

**ALLIANCE INSURANCE & SURETY CO., INC., PETITIONER VS.
HON. EDMUNDO S. PICCIO, IN HIS CAPACITY AS JUDGE OF THE
COURT OF FIRST INSTANCE OF CEBU CITY. VICENTE E. R. ZOSA, IN
HIS CA...**

G.R. No. L-9950. July 31, 1959

Ponente: BAUTISTA ANGELO, J.

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BAUTISTA ANGELO, J.:

This is a petition for certiorari seeking to set aside an order entered by respondent Judge on September 14, 1955 directing that a writ of execution be issued against petitioner on the bond filed by it in the amount of P1,000.00.

On May 22, 1940, a complaint for possession and damages was originally filed by Rufina Vergara against Jose Alcos and Maria Georfo before the Court of First Instance of Cebu. Upon plaintiff's petition, a writ of preliminary injunction was issued so that plaintiff may take possession of the property pendente lite. In the meantime, Rufina Vergara died and was substituted as party-plaintiff by Anatolio Yncino.

On November 28, 1945, the writ of preliminary injunction was lifted upon defendants' filing a counterbond which was subscribed by bondsmen Bernabe Nengasca and Ismael Abendan. Later these bondsmen were allowed to withdraw on condition that defendant file a counterbond, and in compliance with this order defendants on September 6, 1952 caused the Alliance Insurance & Surety Co., Inc., petitioner herein, to file said counterbond subject to the condition that in case plaintiff should suffer damages by reason of the lifting of the preliminary injunction the principal and surety jointly and severally shall be responsible therefor in an amount not exceeding P1,000.00.

During the trial of the case wherein plaintiff presented evidence not only as to his right of possession but also as to his claim for damages, defendants were present, assisted by their counsel, who likewise presented evidence in their behalf, but not the surety who was not notified thereof. And on May 13, 1953, the trial court rendered judgment ordering defendants to deliver the possession of the property to plaintiff and to pay the amount of P8,416.00 as damages. The Court of Appeals affirmed this judgment in toto on appeal taken by defendants.

After the case was remanded to the court of origin, the decision having become final and executory, plaintiff filed a motion for execution of the judgment against defendants, which was granted, but the writ was returned by the sheriff with the statement that defendants had no property which may be subject of execution. Thereupon, plaintiff filed another motion praying that an alias writ of execution be issued against the surety in view of the Insolvency of defendants, to which petitioner filed an opposition upon the main ground that the decision does not contain any award of damages arising from the lifting of the writ of preliminary injunction and that, even if it does, no notice was given of the hearing thereof to the surety before entry of final judgment as required by section 20, Rule 59 of the Rules of Court. But this opposition notwithstanding, the court granted the motion. Hence the present petition for certiorari.

Petitioner now contends that the award of damages contained in the decision cannot be enforced against it for the reason that no notice was given to it of the hearing relative to said damages as required by section 9, Rule 60, in relation to section 20, Rule 59, of the Rules of Court. And since said decision has already become final and executory, plaintiff's claim for damages can no longer be enforced against the petitioner who is deemed relieved from its liability under the bond, Section 9, Rule 60, provides:

"SEC. 9. Judgment to damages against party and sureties.—Upon the trial the amount of damages to be awarded to the plaintiff, or to the defendant, as the case may be, upon the bond of the other party, shall be claimed, ascertained, and awarded under the same procedure as prescribed in section 20 of Rule 59."

Section 20, Rule 59, provides:

"SEC. 20 Claim for damages on plaintiff's bond on account of illegal attachment.—If the judgment on the action be in favor of the defendant, he may recover, upon the bond given by the plaintiff, damages resulting from the attachment. Such damages may be awarded only upon application and after proper hearing, and shall be included in the final judgment. The application must be filed before the trial or, in the discretion of the court, before entry of the final judgment, with due notice to the plaintiff and his surety or sureties, setting forth the facts showing his right to damages and the amount thereof. Damages sustained during the pendency of an appeal may be claimed by the defendant, if the judgment of the appellate court be favorable to him, by filing an application therewith, with notice to the plaintiff and his surety or sureties, and the appellate court may allow the application to be heard and decided by the trial court."

