

**DIONISIO MALACORA, AND LUCIA MARABULAS, PETITIONERS, VS.
COURT OF APPEALS, CONSUELO LIBARNES AND RODRIGO
LIBARNES, RESPONDENTS.**

G.R. No. 51042. September 30, 1982

Ponente: DE CASTRO, J.

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DE CASTRO, J.:

Appeal by certiorari to review the decision of the Court of Appeals which modified the judgment of the trial court, the Court of Agrarian Relations, Branch I, Butuan City, the dispositive portion of which reads as follows:

"WHEREFORE, questioned orders of June 27, 1978 and August 1, 1978 , as well as the writ of execution of October 7, 1974 , the Sheriff's Certificate of Sale and Sheriff's Final Deed of Sale are hereby annulled and set aside, with costs against the private respondents."[1]

From the decision of the Court of Appeals, the following facts as set forth therein are undisputed:

"On April 14, 1971, the respondent court rendered a decision in CAR Case No. 6, entitled "Dionisio Malacora and Lucia Marabulas vs. Rodrigo Libarnes and Consuelo Libarnes", the dispositive portion of which reads as follows:

'IN VIEW OF ALL THE FOREGOING, judgment is hereby rendered ordering the herein defendants RODRIGO LIBARNES and CONSUELO LIBARNES to pay the herein plaintiffs DIONISIO MALACORA and LUCIA MARABULAS the total amount of TWO THOUSAND FIVE HUNDRED AND NINETY FIVE (P2,595.00) PESOS for one-half of all the coconut trees and of TEN (P10.00) PESOS for one-half of the banana plants said plaintiffs planted on the defendants' land and after payment of said amounts their tenancy relation will be considered as terminated and the said plaintiffs will be allowed to surrender and leave their tenanted holding.

'Both parties in this case are hereby ordered to pay fifty-fifty the court fees, the plaintiffs to pay their one-half share upon receipt of the payments for one-half of the improvement as herein above ordered.'

"Defendants, petitioners herein, appealed to this Court (CA-G.R. No. 00658-R) which modified the judgment as follows:

'WHEREFORE, the decision appealed from is hereby affirmed, with the modification that the petitioners are ordered to pay P8.00 per coconut trees for one-half of all the coconut trees which the private respondent had planted on the land in question, without pronouncement as to costs.'

"After Our decision became final and the case had been returned to the respondent court, plaintiffs, private respondents herein, filed a motion for execution. Acting on the motion, the respondent court, on September 20, 1974 , entered an order of execution; and on October 4, 1974 , the Clerk of Court issued a writ of execution which commanded petitioners to pay plaintiffs Dionisio Malacora and Lucia Marabulas the total amount of P2,184.00 for the 273 coconut trees planted by the plaintiffs.

"On October 30, 1974 , the respondent Provincial Sheriff of Agusan del Norte enforced the writ of execution

by levying upon the property of petitioners herein, located in Bo. Mabini, Municipality of Cabadbaran , Agusan del Sur. In the ensuing auction sale conducted on December 16, 1974 , the property was sold for the sum of P3,500.00 to private respondents, who were then issued the corresponding certificate of sale.

"As petitioners failed to exercise their right of redemption, the respondent sheriff on February 21, 1976 , executed a final deed of sale in favor of private respondents.

"On May 12, 1976 , private respondents filed a motion for issuance of a writ of possession, which motion was opposed by petitioners on the ground 'that the writ of execution did not conform to the judgment of the trial court as modified by the decision of this Honorable Court of August 27, 1973.' The above motion was resolved by the respondent court in the questioned order of May 12, 1977 in this wise:

'This is a motion for the issuance of writ of possession on the ground that defendants, the losing party, refuse to surrender the possession of the property subject of execution of which the Sheriff's final Deed of Sale has already been issued in favor of plaintiffs. On record is also a motion in opposition to the issuance of the writ.

'In going over the case, we find that the decision of this Court granted unto plaintiffs the sum of P2,595.00 corresponding to one-half of P5,190.00 which is the total valuation of the 213 fruit bearing coconut trees at P20.00 per tree (P4,260.00) and 62 non-bearing coconut trees at P15.00 per tree (P930.00).

