

**ROSA GONZALES VDA. DE PALANCA, SEVERINA G. PALANCA,
ANTONIO G. PALANCA, MILAGROS PALANCA-FURER, LEONARDA
PALANCA-ARENAS, CARLOS PALANCA, JR., MACARIO G. PALANCA,
RAMON G. PALANC...**

G.R. No. L-26430. March 11, 1969

Ponente: CONCEPCION, C.J.

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CONCEPCION, C.J.:

Appeal by certiorari from a decision of the Court of Appeals setting aside an order of the Court of First Instance of Manila, in Civil Case No. 54295 thereof dismissing the appeal taken by Chua Keng Klan from a decision of the Municipal Court of Manila in the present detainer case.

The same was, on December 12, 1962, commenced by Roman Ozaeta, as executor of the estate of the late Carlos Palanca y Tanguinlay, in Special Proceedings No. 12126 of the Court of First Instance of Manila. The estate included a lot of about 801.20 square meters, with the improvements thereon, located at No. 1089 Aguilar St., Manila, which had been leased to Chua Keng Kian, since the Japanese occupation of the Philippines, at a monthly rental of 200, on a month-to-month basis.

Prior to the institution of said case, on March 3, 1962, defendant had received a letter from Ozaeta stating that the lease of the premises was thereby terminated as of April 30, 1962, because the heirs of the deceased intended to construct an apartment house on the lot aforementioned, and urging the defendant to vacate the same, on or before the date last mentioned. The defendant having refused to do so, despite repeated demands, said case was filed on the date adverted to above.

Defendant's answer in the Municipal Court averred that the alleged intent to construct an apartment house was merely a ruse to impose upon him a higher rate of rental. He, moreover, set up a counter claim for P22,500, said to represent one-half of the cost of improvements he claimed to have introduced on the lot in question, with the alleged authority of its deceased owner, Carlos Palanca. In due course, the Municipal Court rendered judgment, on May 28, 1963, sentencing the defendant to vacate the property in litigation; to pay to plaintiff the sum of P1,600, as rentals for the period from May to December, 1962, and P600 a month from January, 1963, up to such time as the defendant shall have vacated said property, as reasonable compensation for the use and occupation thereof, in addition to attorney's fees in the sum of P300 and the costs.

The defendant seasonably appealed to the Court of First Instance of Manila, where the case was docketed as Civil Case No. 54295, and he filed an answer, dated June 28, 1963, reproducing, in effect, the one submitted in the Municipal Court. Plaintiff moved, on July 2, 1963, to dismiss defendant's counterclaim, and, on August 16, 1963, to be allowed to withdraw the deposits made by the defendant. The latter was denied on August 24, 1963 and the former on August 29 of the same year.

Over a year later, on October 20, 1964, the Court of First Instance *motu proprio* dismissed defendant's appeal,

for "lack of interest to prosecute the same". A motion for reconsideration of the order to this effect having been denied, defendant appealed to the Court of Appeals which, after appropriate proceedings, rendered the decision appealed from, setting aside the order of dismissal of the Court of First Instance and remanding the case thereto for trial on the merits. Hence, this petition for review on certiorari, to which we gave due course.

Prior thereto, or while the case was pending in the Court of Appeals, the project of partition among the heirs of the deceased Carlos Palanca had been approved by the probate court, in view of which said heirs substituted Roman Ozaeta as plaintiff in this case.

Plaintiffs herein raise two questions, namely: (1) whether the Court of Appeals had jurisdiction to entertain defendant's appeal from the order of dismissal of the Court of First Instance; and (2) whether the Court of Appeals erred in setting aside said order of dismissal.

As regards the first question, it is urged that since the defendant's appeal from said order of dismissal raised a question purely of law, namely, whether he had unduly failed to prosecute the appeal, the same was within the exclusive appellate jurisdiction of the Supreme Court, so that the decision of the Court of Appeals must be deemed null and void ab initio. We deem it, however, unnecessary to pass upon this question because, whether we deal with the proceedings before Us as one for review on certiorari of said decision of the Court of Appeals, or as a direct appeal from the order of dismissal of the Court of First Instance, the result is the same.

Indeed, it is not disputed that the question whether or not a case should be dismissed for "failure to prosecute" is mainly addressed to the sound discretion of the trial court. As a consequence, the action taken by said court should not be disturbed by an appellate court unless it appears affirmatively that the former had abused its aforementioned discretion. In other words, the trial court must be presumed to have acted correctly, unless and until the contrary is satisfactorily established.[1] In the case at bar, the Court of Appeals adopted, in effect, the opposite procedure, for it assumed that "in all probability, the court" - of first instance - "could not have heard the case immediately even if there was a motion to set it for hearing, because of the pendency of other urgent or similar matters" and that "this is the reason why the clerk of court did not x x x include this case in the calendar," during the period it had not been included therein.

Then again, the Court of Appeals acted upon the false premise that the decision of a municipal court against the defendant in illegal detainer cases is vacated on appeal taken by said defendant. As early as January 23, 1948, such premise had been explicitly rejected by this Court, in *Torres vs. Ocampo*[2], in which it held that:

" x x x judgment rendered by an inferior court in forcible entry or illegal detainer is not vacated by the appeal until after the rendition of judgment by the Court of First Instance; but it continues in force and may be executed upon failure on the part of the appellant to put up the supersedeas bond and monthly deposits required by law, during the pendency of the appeal."

Over twelve (12) years later, this was reiterated in *Acierto vs. Laperal*, in the following language:

"The only issue posed in this petition is whether the appeal taken by plaintiffs from the decision of the Municipal Court of Manila to the court of first instance had the effect of vacating said decision as is the case in ordinary actions as provided for in Section 9, Rule 40, of the Rules of Court.

"While in an ordinary action a perfected appeal shall operate to vacate the judgment of the justice of the peace or of the municipal court, and the action when duly entered in the court of first instance shall stand de novo upon its merits in accordance with the regular procedure in that court as though the same had never been tried before and had been originally there commenced (Sec. 9, Rule 40), this rule only applies to ordinary actions, and not to cases of ejectment which are governed by Sec. 8, Rule 72. This rule sets out a particular procedure that may be deemed to be an exception to the provisions of Sec. 9, Rule 40 x x x"

Indeed, the appeal taken by the defendant in a forcible entry or illegal detainer case from a decision rendered against him does not bar its execution during the pendency of the appeal. To stay execution he must file a bond - which would be unnecessary if the decision had been vacated, for there would then be nothing to execute, and, hence, nothing to stay - and must deposit the amount due to the plaintiff "as found by the judgment" appealed from. As a consequence, the appealed judgment is thereby enforced or enforce-able one way or the other - either by ordinary execution or by de-posit of said amount, coupled with a bond to stay said execution.

Moreover, the Court of Appeals held that the period from June 28, 1963, when defendant filed his answer, to October 20, 1964, when the order of dismissal was issued, or over one (1) year and three (3) months, during which defendant had not asked the case to be set for hearing in the Court of First Instance, is not long enough to warrant dismissal of the appeal for failure to prosecute. This is contrary to the position taken by this Court in *Chuan vs. De la Fuente*², *Villanueva vs. Secretary of Public Works*³, and *Insurance Co. of North America vs. Republic*¹, in which we upheld orders of dismissal based upon inaction for a similar length of time.

One other factor must be taken into account. This unlawful detainer case is a special civil action which, by its nature, is meant to be summary in character. Besides, it is a matter of common knowledge that there is a considerable number of cases of this kind pending before our courts; that appeals therefrom have only too often been resorted to for purposes of delay; and that such cases and the appeals therein taken contribute materially to the clogging of court dockets and, hence, to the delay in the disposition of other cases deserving of more attention. In short, considerations of public policy warrant that greater diligence be demanded from defendants-appellants in forcible entry and detainer cases to expedite the disposal thereof.

WHEREFORE, the order of dismissal of the Court of First Instance of Manila is hereby affirmed, with costs against defendant Chua Keng Kian.

IT IS SO ORDERED.

Reyes, JBL, Dizon, Makalintal, Zaldivar, Sanchez, Ruiz Castro, Fernando, Capistrano, and Teehankee, JJ., concur.

Barredo, J., concurring and dissenting in separate opinion.