It really appears from the above that the application for damages resulting from the issuance of a writ of preliminary injunction must be filed before the trial or before entry of final judgment, with due notice to the other party and his surety, setting forth the facts showing his right to the damages and the amount thereof. It likewise appears that the damages may be awarded only upon proper application and after proper hearing, and shall be included in the final judgment, the philosophy of this ruling being that the court had acted on the provisional remedy which caused the damages has the exclusive jurisdiction to assess them because of its control of the case. (Moran's Comment, Vol. II, page 50, 1957 ed.).

And it has been held that this remedy is exclusive and by failing to file a motion for the determination of damages on time and while the judgment is still under the control of the court, the claimant loses his right to such damages.[1]

In the recent case of *Visayan Surety & Insurance Corporation vs. Pascual, et al.*, 47 Off. Gaz. 5075, this Court made a restatement of the procedure to be followed as prescribed in section 20, Rule 59, in the following wise:

"(1) That damages resulting from preliminary attachment, preliminary injunction, the appointment of a receiver, or the seizure of personal property, the payment of which is secured by judicial bond, must be claimed and ascertained in the same action with due notice to the surety;

(2) That if the surety is given such due notice, he is bound by the judgment that may be entered against the principal, and writ of execution may issue against said surety to enforce the obligation of the bond; and,

(3) That if, as in this case, no notice is given to the surety of the application for damages, the judgment that may be entered against the principal cannot be executed against the surety* without giving the latter an opportunity to be heard as to the reality or reasonableness of the alleged damages. In such case, upon application of the prevailing party, the court must order the surety to show cause why the bond should not respond for the judgment for damages. If the surety should contest the prevailing party, the court must set the application and answer for hearing. The hearing will be summary and will be limited to such new defense, not previously set up by the principal, as the surety may allege and offer to prove. The oral proof of damages already adduced by the claimant may be reproduced without the necessity of an opportunity to cross-examine

the witness or witnesses if it so desires.

To avoid the necessity of such additional proceedings, lawyers and litigants are admonished to give due notice to the surety of their claim for damages on the bond at the time such claim is presented."

The question that now arises is: Since plaintiff's claim for damages has already been awarded in the main decision without notice to the surety and the decision has become final, can said claim still be pressed against the surety by setting the same for hearing and giving the surety notice thereof? Does the failure to notify the surety on time relieve the surety from his liability under the bond?

This is the issue that was resolved by this Court in a more recent case wherein after making a review of all the decisions of this Court on matters pertaining to the execution of the bond that may be filed in relation to attachment, injunction, and replevin, reached the conclusion that such failure is fatal in that it has the effect of relieving the surety from liability.[2] A brief statement of the facts of that case will not be amiss if only to show the close parallelism that exist between that case and the instant one.

The facts in the Nava case are:

"Domingo del Rosario had instituted an ejectment suit against Gonzalo P. Nava in the Municipal Court of Manila, Civil Case No. 4467, and on January 30, 1948, he secured a writ of attachment upon due application and filing of an attachment bond for P5,000, with the Alto Surety and Insurance Co., Inc., as surety. Attachment was levied and after the case was tried, the Municipal Court rendered judgment against the defendant Nava. The latter appealed to the Court of First Instance of Manila, where the case was docketed with number 4949. In the Court of First Instance, Nava filed a new answer with a counterclaim, alleging that the writ of attachment was obtained maliciously, wrongfully, and without sufficient cause, and that its levy had caused him damages amounting to P5,000. No notice was served upon the surety of the attachment bond, Alto Surety and Insurance Co., Inc.

By decision of July 21, 1960, the Court of First Instance found that the attachment was improperly obtained, and awarded P5,000 damages and costs to the defendant Nava. The judgment having become final, a writ of execution was issued, but it had to be returned unsatisfied on January 19, 1951, because no leviable property of the plaintiff Del Rosario could be found. On November 7, 1951, Nava filed, through counsel, a motion in Court setting forth the facts and praying that the Alto Surety and Insurance Co., Inc. be required to show cause why it should not respond for the damages adjudged in favor of the defendant and against the plaintiff. The surety company filed a written opposition on the ground that the application was filed out of time, it being claimed that under sec. 20, Rule 59 of the Rules of Court, the application and notice to the surety should be made before trial, or at the latest, before entry of the final judgment. After written reply and rejoinder, the Court of First Instance, on December 10, 1951, issued the assailed order, rejecting Gonzalo P. Nava's motion to require the . Alto Surety and Insurance Co., Inc. to show cause, because it was filed out of time. Nava then appealed to this Court."

