

**ANTONIO LIM TANHU, DY OCHAY, ALFONSO LEONARDO NG SUA
AND CO OYO, PETITIONERS, VS. HON. JOSE R. RAMOLETE, AS
PRESIDING JUDGE, BRANCH III, CFI, CEBU, AND TAN PUT,
RESPONDENTS.**

G.R. No. L-40098. August 29, 1975

Ponente: BARREDO, J.

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BARREDO, J.:

Petition for (1) certiorari to annul and set aside certain actuaciones of respondent Court of First Instance of Cebu Branch III in its Civil Case No. 12328, an action for accounting of properties and money totalling allegedly about P15 million pesos filed with a common cause of action against six defendants, in which after declaring four of the said defendants herein petitioners, in default and while the trial as against the two defendants not declared in default was in progress, said court granted plaintiff's motion to dismiss the case in so far as the non-defaulted defendants were concerned and thereafter proceeded to hear ex-parte the rest of the plaintiffs evidence and subsequently rendered judgment by default against the defaulted defendants with the particularities that notice of the motion to dismiss was not duly served on any of the defendants, who had alleged a compulsory counterclaim against plaintiff in their joint answer, and the judgment so rendered granted reliefs not prayed for in the complaint, and (2) prohibition to enjoin further proceedings relative to the motion for immediate execution of the said judgment.

Originally, this litigation was a complaint filed on February 9, 1971 by respondent Tan Put only against the spouses-petitioners Antonio Lim Tanhu and Dy Ochay. Subsequently, in an amended complaint dated September 26, 1972, their son Lim Teck Chuan and the other spouses-petitioners Alfonso Leonardo Ng Sua and Co Oyo and their son Eng Chong Leonardo were included as defendants. In said amended complaint, respondent Tan alleged that she "is the widow of Tee Hoon Lim Po Chuan, who was a partner in the commercial partnership, Glory Commercial Company ... with Antonio Lim Tanhu and Alfonso Ng Sua"; that "defendant Antonio Lim Tanhu, Alfonso Leonardo Ng Sua, Lim Teck Chuan, and Eng Chong Leonardo, through fraud and machination, took actual and active management of the partnership and although Tee Hoon Lim Po Chuan was the manager of Glory Commercial Company, defendants managed to use the funds of the partnership to purchase lands and buildings in the cities of Cebu, Lapulapu, Mandaue, and the municipalities of Talisay and Minglanilla, some of which were hidden, but the description of those already discovered were as follows: (list of properties) x x x;" and that:

"13. (A)fter the death of Tee Hoon Lim Po Chuan; the defendants, without liquidation, continued the business of Glory Commercial Company, by purportedly organizing a corporation known as the Glory Commercial Company, Incorporated, with paid up capital in the sum of P125,000.00, which money and other assets of the said Glory Commercial Company, Incorporated are actually the assets of the defunct Glory Commercial Company partnership, of which the plaintiff has a share equivalent to one third (1/3) thereof:

14. (P)laintiff, on several occasions after the death of her husband, has asked defendants of the above-mentioned properties and for the liquidation of the business of the defunct partnership, including

investments on real estate in Hong Kong, but defendants kept on promising to liquidate said properties and just told plaintiff to wait;

15. (S)ometime in the month of November, 1967, defendants, particularly Antonio Lim Tanhu, by means of fraud, deceit and misrepresentations did then and there, induce and convince the plaintiff to execute a quitclaim of all her rights and interests, in the assets of the partnership of Glory Commercial Company, which quitclaim is null and void, executed through fraud and without any legal effect. The original of said quitclaim is in the possession of the adverse party, defendant Antonio Lim Tanhu;

"16. (A)s a matter of fact, after the execution of said quitclaim, defendant Antonio Lim Tanhu offered to pay the plaintiff the amount of P65,000.00 within a period of one(1) month, for which plaintiff was made to sign a receipt for the amount of P65,000.00 although no such amount was given, and plaintiff was not even given a copy of said document;

17. (T)hereafter, in the year 1968-69, the defendants who had earlier promised to liquidate the aforesaid properties and assets in favor, among others of plaintiff and until the middle of the year 1970 when the plaintiff formally demanded from the defendants the accounting of real and personal properties of the Glory Commercial Company, defendants refused and stated that they would not give the share of the plaintiff." (Pp. 36-37, Record.)

She prayed as follows:

"WHEREFORE, it is most respectfully prayed that judgment be rendered:

a) Ordering the defendants to render an accounting of the real and personal properties of the Glory Commercial Company including those registered in the names of the defendants and other persons, which properties are located in the Philippines and in Hong Kong;

b) Ordering the defendants to deliver to the plaintiff after accounting, one third (1/3) of the total value of all the properties which is approximately P5,000,000.00 representing the just share of the plaintiff;

c) Ordering the defendants to pay the attorney of the plaintiff the sum of Two Hundred Fifty Thousand Pesos (P250,000.00) by way of attorney's fees and damages in the sum of One Million Pesos (P1,000,000.00).

"This Honorable Court is prayed for other remedies and reliefs consistent with law and equity and order the defendants to pay the costs." (Page 38, Record.)

The admission of said amended complaint was opposed by defendants upon the ground that there were material modifications of the causes of action previously alleged, but respondent judge nevertheless allowed the amendment reasoning that:

"The present action is for accounting of real and personal properties as well as for the recovery of the same with damages.

An objective consideration of pars. 13 and 15 of the amended complaint pointed out by the defendants to sustain their opposition will show that the allegations of facts therein are merely to amplify material averments constituting the cause of action in the original complaint. It likewise includes necessary and indispensable defendants without whom no final determination can be had in the action and in order that complete relief is to be accorded as between those already parties.

Considering that the amendments sought to be introduced do not change the main causes of action in the original complaint and the reliefs demanded and to allow amendments is the rule, and to refuse them the exception and in order and that the real question between the parties may be properly and justly threshed out in a single proceeding to avoid multiplicity of actions." (Page 40, Record.)

In a single answer with counterclaim, over the signature of their common counsel, defendants denied specifically not only the allegation that respondent Tan is the widow of Tee Hoon because, according to them, his legitimate wife was Ang Siok Tin, still living and with whom he had four (4) legitimate children, a twin born in 1942, and two others born in 1949 and 1965, all presently residing in Hongkong, but also all the allegations of fraud and conversion quoted above, the truth being, according to them, that proper liquidation had been regularly made of the business of the partnership and Tee Hoon used to receive his just share until his death, as a result of which the partnership was dissolved and what corresponded to him were all given to his wife and children. To quote the pertinent portions of said answer:

"AND BY WAY OF SPECIAL AND
AFFIRMATIVE DEFENSES,

defendants hereby incorporate all facts averred and alleged in the answer, and further most respectfully declare:

1. That in the event that plaintiff is filing the present complaint as an heir of Tee Hoon Lim Po Chuan, then, she has no legal capacity to sue as such, considering that the legitimate wife, namely: Ang Siok Tin, together with their children are still alive. Under Sec. 1, (d), Rule 16 of the Revised Rules of Court, lack of legal capacity to sue is one of the grounds for a motion to dismiss and so defendants prays that a preliminary hearing be conducted as provided for in Sec. 5, of the same rule;
2. That in the alternative case or event that plaintiff is filing the present case under Art. 144 of the Civil Code, then, her claim or demand has been paid, waived abandoned or otherwise extinguished as evidenced by the 'quitclaim' Annex 'A' hereof, the ground cited is another ground for a motion to dismiss (Sec. 1, (h), Rule 16) and hence defendants pray that a preliminary hearing be made in connection therewith pursuant to Section 5 of the aforementioned rule;
3. That Tee Hoon Lim Po Chuan was legally married to Ang Siok Tin and were blessed with the following children, to wit: Ching Siong Lim and Ching Hing Lim (twins) born on February 16, 1942; Lim Shing Ping born on March 3, 1942 and Lim Eng Lu born on June 25, 1965 and presently residing in Hongkong;
4. That even before the death of Tee Hoon Lim Po Chuan, the plaintiff was no longer his common-law wife and even though she was not entitled to anything left by Tee Hoon Lim Po Chuan, yet, out of the kindness and generosity on the part of the defendants, particularly Antonio Lim Tanhu, who, was inspiring to be monk and in fact he is now a monk, plaintiff was given a substantial amount evidenced by the 'quitclaim' (Annex 'A');
5. That the defendants have acquired properties out of their own personal fund and certainly not from the funds belonging to the partnership, just as Tee Hoon Lim Po Chuan had acquired properties out of his personal fund and which are now in the possession of the widow and neither the defendants nor the partnership have anything to do about said properties;
6. That it would have been impossible to buy properties from funds belonging to the partnership without the other partners knowing about it considering that the amount taken allegedly is quite big and with such big amount withdrawn the partnership would have been insolvent;
7. That the plaintiff and Tee Hoon Lim Po Chuan were not blessed with children who would have been lawfully entitled to succeed to the properties left by the latter together with the widow and legitimate children;
8. That despite the fact that plaintiff knew that she was no longer entitled to anything of the shares of the late Tee Hoon Lim Po Chuan, yet, this suit was filed against the defendant who have to interpose the following —

C O U N T E R C L A I M

- A. That the defendants hereby reproduced, by way of reference, all the allegations and foregoing averments as

part of his counterclaim;

B. That plaintiff knew and was aware that she was merely the common-law wife of Tee Hoon Lim Po Chuan and that the lawful and legal is still living, together with the legitimate children, and yet she deliberately suppressed this fact, thus showing her bad faith and is therefore liable for exemplary damages in an amount which the Honorable Court may determine in the exercise of its sound judicial discretion. In the event that plaintiff is married to Tee Hoon Lim Po Chuan, then, her marriage is bigamous and should suffer the consequences thereof;

"C. That plaintiff was aware and had knowledge about the 'quitclaim', even though she was not entitled to it, and yet she falsely claimed that defendants refused even to see her and for filing this unfounded, baseless, futile and puerile complaint, defendants suffered mental anguish and torture conservatively estimated to be not less than P3,000,000.00;

D. That in order to defend their rights in court, defendants were constrained to engage the services of the undersigned counsel, obligating themselves to pay P500,000.00 as attorney's fees;

E. That by way of litigation expenses during the time that this case will be before this Honorable Court and until the same will be finally terminated and adjudicated, defendants will have to spend at least P5,000.00," (Pp 44-47, Record.)

After unsuccessfully trying to show that this counterclaim is merely permissive and should be dismissed for non-payment of the corresponding filing fee, and after being overruled by the court, in due time, plaintiff answered the same, denying its material allegations.

On February 3, 1973, however, the date set for the pre-trial, both of the two defendants-spouses, the Lim Tanhus, and Ng Suas, did not appear, for which reason, upon motion of plaintiff dated February 16, 1973, in an order of March 12, 1973, they were all "declared in DEFAULT as of February 3, 1973 when they failed to appear at the pre-trial." They sought to have this order lifted thru a motion for reconsideration, but the effort failed when the court denied it. Thereafter, the trial started, but at the stage thereof where the first witness of the plaintiff by the name of Antonio Nuñez, who testified that he is her adopted son, was up for re-cross-examination, said plaintiff unexpectedly filed on October 19, 1974 the following simple and unreasoned

"MOTION TO DROP DEFENDANTS LIM TECK CHUAN AND ENG CHONG LEONARDO

"COMES now plaintiff, through her undersigned counsel, unto the Honorable Court most respectfully moves to drop from the complaint the defendants Lim Teck Chuan and Eng Chong Leonardo and to consider the case dismissed insofar as said defendants Lim Teck Chuan and Eng Chong Leonardo are concerned.

