or by agreement of parties. Accordingly, if a decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution. Once the application is granted the decree may be executed in the same manner and subject to the same conditions as if the application were made by the original decree-holder. See article 381(1) of Cv.Pr.C.

Where the decree has been transferred by assignment and the assignee applies for execution, notice of the application shall be given to the original decree-holder and the judgment-debtor; the decree shall not be executed until the court has heard any objection either may have to its execution. See article 381(3) of Cv.Pr.C. The purpose of such notice is to permit the raising of defences to execution by the assignee, e.g., the assignee did not satisfy his agreement with the assignor or the judgment-debtor to pay the assignor. Note that such notice is not necessary where the transfer has been made by operation of law.

A transfer of the decree by operation of law may arise in any of the following ways:

1. the decree-holder has died, and the decree has passed by devolution or succession,

2. the decree-holder has become insolvent, and the decree has passed to the assignee or receiver;
3. a judgment has been entered against the decree-holder in another suit, and the decree has been transferred in execution proceedings against him.

Where a decree for the payment of money against two or more persons has been transferred to one of them, either by assignment or operation of law, the transferee judgment-debtor cannot execute the decree against the other judgment-debtor. The purpose of this rule is to force the transferee judgment-debtor to proceed against his co-debtors by way of a suit for contribution, which is considered an a more appropriate procedure.

#### 4. Application against sureties and representatives

Basically the judgment debtor has a responsibility to execute the judgment. But this is not the case all the time. There are time which the judgment debtor could not do so. One of those reasons could be death of the individual. Where the judgment-debtor dies before the decree has been fully satisfied, the decree-holder may apply to the court, which passed it for execution against the legal representative of the deceased judgment-debtor. See Art. 383 of the Ci.Pr.C.

Where any person has become liable as surety: for the execution of a decree or any part thereof; for the restitution of any property taken in execution of a decree; or for the payment of any money or the fulfillment of any condition imposed on any person, under an order of the court in proceeding consequent thereon, the decree or order may be executed against him to the extent to which he has rendered himself personally liable and he shall be deemed to be a party within the meaning of Art. 375, provided that such notice as the court in each case thinks sufficient shall be given to him.



#### 4.2.2 Limitation

We may now consider the matter of limitation. The Civil Procedure Code does not specify a period in which the first application to execute the decree must be filed. Since the decree creates an obligation for the benefit of the decree-holder, the ordinary period of limitation for the enforcement of obligations, which is ten years, should be applicable, and if the application is filed more than ten years after the date of the decree sought to be executed, it should be barred by limitation.

The Code does provide a period of limitation for a second application, and all matters relating to a second application are governed by the Code. Per article 384 of the Cv.Pr C, once an application to execute a decree, other than one granting an injunction, has been made, no fresh application may be entertained after the expiration of ten years from

1. the date of the decree sought to be executed, or
2. where the decree or any subsequent order directs the payment of money or the delivery of property to be 'made at a certain date or at recurring periods, the date of the default.

There is no restriction on the number of applications that the decree-holder may make within the ten years period. However, where one application has been ejected and a subsequent application raises the same questions as did the rejected one e.g., the decree-holder seeks to execute on property that was declared to be exempt from execution, the court may reject the application on the ground that the questions raised in the application have been decided previously.

**Question:** Does second or third application of the execution of the judgment terminate the running of period of limitation?

### **4.2.3. Process of Execution**

#### 5. Receipt of application and examination of the judgment-debtor

We hope you try to answer the question here above which is related with the effect of failure to comply the formal requirements of the application for execution. If these conditions have not been complied with, the court must reject the application; or if the defect can be remedied, it must allow the applicant to do so on such terms as it shall fix. Any amendment so made shall be dated and signed by the presiding judge. The application is then deemed to be one in accordance with the law, and the amendment relates back to the time when the application was originally filed. See article 385 of the Cv.pr.C

Where the application for execution is admitted, the same procedure as to the summoning of the defendant in the trial court will be applied. i.e., a copy is served on the judgment-debtor together with a summons requiring him to appear before the court on a day fixed in the summons to show causes why the decree should not be executed. Once the judgment debtor appears before the court, the proceeding is oral one. The judgment debtor is not allowed to bring any written respond to the application. See article 386(1) and (2) of the Cv.Pr .C

If the judgment-debtor does not appear, the court orders the decree to be executed and issues process for such execution. In addition, where the application made for execution of a decree for the payment of money, the court must order the judgment-debtor to be arrested and brought before the court for the purpose being examined as to his means. See article 386(3) and (4) of the Cv.Pr.C

When the judgment-debtor appears, he may make objection to the execution of the decree, and the court will consider his objection and make an appropriate order. The court would dismiss the application if it finds the decree has been satisfied, or that the application is barred by limitation or is otherwise objectionable.

Where the court considers that the judgment-debtor does not have the means to pay the amount due, it may not issue any process for execution. The burden should be on the decree-holder to persuade the court that the judgment-debtor has sufficient means. If the court cannot issue process because it considers that the judgment-debtor cannot pay the amount due, it should not dismiss the application, because it may issue process at any subsequent time on being satisfied that the judgment-debtor has a means to pay such amount.

In the event that the judgment-debtor has not shown causes why the decree should not be executed, the court will issue process for execution of the decree in such manner as the nature of the relief granted may require.

Per article 389 of the Cv.Pr.C, in addition to issuing process for execution, the court is authorized to order the detention of the judgment-debtor as a means of forcing him to comply with the decree It may issue such an order in two situations:

- 1 if the court concludes that prior to the time when the application for execution was filed, the judgment-debtor is in a position to satisfy the decree and willfully fails to do so, i.e., he had the means to satisfy the judgment or the ability to perform the required act, and there was no excuse for his failing to do so; or
- 2 If, after the court has examined the judgment-debtor and ordered him to comply with the decree, he refuse without good cause to do so.

In either case the court may order his arrest (if he is not already under arrest) and his detention in a civil prison for a period not to exceed six months.

## 6. Execution of decrees for the payment of money

The Code specifically directs how various kinds of decrees are to be executed. A decree for the payment of money, including a decree for the payment of money as an alternative to some other relief, may be executed by the *attachment* and *sale* of the judgment-debtor's property. See article 394 of the Cv.Pr .C

The property attached may be movable or immovable, and there is no requirement that the decree-holder first proceed against movable property. The value of the property attached must be, as nearly as may be, correspond ant with the amount due under the decree.

The money payable under the decree may be paid into court whose duty is to execute the decree or to the decree-holder out of court or otherwise as the court which passed the decree may direct. See article 395 of the Cv.Pr.C

## 7.Execution of cross-decrees

It may be that an application is made by a decree-holder against the judgment-debtor for execution of a decree for the payment of money at the same time that the judgment-debtor has applied for execution of a decree for the payment of money against the decree-holder, which was obtained in a separate suit. Some how, it is similar to counter claim brought by the defendant when the plaintiff institute a case against him.

Where both parties have made such applications, their decrees are called cross-decrees, and the execution of such decrees is governed by special rules. In order for the rules relating to cross-decrees to apply, the following conditions must be satisfied:

1. Both decree-holders must make application to the same court for execution of their decrees;
2. The decrees must be obtained in separate suits;

3. Both decrees must be for the payment of definite sums of money;
4. The parties must be the same in the sense that the decree-holder in one of the suits was the judgment-debtor in the other suit and the parties were involved in both suits in the same capacities; and
5. Both decrees are capable of execution at the same time by the court. The holder of a decree passed against several persons jointly and severally may also treat it as a cross-decree in relation to a decree passed against him singly in favor of one or more of such persons.

*Illustration*

Where A has a judgment against B for Eth. \$ 1,000 obtained on a debt owed by B to him; and B has a judgment against A for Eth. \$2,000 on a debt owed to him by A and both apply for execution. The court must treat the decrees as cross-decrees and apply the special rules as to their execution.

Decrees may also be treated as cross-decrees where the assignee of a decree assumed judgment-debts due by the assignor to the judgment-debtor or where the judgment-debtor himself holds a decree against the assignee. See article 397(2) of the Cv.Pr.C

*Illustration*

Suppose that A holds a decree against B and B holds a decree against A Passed in a separate suit in the same court. A assigns his decree against B to C. When C seeks to enforce that decree against B, B's decree against A is not considered a cross-decree, since it runs only against A and not against C.

However, if C assumed A's obligations under the decree held by B against A, both decrees are cross-decrees, since, in effect, C now has a decree against B and B has a decree against C.

