# JIMMA UNIVERSITY

## CIVIL PROCEDURAL LAW PART 1 AND PART 2

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# Chapter One

## Introduction to Civil Procedure: Conceptual and Historical Background

### Substantive Vs Procedural Laws: Significance:-

### Major classification of laws:-

- A broad distinction of law are substantive and adjective legal rules.

Adjective rules are, in turn, subdivided into procedural and evidence laws with the **former** constituting the major portion of it.

### What are procedural laws?

- Procedural laws are, comparatively speaking, means to the end contemplated by substantive laws.

Thus, prescription without application is nothing but pretence. This means that the rights and duties envisaged by the laws would mean nothing unless they are fully enforced.

Procedural rules, in essence, give effect ("life") to the ends sought to be achieved by substantive laws.

Issues are regulated by procedural laws:-

 The **function of procedural rules,** to which civil procedure belongs are;

- to govern as to how claims of persons are prepared;
- where and when presented; and,
- How determined and finally enforced by a court of law.

Is there a clear demarcation between substantive and procedural laws?

 As a matter of fact, it is not, more often than one would expect that easy to readily put, with definitive precision, a particular legal rule to either of the categories.

For instance in Ethiopian case;

**a) Art 1856(2) of the Civil Code** prescribes that a court dealing with a given case shall not have regard to period of limitations unless it is pleaded by the parties;

it is substantive because found in Ethiopian civil code ( a substantive law of Ethiopia) and

At the same time it is procedural law. Since the rule is actually setting forth a guideline for the court as to how it should go about dealing with issues of period of limitation in relation to judicial proceedings.

**Essential methods of identifying procedural law from substantive law.**

 There are three techniques to this effect;

a. Look at the material source; i.e., the constituent document of the rule under consideration.

This means, rules of civil procedure, for instance, are primarily and substantially embodied in the CPrC and, Whereas rules of substantive laws are predominantly

incorporated in such substantive codes as the 'Civil' and 'Commercial' they are secondarily, found in some other laws relating to civil matters.

b. Look the contents (purposes) and the functional correlations between them: it is;

The rules of substantive laws contents is granting the **rights** and **duties** of individuals and groups;

and, by regulating their interactions at various levels of relations. But, procedural laws are fundamentally meant to deal with the manners of framing law suits; determining their place of institutions; and, governing the way they are to be considered and finally enforced by the courts of law.

c. Look the actual functions of the two classes of laws vis- a-vis their respective spheres of applications; procedural laws (law in action or motion) governs the relation between legal actors and parties to the case inside the court, where as substantive laws (law of the rest) is applicable even outside the court.

✓ **Civil Vs Criminal Procedures: Scope of Application:-**

**Grounds to classify laws in to criminal and civil law:-**

 Laws may also be classified into 'civil' and 'criminal' based on the following grouns;

a. the purposes and the ultimate objectives underlying their very establishment

b. the types of relationships they chiefly govern;

c. the nature of the legal interests that would be affected at their **violations** and, hence, the parties who would have sufficient stake therein so as to invoke a justiciable controversy,

**Jurisprudential grounds of establishing civil and criminal liabilities:-**

**a. Civil liability or remedial liability**: is found in the legal maxim "ubi jus ibi remedium", which means, where there is a right, there must be a remedy –taking into consideration the bare act irrespective of the intention of the wrongdoer.

**b. Criminal or penal liability:** the fundamental rule underlying penal liability is contained in the jural dictum "actus non facit reum, nisimens sirea"; which means that a mere act does not amount to crime unless it is accompanied by guilty mind. Thus, criminal liability invariably requires moral guilt (intention or negligence), plus, personal act or forbearance.

**Common parameters to differentiate civil cases from criminal cases:-**

 With a view to differentiating civil cases from criminal ones, three parameters, inherently based on the jurisprudential background of the two areas of laws discussed above:-

**A. The nature of the parties instituting the legal action:** A **civil** case is initiated by a private person claiming redress for some wrong alleged to have been committed against him by another.

Is there any possibilities that the government involved in the civil case as a legal person?

 Yes; the government may initiate a legal action and be a party to a civil case. This occurs when it acts in and exercise its private capacity.

 A government is said to have acted in its private capacity when it engages in matters typically undertaken by individuals.

If so, does it mean the act of the government at public capacity cannot be raised in civil proceedings?

**Yes;**

Is there any possibilities whereby individual vs individuals are involved in the criminal case?

**Yes**:- The exception is 'offences upon complaints' -as the law calls them.

That is why, a criminal case is generally considered to be one not between the individual victim (and / or his relatives) and the alleged offender as such, but, a matter between the state and the offender.

**B. Purpose of initiating a law suit and the nature of the relief sought:** thereby is the other yardstick used to make a distinction between civil and criminal cases.

**i. Civil case:** The relief demanded in a civil case is mostly the payment of money or is usually to be assessed in monetary values. In some exceptional civil cases, however, the following punishment are imposed;

- Specific relief (personal performance) or forced performance of legal obligations, such as, restitution or delivery of goods or an injunction.

- Detention :- who either refuses to furnish security for appearance-while the case is pending- (Arts 147-150);or

fails, without good cause, to satisfy a decree(Art 389), may **exceptionally** be detained in a civil prison for a period not exceeding six months.

**ii. Criminal case:** the overall purposes and aims for initiating a criminal case is the maintenance of peace and order of the general public by, primarily, punishing the law breaker. End up on the loss of liberty (as in imprisonment) or deprivation of life (as in capital punishment) and fine.

**C. Availability of alternative dispute settling mechanism**:

**i. Civil case:** are subject to negotiations; and, hence, a compromise could be reached upon independently between the parties themselves.

However, certain single act may give rise to both a civil and a criminal case whereby the parties are at liberty to negotiate over the civil aspect of the matter.

Moreover, the parties are at liberty to negotiate over their disputes even while the case is still pending; and have it withdrawn from the court any time, but before a final judgment is rendered.

**ii. Criminal Cases:** are not subject to such ADR. This means, the matter lies exclusively within and is done under the power of the prosecution officers irrespective of the negotiations and the agreement that may be made between the victim and the offender; unless, of course, the case falls within the category of 'offences upon complaint'.

## ✓ The Purpose of Civil Procedure Vis-à-vis Fundamental Procedural Rule:-

° Fundamental purposes of civil procedural law:-

• Procedure aim to ensure that disputes are handled by an impartial legal tribunal in a fair and orderly manner and as expeditiously and economically as possible.

• Meant to secure the just, speedy and inexpensive disposition of cases.

• More specifically; they aim at treating the parties to a law suit equally and laying down the ground for a smooth and orderly flow of litigation so as to make the decision within a reasonably fair and quick time.

°Rationales for granting expeditious justice:-

 It is based on the known proverb, '*justice delayed is justice denied', and it is also equally true that 'justice rushed is justice crushed!'*

• Meaning, sketchy judgments rendered at the expense of justice in a manner that obstructs or destroys justice itself would amount to a miscarriage of justice potentially jeopardizing the administration of justice.

° Essential factors that should be taken in order to measure the speedy justice:-

• The number and nature (complexity) of filed cases Vis-à-vis the number of the courts (benches) engaged in the business; and,

•The number of the judges (justice officials) operating therein; as well as the degree of compliance with the governing rules and case flow management techniques.

° Major criticisms on Ethiopian civil procedure in general

a. The defect of the procedure (law) per se: the proponents provided the grievances that;

It is better to be sued and stand as a defendant in our courts than claiming one's right through them as a plaintiff". it is due to;

- Indeterminable number and complexities of the procedural steps followed in the litigation process;

- Lack of procedural transparency;

- The great uncertainty of the governing rules and

- The irreconcilably divergent inconsistencies in the application of the law.

b. The defect on the practice not on the law: even though there are tolerable gapes on the law, the major problems are related with the practice due to;

- Self-imposed, deep -rooted and rampant customary practices which are repugnant to and observably

inconsistent with the dictates of the existing law. ( e.g both a torture to write and a torture to read" ,

- Neither the litigants worry themselves of complying with the prescription of the law in preparing their pleadings; nor, sadly enough, the court officials are seriously engaged in and bother themselves of ensuring the formal sufficiency of the pleadings as they seem comfortable with (and, hence, evidently complicit in) the bad practices.

- No tradition of managing law suits separately Vis-à-vis their specific natures. Cases, which need summary or accelerated procedures, from cases that is to be entertained in the ordinary procedures.

✓**Fundamental principles and procedures (Both in criminal and civil proceedings)**

they are;

A. Fair Hearing of a Suit/Impartiality of the Courts

Factors against which impartiality of courts is evaluated or through which “fair hearing of a suit” is ensured:-

1 Neutrality of the Presiding Judge: Impartiality mean--

 Any person who sits in judgment over the interests of others must be able to bear an impartial and objective mind to the question in the controversy; i.e. he/ she should impart justice without fear or favor.

There are two attributive features of impartiality.

a. Subjective impartiality:, which refers to the impartiality of the judge himself and

b. Objective impartiality: of the tribunal; i.e., the tribunal/ court or bench should provide the public with the guarantee that it operates impartially; i.e., conditions that avoids suspicions of impartiality.

✓Possible grounds that disqualify the judge from entertaining the case:-

a. Personal Bias: It usually arises from friendship, relationship (either personal or professional) or hostility or animosity against either of the parties; or, negativity from personal prejudices; or even political rivalry.

b. Pecuniary Bias/ Bias as to the Subject- Matter: it arises from monetary interests in the subject matter of the dispute, no matter how small or insignificant it might be.

## 2 Right to be Heard: Nobody should be condemned unheard:-

Rationale behind granting this right:- *audi alter am par tem*'; meaning 'Hear the other side'– nobody should be condemned unheard.

**Elements of the right to be heard:-**

a. Notice has to be given to the party before the proceedings start and,

b. A party has to be given an adequate and reasonable (effective) opportunity to explain (hearing).

NB= A party should also have the opportunity to adduce all relevant evidence on which he relies and opportunity for rebuttal of evidence submitted against him.

## 3 Equality of Treatment Everyone is prima-facie equal before the law

## Indicators of equality in procedure:-

A) Equipage Equality: This implies equality between the litigants in preparing their respective pleadings in getting legal aids (services) in searching for evidence etc, irrespective of their differences in income levels.

B) Rule Equality: each party should be subjected to and protected by, similar rules. Same issues should be resolved through similar legal ruless. If, for instance, Art 58 (a) of the Cv. Pr. Cd, representation is allowed for a 'brother' it should be allowed for sisters.

C) Outcome Equality: Similar issues, under same grounds /circumstances, should have similar outcomes

Like cases should be treated alike.

4 Public Hearing of a Suit (Justice must not only be done but must also be seen being done)

• In principle when the court undertakes a hearing, the public at large, must have access to the litigation process (court-room) without, of course, negating exceptional situations ofinherently confidential nature-wherein courts may consider cases in a closed chamber ("in Camera").

• Accessibility to the media-which serves as a bridge between the two-is another important aspect of transparency acceptability and reliability (credibility). see art 12 FDRE Constitution.

## 5 Independence of the Judiciary and Accountability of the Judges

### I) Judicial Independence

Form of judicial independence

A) Institutional Independence: the freeing of the judiciary from an unwarranted encroachment or influence of any sort, particularly, from the executive wing or official of the government.

• Institutional independence of the judiciary is essentially ensured through the following means;

a) Legal Basis: So as to firmly establish institutional independence of the judiciary, there has to be a legal stipulation to that effect-it has to be legally declared. (See, for instance, Arts 78&79 of the FDRE Constitution.)

b) Independence to Administer Internal Affairs: Formally speaking, however, it was only Proc.No.323/1975 which marked the ever first move for the institutional independence of the judiciary; at least, in theory.

How it can be ensured?

- Financial control,
- Management of it's personal affairs,
- Appointments of Judges,
- Enjoyment of a secured tenure,

• defined rules on training and promotional opportunities of the judges; their transfers; decisions on disciplinary measures; suspension or removal from their duty etc before reaching the legally mandated term of office.

## B) Functional/Personal Independence

 It is a functional or individual independence-which could either be internal or external.

i. Internal: This means that, in the process of discharging their judicial tasks, judges should be free, internally, from their own colleagues and/or from the influence of superior courts;

ii. External: free from any kind of outside intrusion, fear or influence; and they should solely be bound and guided by the law.

## II) Accountability of the Judges

- Independence should not be left without restraint, there has to be credible means of safeguarding those cherished human values.
- Independence does not mean and should not lead to irresponsibility and arbitrariness. It should not be manipulated as an incentive for laziness, corrupt motives, or for a tremendous degree of discretion so as to end up in the ‘rule of the judges’.
- Thus, judges are to be held responsible for their decisions. In other words, they are not allowed to act as free riders.

### 6 Establishment of Courts by Law

The structures of the courts;

Their hierarchical relations and

Their comparable jurisdictions have to be explicitly constituted by law; and, only courts so established can assume judicial function.

Special or temporary bodies that take away judicial powers from regular courts; and by and large, do not follow procedures prescribed by law ought not to be set up. Judicial power should principally and solely be

vested in the regular courts except tribunals having quasi judicial powers (administrative tribunals).