WHEREFORE, it is most respectfully prayed of the Honorable Court to drop from the complaint the defendants Lim Teck Chuan and Eng Chong Leonardo and to dismiss the case against them without pronouncement as to costs." (Page 50, Record.)

which set for hearing on October 21, 1974. According to petitioners, none of the defendants declared in default were notified of said motion, in violation of Section 9 of Rule 13, since they had asked for the lifting of the order of default, albeit unsuccessfully, and as regards the defendants not declared in default, the setting of the hearing of said motion on October 21, 1974 infringed the three-day requirement of Section 4 of Rule 15, inasmuch as Atty. Adelino Sitoy of Lim Teck Chuan was served with a copy of the motion personally only on October 19, 1974, while Atty. Benjamin Alcudia of Eng Chong Leonardo was served by registered mail sent only on the same date.

Evidently without even verifying the notices of service, just as simply as plaintiff had couched her motion, and also without any legal grounds stated, respondent court granted the prayer of the above motion thus:

"O R D E R

Acting on the motion of the plaintiff praying for the dismissal of the complaint as against defendants Lim Teck Chuan and Eng Chong Leonardo ?

The same is hereby GRANTED. The complaint as against defendant Lim Teck Chuan and Eng Chong Leonardo is hereby ordered DISMISSED without pronouncement as to costs."

Simultaneously, the following order was also issued: —

"Considering that defendants Antonio Lim Tanhu and his spouse Dy Ochay as well as defendants Alfonso Ng Sua and his spouse Co Oyo have been declared in default for failure to appear during the pre-trial and as to the other defendants the complaint had already been ordered dismissed as against them, ?

Let the hearing of the plaintiffs evidence ex-parte be set on November 20, 1974, at 8:30 A.M. before the Branch Clerk of Court who is deputized for the purpose, to swear in witnesses and to submit her report within ten (10) days thereafter. Notify the plaintiff.

SO ORDERED.

Cebu City, Philippines, October 21, 1974." (Pages 52, Record.)

But, in connection with this last order, the scheduled ex--parte reception of evidence did not take place on November 20, 1974, for on October 28, 1974, upon verbal motion of plaintiff, the court issued the following self-explanatory order:

"Acting favorably on the motion of the plaintiff dated October 18, 1974, the Court deputized the Branch Clerk of Court to receive the evidence of the plaintiff ex-parte to be made on November 20, 1974. However, on October 28, 1974, the plaintiff, together with her witnesses, appeared in court and asked, thru counsel, that she be allowed to present her evidence.

Considering the time and expenses incurred by the plaintiff in bringing her witnesses to the court, the Branch Clerk of Court is hereby authorized to receive immediately the evidence of the plaintiff ex-parte.

SO ORDERED.

Cebu City, Philippines, October 28, 1974." (Pages 53, Record.)

Upon learning of these orders, on October 23, 1973, the defendant Lim Teck Cheng, thru counsel, Atty. Sitoy, filed a motion for reconsideration thereof, and on November 1, 1974, defendant Eng Chong Leonardo, thru counsel Atty. Alcudia, filed also his own motion for reconsideration and clarification of the same orders. These motions were denied in an order dated December 6, 1974 but received by the movants only on December 23, 1974. Meanwhile, respondent court rendered the impugned decision on December 20, 1974. It does not appear when the parties were served copies of this decision.

Subsequently, on January 6, 1975, all the defendants, thru counsel, filed a motion to quash the order of October 28, 1974. Without waiting however for the resolution, thereof, on January 13, 1974, Lim Teck Chuan and Eng Chong Leonardo went to the Court of Appeals with a petition for certiorari seeking the annulment of the above-mentioned orders of October 21, 1974 and October 28, 1974 and decision of December 20, 1974. By resolution of January 24, 1975, the Court of Appeals dismissed said petition, holding that its filing was premature, considering that the motion to quash the order of October 28, 1974 was still unresolved by the trial court. This holding was reiterated in the subsequent resolution of February 5, 1975 denying the motion for reconsideration of the previous dismissal.

On the other hand, on January 20, 1975, the other defendants, petitioners herein, filed their notice of appeal, appeal bond and motion for extension to file their record on appeal, which was granted the extension to expire after fifteen (15) days from January 26 and 27, 1975, for defendants Lim Tanhu and Ng Suas, respectively. But on February 7, 1975, before the perfection of their appeal, petitioners filed the present petition with this Court. And with the evident intent to make their procedural position clear, counsel for defendants, Atty. Manuel Zosa, filed with respondent court a manifestation dated February 14, 1975, stating that "when the non-defaulted defendants Eng Chong Leonardo and Lim Teck Chuan filed their petition in the Court of Appeals, they in effect abandoned their motion to quash the order of October 28, 1974." and that similarly "when Antonio Lim Tanhu, Dy Ochay, Alfonso Leonardo Ng Sua and Co Oyo, filed their petition for certiorari and prohibition. . . in the Supreme Court, they likewise abandoned their motion to quash." This manifestation was acted upon by respondent court together with plaintiffs motion for execution pending appeal in its order of the same date February 14, 1975 thiswise:

"O R D E R

When these incidents, the motion to quash the order of October 28, 1974 and the motion for execution pending appeal were called for hearing today, counsel for the defendants-movants submitted their manifestation inviting the attention of this Court that by their filing for certiorari and prohibition with preliminary injunction in the Court of Appeals which was dismissed and later the defaulted defendants filed with the Supreme Court certiorari with prohibition they in effect abandoned their motion to quash.

IN VIEW HEREOF, the motion to quash is ordered ABANDONED. The resolution of the motion for execution pending appeal shall be resolved after the petition for certiorari and prohibition shall have been resolved by the Supreme Court.

SO ORDERED.

Cebu City, Philippines, February 14, 1975." (Pages 216, Record.)

Upon these premises, it is the position of petitioners that respondent court acted illegally, in violation of the rules or with grave abuse of discretion in acting on respondent's motion to dismiss of October 18, 1974 without previously ascertaining whether or not due notice thereof had been served on the adverse parties, as, in fact, no such notice was timely served on the non-defaulted defendants Lim Teck Chuan and Eng Chong Leonardo and no notice at all was ever sent to the other defendants, herein petitioners, and more so, in actually ordering the dismissal of the case by its order of October 21, 1974 and at the same time setting the case for further hearing as against the defaulted defendants, herein petitioners, actually hearing the same ex-parte and thereafter rendering the decision of December 20, 1974 granting respondent Tan even reliefs not prayed for in the complaint. According to petitioners, to begin with, there was a compulsory counterclaim in the common answer of the defendants the nature of which is such that it cannot be decided in an independent action and as to which the attention of respondent court was duly called in the motions for reconsideration. Besides, and more importantly, under Section 4 of Rule 18, respondent court had no authority to divide the case before it by dismissing the same as against the non-defaulted defendants and thereafter proceeding to hear it ex-parte and subsequently rendering judgment against the defaulted defendants considering that in their view, under the said provision of the rules, when a common cause of action is alleged against several defendants, the default of any of them is a mere formality by which those defaulted are not allowed to take part in the proceedings, but otherwise, all the defendants, defaulted and not defaulted, are supposed to have but a common fate, win or lose. In other words, petitioners posit that in such a situation, there can only be one common judgment for or against all the defendants, the non-defaulted and the defaulted. Thus, petitioners contend that the order of dismissal of October 21, 1974 should be considered also as the final judgment insofar as they are concerned, or, in the alternative, it should be set aside together with all the proceedings and decision held and rendered subsequent thereto, and that the trial be

resumed as of said date, with the defendants Lim Teck Chuan and Eng Chong Leonardo being allowed to defend the case for all the defendants.

On the other hand, private respondent maintains the contrary view that inasmuch as petitioners had been properly declared in default, they have no personality nor interest to question the dismissal of the case as against their non-defaulted co-defendants and should suffer the consequences of their own default. Respondent further contends, and this is the only position discussed in the memorandum submitted by her counsel, that since petitioners have already made or at least started to make their appeal, as they are in fact entitled to appeal, this special civil action has no reason for being. Additionally, she invokes the point of prematurity upheld by the Court of Appeals in regard to the above-mentioned petition therein of the non-defaulted defendants Lim Teck Chuan and Eng Leonardo. Finally, she argues that in any event, the errors attributed to respondent court are errors of judgment and may be reviewed only in an appeal.

After careful scrutiny of all the above-related proceedings in the court below and mature deliberation, the Court has arrived at the conclusion that petitioners should be granted relief, if only to stress emphatically once more that the rules of procedure may not be misused and abused as instruments for the denial of substantial justice. A review of the record of this case immediately discloses that here is another demonstrative instance of how some members of the bar, availing of their proficiency in invoking the letter of the rules without regard to their real spirit and intent, succeed in inducing courts to act contrary to the dictates of justice and equity, and, in some instances, to wittingly or unwittingly abet unfair advantage by ironically camouflaging their actuations as earnest efforts to satisfy the public clamor for speedy disposition of litigations, forgetting all the while that the plain injunction of Section 2 of Rule 1 is that the "rules shall be liberally construed in order to promote their object and to assist the parties in obtaining" not only 'speedy' but more imperatively, "just . . . and inexpensive determination of every action and proceeding." We cannot simply pass over the impression that the procedural maneuvers and tactics revealed in the records of the case at bar were deliberately planned with the calculated end in view of depriving petitioners and their co-defendants below of every opportunity to properly defend themselves against a claim of more than substantial character, considering the millions of pesos worth of properties involved as found by respondent judge himself in the impugned decision, a claim that appears, in the light of the allegations of the answer and the documents already brought to the attention of the court at the pre-trial, to be rather dubious. What is most regrettable is that apparently, all of these alarming circumstances have escaped respondent judge who did not seem to have hesitated in acting favorably on the motions of the plaintiff conducive to the deplorable objective just mentioned, and which motions, at the very least, appeared to be of highly controversial merit, considering that their obvious tendency and immediate result would be to convert the proceedings into a one-sided affair, a situation that should be readily condemnable and intolerable to any court of justice.

Indeed, a seeming disposition on the part of respondent to lean more on the contentions of private respondent may be discerned from the manner it resolved the attempts of defendants Dy Ochay and Antonio Lim Tanhu to have the earlier order of default against them lifted. Notwithstanding that Dy Ochay's motion of October 8, 1971, co-signed by her with their counsel, Atty. Jovencio Enjambre, (Annex 2 of respondent answer herein) was over the jurat of the notary public before whom she took her oath, in the order of November 2, 1971, (Annex 3 id.) it was held that "the oath appearing at the bottom of the motion is not the one contemplated by the above-quoted pertinent provision (Sec. 3, Rule 18) of the rules. It is not even a verification. (Sec. 6, Rule 7.) What the rule requires as interpreted by the Supreme Court is that the motion must have to be accompanied by an affidavit of merits that the defendant has a meritorious defense", thereby ignoring the very simple legal point that the ruling of the Supreme Court in *Ong Peng vs. Custodio*, 1 SCRA 781, relied upon by His Honor, under which a separate affidavit of merit is required refers obviously to instances where the motion is not over the oath of the party concerned, considering that what the cited provision literally requires is no more than a "motion under oath."

Stated otherwise, when a motion to lift an order of default contains the reasons for the failure to answer as well as the facts constituting the prospective defense of the defendant and it is sworn to by said defendant, neither a formal verification nor a separate affidavit of merit is necessary.

What is worse, the same order further held that the motion to lift the order of default "is an admission that there was a valid service of summons" and that said motion could not amount to a challenge against the jurisdiction of the court over the person of the defendant. Such a rationalization is patently specious and reveals an evident failure to grasp the import of the legal concepts involved. A motion to lift an order of default on the ground that service of summons has not been made in accordance with the rules is in order and is in essence verily an attack against the jurisdiction of the court over the person of the defendant, no less than if it were worded in a manner specifically embodying such a direct challenge.