[1] *Inter-Island Gas Service v. De la Cerna*, L-17631, Oct. 19, 1966; *People v. Cloribel*, L-20314, August 31, 1964; *Flores v. Phil. Alien Property Administrator*, L-12741, April 28, 1960; *Adorable v. Bonifacio*, L-10898, April 22, 1959; *Montelibano v. Benares*, 103 Phil. 106; *Matias v. Teodoro*, 102 Phil. 701; *Smith Bell & Co. Ltd. v. Amer. President Lines*, 94, Phil. 879.

[2] 80 Phil. 36.

¹ G. R. No. L-15966, April 29, 1960. Emphasis supplied.

² 90 Phil. 813.

³ L-21043, March 30, 1966.

¹ L-26794, November 15, 1967.

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CONCURRING AND DISSENTING OPINION

BARREDO, J.:

I am in full accord with the view that "it is a matter of common knowledge that there is a considerable number of cases of this kind pending before our courts; that appeals therefrom have only too often been resorted to for purposes of delay; and that such cases and the, appeals therein taken contribute materially to the clog-ging of court dockets and, hence, to the delay in the disposition of other cases deserving of more attention." (p. 5, Decision) I deeply regret, however, that I cannot find my way to joining the majority's conclusion that be-cause in desahucio cases, the judgments of inferior courts appealed to the courts of first instance are not vacated, unlike in ordinary actions, upon the perfection of the appeals, the order of dismissal of herein respond-ent's appeal from the decision of the City Court to the Court of First Instance of Manila, for failure to prosecute the same, should have been affirmed by the Court of Appeals. Neither am I in a position to agree that "con-siderations of public policy warrant that greater dili-gence be demanded from defendants-appellants in forcible entry and detainer cases to expedite the disposal there-of." My reasons are both legal and of policy also and I am submitting them humbly and respectfully hereunder.

I must state at the outset that this task I am undertaking of separating from the majority in this case is neither pleasant nor easy. Being a new arrival in this venerable body, the impulse of restraint in dissent seems humanly natural within me. I do not want to give anyone the impression, erroneous, and false, of course, in all respects, that I feel like an upstart minor hunger-ing for an opportunity to show up my elders. In truth, the very idea of having to point out the flaws in the unanimous opinion of all my senior brethren is in itself awesome. When it is considered, further, that the majority opinion is from the pen of no less than our very worthy Chief Justice, my predicament and hesita-tion are necessarily augmented and become almost insur-mountable, so much so, that if I were not thoroughly convinced of my position and were less conscious of my responsibility in the premises, I would have gladly given up this heavy burden. My only consolation is that, as I see it, this decision constitutes a new rule as regards the prosecution of appeals from inferior courts to the courts of first instance in forcible entry and unlawful detainer cases and, therefore, it is, in my humble view, better perhaps that it is subjected to more minute scru-tiny from all angles before it is finally accepted as an established precept in remedial law. May I add that there is here no pretense whatsoever to any degree of unusual learning everything herein contained is just the modest result of what I have gathered from repeated handling of cases of this nature as a private practitioner and of constant discussion by me of the subject at hand in the law school classes while trying to imbibe and comprehend as much as I could the rules of procedure together with the students of law, in which activities, I had the oppor-tunity to indulge for quite sometime. I am sure that, at least, among those similarly, engaged in said activities as I have been, the clarifications contained in the ma-jority opinion and, may be, in this separate views of mine will be most welcome.

Coming now to the case before Us, in synthesis, the rule that the majority is laying down is that, not-withstanding that an appeal by the defendant in an unlaw-ful detainer case from an unfavorable judgment of eject-ment of an inferior court has already been transmitted by such inferior court to the proper court of first in-stance and entered in the latter's docket and proceedings in the appealed case have already been started in the latter court, if subsequently, none of the parties should move, for an unreasonably long time to have the case tried and resolved by the court of first instance, the said court may, instead of dismissing the complaint for failure of the plaintiff to prosecute his action, dis-miss the appeal of the defendant, for failure of said defendant to prosecute said appeal,

despite the fact that said defendant-appellant has seasonably filed the required supersedeas bond for the payment of all accrued rentals and has been, furthermore, religiously depositing with the court, the current ones. Truth to tell, this is the first time I have come across a ruling of this kind since I began practicing in the bar thirty-two years ago and I have not found any similar one in any jurisprudence I have read to this day. If for this reason alone, I hope that my curiosity and the extensiveness of this opinion due to my eagerness to make it as comprehensive as I feel it should be will be pardoned by my learned colleagues.

As I gather from the records, particularly, from petitioners' own brief, this case of unlawful detainer was begun with a complaint filed in the City Court of Manila on December 12, 1962; after due hearing, the said City Court rendered judgment on May 28, 1963, ordering defendant, now respondent, to vacate the premises in question and to pay the sum of P1,600.00 as rental for the period from May, 1962 to December, 1962 and the sum of P600.00 until said respondent vacates the premises, as the reasonable rental for the same, considering the size and location of the place and to pay the amount of P300.00, as attorney's fees, plus the costs,[1] respondent appealed in due time and manner, and on June 24, 1963, (Petitioners' Brief) the Court of First Instance of Manila to which the appeal was made notified respondent that the docket entries together with all the original papers and processes and the appeal bond had been received by said court in accordance with section 5, Rule 40, of the old as well as the revised Rules of Court (not Rule 46, section 47 as erroneously referred to by petitioners in their brief, p. 3); pursuant to section 7 of the same Rule 40, on June 28, 1963, respondent filed his answer to the complaint which was considered as reproduced (under the old Rules); on July 2, 1963, plaintiff[2] filed a Motion to Dismiss respondent's counterclaim which was opposed by said respondent on July 15, 1963; later, on August 16, 1963, petitioner filed a motion to allow withdrawal of deposit, which was opposed by defendant on August 23, 1963; both motions were denied in the court's orders of August 24 and 29, 1963 respectively; as neither party made any move, since the appeal was entered, to have the case set for hearing, on October 20, 1964, the Court of First Instance, Judge Arsenio Solidum, presiding, entered an order dismissing the appeal of respondent for failure to prosecute; his motion for reconsideration of the said order of dismissal having been denied, respondent appealed to the Court of Appeals where, on June 36, 1966, the latter court rendered a decision, penned by Justice Salvador Esguerra, setting aside the dismissal and ordering the remand of the case to the lower court for trial on the merits; reconsideration of this decision on motion of petitioners was denied; and so, the case is now before Us on appeal by said petitioners.

At the outset, it is to be importantly noted that at the time Judge Solidum issued the order of dismissal of respondent's (then appellant, now appellee) appeal on October 20, 1964, all the steps necessary to complete appeal of said respondent had long before been completed already, as evidenced by the notice sent by the Court of First Instance to that effect on June 24, 1963, as above-related. Nothing, but nothing, remained to be done by the respondent to enable the Court of First Instance to assume jurisdiction over his appeal. As a matter of fact, and this is important too, the said court had by then already acted in two incidents properly within its jurisdiction, namely, the motion to dismiss defendant's counterclaim and plaintiff's motion to withdraw deposit, which were both opposed in due time formally and in writing by respondent, when it entertained and subsequently denied both motions on August 24, 1963 and August 29, 1963, respectively. I respectfully submit that upon these facts, the period during which the Court of First Instance had the power to dismiss respondent's appeal for failure of appellant to prosecute the same had already passed, as it ended on June 24, 1963, the date when the court sent out the notice to defendant required by Section 5 of Rule 40 and entered the appeal upon its docket (sec. 6, Rule 40). Thereafter, according to the express edict of the Rules of Court, the case in the Court of First Instance "stood (shall stand) for trial de novo upon its merits in accordance with the regular procedure in that court, as though the same had never been tried before and had been originally there commenced." (sec.9, Rule 40) [Emphasis supplied] Accordingly, to my mind, at that juncture in which the case was, there could be no consideration