Hopefully, you have now clear understanding of what constitute cross-decrees. Therefore, the next issue that needs to be answered is what rules should be applied for execution of such issues. In such a case, the following rules will be applicable.

- If the sums due under both decrees are equal, the court enters satisfaction upon both decrees.
- Where the sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for only so much as remains after deducting the smaller sum.

Note that the provisions for execution of cross-decrees are necessarily limited to the situation where both decrees were issued by the same court. Since an application for execution must be made to the court, which issued it, a court would not be capable of execution a decree that had been passed by another court and, therefore, could not apply those provisions.

However, these days there is specialization of benches especially in Federal Courts. There are benches that assigned to entertain only a certain kind of cases. There are benches established only to the execution of judgment entered by different courts. In Federal Courts, two benches in Lideta and Arada division established only to the execution of judgment entered by different courts. Application of the execution of judgment is fully the responsibility of these benches. The court that has given the judgment does not entertain the execution of the judgment it has entered. Therefore, there is a chance, at least in Federal Court Structure in Addis Ababa, for the application of the execution of joint decree that entered by different courts.

## 8. Execution of other decrees

A decree for recovery of specific movable property or a share of such property is to be executed by the seizure of the property or share thereof and the delivery to the decree-holder or such person as he appoints to receive delivery on his behalf. See article 399 of the Cv.Pr.C.

However, this rule is applicable only to property in the possession of the judgment-debtor. If the property is in the possession of someone else, the decree-holder must proceed to attach that property. This is so that the person in possession may have the opportunity to raise an objection to the attachment.

In the case of a decree for the delivery of immovable property, possession is to be delivered by the execution officer to the decree-holder or such person as he may appoint to receive delivery on his behalf. The execution officer may remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession. See article 402 of the Cv.Pr.C

Where the decree is for the joint possession of immovable property, physical possession is not delivered. Instead, a copy of the decree is affixed in some conspicuous part of the property and the substance of the decree is proclaimed by beat of drum or some other customary mode. Presumably, the judgment-debtor will then permit the decree-holder to enter into possession peaceably. If the judgment-debtor resists the possession of the decree-holder, the decree-holder may obtain the assistance of the court against such resistance. See article 402 (2) of the Cv.Pr.C

The court, instead of ordering such attachment and sale, may order the arrest or detention of the judgment-debtor if he is not already under arrest in the civil prison. But, the maximum period of detention should not exceed six months. (See Article 389 of the Cv.Pr.C)

It may also direct that the act required to be done shall be done, as far as practicable, by the decree-holder or some other person appointed by the court, at the expense of the judgment-debtor; when the act is done, the costs incurred will be determined by the court and may be recovered as though they were included in the decree.

*Question:* What if the judgment debtor fails to execute the decree within the detention period and the court understands that same reason arises after he is released from detention? Could the court order second arrest? Why? /Why not?

### **4.3. Attachment and Sale**

Under this section, we will deal with the most important part of the execution process i.e., attachment and sale of the property of the judgment-debtor to satisfy the decree. This part is important because, the best remedy for the judgment holder to secure its decree is to attach the judgment debtor's property and sale it for the satisfaction of the decree.

Most decrees are for the payment of money, and this is the primary method by which such decrees are executed. Although coercive methods against the judgment-debtor may be employed, it is only by attachment and sale that the court can guarantee satisfaction to the decree-holder. Attachment must also be used to effect delivery of movable property put in the possession of the judgment-debtor and to obtain an undivided share in movable property for the decree-holder.

Moreover, where the decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may be attached as in the case of a decree for the payment of money before the exact amount due has been ascertained. However, for the most part, attachment and sale will involve the satisfaction of a decree for the payment of money.



Accordingly, there are a number of things that needs answer to apply the attachment and sale of the property of the judgment debtor. Among these, identifying the property, which is subject to attachment, the process on how attachment of property is being performed, the process of selling the property attached and other alternative methods related to it, and any other measure, which the decree orders will be delt out under this section.

### **4.3.1. Methods of and Objections to Attachment**

#### **9.Methods of attachment**

You will recall that when the decree-holder files his application for execution, he must indicate whether he wishes the decree to be executed by the attachment and sale of property, and if he does, the application for attachment must be accompanied by certain particulars. Note also that the application for attachment must be for the attachment of *specific property*, and the Code contains directions as to how various types of property are to be attached.

Before considering how property is to be attached, we must note that certain property is exempt from attachment. There is no minimum amount of property that the judgment-debtor can retain but exemptions are made so that the judgment-debtor will not be deprived of the necessities of life and the opportunity to earn a livelihood. See article 404 of the Cv.Pr.C. Those properties which are exempted from attachment are:

1. the necessary wearing-apparel, cooking vessels, bed and bedding of the judgment-debtor and his family;
2. tools, instruments or implements of any kind used by the judgment-debtor in his profession, art or trade;
3. where the judgment-debtor is an agriculturalist, such cattle and seed-grain as may, in the opinion of the court, be necessary to enable him to earn his livelihood;
4. such amount of food and money as may, in the opinion of the court, be necessary to sustain the judgment-debtor and his family for a period of three months;

5. pensions and alimonies;
6. two-thirds of the judgment-debtor's salary, or where the salary does not exceed Eth.\$ 2 per day, and the judgment-debtor has no other income, the entire salary;
7. any other property declared by law to be exempt from attachment or sale.

It is clear that the exemptions represent an attempt to leave the judgment-debtor with the minimum amount of property that he needs to subsist and to earn a livelihood. On the whole, relatively little property is exempted from attachment, and it is likely that the decree-holder will receive some satisfaction despite these exemptions.

We will now consider the specific directions for the attachment of various kinds of property. Depending on the nature of the property and the person who has control over it, different methods are to be employed.

In the case of movable property in the possession of the judgment-debtor, other than agricultural produce, the attachment is made by physical seizure of the property; the execution officer must keep the property in a safe place and be responsible for its custody. See article 406 of the Cv.Pr.C

There are different methods of attachment. Hence depending on what is going to be attached, the appropriate method will be applied.

- Where the goods are stored in a warehouse or similar place and it is inconvenient to remove them, an attachment can be effected by affixing the warrant of attachment to the outer door of the building.

- Where the property to be attached is agricultural produce, attachment is made by the affixing of warrant rather than by physical seizure. See article 407 of the Cv.Pr.C
  
- Where the property to be attached is a debt not secured by a negotiable instrument or is a debt owed to the judgment-debtor under another decree, the attachment is made by a written order prohibiting the judgment-debtor from recovering the debt and his debtor from paying him until further order of the court. (This rule does not include debts secured by a negotiable instrument, which are treated separately; however, a debt secured by mortgage can be attached under this rule.) See article 409 (1) of the Cv.Pr.C
  
- Where the property to be attached is a share in the capital of a corporation the attachment is made by a written order prohibiting the person in whose name the share may be, i.e., the judgment-debtor or the person holding the share on his behalf, from transferring the share or receiving any dividend, and the corporation from registering any transfer of the share. See article 409 (2) of the Cv.Pr.C
  
- Where other movable property or a sum of money in the possession of someone other than the judgment-debtor is to be attached, the attachment is made by a written order prohibiting the person in possession from giving it over to the judgment-debtor. See article 409 (3) of the Cv.Pr.C
  
- Where the property to be attached consists of the share or interest of the judgment-debtor in movable property belonging to him and another as co-owners, the attachment is made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way. See article 410 of the Cv.Pr.C

- Attachment of salary is to be made by an order to the employer, directing that the amount be withheld either on one payment or by monthly installments. See article 411 of the Cv.Pr.C
  
- The decree-holder may also attach a negotiable instrument payable to the judgment-debtor or endorsed over to him. In order to prevent further negotiation of the instrument, the instrument itself must be seized by the execution officer and brought into court. Since the person obligated to pay will insist on the surrender of the instrument, this procedure also prevents the judgment-debtor or anyone else from receiving payment. See article 412 of the Cv.Pr.C

Here above, we have seen the different methods of attachment. Following also we may consider the procedure to be followed after the property has been attached. Per article 415 of the Cv.Pr.C, the attachment is to be withdrawn only under one of the following circumstances:

1. when the amount decreed with costs and all charges and expenses resulting from the attachment of the property have been paid into court; or
2. when satisfaction of the decree is otherwise made through the court or certified to the court; or
3. when decree which is the subject of the attachment is set aside or reversed. In case of immovable property, the withdrawal must be proclaimed, if the judgment-debtor so desires and at his expense, in the same manner as was the attachment.