Art 78(4)- religious and customary courts

✓ **Major rationales for establishing administrative tribunals:-**

Cheaper justice, speedy justice & well trained personal.

 the FDRE Constitution provided that: ‘ad hoc’ or ‘special’ courts outside the regular court system are prohibited; and, that other religious or customary courts- whose power is limited to personal or family matters- may be established or given official recognition.

✓ Accordingly phrase “… institutions legally empowered to exercise judicial functions…” under Art 78(4) of the FDRE Constitution, is said to have been included to

denote and encompass administrative tribunals such as the ‘Labor Relations Board’, ‘Tax Appeal Commission’, ‘Civil Service Tribunals’ and the ‘Board of Privatization Agency.

## ✓ Rules of Procedure Vis-à-vis Modes of Proceedings:-

*Adversarial Vs Inquisitorial

The basic ground to differentiate is by the role of the patties and the judge.

## 1 Features of the adversarial proceeding:-

A) The role of the parties:- shoulder the burden of initiating, shaping and fixing the scope of the litigation.

B) Factual methodology': The underlying proposition of the system is that truth is most likely to emerge as a bi-product of the vigorous combat between intensely partisan advocates.

C) Interest consideration: The advocates are not supposed, at least as a matter of fact; to see the resolution of the case as a question of what might be best for the society as a whole. Rather, their ultimate goal is to see the possible disposition of the controversy in terms of their clients' best interest-taking a "win-at-all-costs" attitude.

D) The Role of the Judge: play a relatively passive role. Their function is limited to regulating the proper conduct (smooth flow) of process. Thus, known as impartial umpire to see to it that the rules of the game are evenly and properly observed by the players.

## 2 Features of Inquisitorial Procedure:-

a) Role of the judge: procedure is self-expressive in that the judges can inquire deep into the merits of the case so as to be able to decide on what the real issues between the parties are.

b) Role of the Parties; Yet, true to this system, the real parties do have active role to play in initiating, shaping and fixing the scope of the litigation. However, relatively speaking the system envisages, a more active role for the judges.

The basic material source of the Ethiopian civil procedure Code is observed to be the 1908 Indian Code of Civil Procedure, Hence, one may plausibly propound that the Code was extensively influenced by and originated from the Common Law Tradition-to which the UK was (and still is) the typical representative.

Thus Ethiopian civil procedure code employed most dominantly Adversarial method.

## ✓ Salient Features of the 1965 Civil Procedure Code

 The following distinguishing features of the code deserve special attention:-

a. Inconsistent prescriptions between the two versions of the Code In relation to the pleadings:Art. 80(2) of the Amharic text make the use of the forms indispensably mandatory, while such a strict prescription is missing from the English version.

Surprisingly, Art 244(4) of the Amharic Code stipulates that non- observance of formal requirements cannot be a ground for a preliminary objection. This becomes, at times, a source of fierce conflict in the effective application of the provisions of the Code.

b. Difficulty to interpret the inconsistency between Amharic and English version: there are also blatant mismatches between the Amharic and the English versions.

c. Different sources of substantive and procedural law: Our substantive  from the civil law legal system whereas the procedural law is from common law tradition.

Thus, there are problems in the interpretation of different terminologies used.

d. Absence of legislature intention based interpretation: since the Code was not promulgated by the parliament (rather by decree), there are no documents containing legislative debates ("travox preparatory") on the drafts of its provisions, there is no thing published, indicating the drafters intent i.e. the background policy explaining the contents of the legal rules and prescribing guidelines for interpretation.

# Chapter Two

## Judicial Systems in Ethiopia and Jurisdiction of Courts

### Common features of Ethiopian judicial system in the Unitary Court Structure:-

It was thus only the 1931 ever written Constitution of the country that could safely be considered as marking the beginning of a new era in the establishment of the modern judicial system.

 The constitution establish;

a. the Supreme Imperial Court,

b. the High Court, and

c. the Provincial (Teklay-Gizat) Courts

d. the Awraja –Gizat Court,

e. Woreda-Gizat Court and

f. The Mikiti-Gizat Court were also subsequently instituted.

# ✓ The Present Dual Court Structure:--(Article 78)

## Jurisdiction of Courts: Essential Elements

Judicial Jurisdiction refers to the legal competence of the courts of a particular nation or state to exercise a judicial power i.e., to adjudicate a law suit and render a judgment binding an individual, or his property involved therein.

Normally JJ arises when there is a 'foreign element' in a case appearing before a court of a given state.

A case is said to have involved a foreign element, if either of the parties is a foreigner to that state or the transaction or property, which is the subject matter of the suit, is occurs or is situated outside of the territorial boundaries of that states.

If so, when a state possess a judicial jurisdictions?

 In most instances, a court of a state is held to possess judicial jurisdiction if it has sufficient contact with either the defendant or property that is involved in the suit.

## How a foreign judgments are enforced?

 In some instances, a court's judgement of a given country may be enforced in another country on the basis of bilateral or multilateral treaties. The need for a concession of reciprocity is also the other factor in this respect.

However, the court of a state to which a judgement is sent for execution will consider only whether the court that gave the judgement possessed judicial jurisdiction. i.e., the court of the state in which the judgement is sought will not review the merits of the case rather it, merely, determines whether the court that rendered the judgement had the competent jurisdiction in that state itself.

Accordingly, the plaintiff (judgement-creditor) is not to file another suit on the merits of the case in that state; but, simply makes a formal application for the enforcement of the judgement and obtain execution against the judgement-debtors property in that country.

Does Ethiopia has an independent law governing judicial jurisdictions? No there is no specific law to that effect

Though the conditions for granting permissions to the execution of foreign judgements are put forth by the Civil Code, the existence of judicial jurisdiction with the court that rendered the decision not expressly required as such. Instead, the Ethiopian courts ordered to, principally, identify the presence of any conditions stated under the civil procedure code (See, Arts 485-61).

# 1. Judicial Jurisdiction:-

## What are the basis of classification of judicial jurisdiction?

Classified based on the nature of the case and the relief sought bt the plaintif.

A) Judicial jursdiction in personnem

only when and are not cummulative;

a. the defendant is ethiopian national or domicilary

b. the defendant is consented (expressly or ilidely) to ethiopian jursdiction

c. the subject matter of the case is occured or situated in ethiopia.

## What does action against or in personam means?

An action in Personam, is brought against a person,

natural or legal, and seeking a relief against the person of the defendant, i.e., the claim is made for an order requiring the defendant to do or refrain from doing an act.

• A suit filed for damages, or/ and injunction would thus be an in Personam suit; and, the power of the court in this regard, needless to mention, is *jurisdiction in Personam.*

**Essential requirements to assume judicial jurisdiction in personam in Ethiopia:-**

On the grounds of the general legal principles, and the usual court practices, there are three requirements and these factors are optional or alternative grounds but not cumulatively fulfilled;.

i. Nationality or Domiciliary of Defendant:-

If the defendant who possesses either of such status is subject to Ethiopia's judicial jurisdiction even though the transaction which gave rise to the suit occurred outside of Ethiopia.

 Here, it has to be noted that it is the defendant's status that matters; i.e., it is irrelevant whether the plaintiff is an Ethiopian national or, is domiciled here.

## How legal persons are subject to Ethiopian jurisdiction?

 Just as physical persons are subject to judicial jurisdiction in the state of their nationality or domicile, legal persons (corporate bodies) are also subject to the courts of the state which created them.

Foreign corporate body (created under the law of another state and/or situated elsewhere) would normally be subjected to the Ethiopian judicial jurisdiction with respect to suits arising out of its activities carried out here in Ethiopia.(See, Arts 545-549 of the Civil Code.

## ii. The Doing of an Act:-

Subject matter of the suit occurred in Ethiopia,& if suit that had been concluded outside of Ethiopia but was performed here, Ethiopian court will have personal jurisdiction.

## iii. Consent of Parties

When a person undertakes an obligation to submit to the jurisdiction of the courts. Consent may be express or implied.

- Consent can be gathered, by implication, from the behaviour of the defendant. It is when the defendant appears and starts defending himself without raising any objection on the grounds of judicial jurisdiction; he cannot, subsequently, repudiate his consent and challenge the jurisdiction of the court.

Such an objection is, as a rule, deemed to have been waved if not raised at the earliest possible opportunity before proceeding with the trial/merits of the suit (See, Art 244(2) & (3) of the Cv Pr Cd)

B) Jurisdiction in Rem:-

An 'action in rem (latin term)' is, thus, one, essentially directed against property and the relief sought pertains to the property itself- without reference to the title of individual claims or specific person as such.

The plaintiff does not seek such an order as binding the person of the defendant although an individual may be named as a defendant in the proceeding.

•Judgement in rem settles the destiny of the res (property) itself (or of some interest therein) not merely as between the parties themselves; but, as against all whom it might concern or, briefly put, with reference to 'the entire world'; and,

thus, binds all persons claiming an interest in the property inconsistence with the judgement-even though pronounced in their absence.

**Ethiopian courts have a jurisdiction on the claim against property**:-

Such an action is established in the courts of the place where the thing i.e. the subject matter of the suit-is located. Consequently, it will only be the courts of the state wherein the property is situated that can, exercise in rem jurisdiction.

## 2. Material /Subject-Matter Jurisdiction

Refers to the power of a particular court of a state to determine the type or kind of a dispute involved in a case.

What are the essential issues to identify material jurisdiction in federal system of government?

 Specifically stated, there are basically three issues that need to be cleared from the outset;

a. Whether the case is not one falling outside the judicial power of ordinary courts.

b. A distinction has to be made horizontally between the Federal and Regional/States matters (jurisdiction).

c. Which level of court is competent, i.e., vertically from among a given structure to see a given law-suit.

**Essential criteria's to identify material jurisdiction**

There are two broad criteria commonly employed to determine the material jurisdiction of courts in Ethiopia. These are:

a. Subject Matter' jurisdiction and

b. 'Pecuniary' jurisdiction.

## A) Subject Matter Jurisdiction (type of the case)

i. Matters outside the Jurisdiction of Courts

ii. Federal Vs Regional Subject-Matter Distinction

There are two conceivable ways of looking at the issue under consideration in order to determine the respective competence of the Federal and Regional court:

a. On the basis of the power-sharing method of the Constitution itself. (see art 80( 1 & 2)

b. By looking at the problem on the basis of the more specific subsidiary law: the Federal Courts Establishment Proclamation, Proc, No 25/1996. se art 5.

The proclamation employed three separate parameters so as to determine the material (subject-matter) jurisdiction of the Federal Courts on a given law-suit;

a. The nature and status of the law on which the case is based.

That is, if the case is based on the Federal Constitution, Federal laws, or, international agreements (treaties), then, it falls under the Federal Courts' subject-matter jurisdiction; and is treated as such.

b. The status of the parties themselves.

If the parties to a suit are those specified or administered by the Federal laws, the power to entertain the case resides in the Federal Courts.

To be more specific,

- either or both of the parties to a law-suit is a federal organ or official (employee); or

- if it is between parties permanently residing in different Regional States; or,

- If one of the parties is a foreign national, then it shall be considered by the Federal Courts.(See, Art 5(1)-(4) of Proc No 25/96).

c. The 'place' where the case arose

Addis Ababa and Dirre-Dawa; that is, disputes

arising in either of those places, would be within the competence of the Federal Courts regardless of the identity of the parties-as in the earlier case.

d. The nature or type of the case itself.

Matters of nationality, or,

Business organizations registered or established by the Federal Government; or,

negotiable instruments, patent or copy rights, or, one based on insurance policy; and, an application for Habeas Corpus. (See, Art 5(5)-(10) of the Proc No 25/96).

Consequently, one may argue that State cases are cases that arise on the cases of State Law and that are not categorized under Federal cases.

Does art 3 (1) and (2) of proc no. 25/96 are contradictory?

- Even though, some say they are contradictory, we can say that there is no contradiction between articles 3(1) & 3(2) of the Federal Court Proclamation.
- This is because, while in articles 3(1) the base for jurisdiction is the issue of litigation, in articles 3(2), the base for jurisdiction is the identity of the parties, not the issue that they raise.

Therefore, what we can conclude here is, Federal Courts will have subject matter jurisdiction over cases arising from Federal Laws as well as on issues (though based on states laws) between parties who have been specified in Federal Laws.

# B ) Jurisdictional Limits of Courts: Pecuniary Amount Vs Types of Cases

## a. Pecuniary Amount: Federal Vs States' Courts Jurisdictional Limits

### i. Federal Courts: General Vs Limited Jurisdiction

 The civil jurisdiction of the Federal First Instance and High Court are treated, under its Arts 5 and 14 of Proc. 1234/2013 respectively. The two grounds the Proclamation employed to determine the jurisdictional limit of the Federal Courts are: the amount of money and the type of the case.

• While civil cases which involve an amount not exceeding Birr 500,000 (Five Hundred Thousand Birr), are subject to the jurisdiction of FFIC, Those, which involve an amount in excess of Birr 10,000,000 (Ten Million Birr), are entrusted to the jurisdiction of FHC.

On the other hand, there are cases that cannot be valued in monetary terms; and, this is where the other ground comes i.e. The 'type' of the case-determining the jurisdictional limits of courts. Consequently, they are given to FFIC.