In holding that notice to the surety should be given either before the trial or, at the latest, before entry of the final judgment, in all cases where damages are claimed arising from the issuance of a bond, this Court made the following comment:

"It will be seen that the rulings above quoted are silent on the application and notice to the surety should be filed in those cases where a judgment for damages has already been rendered against the plaintiff as principal of the attachment bond. Upon mature consideration, we have reached the conclusion that under the terms of section 20 of Rule 59, the application for damages and the notice to the sureties should be filed in the trial Court by the party damnified by the wrongful or improper attachment either 'before the trial or, at the latest, 'before entry of the final judgment', which means not later than the date when the judgment becomes final and executory (sec. 2, Rule 36). Only in this way could the award against the sureties be included in the final

judgment' as required by the first part of sec. 20 of Rule 59. The rule plainly cans for only one judgment for damages against the attaching party and his sureties; which is explained by the fact that the attachment bond is a solidary obligation. Since a judicial bondsman has no right to demand the exhaustion of the property of the principal debtor (as expressly provided by Art. 2084 of the new Civil Code, and Art. 1856 of the old one), there is no justification for the entering of separate judgments against them. With a single judgment against principal and sureties, the prevailing party may choose, at his discretion, to enforce the award of damages against whomsoever he considers in a better situation tor pay it."

This Court made the following conclusion:

"In view of the foregoing, we hold that while the prevailing party may apply for an award of damage against the surety even after an award has been already obtained against the principal, as ruled in *Visayan Surety and Insurance Corp. vs. Pascual*, G. R. No. L-3694, still the application and notice against the surety must be made before the judgment against the principal becomes final and executory, so that all awards, for damages may be included in the final judgment. Wherefore, the Court below committed no error in refusing to entertain the appellant Nava's application for an award of damages against the appellee surety Company ten months after the award against the principal obligor had become final."

An attempt was made by some members of this Court to make this case fall under section 17, Rule 59, which provides:

"SEC. 17. When execution returned unsatisfied, recovery had upon bond.—If the execution be returned unsatisfied in whole or in part, the surety or sureties on any bond given pursuant to the provisions of this rule to secure the payment of the judgment shall become finally charged on such bond, and bound to pay to the plaintiff upon demand the amount due under the judgment, which amount may be recovered from such surety or sureties after notice and summary hearing in the same action."

by arguing that even in a case where a judgment has been returned unsatisfied the surety may still be bound to the plaintiff under the bond "after notice and summary hearing in the same action."

This claim overlooks the fact that the aforesaid section refers to the bond executed in behalf of defendant in favor of the plaintiff wherein the surety binds himself to pay the amount of the judgment that may be rendered in favor of the plaintiff, which bond is given as a result of the issuance of a writ of preliminary attachment, and because it refers to the very judgment the surety is bound by it once it is rendered. On the other hand, section 20, Rule 59, refers to the damages that may be suffered by defendant on account of the levy of, the attachment.

Those two sections therefore refer to different subjects and they should not be confused one with the other. Moreover, section 17 refers exclusively to attachment and has no application whatsoever to injunction which is the subject of the instant case.

It is claimed by the distinguished dissenter that "in counterbonds * * * the surety is presumed to have actual knowledge of the claims for damages explicitly made in the complaint, for that is the only and very purpose of the counterbond. If the surety has that knowledge, what is the use of a further notice? He also knows that if insisted upon, such claim would be proven during the trial of the case. So if he is in any way interested in resisting the claim, he should see to it that he attend the hearing through a prior request to the Clerk of Court for such notice."

The flaw we find in this claim is that it presupposes that the surety in a counterbond is deemed to be a party to the case and as such he is not entitled to notice of hearing of the claim for damages, which claim has no legal basis because our rules do not consider him as such party. There is nothing in said rules that would require a surety under a counterbond to be so regarded and to be present in the case throughout the proceedings. To so hold would be an unwarranted amendment of the rules.