Note that the attachment is withdrawn only where the amount paid into court satisfies the amount of the decree. If that amount is subject to rateable distribution, the attachment should not be withdrawn. Also, the Code says that the attachment "shall be deemed to be withdrawn." Upon the satisfaction of any of the three conditions mentioned above, the attachment is automatically withdrawn, and no further action on the part of the court is

necessary. Any property in the custody of the court should then be returned to the judgment-debtor or the person from whom it was taken.

If, due to the default of the decree-holder, the court is unable to proceed further with the application for execution after property has been attached, it may dismiss the application or, for sufficient cause, adjourn the proceedings to a further date. If the application is dismissed, the attachment automatically ceases to be effective. See article 417 of the Cv.Pr.C

#### 10. Objections to attachment

The most important part of the attachment procedure is that relating to the investigation of claims to the attached property and objections made to the attachment. Property may not be subject to attachment either because it is exempted from attachment or because it is not the property of the judgment-debtor. See article 418 of the Cv.Pr.C

The judgment-debtor may file an objection to the attachment on the ground that the property is exempted from attachment, and the person claiming that the property belongs to him rather than to the judgment-debtor may prefer a claim to it. So too, where a debt allegedly owing to the judgment-debtor, a share in the capital of a corporation or property in the possession of a third party has been attached, the garnishee, officer of the corporation or party in possession may file an objection to the attachment or prefer a claim to the property.

Obviously, only the judgment-debtor can raise the objection that the property is exempted from attachment, since the exemption is for his benefit. By the same token, the judgment-debtor should not be able to prefer a claim to the property on behalf of a third party. He should notify the third party, who can then file his own claim.

A claim or objection is made by presenting a written application to the court executing the decree. Upon receipt of the application, the court proceeds to investigate the claim or objection; where the claimant or objector was not a party to the original suit, he becomes a party to the proceedings for the purpose of the court's hearing his claim or objection, and is subjected to the power of the court with respect to examination and the like as if he were a party. If the court finds that the claim or objection was designedly or unnecessarily delayed, it will not make the investigation, and the claim is, in effect, rejected. See article 418(1) of the Cv.Pr.C

After the investigation, if the court is satisfied either for the reason stated in the application or for any other reason, the property is not subject to attachment. It is to release the property, wholly or to the extent it thinks fit, from the attachment. If it is satisfied that the property is subject to attachment, it will disallow the claim or objection. See article 419 of the Cv.Pr.C. The court is not required to prepare an opinion with the order, but it would be good practice to do so.

#### **4.3.2 Sale of property**

Once a property has been attached and, in case of objection, found to be subject to attachment, the court proceeds to order the sale of the property of such portion as may be necessary to satisfy the amount of the decree, and the proceeds of the sale or a sufficient portion thereof, will be paid to the decree-holder. While there are general rules governing all sales, there are some procedures especially applicable to the sale of movable property and other procedures especially applicable to the sale of immovable property. We will first consider the rules applicable to all sales, then those applicable to the sale of movable property and finally those applicable to the sale of immovable property.

## **1. Special Provisions as to the Sale**

### **A. General rules**

Unless otherwise directed, all sales must be conducted by an officer of the court or a person appointed for this purpose and made by public auction. However, the court, after hearing the decree-holder, may authorize a sale by private contract at the request of or with the consent of the judgment-debtor. See article 422 of the Cv.Pr.C

The decree-holder is to make an application for an order of sale, which must be accompanied by a statement signed and verified in the manner prescribed for the signing and verification of pleadings and containing, insofar as they are known or can be ascertained, the matters required to be specified in the proclamation of sale. For the purpose of determining such matters, the court may summon and examine any person whom it thinks able to supply such information and may require him to produce any document in his possession or power; it may also appoint an expert to estimate the value of the property to be sold. See article 424 of the Cv.Pr.C

Where the sale is to be by public auction, the court must cause a proclamation of sale to be made. The proclamation of sale may be drawn up only after notice to the decree-holder and the judgment-debtor must state the time and place of sale and must specify as fairly and accurately as possible the following information:

1. the property to be sold and the estimated value thereof;
2. any encumbrance to which the property is liable;
3. the amount for the recovery of which the sale is ordered;
4. the terms and conditions of the sale and the manner in which and the time within the purchase price shall be paid; and
5. all other information which the court considers material for a purchaser to know in order to judge the nature and value of the property. See article 423 of the Cv.Pr.C

No sale may take place, without the consent in writing of the judgment-debtor, until at least 30 days after publication of the proclamation in the case of immovable property, and 15 days after publication in the case of movable property. See article 426 of the Cv.Pr.C. The only exception is where the property is subject to decay or is of a kind that must be stored at a cost in excess of its value. In such cases the property may be sold immediately after attachment.

The date is calculated from the time when the copy of the proclamation is affixed on the courthouse door or the date of proclamation in the newspaper, if this is done, whichever is later. The purpose of this requirement is to give prospective bidders sufficient time to be advised of the sale and to decide to bid. Therefore, the judgment-debtor may waive the requirement. However, a sale held before the time is not rendered void, but is treated as an irregularity. As long as there has been a proclamation which has been published, the sale is not void.

The decree-holder may not bid at the sale without the written permission of the court, and a copy of the order granting permission must be given by the court to the auctioneer. The purpose of this restriction is to enable the court to impose conditions on the decree-holder if it "thinks fit. See article 430 of the Cv.Pr.C

At any time before the property is knocked down, that is, before the auctioneer hammers the sale to a close and declares the highest bid, the sale must be stopped if the debt and costs, including the costs of the sale, are tendered to the auctioneer or proof is given to his satisfaction that this amount has been paid into the court which ordered the sale. See article 427 of the Cv.Pr.C. Thus, before the sale is completed, the judgment-debtor can still save the property by paying the amount of the debt and the costs. If there is a question as to whether the amount has been paid into court, the auctioneer should stop the bidding until he has an opportunity to determine 'whether it has been so paid.



Where the highest bid does not reach a sum equal to the value specified in the proclamation of sale, the property is not to be sold. Instead a second sale by auction must be held after the issuance of a fresh proclamation in accordance with the prescribed rules. At the second sale, the highest bid, whatever its amount, must be accepted and the property is sold. See article 428(1) of the Cv.Pr.C

## B. Sale of Movable Property

We will now consider the rules specifically applicable to the sale of movable property. Where the property to be sold is agricultural produce, the sale is to be held in certain places. If the produce is a growing crop, the sale is to be held on or near the land on which the crop has grown. If the crop has been cut or gathered, it must be held at or near the threshing floor or place for treading out grain or the like or fodder stack on or in which it is deposited. See article 432 of the Cv.Pr.C

The following rules govern the delivery and transfer of the property to the purchaser.

- Where the movable property has actually been seized, it is simply delivered to the purchaser after the sale.
- Where it is in the possession of some person other than the judgment-debtor, the delivery is made by giving notice to that person prohibiting him from delivering possession of the property to anyone except the purchaser.
- In the case of a sale of a share in corporation, delivery is effected by a written order of the court prohibiting the person in whose name the share may be standing from making any transfer of the share to anyone except the purchaser, or receiving payment of any dividend or interest; the order will also prohibit the manager, secretary or other proper officer from permitting such transfer or making such payment to anyone except the purchaser.
- Where the execution of a document or the endorsement of the party in whose name a negotiable instrument or a share in a corporation stands is required to transfer such instrument or share, the endorsement may be made by the execution

officer or other officer appointed by the court in accordance with the provisions of Art. 401 (4).

- In the case of any movable property not otherwise provided for, the court is to make an order vesting the property in the purchaser. The purchaser is then considered as the owner, and the order operates as proof of ownership, enabling him to bring a suit to recover the property and to resist a suit by another to obtain the property from him. See articles 436-438 of the Cv.Pr.C

### C. Sale of Immovable Property

If the property which is attached for the satisfaction of decree is an immovable property, we will follow different rules or procedures for selling it. These rules are designed to achieve the following purposes.

1. To enable the judgment-debtor to "save" the property if at all possible;
2. To protect the interests of all persons having a claim to the property;
3. To protect persons who would be adversely affected by a fraudulent or improper sale of the property;
4. To establish the ownership of the property in the purchaser;
5. To enable the purchaser to gain possession of the property without the necessity of a separate suit;
6. To determine all claims to possession of the property expeditiously.