'On appeal, the valuation was modified by the Court of Appeals to P8.00 per coconut tree, be it fruit bearing or not. The total number of trees is 275. Multiply this by P8.00 we get a result of P2,200. One half of this is P1,100. There is then a difference of P1,495.00 of what ought to have been executed and of what was actually executed which was P2,595.00.

'This Court feels that this variance in amount is not sufficient to cancel and/or declare as null and void an otherwise regular and lawful execution proceedings undertaken by the Sheriff. A simple restitution would better serve the ends of justice than have us follow the complexities of technical rules of procedure and of law (Sec. 16, PD 946).

'WHEREFORE, in view of the foregoing, plaintiffs are hereby ordered to restore/return and/or reimburse unto defendants the sum of P1,495.00 within 15 days from receipt of this Order."

"Petitioners filed a motion for reconsideration of the above order, and after due hearing, the respondent court modified the said order as follows:

'WHEREFORE, the Order of this Court dated May 12, 1977, is hereby modified as follows:

'1. Ordering the Provincial Sheriff of Agusan del Norte or his Deputy to place plaintiffs in effective possession of the above-described property as owners thereof;

'2. Ordering plaintiffs to reimburse the amount of ONE THOUSAND FIFTY FIVE PESOS and 50/100 (P1,055.50) unto defendants within a period of Thirty (30) days from receipt of this Order.'

"Thereafter, petitioners filed the instant petition."[2]

The issue raised for Our resolution is whether the Court of Appeals erred in declaring the writ of execution, the sheriff's certificate of sale and the sheriff's final deed of sale, and the orders of June 27 and August 1, 1978 in CAR Case No. 6 Agrarian '68 as annulled and set aside.

The writ of execution is supposed to be to enforce the judgment of the Court of Appeals, the dispositive portion of which reads:

"WHEREFORE, the decision appealed from, is hereby affirmed, with the modification that the petitioners are

ordered to pay P8.00 per coconut tree for one-half of all the coconut trees which the private respondent had planted on the land in question, without pronouncement as to cost."[3]

The variance between the writ of execution and the final judgment of the Court of Appeals sought to be enforced is at once noticeable. On the basis of the judgment to be executed, the amount to be paid by the private respondents to petitioners should be only P1,100.00, the value of 1/2 of the 275 coconut trees planted, at the rate of P8.00 a tree already fruit bearing or not. The writ of execution fixed the value at P2,184.00. Not being in accordance with the judgment to be enforced, in a very substantial manner, the writ of execution was correctly set aside as a nullity by the respondent Court of Appeals, properly acting on the authority of the Collector of Internal Revenue vs. Gutierrez, et al.[41]

The dispositive portion of decision controls in execution of judgment.[5]

Consequently, the judgment appealed from must be sustained, being fully supported by jurisprudential authority on the matter treated therein.

Furthermore, the records show that despite the Resolution of this Court of June 11, 1980 requiring the parties to submit their memorandum simultaneously within thirty (30) days from notice, after the petition was given due course, the petitioner failed to file their memorandum, while the private respondents filed their own. The petitioners, as the appellants, should feel more under obligation to file his memorandum, just like the appellant in an ordinary appeal, which would be dismissed for failure to file the appellant's brief.

Under the provision of Article X, Section 11 of the 1973 Constitution which provides for a period of eighteen (18) months within which an appealed case should be decided by this Court, the appealed decision may also be deemed affirmed, this case having been submitted for decision on October 8, 1980. I wish to go on record that I am personally for applying the aforesaid provision with due respect to my colleagues, who may have a different view.

During my first days in January, 1979 in the Supreme Court, I had occasion to bring up, while the Court was in session en banc, the question of why the aforementioned provision has not been implemented despite the lapse of so long a period as more than six (6) years at the time, from the effectivity of the New Constitution. The answer given was that the constitutional provision referred to is merely directory, not mandatory, and furthermore, the court was not then in its full strength of fifteen (15) members.

We have since May 14, 1982, been brought to the full membership of fifteen (15) justices, including the Chief Justice, as provided by the Constitution. We have heard that both the President and the Batasan Pambansa have taken the view that the provision is mandatory. This is, too, the view of the Court of Appeals which, while I was still there, had already started to draft internal rules for the implementation of the cited constitutional provision and had, some years ago, already approved said rules. Actual application of the said internal rules was, however, held in abeyance in deference to the Supreme Court which has not seemed as eager to avail of the benefits as envisioned by the provision.