That the stand we take on the matter is the correct one may be seen by considering the case of a defendant who, having his property been preliminary attached, applied for dissolution of the attachment upon filing a counterbond "to secure payment to the plaintiff of any judgment he may recover in the action," as prescribed in section 12, Rule 59. In such case the rule does not consider the surety as a party to the case so much that "if the execution be returned unsatisfied" the surety can only be bound under the bond "after notice and summary hearing in the same action" (section 17, Rule 59). This proves, contrary to minority's claim, that even in a counterbond notice to the surety is necessary.

With regard to the cases cited in the minority opinion to support the theory that no notice to the surety is necessary to hold it liable for damages under its counterbond, suffice it to say that they are either favorable to our theory or are not in point.

Take for instance the *Aguasin* case^[(1)] Here the surety objected to the execution on the bond because it was not notified of the hearing on the claim for damages and this Court upheld the objection and relieved the surety from liability holding that notice to the surety is indispensable if it should be given due process. And while the Court added the obiter dictum that "This case is different from those in which the surety, by law and/or by the term of his contract has promised to abide by the judgment against the principal renounced the right to be sued or cited," this cannot here apply because no such renunciation appears in the bond under consideration.

The case of *Lawyers Cooperative Publishing Company* ^[(2)] is not also in point. That is a case where the surety bound itself to guarantee the return of certain law books in the event that the return is adjudged to the plaintiff, and judgment having been rendered ordering the return of the books, the Court said that the bondsmen are liable under the bond. The bond, therefore, refers to something definite and not to something to be proven, as in the instant case. Moreover, the issue of lack of notice was not raised therein.

The same thing may be said with regard to the *Mercado* case^[(3)] wherein the sureties bound themselves to pay to plaintiff in case of judgment the amount of \$912.40. And so this Court held that they were liable because "the liability of the sureties was fixed and conditioned on the finality of the judgment rendered regardless of whether the decision was based on the consent of the parties, or on the merit." Clearly this case is inapplicable.

To follow the theory advocated in the minority opinion would be to add more confusion to the already befuddled state in which the bar is now found on the point in controversy. Our duty is to dispel any vestige of doubt rather than indulge in subtle distinctions. This we did in the *Nava* case (*supra*) which in our opinion represents a fair interpretation of our rule. No other course is left to us than to uphold it.

Wherefore, petition is granted. The order of respondent Judge dated September 14, 1955 is set aside. No costs.

Bengzon, Padilla, Montemayor and Concepcion, JJ., concur.

[1] *Casimiro Japco vs. The City of Manila*, 48 Phil., 851, 855 citing *Santos vs. Moir*, 36 Phil., 350; *Somes vs. Crossfield*, 9 Phil., 13, *Macatangay vs. Municipality of San Juan de Bocboc*, 9 Phil., 19; *Visayan Surety & Insurance Corp. vs. Lacson, et al.*, 96 Phil., 878.

[2] *Del Rosario vs. Nava*, 95 Phil., 637.

[(1)] *Aguasin vs. Velasquez*, 88 Phil., 357.

[(2)] *Lawyers Cooperative Publishing Company vs. Fernando Periquet and Luzon Surety Co., Inc.*, 71 Phil., 204.

[(3)] Mercado, et al. vs. Macapayag, et al., 40 Off. Gaz. (6th Supp. 108.)

CONCURRING

BARRERA, J.,

I concur in the majority opinion.

Apart from what has been stated therein, I wish to express my views why I believe Section 17, Rule 59 of the Rules of Court is not applicable to the case at bar.

Rule 59, which deals on attachment, has three provisions regarding bonds; the plaintiff's bond and the defendant's bond, generally known as a counterbond. Textually the Rule provides:

"SEC. 4. Bond required from plaintiff.—The party applying for the order must give a bond executed to the defendant in an amount to be fixed by the judge, not exceeding the plaintiff's claim, that the plaintiff will pay all the costs which may be adjudged to the -defendant and all damages which he may sustain by reason of the attachment, if the court shall finally, adjudge that plaintiff was not entitled thereto." (Italics supplied)

"SEC 5. Executing Officer.—The officer executing the order shall without delay attach, to await judgment and execution in the action, all the properties of the defendant in the province not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiffs demand, unless the defendant makes a deposit with the clerk of court or judge of the Court from which the order issued, or given a bond executed to the plaintiff, in an amount sufficient to satisfy such demand besides costs, or in an amount equal to the value of the property which is about to be attached, to secure the payment to the plaintiff of any JUDGMENT which he may recover in the action. The officer shall also forthwith serve a copy of the plaintiff's affidavit and bond, and of the order of attachment, on the defendant, if he be found within the province." (Italics supplied) .