#### 2. Setting Aside the Sale

So far we have covered the greatest part of execution of decree, which actually includes attachment and sale of movable and immovable property. The most significant difference between a sale of immovable property and a sale of movable property is that in certain circumstances a sale of immovable property can be set aside. Once the immovable

property is sold, the court for the following reasons set aside the sale. There are basically three situations where this can be done. Those are where:

- b. The judgment-debtor has no saleable interest in the property;
- c. Another person has an interest in the property;
- d. There is material irregularity or fraud in the conduct of the sale, resulting in substantial injury to the applicant.

Lets try to see them one by one.

***a. Where the judgment-debtor has no saleable interest in the property;***

The first condition whereby the sale of immovable property set aside is, when the purchaser applies to that effect, on the ground that the judgment-debtor had no saleable interest in the property. It is important to state that the judgment-debtor or decree-holder may not apply on this ground. However, if the decree-holder purchased with permission, he is in the position of a purchaser and may apply.

Therefore, it has been held that where the decree-holder purchaser discovers that the judgment-debtor had no saleable interest in the property, he must move to set the sale aside before proceeding to attach other property. The application is authorized only where the judgment-debtor had no saleable interest in the property.

***b. Where another person has an interest in the property;***

The second situation which initiates the setting aside of sale of immovable property is in case where there is a person who has an interest in the property that has been sold claims for setting aside the decision. It is provided that any person, either owning such property or holding an interest therein by virtue of title acquired before the sale, may apply to have the sale set aside on such conditions as the court may determine. The civil procedure code enables the rightful owner or a person, who has an interest superior to that of the purchaser, to protect that property or interest without having to institute a suit against the purchaser.

So, a transferee of the property from the judgment-debtor before the sale, the holder of a contract for sale made prior to the execution sale or a prior mortgage may have the sale set aside under this rule. Presumably, if the judgment-debtor were not the owner, the person who would assert his claim when the attachment was made, but if he did not, he may have the sale set aside under this rule.

However, the setting aside of the sale does not relieve the judgment debtor from his liability as to costs and interests not covered by the proclamation of sale.

*c. Where there was material irregularity or fraud in the conduct of the sale, resulting in substantial injury to the applicant.*

A sale of immovable property may also be set aside on the ground of a material irregularity or fraud in the publishing or conducting of the sale provided that the applicant satisfies the court that he has sustained substantial injury by reason of such irregularity or fraud. The application to set aside on this ground may be made by the decree-holder, any person entitled to share in a rateable distribution of assets, or by any person whose interests are affected by the sale. See articles 445 of the Cv.Pr.C

A transferee of the interest of the judgment-debtor prior to the sale would not be such a person, since his interests can in no way be affected by the sale. He could apply to have the sale set aside as one owning or holding an interest in the property since he acquired his interest prior to the sale. However, a transferee from the judgment-debtor following the sale who, as we said, should not be able to apply as one "owning or holding an interest in the property," should be able to apply as a "person whose interests are affected by the sale." If the sale is set aside, he will be entitled to the property. So, his interests are affected and he should be able to raise a claim of material irregularity or fraud.

The expression, “*interests affected by the sale,*” should be broadly construed, since it is only in exceptional circumstances that the sale will actually be set aside. But where those circumstances exist, any person whose interests can reasonably be said to have been affected should be able to apply to have it set aside.

The only grounds on which a sale may be set aside are material irregularity or fraud. The fact that the property realized only half of the value stated in the proclamation of sale, without more, does not justify setting the sale aside. The material irregularity or fraud must be affirmatively shown. A material irregularity may be said to have occurred, where there has been a failure to comply with the provisions of the Code designed to insure and the best price is realized upon the sale and that prospective buyers have all the information necessary to make a proper bid.

Even though a material irregularity or fraud may have occurred, the sale will not be set aside unless the applicant can prove that he suffered *substantial injury* as a result of such irregularity or fraud. The injury must be proved independently, and it is not presumed from the existence of the irregularity or fraud. The nature of the irregularity or fraud, however, may determine whether the applicant could have suffered substantial injury.

### 3. Confirmation, Delivery of Possession and Resistance

#### A. Confirmation

Finally, we will consider confirmation of the sale, delivery of possession and problem of resistance. Where no application to set aside is made within two months from the date of the sale, the sale becomes absolute. It is not necessary for purchaser to make an application to this effect. By the same token, if an application to set aside is made and is rejected, the court shall make an order confirming the sale and thereupon the sale shall become absolute. Where a sale of immovable property has become absolute, that is, where no application to set aside has been made within the two month period or application has been made, but disallowed, the court must issue a certificate specifying

the property sold, the name of the purchaser and the date on which the sale came absolute. See articles 447(1-3) of the Cv.Pr.C

Where an application to set aside the sale is granted, the court must make an order to that effect. Such an order is not to be made, i.e., the sale is to be set aside, unless notice of the application to set aside has been given to persons affected thereby. See articles 446(4) of the Cv.Pr.C. "Persons affected thereby" should be construed to mean the auction purchaser, the judgment-debtor, the decree-holder and any person entitled to rateable distribution. A transferee from the purchaser should not be deemed "a person affected thereby," since frequently the transfer will not be known, and interests of the transferee can be protected by giving notice to the purchaser, rule as to notice is mandatory. And, it has been held that where the sale was aside without notice to the purchaser, he was entitled to apply for confirmation.

However, so long as the application to set aside was made within the two month period, the court should not confirm the sale but reconsider the application to set aside after giving proper notice to the judgment-debtor.

#### B. Delivery of Possession

Normally it is obvious that immovable property cannot be seized physically. Hence it is necessary to say some thing on the delivery of such property.

Where the property is in the possession of the judgment debtor or some person on his behalf, or a person claiming under the title created by the judgment debtor subsequently to the attachment of the property, the following procedure will be applied.

- After the certificate indicating that the sale has become absolute and has been issued, the purchaser may make application for delivery and the court will order

delivery by putting the purchaser or his appointee into possession, and if necessary, by removing any person who refuses to vacate the property. Or

- If the purchaser agrees with the judgment debtor that the latter could remain in possession of the property or a part thereof, the judgment debtor may call this to the attention of the court and the court will not direct his removal. See articles 448 of the Cv.Pr.C

If the property is in possession of other person entitled to possession, delivery is effected in the following manner. After the certificate has been granted and on application of the purchaser, the court will order delivery to be made by affixing a copy of the certificate in some conspicuous place on the property and proclaiming by beat of drum other customary mode, at some convenient place that the interest of the judgment debtor has been transferred to the purchaser. See articles 449 of the Cv.Pr.C

### C. Putting into Possession

In the above section we have been discussing on how delivery could be effected to the right holder. However, the one who is ordered by the court to surrender his possession may refuse to do that. Hence, whenever possession is resisted or obstructed, the decree holder for the possession of immovable property has to have a remedy to secure its rights.

In such cases, the right holder has to put an application to the court of complaining of such resistance or obstruction. The court shall fix a day for investigating the matter and shall summon the person against whom the application has been made to appear and answer the charge. See articles 450 of the Cv.Pr.C

Depending on the findings of the investigation, if it is satisfied that the resistance or obstruction was occasioned with out good cause by the judgment-debtor or some other person at his instigation, it will direct that the applicant be put in the possession of the

property; if the applicant is still resisted or obstructed, in obtaining possession, it may at his instance, also order that the judgment-debtor or some other person at his instigation be detained in a civil prison for a period not exceeding thirty days. See articles 451 of the Cv.Pr.C

However, if the court is satisfied that the resistance or obstruction was occasioned by a person other than the judgment-debtor, claiming in good faith to be in possession on his own account or on account of some person other than the judgment-debtor, the court shall make an order dismissing the application.

As long as the court is satisfied that the claimant is asserting a bona fide claim to possession independent of the claim of the judgment-debtor, it may not put the decree-holder or purchaser into possession. See articles 452 of the Cv.Pr.C

Therefore, the crucial questions are the status of the person who is resisting or obstructing possession and the reason why he is doing so. If the person is the judgment-debtor or one holding for him or claiming through him, the court must determine whether there is good cause for his resisting or obstructing possession. If there is not good cause, i.e., if the person does not have a legal right to possession, the court will direct that the decree-holder or purchaser be put into possession, and if that order is still resisted, the person resisting may be imprisoned. But if the person is not the judgment-debtor and not holding or claiming possession through him, the court must dismiss the application.



## **CHAPTER FIVE**

### **RES JUDICATA AND SPLITTING OF CLAIMS**

Objectives of the Chapter: Upon successful completion of this section you will be able to:

- Comprehend what res judicata is;
- Understand the general principles which govern res judicata;
- Pin point the parties who are bound by res judicata;
- Verify what matters are directly and substantially in issue;
- Grasp what the essence of matters heard and decided;
- Delineate the scope of res judicata;
- Address issues in regard to splitting of claims, and omitting of relief.