I have always felt very strongly, and more so now, for the reasons above stated, that the provision of Article X, Section 11 of the Constitution, is mandatory and should have been complied with immediately after the effectivity of the New Constitution. This has always been my position, basically, on the legal principle that all provisions of the Constitution which direct specific acts to be done, or prohibit certain acts to be done, should be construed as mandatory. To construe them as merely directory would be to thwart the intention of the Constitution which, its command being of the highest order should, under no circumstance, be permitted if they are the 'great ordinances' as Justice Holmes had called the provisions of the Constitution (Springer vs. Government of the Philippine Island, 27 U.S. 189, 216 [1928]).

"The provision in question states:

'Section 11. (1) Upon the effectivity of this Constitution, the maximum period within which a case or matter shall be decided or solved from the date of its submission, shall be eighteen (18) months for the Supreme Court, and unless reduced by the Supreme Court, twelve (12) months for all inferior collegiate courts, and three (3) months for all other inferior courts.

'(2) With respect to the Supreme Court and other collegiate appellate courts, when the applicable maximum period shall have lapsed without the rendition of the corresponding decision or resolution because the necessary vote cannot be had, the judgment, order, or resolution appealed from shall be deemed affirmed except in those cases where a qualified majority is required and in appeals from judgment of conviction in criminal cases; and in original special civil actions and proceedings for habeas corpus, the petition in such cases shall be deemed dismissed; and a certification to this effect signed by the chief magistrate of the court shall be issued and a copy thereof attached to the record of the case.'" (Underscoring supplied.)

From the plain language of the provision, the Constitution could not have intended anything but full and immediate compliance therewith. The manifest purpose of the provision is to avoid delay in the disposition of cases, which always is a cause of injustice, under the familiar aphorism that 'justice delayed is justice denied.' It would, at the same time, ease up the clogged dockets of the courts, which had long presented a problem that defies solution, despite the striving of this Court in constant quest of one.

To begin with, it is, to me, not correct to say that it is impossible to comply with the provision of Section 11, Article X of the Constitution. There is nothing hard to just follow its simple mandate of considering an appealed decision affirmed if no decision is rendered before the lapse of time limit set therefor. What may be impossible is for the Supreme Court, for example, to decide a case on the merit within the eighteen (18) months given to it from its submission for decision, because so many other appealed cases had already accumulated and will increasingly do so, as long as we do not apply the clear mandate of the Constitution. It is precisely with full cognizance of this fact--the impossibility of avoiding delays in disposing of appealed cases on the merits--that prompted the adoption of this special remedy by no less than the Constitution because similar time limitations as provided by mere statutes, without an alternative prescription of what would be the effect of failure to meet the deadline, had been held merely directory. To hold the Constitutional provision as also merely directory would render it nugatory, because the unmistakable and clear intent of the framers would be put to naught. The automatic affirmance of the appealed provision in case of failure to decide or resolve within the time limit is precisely the alternative prescription, believed to better serve the cause of justice than waiting, no matter how long, for a decision on the merit.

This may be illustrated with a case in which a money award is made in favor of the plaintiff. By applying the Constitution, the appealed decision is deemed affirmed if no decision is rendered within the applicable maximum period allowed. Without the constitutional provision, it may take many years more from the lapse of that period before decision is actually rendered on the merits. If statistics showing that 95%, more or less, of the appealed cases to this Court are affirmed is accurate, the appealed decision would, in all probability, be affirmed, if decision on the merits is rendered. The injustice caused by the delay becomes instantly patent when it is considered that if the award is paid earlier, the money would have a greater purchasing value than when it is paid years later. This is due to inflation which had long since gripped the whole world so tightly and unrelentingly as the Constitutional Convention was obviously aware of, for which it saw the need of inserting the unique and novel provision in the new Constitution, as a much needed extraordinary remedy.

Under Section 2 of Article X of the Constitution, eight (8) votes are required for a decision of the Court en banc,

five (5) votes, for a decision of a Division. If the necessary vote is not obtained, the petition is dismissed, and the appealed decision, order or resolution is then deemed affirmed. This is what happens when this Court acts on the case within the period fixed in Section 11 of Article X of the Constitution, but fails to obtain the necessary vote. From this observation, it becomes apparent that to hold the provision of Section 11 of Article X of the Constitution as only directory would make said provision serve no purpose at all, because notwithstanding the lapse of the applicable maximum period without a decision or resolution having been rendered, the case may nevertheless still be decided on the merit, as if the provision did not exist.