anymore of the prosecution of the appeal, for, if I am not mistaken, it is clear from the quoted provision that by then, the prosecution of the appeal had already been consummated, the whole process thereof having been completed, and what was pending before the Court of First Instance, was, in legal contemplation, no longer an appeal or review but, rather, a case to be tried "upon its merits in accordance with the regular procedure in that court, as though the same had never been tried before and had been originally there commenced." Please note that the provision speaks emphatically of "trial ... upon its (the complaint) merits", thereby excluding the idea of any possible consideration of the merits or demerits of the appeal per se, in the light of the evidence before and the judgment of the inferior court, or of its prosecution or non-prosecution. Indeed, I cannot conceive of any language more unmistakable than that used in this provision to express the intent of the Rules as to the nature of the trial de novo in the Court of First Instance in an appeal to it from an inferior court. Verily, in such an appeal, the Court of First Instance is not a reviewing court that merely affirms or reverses the judgment of the inferior court; rather, it is a court of new trial or a court where the case is to be tried anew and again, with the only qualifications that even if the pleadings of the parties may be amended, no new causes of action or defenses, much less, any matter beyond the inferior court's jurisdiction may be alleged therein, and the theories of the parties, as presented to the inferior court, may not be substantially altered; in other words, the new trial is conducted on the basis exclusively of the causes of action, defenses and theories presented by the parties in the inferior courts, (Alonso v. Municipality of Placer, 5 Phil. 71; Enriquez v. Watson & Co., 6 Phil. 114; Evangelista v. Ta-bayuyong, 7 Phil. 607; Belzunce v. Fernandez, 10 Phil. 452; Roses v. Rebuena, 11 Phil. 300; Bernardo v. Genato, 11 Phil. 603; Yu Lay v. Galmez, 40 Phil. 651; Royal Shirt Factory v. Co Bin Tic, 94 Phil. 994) but without regard to the proofs presented in the inferior court or to the conclusions reached by the judge thereof. (Colegio de San Jose v. Sison, per Justice Street, 56 Phil. 344; Ligo v. Carandang, 73 Phil. 649; Crisostomo v. Director of Prisons, 41 Phil. 368; see also Feria, Civil Procedure Annotated, 1967 ed. p. 824)

What is meant by the very self-explanatory clauses to the effect that the new trial shall be "in accordance with the regular procedure in that court (Court of First Instance), as though the same had never been tried before and had been originally there commenced" has even been explained further in, at least, four cases, in a manner pertinent to our present discussion. In Marco v. Hashim, 40 Phil. 592, this Court held that where the plaintiff in a case appealed to the Court of First Instance from an inferior court failed to appear at the scheduled trial in the higher court and the case is dismissed, such plaintiff is not barred to file a new complaint for the same cause, because the rule in the Court of First Instance (then)[3] is that the dismissal of an action by non-suit was without prejudice. It is not the appeal that is dismissed, thereby causing the revival of the judgment of the inferior court, and finally terminating the case; rather, it is the Court of First Instance case that is dismissed, reserving to the plaintiff, by mandate of the rule, the right to refile the same in the inferior court.[4]

In the other case of Smith v. Kapunan, 98 Phil. 406, in 1956, our esteemed senior colleague, Mr. Justice J.B.L. Reyes had this to say: "The previous order of Judge Vicente Santiago, of the Court of First Instance, dismissing defendants' appeal on the ground that they did not serve upon plaintiff a copy of their answer within the reglementary period x x x was clearly erroneous (since the proper procedure in case of failure to answer is to declare the appealing defendant in default, hear the evidence for the plaintiff, and render judgment in accordance therewith) x x x." (p. 408) Indeed, earlier, in 1951, in the case of Quizan v. Arellano, et al., 90 Phil. 644, Mr. Justice Tuason had spoken in similar vein, because the counsel for defendant-appellant therein had appeared in the inferior court when the action of forcible entry against said defendant-appellant was first called for hearing, moved verbally, to dismiss the same and, when his motion to dismiss was denied, left the courtroom and announced he would appeal any unfavorable decision the court would render in the case, as, in fact, he did appeal when the court ultimately rendered judgment adverse to his client, and, when the case was already in the Court of First Instance, he filed a lengthy written answer with denials, special denials, affirmative defenses and

counterclaim, whereupon, on motion of plaintiff, Judge Arellano of the Court of First Instance, threw out the answer and dismissed the appeal, treating the defendant, in effect, as though she had been in default. Mr. Justice Tuason admonished:

"In the Court of First Instance the appellant was not in default any more than she had been in the justice of the peace court. She had filed an answer in the former court, and the mere fact that the answer was defective did not outlaw her from the case. Even if she had been in default in the Court of First Instance the correct practice should have been not to dismiss the appeal because the appeal had duly been taken, but to hear the plaintiff's evidence in the absence or without the intervention of the adverse party and decide the case on the merits as the allegations and evidence warranted. Let it be noted that by Section 9, Rule 40, an appeal vacates the justice of the peace's judgment and the case stands as if it had been originally commenced the Court of First Instance. This rule also provides that 'If the appeal is withdrawn, deemed revived and shall forthwith be remanded to the justice of the peace or municipal court for execution.' The express mention in this Rule of withdrawal of the appeal as the cause of revival of the justice of the peace's judgment, excludes by implication failure to answer as ground for executing the judgment.

We are therefore of the opinion that the respondent judge erred in dismissing the appeal, and should proceed to hear the case after ordering the exclusion from the answer of such allegations as are special or affirmative defenses and counterclaims." (At p. 648)

There is also the case of *Quiogue v. Buenaventura* referred to in our footnote (4).

I have no doubt whatsoever that these rulings are as valid today as they were unassailable at the time they were rendered. The law and the Rules relative to the point under discussion have not been changed a bit in the direction pursued by the majority. As will be explained anon, the development in the Civil Code and the revised Rules of Court has been, on the contrary, along the position I have taken.

The majority argues, however, that in ejectment cases, forcible entry and unlawful detainer, the procedure is different and that the trial de novo rule under section 9, of Rule 40 does not apply in such cases, unmindful evidently of the fact that the above case of *Quizan* decided by Mr. Justice Tuason was actually one of forcible entry. Says the majority:

"Then again, the Court of Appeals acted upon the false premise that the decision of a municipal court against the defendant in illegal detainer cases is vacated on appeal taken by said defendant. As early as January 23, 1911 such precise had been explicitly rejected by this Court, in *Torres v. Ocampo*, in which it held that:

'x x x judgment rendered by an inferior court in forcible entry or illegal detainer is not vacated by the appeal until after the rendition of judgment by the Court of First Instance; but it continues in force and may be executed upon failure on the part of the appellant to put up the supersedeas bond and monthly deposits required by law, during the pendency of the appeal.'

"Over twelve (12) years later, this was reiterate in *Acierto v. Laperal* in the following language:

"The only issue posed in this petition is whether the appeal taken by plaintiffs from the decision of the Municipal Court of, Manila to the court of first instance had the effect of vacating said decision as is the case in ordinary actions as provided for in Section 9, Rule 40, of the Rules of Court.

"While in an ordinary action a perfected appeal shall operate to vacate the judgment of the justice of the peace or the municipal court, and the action when duly entered in the court of first instance shall stand de novo upon its merits in accordance with the regular procedure in that court as though the same had never been tried before and had been originally there commenced (Sec. 9, Rule 40), this rule only applies to ordinary actions, and not to cases of ejectment which are governed by Sec.8, Rule 72. This rule sets out a particular procedure that may be

deemed to be an exception, to the provisions of Sec. 9, Rule 40 x x x '

"Indeed, the appeal taken by the defendant, in a forcible entry or illegal detainer case from a decision rendered against him, does not bar its execution during the pendency of the appeal. To stay execution he must file a bond - which would be un-necessary if the decision had been vacated, for there would then be nothing to execute, and, hence, nothing to stay - and must deposit the amount due to the plaintiff 'as found by the judgment' appealed from. As a consequence, the appealed judgment is thereby enforced or enforce-able one way or the other - either by ordinary execution or by deposit of said amount, coupled with a bond to stay said execution."

I find it difficult to share the view that " the Court of Appeals acted upon the false premise that the decision of a municipal court against the defendant in illegal detainer cases is vacated on appeal taken by the said defendant." Indeed, it is quite plain to me that in relation to the issue herein involved, the "premise" of the Court of Appeals is correct or, at the worst, nearest to what is correct. What is here in issue is the procedure to be followed in the proceedings in the Court of First Instance after the appeal is entered in its docket, not the procedure in the immediate execution or execution pending appeal of the judgment of an inferior court under section 8 of Rule 70 (Rule 72 then), to which the Torres decision refers. There is no question that in the latter incident, the judgment appealed from is not vacated and I date say that this legal fiction continues even when the Court of First Instance is already conducting a trial de novo, but I hasten to add that it continues for the sole and only purpose of enabling the court to order immediate execution of the appealed judgment should the defendant-appellant fail to comply with the requirement to be up-to-date in the payment of the current rentals, as fixed in the judgment or in the contract of lease or should the said appellant withdraw his appeal.[5]

I am afraid that the reliance reposed by the majority on the case of *Torres v. Ocampo*, 80 Phil. 36, thanks to the unwittingly misleading citation in petitioners' brief, is misplaced. My reason is simple, - that case was not one of forcible entry and unlawful detainer., So said this Court:

"If the action filed in the Municipal Court of Manila were an action of forcible entry or illegal detainer, and the damages claimed by the plaintiff against the defendant were either rents or damages consisting in reasonable value of the use and occupation of the premises by the defendant, there would be no question that the plaintiff is entitled to the writ of mandamus prayed for in the petition filed in the case. But the action instituted by the plaintiff against the defendant was neither of forcible entry nor of illegal detainer. It is an ordinary action for the recognition of the plaintiff's preferred right to the use and occupancy of the stalls in question in Sampaloc Market, against the claim of the defendant, under the provisions of the Market Code and administrative regulations in implementation thereof. In ordinary actions the provisions of section 8, Rule 72, are not applicable, and upon the perfection of an appeal the judgment of the municipal court is vacated, and the case is tried de novo in the Court of First Instance in accordance with section 9, Rule 40.