And then, in the order of February 14, 1972 (Annex 6, id.) lifting at last the order of default as against defendant Lim Tanhu, His Honor posited that said defendant "has a defense (quitclaim) which renders the claim of the plaintiff contentious." We have read defendants' motion for reconsideration of November 25, 1971 (Annex 5, id.), but We cannot find in it any reference to a "quitclaim". Rather, the allegation of a quitclaim is in the amended complaint (Pars. 15-16, Annex B of the petition herein) in which plaintiff maintains that her signature thereto was secured through fraud and deceit. In truth, the motion for reconsideration just mentioned, Annex 5, merely reiterated the allegation in Dy Ochay's earlier motion of October 8, 1971, Annex 2, to set aside the order of default, that plaintiff Tan could be but the common law wife only of Tee Hoon, since his legitimate wife was still alive, which allegation, His Honor held in the order of November 2, 1971, Annex 3, to be "not good and meritorious defense". To top it all, whereas, as already stated, the order of February 19, 1972, Annex 6, lifted the default against Lim Tanhu because of the additional consideration that "he has a defense (quitclaim) which renders the claim of the plaintiff contentious", the default of Dy Ochay was maintained notwithstanding that exactly the same "contentious" defense as that of her husband was invoked by her.

Such tenuous, if not altogether erroneous reasonings and manifest inconsistency in the legal postures in the orders in question can hardly convince Us that the matters here in issue were accorded due and proper consideration by respondent court. In fact, under the circumstances herein obtaining, it seems appropriate to stress that, having in view the rather substantial value of the subject matter involved together with the obviously contentious character of plaintiff's claim, which is discernible even on the face of the complaint itself, utmost care should have been taken to avoid the slightest suspicion of improper motivations on the part of anyone concerned. Upon the considerations hereunder to follow, the Court expresses its grave concern that much has to be done to dispel the impression that herein petitioners and their co-defendants are being railroaded out of their rights and properties without due process of law, on the strength of procedural technicalities adroitly planned by counsel and seemingly unnoticed and undetected by respondent court, whose orders, gauged by their tenor and the citations of supposedly pertinent provisions and jurisprudence made therein, cannot be said to have proceeded from utter lack of juridical knowledgeability and competence.

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The first thing that has struck the Court upon reviewing the record is the seeming alacrity with which the motion to dismiss the case against non-defaulted defendants Lim Teck Chuan and Eng Chong Leonardo was disposed of, which definitely ought not to have been the case. The trial was proceeding with the testimony of the first witness of plaintiff and he was still under re-cross-examination. Undoubtedly, the motion to dismiss at that stage and in the light of the declaration of default against the rest of the defendants was a well calculated surprise move, obviously designed to secure utmost advantage of the situation, regardless of its apparent unfairness. To say that it must have been entirely unexpected by all the defendants, defaulted and non-defaulted, is merely to rightly

assume that the parties in a judicial proceeding can never be the victims of any procedural waylaying, as long as lawyers and judges are imbued with the requisite sense of equity and justice.

But the situation here was aggravated by the indisputable fact that the adverse parties who were entitled to be notified of such unanticipated dismissal motion did not get due notice thereof. Certainly, the non-defaulted defendants had the right to the three-day prior notice required by Section 4 of Rule 15. How could they have had such indispensable notice when the motion was set for hearing on Monday, October 21, 1974, whereas the counsel for Lim Teck Chuan, Atty. Sitoy, was personally served with the notice only on Saturday, October 19, 1974 and the counsel for Eng Chong Leonardo, Atty. Alcudia, was notified by registered mail which was posted only that same Saturday, October 19, 1974? According to Chief Justice Moran, "three days at least must intervene between the date of service of notice and the date set for the hearing, otherwise the court may not validly act on the motion." (Comments on the Rules of Court by Moran, Vol. 1, 1970 ed. p. 474.) Such is the correct construction of Section 4 of Rule 15. And in the instant case, there can be no question that the notices to the non-defaulted defendants were short of the requirement of said provision.

We can understand the over-anxiety of counsel for plaintiff, but what is incomprehensible is the seeming inattention of respondent judge to the explicit mandate of the pertinent rule, not to speak of the imperatives of fairness, considering he should have realized the far-reaching implications, specially from the point of view he subsequently adopted, albeit erroneously, of his favorably acting on it. Actually, he was aware of said consequences, for simultaneously with his order of dismissal, he immediately set the case for the ex-parte hearing of the evidence against the defaulted defendants, which, incidentally, from the tenor of his order which We have quoted above, appears to have been done by him *motu proprio*. As a matter of fact, plaintiff's motion also quoted above did not pray for it.

Withal, respondent court's twin actions of October 21, 1974 further ignores or is inconsistent with a number of known juridical principles concerning defaults, which We will here take occasion to reiterate and further elucidate on, if only to avoid a repetition of the unfortunate errors committed in this case. Perhaps some of these principles have not been amply projected and elaborated before, and such paucity of elucidation could be the reason why respondent judge must have acted as he did. Still, the Court cannot but express its vehement condemnation of any judicial actuation that unduly deprives any party of the right to be heard without clear and specific warrant under the terms of existing rules or binding jurisprudence. Extreme care must be the instant reaction of every judge when confronted with a situation involving risks that the proceedings may not be fair and square to all the parties concerned. Indeed, a keen sense of fairness, equity and justice that constantly looks for consistency between the letter of the adjective rules and these basic principles must be possessed by every judge, if substance is to prevail, as it must, over form in our courts. Literal observance of the rules, when it is conducive to unfair and undue advantage on the part of any litigant before it, is unworthy of any court of justice and equity. Withal, only those rules of procedure informed with and founded on public policy deserve obedience in accord with their unequivocal language of words.

Before proceeding to the discussion of the default aspects of this case, however, it should not be amiss to advert first to the patent incorrectness, apparent on the face of the record, of the aforementioned order of dismissal of October 21, 1974 of the case below as regards non-defaulted defendants Lim and Leonardo. While it is true that said defendants are not petitioners herein, the Court deems it necessary for a full view of the outrageous procedural strategy conceived by respondent's counsel and sanctioned by respondent court to also make reference to the very evident fact that in ordering said dismissal respondent court disregarded completely the existence of defendant's counterclaim which it had itself earlier held, if indirectly, to be compulsory in nature when it refused to dismiss the same on the ground alleged by respondent Tan that the docketing fees for the filing thereof had not

been paid by defendants.

Indeed, that said counterclaim is compulsory needs no extended elaboration. As may be noted in the allegations thereof aforequoted, it arose out of or is necessarily connected with the occurrence that is the subject matter of the plaintiff's claim, (Section 4, Rule 9) namely, plaintiff's allegedly being the widow of the deceased Tee Hoon entitled, as such, to demand accounting of and to receive the share of her alleged late husband as partner of defendants Antonio Lim Tanhu and Alfonso Leonardo Ng Sua in Glory Commercial Company, the truth of which allegations all the defendants have denied. Defendants maintain in their counterclaim that plaintiff knew of the falsity of said allegations even before she filed her complaint, for she had in fact admitted her common-law relationship with said deceased in a document she had jointly executed with him by way of agreement to terminate their illegitimate relationship, for which she received P40,000 from the deceased, and with respect to her pretended share in the capital and profits in the partnership, it is also defendants' posture that she had already quitclaimed, with the assistance of able counsel, whatever rights if any she had thereto in November, 1967, for the sum of P25,000 duly receipted by her, which quitclaim was, however, executed, according to respondent herself in her amended complaint, through fraud. And having filed her complaint knowing, according to defendants, as she ought to have known, that the material allegations thereof are false and baseless, she has caused them to suffer damages. Undoubtedly, with such allegations, defendants' counterclaim is compulsory, not only because the same evidence to sustain it will also refute the cause or causes of action alleged in plaintiff's complaint, (Moran, *supra* p. 352) but also because from its very nature, it is obvious that the same cannot "remain pending for independent adjudication by the court." (Section 2, Rule 17.)

The provision of the rules just cited specifically enjoins that "(i)f a counter-claim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court." Defendants Lim and Leonardo had no opportunity to object to the motion to dismiss before the order granting the same was issued, for the simple reason that they were not opportunely notified of the motion therefor, but the record shows clearly that at least defendant Lim immediately brought the matter of their compulsory counterclaim to the attention of the trial court in his motion for reconsideration of October 23, 1974, even as the counsel for the other defendant, Leonardo, predicated his motion on other grounds. In its order of December 6, 1974, however, respondent court not only upheld the plaintiffs supposed absolute right to choose her adversaries but also held that the counterclaim is not compulsory, thereby virtually making an unexplained and inexplicable 180-degree turnabout in that respect.

There is another equally fundamental consideration why the motion to dismiss should not have been granted. As the plaintiff's complaint has been framed, all the six defendants are charged with having actually taken part in a conspiracy to misappropriate, conceal and convert to their own benefit the profits, properties and all other assets of the partnership Glory Commercial Company, to the extent that they have allegedly organized a corporation, Glory Commercial Company, Inc. with what they had illegally gotten from the partnership. Upon such allegations, no judgment finding the existence of the alleged conspiracy or holding the capital of the corporation to be the money of the partnership is legally possible without the presence of all the defendants. The non-defaulted defendants are alleged to be stockholders of the corporation and any decision depriving the same of all its assets cannot but prejudice the interests of said defendants. Accordingly, upon these premises, and even prescinding from the other reasons to be discussed anon, it is clear that all the six defendants below, defaulted and non-defaulted, are indispensable parties. Respondents could do no less than grant that they are so on page 23 of their answer. Such being the case, the questioned order of dismissal is exactly the opposite of what ought to have been done. Whenever it appears to the court in the course of a proceeding that an indispensable party has not been joined, it is the duty of the court to stop the trial and to order the inclusion of such party. (The Revised Rules of

Court, Annotated & Commented by Senator Vicente J. Francisco; Vol. I, p. 271, 1973 ed.; See also *Cortez vs. Avila*, 101 Phil. 705.) Such an order is unavoidable, for the "general rule with reference to the making of parties in a civil action requires the joinder of all necessary parties wherever possible, and the joinder of all indispensable parties under any and all conditions, the presence of those latter being a sine qua non of the exercise of judicial power." (*Borlasa vs. Polistico*, 47 Phil. 345, at p. 347.) It is precisely "when an indispensable party is not before the court (that) the action should be dismissed." (*People v. Rodriguez*, 106 Phil. 325, at p. 327.) The absence of an indispensable party renders all subsequent actuations of the court null and void, for want of authority to act, not only as to the absent parties but even as to those present. In short, what respondent court did here was exactly the reverse of what the law ordains — it eliminated those who by law should precisely be joined.

As may be noted from the order of respondent court quoted earlier, which resolved the motions for reconsideration of the dismissal order filed by the non-defaulted defendants, His Honor rationalized his position thus:

"It is the rule that it is the absolute prerogative of the plaintiff to choose, the theory upon which he predicates his right of action, or the parties he desires to sue, without dictation or imposition by the court or the adverse party. If he makes a mistake in the choice of his right of action, or in that of the parties against whom he seeks to enforce it, that is his own concern as he alone suffers therefrom. The plaintiff cannot be compelled to choose his defendants. He may not, at his own expense, be forced to implead anyone who, under the adverse party's theory, is to answer for defendants' liability. Neither may the Court compel him to furnish the means by which defendant may avoid or mitigate their liability. (*Vano vs. Alo*, 95 Phil, 495-496.)

This being the rule this court cannot compel the plaintiff to continue prosecuting her cause of action against the defendants-movants if in the course of the trial she believes she can enforce it against the remaining defendants subject only to the limitation provided in Section 2, Rule 17 of the Rules of Court. x x x" (Pages 62-63, Record.)