"Sec.12. Discharge of attachment upon defendant giving security—At any time after an order of attachment has been granted, the defendant, or the person appearing on his behalf, may, upon reasonable notice to the plaintiff, apply to the judge who granted the order, or to the judge of the court in which the action is pending, for. an order discharging the attachment wholly or in part on security given, and the judge shall, after hearing, order the discharge of the attachment if a deposit is made, or a bond, executed to the plaintiff is filed, on behalf of the defendant, with the clerk or judge of the court where the application is made', in an amount equal to the value, to be determined by the judge, of the property attached, to secure the payment to the plaintiff of any JUDGMENT he may recover in the action. Upon filing such bond, the defendant, or someone on his behalf, shall forthwith serve a copy thereof on the plaintiff or his lawyer. Upon the discharge of an attachment in accordance with the provisions of this section the property attached, and the proceeds of any sale thereof, shall be delivered to the. defendant, or the person appearing on his behalf, the deposit or bond aforesaid standing in place of the property so released. . Should such bond for: any reason be found to. be, or become, insufficient, and' the defendant fail to forthwith file an approved bond the plaintiff may apply for a new order of attachment." (Italics supplied)

It seems clear from the above-quoted provisions that while the plaintiff's bond in attachment is contingent upon and answerable for "all damages which he (defendant) may sustain by reason of the attachment", the undertaking of the defendant's counterbond is more direct, specific and definite in its terms: "to secure the payment to the plaintiff of any judgment he may recover in the action" and that the "bond aforesaid" stands "in place of the property so released." When we consider that an attachment is a lien on the property attached, the obligation of the defendant's bond "standing in place of the property released" can not be less effective. In fact, Section 17 of

Rule 59 is not a provision outlining a method of determining the liability of the sureties to the defendant's counterbond. It provides rather the last recourse in the execution of the judgment in favor of the successful attaching plaintiff. Thus, Section 15 of the Rule (59) points out the starting stage of the execution process. This section is entitled "Satisfaction of judgment out of the property attached," and directs the sheriff to "cause the judgment to be satisfied out of the property attached" setting the order of auction sale, first of the attached perishable properties or other property as directed by the judge; then the order attached properties, real or personal and lastly, the credits, if any, duly garnished. If the property attached is insufficient, Section 16 provides that "the officer must proceed to collect such balance as upon execution in other cases," resorting, for this purpose, to the other properties of the defendant. Should there still be an unpaid balance on the judgment, Section 17 comes into operation.

"SEC. 17. When execution returned unsatisfied, recovery had upon bond.—If the execution be returned unsatisfied in whole or in part, the surety or sureties on any bond given pursuant to the provisions of this rule to secure the payment of the judgment shall become finally charged on such bond, and bound to pay to the plaintiff upon demand the amount due under the judgment, which amount may be recovered from such surety or sureties after notice and summary hearing in the same action." (Italics supplied)

Contrast the above procedure in foreclosing on the fixed and direct undertaking of the defendant's sureties in an attachment proceeding and the procedure for determining the liability of the plaintiffs sureties prescribed in Section 20 thus:

"SEC. 20. Claim for damages on plaintiff's bond on account of illegal attachment.—If the judgment on the action be in favor of the defendant, he may recover, upon the bond given by the plaintiff, damages resulting from the attachment. Such damages may be awarded only upon application and after proper hearing, and shall be included in the final judgment. The application must be filed before the trial or, in the discretion of the court, before entry of the final Judgment, with due notice to the plaintiff and his surety or sureties, setting forth the facts showing his right to damages and the amount thereof. Damages sustained during the pendency of any appeal may be claimed by the defendant, if the judgment of the appellate court be favorable to him, by filing an application therewith, with notice to the plaintiff and his surety or sureties, and the appellate court may allow the application to be heard and decided by the trial court." (Italics supplied)