#### **(2) Res Judicata**

##### **1 General Principles**

Res Judicata is a Latin term which literally means “the matter having been litigated.” The principle is that once a matter has been litigated, it may not be re-litigated, and issues that have been determined once may not be determined again in subsequent suit. A party to a suit may seek review of the judgment in accordance with the law, but in the absence of such review, the judgment and the decision on the issue in the suit is final. At this juncture, to have a clear picture on res judicata, it is important to distinguish the principle of res judicata from that of principle of pendency.

According to Art 8 of the Civil Procedure Code:

No court shall try any suit in which the matter in issue is also directly and substantially in issue in previously instituted civil suit between the same parties, or between parties under whom they or any party claim, litigating under the same title, where such civil suit is pending in the same or any other court in Ethiopia having jurisdiction to grant the relief claimed.

So much so that one and the same civil suit may not be instituted in more than one civil court. And where a suit may be instituted in any one of several courts, the court in which the statement of claim was first filed shall have jurisdiction and the suit shall be pending in such court. However, it is importance to note in this regard that the pendency of a suit in a foreign court shall not preclude the courts in Ethiopia from trying a suit founded on the same cause of action.

The general condition for the application of the rule of res judicata is stipulated under Art 5 of the Civil Procedure Code. Accordingly:

1. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, and has been heard and finally decided.
2. Any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been directly and substantially in issue in such suit.
3. Any relief claimed in the former suit which has not been expressly granted by the decree passed in such suit shall, for the purpose of this article, be deemed to have been refused.
4. Where persons litigate in good faith in respect of public or private rights claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this article, be deemed to claim under the persons so litigating.

For the above very reasons, it must be remembered that the rule of res judicata operates as a defence for the person in whose favor the previous suit or issue was decided. On the basis of Art 244 of the Civil Procedure Code, either party who wishes to assert a plea of

res judicata must do so by way of a preliminary objection at the first hearing. If he fails to do so, the defence will be deemed to have been waived.

And once the plea has been asserted and the court is satisfied that it is well founded, the suit will be dismissed. In this regard, the only ground for avoiding the bar would seem to be that the court, which rendered the first judgment, lacked judicial or material jurisdiction to hear the case, and the party against whom the plea is made shall be able to raise this point.

For our case “Former suit” includes a suit in which an ex parte or default decree was rendered. A suit that has been withdrawn with leave does not constitute a suit in which the matter was decided; to hold that such a suit operates as res judicata would obviously negate the purpose in permitting a fresh suit to be filed. See articles 278 of the Cv.Pr.C

A decision on an interlocutory matter operates as res judicata as to the issue involved. So, where one party objected that the court did not have the power to order the dispute to be referred to arbitration and the court held that it had such power; the decision as to the court’s power was res judicata. The same is true with decisions in execution proceedings, such as decision on whether a subsequent application is barred by limitation.

For the purpose of Art 5 of the Civil Procedure Code, a criminal proceeding is not a “Former suit”. As it is clearly indicated under Art 2149 of the Civil Code: “In deciding whether an offence has been committed, the court shall not be bound by an acquittal or discharge by a criminal court.”

This is the general rule. However, in practice, it must be remembered under our legal system an injured party may join a claim for damages in the criminal proceeding. So much so that, in our case, if the injured party fails to file a claim for damages in the criminal prosecution, the result in the criminal prosecution will be irrelevant in the subsequent civil suit. It should also be noted that if the accused in the criminal

prosecution pleaded guilty to the offence, his plea of guilty could be introduced as evidence in the subsequent civil case, since ordinarily any statement made by a party to a suit can be introduced against him by the opposing party.

Furthermore, a question may arise as to the operation of res judicata in the case of two suits involving the same question. Where the two suits were brought in Ethiopia and were not consolidated the decision in the case that was determined first must operate as res judicata. This is because once the matter has been disposed of, a second decision on the same matter would not be proper.

As to the time when res judicata objection be raised, it should be raised as soon as the first decision is handed down by any of the courts without taking in to consideration which suit was first instituted.

## **5.1. Persons Bound**

### **A. Parties to suit**

According to Art 5(1) of the Civil Procedure Code, in order a decision to have res judicata effect, the former suit have to involve the same parties or parties under whom the parties in the subsequent suit claim. In both instances, all parties must be litigating under the same title.

For the above purpose, where persons litigate in good faith in respect to public or private rights claimed in common for themselves and others, all persons interested in the right are deemed to claim under the persons litigating in the original suit.

Now let us proceed to see when a claim of res judicata is asserted, whether the party against whom the claim is made is bound by the judgment in the former suit.

In line to our procedural set up, a party who withdraws or whose name is struck off ceases to be a party, and is not bound by the judgment. The same is true as to a party who dies and as to whom the suit abates, eventhough his name erroneously remains on the record. By the same token, a person who was not named in the suit is not a party, although his rights may have been asserted.

Where the suit has been filed or defended by a representative, the decision is binding on the person so represented, e.g. minor. However, it has been held that it is open to the minor to show that he was not represented in accordance with the law, and if the contention is upheld, the decision in the former suit will not operate as *res judicata*.

*Res judicata* may also apply between co-defendants. This will be so where:

1. there is conflict of interest between them,
2. it is necessary to resolve that conflict in order to give the plaintiff appropriate relief, and
3. there is actually a decision of the question as between the co-defendants.

#### B. Persons Claiming Under the Parties to Prior Suit

The most troublesome questions revolve around what persons are bound because they are claiming under parties who litigated the question under the same title in a previous suit.

One way of defining claiming under and litigating under the same title is to say that the party claiming the benefit of the prior judgment or sought to be bound by it must be in priority with a party to the former suit. In order for a person to be bound as a priority, he must have acquired an interest in the subject matter of the suit by inheritance, succession, or purchase subsequently to the former suit or must hold the interest subordinately in the sense that his interest is entirely dependent on the interest of the superior holder and automatically comes to an end after the interest is extinguished. Thus, the heir is bound by any decision involving the property in a suit by or against the ancestor; the purchaser is bound by any decision involving the property in a suit by or against the seller prior to

the time of purchase. And the lessee of land is bound by any decision involving the property rendered in a suit by or against the lessor, since his interest is dependent on the interest of the lessor.

### C. Other Situations

The next question we have to consider is whether a person should be bound by a judgment in a prior suit where the party in the subsequent suit was not a party to the former suit, and is not claiming under a party to that suit.

The question is whether a party who has raised a matter once may re-litigate the same matter in the subsequent suit involving a different party. Some courts elsewhere have held that, at least in civil suits, he may not do so. So, where the customer sued the manufacturer, claiming damages for injuries caused by allegedly defective products, and in prior suit by him against the retailer, the court found that the product was not the cause of his injuries; he was not permitted to sue the manufacturer. In other words, a party who has litigated a question once should not be able to litigate the same question again in a subsequent suit even against a different party. This is a desirable solution in that it prevents re-litigation of a question once decided.

However, when we come back to our legal system, such a result is not clearly authorized by Art 5, and it is questionable whether the courts will apply this expanded concept of *res judicata*.

Finally, before we wind up our discussion, let us consider the effect of *res judicata* in suits where persons have litigated rights claimed in common for themselves and others. On the basis of Art 5(4) the decision in such case is binding on all persons interested in that right, who are deemed to claim under the persons who litigated the original suit.

This rule would be applicable primarily to the situation where a representative suit has been filed under Art 38, and all persons who have agreed to be represented are bound by the judgment. It should also include any litigation where parties are entitled to represent interested persons other than themselves. In other words, where there is, in fact, a right claimed in common, any litigation involving that right is binding on all persons claiming it.

## 2Matters Directly and Substantially in Issue

The principle of res judicata is applicable only where the matter directly and substantially in issue in the subsequent suit was also directly and substantially in issue in the former suit. However, as we will see, matters which ought to have been raised in the first suit are deemed to have been raised, and consequently cannot be raised in the subsequent suit. Apart from this requirement, the question will ordinarily revolve around what issues actually were raised in the first suit. In order to determine this question, we must ask what issues were raised by the pleadings, were framed for trial at the first hearing, and were included in the judgment?

Since, res judicata operates only as to the issues decided in the first suit, it follows that where a suit is dismissed on a ground not related to the merits of the plaintiff's claim, a subsequent suit on the same claim is not barred by res judicata. Examples of non-merits determinations that do not prevent a subsequent suit would be a dismissal of the suit for want of jurisdiction, for default of appearance, for failure to state cause of action, and for failing to post security for costs when required.