## ii. States Courts: Original Vs Appellate Jurisdiction

The jurisdictional limits of States Courts are determined based on the provisions of Art 13of civ. pro code as follows:

- The Woreda courts will have first instance Jurisdiction over claims that involve up to 5,000 Birr for movable properties, and up to 10,000 Birr for immovable properties;
- State High Courts also handle cases that involve claims exceeding 5,000 Birr for movables and exceeding Birr 10,000 for immovable properties.

N.B. However, State Supreme Courts do not have first instance or original jurisdiction. That is all cases in State Courts must start either in the Woreda Court or High Court.

✓ Courts determine the pecuniary amounts involved in the case:-

Gathered from the **statement of claim of the plaintiff**. As a rule, the plaintiff is expected to specifically describe the monetary value or type of the case with a view to describing that the court has jurisdiction over the case. Art. 16(2) see also (Arts. 226-228).

Is there exclusive jurisdictions of courts? Exclusive jurisdiction means that a jurisdiction given to the court irrespective of the pecuniary amount involved therein.

In other words, the FHC has exclusive jurisdiction in all cases mentioned under Art 11(2) of Pro No 25/96.

## 3. Local Jurisdiction

Local Jurisdiction have to do with an area where a case shall be tried, or, in other words, take us to the specific court to which a law-suit is to be submitted; and, in effect allocate cases among the same level of courts (say, the Federal First Instance Courts) within a given court structure.

 Moreover, the rules on local jurisdiction are framed in such a way as to primarily enable one to refer the case to a particular court convenient for the parties and their witnesses, particularly, the defendant.

**A) The Basic Place of Local Jurisdiction:-** The most relevant place, what might also be called the 'basic place', is, in simple and pure terms is the place where local jurisdiction lies unless it is prohibited by law or a court sitting in another place is authorized to assume the jurisdiction.

Art 19(1) of the Code stipulates that the basic place of local jurisdiction lies with "…*the court of the place where the defendant actually resides or carries on business or personally works for gain.*"

✓ **Elements**:-

a. actually resides

A person's primary residence would, thus, be the place where he actually resides for purposes of local jurisdiction-which probably is the place where it is convenient for one to defend a suit brought against him.

b. carries on business

It is the fact of owning interest in the business and enjoying profits therefrom, which matters most. This means, more specifically, having a share in the profit or the loss and a voice (some control) over the business is an important factor.

**If defendant is not Ethiopian or reside outside Ethiopia:-**

- Art 20(1) provides that the suit may be instituted in any court in Ethiopia where the plaintiff prefers; unless, of course, the suit relates to an immovable property of the defendant; in which case it is the court of the place where the property is located.

the 'legal persons', mentioned under Art 22(2) are somewhat different from those described under Art 22(1). Legal persons, which are stated under Art 22(1), are basically established to make profits; the ones under Art 22(2) are formed for non-profit purposes.

The Article 25 provides that suits involving immovable property must be instituted at the place where the immovable property exists.

 The reasons for the rule are:

a) Such property cannot be transferred from place to place;

b) In cases where dispute is on boundary matters that may necessitate measurement of the boundary, or essential document about the property are found in the place where the property exists,

c) Where the case is defendant upon the testimony of witnesses, such witnesses probably reside at the place where the immovable is situated.

✓ **Suits Regarding Contracts:-** Article 24 provides four mutually exclusive rules on suits regarding contracts.

**1) Suits Regarding Contracts in General:-** Pursuant to Art 24(1), suits arising from contracts, in general, may be instituted at the place where the contract was made or executed unless some other place is mentioned in the contract-in the discretion of the plaintiff. The plaintiff could also institute his case in a place where the defendant resides, works for gain or carries on business, according to Art 19 of the Code.

**2) Suits regarding contracts of carriage:-** Carriage by see and carriage by air. In each case, suits will be instituted in accordance with their respective laws.

**3) Suits regarding Contract of Insurance**:- The court of the plaice where the head office of the insurance company is situated or registered or where the object insured is situated. (See to Art. 24(3) of the Civil Procedure Code).

**4) Suits Regarding Pledge, Deposit or Bailment:-**Suits concerning pledges, deposits and bailment are instituted in the court of the place where the property is located.

✓ **Suits for Wrong Done to Persons or Movable Property:**

It is the question of local jurisdiction in case of extra contractual liability. According to Art 27(1), such suits may be instituted in the court of the place where the wrong was done or in accordance with the provisions of art 19.

✓ **Suits Regarding Successions**:- According to Art 23 of the Cv. Pr. Co., suits regarding succession, which is being liquidated, shall be instituted in the court of the place where the succession was opened.

✓ **Suits upon Several Causes of Action**:-

The suit may be instituted in any court that has jurisdiction over one of the causes of action.

## B) Change of Venue (Transfer of Suit) and Removal of Judges

There could be conditions whereby the place stated here above, as a place of local jurisdictions, may not be convenient for either or all of the litigating parties for certain reasonable grounds.

•CPC has provided, under its Art 31, way outs to such problem. In this regard, there are two closely related legal practices: transfer of suits, or, change of forum, and removal of judges:-

a. transfer of suit:- In the ordinary course of the law, the transfer is to be ordered where there exists a problem with the proceedings in the court where the case is originally instituted. In accordance with Art 31 of the Code, there are three grounds that justify such transfer.

1) When there is an allegation that a fair and impartial trial cannot be made in the court where the suit was instituted.

2) A situation where a party contends that the court in which the case is pending cannot properly handle the proceeding since the case involves some question of law of unusual difficulty.

3) Where the court seized of the case is found to be inconvenient to the party so demanding.

4) When a pleading submitted to a court is amended and this makes the case to fall under the jurisdiction of a higher court, the court that was holding the case shall transfer it to the higher competent court. see art 91 cum 31. Since the rule on the transfer of suits is an exception to the general principle, narrow interpretation should be adopted when the need arises.

b. Removal Of Judges:- A judge may withdraw or be removed from a bench essentially to achieve impartiality of the court. Unlike the transfer of suits, reasons that may lead to the removal or withdrawal of judges from a bench are listed down by proc No 1234/13 article 33&34:- judges may be removed if he:-

- has some relations to a party or an advocate; or,
- was a tutor or legal representative of a party; or,
- has some prior connection with the case; or
- Has a pending case somewhere else with a party or advocate thereof; he shall withdraw as soon as he aware of those issues. Moreover, the reasons mentioned there are not exhaustive and any other sufficient reasons may be added to the list.

The Federal Courts Proclamation No 1234/2021 (hereafter the Proclamation) is out repealing former Federal Court Proclamations and its amendments namely Proclamations 25/96, 138/98, 254/2001, 321/2003 and 454/2005, effective from January 21, 2021.

**Here are some of the major changes:-**

° Federal Courts are endowed with the common jurisdiction of interpreting and observing the FDRE Constitution.

Basic or fundamental error of law has not been defined. But now with this Proclamation it is defined. It is defined as judgment, ruling, decision, order or decree a) in violation of the constitution; b) by misinterpreting a legal provision or by applying an irrelevant law to the case;

c)by not framing the appropriate issue or by framing an issue irrelevant to the litigation;d) by denying to award judgment to a justiciable matter; e) by giving an order in execution proceedings unwarranted by the main decision; f)in the absence of jurisdiction over the subject matter; g) an administrative act or decision rendered in contradiction with the law; and h) in contravention to binding decision of the Federal Supreme Court Cassation Division.

° First Instance jurisdiction of the Federal Supreme Court (FSC) shrinks to change of venue issues. This seems to open the door for appeal right unlike the previous Proclamation no 25/96 where offences by federal government officials, ambassadors or consuls or representatives of international organizations were subject to first instance jurisdiction of the FSC.

° FSC Cassation Division (FSCCD) is clearly empowered to see cases decided by Regional Supreme Court Cassation Divisions i.e cassation over cassation. However such cassation over cassation is limited to basic or fundamental error of law indicated on Article 2(4)(a) violations of the Constitution and (h) in contravention to binding decision of the FSCCD. Moreover basic or fundamental error of law on Article 2(4)(b) i.e. misinterpreting a legal provision or by applying an irrelevant law to the case, can make a Regional cassation decision be seen by FSCCD where such a case have public interest and national importance.

° FSCCD is empowered to see final decisions rendered by organs vested with judicial power. Also without prejudice to provisions of appropriate law, FSCCD can receive and see final decision rendered by Alternative Dispute Resolution mechanisms regarding cases that may be filed in Federal Courts.

° Binding precedence of the decisions of the Cassation Division shall start from the date the decision is rendered and not when published.

° FHC civil jurisdiction has new addition. Any person, it states, who has vested interest or sufficient reason can institute a case before the FHC to protect the rights of his own or others, using the Civil Code Procedure on Article 176-179. Thus FHC may render decision, judgment or order to protect justifiable human rights specified under Chapter 3 of the FDRE Constitution.

FFIC appellate jurisdiction was absent previously. Now appellate jurisdiction of the FFIC is added. FFIC shall have an appellate jurisdiction on matters bestowed on it by other laws.

**✓ Conflicts of Jurisdiction: Priority, Pendency and Consolidation of Cases:-** The power to determine on such conflict of jurisdiction is conferred upon the Federal Supreme Court. With a view to resolving problems resulting from such circumstances, the Civil Procedure Code treats the matter through the rules of priority, pendency and consolidation.

## 1 Priority

The question of priority arises when a plaintiff institutes two or more suits on the same cause of action in different courts. To avoid this problem, the rule of priority is provided

under Article 7 of the civil Procedure Code:-

1) One and the same civil suit may not be instituted in more than one civil court.

2) Where a suit may be instituted in anyone of several courts, the court in which the statement of claim was first filed should have jurisdiction and the suit shall be pending in such court.

- The rule of priority takes into account the time of submission of the case to a court of law-whereby, the court in which the suit is filed first will have priority to consider the case; and, consequently, the second file in the other court shall thus be dismissed.

## 2. Pendency

Article 8 covers the problem of pendency. As a matter of rule, no court shall try any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties in another court in Ethiopia having jurisdiction.

Thus, if, while a suit is pending in a court, another suit is also filed in another court over the same cause, that would give rise to the problem of pendency, and serve as one of the grounds for preliminary objection as per Art 244(2) of the Code, whereby a party may oppose the second suit.

When the court is aware that another similar case is already instituted in another court between the same parties, it will dismiss the suit or it may direct the parties to apply for consolidation.

However, that Ethiopian court is not prevented from entertaining a case that is already pending in a foreign court. (See, Art. 8(2) of the Cv. Pr. Cd)).

## 3) Consolidation of Suits:-( 11)-

Is a situation where the claims of both parties are separate while the matter in issue in one suit is closely related to a suit pending in another court

Such instance may happen, for instance, in a suit for recovery of a property by one claiming a right to possession and a suit by the possessor claiming that the plaintiff in the other action has committed a trespass to the same property.

In both cases, the issue is the same: who is entitled to the property?

In such a situation, either party can make an application to a higher court that the cases be consolidated for trial under Art 11-whereby the higher court will direct one of the subordinate courts to try the case.

Consolidation is thus a procedure that is applied when two or more suits pending in different courts or the same court and between the same parties give rise to similar issues and are to be decided in different courts.

In other words, where two or more suits which involve the same parties and similar issues in different courts or where there is a **question of pendency,** then, both suits will be consolidated under the procedure f consolidation.

Δ **Consolidation** refers to the process of joining or uniting two or more lawsuits or matters that involve a common question of law or fact into one. This practice is often used to promote efficiency in the judicial system and can result in significant savings in terms of time and costs for the parties involved.

= Main aspects of consolidation in legal terms:

1) Combining Similar Issues: When two or more cases present identical or similar issues, the court may consolidate them into a single action.

2) Administrative Judge Authority: Administrative judges have the power to consolidate

or join cases either on their own initiative or upon the motion of a party, provided that doing so would expedite the processing of the cases and not adversely affect the interests of the parties.

3) Potential Outcomes: After consolidation, cases may be treated as one single action resulting in a single judgment, or they may retain their individual identities while being tried together. Additionally, the court may try one representative case and render a judgment binding on the other cases.

4) Class Actions: Consolidation is often compared to class actions, where a group of people with similar claims are represented by a single lawyer or law firm.

# CHAPTER THREE

# PARTIES TO AND DIMENSION OF SUITS

## ✓ Parties to a Civil Suit: General Requirements:-

The parties to a civil suit which is being considered by a court that is exercising its first instance jurisdiction are known as plaintiff and defendant.

Parties to a suit considered by appellate court using its appellate jurisdiction are called appellant & respondent.

° **Requirement**:- There is a requirement that applies to a party plaintiff and party defendant as well as to parties that are brought into a pending suit as intervener, third party defendant,etc.

* **Capacity**:- Article 33(1) of the Civil Procedure Code, reads:

"Any person capable under the law may be a party to a suit".

• Capacity is the power or ability to perform juridical act.

Being a party to a suit is one of the juridical acts. Hence, capacity to sue or be sued refers to an individual‟s ability to represent his interest in a law- suit without the assistance of another.

Hence, incapable persons cannot be parties to a suit,

and, thus, they cannot sue or be sued in their own names (see Article 33(1). Unless the law declares persons as incapable, every person is presumed to possess capacity to perform juridical acts. If one of the parties is found to be an incapable person, the court can, by its own motion or by the application of another party, suspend the litigation until a proper representation is made in accordance with the provision of the relevant law.