Noticeably, His Honor has employed the same equivocal terminology as in plaintiff's motion of October 18, 1974 by referring to the action he had taken as being "dismissal of the complaint against them or their being dropped therefrom", without perceiving that the reason for the evidently intentional ambiguity is transparent. The apparent idea is to rely on the theory that under Section 11 of Rule 3, parties may be dropped by the court upon motion of any party at any stage of the action, hence "it is the absolute right prerogative of the plaintiff to choose — the parties he desires to sue, without dictation or imposition by the court or the adverse party." In other words, the ambivalent pose is suggested that plaintiff's motion of October 18, 1974 was not predicated on Section 2 of Rule 17 but more on Section 11 of Rule 3. But the truth is that nothing can be more incorrect. To start with, the latter rule does not comprehend whimsical and irrational dropping or adding of parties in a complaint. What it really contemplates is erroneous or mistaken nonjoinder and misjoinder of parties. No one is free to join anybody in a complaint in court only to drop him unceremoniously later at the pleasure of the plaintiff. The rule presupposes that the original inclusion had been made in the honest conviction that it was proper and the subsequent dropping is requested because it has turned out that such inclusion was a mistake. And this is the reason why the rule ordains that the dropping be "on such terms as are just" — just to all the other parties. In the case at bar, there is nothing in the record to legally justify the dropping of the non-defaulted defendants, Lim and Leonardo. The motion of October 18, 1974 cites none. From all appearances, plaintiff just decided to ask for it, without any relevant explanation at all. Usually, the court in granting such a motion inquires for the reasons and in the appropriate instances directs the granting of some form of compensation for the trouble undergone by the defendant in answering the complaint, preparing for or proceeding partially to trial, hiring counsel and making corresponding expenses in the premises. Nothing of these, appears in the order in question. Most importantly, His Honor ought to have considered that the outright dropping of the non-defaulted defendants Lim and Leonardo,

over their objection at that, would certainly be unjust not only to the petitioners, their own parents, who would in consequence be entirely defenseless, but also to Lim and Leonardo themselves who would naturally correspondingly suffer from the eventual judgment against their parents. Respondent court paid no heed at all to the mandate that such dropping must be "on such terms as are just" — meaning to all concerned with its legal and factual effects.

Thus, it is quite plain that respondent court erred in issuing its order of dismissal of October 21, 1974 as well as its order of December 6, 1974 denying reconsideration of such dismissal. As We make this ruling, We are not oblivious of the circumstance that defendants Lim and Leonardo are not parties herein. But such consideration is inconsequential. The fate of the case of petitioners is inseparably tied up with said order of dismissal, if only because the order of ex-parte hearing of October 21, 1974 which directly affects and prejudices said petitioners is predicated thereon. Necessarily, therefore, We have to pass on the legality of said order, if We are to decide the case of herein petitioners properly and fairly.

The attitude of the non-defaulted defendants of no longer pursuing further their questioning of the dismissal is from another point of view understandable. On the one hand, why should they insist on being defendants when plaintiff herself has ready released them from her claims? On the other hand, as far as their respective parents-co-defendants are concerned, they must have realized that they (their parents) could even be benefited by such dismissal because they could question whether or not plaintiff can still prosecute her case against them after she had secured the order of dismissal in question. And it is in connection with this last point that the true and correct concept of default becomes relevant.

At this juncture, it may also be stated that the decision of the Court of Appeals of January 24, 1975 in G.R. No. SP-03066 dismissing the petition for certiorari of non-defaulted defendants Lim and Leonardo impugning the order of dismissal of October 21, 1974, has no bearing at all in this case, not only because that dismissal was premised by the appellate court on its holding that the said petition was premature inasmuch as the trial court had not yet resolved the motion of the defendants of October 28, 1974 praying that said disputed order be quashed, but principally because herein petitioners were not parties in that proceeding and cannot, therefore, be bound by its result. In particular, We deem it warranted to draw the attention of private respondent's counsel to his allegations in paragraphs XI to XIV of his answer, which relate to said decision of the Court of Appeals and which have the clear tendency to make it appear to the Court that the appeals court had upheld the legality and validity of the actuations of the trial court being questioned, when as a matter of indisputable fact, the dismissal of the petition was based solely and exclusively on its being premature without in any manner delving into its merits. The Court must and does admonish counsel and that such manner of pleading, being deceptive and lacking in candor, has no place in any court, much less in the Supreme Court, and if We are adopting a passive attitude in the premises, it is due only to the fact, that this is counsel's first offense. But similar conduct on his part in the future will definitely be dealt with more severely. Parties and counsel would be well advised to avoid such attempts to befuddle the issues as invariably they will be exposed for what they are, certainly unethical and degrading to the dignity of the law profession. Moreover, almost always they only betray the inherent weakness of the cause of the party resorting to them.

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Coming now to the matter itself of default, it is quite apparent that the impugned orders must have proceeded from inadequate apprehension of the fundamental precepts governing such procedure under the Rules of Court. It is time indeed that the concept of this procedural device were fully understood by the bench and bar, instead of being merely taken for granted as being that of a simple expedient of not allowing the offending party to take part in the proceedings, so that after his adversary shall have presented his evidence, judgment may be rendered in

favor of such opponent, with hardly any chance of said judgment being reversed or modified.

The Rules of Court contain a separate rule on the subject of default, Rule 18. But said rule is concerned solely with default resulting from failure of the defendant or defendants to answer within the reglementary period. Referring to the simplest form of default, that is where there is only one defendant in the action and he fails to answer on time, Section 1 of the rule provides that upon "proof of such failure, (the court shall) declare the defendant in default. Thereupon the court shall proceed to receive the plaintiff's evidence and render judgment granting him such relief as the complaint and the facts proven may warrant." This last clause is clarified by Section 5 which says that "a judgment entered against a party in default shall no exceed the amount or be different in kind from that prayed for."

Unequivocal, in the literal sense, as these provisions are, they do not readily convey the full import of what they contemplate. To begin with, contrary to the immediate notion that can be drawn from their language, these provisions are not to be understood as meaning that default or the failure of the defendant to answer should be "interpreted as an admission by the said defendant that the plaintiff's causes of action find support in the law or the plaintiff is entitled to the relief prayed for." (Moran, *supra*, p. 535 citing *Macondray & Co. v. Eustaquio*, 64. Phil. 466, citing with approval *Chaffin v. McFadden*, 41 Ark. 42; *Johnson v. Pierce*, 12 Ark. 599; *Mayden v. Johnson*, 59 Ga. 105; *People v. Rust*, 292 Ill. 328; *Ken v. Leopold*, 21 Ill. A. 163; *Chicago, etc. Electric R. Co. v. Krempel*, 116 Ill. A. 253.)

Being declared in default does not constitute a waiver of rights except that of being heard and of presenting evidence in the trial court. According to Section 2, "except as provided in Section 9 of Rule 13, a party declared in default shall not be entitled to notice of subsequent proceedings, nor to take part in the trial." That provision referred to reads: "No service of papers other than substantially amended pleadings and final orders or judgments shall be necessary on a party in default unless he files a motion to set aside the order of default, in which event he shall be entitled to notice of all further proceedings regardless of whether the order of default is set aside or not." And pursuant to Section 2 of Rule 41, "a party who has been declared in default may likewise appeal from the judgment rendered against him as contrary to the evidence or to the law, even if no petition for relief to set aside the order of default has been presented by him in accordance with Rule 38."

In other words, a defaulted defendant is not actually thrown out of court. While in a sense it may be said that by defaulting he leaves himself at the mercy of the court, the rules see to it that any judgment against him must be in accordance with law. The evidence to support the plaintiff's cause is, of course, presented in his absence, but the court is not supposed to admit that which is basically incompetent. Although the defendant would not be in a position to object, elementary justice requires that only legal evidence should be considered against him. If the evidence presented should not be sufficient to justify a judgment for the plaintiff, the complaint must be dismissed. And if an unfavorable judgment should be justifiable, it cannot exceed in amount or be different in kind from what is prayed for in the complaint.

Incidentally, these considerations argue against the present widespread practice of trial judges, as was done by His Honor in this case, of delegating to their clerks of court the reception of the plaintiff's evidence when the defendant is in default. Such a practice is wrong in principle and orientation. It has no basis in any rule. When a defendant allows himself to be declared in default, he relies on the faith that the court would take care that his rights are not unduly prejudiced. He has a right to presume that the law and the rules will still be observed. The proceedings are held in his forced absence, and it is but fair that the plaintiff should not be allowed to take advantage of the situation to win by foul or illegal means or with inherently incompetent evidence. Thus, in such instances, there is need for more attention from the court, which only the judge himself can provide. The clerk of court would not be in a position much less have the authority to act in the premises in the manner demanded by

the rules of fair play and as contemplated in the law, considering his comparably limited area of discretion and his presumably inferior preparation for the functions of a judge. Besides, the default of the defendant is no excuse for the court to renounce the opportunity to closely observe the demeanor and conduct of the witnesses of the plaintiff, the better to appreciate their truthfulness and credibility. We therefore declare as a matter of judicial policy that there being no imperative reason for judges to do otherwise, the practice should be discontinued.

Another matter of practice worthy of mention at this point is that it is preferable to leave enough opportunity open for possible lifting of the order of default before proceeding with the reception of the plaintiff's evidence and the rendition of the decision. "A judgment by default may amount to a positive and considerable injustice to the defendant; and the possibility of such serious consequences necessitates a careful and liberal examination of the grounds upon which the defendant may seek to set it aside." (Moran, *supra* p. 534, citing *Coombs vs. Santos*, 24 Phil. 446; 449-450.) The expression, therefore, in Section 1 of Rule 18 aforequoted which says that "thereupon the court shall proceed to receive the plaintiff's evidence etc." is not to be taken literally. The gain in time and dispatch should the court immediately try the case on the very day of or shortly after the declaration of default is far outweighed by the inconvenience and complications involved in having to undo everything already done in the event the defendant should justify his omission to answer on time.

The foregoing observations, as may be noted, refer to instances where the only defendant or all the defendants, there being several, are declared in default. There are additional rules embodying more considerations of justice and equity in cases where there are several defendants against whom a common cause of action is averred and not all of them answer opportunely or are in default, particularly in reference to the power of the court to render judgment in such situations. Thus, in addition to the limitation of Section 5 that the judgment by default should not be more in amount nor different in kind from the reliefs specifically sought by plaintiff in his complaint Section 4 restricts the authority of the court in rendering judgment in the situations just mentioned as follows:

"Sec. 4. Judgment when some defendants answer, and others make default. — When a complaint states a common cause of action against several defendants, some of whom answer, and the others fail to do so, the court shall try the case against all upon the answers thus filed and render judgment upon the evidence presented. The same procedure applies when a common cause of action is pleaded in a counterclaim, cross-claim and third-party claim."

Very aptly does Chief Justice Moran elucidate on this provision and the controlling jurisprudence explanatory thereof this wise:

"Where a complaint states a common cause of action against several defendants and some appear to defend the case on the merits while others make default, the defense interposed by those who appear to litigate the case inures to the benefit of those who fail to appear; and if the court finds that a good defense has been made, all of the defendants must be absolved. In other words, the answer filed by one or some of the defendants inures to the benefit of all the others, even those who have not seasonably filed their answer. (*Bueno v. Ortiz*, L-22978, June 27, 1968, 23 SCRA 1151.) The proper mode of proceeding where a complaint states a common cause of action against several defendants, and one of them makes default, is simply to enter a formal default order against him, and proceed with the cause upon the answers of the others. The defaulting defendant merely loses his standing in court, he not being entitled to the service of notices in the cause, nor to appear in the suit in any way. He cannot adduce evidence; nor can he be heard at the final hearing, (*Lim Toco v. Go Fay*, 80 Phil. 166.) although he may appeal the judgment rendered against him on the merits. (Rule 41, sec. 2.) If the case is finally decided in the plaintiff's favor, a final decree is then entered against all the defendants; but if the suit should be decided against the plaintiff, the action will be dismissed as to all the defendants alike. (*Velez v. Ramas*, 40 Phil. 787-792; *Frow v. de la Vega*, 15 Wal. 552, 21 L. Ed 60.) In other words, the judgment will affect the defaulting defendants either favorably or adversely. (*Castro v. Peña*, 80 Phil. 488.)