"The action of the plaintiff against the defendant is not an action of forcible entry, for the simple reason that it is not an action instituted by a person who was in possession of a land or building against a person who has deprived him of the possession thereof by force, intimidation, threat, strategy or stealth, within one year from such unlawful deprivation. Assuming, without deciding, for the purpose of this decision that a market stall is a building or land within the meaning of Rule 72, Rules of Court, whatever right the plaintiff may have to occupy the market stall in question, originated from the alleged award to plaintiff by the City Health Officer of Manila. And nothing entered into possession under that or lease of the market stall in dispute plaintiff had acquired no right in the leased property in the nature of a right in rem, which third persons were bound to respect or not to infringe.

"The action brought by the plaintiff against the defendant was not an action of illegal detainer, because according to section 1, Rule 72, this action is for the recovery of possession of any land or building, instituted within one year from date of illegal possession, by a person against whom the possession of any land or

building is being unlawfully withheld by another after the right of the latter to hold possession by virtue of any contract, express or implied, with the plaintiff has expired or terminated. In the present case, there was no contract whatsoever, express or implied, between plaintiff and defendant for the possession of the market stall, and hence no expiration or termination of the latter's right to hold possession thereof under contract." (80 Phil. 40)

It is true that in the penultimate paragraph of that decision, the following appears:

"Payment of damages other than those described above such as that which the plaintiff expect to obtain from his business to be located in the premises, or for material injury caused to the premises, can not be claimed in connection with or as incidental to an action of illegal detainer or forcible entry, and for that reason in case of appeal by defendant, the latter is not required to file a supersedeas bonds and deposit every month, a certain amount to answer for the payment of said damages in order to stay the execution of a judgment during the pendency of the appeal. Because in actions other than forcible entry or illegal detainer, the judgment of the inferior court appealed to the Court of First Instance is vacated, and the action is tried de novo in the latter court as if the action has been originally, instituted therein, and no judgment of the inferior court may be executed, for the latter is set aside by the appeal. While judgment rendered by an inferior court in forcible entry or illegal detainer is not vacated by the appeal until after the rendition of judgment by the Court of First Instance; but it continues in force and may be executed upon failure on the part of the appellant to put up the supersedeas bond and monthly deposits required by law, during the pendency of the appeal." (80 Phil. 42) [Emphasis supplied]

It is easy to see, however, from a reading of the whole decision, that apart from the fact that this portion just quoted is concededly obiter, it is as evident too that what the Court meant in relation to the non-vacating or non setting aside of the judgment in appeals from decisions of inferior courts in desahucio cases was only the legal fiction I have already referred to, for purposes of immediate execution. This is clearly inferable from the reference to immediate execution in the portion I have underlined.[6] I have absolutely no doubt in my mind, as I know and remember it from actual practice not so long ago, that even when the inferior court's judgment in such a case is immediately executed, the appeal still proceeds taking its course and that definitely, the procedure followed in such an appeal is that of trial de novo, exactly the same procedure as in ordinary cases which is based on the assumption that the judgment appealed from has been vacated.

Petitioners' citation and the majority's adoption of the case of *Acierto v. Laperal*, G.R.No. L-15966, April 29, 1960, are, I respectfully submit, equally unfortunate. To start with, the ruling in said case is based on the above-discussed decision in *Torres v. Ocampo* which I have shown to be far from being controlling herein. What happened in the *Acierto* case was this: *Acierto* brought an action of consignment of rentals in the Municipal Court of Manila against the *Laperals*, the lessor of the premises *Acierto* was occupying. In their answer, the *Laperals* alleged default of payment of such rentals by *Acierto*, and claiming that the latter had been duly notified to vacate on account of such default, prayed for ejectment, by way of counterclaim. To continue, now, in the language of this Court:

"On April 11, 1959, after trial, the court rendered judgment ordering plaintiffs to vacate the premises occupied by them and each to pay the monthly rental at the rate therein specified from December 1956 until they shall have surrendered their possession to defendants. In due time, plaintiffs appealed to the court of first instance.

"The appeal having been given due course, the court set the case for hearing on June 2, 1959, notice thereof having been received by counsel for plaintiffs on May 26, 1959. On May 29, 1959, plaintiffs' counsel filed a motion for postponement alleging that he had a trial in *Castillejos, Zambales* on June 2 and 3, 1959, but due to the fact that said motion was not set for hearing by movant and no proof was presented of the allegations contained therein, the court denied the motion and declared the appeal abandoned. From this order, plaintiffs appealed to the Supreme Court.

"On August 1, 1959, defendants filed a petition for execution of the judgment of the municipal court in view of plain they, it's failure to deposit the rentals which were sentenced to pay as required by the rules, which petition was granted on August 20, 1959. And their motion for reconsideration having been denied, plaintiffs interposed the pre-sent petition for certiorari alleging that respondent judge has acted without or in excess of his jurisdiction."

It was upon these factual bases that this Court mounted the ruling, quoted by the majority, thus:

"The only issue posed in this petition is whether the appeal taken by plaintiffs from the decision of the Municipal Court of Manila to the court of first instance had the effect of vacating said decision as is the case in ordinary actions as provided for in Section 9, Rule 40, of the Rules of Court.

"While in an ordinary action a perfected appeal shall operate to vacate the judgment of the justice of the peace or the municipal court, and the action when duly entered in the court of first instance shall stand (for trial) de novo upon its merits in accordance with the regular procedure in that court as though the same had never been tried before and had been originally there commenced (sec. 9, Rule 40), this rule only applies to ordinary actions, and not to cases of ejectment which are governed by section 8, Rule 72. This rule sets out a particular procedure that may be deemed to be an exception to the provision of section 9, Rule 40 (Torres v. Ocampo, 80 Phil. 36; Taguilimot v. Makalintal, 47 O.G. 2318)"

It is to be regretted that while this decision cites the cases of Torres v. Ocampo, supra and Taguilimot v. Makalintal, et al., 85 Phil. 40, it goes much beyond the real import of said cases, without any leg to stand on. As I see it, the sweeping ruling therein to the effect that "While in an ordinary action a perfected appeal shall operate to vacate the judgment of the justice of the peace court or the municipal court, and the action when duly entered in the court of first instance shall stand (for trial) de novo upon its merits in accordance with the regular procedure in that court as though the same had never been tried before and had been originally there commenced (section 9, Rule 40), this rule only applies to ordinary actions, and not to cases of ejectment which are governed by section 8, Rule 72; this rule sets out a particular procedure that may be deemed to be an exception to the provision of section 9, Rule 40, "is, at best, only one-third accurate. It is, of course, correct to say that the rule in ordinary cases that a perfected appeal shall operate to vacate the appealed judgment of an inferior court does not apply to desahucio cases, but as I have already shown above, this is true only for purposes of immediate execution, as a legal fiction, in order to give way to such immediate execution if the circumstances justify it. At the most, what may be conceded, in this connection, is that the perfection of such an appeal suspends the judgment of the inferior court as opined by Prof. Feria. No doubt, the later part of the ruling implying that the rule of trial de novo is not also applicable to ejectment cases is entirely unwarranted. I am certain that neither Mr. Justice Feria who penned the Torres v. Ocampo decision nor former Chief Justice Bengzon who wrote the Taguilimot opinion, ever intended their views to be so erroneously extended, for it is settled by the better reasoned decisions I am citing in this opinion, that even in ejectment cases, the procedure on appeal to the Court of First Instance is trial de novo, never a review, except when the case happens to be comprehended within section 10 of Rule 40 in cases wherein there has been no trial on the merits in the inferior court and such cases have been disposed of therein upon a question of law.[7]