It seems to me crystal clear that the Constitution intends that aside from the way an appealed decision, order or resolution is deemed affirmed because of lack of necessary vote under Section 2 of Article X, the same effect is contemplated by reason of the lapse of the period fixed without the case being decided on the merits. If however, the maximum periods fixed in Section 11, which is the real core of said provision, its heart and soul, as it were, may be disregarded, because the provision is merely directory, We would be attributing to the framers of the Constitution, with all their vision and wisdom, an act of colossal absurdity. They have inserted a new provision which would have no different effect than what is already covered by Section 2 of the same Article, thus rendering Section 11 a complete surplusage. Only by holding that Section 11 is of mandatory character would such an absurdity be avoided, as both Section 2 and Section 11 would each be given distinct identity achieving a common objective but through two different and separate ways: (1) the necessary vote could not be had, under Section 2, and (2) the period fixed had lapsed, under Section 11.

It is elementary that all parts of a statute, and this should be more so of the Constitution, should be given effect and made to serve its own distinct purpose, as no useless provision or one without any purpose at all could have been intended to be made part of, or incorporated in, the law. This is actually what had happened with Section 11 of Article X of the Constitution on its being considered as merely directory, not mandatory. There has been, to my knowledge, never any instance where Section 11 had been applied despite that it has been in the Constitution for more than nine (9) years now. This is unheard of with reference to no less than a constitutional mandate.

Examining how the provision works with the Court of First Instance, a one-man court, not a collegiate court, may help in reaching the correct construction of the provision in question. If the Court of First Instance fails to decide the case within the 3-month period given it, what happens? If the case is an ordinary civil action, there is no provision that after the lapse of the 3-month period this case would be dismissed. What the provision of Section 11, paragraph 2, makes specific mention of are only (1) appealed cases and (2) original special civil actions. In a one-man court, the condition, "because the necessary vote could not be had" has no application. If the period has lapsed without the decision or resolution being rendered, that is all that is required for the appealed decision to be deemed affirmed, or the original special civil action, dismissed, if the provision in question is to be given meaning and purpose.

What the above observation proves is that all that paragraph 2 of Section 11 requires for the appealed decision to be deemed affirmed and original special civil actions, dismissed, is that the applicable maximum period has lapsed without the decision of the merits being rendered, because of failure to act on the case and put it to a vote, not that it was put to a vote, but "the necessary vote could not be had." This phrase would thus appear to be either a mere surplusage or as merely descriptive of how a decision is reached in the Supreme Court, where alone that phrase has application. It cannot apply to the Court of Appeals, because there the necessary votes can always be had for a decision to be reached, just like in the one-man Court of First Instance, as long as the Court acts. What the Constitution has in mind, therefore, is "inaction" on the part of the court during the applicable period, as the reason or cause for the failure to render a decision or resolution within the applicable period, not that "the necessary vote cannot be had."

If the argument thus far presented is not enough to support the view that the provision in question is mandatory, not merely directory, We need not go outside of the text of the provision to look for perhaps the argument that will end all arguments. The express mention by Section 11 itself of exceptions to the automatic affirmance of appealed decisions, orders or resolutions when not reversed or modified within the prescribed period, namely, (1) cases where a qualified majority is required and (2) appeals from judgment of conviction in criminal cases, which even after the lapse of the fixed period may still be decided on the merits, clearly means under the maxim "expressio inius est exclusio alterius," that aside from the exceptions expressly mentioned, all other cases may no longer be decided on the merit after the lapse of the applicable maximum period. The appealed decision, order and resolution would be deemed affirmed, and shall then be so certified by the chief magistrate of the court, as provided in the last part of paragraph 2 of Section 11. Said provision would be rendered also useless by holding Section 11 merely directory because the occasion for the certification will never arise. It will thus be seen that the exceptions expressly mentioned in the provision and the certification required thereby as just pointed out, argue most eloquently and convincingly in favor of the mandatory character of Section 11 of Article X of the New Constitution.