Defaulting defendant may ask execution if judgment i

s in his favor. (*Castro v. Peña*, supra.)" (*Moran*, Rules of Court, Vol. I, pp. 538-539.)

In *Castro vs. Peña*, 80 Phil. 488, one of the numerous cases cited by *Moran*, this Court elaborated on the construction of the same rule when it sanctioned the execution, upon motion and for the benefit of the defendant in default, of a judgment which was adverse to the plaintiff. The Court held:

"As above stated, Emilia Matanguihan, by her counsel, also was a movant in the petition for execution Annex 1. Did she give a right to be such, having been declared in default? In *Frow vs. De Ia Vega*, supra, cited as authority in *Velez vs. Ramas*, supra, the Supreme Court of the United States adopted as ground for its own decision the following ruling of the New York Court of Errors in *Clason vs. Morris*, 10 Johns., 524:

'It would be unreasonable to hold that because one defendant had made default, the plaintiff should have a decree even against him, where the court is satisfied from the proofs offered by the other, that in fact the plaintiff is not entitled to a decree.' (21 Law, ed., 61.)

The reason is simple: justice has to be consistent. The complaint stating a common cause of action against several defendants, the complainant's rights — or lack of them — in the controversy have to be the same, and not different, as against all the defendants, although one or some make default and the other or others appear, join issue, and enter into trial. For instance, in the case of *Clason vs. Morris* above cited, the New York Court of Errors in effect held that in such a case if the plaintiff is not entitled to a decree, he will not be entitled to it, not only as against the defendant appearing and resisting his action but also as against the one who made default. In the case at bar, the cause of action in the plaintiffs' complaint was common against the Mayor of Manila, Emilia Matanguihan, and the other defendants in Civil Case No. 1318 of the lower court. The Court of First Instance in its judgment found and held upon the evidence adduced by the plaintiff and the defendant mayor that as between said plaintiff and defendant Matanguihan the latter was the one legally entitled to occupy the stalls; and it decreed, among other things, that said plaintiff immediately vacate them. Paraphrasing the New York Court of Errors, it would be unreasonable to hold now that because Matanguihan had made default, the said plaintiff should be declared, as against her, legally entitled to the occupancy of the stalls, or to remain therein, although the Court of First Instance was so firmly satisfied, from the proofs offered by the other defendant, that the same plaintiff was not entitled to such occupancy that it peremptorily ordered her to vacate the stalls. If in the cases of *Clason vs. Morris*, supra, - *Frow vs. De la Vega*, supra, and *Velez vs. Rams*, supra, the decrees entered inured to the benefit of the defaulting defendants, there is no reason why that entered in said case No. 1318 should not be held also to have inured to the benefit of the defaulting defendant Matanguihan. Indeed, the doctrine in said three cases plainly implies that there is nothing in the law governing default which would prohibit the court from rendering judgment favorable to the defaulting defendant in such cases. If it inured to her benefit, it stands to reason that she had a right to claim that benefit, for it would not be a benefit if the supposed beneficiary were barred from claiming it; and if the benefit necessitated the execution of the decree, she must be possessed of the right to ask for the execution thereof as she did when she, by counsel, participated in the petition for execution Annex 1.

Section 7 of Rule 35 would seem to afford a solid support to the above considerations. It provides that when a complaint states a common cause of action against several defendants, some of whom answer, and the others make default, 'the court shall try the case against all upon the answer thus filed and render judgment upon the evidence presented by the parties in court'. It is obvious that under this provision the case is tried jointly not only against the defendants answering but also against those defaulting, and the trial is held upon the answer filed by the former; and the judgment, if adverse, will prejudice the defaulting defendants no less than those who answer. In other words, the defaulting defendants are held bound by the answer filed by their codefendants and by the judgment which the court may render against all of them. By the same token, and by all rules of equity and fair play, if the judgment should happen to be favorable, totally or partially, to the answering defendants, it must correspondingly benefit the defaulting ones, for it would not be just to let the

judgment produce effects as to the defaulting defendants only when adverse to them and not when favorable."

In *Bueno vs. Ortiz*, 23 SCRA 1151, the Court applied the provision under discussion in the following words:

"In answer to the charge that respondent Judge had committed a grave abuse of discretion in rendering a default judgment against the PC, respondents allege that, not having filed its answer within the reglementary period, the PC was in default, so that it was proper for Patanao to forthwith present his evidence and for respondent Judge to render said judgment. It should be noted, however, that in entering the area in question and seeking to prevent Patanao from continuing his logging operations therein, the PC was merely executing an order of the Director of Forestry and acting as his agent. Patanao's cause of action against the other respondents in Case No. 190, namely, the Director of Forestry, the District Forester of Agusan, the Forest Officer of Bayugan, Agusan, and the Secretary of Agriculture and Natural Resources. Pursuant to Rule 18, Section 4, of the Rules of Court, 'when a complaint states a common cause of action against several defendants some of whom answer and the others fail to do so, the court shall try the case against all upon the answer thus filed (by some) and render judgment upon the evidence presented.' In other words, the answer filed by one or some of the defendants inures to the benefit of all others, even those who have not seasonably filed their answer.

"Indeed, since the petition in Case No. 190 sets forth a common cause of action against all of the respondents therein, a decision in favor of one of them would necessarily favor the others. In fact, the main issue, in said case, is whether Patanao has a timber license to undertake logging operations in the disputed area. It is not possible to decide such issue in the negative, insofar as the Director of Forestry, and to settle it otherwise, as regards the PC, which is merely acting as agent of the Director of Forestry, and is, therefore, his alter ego, with respect to the disputed forest area."

Stated differently, in all instances where a common cause of action is alleged against several defendants, some of whom answer and the others do not, the latter or those in default acquire a vested right not only to own the defense interposed in the answer of their co-defendant or co-defendants not in default but also to expect a result of the litigation totally common with them in kind and in amount whether favorable or unfavorable. The substantive unity of the plaintiff's cause against all the defendants is carried through to its adjective phase as ineluctably demanded by the homogeneity and indivisibility of justice itself. Indeed, since the singleness of the cause of action also inevitably implies that all the defendants are indispensable parties, the court's power to act is integral and cannot be split such that it cannot relieve any of them and at the same time render judgment against the rest. Considering the tenor of the section in question, it is to be assumed that when any defendant allows himself to be declared in default knowing that his co-defendant has already answered, he does so trusting in the assurance implicit in the rule that his default is in essence a mere formality that deprives him of no more than the right to take part in the trial and that the court would deem anything done by or for the answering defendant as done by or for him. The presumption is that otherwise he would not have seen to it that he would not be in default. Of course, he has to suffer the consequences of whatever the answering defendant may do or fail to do, regardless of possible adverse consequences, but if the complaint has to be dismissed in so far as the answering defendant is concerned, it becomes his inalienable right that the same be dismissed also as to him. It does not matter that the dismissal is upon the evidence presented by the plaintiff or upon the latter's mere desistance, for in both contingencies, the lack of sufficient legal basis must be the cause. The integrity of the common cause of action against all the defendants and the indispensability of all of them in the proceedings do not permit any possibility of waiver of the plaintiff's, right only as to one or some of them, without including all of them, and so, as a rule, withdrawal must be deemed to be a confession of weakness as to all. This is not only elementary justice; it also precludes the concomitant hazard that plaintiff might resort to the kind of procedural stratagem practiced by private respondent herein that resulted in totally depriving petitioners of every opportunity to defend themselves against her claims which, after all, as will be seen later in this opinion, the record does not show to be invulnerable, both in their

factual and legal aspects, taking into consideration the tenor of the pleadings and the probative value of the competent evidence which were before the trial court when it rendered its assailed decision. Where all the defendants are indispensable parties, for which reason the absence of any of them in the case would result in the court losing its competency to act validly, any compromise that the plaintiff might wish to make with any of them must, as a matter of correct procedure, have to await until after the rendition of the judgment, at which stage the plaintiff may then treat the matter of its execution and the satisfaction of his claim as variably as he might please. Accordingly, in the case now before Us together with the dismissal of the complaint against the non-defaulted defendants, the court should have ordered also the dismissal thereof as to petitioners.

Indeed, there is more reason to apply here the principle of unity and indivisibility of the action just discussed because all the defendants here have already joined genuine issues with plaintiff. Their default was only at the pre-trial. And as to such absence of petitioners at the pre-trial, the same could be attributed to the fact that they might not have considered it necessary anymore to be present, since their respective children Lim and Leonardo, with whom they have common defenses, could take care of their defenses as well. Anything that might have had to be done by them at such pre-trial could have been done for them by their children, at least initially, specially because in the light of the pleadings before the court, the prospects of a compromise must have appeared to be rather remote. Such attitude of petitioners is neither uncommon nor totally unjustified. Under the circumstances, to declare them immediately and irrevocably in default was not an absolute necessity. Practical considerations and reasons of equity should have moved respondent court to be more understanding in dealing with the situation. After all, declaring them in default as respondent court did did not impair their right to a common fate with their children.

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Another issue to be resolved in this case is the question of whether or not herein petitioners were entitled to notice of plaintiff's motion to drop their co-defendants Lim and Leonardo, considering that petitioners had been previously declared in default. In this connection, the decisive consideration is that according to the applicable rule, Section 9, Rule 13, already quoted above, (1) even after a defendant has been declared in default, provided he "files a motion to set aside the order of default, — he shall be entitled to notice of all further proceedings regardless of whether the order of default is set aside or not" and (2) a party in default who has not filed such a motion to set aside must still be served with all "substantially amended or supplemental pleadings." In the instant case, it cannot be denied that petitioners had all filed their motion for reconsideration of the order declaring them in default. Respondents' own answer to the petition herein makes reference to the order of April 3, 1973, Annex 8 of said answer, which denied said motion for reconsideration. On page 3 of petitioners' memorandum herein this motion is referred to as "a motion to set aside the order of default." But as We have not been favored by the parties with a copy of the said motion, We do not even know the excuse given for petitioners' failure to appear at the pre-trial, and We cannot, therefore, determine whether or not the motion complied with the requirements of Section 3 of Rule 18 which We have held to be controlling in cases of default for failure to answer on time. (The Philippine-British Co., Inc. etc. et al. vs. The Hon. Walfrido de los Angeles etc. et al., 63 SCRA 50.)

We do not, however, have here, as earlier noted, a case of default for failure to answer but one for failure to appear at the pre-trial. We reiterate in the situation now before Us, issues have already been joined. In fact, evidence had been partially offered already at the pre-trial and more of it at the actual trial which had already begun with the first witness of the plaintiff undergoing re-cross-examination. With these facts in mind and considering that issues had already been joined even as regards the defaulted defendants, it would be requiring the obvious to pretend that there was still need for an oath or a verification as to the merits of the defense of the defaulted defendants in their motion to reconsider their default. Inasmuch as none of the parties had asked for a

summary judgment, there can be no question that the issues joined were genuine, and consequently, the reason for requiring such oath or verification no longer holds. Besides, it may also be reiterated that being the parents of the non-defaulted defendants, petitioners must have assumed that their presence was superfluous, particularly because the cause of action against them as well as their own defenses are common. Under these circumstances, the form of the motion by which the default was sought to be lifted is secondary and the requirements of Section 3 of Rule 18 need not be strictly complied with, unlike in cases of default for failure to answer. We can thus hold as We do hold for the purposes of the revival of their right to notice under Section 9 of Rule 13, that petitioners' motion for reconsideration was in substance legally adequate, regardless of whether or not it was under oath.