At this point, for the reason that it is my humble view that the decision of this Court in the case of Evangelista v. Soriano, 92 Phil. 190, decides the point I have discussed in a manner more in accord with law and practice, and in many respects it is almost squarely on all fours with the case now before Us, I shall take the liberty of quoting the said decision in extenso:

"This is an action for, detainer and collection of rentals due and unpaid. After trial judgment was rendered for the plaintiffs. The defendant appealed filing a supersedeas bond. In the Court of First Instance, the defendant filed an answer setting up illegality of the rentals sought to be collected and of the assessed value of the leased

premises upon which the increased rental was based, failure of the plaintiffs to make plumbing repairs on the leased premises, a counterclaim for P128 claim-ed to be an excess of the amount of rental authorized by law from February 1945 to December 1946, both inclusive, and damages in the sum of P250. On 21 January 1949 the attorneys for the plaintiffs filed a motion praying for the dismissal of the case, payment to the plaintiffs of the supersedeas bond in the sum of P347.50 and withdrawal by them of the amount of P176 for rentals deposited by the defendant, for the rea-son that the latter had vacated the pre-mises on 19 January, 1949 and because she and her attorney failed to appear at the resumption of the trial of the case on 21 January, the plaintiffs waiving payment of rentals for July, October, November and December 1948 and half of January 1949, to put an end to the litigation, without costs. On that date, after stating that the case was partly tried on 1 July, the trial having been postponed due to the failure of the clerk of the municipal court to forward the ex-hibits presented by the parties, and that the resumption of the trial set for 24 August and 23 September was postponed again upon motion of the attorney for the defendant and set for 21 January 1949, on which date the defendant and her attorney failed to appear and the attorneys for the plaintiffs moved for the dismissal of the case and prayed that the plaintiffs be allowed to withdraw the rentals deposited in court by the defendant, the court en-tered an order holding that 'her failure to appear and prosecute her appeal is tantamount to a withdrawal of said appeal' and that 'the appeal is considered with-drawn, the judgment of the Municipal Court is deemed revived and let the record of the case be remanded to the Municipal Court in accordance with section 9, Rule 40 of the Rules of Court, for the en-forcement of the judgment rendered by it in the case.' On 24 January 1949 the attorney for the defendant filed a motion praying that the proceedings be suspended until after the provisions of section 17, Rule 3, shall have been complied with, in view of the fact that the defendant had died on 9 January 1949, and explaining that his (attorney's) failure to appear at the presumption of the trial on 21 Jan-uary was due to the fact that there was a proposal for an amicable settlement and that not having heard from the defendant despite his letter to her sent on the 15th, he thought that the case had been settled amicably. On 29 January 1949 both motions for dismissal of the case filed on behalf of the plaintiffs and for suspension of the proceedings filed in behalf of the de-fendant were acted upon, the Court inviting attention to its order of 21 January 1949, which, according to it, dispose of the two motions, and further holding that the case was 'within the jurisdiction of the Muni-cipal Court for the execution of the judg-ment rendered by it in this case.' On 18 May 1949, acting upon a motion filed by the plaintiffs, the court authorized the attorneys for the plaintiffs to withdraw the sum of P176 in cash for rentals deposit-ed and of P347.50 filed as supersedeas bond, and further stated that 'this withdrawal is authorized in accordance with the judgment rendered in this case on 21 January 1949.' On 21 June 1949 attorney for the defendant moved for reconsideration of the order of 18 May 1949, on the ground that it was contrary to law and entered without jurisdic-tion. This motion was denied. A notice of appeal, an appeal bond and a record on appeal were filed. The appeal was certified to this Court because only questions of law are raised and involved.

"Section 9, Rule 40, provides: 'A per-fected appeal shall operate to vacate the judgment of the municipal court and the action when duly entered in the Court t of First Instance shall stand for trial de novo upon its merits in accordance with the regu-lar procedure in that Court, as though the same had never been tried before and had been originally there commenced. If the appeal is withdrawn, the judgment shall be deemed revived and shall forthwith be reman-ded to the ... municipal court for execution.' The defendant filed her answer within the time provided or in section 1, Rule 9, so she could not e deemed and declared in default (section 3, Rule 7). Even if she had failed to file her answer within the time required and were declared in de-fault, the plaintiffs were bound to present their evidence upon which judgment could be rendered. In accordance with the above quoted provisions of section 9, Rule 40, the party who could withdraw the appeal was the appellant, because such withdrawal would revive the judgment against her rendered by the municipal court. Obviously, the appel-lees for whom judgment was rendered could not ask for the withdrawal of the appeal. They would not ask for the dismissal of the case because the judgment secured by them would not be revived thereby and they would be left without judgment which was vacated upon perfection of the appeal.

"It is contended that section 9, Rule 40, is not applicable to appeals in detainer cases because the appeal does not vacate the judgment but suspends only, as may be inferred from the authority of the court to which the case

has been appealed to order execution of the judgment during the pendency of the appeal upon failure of the appellant to pay to the prevailing party or to deposit in court the stipulated rentals or the reasonable compensation, for the preceding month on or before the tenth day of each month, for the use or occupation of the premises, as found by the judgment of the municipal or justice of the peace court. This authority to direct Execution expressly provided forth section 8, Rule 72, in no way alters the provisions of section 9, Rule 40, on the effect of an appeal upon a judgment rendered by a municipal or justice of the peace court. And proof of this is the provision in the same section that 'such execution shall not be a bar to the appeal taking its course until the final disposition thereof on its merits.' When the de-fendant or her attorney failed to appear at the resumption of the trial on 21 January 1949, the court could not dismiss the appeal because it was not authorized to do so, but was in duty bound to hear the evidence of the plaintiffs and render judgment thereon unless for good reasons it deemed it justified to postpone the hearing of the case. Nor could it dismiss the case and grant the remedy prayed for, such the payment of rentals, even if the defendant had vacated already the premises, with a finding that such rental were really due and unpaid, for a dismissal of the case, if granted would leave the prevailing ties in the municipal court bereft of or without a judgment. The failure of the de-fendant or her attorney to appear at the re-sumption of the trial of the case on 21 January 1949 could not be deemed a withdrawal of her appeal. And as there are no findings of facts upon which a judgment may be based and rendered, the order of 21 January 1949 is not and cannot be deemed a judgment of the case on the merits. (section 12, Article VIII, of the Constitution).

"As to the substitution of the defendant, her attorney should prove the fact of her death and the court shall order, upon proper notice, the legal representative of the deceased to appear for her within 30 days or such time as may be granted, as provided for in section 17, Rule 3. The court could not order the legal representative of the deceased to appear for her, because it considered the order of 21 January 1949 as judgment entered in the case and notice of the defendant's death was given it three days later or on 24 January 1949.

"The trial court seems to be of the belief and opinion that the order of 21 January 1949 is a judgment, where it held that failure of the defendant or her attorney to appear at the resumption of the hearing of the case on that date was tantamount to a withdrawal of the appeal, that the judgment of the Municipal Court was revived, and that for that reason it directed the record of the case to be remanded to the municipal court for execution. For the reasons above set forth this is an error, because as the appellant did not withdraw the appeal there was no withdrawal thereof. On the other already, as already stated, the appellees could not ask for the withdrawal of the appeal because it was not their appeal and would not ask for the dismissal of the case because, if granted, they would have been left without a judgment.

"The orders of 29 January and 18 May 1949, being predicated upon an erroneous opinion that the order of 21 January 1949 is a judgment, which is not and is a nullity, are set aside and the case remanded to the court below for further proceedings in accordance with law, without costs." (92 Phil. 191-195) [Underlining supplied]

It is my considered opinion that it is this decision in *Evangelista v. Soriano* that should bind Us as a precedent in the case now before Us, rather than the cases cited by the majority. The facts of the *Evangelista* case are the ones that appear to me to be almost parallel to the one at bar. Both are actions of unlawful detainer; in both cases, there were judgments of the inferior courts adverse to the defendants-tenants or lessees; in both of them, there were appeals; in both of them there was no withdrawal of the appeal; and in both instances; the appeals were dismissed by the court without any motion of the plaintiffs and appellees.[8] Under these circumstances, I cannot find any reason why Our ruling now should be different. Since in the *Evangelista* case, this Court held that judgment of inferior courts even in ejectment cases are not vacated for purposes of the appeal therefrom to the court of first instance, which is exactly the practice now going on in all our courts of first instance, why should this Court prefer to follow, in the present case, and further sanction, by reiteration, the patently incorrect view expressed in the case of *Acierto v. Laperal*? Inasmuch as in the *Evangelista* case, this Court ruled that the failure of the

defendant to appear at the trial, repeatedly, at that, did not constitute default, much less a withdrawal of the appeal, why are We going to insist now, in this case before Us, that the respondent has failed to prosecute his appeal in the court of first instance, just because neither he nor the petitioners had moved for a hearing of the case in said court, although respondent had been religiously complying with the requirements of filing a supersedeas bond and paying the current rentals or rental value of the property in question which, incidentally, the City Court of Manila increased to P600.00 a month from the P200.00 fixed in the contract of lease?