Article 34(2) of the Civil Procedure Code states:

*Where a person under disability is not represented by his legal representative, the proceedings shall be stayed until a legal representative is appointed in accordance with the relevant provisions of the Civil Code.*

Incapacity is one of the grounds of preliminary objection specified under Article 244(2) of the CPrC.

Capacity applies to all parties taking part in a suit, plaintiff, defendant, intervener, etc.

## ✓Party Plaintiff and Party Defendant

### A) Party Plaintiff

**Essential requirement to be party plaintiff:-**

To be plaintiff, the first requirement is to possess capacity to perform juridical acts in general.

## * Vested Interest

The other requirement is that a person must be the real party interest with regard to the particular claim or allegation he brings to a court of law against another party. It means that the name plaintiff should possess the right required to be enforced under the governing substantive law art 33(2). The requirement is not that the person is the one who will ultimately benefit from the successful decision made in his favor.

- It must be a person who has an immediate stake at a time of filing a case. At a time of filing a case, he should show that he has a vested interest in the subject matter of a suit.

Why the law set vested interest requirement? The reason why the law attaches this requirement to party plaintiff is because:-

a) a civil suit concerns individual interest/ right. Hence, no other person could decide to bring action for a real party with interest in a suit.

b) Another reason may also be to avoid defendant facing two suits over a single cause of action.

° The determination of whether a person appearing as plaintiff may have a vested interest depends on cases appearing before a court. However, in all cases plaintiffs are expected to indicate a cause of action in their statement of claim as provided under Articles 222 and 231 of the Civil Procedure Code. It is from what is stated in plaintiff's claims that whether or not a plaintiff has a vested interest in a case can be decided.

What will happen if a plaintiff who does not have a vested interest/ makes a suit?

- **Effects of Lack of Vested Interest**

If an action is brought by a plaintiff who does not have a vested interest, an opposite party should raise this as an objection on the grounds that a party bringing action is unqualified to act in the proceedings. Absence of a vested interest in a suit is a ground of preliminary objection under Article 244(2) of the CPrC. On the basis of the objection of the other party, the court may order the substitution or addition of a party as a plaintiff as per article 40.

? What if a suit is made by a plaintiff deliberately to benefit from a claim in which he knows that he does not have a vested interest?

The CPC does not provide any rule in this respect.

The remedy in such a case is to dismiss his case and impose penalty on him for creating inconvenience to defendant, and he could also face criminal liability.

• This is to be inferred from a rule of Art 481 of the Civil Procedure Code and Art 452 of the Penal Code-which can extend to a suit made deliberately to obtain benefit without having a vested interest.

√ If the defendant fails to raise objection on the ground of lack of vested interest and a decision is made for a party without vested interest, the defendant cannot object to a second suit made by a real party with interest.

He should satisfy the claim of the real party with a vested interest and bring a suit against the other party on the basis of the provisions of the law of unlawful enrichment to recover what he has already paid for him.

## B) Party Defendant:

* Allegations:- To be considered as a defendant, there must be an allegation made against a person.

Article 33(3) says:

*"No person may be a defendant unless the plaintiff alleges some claim against him".*

A person sued must be the one responsible for the wrongs committed and claims arising therefrom. Hence, if no claim is made against the defendant, he cannot be made a defendant in a suit. That is why article 224 of the Civil Procedure Code says that the statement of claim shall state specific relief that the plaintiff claims.

## ✓ Representation in Civil Suits:

### Types and Requirements:-

Representation is allowed in civil cases and the reason why it is allowed is to be found in Article 65 of cpc.

According to this Article, parties to a civil case need not appear in person to undertake activities in a court of law unless a court orders appearance in person.

This means representation is a rule in most civil cases, and appearance in person is an exception.

Appearance in person is limited to some cases where a court believes it is necessary for the proper determination of the suit.

## What are the Common forms of representation?

a. A situation in which the representatives act for the interest of the real parties to a suit. Specified under Articles 34, 57-64.

b. A situation where the representatives represent the interest of others as well their own interest. They serve two interests here. See Article 38 of the Civil Procedure Code.

1) Legal Representation: Types and Requirements

The representation under Article 34 is known as legal representation. Represents persons under incapacity.

• Since incapable persons cannot be parties to civil suits, their legal representatives should represent them. Their legal representatives are their organs of protection.

The reason here is merely the incapacity of persons concerned to be parties to a suit.

2) Representative Class Suits: Requirements:- provided under Article 38 . The reason why this representation is allowed is because a suit involves several persons and that it is inconvenient for all concerned to be parties.

**Essential requirements for this forms of representation:-**

a. The parties should have the same interest in a suit;

It means that as plaintiffs, they must demand the same relief against the defendant for the same wrong committed against all of them; as defendants they must be invoking the same defense against the plaintiff on the same cause of action.

b. that they agree to be represented:- Once proper representation is made and the court accepts it, the parties represented are bound by a decision of a court.

They are considered to have litigated through their representatives and, hence, they cannot bring a suit or be sued after a decision is made. The decision is res judicata against them.

A person not willing to be represented can bring his own separate suit.

c. That the number of parties is more than two: since the provision demands the number of parties to be several.

## 3. Agents and Pleaders See Article 57

A legal representative, agent or pleader of a person may make any appearance, application or act in or to any court.

The requirement is that such representatives are able to answer all the material questions relating to a suit.

 A legal representative, according to Article 57, is a person authorized by operation of law to act on behalf of a party to a suit. This refers,

a. Representation to be made by organ of protection of an incapable person.

b. Representation by agent

c. The agent for the government is a person authorized to act for the government with respect to judicial proceedings (See Article 59).

d. Article 61 and 62 of The Civil Procedure Code provided agents for members of the Armed Forces and for prisoners.

e. A person can also be represented by his pleader advocate.

## Who is pleader?

- A pleader is a person who holds an advocate's license, and no person may appear in this capacity unless he holds such a license.

- A pleader has to produce his license together with a letter of authorization from a person who authorized him.

(See, Art 63 of the Cv. Pr. C).

## ✓ Joinder of Parties and Causes of Action:-

The issue here is how two or more plaintiffs bring action against a single or more defendants, and how many causes of actions can be made subject to a single suit.

## 1) Joinder of Parties

### 1.1 Purpose and Significance:-

Joining or joinder of parties multiplies the number of parties and widens the scope of litigation.

* Main advantages are:-

° Makes parties to pool their resources together and enables them to share costs of pursuing a suit.

°Relieves a burden of court in a sense that a court resolves cases involving many persons or causes of action by a single suit.

° It avoids the possibility of making conflicting decisions.

* Main disadvantages are:-

° It expands the scope of litigation and consequently causes delay of proceedings.

° It results in embarrassment of the defendant and makes him not to be able to properly defend himself.

= Thus, one interest is in favor and the other is against joinder of parties and causes of action.

The rule under Article 221 of the Civil Procedure Code tries to strike a balance between these two conflicting interests toward joinder.

- If joinder of causes of actions in a statement of claim results in a delay of proceedings or embarrassment of defendant, the court may order separate suits.(221).

- In all other cases, joinder is, therefore, allowed so long as it does not bring about delay of proceedings or embarrassment to a defendant.

## 1.2 Forms and Types of Joinder of Parties

Joinder of parties appears in different forms;

a. joinder of plaintiffs: Two or more plaintiffs bring action against a single defendant; or

b. joinder of defendants; a single plaintiff brings action against two or more defendants or

c. Joinder of plaintiffs and joinder of defendants: two or more plaintiffs file a suit against two or more defendants.

There are two types of joinder of parties.

### a. Permissive joinder of parties:-

Here the motion of parties makes the joinder.

The parties entitled to join can choose between joint actions or separate suits. They are not obliged to bring a joint action or defense. See Articles 35, and 36(1, 2, 3, 4, 5, 6) of the Civil Procedure Code.

I. Joinder of plaintiffs ( art 35):- The first permissive joinder is provided under Article 35 of the CPC.

Accordingly, Plaintiffs could bring a joint action if two requirements are met:-

1st. The right to relief must arise from the same transaction whether jointly, severally or in the alternative.

*Same transaction'* it does not mean that the parties to join should have the same interest unlike the requirement under Article 38. The parties may claim different remedies. What matters here is the source of claim.

*Series of transaction'* For instance, a car hit electric poll which caused fire, which in turn, resulted in the burning of houses.

2nd. There is a common question of law or fact that would arise if such persons made separate suits. It refers to those questions of law or fact arising out of the claims in a particular case before the court.

## II. Joinder of defendants, See Art 36

 There is one requirement that applies to the joinder of defendants, unlike that of joinder of plaintiffs.

There must be a common question of law or fact, if separate suits were filed against the defendants.

There is no requirement that the reason why the persons sued together arises from the same transaction.

However, it is less likely that there will be a common question of law or fact if the suits arise from separate transactions. The question is that the two suits must involve the same issues of law or of fact.

Article 36(2) makes an exception to Article 36(1) in the sense that there is no requirement of common question of law or fact. It applies where a cause of action emanates from a contract, including parties to a negotiable instrument.

Article 36(5) provides an instance whereby the plaintiff does not know who caused the damage to him-from among several persons-and who is to pay him. In such instance, he can join them.

*** Effect of Misjoinder and Non-Joinder of Parties:-** art 39.

- If the joinder is a permissive type, the mis-joinder or non-joinder does not result in the defeat of a suit.

It means that a court does not dismiss a case for the reason that there is mis-joinder or non-joinder of parties.

- If a party is not joined or is improperly joined, the appropriate measure is not to dismiss a case but to drop a party improperly joined and demand substitution, and proceed with the parties before a court.

- If there is non-joinder, the court shall proceed with the case irrespective of such non-joinder.

- If there is improper joinder of defendants, the plaintiff should be given the option to drop the defendants improperly joined or to proceed with separate suits.

## b. Mandatory joinder ( indispensable parties)

- Parties are under obligation to bring a joint action or defense. There is no choice given to parties other than a joint action or defense.

Mandatory joinder applies to both plaintiff and defendant. Except for Article 36(3) and (4), which applies to joinder of defendants, the Civil Procedure Code does not have an explicit rule on mandatory joinder of plaintiff.

This may be because mandatory joinder is a question of substantive law than procedural rules.

# Mandatory joinder applies to certain categories of persons:-

a. Persons required by substantive law to exercise their rights jointly at a time. Eg, joint owners, joint creditors or debtors, husband and wife over common property, etc.

b. Person who can be affected by a decision given in their absence. This includes, for example, persons who are entitled to oppose the judgment under Article 358.

What will be the consequence if there is non- joinder of an indispensable party in case of joinder of defendants?

 If the mandatory joinder is related to a defendant, there is no problem in case there is a non-joinder of indispensable party defendant. In case of non-joinder of defendant, the case is not dismissed.

The court shall order the joinder of such party, by issuing summon on him. He cannot refuse to be a named defendant.

Thus, in case of non- joinder of a party defendant, the rule under Article 39 40(2) applies and the court makes him a party.

What will be the consequence if there is non- joinder of an indispensable party in case of joinder of plaintiffs?

 There is no clear provision dealing with a non-joinder of a party plaintiff and its effect.

Article 40(2) can be considered to have an application to the non-joinder of an indispensable party plaintiff.

This is because it says that a court may order joinder of a party as plaintiff or defendant if it believes that such party is necessary for the proper determination of a case.

However the court should first secure his consent before adding him as a party plaintiff.

This is because It is up to a party to file a suit or abandon it, since rights of civil matters can be abandoned.

What will happen if a plaintiff who is an indispensable party does not consent to be a party to a particular suit? Can the rule of Article 39 be of help here? Is the court entitled to proceed with the case in the absence of such party? That it is an indispensable party that is not joined and that the rule under article 39 is not applicable to such cases because parties are supposed to be joined as a matter of obligation.

There are **two options available to a c**ourt if an indispensable party plaintiff is not willing to join a suit;-

a. To proceed with the case regardless of the absence of such party,

b. To dismiss a case if a party plaintiff refuses to be added as a party plaintiff. This is because it is an indispensable party that is not joined and hence non-joinder in such instance should not produce similar effect as in the case of non-joinder of permissive party plaintiff.

## 2) Joinder of Causes of Action: Definition

Joinder can also be related to causes of action and not parties as such. The provision of Article 231 says that a statement of claim shall be rejected if it does not indicate a cause of action.

The Civil Procedure Code failed to define what a cause of action is.

 The term "**cause of action**" can be equated with the right of action or legal right forwarded by facts relied upon by the plaintiff. It means that it is related to the nature of the injury alleged to have been suffered.

Here, the focus is on the harm against a person than the acts that caused the harm; such as, breach of contract, body injury, etc.

It can, on the other hand, be defined by the **facts** or **occurrences** that give rise to a claim for relief without particular reference to the substantive law to be applied, or the nature of relief sought.

When parties are allowed to join cause of action?

Parties are allowed to join as many causes of action as possible so long as joining of causes does not bring about delay of proceeding or embarrassment to a defendant. see art 221.