In any event, the dropping of the defendants Lim and Leonardo from plaintiff's amended complaint was virtually a second amendment of plaintiff's complaint. And there can be no doubt that such amendment was substantial, for with the elimination thereby of two defendants allegedly solidarily liable with their co-defendants, herein petitioners, it had the effect of increasing proportionally what each of the remaining defendants, the said petitioners, would have to answer for jointly and severally. Accordingly, notice to petitioners of the plaintiff's motion of October 18, 1974 was legally indispensable under the rule above-quoted. Consequently, respondent court had no authority to act on the motion to dismiss, pursuant to Section 6 of Rule 15, for according to Senator Francisco, "(t)he Rules of Court clearly provide that no motion shall be acted upon by the Court without the proof of service of notice thereof, together with a copy of the motion and other papers accompanying it, to all parties concerned at least three days before the hearing thereof, stating the time and place for the hearing of the motion. (Rule 26, sections 4, 5 and 6, Rules of Court (now Sec. 15, new Rules). When the motion does not comply with this requirement, it is not a motion. It presents no question which the court could decide. And the Court acquires no jurisdiction to consider it. (Roman Catholic Bishop of Lipa vs. Municipality of Unisan, 44 Phil., 866; Manakil vs. Revilla, 42 Phil., 81.) (Laserna vs. Javier, et al., CA-G.R. No. 7885, April 22, 1955; 21 L.J. 36, citing Roman Catholic Bishop of Lipa vs. Municipality of Unisan, 44 Phil., 866; Manakil vs. Revilla, 42 Phil., 81.) (Francisco, The Revised Rules of Court in the Philippines, pp. 861-862.) Thus, We see again, from a different angle, why respondent court's order of dismissal of October 21, 1974 is fatally ineffective.

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The foregoing considerations notwithstanding, it is respondents' position that certiorari is not the proper remedy of petitioners. It is contended that inasmuch as said petitioners have in fact made their appeal already by filing the required notice of appeal and appeal bond and a motion for extension to file their record on appeal, which motion was granted by respondent court, their only recourse is to prosecute that appeal. Additionally, it is also maintained that since petitioners have expressly withdrawn their motion to quash of January 4, 1975 impugning the order of October 28, 1974, they have lost their right to assail by certiorari the actuations of respondent court now being questioned, respondent court not having been given the opportunity to correct any possible error it might have committed.

We do not agree. As already shown in the foregoing discussion, the proceedings in the court below have gone so far out of hand that prompt action is needed to restore order in the entangled situation created by the series of plainly illegal orders it had issued. The essential purpose of certiorari is to keep the proceedings in lower judicial courts and tribunals within legal bounds, so that due process and the rule of law may prevail at all times and arbitrariness, whimsicality and unfairness which justice abhors may immediately be stamped out before graver injury, juridical and otherwise, ensues. While generally these objectives may well be attained in an ordinary appeal, it is undoubtedly the better rule to allow the special remedy of certiorari at the option of the party adversely affected, when the irregularity committed by the trial court is so grave and so far reaching in its consequences that the long and cumbersome procedure of appeal will only further aggravate the situation of the

aggrieved party because other untoward actuations are likely to materialize as natural consequences of those already perpetrated. If the law were otherwise, certiorari would have no reason at all for being.

No elaborate discussion is needed to show the urgent need for corrective measures in the case at bar. Verily, this is one case that calls for the exercise of the Supreme Court's inherent power of supervision over all kinds of judicial actions of lower courts. Private respondent's procedural technique designed to disable petitioners to defend themselves against her claim which appears on the face of the record itself to be at least highly controversial seems to have so fascinated respondent court that none would be surprised should her pending motion for immediate execution of the impugned judgment receive similar ready sanction as her previous motions which turned the proceedings into a one-sided affair. The stakes here are high. Not only is the subject matter considerably substantial; there is the more important aspect that not only the spirit and intent of the rules but even the basic rudiments of fair play have been disregarded. For the Court to leave unrestrained the obvious tendency of the proceedings below would be nothing short of wittingly condoning inequity and injustice resulting from erroneous construction and unwarranted application of procedural rules.

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The sum and total of all the foregoing disquisitions is that the decision here in question is legally anomalous. It is predicated on two fatal malactuations of respondent court, namely (1) the dismissal of the complaint against the non-defaulted defendants Lim and Leonardo and (2) the ex-parte reception of the evidence of the plaintiff by the clerk of court, the subsequent using of the same as basis for its judgment and the rendition of such judgment.

For at least three reasons which We have already fully discussed above, the order of dismissal of October 21, 1974 is unworthy of Our sanction: (1) there was no timely notice of the motion therefore to the non-defaulted defendants, aside from there being no notice at all to herein petitioners; (2) the common answer of the defendants, including the non-defaulted, contained a compulsory counterclaim incapable of being determined in an independent action; and (3) the immediate effect of such dismissal was the removal of the two non-defaulted defendants as parties, and inasmuch as they are both indispensable parties in the case, the court consequently lost the "sine qua non of the exercise of judicial power", per *Borlasa vs. Polistico*, supra. This is not to mention anymore the irregular delegation to the clerk of court of the function of receiving plaintiff's evidence. And as regards the ex-parte reception of plaintiff's evidence and subsequent rendition of the judgment by default based thereon, We have seen that it was violative of the right of the petitioners, under the applicable rules and principles on default, to a common and single fate with their non-defaulted co-defendants. And We are not yet referring, as We shall do this anon, to the numerous reversible errors in the decision itself.

It is to be noted, however, that the above-indicated two fundamentals flaws in respondent court's actuations do not call for a common corrective remedy. We cannot simply rule that all the impugned proceedings are null and void and should be set aside, without being faced with the insurmountable obstacle that by so doing We would be reviewing the case as against the two non-defaulted defendants who are not before Us to hold that the order of dismissal should be allowed to stand, as contended by respondents themselves who insist that the same is already final, not only because the period for its finality has long passed but also because allegedly, albeit not very accurately, said non-defaulted defendants unsuccessfully tried to have it set aside by the Court of Appeals whose decision on their petition is also already final, We would have to disregard whatever evidence had been presented by the plaintiff against them and, of course, the findings of respondent court based thereon which, as the assailed decision shows, are adverse to them. In other words, whichever of the two apparent remedies the Court chooses, it would necessarily entail some kind of possible juridical imperfection. Speaking of their respective practical or pragmatic effects, to annul the dismissal would inevitably prejudice the rights of the non-defaulted defendants whom We have not heard and who even respondents would not wish to have anything anymore to do with the

case. On the other hand, to include petitioners in the dismissal would naturally set at naught every effort private respondent has made to establish or prove her case thru means sanctioned by respondent court. In short, We are confronted with a legal para-dilemma. But one thing is certain — this difficult situation has been brought about by none other than private respondent who has quite cynically resorted to procedural maneuvers without realizing that the technicalities of the adjective law, even when apparently accurate from the literal point of view, cannot prevail over the imperatives of the substantive law and of equity that always underlie them and which have to be inevitably considered in the construction of the pertinent procedural rules.

All things considered, after careful and mature deliberation, the Court has arrived at the conclusion that as between the two possible alternatives just stated, it would only be fair, equitable and proper to uphold the position of petitioners. In other words, We rule that the order of dismissal of October 21, 1974 is in law a dismissal of the whole case of the plaintiff, including as to petitioners herein. Consequently, all proceedings held by respondent court subsequent thereto including and principally its decision of December 20, 1974 are illegal and should be set aside.

This conclusion is fully justified by the following considerations of equity:

1. It is very clear to Us that the procedural maneuver resorted to by private respondent in securing the decision in her favor was ill-conceived. It was characterized by that which every principle of law and equity disdains — taking unfair advantage of the rules of procedure in order to unduly deprive the other party of full opportunity to defend his cause. The idea of "dropping" the non-defaulted defendants with the end in view of completely incapacitating their co-defendants from making any defense, without considering that all of them are indispensable parties to a common cause of action to which they have countered with a common defense readily connotes an intent to secure a one-sided decision, even improperly. And when, in this connection, the obvious weakness of plaintiff's evidence is taken into account one easily understands why such tactics had to be availed of. We cannot directly or indirectly give Our assent to the commission of unfairness and inequity in the application of the rules of procedure, particularly when the propriety of reliance thereon is not beyond controversy.
2. The theories of remedial law pursued by private respondents, although approved by His Honor, run counter to such basic principles in the rules on default and such elementary rules on dismissal of actions and notice of motions that no trial court should be unaware of or should be mistaken in applying. We are at a loss as to why His Honor failed to see through counsel's inequitous strategy, when the provisions (1) on the three-day rule on notice of motions, Section 4 of Rule 15, (2) against dismissal of actions on motion of plaintiff when there is a compulsory "counter-claim, Section 2, Rule 17, (3) against permitting the absence of indispensable parties, Section 7, Rule 3, (4) on service of papers upon defendants in default when there are substantial amendments to pleadings, Section 9, Rule 13, and (5) on the unity and integrity of the fate of defendants in default with those not in default where the cause of action against them and their own defenses are common, Section 4, Rule 18, are so plain and the jurisprudence declaratory of their intent and proper construction are so readily comprehensible that any error as to their application would be unusual in any competent trial court.
3. After all, all the malactuations of respondent court are traceable to the initiative of private respondent and/or her counsel. She cannot, therefore, complain that she is being made to unjustifiably suffer the consequences of what We have found to be erroneous orders of respondent court. It is only fair that she should not be allowed to benefit from her own frustrated objective of securing a one-sided decision.
4. More importantly, We do not hesitate to hold that on the basis of its own recitals, the decision in question cannot stand close scrutiny. What is more, the very considerations contained therein reveal convincingly the inherent weakness of the cause of the plaintiff. To be sure, We have been giving serious thought to the idea of

merely returning this case for a resumption of trial by setting aside the order of dismissal of October 21, 1974, with all its attendant difficulties on account of its adverse effects on parties who have not been heard, but upon closer study of the pleadings and the decision and other circumstances extant in the record before Us, We are now persuaded that such a course of action would only lead to more legal complications incident to attempts on the part of the parties concerned to desperately squeeze themselves out of a bad situation. Anyway, We feel confident that by and large, there is enough basis here and now for Us to rule out the claim of the plaintiff.

Even a mere superficial reading of the decision would immediately reveal that it is littered on its face with deficiencies and imperfections which would have had no reason for being were there less haste and more circumspection in rendering the same. Recklessness in jumping to unwarranted conclusions, both factual and legal, is at once evident in its findings relative precisely to the main bases themselves of the reliefs granted. It is apparent therein that no effort has been made to avoid glaring inconsistencies. Where references are made to codal provisions and jurisprudence, inaccuracy and inapplicability are at once manifest. It hardly commends itself as a deliberate and conscientious adjudication of a litigation which, considering the substantial value of the subject matter it involves and the unprecedented procedure that was followed by respondent's counsel, calls for greater attention and skill than the general run of cases would.

Inter alia, the following features of the decision make it highly improbable that if We took another course of action, private respondent would still be able to make out any case against petitioners, not to speak of their co-defendants who have already been exonerated by respondent herself thru her motion to dismiss:

1. According to His Honor's own statement of plaintiff's case, "she is the widow of the late Tee Hoon Po Chuan (Po Chuan, for short) who was then one of the partners in the commercial partnership, Glory Commercial Co. . . . with defendants Antonio Lim Tanhu (Lim Tanhu, for short) and Alfonso Leonardo Ng Sua (Ng Sua, for short) as co-partners; that after the death of her husband on March 11, 1966 she is entitled to share not only in the capital and profits of the partnership but also in the other assets, both real and personal, acquired by the partnership with funds of the latter during its lifetime."