Coming now to the reasons of public policy advanced by the majority, I happen, again to have a different view. As I have stated at the very outset of this opinion, fully agree that there should be a more speedy disposition of appeals of ejectment cases and, for that matter, of all cases in this Court, so as not to prejudice the numerous litigants waiting for our decision in their respective cases which might be more important, but I am unable to give my conformity to the proposition that, assuming that neither appellant nor appellee takes a move to advance the progress of an ejectment case appealed to the court of first instance from, an inferior court by the defendant, We have the discretion to choose whether to dismiss the complaint or to dismiss the appeal at, what is more, that, as a matter of public policy, the better choice is the latter. I am thoroughly convinced We have no such choice, for it is clear to me that in such a case, the only course of action We can take is plainly set out and fixed in the laws both procedural (Rules of Court) and so procedural (the pertinent provisions of the Civil Code), namely, to dismiss the complaint of the plaintiff. Again, I humbly and respectfully submit my reasons for this conclusion.

I believe I can begin by stating that nowhere is there in the Rules of Court any provision expressly and directly authorizing the dismissal of an appeal from an inferior court to the Court of First Instance for the failure of the appellant to prosecute the same. This paucity is in contrast to the express provision of Section 1(c) of Rule 50 governing appeals from the Court of First Instance to the Court of Appeals which says that an appeal "may be dismissed by the Court of Appeals, on its own motion or on that of the appellee, on the following ground(s) ... (c) Failure of the appellant to prosecute his appeal under Sec. 3 of Rule 46." And Sec. 3 of Rule 46 provides that should the Clerk of Court fail to transmit the record on appeal to the Court of Appeals within thirty (30) days from its approval, the appellee may move the Court of Appeals "to declare the appeal abandoned for failure to prosecute."

It may be pointed out, in answer to my contention, that under revised version of Section 9 of Rule 40 in the 1964 Rules of Court, which reads thus:

"Sec. 9. Effect of Appeals.- A perfected appeal shall operate to vacate the judgment of the justice of the peace or the municipal court, and the action when duly docketed in the Court of First Instance shall stand for the trial de novo upon its Merits in accordance with the regular procedure in that court, as though the same had never been tried before and had been originally there commenced. If the appeal is withdrawn, or dismissed for failure to prosecute, the judgment shall be deemed revived and shall forth-with be remanded to the justice of the peace or municipal court for execution." [Underscoring Mine]

mention is now made of the appeal from an inferior court to the Court of First Instance being "dismissed for failure to prosecute", unlike in the corresponding provision of the Rules of 1940. While the majority opinion does not refer at all to this quite relevant innovation in the rule under scrutiny, I will take it that the same had been considered by my able colleagues. Still, I am at a loss as to how this amendment can support their conclusion.

It must be remembered that the appeal, here in question, from the City Court to the Court of First Instance of Manila was perfected sometime between May 28, 1963, the date of the judgment of the inferior court, and June 24, 1963, when the clerk of the Court of First Instance notified the parties that the appeal had already been entered in his docket,[9] that is, more than six months before the Revised Rules of Court went into effect on January 1, 1964. To be more accurate, therefore, what was actually pending at the time the new rules went in

effect was not the process of appeal of respondent but the case itself of ejectment already docketed in the court of first instance. Such being the situation, it is to me extremely doubtful if the provision of Section 9, Rule 40 regarding failure to prosecute an appeal can be invoked against respondent.

Besides, by express provision of Rule 144 of the current Rules, these rules shall govern proceedings in cases pending on January 1, 1964, "except to the extent that in the opinion of the court their application would not be feasible or would work injustice in which event the former procedure shall apply." I am not persuaded that the order of dismissal of Judge Solidum of October 20, 1964, herein in question, would not work injustice to the appellee, who, for all we know did not even have any inkling at that time, like many lawyers and judges, of the change in the rule, hence my reluctance in applying the revised version, above-quoted, of section 9, Rule 40 to this case.

Furthermore, I consider the reference in sec. 9 of Rule 40 to the dismissal of an appeal from an inferior court to the court of first instance for failure of the appellant to prosecute the same as a dangling provision which by itself alone cannot serve, as basis for such a dismissal and, consequently, may be considered as non-existent. Notice that the provision says, "if the appeal is dismissed for failure to prosecute", thereby implying necessarily that there is another provision authorizing such a dismissal, but where is that provision? The answer is, there is none; albeit, by contrast, as I have already stated, there is one such rule for appeals from the Court of First Instance to the Court of Appeals or the Supreme Court. On the other hand, assuming for the sake of argument, that such a provision should not be considered as a dangling one, and we have to give it some significance in obedience to the rule of statutory construction that all parts of a statute should be given effect, or that the rule in the courts of first instance should be followed by analogy, the inevitable result would be that said phrase "failure to prosecute" should be construed as conveying the significance of the same phrase it is used in the above-mentioned section 1 (c) of Rule 50. Under said provision, as already demonstrated, what is considered failure of the appellant to prosecute his appeal is none other than his failure to urge the clerk of court of the court of first instance to transmit the record on appeal within the period referred to in sec. 3 of Rule 46, and because of which, said transmittal is delayed. In other words, there being a provision section 5 of Rule 40, requiring the municipal judge concerned to transmit to the clerk of court of first instance, "all the papers, process and bond in the appealed case within five (5) days after the perfection of the appeal, "failure to prosecute" an appeal to the court of first instance should be understood as referring only and only to the failure of the appellant to see to it that the said "papers, process and bond", are transmitted within the required period of five (5) days and the said transmittal is, in fact, delayed. There is no such failure nor delay in the case now at bar.

In a way, this innovation in sec. 9 of Rule 40 fills a void that existed under the old Rules. It will be noted that, as shown above, upon the perfection of the appeal, by the seasonable filing by the appellant in the inferior court of the notice of appeal, appeal bond and certificate of deposit of the docket fees in the court of first instance, the judgment of the inferior court is automatically vacated as if everything that happened therein did not exist. On the other hand, it is only upon the entry of the appeal in the docket in the court of first instance that the latter court may assume jurisdiction over the case as if it were originally filed therewith and all the pleadings filed in the inferior court are considered as automatically reproduced therein. In between such perfection of the appeal, on the one hand, and the entry thereof in the docket of the court of first instance, on the other, there would seem to be an empty zone where there are neither pleadings nor judgment, hence, the duty imposed upon appellant to ascertain that the corresponding records are immediately or speedily transmitted to the appellate court. Accordingly, it may be said that as the rules now appear, the duty to press action in a case in an inferior court while the same is pending there devolves upon the plaintiff, under pain of his being non-suited. (sec. 11, Rule 5). After an appeal is perfected, assuming one is made, but before the entry of such appeal in the court of first instance, such duty devolves upon the appellant, whether he be plaintiff or defendant. After the appeal is entered in the docket in the

court of first instance, such duty would already devolve upon the plaintiff again because the procedure in the court of first instance is the same as if the complaint had been originally filed therewith (sec. 3, Rule 17) In other words, as already intimated earlier in this opinion, after the appeal is timely docketed in the court of first instance, there is no more occasion to speak of failure to prosecute the appeal because the same had already been completely, prosecuted and the case takes already the nature of a new one to be governed exclusively by the rules for the court of first instance, as if the same had never been originally there commenced and as though it had never been tried before, and what should be inquired into already is whether or not the plaintiff is duly prosecuting his action in the court of first instance, for which, it is undeniable that there are definite governing rules.

As to the desire of the majority that appeals be speedily disposed of, I wholeheartedly join my brethren, but I fail to see any logic in their holding that "considerations of public policy warrant that greater diligence be demanded from appellants in forcible entry and detainer cases to expedite the disposal thereof."