Now, in Rule 60 on Injunction, both the sureties on, the bond of the plaintiff requesting the injunction as well as on the counterbond of the defendant desiring its dissolution are in similar terms obligated respectively to "pay such (enjoined) party all damages which he may sustain by reason of the injunction" (Sec. 4) or to "pay all damages which the plaintiff may suffer by reason of the continuance during the action of the acts complained of." (Sec. 6). The conditions of their bonds,, therefore, are identical to the undertaking of the plaintiff's bond in an attachment, "to pay ... all damages which he (defendant) may sustain by reason of the attachment." (Sec. 4, Rule 59). It is because of this identity in the nature and scope of the obligation of these three bonds that the same procedure has been adopted for determining the liability of both plaintiff's bond and defendant's counterbond in injunction cases, and, of the attaching party's bond. Hence Section 9 of Rule 60 expressly provides:

"SEC. 9. Judgment to include damages against party and sureties.— Upon the trial, the amount of damages to be awarded to the plaintiff, or to the defendant, as the case may be, upon the bond of the other party, shall be claimed, ascertained, and awarded under the same procedure as prescribed in section 20 of Rule 59" (Italics supplied)

We may add that no reference whatever to Section 17 of Rule 59 is made in the ten sections of Rule 60, nor is there any provision similar to it. Consequently, the law on both plaintiff's bond and defendant's counterbond in injunction can not be otherwise than as stated in Sections. 4, 6 and 9 of Rule 60, in relation to Section 20 of Rule 59.

Furthermore, the condition of the counterbond involved in the instant case is "that in case the plaintiff suffers damages by reason of the lifting of the writ of preliminary injunction defendant and surety will on demand pay to the plaintiff the said damages." Note the similarity in its terms to the language of Sections 4 and 6 of Rule 60 and Section 4 of Rule 59. There is in this counterbond no promise, on the part of the surety, to abide by the judgment (which in this case is principally for the recovery of the land in question) nor a renunciation of the right to be cited. Hence by law and/or by the terms of the bond herein, this instant case does not fall within the exception set forth in the case of *Aguasin vs. Velasquez* (88 Phil., 357), to the principle that it is an elementary right of the surety to be heard in the manner provided by the applicable law (Rule 59, Section 29).

The considerations upon which the dissenting opinion rests have, it may be admitted, some validity, but unless the pertinent rules are amended, it would seem inadvisable and unjustifiable to depart from the doctrines laid down in the recent and controlling decisions of this Court on the matter (see cases cited in the majority opinion).

DISSENTING

PARAS, C.J.:

While I agree entirely with the doctrines enunciated in the cases cited by the majority, I dissent however from their application to the instant case.

When bonds are executed for and on behalf of plaintiff in cases of preliminary attachment, preliminary injunction and replevin, the surety while anticipating claims against his principal has no knowledge of the nature and extent of the probable claims for damages that may accrue to the defendant. In counterbonds, however, the surety is presumed to have actual knowledge of the claims for damages explicitly made in the complaint, for that is the only and very purpose of a counterbond. If the surety has that knowledge, -what is the use of a further notice? He also knows that if insisted upon, such claim would be proven during the trial of the case. So if he is in any way interested in resisting the claim, he should see to it that he attend the hearing through a prior request to the Clerk of Court for such a notice.

In practice, sureties—especially surety companies—do not bother themselves to attend the trial of the principal case. Otherwise, they would be hiring lawyers every time there is to be a hearing of cases where they have posted bonds. Apart from this reason, they not only collect premiums but do not put up a bond without a counterbond to protect themselves.

As clearly appears in the pleadings, there was a complaint for recovery of possession and ownership of two parcels of land and claim for damages, with a specification of their nature and extent. To lift the writ of preliminary injunction issued, a counterbond was executed to respond for these damages. This counterbond provides:

"Wherefore, we, JOSE ALCOS, ET AL. as principal and ALLIANCE INSURANCE & SURETY CO. Inc., a corporation duly organized and existing under the laws of the Philippines, as surety, in consideration of the lifting of said injunction hereby jointly and severally, bind ourselves in the sum of ONE THOUSAND ONLY—pesos (P1,000.00) Philippine currency, under the condition that in case the plaintiff suffers damages by reason of the lifting of the writ of preliminary injunction the defendant and surety will on demand pay to the plaintiff the said damages."