Relatedly, in the latter part of the decision, the findings are to the following effect:

"That the herein plaintiff Tan Put and her late husband Po Chuan were married at the Philippine Independent Church of Cebu City on December 20, 1949; that Po Chuan died on March 11, 1966; that the plaintiff and the late Po Chuan were childless but the former has a foster son Antonio Nuñez whom she has reared since his birth with whom she lives up to the present; that prior to the marriage of the plaintiff to Po Chuan the latter was already managing the partnership Glory Commercial Co. then engaged in a little business in hardware at Manalili St., Cebu City; that prior to and just after the marriage of the plaintiff to Po Chuan she was engaged in the drugstore business; that not long after her marriage, upon the suggestion of Po Chuan, the plaintiff sold her drugstore for P125,000.00 which amount she gave to her husband in the presence of defendant Lim Tanhu and was invested in the partnership Glory Commercial Co. sometime in 1950; that after the investment of the above-stated amount in the partnership its business flourished and it embarked in the import business and also engaged in the wholesale and retail trade of cement and GI sheets and under huge profits;

"x x x x x x x x

"That the late Po Chuan was the one who actively managed the business of the partnership Glory Commercial Co.; he was the one who made the final decisions and approved the appointments of new personnel who were taken in by the partnership; that the late Po Chuan and defendants Lim Tanhu and Ng Sua are brothers, the latter two (2) being the elder brothers of the former; that defendants Lim Tanhu and Ng Sua are both naturalized Filipino citizens whereas the late Po Chuan until the time of his death was a Chinese citizen; that the three (3) brothers were partners in the Glory Commercial Co. but Po Chuan was practically the owner of

the partnership having the controlling interest; that defendants Lim Tanhu and Ng Sua were partners in name but they were mere employees of Po Chuan; x x x" (Pp. 89-91, Record.)

How did His Honor arrive at these conclusions? To start with, it is not clear in the decision whether or not in making its findings of fact the court took into account the allegations in the pleadings of the parties and whatever might have transpired at the pre-trial. All that we can gather in this respect is that references are made therein to pre-trial exhibits and to Annex A of the answer of the defendants to plaintiff's amended complaint. Indeed, it was incumbent upon the court to consider not only the evidence formally offered at the trial but also the admissions, expressed or implied, in the pleadings, as well as whatever might have been placed before it or brought to its attention during the pre-trial. In this connection, it is to be regretted that none of the parties has thought it proper to give us an idea of what took place at the pre-trial of the present case and what are contained in the pre-trial order, if any was issued pursuant to Section 4 of Rule 20.

The fundamental purpose of pre-trial, aside from affording the parties every opportunity to compromise or settle their differences, is for the court to be apprised of the unsettled issues between the parties and of their respective evidence relative thereto, to the end that it may take corresponding measures that would abbreviate the trial as much as possible and the judge may be able to ascertain the facts with the least observance of technical rules. In other words, whatever is said or done by the parties or their counsel at the pre-trial serves to put the judge on notice of their respective basic positions, in order that in appropriate cases he may, if necessary in the interest of justice and a more accurate determination of the facts, make inquiries about or require clarifications of matters taken up at the pre-trial, before finally resolving any issue of fact or of law. In brief, the pre-trial constitutes part and parcel of the proceedings, and hence, matters dealt with therein may not be disregarded in the process of decision making. Otherwise, the real essence of compulsory pre-trial would be insignificant and worthless.

Now, applying these postulates to the findings of respondent court just quoted, it will be observed that the court's conclusion about the supposed marriage of plaintiff to the deceased Tee Hoon Lim Po Chuan is contrary to the weight of the evidence brought before it during the trial and the pre-trial.

Under Article 55 of the Civil Code, the declaration of the contracting parties that they take each other as husband and wife "shall be set forth in an instrument" signed by the parties as well as by their witnesses and the person solemnizing the marriage. Accordingly, the primary evidence of a marriage must be an authentic copy of the marriage contract. While a marriage may also be proved by other competent evidence, the absence of the contract must first be satisfactorily explained. Surely, the certification of the person who allegedly solemnized a marriage is not admissible evidence of such marriage unless proof of loss of the contract or of any other satisfactory reason for its non-production is first presented to the court. In the case at bar, the purported certification issued by a Mons. Jose M. Recoleta, Bishop, Philippine Independent Church, Cebu City, is not, therefore, competent evidence, there being absolutely no showing as to unavailability of the marriage contract and, indeed, as to the authenticity of the signature of said certifier, the jurat allegedly signed by a second assistant provincial fiscal not being authorized by law, since it is not part of the functions of his office. Besides, inasmuch as the bishop did not testify, the same is hearsay.

As regards the testimony of plaintiff herself on the same point and that of her witness Antonio Nuñez, there can be no question that they are both self-serving and of very little evidentiary value, it having been disclosed at the trial that plaintiff has already assigned all her rights in this case to said Nuñez, thereby making him the real party in interest here and, therefore, naturally as biased as herself. Besides, in the portion of the testimony of Nuñez copied in Annex C of petitioner's memorandum, it appears admitted that he was born only on March 25, 1942, which means that he was less than eight years old at the supposed time of the alleged marriage. If for this reason alone, it is extremely doubtful if he could have been sufficiently aware of such event as to be competent to testify

about it.

Incidentally, another Annex C of the same memorandum purports to be the certificate of birth of one Antonio T. Uy supposed to have been born on March 23, 1937 at Centro Misamis, Misamis Occidental, the son of one Uy Bien, father, and Tan Put, mother. Significantly, respondents have not made any adverse comment on this document. It is more likely, therefore, that the witness is really the son of plaintiff by her husband Uy Kim Beng. But she testified she was childless. So which is which? In any event, if on the strength of this document, Nuñez is actually the legitimate son of Tan Put and not her adopted son, he would have been but 13 years old in 1949, the year of her alleged marriage to Po Chuan, and even then, considering such age, his testimony in regard thereto would still be suspect.

Now, as against such flimsy evidence of plaintiff, the court had before it, two documents of great weight belying the pretended marriage. We refer to (1) Exhibit LL, the income tax return of the deceased Tee Hoon Lim Po Chuan indicating the name of his wife was Ang Siok Tin and (2) the quitclaim, Annex A of the answer, wherein plaintiff Tan Put stated that she had been living with the deceased without benefit of marriage and that she was his "common-law wife." Surely, these two documents are far more reliable than all the evidence of the plaintiff put together.

Of course, Exhibit LL is what might be termed as pre-trial evidence. But it is evidence offered to the judge himself, not to the clerk of court, and should have at least moved him to ask plaintiff to explain if not rebut it before jumping to the conclusion regarding her alleged marriage to the deceased, Po Chuan. And in regard to the quitclaim containing the admission of a common-law relationship only, it is to be observed that His Honor found that "defendants Lim Tanhu and Ng Sua had the plaintiff execute a quitclaim on November 29, 1967 (Annex "A", Answer) where they gave plaintiff the amount of P25,000 as her share in the capital and profits of the business of Glory Commercial Co. which was engaged in the hardware business", without making mention of any evidence of fraud and misrepresentation in its execution, thereby indicating either that no evidence to prove that allegation of the plaintiff had been presented by her or that whatever evidence was actually offered did not produce persuasion upon the court. Stated differently, since the existence of the quitclaim has been duly established without any circumstance to detract from its legal import, the court should have held that plaintiff was bound by her admission therein that she was the common-law-wife only of Po Chuan and what is more, that she had already renounced for valuable consideration whatever claim she might have relative to the partnership Glory Commercial Co.

And when it is borne in mind that in addition to all these considerations, there are mentioned and discussed in the memorandum of petitioners (1) the certification of the Local Civil Registrar of Cebu City and (2) a similar certification of the Apostolic Prefect of the Philippine Independent Church, Parish of Sto. Nino, Cebu City, that their respective official records corresponding to December 1949 to December 1950 do not show any marriage between Tee Hoon Lim Po Chuan and Tan Put, neither of which certifications have been impugned by respondent until now, it stands to reason that plaintiff's claim of marriage is really unfounded. Withal, there is still another document, also mentioned and discussed in the same memorandum and impugned by respondents, a written agreement executed in Chinese, but purportedly translated into English by the Chinese Consul of Cebu, between Tan Put and Tee Hoon Lim Po Chuan to the following effect:

"CONSULATE OF THE REPUBLIC OF CHINA
Cebu City, Philippines

T R A N S L A T I O N

This is to certify that I, Miss Tan Ki Eng Alias Tan Put, have lived with Mr. Lim Po Chuan alias Tee Hoon since 1949 but it recently occurs that we are incompatible with each other and are not in the position to keep

living together permanently. With the mutual concurrence, we decided to terminate the existing relationship of common law-marriage and promised not to interfere each other's affairs from now on. The Forty Thousand Pesos (P40,000.00) has been given to me by Mr. Lim Po Chuan for my subsistence.

Witnesses:

Mr. Lim Beng Guan

Mr. Huang Sing Se

Signed on the 10 day of the 7th month of the 54th year of the Republic of China (corresponding to the year 1965).

(SGD) TAN KI ENG

Verified from the records.

JORGE TABAR"

(Pp. 283-284, Record.)

Indeed, not only does this document prove that plaintiff's relation to the deceased was that of a common-law wife but that they had settled their property interest with the payment to her of P40,000.

In the light of all these circumstances, We find no alternative but to hold that plaintiff Tan Put's allegation that she is the widow of Tee Hoon Lim Po Chuan has not been satisfactorily established and that, on the contrary, the evidence on record convincingly shows that her relation with said deceased was that of a common-law wife and furthermore, that all her claims against the company and its surviving partners as well as those against the estate of the deceased have already been settled and paid. We take judicial notice of the fact that the respective counsel who assisted the parties in the quitclaim, Attys. H. Hermosisima and Natalio Castillo, are members in good standing of the Philippine Bar, with the particularity that the latter has been a member of the Cabinet and of the House of Representatives of the Philippines, hence, absent any credible proof that they had allowed themselves to be parties to a fraudulent document His Honor did right in recognizing its existence, albeit erring in not giving due legal significance to its contents.

2. If, as We have seen, plaintiff's evidence of her alleged status as legitimate wife of Po Chuan is not only unconvincing but has been actually overcome by the more competent and weighty evidence in favor of the defendants, her attempt to substantiate her main cause of action that defendants Lim Tanhu and Ng Sua have defrauded the partnership Glory Commercial Co. and converted its properties to themselves is even more dismal. From the very evidence summarized by His Honor in the decision in question, it is clear that not an iota of reliable proof exists of such alleged misdeeds.

Of course, the existence of the partnership has not been denied, it is actually admitted impliedly in defendants' affirmative defense that Po Chuan's share had already been duly settled with and paid to both the plaintiff and his legitimate family. But the evidence as to the actual participation of the defendants Lim Tanhu and Ng Sua in the operation of the business that could have enabled to make the extractions of funds alleged by plaintiff is at best confusing and at certain points manifestly inconsistent.

In her amended complaint, plaintiff repeatedly alleged that as widow of Po Chuan she is entitled to 1/3 share of the assets and properties of the partnership. In fact, her prayer in said complaint is, among others, for the delivery to her of such 1/3 share. His Honor's statement of the case as well as his findings and judgment are all to that same effect. But what did she actually try to prove at the ex-parte hearing?

According to the decision, plaintiff had shown that she had money of her own when she "married" Po Chuan and "that prior to and just after the marriage of plaintiff to Po Chuan, she was engaged in the drugstore business; that not long after her marriage, upon the suggestion of Po Chuan the plaintiff sold her drugstore for P125,000 which amount she gave to her husband in the presence of Tanhu and was invested in the partnership Glory Commercial Co. sometime in 1950; that after the investment of the above-stated amount in the partnership, its business flourished and it embarked in the import business and also engaged in the wholesale and retail trade of cement and GI sheets and under (sic) huge profits." (pp. 25-26, Annex L, petition.)