It may have to be stressed that in any case where, by operation of the constitutional provision, the appealed decision, again for example, of the Court of Appeals, is deemed affirmed by the Supreme Court, because the latter has not been able to decide the appeal on the merits within the prescribed period, no member of the Court is meant to be singled out for any culpability or dereliction of duty. Neither is any adverse reflection meant to be made against the Court as a whole, because there is in the Constitution an implicit recognition of the probability of many appealed cases not being decided or resolved within the period as short as that prescribed, not because of culpable neglect, inefficiency or incompetence of any member of the Court or of the Court itself as a body, but because of sheer physical impossibility. A contrary view which to me is completely unfounded, seems to be what has created a very strong influence towards holding the provision as merely directory, to avoid incurring in some form of guilt or culpability for not deciding an appealed case within the time limit set.

Another deterrent, as has been perceived during our deliberation, to holding the provision in question as mandatory, is the fear that all our decisions already rendered reversing or modifying the appealed decisions after the lapse of the period prescribed, would be questioned even at this late hour. I do not share in this fear because to me, what the provision does is to give a party the right to invoke its mandate and enjoy its beneficial effects. As all rights go, the particular right to demand for the certification of the Chief Magistrate that the appealed decision is deemed affirmed by the lapse of the specified period without a decision on the merits having been rendered, is waivable, and is deemed waived if not invoked within a reasonable time from notice of the questioned decision. At least, the Supreme Court can come up with this ruling, should a case be brought up to raise the question as above intimated, a ruling, I believe, would be impressed with absolute rationality and soundness.

In any event, what should engage the Court's attention is to work out a procedure that would avoid, as much as possible, having to apply the automatic affirmance as provided in the Constitution. I am convinced of the possibility of the adoption of such a workable procedure.

The Constitution provides that the conclusion of the Court shall be reached in consultation before the case is assigned to a member for the writing of the opinion of the Court (Section 8, Article X). Setting a case for that required consultation can reasonably be done within just months from its submission for decision, long before the lapse of the applicable period. This same case had already been discussed among the members, and dismissing it or giving due course to it is not so difficult a matter to determine. Either of these actions is usually taken in the session when the agenda in which the new petition is placed is discussed just one day or so after the new cases are assigned to the members for report and recommendation as to what action to take. There should perhaps be less

difficulty in reaching the final conclusion when, after a long period of study, and with the aid of briefs and/or memoranda, the Court next sits in consultation to reach its decision. It is seldom that the taking of the vote of each member on the issue to be resolved has not been held forthwith, following the consultation or exchange of view. After the voting, the case is actually decided on the merits, or the appealed decision, order or resolution is deemed affirmed by operation of the Constitution, depending on the result of the voting.

If this procedure is adopted, no unnecessary delay need be incurred in. What really takes some time is the writing of the decision by the ponente who is chosen after a final conclusion is reached, because most often if not always, he has many other opinions to write. But if by appropriate Resolution, which may be just a Minute Resolution, it would be made of record that in that session when the voting was held after the required consultation, the Court had reached its conclusion the case has, in fact, been already decided, at least for the purpose of compliance with the Constitution. The decision complete with the opinion as written by the ponente chosen for the purpose may be actually released later, as indeed, there have been instances when decisions were promulgated without prejudice to the writing of the extended opinion.

It is believed that under the procedure as roughly described above, but with the finer details to be laid down, the disposition of any case in this Court can take place well within the period fixed by the Constitution, specially if greater strictness is observed in giving due course to every petition filed with this Court, which at times tends to be quite liberal in this regard.

As to the original special civil actions including habeas corpus, my recollection fails me as to whether any such kind of action has not been disposed of on the merits within the applicable period. In any event, all that the Constitution mandates with respect to original special civil actions is that the petitions in such cases shall be deemed dismissed if the necessary vote cannot be had within the period fixed, which as previously explained, is actually another way of saying that no decision has been rendered. And to repeat, no culpability is intended to attach to anyone of the Court for the happening of this eventuality.

I really see no impossibility in complying with what the Constitution intends to be an urgently needed remedy to avoid injustice, as earlier stated, under the well-known dictum that "justice delayed is justice denied," at the same time helping solve the vexing problem of clogged dockets. Why, indeed, can We not just consider the appealed decision as affirmed, as the Constitution so unequivocally ordains, if, by reason of physical impossibility, which would free the Court or any of its members from any fear of guilt or culpability, a decision of the appeal on the merits within the period considered by the Constitution long enough for an appealed case to remain unresolved may not be rendered? Is it because a decision is the correct decision only when We, ourselves, render that decision on the merits when the case is brought to Us on appeal? Who knows but that had there been a court higher than the Supreme Court, the latter's decision may also be reversed or altered? Many a time a judgment of a Court of First Instance was reversed by the Court of Appeals, but when an appeal was taken to the Supreme Court, the decision of the Court of Appeals was reversed and that the lower court sustained.