Parties are allowed to join even unrelated claims. (A plaintiff could join cases over contract with tort and bring a single action against a defendant.) The same applies to parties entitled to join. See Article 217.

*Article 217:- (1) Unless otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly.(2) Any plaintiff having causes of action in which they are jointly interested against the same defendant or the same defendants jointly, may unite such causes of action in the same suit.*

## Does parties can always join unrelated cause of actions?

# The exception to this rule is provided under Article 218, which provides that claims for the recovery of immovable property may not be joined with other kinds of claims except those involving such property.

# Another exception is on a claim by or against an executor, administrator, or heir in his representative capacity cannot be joined with a claim by or against him in his personal capacity. article 219.

## ✓ Interventions: Conditions and Types:- art 41&ff

### What is intervention and is it similar with joinder of parties?

• Intervention is a mechanism by which a party is brought into a pending case to present a claim or defense.

However, joinder of parties comes in to picture before or at the beginning of the suit.

° Common forms of intervention

 There are two types of intervention.

## a. Intervention by third party (see Article 41)

* A party who wants to intervene shall file a written application in which he is expected to state reasons justifying his intervention.

- The application shall be filed at any time before a decision is given. To intervene, a party must be interested in suit between other parties. It is **this** requirement that justifies a person's intervention in a suit.

The phrase ***interested*** in a suit between other parties mean:+ Means a party's interest that is to be affected.

It determines whether an intervener gains or losses by the direct legal operation of the judgment to be rendered in a suit between other parties.

Unless a party gains or loses something, he may not intervene. Hence, intervention is allowed if it is requested by an indispensable party.

What is the effect of intervention on the proceeding?

- If an application for intervention is granted, the proceedings are suspended until the original parties have been served with a copy of the statement of a party who is allowed to intervene.
- The effect intervention produces is that a decision given on a case also binds the intervener.

What remedy is available to a party whose application for intervention is rejected?

Article 41 does not provide a remedy in case a third party‟s application for intervention is rejected.

## b. Intervention by Public Prosecutor (mandatory intervention) (see Art 42):-

The Public Prosecutor is under obligation to intervene, if parties concerned in such types of suit have initiated a suit.

Substantive law prescribes all of the cases demanding the intervention of the Public Prosecutor. Cases related to civil status, incapacity, marriage and bankruptcy are cases that give rise to the intervention of the Public Prosecutor under Article 42.

The draft Civil Procedure Code made a modification to Article 42 of the existing Civil Procedure Code. Rather than listing cases in which the Public Prosecutor intervenes, it makes the intervention subject to rules of substantive law.

# ✓ Third-Party Practice [Impleader]: Purposes, Requirements and Consequences:- 43

It is the procedural device enabling the defendant in a lawsuit to bring into a suit an additional party who may be liable for all or part of the original plaintiff's claim against the defendant.

 It is a mechanism by which a defendant brings into a suit a third party on the ground that such third party covers or shares the whole or part of claim of plaintiff. It is initiated by a defendant.

* Purpose of third party practice

 To settle claims involving the same cause of action/ transaction in a single suit.

 Avoiding separate suits over the same cause of action/ transaction.

Thus, a defendant who has a claim against a third party does not need to bring a subsequent suit against him. The defendant‟s claim against third party can be seen in the same suit where the plaintiff‟s claim against the defendant is being considered.

However, the defendant is not under obligation to bring a third party into a suit.

It is entirely optional and that the defendant may claim against the third party in a separate suit. That is why Article 43(1) says “may”.

° Essential requirements to apply third party practice:-

 The requirements are found under Article 43;

a. The defendant shall demand a court for the third party practice in his statement of defense. The reasons provided by defendant must indicate that he is entitled to contribution or indemnity from such third party.

b. The defendant should mention the extent of contribution or indemnity to be made or covered by such third party.

If these requirements are fulfilled, the court issues summon on the third party together with a copy of the statement of claim and the statement of defense and require him to appear at a fixed date.

On such a day, the third party should appear and raise any objection he may make to his intervention demanded by the defendant.

If he raises objection, the court considers and decides on it. If the court believes that the objection made by the third party is not well found, it orders his intervention and this makes him third party defendant.

Once he is ordered to be a party, he proceeds like a defendant in a normal action.

He can make a counter claim or set-off against the original defendant (called third party plaintif).

If the third party fails to appear on the date he is supposed to appear, he is deemed to have admitted the existence of contribution or indemnity between him and the defendant.

His mere absence amounts to admission of such relation. This is a rule provided under article 76.

When the defendant should demand the third party practice?

 The application for third party practice is subject to a time limit. The defendant should raise it as soon as he appears before a court ( first hearing of a suit) to make a defense against a claim of the plaintiff.

If he fails to demand the third party practice at this time, he is precluded from doing so at a later stage of the proceedings.

# What does indemnity or contribution mean?

* **Contribution** refers to the situation where more than one person has committed the same wrong against the plaintiff or has the same obligation to him.

* **Indemnity** refers to the situation whereby a party who is to pay a claim is entitled to recover the amount to be paid from another partly or wholly. Contract of insurance against liability, agency and principal relation.

Indemnity involves the transfer of whole or part of a defendant‟s liability to a third party.

°It is to be noted that even if the requirements for the third party practice are fulfilled, it does not follow that the third party practice is allowed since it may unduly complicate the original suit or result in delaying its resolution.

## ✓ Change of Parties

In civil suits, there is a possibility that others can replace the original parties upon death of one of them. This is not the case with criminal suits. If an accused dies in criminal suit, the proceedings shall automatically come to an end. Criminal suits cannot be transferred

to the heirs or members of the family of an accused.

However, in civil cases death of one of the parties does not automatically cause the termination of a suit.

There is a possibility that others can replace the deceased party and the suit continues. This is possible if the right to sue survives. Article 48(1) reads as follows.

The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. Whether or not the right to sue survives depends on the provisions of substantive law.

Unless the subject of a suit is related to a personal obligation of the deceased person, a suit is said to have survived a person‟s death.

There is no change of parties if the court concludes the hearing of a case and adjourns the case to make a decision even if one of the parties dies as provided under Article 53 of the cpc. This means that if one of the parties dies after the hearing of the case is concluded and what remains is giving a decision. In such case, the court is not prohibited from making a decision.

According to the draft Civil Procedure Code, the change of parties may take place if one of the parties to a pending suit assigns the subject matter of the suit to another person. The court orders the change of parties if it accepts the application of the assignee.

There is no change of parties if the court concludes the hearing of a case and adjourns the case to make a decision even if one of the parties dies as provided under Article 53 of the cpc.  This means that if one of the parties dies after the hearing of the case is concluded and what remains is giving a decision. In such case, the court is not prohibited from making a decision.According to the draft Civil Procedure Code, the change of parties may take place if one of the parties to a pending suit assigns the subject matter of the suit to another person. The court orders the change of parties if it accepts the application of the assignee. The draft civil procedure also says that when a court concludes the consideration of a case and adjourns it for making a judgment, there is no change of parties if one of them dies. It does not matter whether or not the right to sue survives in that case. This is because the hearing of a suit is finalized and what remains is making of a decision only.

# CHAPTER FOUR

# . PLEADINGS AND PRE-TRIAL PROCEEDINGS

## 1) Pleadings

Definition and Purposes:-The proceedings in a court of law are set in motion when a court accepts the pleadings filed by a plaintiff and orders the defendant to appear and defend.

Generally defined, Pleadings mean all formally written statements filed to a court of law by parties to a suit

with respect to their respective claims and/or defenses.

CPC does not define pleadings in a direct way. However, it contains, under Article 80(1) formally written statements that constitute them, such as statement of claim, statement of defense, memorandum of claim, appeal, etc; and provides that these documents must be the ones that initiate proceedings in a court of law and make replies thereto.

Thus, any document that does not set in motion proceedings in a court of law or that does not make a reply thereto does not amount to pleadings.

In order to be considered as pleadings, a document filed to a court must be one that originated proceedings in a court. A document is said to originate proceedings in a court of law if it is made with a view to getting enforcement of right or claim. According to Article 80(1), there is, therefore, no limit as regards the types of formally written statements that are considered to be pleadings.

Pleadings are different from evidences.

Pleadings serve various purposes.

The following are the main ones;-

A: They provide the defendant with notice of the suit and enable him to prepare his defenses accordingly.

B: They provide a summary of the claims and defenses of parties to a court, which enables a court to frame the appropriate and relevant issues that need decision.

C: They fix the issues to be decided, and in a way, limit the scope of litigation between parties and determine the evidences to be used by the parties. The main source for the framing of issues is the pleadings submitted to a court by parties, as indicated under Article 248 of the Civil Procedure Code.

D: They guide the parties and the court in the conduct of cases.

E: They try to expedite litigation. This is particularly realized when the rules on them are employed properly by parties and the court.

## General Pleading Rules:

## Requirements and Effects of Non-Compliance

There are certain requirements that pleadings should fulfill in order that a court admits them.

The requirements relate to their preparation, format, and content.

- They can be divided into technical and legal ones.

### Technical requirements:-

- Technical requirements relate mainly to the preparation and format of pleadings. The

technical requirements are provided under Articles 80(2), 222, 223,234,327-330, etc.

**The technical requirements include the following.**

A. They shall be handwritten in ink, printed, or typewritten

B. They shall be prepared in accordance with the form prescribed by the Code art 80/2

C. They shall be made as concise as possible and contain a statement of material facts.

By a concise statement of material facts is it mean that: They shall state what is demanded in clear, precise and plain language.

• Legal provisions and arguments shall not be incorporated in pleadings. It is the business of a court to look for the relevant provisions of the law applying to facts stated by parties.

• The parties should not include issues of evidences in pleadings. Facts as regards evidences are to be raised at a separate stage, which is the trial.

D. They shall be verified (See Article 92(1)

 The verification is made by signature or mark as the case may be. By verification it is mean that facts alleged in the pleadings are true and correct.

E. They shall be signed (See Article 93

F. That annexes must accompany some pleadings (see art 223 and 234

 Annexes as provided under Articles 223 and 234 shall accompany, for instance, a statement of claim and statement of defense. The same is true for petitions and applications filed for special proceedings that are to be accompanied by affidavit.

What measure can the registrar take if one of these requirements is not complied with?

The measures taken by the register are found under different provisions of the Civil Procedure Code. For instance, the registrar can reject a statement of claim as provided under 229.

The statement of claim shall be rejected by the registrar where:

a) it is not in the form provided for by Article 222;

b) it is not accompanied by the annexes provided for by Article 223; or,

c) it is not verified in the manner provided for by Article 92

- What will be the effect/consequence of rejection of pleadings by the registrar?
- Rejection by the registrar does not prohibit a party from bringing a fresh pleading. The rejection by the registrar means that there is an error in the technical requirements of pleadings, and if the party corrects the defects, he can submit fresh pleading on the same cause of action. See Article 232.

The registrar shall provide reasons for which he rejected pleadings. A party unsatisfied by such reasons can apply to the court (judge) to review the decision of the registrar.

If all the technical requirements are fulfilled, the registrar shall hand the pleadings over to a judge. The judge examines the pleadings to determine whether or not legal requirements are complied with.

## Major Types of Pleadings

### . 1 Statement of Claim: Requirements and Contents

Statement of claim is a pleading submitted to a court by plaintiff. It is also known as a complaint.

The technical requirements we discussed earlier are applicable to a statement of claim. In addition a statement of claim shall contain certain items that are listed under Article 222 of the Civil Procedure Code .

**⍰ It has four elements or parts;**

a. Caption: the plaintiff must state the name of the court in which the suit is filed, the title

of the suit, and the names of the parties including their description and address.

b. Statement disclosing a cause of action: shall state the facts constituting a cause of action and when and where it arose. It is legal requirement to be met by the statement of claim, as provided under Article 231 of the Civil Procedure Code.

c. Jurisdiction The plaintiff must allege facts showing that the court has jurisdiction as provided under Article 231.

d. Relief: The statement of claim shall state the demand for the relief to which the pleader believes he or she is entitled to. See Article 224.

If the statement of claim fulfils all the technical requirements, and that there is no reason for rejecting it, the registrar shall proceed as per Article 230. See Article 230.

A party shall state the value of the subject matter of a suit. If, however, it cannot be stated in monetary terms, he shall state the nature of the suit. By looking at the cause of action, value of the subject matter of a suit or the type of a suit, a court can determine that it has jurisdiction. The amount of money stated in the statement of claims is to be confirmed on the basis of the rules under Article 224-226 of the Civil Procedure Code. If the statement of claim is submitted to a court that lacks jurisdiction, it shall be rejected.

Cause of action and jurisdictional issues are legal requirements checked by the judge. If the statements included in the statement of claim do not disclose them, it shall be rejected under Article 231. The effect of rejection is that it does not preclude the plaintiff from filing a fresh statement of claim later on. [See, Art 232 (2)

Following the rejection, the court fee paid by the plaintiff shall be refunded to him since he has not received the service from a court.

Finally, the registrar shall submit the statement of claim and annexes to the court. The judge examines the statement of claim to establish whether or not it fulfills the legal requirements that we discussed earlier.

If it is found to be sufficient in terms of fulfilling

legal requirements, the court issues summons on the defendant.