The precise issues in the case will depend on what relief is sought by the plaintiff and what defences are asserted by the defendant.

*Suppose that A sues B to recover Ethiopian \$500 in rent due for the year and obtains judgment for that amount. He does not pray for a declaration that the rent is so much per meter, even though this is how he computed that Ethiopian \$500 was due. Therefore, in a suit for the rent for the following year, B may challenge*

*the rate at which the rent was computed was not directly and substantially in issue in the former suit.*

Sometimes the question of what matters are directly and substantially in issue is tied up with the question of counterclaim and set-off. The defendant has the option of asserting any claim he may have against the plaintiff by way of counter claim or set-off, but is not required to do so.

Therefore, as we will see, his failure to assert the claim in the suit against him does not bar a subsequent suit on the claim. But, if he has asserted the facts giving rise to the claim as a matter of defence, an issue has been created, and the decision on that issue operates as *res judicata*.

On the other hand, where the facts giving rise to the defendant's claim were not necessarily involved in the prior suit, the subsequent suit may be maintained.

Finally, it should be noted that the decision on certain kinds of issues might not operate as *res judicata* because of the nature of the issue. A good example is an issue as to the amount due under an obligation to supply maintenance. Since the extent of the obligation depends on various conditions, which may change, a decision on that question in a suit for maintenance could not operate as *res judicata* in subsequent suit, because the conditions at the time of the subsequent suit may have changed. The same can be said in custody of the children during divorce. The custody could shift at any time if it is found to the best interest of the children.



### **5.1.1 Matters Which Has Been Heard and Finally Decided**

#### 11. Issues Decided by the Court

A number of issues may have been raised in the case, but not all of them may have been decided. That is, if an issue has been raised, but has not been decided, that issue is not res judicata irrespective of the result of the suit.

Where the case has been appealed, the decree of the appellate court must be considered in order to determine what issues have been decided. The judgment of the appellate court will operate as res judicata as regards all the findings of the lower court necessary to the decision of the appellate court even if they are not referred to in the judgment of the appellate court. In this connection it should be observed that the appellate court may decide the case on a ground different from the ground on which the lower court decided it, and if it does so, only its decisions on that ground are res judicata.

At this juncture, you have to grasp in mind that the decision on an issue must be one that is necessary for the decision of the case. If the lower court for example decided that a suit is barred by limitation and further decides that there was no contract, and the appellate court confirmed the decision as to limitation, the decision on the existence of the contract, even if confirmed by the appellate court, would not operate as res judicata. The lower court may have decided that issue in order to avoid a possible remand if the appellate court reversed its finding on the question of limitation. But once the matter of limitation was decided, there was no need for a decision on the existence of the contract. The existence of the contract then ceased to be in issue, and any decision on the question does not operate as res judicata.

The problem of what issues are res judicata will arise whenever two or more issues have been decided by the court. The question will be whether the decision on both issues is res judicata Or not. Where all the issues have been decided by the lower court, the answer

may depend on whether the party against whom one of the issues was decided may appeal from that decision.

The next scenario that we have to consider is where two issues have been decided by the lower court, and the party against whom they were decided does not appeal. Suppose that A sues B to recover damages for breach of contract. B contends that the parties did not enter in to a valid contract and alternatively, that performance was prevented by force majeure. The court resolves both issues in B's favor and dismisses the suit. A does not appeal.

Now the issue would be whether the decision on both issues is res judicata or not? In this case, since the case was not appealed and since both issues went to the merit of the case, the decision on both should be res judicata.

However, where the lower court decides both merits and a non-merits issue, and no appeal is taken, only the decision on the non-merits issue should be res judicata. When the case is disposed of on the non-merits ground, the suit will be dismissed, and a decision on the merits cannot be said to be necessary to the decision of the case.

So, where in a suit for declaration that a lease was surrendered, the court dismissed on the ground that the suit could not be maintained, but also found that surrender had been effected, the decision on the matter of surrender would not be res judicata.

The final situation that has to be considered is where both parties have attacked a decision in which the merits and non-merits issues were decided.

*Example: A sues B for possession of a land, contending that B's lease has expired. B defends on the ground that he has the right of occupation and that the*

*suit is pre mature, since he has also the right to renew the lease, which he might exercise. The court finds that he did not have a right of occupation, but that he did have a right to renew and, therefore, dismisses the case as premature. A appeals, contending that the court erred in holding that the suit was premature. B files a cross-objection to the finding on his occupancy right. The appellate court confirms the decision of the lower court in all respects.*

*Now the question would be whether the finding on the issue of the occupancy right is res judicata or not? In this regard once the appellate court decided the non-merits ground; there was no reason for it to decide the question of the occupancy right. Thus, the decision on that issue was not necessary to extend to the decision of the case, and should not be res judicata.*

In summary, it is submitted that the following rules should apply whenever two or more issues have been decided. Where two grounds were asserted to the support the claim or defence, and only one of them were decided in favor of the successful party, the decision on the other ground should not operate as res judicata against him, since he could not have appealed from that decision. Where the case has been appealed, the appellate court should only decide only as many issues as are necessary for the confirmation or reversal of the judgment, and its decision on an issue not necessarily for this purpose should not operate as res judicata notwithstanding that the party in whose favor the case was ultimately decided raised that issue. Where two issues were decided and the case was not appealed, the decision on both issues should operate as res judicata only if both issues involved the merits; if one issue involved the merits and one did not, only the decision on the non-merits issue should operate as res judicata.

## 2. Res Judicata and Issues of Law

Another aspect of the problem of “heard and finally decided” concerns the res judicata effect of a decision on an issue of law where the rule of law on which the decision was

based has subsequently been changed. The change may occur as a result of newly-enacted legislation or a later decision of a higher court contrary to the prior decision of a lower court or a later decision of the court that decided that case, which overrules its prior decision.

The question is *whether the former decision on the question of law is res judicata in a subsequent suit or not?*

The general principle is that once an issue has been decided, it cannot be re-litigated in a subsequent suit by parties bound by the prior decision notwithstanding that the law is changed or the prior decision is found to be erroneous.

As to rights acquired under repealed legislation, Art. 3348 of the Civil Code stipulates that:

1. Unless otherwise expressly provided, legal situations created prior to the coming into force of this code shall remain valid, notwithstanding that this code modifies the conditions on which such situations may be created.
2. Unless otherwise expressly provided, this code shall not affect the consequences having arisen out of such legal situation prior to the coming into force of this code.

From the very reading of the above provision, we can safely say that, when law is changed by subsequent legislation, the former decision operates as *res judicata*. This is true because legal situations and rights existing prior to the enactment of the new legislation are not generally affected by such enactment. This principle coupled with the general principle of *res judicata* prevents the re-litigation of a legal issue decided under repealed law.

However, it is important to observe that the prior decision is not *res judicata* where at the time of subsequent suit other facts have been occurred which brings the subject matter of the suit under the new legislation.

Following the above discussion, the more difficult question revolves around the effect of a subsequent judicial interpretation contrary to the interpretation in the prior suit.

*Example: X sells property to A, which was in possession of B. In A's suit against B to recover possession, the court holds that a person out possession may not transfer property and dismisses the suit. Later, a higher court holds in another case that the owner out of possession may transfer the land. Following the change in judicial interpretation, A again sues B to recover possession. The suit is barred on the ground that the issue of A's right to possession against B has already been litigated. It is true that the former suit involves an issue of law, which may have been decided incorrectly. But the correctness of the decision has nothing to do with *res judicata*, and once an issue has been decided, it may not be re-litigated.*

Note, however, that the decision does not operate as rule of law between A and B. Suppose that X sold A two lots. A sues B to recover possession of lot No.1, and the suit is dismissed on the ground that X could not transfer the property to A while out of possession. The higher court later holds in another case that the out-of-possession owner may transfer the land. A then sues B to recover possession of lot No. 2. The court may consider the legal issues of whether the out-of-possession owner may transfer the land. In the former suit the court only decided the issue of possession with respect to lot No.1. There was no issue as to the possession with respect to lot No. 2. It does not matter that the issue of law is the same in both cases, since the first case only involved lot No. 1. In other words, the court in the first suit decided a specific issue-who has the right to possession of lot No. 1. In order to decide that issue, it had to resolve a question of law may be the out-of-possession owner transfer the land. But the decision in the first suit

applies only to lot No. 1, because the first suit involved that lot and not lot No.2. Therefore, while the decision in the first suit is not affected by the new decision, the court may take account of the new decision in determining who is entitled to possession of lot

No. 2.