To begin with, this theory of her having contributed P125,000 to the capital of the partnership by reason of which the business flourished and amassed all the millions referred to in the decision has not been alleged in the complaint, and inasmuch as what was being rendered was a judgment by default, such theory should not have been allowed to be the subject of any evidence. But inasmuch as it was the clerk of court who received the evidence, it is understandable that he failed to observe the rule. Then, on the other hand, if it was her capital that made the partnership flourish, why would she claim to be entitled to only to 1/3 of its assets and profits? Under her theory found proven by respondent court, she was actually the owner of everything, particularly because His Honor also found "that defendants Lim Tanhu and Ng Sua were partners in the name but they were employees of Po Chuan; that defendants Lim Tanhu and Ng Sua had no means of livelihood at the time of their employment with the Glory Commercial Co. under the management of the late Po Chuan except their salaries therefrom; . . ." (p. 27, id.) Why then does she claim only 1/3 share? Is this an indication of her generosity towards defendants or of a concocted cause of action existing only in her confused imagination engendered by the death of her common-law husband with whom she had settled her common-law claim for recompense of her services as common-law wife for less than what she must have known would go to his legitimate wife and children?

Actually, as may be noted from the decision itself, the trial court was confused as to the participation of defendants Lim Tanhu and Ng Sua in Glory Commercial Co. At one point, they were deemed partners, at another point mere employees and then elsewhere as partners-employees, a newly found concept, to be sure, in the law on partnership. And the confusion is worse confounded in the judgment which allows these "partners in name" and "partners-employees" or employees who had no means of livelihood and who must not have contributed any capital in the business, "as Po Chuan was practically the owner of the partnership having the controlling interest", 1/3 each of the huge assets and profits of the partnership. Incidentally, it may be observed at this juncture that the decision has made Po Chuan play the inconsistent role of being "practically the owner" but at the same time getting his capital from the P125,000 given to him by plaintiff and from which capital the business allegedly "flourished."

Anent the allegation of plaintiff that the properties shown by her exhibits to be in the names of defendants Lim Tanhu and Ng Sua were bought by them with partnership funds, His Honor confirmed the same by finding and holding that "it is likewise clear that real properties together with the improvements in the names of defendants Lim Tanhu and Ng Sua were acquired with partnership funds as these defendants were only partners-employees of deceased Po Chuan in the Glory Commercial Co. until the time of his death on March 11, 1966." (p. 30, id.) It is Our considered view, however, that this conclusion of His Honor is based on nothing but pure unwarranted conjecture. Nowhere is it shown in the decision how said defendants could have extracted money from the partnership in the fraudulent and illegal manner pretended by plaintiff. Neither in the testimony of Nuñez nor in that of plaintiff, as these are summarized in the decision, can there be found any single act of extraction of partnership funds committed by any of said defendants. That the partnership might have grown into a multi-million enterprise and that the properties described in the exhibits enumerated in the decision are not in the names of Po Chuan, who was Chinese, but of the defendants who are Filipinos, do not necessarily prove that Po Chuan had not gotten his share of the profits of the business or that the properties in the names of the defendants

were bought with money of the partnership. In this connection, it is decisively important to consider that on the basis of the concordant and mutually cumulative testimonies of plaintiff and Nuñez, respondent court found very explicitly that, and We reiterate:

“x x x x x x x x”

"That the late Po Chuan was the one who actively managed the business of the partnership Glory Commercial Co.; he was the one who made the final decisions and approved the appointments of new personnel who were taken in by the partnership; that the late Po Chuan and defendants Lim Tanhu and Ng Sua are brothers, the latter two (2) being the elder brothers of the former; that defendants Lim Tanhu and Ng Sua are both naturalized Filipino citizens whereas the late Po Chuan until the time of his death was a Chinese citizen; that the three (3) brothers were partners in the Glory Commercial Co. but Po Chuan was practically the owner of the partnership having the controlling interest; that defendants Lim Tanhu and Ng Sua were partners in name but they were mere employees of Po Chuan; x x x" (Pp. 90-91, Record.)

If Po Chuan was in control of the affairs and the running of the partnership, how could the defendants have defrauded him of such huge amounts as plaintiff had made His Honor believe? Upon the other hand, since Po Chuan was in control of the affairs of the partnership, the more logical inference is that if defendants had obtained any portion of the funds of the partnership for themselves, it must have been with the knowledge and consent of Po Chuan, for which reason no accounting could be demanded from them therefor, considering that Article 1807 of the Civil Code refers only to what is taken by a partner without the consent of the other partner or partners. Incidentally again, this theory about Po Chuan having been actively managing the partnership up to his death is a substantial deviation from the allegation in the amended complaint to the effect that "defendants Antonio Lim Tanhu, Alfonso Leonardo Ng Sua, Lim Teck Chuan and Eng Chong Leonardo, through fraud and machination, took actual and active management of the partnership and although Tee Hoon Lim Po Chuan was the manager of Glory Commercial Co., defendants managed to use the funds of the partnership to purchase lands and buildings etc." (Par. 4, p. 2 of amended complaint, Annex B of petition) and should not have been permitted to be proven by the hearing officer, who naturally did not know any better.

Moreover, it is very significant that according to the very tax declarations and land titles listed in the decision, most if not all the of properties supposed to have been acquired by the defendants Lim Tanhu and Ng Sua with funds of the partnership appear to have been transferred to their names only in 1969 or later, that is, long after the partnership had been automatically dissolved as a result of the death of Po Chuan. Accordingly, defendants have no obligation to account to anyone for such acquisitions in the absence of clear proof that they had violated the trust of Po Chuan during the existence of the partnership. (See *Hanlon vs. Hansserman and Beam*, 40 Phil. 796.)

There are other particulars which should have caused His Honor to readily disbelieve plaintiff's pretensions. Nuñez testified that "for about 18 years he was in charge of the GI sheets and sometimes attended to the imported items of the business of Glory Commercial Co." Counting 18 years back from 1965 or 1966 would take Us to 1947 or 1948. Since according to Exhibit LL, the baptismal certificate produced by the same witness as his birth certificate, shows he was born in March, 1942, how could he have started managing Glory Commercial Co. in 1949 when he must have been barely six or seven years old? It should not have escaped His Honor's attention that the photographs showing the premises of Philippine Metal Industries after its organization "a year or two after the establishment of Cebu Can Factory in 1957 or 1958" must have been taken after 1959. How could Nuñez have been only 13 years old then as claimed by him to have been his age in those photographs when according to his "birth certificate", he was born in 1942? His Honor should not have overlooked that according to the same witness, defendant Ng Sua was living in Bantayan until he was directed to return to Cebu after the fishing business thereat floundered, whereas all that the witness knew about defendant Lim Teck Chuan's arrival from

Hongkong and the expenditure of partnership money for him were only told to him allegedly by Po Chuan, which testimonies are veritably exculpatory as to Ng Sua and hearsay as to Lim Teck Chuan. Neither should His Honor have failed to note that according to plaintiff herself, "Lim Tanhu was employed by her husband although he did not go there always being a mere employee of Glory Commercial Co." (p. 22, Annex L, the decision.)

The decision is rather emphatic in that Lim Tanhu and Ng Sua had no known income except their salaries. Actually, it is not stated, however, from what evidence such conclusion was derived in so far as Ng Sua is concerned. On the other hand, with respect to Lim Tanhu, the decision itself states that according to Exhibit NN-Pre-trial, in the supposed income tax return of Lim Tanhu for 1964, he had an income of P4,800 as salary from Philippine Metal Industries alone and had a total assessable net income of P23,920.77 that year for which he paid a tax of P4,656.00. (p. 14, Annex L, id.) And per Exhibit GG-Pre-trial, in the year, he had a net income of P32,000 for which he paid a tax of P3,512.40. (id.) As early as 1962, "his fishing business in Madridejos, Cebu was making money, and he reported "a net gain from operation (in) the amount of P865.64" (id., per Exhibit VV-Pre-trial.) From what then did His Honor gather the conclusion that all the properties registered in his name have come from funds malversed from the partnership?

It is rather unusual that His Honor delved into financial statements and books of Glory Commercial Co. without the aid of any accountant or without the same being explained by any witness who had prepared them or who has knowledge of the entries therein. This must be the reason why there are apparent inconsistencies and inaccuracies in the conclusions His Honor made out of them. In Exhibit SS-Pre-trial, the reported total assets of the company amounted to P2,328,460.27 as of December, 1965, and yet, Exhibit TT-Pre-trial, according to His Honor, showed that the total value of goods available as of the same date was P11,166,327.62. On the other hand, per Exhibit XX-Pre-trial, the supposed balance sheet of the company for 1966, "the value of inventoried merchandise, both local and imported", as found by His Honor, was P584,034.38. Again, as of December 31, 1966, the value of the company's goods available for sale was P5,524,050.87, per Exhibit YY and YY-1-Pre-trial. Then, per Exhibit II-3-Pre-trial, the supposed Book of Account, whatever that is, of the company showed its "cash analysis" was P12,223,182.55. We do not hesitate to make the observation that His Honor, unless he is a certified public accountant, was hardly qualified to read such exhibits and draw any definite conclusions therefrom, without risk of erring and committing an injustice. In any event, there is no comprehensible explanation in the decision of the conclusion of His Honor that there were P12,223,182.55 cash money defendants have to account for, particularly when it can be very clearly seen in Exhibits II-4, II-4-A, II-5 and II-6-, Pre-trial, Glory Commercial Co. had accounts payable as of December 31, 1965 in the amount of P4,801,321.17. (p. 15, id.) Under the circumstances, We are not prepared to permit anyone to predicate any claim or right from respondent court's unaided exercise of accounting knowledge.

Additionally, We note that the decision has not made any finding regarding the allegation in the amended complaint that a corporation denominated Glory Commercial Co., Inc. was organized after the death of Po Chuan with capital from the funds of the partnership. We note also that there is absolutely no finding made as to how the defendants Dy Ochay and Co Oyo could in any way be accountable to plaintiff, just because they happen to be the wives of Lim Tanhu and Ng Sua, respectively. We further note that while His Honor has ordered defendants to deliver or pay jointly and severally to the plaintiff P4,074,394.18 or 1/3 of the P12,223,182.55, the supposed cash belonging to the partnership as of December 31, 1965, in the same breath, they have also been sentenced to partition and give 1/3 share of the properties enumerated in the dispositive portion of the decision, which seemingly are the very properties allegedly purchased from the funds of the partnership which would naturally include the P12,223,182.55 defendants have to account for. Besides, assuming there has not yet been any liquidation of the partnership, contrary to the allegation of the defendants, then Glory Commercial Co. would have the status of a partnership in liquidation and the only right plaintiff could have would be to what might result

after such liquidation to belong to the deceased partner, and before this is finished, it is impossible to determine, what rights or interests, if any, the deceased had (*Bearneza vs. Dequilla*, 43 Phil. 237.) In other words, no specific amounts or properties may be adjudicated to the heir or legal representative of the deceased partner without the liquidation being first terminated.

Indeed, only time and the fear that this decision would be much more extended than it is already prevent us from further pointing out the inexplicable deficiencies and imperfections of the decision in question. After all, what have been discussed should be more than sufficient to support Our conclusion that not only must said decision be set aside but also that the action of the plaintiff must be totally dismissed, and, were it not seemingly futile and productive of other legal complications, that plaintiff is liable on defendant's counterclaims. Resolution of the other issues raised by the parties albeit important and perhaps pivotal has likewise become superfluous.

IN VIEW OF ALL THE FOREGOING, the petition is granted. All proceedings held in respondent court in its Civil Case No. 12328 subsequent to the order of dismissal of October 21, 1974 are hereby annulled and set aside, particularly the ex-parte proceedings against petitioners and the decision of December 20, 1974. Respondent court is hereby ordered to enter an order extending the effects of its order of dismissal of the action dated October 21, 1974 to herein petitioners Antonio Lim Tanhu, Dy Ochay, Alfonso Leonardo Ng Sua and Co Oyo. And respondent court is hereby permanently enjoined from taking any further action in said civil case save and except as herein indicated. Costs against private respondent.

Fernando and Concepcion, Jr., JJ., concur.

Makalintal, C.J., and Aquino, J., in the result.

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