As I understand it, the principle behind the rules ordaining the dismissal of any case for failure to prosecute is that if the party who would be prejudiced by the inaction of the court is not interested in hastening the progress of his suit, the court should declare that it has less interest in entertaining the same by terminating it forthwith. This is true as to actions in inferior courts as well as to those in superior courts. This principle is also true as to appeals from one superior court to another superior court, which appeal is by review, because if the party who wants a review of the lower court's action does not press for such review, why should the court entertain the request for review any longer? Besides, in such appeal, the appellant is prejudiced by the delay because, as the judgment stands until reversed, there is that sword of Damocles over him, and there are even instances when it may be executed. This is not true with appeals from inferior courts, where the judgments appealed from are vacated upon the perfection of the appeal and the plaintiff has to prove his case all over again in the appellate court "as though it had been originally there commenced." As regards ejectment cases, in particular, the appellant is not prejudiced but, on the contrary, favored by the pendency of the appeal, since he can continue in possession of the property in question, even if he has to be up-to-date in the payments of rentals therefor.

My point, therefore, is that it is precisely in ejectment cases that the one who stands to be juridically and materially prejudiced by the prolongation of the appeal is the plaintiff who is continuously being deprived of possession of the property in question and not the defendant, who is allegedly in illegal occupation thereof. Under the above principle that he who is prejudiced by inaction in a case is the one on whom the rules impose the obligation to see to it that the suit progresses speedily to its termination, the inescapable conclusion is that in an ejectment case, it is the plaintiff who must be diligent in the prosecution of the action. I cannot imagine a case being dismissed because the defendant has failed to ask for a hearing thereof. Indeed, from the very nature of things, a defendant cannot be expected to hurry a case because no sanction can be applied to him, if he should not cooperate; he cannot be declared in default; he cannot be adjudged liable; not even a summary judgment or a judgment on the pleadings may be rendered against him, on account of his inaction. Why should his situation change in an ejectment case already appealed to the court of first instance wherein the action is deemed to be originally commenced therein without regard to the evidence and the judgment of the inferior court," as though the same had never been tried before", and where, consequently, the plaintiff has to prove his case in order to win?

I also believe that my position in this case, albeit lonesome because the majority are inclined otherwise, is in accordance with the spirit and objective of Art. 1674 of the Civil Code. This article provides:

"ART. 1674. In ejectment cases where an appeal is taken, the remedy granted in article 539,[10] second paragraph, shall also apply, if the higher court is satisfied that the lessee's appeal is frivolous or dilatory, or that

the lessor's appeal is prima facie meritorious. The period of ten days referred to in said article shall be counted from the time the appeal is perfected."

"A possessor deprived of his possession through forcible entry may within ten days from the filing of the complaint present a motion to secure from the competent court, in the action for forcible entry, a writ of preliminary mandatory injunction to restore him in his possession. The court shall decide the motion within thirty(30) days from the filing thereof."

By this provision, the plaintiff in an ejectment case is given the right not only to secure his rentals by the application of sec. 8, Rule 70, containing the conditions sine qua non for the non-execution of the judgment pending the appeal, but also the right to immediately take back the possession of his property, without regard to said section 8 of Rule 70, provided that his motion to such effect is filed within ten (10) days from the docketing of the appeal in the court of first instance. (*Sycip v. Judge Soriano, et al.*, [CA] 52 O. G., 1474). Should plaintiff not avail of this right, he must be deemed to have preferred that the possession of the property involved remain with the defendant until after the trial on the merits. That is exactly the situation in which petitioners were at the time Judge Solidum issued the questioned dismissal order. For this Court to inject into such presumption of the law and situation of petitioners the idea of the respondent being obligated in these premises to have moved so that this case could be terminated earlier and thereby probably lose the possession which he had is absurd. In a sense, for this Court to do such a thing is to lay it open to the charge of being more popish than the Pope, to use a trite expression.

I have no quarrel with the proposition that actions for recovery of possession of lands or buildings, denominated as actions of forcible entry and unlawful detainer, have been made purposely summary in nature so that there may be a peaceful, speedy and expeditious means of preventing an alleged illegal possessor of property from unjustly continuing his possession for a long time, thereby insuring the maintenance of peace and order in the community, as, otherwise, the party illegally deprived of possession might feel the despair of long waiting and decide, as a measure of self-protection, to take the law in his hands and seize the same by force and violence. I agree that all our decisions should follow this line and I will never be the last member of this Court to condemn acts of the defendant amounting directly or indirectly to dilatory tactics. What seems to me, however, to be a reversal of the natural order of things is the thinking of the majority that the defendant should go out of his way and be the one to urge the court to earlier terminate the case which might result in his ouster from the premises he is actually possessing. To expect a person to hasten his own possible defeat is to demand the unreasonable; it can even be oppressive. Worse, by so doing, we relieve the party who should be most interested in the early recovery of his property of the duty to be diligent and active in the prosecution of his suit.

Incidentally, before I close and in the interest of accuracy, I might just as well invite attention to the fact that respondent cannot be charged with inaction from June 28, 1963, when he filed his answer. It should be recalled that the answer contained a counterclaim and that on July 2, 1963 plaintiff (then) Ozaeta filed a motion to dismiss said counterclaim. It was only on August 29, 1963 that Judge Solidum denied this motion. Thereafter, plaintiff had still to answer the counterclaim, and it was only after the filing of said answer that the case stood ready for trial. By reasonable calculation, this must have been around the middle of September, 1963 already, so that when Judge Solidum ordered the dismissal of the appeal on October 20, 1964, scarcely one year and a few days only of inaction had passed. With this clarification, it is not, in my humble opinion, safe to hold that the cases cited by the majority are good precedents for the case at bar, because in (1) *Chuan v. de la Fuente*, 90 Phil., 813, what happened was this: "Al siguiente dia los recurridos presentaron su contestacion. Desde el 26 de febrero de 1949 estaba disponible la causa para vista; pero el recurrente dejo transcurrir un año, cuatro meses, y cuatro dias sin gestionar la vista correspondiente, y se trataba, no de una causa ordinaria, sino de un remedio especial urgente" so "esta tiempo transcurrido es un tiempo irrazonable de falta de gestion por parte del recurrente para que el

Juz-gado motu proprio quede justificado en sobreseer la deman-da, x x x" (at p. 815); in (2) Villanueva v. Secretary of Public Works, 16 SCRA-422, an action for injunction, there was also a preliminary injunction issued in favor of plaintiff and no move was made by said plaintiff to have a hearing from June 11, 1960, when issues were joined, to May 10, 1962 or almost two years, indeed an unreasonable inaction, considering there was a preliminary injunction; and in (3) Insurance Company of North America v. Republic, 21 SCRA-887, the inaction was for one year, three months and twenty-one days. In all said cases, the period was considerably longer and there were preliminary injunctions in two of them. In language which seems to be echoed in the decision of Justice Esguerra We are now reviewing, Messrs Justices Tuason and Alex Reyes, expressed their dissent from the ruling in Chuan v. de la Fuente, supra thus:

"Neither law nor the Rules of Court provides that the plaintiff shall move for the trial of his case, and much less do they say that the court may dismiss an action when the plaintiff neglects to make such motion. In reality the practice has been and is for the courts to prepare their calen-dars of trial in the manner suitable to their convenience with or without promp-tings by the parties. Indeed where the parties do request for inclusion of their cases in the calendar, they more often than not meet with deaf ears or are told to wait, generally for the reason that there are older or more ur-gent cases.

"In courts burdened with clogged dockets, where litigants who are really anxious to have their cases terminated have to put up with exasperating delays notwithstanding repeated pleas for in-clusion of such cases in the calendar, are the parties to be blamed and punish-ed for not doing what the plaintiff at bar is said to have neglected?

"Section 3 of Rule 30 cited in the majority decision should be construed to mean, in the light of the circum-stances above stated, unjustified fail-ure to be present when the case is call-ed for trial, or to take such steps as may have been ordered by the court or required by procedure and without which the courts could not proceed with the hearing to its final termination.

"That at least is the norm by which legal practitioners have been guided; and if section 3 of Rule 30 means as this Court holds the attorneys' wrong notion should at least be first, corrected and they should be warned that penalty of dismissal or non-suit, it or after each indefinite is decreed, to call the attention of the court to the pendency of their cases lest these be forgotten.