The principle may be stated in another way. The decision on question of law litigated between two parties is res judicata in any subsequent suit involving the same cause of action, but is not res judicata in a suit involving a different cause of action.

In a nutshell, once an issue of law has been decided, the decision operates as res judicata with respect to the cause of action involved in the suit in which it was rendered. However, it is not res judicata in a subsequent suit between the same parties involving a different cause of action. The important point to remember at this stage is that a change in the law or the interpretation of the law on which a decision on an issue was based does not affect the operation of the rule of res judicata.

### **5.1.2. The Scope of Res Judicata**

The drafter of the Civil Procedure Code has made it clear that the scope of res judicata is to be very broad. There are two aspects of this broad scope. First, any matter on which might and ought to have been made a ground of defence or attack in the suit shall be deemed to have been substantially and materially in issue. Secondly, any relief claimed in the suit which has not been expressly granted by the decree passed in the suit shall be deemed to have been refused.

Following the general overview of the scope of res judicata, let us now thoroughly discuss both aspects separately.

#### **1. Matters to Be Raised**

For the purposes of *res judicata*, the parties are deemed to have asserted all such grounds, which might and ought to have been asserted. Therefore, *res judicata* applies not only to the issues that were expressly decided, but also to the issues that would have been decided if raised by the parties. The failure to raise such grounds in a former suit means that they cannot be raised in any subsequent suit. In effect, they are deemed to have been decided adversely to the party seeking to raise them in subsequent suit, and a case may not be re-opened to permit a party to raise a new claim or defence that he would have raised in the first suit.

The question of failure to include a ground of attack or defence arises in a number of contexts. One is where the plaintiff brings suit on a claim and fails to assert certain grounds that would entitle him to relief. On the basis of the ground he asserts, judgment is for the defendant. The plaintiff brings a subsequent suit alleging a different ground. Since he is suing on the same cause of action and failed to the ground in the first suit, the subsequent suit is barred by *res judicata*.

By the same token, a defendant who could have asserted a defence and fails to do so may not assert the defence when a subsequent suit is brought on the same cause of action.

As we have seen in the previous section, in order for parties to be bound by the judgment in a former suit, they must be litigating under the same title in the subsequent suit. So, a decision rendered against a person in his individual capacity does not bar a suit by him in his representative capacity, since in the second suit he is suing on behalf of the person whom he represents. By analogy, when a person is sued in one capacity, he is not expected to assert a claim to the subject matter in dispute based on another capacity.

Finally, it should be observed that the failure to assert a claim of counterclaim or set-off by the defendant does not bar his doing so in a subsequent suit. By definition, the defendant has an option in this regard: he may assert the claim or may raise it in an independent suit. Since he has this option, a claim of counter claim or set-off does not

constitute a “matter which ought to have been made a ground of defence” with in the meaning of the rule.

Note, however, that where the defendant has asserted the facts giving rise to the counter claim or set-off as a defence to the plaintiff’s claim and the issue created by the facts is revolved against the defendant, he may not subsequently bring a suit on the claim.

## 2. Relief not Granted

The second aspect of the scope of res judicata is provided under Art 5(3) of the Civil Procedure Code. According to this article: “Any relief claimed in the former suit which has not been expressly granted by the decree passed in such suit shall be deemed to have been refused.”

This have to be distinguished from the situation where the plaintiff splits his cause of action, that is, where he seeks recovery for only a part of the damage suffered, and from the situation where the plaintiff fails to ask for some relief to which he was entitled. On the basis of Art 216, where a plaintiff sues for only a part of the damage, as we will see, he may not sue for the remainder. By the same token, if he does not seek relief to which he was entitled, he may not claim the relief subsequently, for this too involves splitting of a cause of action.

The present rule deals with the situation where relief was in fact asked for, but was not expressly granted nor refused. In other words, the present rule applies when the decree is silent as to the relief claimed. In such a case the relief is deemed to have been refused notwithstanding the absence of an express ruling to this effect.

Example: Where the plaintiff sues to recover possession of land and mesne profits for the time the defendant was in occupation, and the decree ordered that the plaintiff



be restored to possession, the plaintiff could not subsequently sue to recover mesne profits. The decree was silent as to mesne profits, and thus, the request for mesne profit was deemed to have been refused.

In general, in this section, we have explored at length the provisions of the code relating to res judicata. These provisions are broad and designed to insure that matters which were litigated or could have been litigated between parties to a suit or persons claiming under such parties will not be litigated again. The purpose is to insure finality of litigation. A related purpose may be found in the rule against splitting a claim to which we will embark on next.

## **5.2. Splitting of Claims**

### **5.2.1. General Principles**

According to Art 216 of the Civil Procedure Code:

1. Every suit shall, as far as practicable, be framed so as to afford ground for final decision upon the subject matter in dispute and to prevent further litigation concerning them.
2. Every suit shall include the whole of the claim, which the plaintiff is entitled to make with respect to the cause of action unless he intentionally relinquishes any portion of his claim so as to bring the suit within the jurisdiction of any court.
3. A plaintiff who omits to sue in respect of, or intentionally relinquishes, any part of his claim shall not afterwards sue with respect to the portion so omitted or relinquished.
4. A person entitled to more than one relief with respect to the same cause of action may sue for all or any of such relief, but if omits, except with the leave of the court, to sue for all such relief's, he shall not afterwards sue for any relief so omitted.

In line to the above provision, every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in the dispute and to prevent further litigation concerning them. The principles of res judicata just discussed are designed to implement this purpose, particularly that requiring a party to assert all the grounds of attack or defence he may have at the peril of not being able to assert them in a subsequent suit. The purpose is further implemented by the rule prohibiting the splitting of cause of action. Every suit must include the whole of the claim, which the plaintiff is entitled to make with respect to the cause of action. If the plaintiff omits to sue in respect of any portion of his claim, he may not afterward sue with respect to the portion so omitted.

Stated simply, a plaintiff may not split his cause of action. In this regard, we can safely say that the rule is designed to prevent the courts from being burdened by multiple suits on what is essentially one wrong and to protect the defendant from harassment by repeated suits. It is not difficult to picture a vindictive plaintiff bringing a number of suits against a defendant who has committed a wrong against him.

Since the purpose of civil litigation is to provide compensation for the injured party, it is reasonable and proper to require him to claim all the compensation to which he is entitled in a single suit.

Furthermore, as to a party entitled to more than one relief with respect to the same cause of action, he must sue for all those relieves in one suit, and if he fails to do so, he may not afterwards do so for the relief omitted.

However, in certain cases, as it is clearly indicated under Art 216(4), the court may give him leave to sue for additional relief at another time.

Thus, there are two aspects to the rule against splitting a cause of action:

1. the plaintiff must include the whole of his claim with respect to the cause of action on which he sues, and
2. the plaintiff must seek all the relief to which he is entitled under that cause of action.

If he omits to sue for part of the claim or omits, except with leave of court, to sue for all of the relief to which he is entitled, he may not subsequently sue for the part of the claim or relief he has omitted.

There is one situation where the whole of the claim need not be included. The plaintiff may intentionally relinquish a portion of his claim so as to bring it within the jurisdiction of a particular court. But if he does so, he may not subsequently sue with respect to the portion of the claim that was relinquished.

Example: Suppose that A has sued a promissory note to B for Eth. \$500,200.00. This suit should be brought in the High Court of the Federal or in the Supreme Court of the State, by delegation. But B, the resident of a certain Woreda in State X, does not want to travel to the Supreme Court of the State, which has jurisdiction by delegation, and wants to file the suit in the High Court of such State. He is permitted to do so by relinquishing Eth. \$ 200 and suing for Eth. \$ 500,000.00 instead of Eth. \$500,200.00, but he may not later sue A in the High Court to recover the remaining Eth. \$200. He has abandoned the right to recover that sum. However, if the case should be transferred to the Supreme Court of the State, it would be proper for B to amend his statement of claim to add the remaining Eth. \$200.

Besides, that the plaintiff having a number of causes of action against a defendant is not required to join them in a single suit. A plaintiff may unite several causes of action

against a single defendant but he is not required to do so. The rule only prohibits splitting of a single cause of action. As we will see, many cases revolve around the question of whether the plaintiff had, in fact, two causes of action against the defendant.

The rule refers to “omitting a portion of his claim.” So long as the plaintiff was aware of the claim, the omission of a portion, even if unintentional, bars a subsequent suit with respect to that portion. By the same token, the code says the plaintiff shall not sue after.