On the date fixed in the summons, both the plaintiff and defendant are supposed to appear before a court for the opening of the hearing of the suit. It is on this date that the statement of defense is examined by the court. Let us now discuss the requirements to be fulfilled by the statement of defense.

## 2 Statement of Defense: Purposes and Contents:-

It is a pleading produced by the defendant. It is the pleading that contains material facts on which the defendant relies for his defense.

The statement of defense is subject to the rule under Article 80(2) and 223.

 The statement of defense has mainly two parts:-

a. Caption: in which the defendant is supposed to state the name of the court to which he submits his defense, and the number of the suit.

b. The statement showing the points of defense: In this part, the defendant is expected to raise affirmative grounds of defense, any ground of objections to a suit, a counterclaim or set off against the claim of the plaintif.

Can the defendant defend the claims of the plaintiff in general terms?

The defendant must respond to each allegation of the facts made in the statement of claim whether he admits or denies them. The denial he makes must be put in a direct manner.

Thus, Evasive denial does not amount to a defense under Article 235 rather it amounts to admittance, exception evasive denial made by **person under disability** art 235. **Evasive** denial is a denial in general terms. For instance, saying that, “I am not responsible or I am not liable” is considered to be an evasive denial.

## What if the requirements for statements of defense are not fulfilled?

The court can reject the statement of defense if it does not sufficiently fulfill the requirements it is supposed to comply with.

- The same rule under Article 229 shall apply to the rejection of statement of defense. See Article 238.

## Effect of rejection of statement of defence:-

- If the statement of defense is rejected, the court shall proceed with the trail of the case. The rejection does not mean that the case is to be decided for the plaintiff. art 238 (3). This is because even if it is rejected, the defendant could defend himself orally under Article 241.

**Effects of Failure to Plead:-** A party pleading is supposed to plead all the claims arising from a single cause of action.

Failure to plead means that the plaintiff omits some facts he could have alleged.

 The remedy for failure to plead at the beginning is to request an amendment of pleading.

In the absence of permission to amend the pleading, the plaintiff is not allowed to raise new issues at a trial and introduce evidence unless the court frames issues by its own motion using the power given to it under Article 252.

## When the question of failure to plead take in to effect?

Failure to plead produces effect if the defendant raises it. However, if the defendant fails to object to a new issue raised by the plaintiff at a trial, it means that he consents to the trial of that issue.

## ✓ Alternative and Subsequent Pleadings:-

# 1 Alternative pleading

It is optional grounds of claims or defenses relied on by a party. It is a pleading that aims at maximizing the grounds of claim or defense.

a. Alternative pleading by the defendant: As per Article **237**, the defendant may state different and separate grounds of defense in a single statement of defense. There is no limitation as to the ground of defense that is invoked by the defendant.

b. Alternative pleading by the plaintiff: Article **224**(1) states the application of alternative pleading to the plaintiff. The statement of claim shall state specifically the relief which the plaintiff claims either simply or in the alternative.

**2 Subsequent pleading or further pleading:-** it is pleading again on the same issue on which the pleading already been made. The procedure is that once the court fixed a date for the hearing of a suit and conducted a pre-trial proceeding, it shall proceed to a full-scale hearing of a suit since the pleading stage is completed. However, further pleading is allowed in certain instances before the trial of a case. This is provided under Article 239.

Further pleading is allowed when the statement of defense contains counter-claim or set-off against the claim of the plaintiff.

When the defendant raises counter claim in his statement of defense, he becomes plaintiff. This is because he is raising a new claim against the claim made by the plaintiff. That is why the rule under Article 215(2) says that the defendant shall pay court fee.

The claim raised by way of counter claim can be filed as an independent suit. That is also why the defendant shall pay court fee under Article 215(2).

The practice at present is that further pleading is allowed whenever a party requests even for a statement of defenses not containing counter claim or set off. It has become the practice that adjournment is made by courts so that parties are able to file a reply or a counter-reply for pleadings.

## ✓ Amendment of Pleadings

### 1 Nature and Purpose

Amendment of pleading presupposes that a technically and legally sufficient pleading has already been filed and that it is found to be defective in terms of what has been claimed or stated.

Thus the amendment is allowed:-

a. To rectify defects in pleadings.

b. If allowed, an amendment introduces a modification to the content of the pleading already submitted to a court. See Article 91 and 251.

A party can request amendment at any time before a court renders decision. So long as it is necessary to determine the real dispute between the parties, it can be demanded and allowed by the court at any time.

## 2 Grounds and the Process:-

The amendment is ordered by the motion of a court or by the application of a party.

a. Amendment by the court: it should be limited to exceptional cases where the error in pleading is likely to affect the substantive rights of a party.

b. Amendment by the party: In other cases, the court should order amendment on the basis of the application of a party.

NB According to Articles 91 and 251, the amendment is made when it is necessary for the purpose of determining the real issues in dispute between the parties. This means that the amendment has a bearing on deciding the issues between the parties.

## 3 Effects and Related Issues:-

Which approaches Ethiopian laws follows in the amendment of pleading? (Liberal or restrictive).

Amendment brings into picture the consideration of two interests.

a. It causes delay of proceedings. This is because if it is permitted, the proceedings will start as a fresh one.

b. Protects a party from losing his substantive rights or being affected as a result of pleading error.

The phrase in Articles 91 and 252, which says" necessary for the purpose of determining the real question in dispute" aims at striking a balance between these two interests.

Another factor for striking such a balance is the imposition of damage on a party who requested the amendment of pleadings.

In trying to strike a balance between these two interests the tendency in most legal systems is toward allowing amendment. It means that there is a liberal approach toward amendment and that the request for amendment should be taken into account in liberal manner that permits amendment.

Is an amendment allowed to produce new evidence that was not originally annexed to a pleading?

Courts prohibit in practice the amendment for the reason that the introduction of new evidences does not fall under Article 91(1) and that there is a separate procedure on the production of evidences.

 Hence, the court said that the introduction of new evidence could not serve as a ground for the amendment of pleading.

# 2 Pre-Trial Proceedings

## 2.1 Service of Process:-

A statement of claim filed to a court is to be examined by the registrar as well as the judge. If it passes the scrutiny of the Registrar and judge, which means that it fulfills both technical and legal requirements, the court proceeds to notify the opposite party of the fact that a suit is made against him. This notice is made possible by issuing and serving summons or notice on him.

## *) Issuance of Summons:-

In the context of proceedings in a court of law, it refers to a formal mechanism by which a defendant is notified of a suit made against him and called upon to appear on a fixed time and date before a designated court to answer a complaint/allegation made by the plaintiff against him.

The authority to issue summons is invested in either the judge or the registrar of a court. Either the Registrar or judge can sign on it and cause it to be sent to a defendant. This is the rule provided under Article 94(3).

*** Modes of Service:-** The items to be included in summons are the following: the name of plaintiff and what he is claiming against the defendant, the name of defendant and his address, the time, date, and court before which the defendant is supposed to appear.

The things he should produce on the date of appearance are statement of defense, list of his witnesses, and documentary evidences in his possession, and list of documents that are not in his possession.

In addition, it shall disclose to the defendant that a case will be considered even if he fails to appear on the fixed date, or even if he fails to bring his statement of defense.

After summons is issued, it is collected from a court and served on defendant by the serving officer.To be a serving officer, the only requirement is the authorization of a court. Any person authorized to serve summons can be a serving officer (usually the plaintiff in practice). See Article 95(1). The Code places the plaintiff who acts as a serving officer under obligation to serve summon on defendant properly, or otherwise faces a serious consequence. See Article 70(d) of the Cpc.

Article 70(d) if it is proved that the summons was not served on the defendant or any one of several defendants through the plaintiff‟s negligence or default, the court may adjourn the hearing or order that the suit be struck out as against any defendant not served, or in cases of appeal, that the appeal be dismissed as against respondent not served. Provided that no order for the striking out of the suit or the dismissal of the appeal under sub-article (d) shall be made where, although the summons has not been served on the defendant or respondent, the defendant or respondent appears in person or by agent or pleader when the suit or appeal is called on for hearing.

The mode of service of summons used determines its legal sufficiency. Service is legally sufficient if the mode of service used is reasonable under a given circumstance.

 the major forms are;

**a. Personal service:** When it is received by the defendant himself from the hands of a serving office. This mode amounts to the general rule on service of summons. Article 95(3). Personal mode of service is the best mode of service since the summons is actually handed over to the defendant himself.

When summon is received by the following person it is assimilated to personal service by law;

- When summon is served on the defendant's agent who is authorized to accept service, and defendant's pleader / advocate, the service on agent shall be as effectual as service on the defendant in person. Article 96(1&2).

**b. Constructive Mode of Service:**

 This mode includes the following types of service.

• When the defendant does not reside within the local limits of a court's jurisdiction but has an agent who carries business on his behalf, service can be made on the agent. The agent referred to here is not authorized to receive summons unlike in the mode of service we explained above. See Article 99.

• When summons is served on an agent in charge of immovable property. Article 100.

• Services to the adult member of defendant's family, 101.

## c. Substituted Mode of Service.

It is the least and final mode of service used when all other modes of service are not applicable. This mode of service includes service by affixing a copy of summons in public areas, publication in newspaper, etc

It is a mode used where all other modes cannot be applicable. This is implied in the rule under Articles 103 and 105. If the serving officer cannot serve, he shall return it to a court.

Then the court orders a substituted mode of service.

N.B. The serving officer is under obligation to request the person served to sign an acknowledgment that he received the summons. The person served must, in his part, sign an acknowledgement of service. See Article 102 (1) and (2).

What if a person served refuses to sign an acknowledgment?

The court orders a fresh summons or substituted service or the court may consider that the person is properly served and proceeds with the case.

 This is when the serving officer returned the summons to the court and produced an affidavit as to the facts that prevented him from serving the summons. See articles 103 and 105(2).

## * Effects of Non- Appearance of Parties

Shall parties appear in person?

 On the first day of the opening of a suit, parties need not appear in person **unless** the court demands it. If the court orders appearance to be in person, but a party fails to appear in person, it is treated that such party makes no appearance, even if someone appears on his behalf. See art 69(2).

What if a party fails to appear?

The effects of non-appearance depend on a party who fails to appear and on whether or not the summons is duly served on the defendant.

If both parties (plaintiff and defendant) fail to appear on the date fixed for the first hearing of a suit, the court shall strike out in fresh suit and. dismissed in appeal. See Article 69(2). The rule under article 69(2) is a **mandatory provision**. Hence, the court does not have any discretion to make an order other than striking or dismissing a case if both parties fail to appear.

What if the defendant appear and the plaintiff failed to appear?

When the defendant appears but the plaintiff fails to appear the court shall dismiss a case.

The only question put to the defendant in case of non-appearance of plaintiff is **whether or not he admits** the claim of plaintiff.

If he admits, the court makes a decision for plaintiff on the basis of such admission.

If he denies, the court shall dismiss the case. See Article 73.

What if the plaintiff appear and the defendant failed to appear?

The measure to be taken by the court depends on whether or not the summons has been properly served on the defendant.

thus;

A) If the summons has been duly served on the

defendant, the suit shall be heard in the absence of the defendant. See Art 70(a) known as ***ex parte hearing.***

B) if summons was not duly served on the defendant, the court orders the issuance of second summon on him.

C) if Summon is served but the defendant does not acquire sufficient time to prepare his defense, the court may adjourn the hearing of a suit.

D) But if the summons is not served on the defendant owing to the plaintiff's negligence in serving summons, the court may adjourn the hearing of a suit or may strike out if it is a **fresh suit** or dismiss it if it is a case on **appeal**. See Article 70(d).

## Default judgment;-

When a third party defendant (under Article 43) does not appear, the rule under article 70(a) does not apply.

The court decides that he has admitted the claim of defendant. This kind of judgment is known as ***default judgment.*** It is a decision based on the sole reason of absence of third party defendant. It is provided under Article 76.

What measure can a court take if the defendant who cannot appear on the first day of hearing of suit appears on the day fixed for the next hearing of a suit?

See Article 72

 The fate of the defendant who could not appear on the opening of the suit depends on the presentation of good cause by him. If he shows good cause, he is permitted to defend himself.  it says that the defendant is heard *as if he appeared* on the day fixed for his appearance. Since this causes delay of proceedings, the court can impose costs on the defendant for causing delay of proceedings.

What if could not show good cause to a court for his non-appearance on the day fixed for the first hearing of a suit? The Civil Procedure Code does not have an express rule on this. The court has two options to decide on this issue:-

a. To prohibit him from participating in a suit at all since he does not have good cause for his previous non-appearance, which means that he is indifferent to defend himself. This is implied from Article 72 itself.

b. To allow him to defend himself from where the proceedings begin on the next hearing of a suit. It means that he is considered to be present during the first hearing of a suit. He is not entitled to do what he could have done on the first hearing of a suit. e.g. no objections are allowed.

*N.B. The rules on non-appearance of parties apply to any proceedings, be it first hearing, full scale hearing, review, execution, and etc.. See Article 32(1).*

What does it mean by good / sufficient cause?

 There is no definition of what is mean by 'good cause'.

The determination of what amounts to good cause is subjective and depends on a case-by-case consideration of circumstances.

 It needs to be interpreted narrowly. This is because if it is interpreted broadly, has a potential to bring about delay in the trial of a suit.