Said claim for damages was duly proven during the trial of the case and the decision awarding a fixed amount was handed down. What could therefore be the need for another hearing if its purpose is to reproduce the same evidence already in the record, there being no pretension that there was collusion or fraud between the parties?

Sec. 17, Rule 59 of the Rules of Court, I believe has to be applied. It provides:

"When execution returned unsatisfied, recovery had upon bond.— If the execution be returned unsatisfied in whole or in part, the surety or sureties on any bond given pursuant to the provisions of this rule to secure the payment of the judgment shall become finally charged on such bond, and bound to pay to the plaintiff upon demand the amount due under the judgment, which amount may be recovered from such surety or sureties after notice and summary hearing in the same action."

In commenting this section, the majority states: "This claim overlooks the fact that aforesaid section refers to the bond executed in behalf of defendant in favor of the plaintiff wherein the surety binds himself to pay the amount of the judgment that may be rendered in favor of the plaintiff, which bond is given as a result of the issuance of a writ of preliminary attachment, and because it refers to the very judgment the surety is bound by it once it is rendered." Precisely, the bond in the present case-is of this nature, one in behalf of the defendant and in favor,of the plaintiff.

While it is an elementary right of the surety to be heard and to be informed that the party seeking indemnity would hold it liable and was going to prove the grounds and extend of its liability, this principle does not apply to those cases where the surety, by law and/or by the terms of his contract has promised to abide by the judgment against the principal and deemed to have renounced the right to be sued or cited. In *Aguasin vs. Velasquez*, 88 Phil., 357, this Court held:

"If the surety is to be bound by his undertaking, it is essential according to Section 10 of Rule 62 in connection with Section 20 of Rule 59 of the Rules of Court that the damages be awarded upon application and after proper hearing and included in the final judgment. As a corollary to these requirements, due notice to the plaintiff and his surety setting forth the facts showing his right to damages and the amount thereof under the bond is indispensable. This has to be so if the surety is not to be condemned or made to pay without due process of law. It is to be kept in mind that the surety in this case was not a party to the action and had no notice of or intervention in the trial. It seems elementary that before being condemned to pay, it was the elementary right of the surety to be heard and to be informed that the party seeking indemnity would hold it liable and was going to prove the grounds and extent of its liability. This case is different from those in which the surety, by law and/or by the terms of his contract has promised to abide by the judgment against the principal and renounced the right to be sued or cited."

In the case of the *Lawyers Cooperative Publishing Company vs. Fernando Periquet and the Luzon Surety Co., Inc.*, 71 Phil., 204, this Court held:

"The only question to be determined in this case is whether or not the defendant-appellants are liable upon the bond subscribed to and filed by them as aforesaid. As was stated, the purpose of filing the said bond was to guarantee the return of the law books under litigation in the event that the municipal court of Manila should adjudge such return in civil case No. 116406. The said court having rendered judgment ordering the return of the books and said judgment having become final, the bondsmen should be released from their liability only upon satisfaction of the judgment in question. The said judgment having remained unsatisfied, and the defendants-appellants not having shown any cause or causes which will extinguish the guarantee according to law (arts. 18471862, Civil Code), the defendants-appellants are bound to fulfill their undertaking under the bond."

There can be no question that in essence and purpose, redelivery bonds in cases of attachment are similar to counterbonds in that of preliminary injunction. In the case of *Mercado, et al. vs. Macapayag, et al.*, 40 Off. Gaz. (6th Supp. 103), this Court held:

"The only issue, therefore, raised in the case at bar revolves around the question of liability of the sureties on their redelivery bond as a consequence of the failure of the defendants to satisfy the decision rendered against

them. An analysis of the terms of the redelivery bond shows unmistakably that the sureties bound themselves to answer solidarily for the obligations of the defendants to the plaintiffs in the amount of P912.04 'si fuera declarado por este juzgado que los referidos demandantes tenian derecho a la posesion de dichos bienes y al pago de la cantidad por sentenda firtne recobren contra los demandados,' In other words, the liability of the sureties was fixed and conditioned on the finality of the judgment rendered regardless of whether the decision was based on the consent of the parties, or on the merits. A judgment entered on a stipulation is nonetheless a judgment of the court because consented to by the parties. In the absence of fraud and collusion we see no good reason why sureties on a replevin bond should not be bound by a judgment thus obtained. (Manila Railroad Co. vs. Arzadon, 20 Phil. 452; Donovan vs. Etna Indemnity Co., 10 Cal. 723, 733, 103 p. 365).