A question also arises as to what is the effect of the plaintiff’s splitting his claim by filing simultaneous suit, that is, when he files separate suit at the same time either before the same court or before different courts.

One view is to hold that according to Art 11 of the Civil Procedure Code the suit should be consolidated, and this may be done whether the suits are pending before the same court or before different courts. Another view is to hold that one must be dismissed, and the one bearing the latter number is deemed filed afterwards. A third view is to hold that the plaintiff may select which suit he wants to prosecute; presumably he could amend his statement of claim to add the amount omitted.

The latter procedure seems the soundest. It is sound because there is no reason to deprive the plaintiff a portion of his claim simply because he files separate suits.

However, in such cases, he should be made to pay the costs of the suit he has withdrawn, and any amendment should be conditional upon his paying those costs. Although he has acted in violation of the rule, the harm can easily be remedied. He should be disciplined by being charged with costs and not by the loss of a portion of his claim. Also, where a suit was brought only with respect to a portion of a claim, the plaintiff should be permitted to amend to add the omitted portion.

At this juncture it is important to note that the prohibition is against the bringing of a subsequent suit with respect to the omitted portion. It does not prohibit the plaintiff from asserting an omitted portion of a claim as a defence in a subsequent suit.

Example: Suppose that a mortgagee omits to include a portion of the mortgaged property in his suit to obtain possession under the mortgage. However, he does obtain possession of the whole, and the mortgager brings suit against him to recover possession of that part of the property not included in the decree in the prior suit. The mortgagee is not precluded from asserting his right of security in that portion by way of defence to that suit. However, a party who omitted to include a portion of the claim in a prior suit should not be able to recover that amount by way of counterclaim or set-off in a subsequent suit against him. A defendant asserting a counter claim or set-off is in the position of a plaintiff as regards that counterclaim or set-off, and should be subject to the same rule prohibiting the splitting of claims. Also, the prohibition of splitting of claims applies to any claim that has been asserted by way of counter claim or set-off. So, where A sues B for Eth. \$ 200 and B, who has a claim of Eth. \$ 1,200, seeks to set-off Eth. \$ 200 of his claim and does so, he is precluded from subsequently suing for the remaining Eth. \$ 1,000.

The rule against splitting of claims is not applicable to proceedings in execution in the sense that the decree-holder may present successive applications for realizing different portions of the same decree. So, the decree-holder may file an application to recover possession of the property and a subsequent application to realize the costs. But the rule should be applicable to the money decrees, since such decrees may be executed as a unit. If the decree-holder only applies for execution of part of a money-decree, he may not later apply for execution of the balance.

### **5.2.2. The Whole of the Claim with Respect to the Cause of Action**

#### 1. What Constitutes the Whole of the Claim?

As we have already discussed above, the rule prohibits only the splitting of a single cause of action and does not require the plaintiff to sue on all the causes of action he has against the defendant.

The question that should be addressed at this stage is then whether the plaintiff has splitted his claim with respect to the cause of action or not.

In order to answer this question, the court must determine:

1. what was the cause of action in respect of which the claim was made in the former suit;
2. what was the claim made in the subsequent suit, and
3. whether the claim made in the subsequent suit could have been made in whole or in part in respect of the cause of action in the prior suit

As we have pin pointed above, the cause of action may be defined as that which gives occasion for and forms the foundation of the suit. It is the fact which gives rise to the liability of the defendant and the relief claimed by the plaintiff. Where the facts could give rise to only one cause of action, if the plaintiff has not included the whole of the claim in the prior suit, he may not subsequently sue on the rest of his claim.

The rule against splitting of claims is not affected by the fact that the claim is due in installments. So, where a debt is payable in installments and two or more are due at the time of suit, the plaintiff must sue to recover the amount due under both installments. Nor does it matter that the obligation is to be satisfied in two ways.

Example: B owes A Eth. \$ 1,300 for services rendered. He issues a promissory note for Eth. \$ 700 and agrees to perform service for A, which the parties agree worth Eth. \$ 600. He dies without performing the services. A sues his representative on the note and obtains a judgment. He later sues the representative to recover the Eth. \$ 600, the value of the service B failed to perform. The second suit is barred. B had an obligation to A in the amount of Eth. \$ 1,300, and at the time of the first suit, that amount was due. It is immaterial that the obligation was to be satisfied in two ways and the theory of liability for each is different: there was a single obligation to pay Eth. \$ 1,300, and it has to be enforced in its entirety. However, if at the time of suit on the note, B was still alive and had not refused to perform the services, a subsequent suit to recover the Eth. \$ 600 as the value of the unperformed services would not be barred. At the time of the suit, the only part of the obligation that owed was the amount of the note, and that part of the obligation requiring the performance of service could have not been enforced. If B had refused or was clearly unable to perform the services, the suit would have to be brought for the Eth. \$ 1,300.

Likewise, where at the time of the suit on a mortgage debt, both principal and interest are due, and the mortgagee sues only to recover the interest, a subsequent suit for the principle is barred.

#### 1. Single and Multiple Causes of Action

The most difficult case is when there is a situation of dispute as to whether the facts of the transaction gave rise to one cause of action or to two. If there are two causes of action, then the failure to claim the relief to which the party would be entitled under the second cause of action does not amount to a splitting of his claim since he was not making a claim with respect to the second cause of action.

However, the mere fact that separate properties are involved does not necessarily mean that there are two causes of action. If both properties were injured by a single act, it would be a single cause of action.

To review, the crucial question in the subsequent suit is whether the plaintiff is suing on the same cause of action as we have defined that term. If the court concludes that he is suing on a different cause of action, the subsequent suit is not barred, this is so because the rule only prohibits the splitting of a claim which the plaintiff is entitled to make with respect a single cause of action.

## 2. Omitting of Relief

A party may be entitled to more than one relief with respect to the same cause of action. In such a case, he may sue for all or any of such reliefs. But if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

The court has no discretion to permit a plaintiff to omit part of his claim, but may, in appropriate cases, permit a plaintiff to omit to sue for some of the relief to which he is entitled. With that exception, the rule prohibiting the splitting of relief is the same as the rule of prohibiting the splitting of claims, and some cases may involve both questions.

To be in line to the law, the court must determine whether the relief sought in the subsequent suit existed with respect to the cause of action on the plaintiff sued previously. If it did, and the plaintiff failed to ask for it at that time, he may not do so in the subsequent suit. Moreover, a party may be entitled to certain relief at one time and to other relief at another time. If he was only entitled to certain relief at the time of the former suit, he is not barred from seeking the relief to which he has subsequently become entitled in the later suit. The basic question is whether at the time of the first suit, the plaintiff was entitled to more than one relief with respect to the same cause of action, for which he failed to sue.



Finally, to have a full-fledged understanding of the subject matter, a word should be said about the power of the court to grant the plaintiff leave to omit to sue for part of the claim. The court may do so even if the pecuniary value of the relief allowed to be omitted exceeds its pecuniary jurisdiction. However, before the court do so, it should be convinced that there are very valid reasons for granting such leave and should not permit the plaintiff to avoid the provisions of the code relating to relinquishment of the claim in order to bring the case within the jurisdiction of a particular court. Leave should only be given in situations where the plaintiff is entitled to alternative reliefs and may legitimately wish to exercise one such relief first.

For example, the plaintiff sues to obtain specific performance of a contract. He is not interested in damages at that time, but if specific performance is not available, he might wish to claim them later. Or, he may not have ascertained whether he can recover damages, because what he wants to is specific performance.

The granting of leave to sue for omitted relief should be done sparingly so as not to defeat the purpose of the rule requiring all reliefs to which the plaintiff is entitled to be sought in a single suit.

In this chapter we have discussed the provisions of the Code designed to insure finality of litigation. The drafters have demonstrated a clear intention that all matters in dispute between the parties that relate to the same transaction should be disposed of in the same suit. Careful enforcement of these provisions will reduce the volume of litigation and prevent harassment of one party by another.

## **Review Questions**

1. What do we mean by res judicata?
2. Briefly, discuss what the rationale and significance of res judicate are
3. Pin point the parties who could possibly be bound by res judicata.
4. What do we mean by “matters heard and finally decided?”
5. What do we mean by “matters directly and substantially in issue?”
6. Delineate the scope of res judicata.
7. Explain what “splitting of claim” is.
8. Address issues, which could possibly raised in relation to single and multiple causes of action.
9. Identify the general principles that regulate splitting of claim.
10. Discuss omission of relief vis-à-vis res judicata.