## In summary:-

What are the effects of non- appearance of parties?

 The measure taken by the court can either be dismissal or striking out of a suit.

**1) Striking out of suit**

**Grounds to take measure:-**

 when both parties fail to appear (Art. 69), and

 When the plaintiff committed default in serving summons on the defendant (Article 70(d).

**The effects of the measure:-**

- it does not prevent a party from filing a fresh suit on the same cause. and The consequence it entails is payment of another court fee
- A plaintiff can even be relieved from paying a court fee if he shows the court that he was not able to appear because of sufficient good cause.
- If a case is struck out, it is considered as if it were not filed at all to a court.

**2) dismissal**

**Grounds to take measure:-**

- When the plaintiff fails to appear but defendant appears;
- when both parties fail to show upon appeal; and

 When an appellant is proved to be in default in serving summon on respondent (see Articles 69(2), 70(d), 73).

**The effects of the measure:-**

 The plaintiff is prevented from bringing a fresh suit on the same cause of action.

 He cannot pay a court fee and proceed with a suit.

 The dismissal leads to a loss of right to bring action. Unless the dismissal is lifted by a court of law, following the showing of good cause, a plaintiff cannot bring a fresh suit. (Shall be within one month from the date an order is made by a court to dismiss the case.)

 The defendant in whose absence a case is heard and decided can also request the setting aside of exparte decision or default judgment. He could apply within one month of the day he became aware of such decision by showing the good cause. See Article 78(1)

# CIVIL PROCEDURAL LAWS PART 2

## CHAPTER ONE

## PRE -TRIAL PROCEEDINGS:-

### 1 The First Hearing:-

In the first hearing, parties to litigation, mainly, party plaintiff and party defendant, are expected to appear.

The court reads the statement of defense, examines both parties to determine their respective positions, rules on any preliminary objections, and frames the issues for trial.

If the proceeding is transferred to the trial stage, the court sets a date for the trial and at the trial it hears evidence and decides the issues.

a. Action Upon non-appearance of both parties:-when the suit is called on for hearing, the court shall make an order that the suit be struck out, or in case of appeal, that the appeal be dismissed. (Art. 69(2)).

b. Action where defendant does not appear:- when the suit is called on for hearing, the court does not simply take action with out having enough information about the non-appearance. If the court is satisfied with the mode of service to the defendant, it automatically orders *Ex-parte proceeding.* (Art.70 (a)).

However, we have to understand the distinction between Ex-parte proceeding made according to Article 70 of the Ci.Pr.C and Default proceeding made based on Article 233 of the Ci.Pr.C. On this point, the FCCD has made a very interesting interpretation under file15835.

Art. 70 Defendant failing to appear :-Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing: a)) if it is proved that the summon was duly served, the suit shall be heard ex-parte;

Art. 233. - Service of statement of claim;-Where there are no reasons for rejecting a statement of claim under Art.231 the court shall cause the statement of claim and annexes to be served on the defendant together with a summons requiring him to appear with his statement of defence on a day to be fixed in the summons and informing him that the case will proceed with notwithstanding that he does not appear or that he appears without his statement of defence.

**According to the FCCD interpretation:-** first we have to clearly differentiate the date for submitting statement of defence and the date of hearing.

If the hypen happened on the date which is fixed for submission of statement of defence, and if it is proved that the defendant is duly served with the summon, the court should order *Default proceeding based on Article 233 of the Ci.Pr.C* Whereas, if the hyphen of the defendant is on the date which is fixed for hearing, the order of the court will *be Ex-parte proceeding.*

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

third possibility with regard to non-appearance of defendant is, in case where the summons was served on him in so short time that he may not be able to appear.

The court will adjourn the hearing so that the defendant will have sufficient time to consider the allegations of the statement of claim and able to appear at the day fixed with his/her defense. But despite the fact that the defendant has not been served, if he/she appears in that day, the suit will continue.

c. Action where plaintiff does not appear:- when the suit is called for hearing, the court shall make an order that the suit be dismissed, unless and otherwise the defendant, in his/her statement of defense, admits all or part of the claim. Interpretation of the law made by the FCCD interpretation under file14184,there is difference between the date that is fixed for submission of statement of defence, in which the suit should not be dismissed and the date that is fixed for hearing, in which dismissing of suit is appropriate.

**Effect of Non-appearance;**

A),The suit may be struck out; (Art. 69(2) or 70(d)):- where plaintiff non-appear or fail to serve summon on defendant.

B),The suit may be dismissed; (Art. 73, 69(2) (2) 70(d) or 73):-where plaintiff fails to appear but defendant appears; when both parties fail to show upon appeal;

and when an appellant is proved to be in default in serving summon on respondent.

C), The court may proceed ex-parte; (Art. 70(a)):-where defendant fail to appear.

D),The court may issue a default Proceeding; (Art. 233).

Where the case is struck out; the plaintiff may as of right bring a fresh action on the payment of full court fees.

On the other hand, if he satisfies the court that there was a sufficient cause for his/her non-appearance, the original suit may continue and the plaintiff is relieved from payment of court fee.

If the defendant, while he is duly served, failed to appear in court of law on the date which is fixed for submitting his statement of defence, the court shall order default proceeding based on Article 233 of the Ci.Pr.C. The effect of such order is not equal to ex-parte proceeding.

*In ex-parte proceeding,* the party whom an order is made against him will not have the right to be involved in the litigation proceedings following the order. Whereas in *default proceeding*, the non-appearing party, i.e; the defendant, should not be refused to be a party to the litigation. The only effect of such order is that he will be precluded to exercise the procedural rights that should be exercised on the date of his non-appearance.

In default proceeding, the non-appearing party can exercise his right to be a part to the litigation from the date he appears in court of law, but he loses to be benefited from those procedural rights that should be exercised during his non-appearance.

## ✓ Examination of Parties:-

If the issue of appearance is decided and the case can be proceeded, the next task of the court in the first hearing will be examination of parties.

The examination of the plaintiff at this time is particularly important since the plaintiff file a responsive pleading to the statement of defense that he received in writing. Secondly, the defendant might have raised affirmative defenses, e.g., Force majeure.

The **main purpose of the examination** at the first hearing is to help the court clarify and develop the issues for trial.

The examination is simply to determine what admissions and denials are made by the defendant which assists the court in framing the issues.

✓ **Ruling on Preliminary Objections:-**

After the court has examined the parties, it proceeds to decide any preliminary objections that have been raised.

A preliminary objection may be defined as an objection not going to the merits of the case that is, **not** involving the question of whether the defendant is liable to the plaintiff under the substantive law.

Art 244 (2) also sets forth certain preliminary objections. The list of preliminary objections provided under Art. 244(2) are not exhaustive.

Some preliminary objections, like lack of material jurisdiction, even if not raised at the first hearing may be taken as issues throughout the proceeding ,

because their existence prevents the court from giving a valid judgment. If a court sustains an objection, the effect on the suit may be dismissal of the suit or the suit may only be struck out.

Where the court sustains an objection on the ground that the subject matter of the suit is res judicata or the suit is barred by limitation, the suit will be dismissed.

There is no opportunity for the plaintiff to file a fresh suit.

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

## ✓ Framing of Issues:-

After preliminary objections, if any, have been decided, the court shall ascertain upon what material propositions of fact or of law the parties are a variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

This may be framed based on the material proposition of fact or of law affirmed by one party and denied by the other.

Material propositions are those propositions of fact or of law, which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

In framing the issues, the court considers the allegations in the pleadings, the contents of the documents produced by either party,and the oral allegations

made by the parties or their pleadings or persons present on their behalf. See Cv.Pr.C Article 248.

The very advantage of framing issues is to limit the scope of litigation of the parties during the trial proceedings.

## 2 Adjudication without Trial:-

AWT exist in different situations, i.e. trial is not necessary always to resolve the case at hand. Thus, AWT exists when:---there is admission by one of the party of the case (241 cum 242).

- There is question of law ( no witnesses are required to testify on question of law. Since judges are preside over the case to interpret the law) or when there is no factual dispute. ( art 247 (4).

*Article 247 (4) Where issues both of fact and of law arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.*

- There exist documentary evidence that can proof the allegation sufficiently.

- Documentary evidences can be submitted to the court in to **three** stages;

1. during submission of the pleading (art 223 cum 145 (2), if it is in the hands of the parties ( shall provide copy of the document or shall annex it to the end of pleading) or if parties can refer the place of the document to be collected by the court. (art 268),

2. on the very first day of the hearing (art 137),

3. during the trial stage with affidavit coupled with the reason for the delay ( it may be the parties obtain the document at the end of the day and if the parties cannot come across the document to the pre trial and at the hearing stage).

4. in exceptional occasions the document may be submitted in the appeal or cassation stage (art 345).

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

**A) Agreement on Issue:-** Some times, parties by themselves may agree as to the question of fact or law to be decided between them, article 252 of C.Pr.C.

Agreement on an issue plays a great role in facilitating the trial proceeding of the suit.

Normally, Issue can be legal or factual.

Some times, the issues framed by the parties could only be issue of law. If it is a legal issue, there will be no trial. In such cases, the court may render judgment at the pre trial stage.

**B) Parties Not at Issue :-**The primary purpose of the pleadings and the first hearing or proceedings prior to trial is to develop the issues for trial.

As a result of such proceedings, **there do not appear to be any such issues;** the court may pronounce judgment at the first hearing.Art. 254 of the C. Pr.

If plaintiff has forwarded his propositions, which are found to be legally sufficient, the defendant is required to

admit or specifically deny it.

If the defendant admits the allegations or the material propositions of the plaintiff, there is no issue to be disposed by the court.

That is where a party admits the material proposition of the other, the parties are not at issue and the court will, at once, pronounce judgment in favor of plaintiff.

## C) Deposition of issues at the First Hearing:-

Some times parties may be at issue but their issue could,

be adjudicated without the need for full-scale trial. i.e., it may be easy to dispose the issue at the first hearing.

This happens where the court is satisfied that the issues framed for trial can be determined with out argument or evidence other than that which the parties can at once,

produce,and that no injustice would result from proceeding in this manner. Article 255 of C. Pr.C.

The other opportunity to dispose issue at first hearing is where the issue or issues framed are issues of law.

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

## 3 Compromise and withdrawal:-

The fact that the issue will have been formulated prior to trial may have the effect of persuading a party that he is not likely to prevail if the case comes to trial. The plaintiff might then decide that he wishes to discontinue the suit.

* The parties might decide to compromise the case. This may happen not only before trial is conducted, but it may also be raised after trial is conducted and before judgment is rendered.

## A) Compromise:- 274

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

Compromise defined under Art. 3307 of CC and 274(1) of C.Pr.C.

The under C.Pr.C does not include compromise that will be made before the institution of the suit.

- The defendant may assert the compromise as a defense.

**Valid requirements of compromise agreement: (Art. 276)**

° The name and place of the court in which the suit is pending

° The title of the action and the number of the suit

° The name, description, place of residence and address for service of the parties; and

° The matter to which the agreement relates.

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

## B) Withdrawal of suit:-278

A party may withdraw the suit or abandon any of his claims against any or all defendants.

There are two types of withdrawal of suit; namely, withdrawal with leave and withdrawal with out leave.

While the case is pending, the plaintiff may for different reasons decide to withdraw or abandon the suit.

In such cases he/she may ask leave of the court to withdraw the suit.

In such cases, the court will analyze whether the reason forwarded for withdrawal is satisfactory or not.

**1) Withdrawal with leave:-278**

**The criteria for satisfaction of the court to permit the party to withdraw the suit are stated under Art. 278(2)(a)&(b).** These are: • If a suit must fail by reason of some formal defect; or that there are other sufficient grounds for allowing the plaintiff to institute a fresh action for the subject matter of a suit or part of a claim, it may grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh action in respect of the subject matter of the suit.

Therefore, for the court to permit withdrawal of suit with leave, the exception should be strictly construed. Otherwise if the court simply allows such permission for those who could possibly continue with the proceedings but are interested to initiate the suit in some any other time, which is convenient for them, the other party may be imposed to incur unnecessary expenses and inconveniencies.

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

**2) Withdrawal without leave:- 279**

Party may withdraw a suit with out leave for two reasons:

1) The first reason is incase the reason he/she suggested to the court for permission to withdraw fail to satisfy and the party decide to withdraw regardless of the decision of the court .

2) The second reason is also if the party simply withdraws the suit without asking any permission to the court on that issue.

# The ultimate outcome of withdrawal without leave to file a fresh suit is clear i.e., he/she can not institute a fresh suit in respect to the cause of action.

However, according to Art. 279 of the C. Pr.C, the

plaintiff may institute a fresh suit against the defendant on the same subject matter with different **claim**.

# CHAPTER TWO

## THE TRIAL AND OTHER PROCEDURES

### 1) Ordinary Proceedings

### A) Production of Evidence to the Court:-

**The purpose of Civil and Criminal Procedure Codes:-**

1 Entrenching expedite trial by eliminating worthless evidence.

2 The second purpose is exclusion of prejudicing and inherently unreliable information from trial.

3 The third purpose of procedural law is protecting the privacy of the parties on learning the truth for purposes of llitigation. Thus, some evidence, although valuable and non- prejudicial, will be inadmissible eventhough its exclusion might result in an incorrect factual determination at the trial.