WHEREFORE, the appealed decision is hereby affirmed, and the instant petition, dismissed, without special pronouncement as to costs.

SO ORDERED.

Barredo, J., (Chairman), in the result because I agree with J. Abad Santos.

Aquino, J., see attached concurring in the result.

Guerrero, J., in the result.

Concepcion, Jr. and Escolin, JJ., no part.

[1] p. 17, Rollo.

[2] pp. 13-16, Rollo.

[3] p. 60, Rollo.

[4] 108 Phil. 215.

[5] Presto vs. Galang, 78 SCRA 534; Castillo vs. Nagtalon, 4 SCRA 48; Philippine American Accident Insurance Co., Inc. vs. Flores, 97 SCRA 811.

CONCURRING IN THE RESULT

AQUINO, J.:

This case is about the implementation of an erroneous writ of execution. The Court of Agrarian Relations at Butuan City in its decision dated April 14, 1971 ordered the spouses Rodrigo Libarnes and Consuelo Libarnes (landowners) to pay the spouses Dionisio Malacora and Lucia Marabulas (tenants) the sum of P2,595 for 1/2 of all the coconut trees plus ten pesos for one-half of the banana plants on the tenanted land (Case No. 6).

In a 1974 decision, the Court of Appeals modified that decision by requiring the Libarnes spouses to pay the Malacora spouses eight pesos a tree for one-half of all the coconut trees which the Malacora spouses had planted (CA-G.R. No. 00658-R).

To enforce that judgment, the trial court issued a writ of execution dated October 4, 1974, requiring the Libarnes spouses to pay the Malacora spouses the sum of P2,184 for the 273 coconut trees planted by the latter, instead of only one-half of that amount or P1,092 only.

The sheriff enforced the said writ of execution for P2,184 by levying on the land of the Libarnes spouses located at Barrio Mabini, Cabadbaran, Agusan del Sur. The land was sold at an auction sale to the Malacora spouses for P3,500. The corresponding certificate of sale was issued to them. A final deed of sale was issued to them on February 21, 1976 in view of the failure of the Libarnes spouses to redeem the land.

Later, the Malacora spouses filed a motion for the issuance of a writ of possession. In resolving that motion, the Agrarian Court recomputed the amount due from the Libarnes spouses under the judgment of the Court of Appeals. It found that they were liable only for P1,100 as one-half of the value of 275 coconut trees at eight pesos per tree. But the trial court did not annul the execution. It simply ordered the Malacora spouses to pay the Libarnes spouses the excess amount of P1,495.

In a subsequent order, that excess amount was recomputed and reduced to P1,055. The trial court directed that a writ of possession be issued. Those two orders were assailed in the Court of Appeals by means of certiorari.

The Appellate Court in its decision dated February 13, 1979, through Justice Escolin, annulled the said orders and declared void the auction sale, the certificate of sale and the final deed of sale issued to the Malacora spouses because the writ of execution did not conform to its 1974 judgment (Libarnes vs. Judge Hidalgo, CA-G.R. No. 08321-SP). From that decision, the Malacora spouses appealed to this Court.

I concur in the opinion of Justice De Castro that the judgment under appeal should be affirmed because the writ of

execution was void.

However, I disagree with his personal view that the judgment of the Court of Appeals should be affirmed on the additional ground that, as this case was submitted for decision on October 6, 1980, the period of eighteen months for deciding it, as fixed in section 11, Article X of the Constitution, had already expired.

In my opinion, it is impossible for this Court to comply with the eighteen-month period because of the thousands of judicial, administrative and disbarment cases pending decision. Since the Constitution took effect on January 17, 1973, this Court has never complied with the eighteen-month period.

Some Justices consider that provision directory. There is an opinion that the judgment or order under appeal is deemed affirmed after the expiration of the eighteen-month period only when there is a showing that "the necessary vote cannot be had". In the absence of such a showing, the automatic affirmance of the judgment or order under appeal would not take place.

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