"The opinion of this Court that the present action was unmeritorious and that the delay suited the plaintiff's interest, has no place in the decision. But if the Court's belief be well found-ed and material, this circumstance should have placed on the defendant greater responsibility than on the plaintiff to see that the case was disposed of promptly. In that case the defendant would be as deserving, if not more, as the plaintiff of condemnation for lack of diligence." [Underscoring Mine]

Taking all other relevant circumstances I have discussed above into account and judged by the above opinion, even if only dissenting, of two of the most respected former members of this Court, I am constrained to regard the one year inaction of respondent herein, if he could be blamed for it, as not too long as to have given Judge Solidum sufficient basis for declaring respondent's appeal abandoned. Ordinary considerations of equity alone should have enjoined the court to instruct the clerk of court to put the case in the next calendar, if it could not slap the dismissal on the plaintiff (then) for not taking enough interest in prosecuting his suit.

In conclusion, I humbly submit that the holding of the majority that in ejectment cases, the rule as regards vacating of judgments and trial de novo in appeals from inferior courts to the courts of first instance does not apply to ejectment cases is based on previous decisions of this Court that are either not controlling herein or are "clearly erroneous", to borrow the language of Mr. Justice J. B.L. Reyes in Smith v. Kapunan, supra; that the duty to have the action speedily determined does not devolve upon the defendant-appellant in such appeals, after the same have been completed upon entry thereof in the docket of the court of first instance, because in such

circumstance, it is the plaintiff-appellee who must be called upon to prosecute the case in accordance with section 3 of Rule 17, the rule for the courts of first instance, since the case already stands therein "for trial de novo upon its merits in accordance with the regular procedure in that court, as though the same had never been tried before and had been originally there commenced."; that should there be an unreasonably long inaction of both parties and the court after the completion of such an appeal, the complaint of the plaintiff, not the appeal of the defendant should be the one dismissed; that under Article 1674 of the Civil Code, if the plaintiff-appellee does not seek a preliminary mandatory injunction to recover possession of his property because of the dilatory or unmeritorious appeal of defendant-appellant, it is not for the court to be more popish than the Pope and punish the defendant-appellant who religiously keeps on paying the rentals fixed by the court, rather, it should consider the plaintiff-appellee as having preferred to allow the defendant-appellant to continue in possession until the termination of the case on the merits; that the rule on immediate execution under sec. 8 of Rule 70, relative to ejectment cases, is independent of and has nothing to do with the rule of trial de novo in appeals from inferior courts to the court of first instance; that the inaction in dispute in the pre-sent case is, to be exact, only of barely one year and not more than one year and three months, as the majority seems to believe, and which has been found unreasonably long in the cases of Chuan, Evangelista & Insurance Company of North America, cited by the majority, (because there were inactions in all three of them of more than one year and three months, with the first two named cases having preliminary injunctions against defendant, as special circumstance demanding urgency,) hence said cases are not controlling herein; that, viewed in proper light, the above-quoted remarks of Mr. Justice Tuason in the Chuan case may well guide Us in determining whether or not, in this case, the Court of First Instance of Manila acted within sound discretion or within the law in issuing the order of dismissal herein in question; consequently, We should hold that Judge Solidum was unduly strict, under the circumstances, in dismissing outright the appeal of respondent without giving him an opportunity to show cause why he should not be the one adjudged as lacking in diligence; that, by and large, even if there should be any doubt, which I do not entertain, as to the proper interpretation of the applicable provision of the Rules of Court, sec. 9, Rule 40, to this case, I feel very strongly that the equities of this case are in favor of the respondent, for the reasons. I have extensively discussed herein; and that the requirement of public policy that cases should be disposed of more speedily may better be enforced by dismissing the complaint rather than the appeal of the defendant, since it is fundamental that Our idea of public policy cannot supplant that announced already in the existing provisions of law and the Rules. Regarding the desire of the majority that a new policy be enunciated demanding more diligence from defendants-appellants in forcible entry and detainer cases so that their appeals may be more expeditiously disposed of, I hold that the most We can do is to make it plain to them that We are not going to tolerate any dilatory tactics on their part, even as We continue to hold plaintiffs-appellees to their natural role of being the ones responsible for the continuous progress of their suits, under pain of the same being dismissed if they are not prosecuted within a reasonable time.

I have no alternative but to vote to affirm the decision of the Court of Appeals, specially because it does not order the dismissal of the complaint but only requires the trial court to try the case on the merits, a solution not as hard on the petitioners as the dismissal of their complaint, which could properly be done, with the amendment that the trial court be instructed to give this case the preference that its nature and present status deserve, as against those of the other cases pending before said court, without costs.

[1] The rental stipulated in the contract of lease was P200.00 a month. (Record on Appeal, p. 3)

[2] The original plaintiff in this case was Roman Ozaeta, as executor of the estate of Don Caslos Palanca. The present plaintiff-petitioners are the heirs of said Don Carlos Palanca who were substituted in place of Ozaeta while this case was pending in the Court of Appeals.

[3] Under the Rubs of Court, both of 1940 and 1964, dis-missals by non-suit are with prejudice unless other-wise ordered by the court.

[4] In Quiogue v. Buenaventura, 64 Phil. 718, Chief Justice Avanceña ruled in a unanimous decision that if in an appeal from an inferior court to the Court of First Instance, the case is dismissed by the latter court for failure to prosecute, the judgment of the inferior court cannot be executed because it has been set aside by the perfection of the appeal.

[5] Section 8 of Rule 72 of the Rules of 1940 (which is the same as Section 8 of Rule 70 of the 1964 Rules, with some minor changes) provided:

SEC. 8 Immediate execution of judgment. How to stay same.- If judgment is rendered against the defendant, execution shall issue immediately, unless an appeal has been perfected and the de-fendant to stay execution files a sufficient bond approved by the justice of the peace or muni-cipal court and executed to the plaintiff to enter the action in the Court of First Instance, and to pay the rents, damages, and costs down to the time of the final judgment in the action, and unless, during the pendency of the appeal, he pays to the plaintiff or to the Court of First Instance the 'amount of rent due from time to time under the contract, if any, as found by the judgment of the justice of the peace or municipal court to exist, or, in the absence of a contract, he pays to the plaintiff or into the court, on or before the tenth day of each calendar month, the reasonable value of the use and occupation of the premises for the pre-ceding month at the rate determined by the judgment. All moneys so paid to the Court of First Instance shall be deposited in the provincial treasury, or in the City of Manila in the Insular Treasury, and shall be held there until the final disposition of the appeal. Should the defendant fail to make the payments above prescribed the pendency of the appeal, the Court of First In-stance, upon motion of the plaintiff of which the defendant shall have notice and upon proof of such failure shall order the execution of the judgment appealed from, but such execution shall not be a bar to the appeal taking its course until the final disposition thereof on its merits. If the case is tried on its merits in the Court of First Instance, any money paid into court by the defendant for the purposes of stay of execution shall be disposed of in accordance with the provisions of the judgment of the Court of First Instance, and in any case wherein it appears that the defendant has been de-prived of the lawful possession of land or building pending the appeal by virtue of the execution of the judgment of the justice of the peace or municipal court, damages for such deprivation of possession may be allowed the defendant in the judgment of the Court of First Instance disposing of the appeal. The bond above referred to shall be trans-mitted by the justice of the peace or municipal court, with the other papers, to the clerk of Court of First Instance to which the action is appealed.

[6] Professor Jose Feria has the following interpretation of the decision in Torres v. Ocampo:

"This means that the judgment is set aside. The only exception is in forcible entry and detainer cases, in which the judgment of the inferior court is only suspended until the rendered and supersedes the former. It is suspended and not vacated because it may be executed upon failure of the defendant?appellant to put up a supersedeas bond to cover the rents or damages already due and to pay or deposit the rents or damages to become due, as determined in the judgment of the inferior court. (Sec. 8 of Rule 70. See the case of Torres v. Ocampo, et al., Phil. 36)" [Feria, Civil Procedure 4 stated, 1967 ed. p. 826]

[7] In his brief, respondent already invited our attention to the fact in the case of Roxas et. al. v. Juan Ismael & Co., Inc., 97 Phil. 594, the trial de novo rule was applied in a case of illegal detainer.

[8] In the Evangelista case, the plaintiff asked for the dismissal of the case, not the appeal.

[9] The record on appeal fails to show the exact date.

[10] Art. 539 of the Civil Code provides:

"ART. 539. Every possessor has a right to be respected in his possession; and should he be disturbed therein he shall be protected in or restored to said possession by the means established by the laws and the Rules of Court.

"A possessor deprived of his possession through forcible entry may within ten days from the filing of the complaint present a motion to secure from the competent court, in the action for forcible entry, a writ of preliminary mandatory injunction to restore him in his possession.

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