"Had it not been for the redelivery bond of sureties the lower court would not have lifted the warrant of seizure as to the portion of the palay in the possession of the defendants and the palay could not have been disposed of by them. Having undertaken to substitute the obligation of the defendants to deliver the palay retained by the latter in case the court were to declare by final judgment that the plaintiffs were entitled to the possession of the same, the sureties should answer on their redelivery bond."

In my opinion, sureties should not easily be let off on a misunderstood technicality.

Endencia, J., concurs.

DISSENTING

LABRADOR, J.:

Much as it pains me to say so, I feel that the majority opinion is a blind application of a rule(Sec. 20, Rule 59), without due regard to the cause or reason for the provision or the circumstances surrounding the case at bar.

Section 20 of Rule 59 indicates the manner in which a claim for damages caused by the issuance of an illegal attachment may be presented and proved as against the surety on the plaintiff's bond. The claim is essentially "***distinct and different from the subject of the plaintiff's action in which the attachment was issued. The attachment is made against property belonging to the defendant, and to secure the levy or seizure of the property attached, the bond is presented. Property is seized by the sheriff that it may, after the plaintiff's original action has been proved and inability of defendant to pay the judgment, be sold to satisfy the claim contained in the complaint. The attachment is a proceeding independent of the original action, resorted to by the sheriff or an officer of the court without judicial intervention; and the damages sustained by the owner of the property attached are independent and different from the claims contained in the main action. Evident is the necessity, therefore, of the filing in court of the claim for damages caused by the attachment. The claim is included in defendant's answer, in a counterclaim, or is filed subsequently thereafter before judgment becomes final.

The amount of damages sustained by the illegal attachment is never subject of the main action, hence the need for an independent counterclaim for such damages, or a motion after judgment for a claim therefor, and a trial after such claim is pleaded or claimed by motion. When Section 9 of Rule 59, for the claim for damages caused by the injunction, the rule assumes that the injunction has been issued independent of the main cause, so that a demand for damages for said injunction must be made in a counterclaim or by means of a motion after judgment is rendered and trial thereof held after notice.

But in the present case, the bond for the defendant is a redelivery bond, in which the defendant and the bondsmen expressly agree to pay the damages that the plaintiff may suffer as a result of the continuance of the possession of the property sought to be recovered from the defendant. The main action is for the delivery of the possession of

the property and for damages to plaintiff because of defendant's possession. The damages caused by the execution of the redelivery bond and those caused by reason of the continuance of the defendant of the possession of the property are the same and are one of the issues of the main action. Why should another hearing be held to determine the amount of such damages, when the same has already been threshed out in the main action?

The subject of the action is the possession of the property, the demand for which is made by the plaintiff and which the court has granted upon presentation by the plaintiff of his own bond. The bondsmen on the redelivery bond are aware of the fact that the damages to be caused by the execution of their bond are the damages for the retention of the property by the defendant. These damages, I repeat, are the same damages that the plaintiff alleges are being caused to him by the retention of the property by the defendant. Conclusive evidence of this fact is the term of the redelivery bond itself, which says that the bondsmen and the principal bind themselves to pay to the plaintiff the amount that the latter suffers by reason of the lifting of the preliminary injunction, i.e., by the fact that the property is retained by the defendant instead of being delivered to the plaintiff.

Under the circumstances of the case at bar, therefore, the amount of the damages is the subject of the main action. The surety on the redelivery bond knows or is presumed to know that such damages are the subject of said action; he also knows that such damages are being inquired into both as to their existence as well as to their amount in the ordinary action. Of what use, therefore, is there to notify the defendant's bondsmen thereof again, when, by the circumstances of the case and by the very language of the bond, such damages are the subject of the main action? The new notice and hearing prescribed in Section 20 of Rule 59 is, therefore, a repetition and a superfluity; it is not under the circumstances, a requirement of due process.

I hold that the present situation is not within the contemplation of Section 20 of Rule 59, and the application of this provision is entirely out of place.

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