There are several kinds of privilege, which contributed for the exclusion. The most common privileges that are incorporated in our laws are the so- called communication privileges that protect conversations between individuals who are in a special relationship.

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

According to Art. 223[1][a] and 234[1],when a party files his pleading, he includes a list of witnesses to be called at the trial, together with their address and the purpose for which they are to be called.

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

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

Art. 118 of civ. P. code is about summon to witness.

The whole purpose of summoning witnesses is to examine them what they testify as to what they know.

- Where a witness is **not** in a position to testify in court because of physical incapacity or because of other causes. Article **122** provides that such witness may be **examined on commission.** An examination on commission is the examination of a witness by a person specifically authorized to examine the witness.

(Note from Micky)

**Witness does not have any civil and criminal duty when they are;**

**1. the holder of immunity:** even if the wetness is very necessary for justice are not expected to testify and after they are summoned by the court, if they come they can testify, but if they refuse to come the court cannot forces them to testify. ( they are judges, parliament members, diplomats…..)

**2. holders of legal privileges:** (art 267) the holder of the privilege shall respect the summon of the court and shall provide or tell his/ her privilege.

A. Expenses of witness:- See art 112 and 113(3)

When witness alleged that he cannot afford the cost, it shall be covered by the parties in whose favor the witness is going to testify.

If the parties in whose favor testified cannot cover the expense of witnesses the court shall order the payment of witness expenses according to art **113** (3).

The expense of witnesses are based on the economic status of the parties, shall be reasonable and in good faith.

## B. Suit of Pauperism (Art 468)

When the parties are not able to cover the court fees or at the state of poor economic status. The privilege shall be extended to the **expense of witnesses.** Since if the courts demands the witness expenses from the party who cannot afford the cost, it is indirectly denial of justice (see also Art 37 of FDRE constitution).

For the witnesses summoned by the courts the parties shall contribute to the witness expenses or the **court** by it self cover the cost (art 264 (3).

## C. Number of witness

There is no restriction on the minimum no. of witness, unless the substance of the law provide the no. witnesses to testify certain cases. Under Ethiopian civil procedure code it can be enough one witness ( known as indispensable person). The maximum no. of witness are also not restricted under our civil procedure code.

## D. Who are witness before the court of Law

In principle the court shall listen the witnesses listed or submitted in the annex of the pleading. (art 223 & 234)

But for new witnesses in addition to or replaced by listed witnesses on the pleading the party to the case shall notify the court. But the parties to the case shall not surprise the judge or the opposing parties during the trial. ( see cassation decision file no. 45984, volume 9, decided on January 26/ 02)

## E. change of witnesses

The parties to the case can change the witness when the existing witnesses are;

1. adverse witnesses or hostile witnesses.

2. absence of witnesses (out side the territory of the country or cannot cover up the cost of witnesses).

## F. Competency of Witnesses

There are two forms of witness competency in civil proceeding;

1. General Competency: no minimum age, but only check the memory of the witness to remember the facts of the case or he or she can decode or encode what she observed, heard. But if s/he is sane or criminally sentences may **not** be able to testify before the court.

2. special competency: witness that have a scientific specialization on the issue under dispute or expert witness.

## G. witnesses summon (art 114)

The mode of summon for witnesses are similar with defendant summon in its form. (art 116)

Reasonable time should be given for the witnesses to appear before the court of law. Most often 10 days in practice. (see art 240;).

When there are witnesses abscond, refuse to receive the summon or hide himself to the court, the court, police officers, employers, and kebele administrator shall cooperate to provide the summon to the witness. (art 109). **provided** that; the person shall inform to the court with affidavit that the witness called by the summon is either abscond or hide himself from the court of law. (see art 103, 110 cum 205).

## H. How many witness to be fulfilled in order to examine witnesses.

As long as possible they shall be heard in one day, if not they may change their mind by compromising with other witnesses or with the party of the case. If the witnesses are failed to appear the court shall adjourn and request parties to change their witness by imposing the cost of witnesses on the parties to the case. (art 199) N.B. a party who wishes to testify on his behalf can testify before calling his witnesses; provided that he/she is deemed as a witness to the case in all practical cases. (art 261 (2)

When the witness are to many or abroad the court establish a commission judge to listen them. (art 122-136) similarly, when witnesses are in abroad the court establish a commission judge. (130 & 127)

The effect of adjournment is cost and defense. If a party fails in the first adjournment, it is better to provide the second opportunity to come, but if not appeared again deny his/ her right.

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

On this basis, the parties are required to appear before the commissioner in person or through their representatives.

*There is another way of hearing or admitting the testimony of a witness. This other way is that, if such witness is required by neither party to be examined, he may be permitted by the court to give his testimony by **affidavit**.This means that a witness may put what he knows about the fact in issue by an affidavit and submit the same to the court.

Testimony by affidavit, if neither party to be examined. Art 204 of Civ Pr C.

Where evidence is given by affidavit, the witness is not present for cross-examination or examination by the court, the court or the parties would not have a chance to observe his demeanor and other factors that affect his credibility. So, the court should use its power of allowing a witness to testify by affidavit in rare and **exceptional** cases. [Art. 204].

**Affidavits can be employed in two situations:-**

The first is that the party proved the facts to the best of his knowledge, and

The second is that the party may prove some fact by affidavit where he believes that the facts are happening or will happen.

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

Documentary evidence is classified as real proof as opposed to oral testimony.

Real evidence includes written documents and demonstrative evidence.

Photographs, recordings, and tangible objects like the murder weapon or a broken glass would be classified as real proof. Most of the real proof introduced at trial is in the form of documents.

**There are generally two special rules that govern the admissibility of documents under the procedure code and the new evidence draft law:-**

1 Rule of authentication:-This rule requires a showing that a document, what its proponent claims it to be before it, will be admitted into evidence.

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

Each party must include with his pleading the original

copy of any document in his possession on which he relies [read Art, 223(1), and 234(1)].

Article 264(1) of C.Pr.C, Any person present in court may be required by the court to give evidence or to produce any document then and there in his possession or power.

Where a party to the suit who has been ordered to produce a document failed to do so, the court may pronounce judgment against him as per article 267 of C.

Production of document by persons who are not parties to suits and who are not witnesses are provided under Art.115 and 119 of the Civil Procedure Code.

_- Court most of the time rules on admissibility of the document at trial stage.

The court may also send for the record of any other suit or proceeding either from its own files or from the files of another court. Art 145(1).

**The procedure of admission of documentary evidence by the court.**

The rules are provided in Arts.139-141 of the Civil Procedure Code.

Where document has been produced, the court endorses on it the number and title of the suit, the name of the person producing the document, and the date on which it was produced.

This should be done **irrespective** of whether the court considers the document to be admissible in evidence, but where it is inadmissible the court must include a statement to the effect that the document has been **rejected**.

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

The party will presumably seek to introduce in to evidence the documents on which he is relying during the presentation of his case at trial.

The court may at any stage of the suit reject any document that it considers irrelevant or inadmissible.

The court might rule on the admissibility of the documents at the first hearing.

But, it is more likely that it will wait until the trial.

**At the trial,** the proponent will seek to introduce his document into evidence, and any objection to the admissibility of the document can be considered at that time.

Note that, the court has the **duty** to exclude or not to admit the document even if no objection is made.

In a nutshell, the code bestows the court broad powers to compel the **attendance of witnesses** and the **production of documents** and generally to obtain evidence that it considers necessary to enable it to decide the issues at hand in the suit.

# B) Conduct of The Trial:-

At the trial each party introduces the oral and documentary evidence necessary to support his side of the issue.

1.Order of Proceeding:- Burden of proof:-

Two concepts are involved under burden of proof:

A) Burden of persuasion is the ultimate burden of convincing the court of an issue, and it does **not** shift during the trial.

B)The burden of going forward with the evidence is on the plaintiff at the start of the tria. But shift to the defendant if defendant admits the allegations of the statement of claim and has raised what we have called **affirmative defences.**

Article 258 of C.Pr.C.This article reflects the general rule that the party who has the burden of proof has the right to begin.

**Preponderance of evidence:** Art. 259 of the Civil Procedure Code stipulate that:

1) The party entitled to begin shall state his case, produce his evidence in support of the issues which he is bound to prove.

2) The other party shall then state his case and produce his evidence and may address the court generally on the whole case.

3) The party beginning the reply generally on the whole case.

It is worthy to note that the order of proceeding or burden of proof and shift of the burden of proof is based on the substantive law.

**Art 2001 of the civil code:** "The party who demands performance of an obligation shall **prove** its existence, and the party who alleges that an Obligation is **void**, has been varied or is extinguished shall prove the facts causing such **nullity**, Variation or extinction.

**All at one or reserve it-**Art 260.provides that:(1) Where there are several issues, the burden of proving some of which lies in the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party. 2) When evidence is reserved, the party beginning may produce such evidence after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning but the latter party shall then be entitled to reply generally on the whole case.

## 2. Production of Evidence by the Parties:-

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

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

### 1) Examination in Chef/Direct Examination (art 263 (1& 2)

The proponent of the case shall ask to his witnesses to testify in favor of him.

The main purpose of direct examination is for the establishment of the case or what submitted in the statement of claim at the hearing stage.

Witnesses can testify what they perceived or in his direct or indirect knowledge. No leading question is allowed at this stage.

Leading questions are a guiding questions to the answer or almost it is putting the words of the proponent in the mouth of witnesses.

e.g. Yes or No questions or nodding

N.B. leading questions are allowed only up on the permission of the court & only

when ;

1. for introductory questions

2. child witnesses

3. refreshing old memories (when the facts of the case are occurred in a long period of time and the witness fails to remember the facts fully)

4. on hostile or adverse witnesses.

Double bearing questions or questions that leads to alternative answer s are still argumentative on whether they are leading question or not.

e.g. when you are met with me before 4 years , Roman was my wife or my fiancé or else I didn't have any relationship with her?

## 2. Cross Examination (art 263 (3)

It is a chance of the opponent to respond, demolish impeach, discredited or defend the claim of the proponent established during the direct examination

through his witness who testify in his favor.

The opponent shall show the erroneous, doubtful and untrue nature of the testimony given in the direct examination; **provided that;** leading questions are possible at this stage.

Questions at this stage shall be limited only on the examination in chief; **provided that**, no new questions can be raised by the opponent to the witnesses.

**It should be noted that during cross examination the opponent shall show:263(2)**

bias ( like, witnesses special relation with the proponent, hostile with himself and etc…)

Poor reputation of the witnesses (like, his previous false testimony and if the witness is known for forgery)

Attack the capacity of the witnesses ( for instance, when the witness is the child the opponent shall show his poor capacity to appreciate the fact of the case fully; if the witness is blind, the opponent shall show that the witness cannot testify what he did not perceived in his eye and etc…)

Show the inconsistency between the words of the witnesses during in direct examination and in cross examinations and

Show the inconsistency between the words of witnesses from the other witness of the opponent.

When there is no examination in chief or nothing is testified against the opponent, he shall inform to the court that he does not have cross examination.

**provided that;** cross examination of witnesses is not mandatory, but only when there is examination in chief and testified against the opponent.

### 3. Re- examination (Redirect examinations) (art 263 (4)

It is the second chance to the proponent with the main purpose of rehabilitation.

No new question is allowed at this stage except for the purpose of clarifying matters which have been raised in cross examinations. Since there is no more cross examination. **provided** that, if new questions are raised by the proponent the other party can raise objections to the court.

Proponents are allowed to adduce a documentary evidence, if they have on their hand.

But expert witness are **not** allowed to testify at this stage.

## 4. Refinery examinations (art 261 (4) cum 264(2) and 266)

It is left to the court to ask any question to witnesses that are necessary to clarify the issue of the case, the testimony of witnesses and to the determination of the suit.

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

Under the adversarial system of litigation, the role of the court is minimal with regard to the examination of witnesses when it is compared with the inquisitorial system of litigation.

However, the Ethiopian Civil Procedure Code has given the courts broad power with respect to the examination of witnesses and the production of documents at the trial.

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

Furthermore, according to Art. 266 the court has the power to **recall** any witness who has been examined and may put to him such questions as it thinks fit.

If a person who is a party to a suit refuses to give evidence or to produce any document, the court may **order**, with or without a bail for the arrest of such person, as it considers the attendance of such person necessary.

This position is inferred from the very reading of Art. 268 in tandem with Art.118 [2] [b].

**Generally the court has the ff power:-**

- the court has power to order amendment of pleadings

- the power to frame issues for trial,

-The power to recall witness who has been examined-Art 266.

- Where a party, without a lawful excuse, refuses to give **evidence** or **produce** a document in his power the court may pronounce judgment against him. Art 267

-Refusal to give or produce evidence- Arrest –Art 268 and 118(2)(b).

**Δ Recording of evidence: Art 269:-**

Where there has been an objection to a question, which is **overruled**, on the basis of Art. 270 of the Civil Procedure Code, the court must **record** the question, the **answer**, the **objection**, the **name** of the person making it and the **courts** ruling.

If a party does not object to a particular question at the trial, he **cannot contend on appeal** that the court should not have considered the evidence given in answer to the question.

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

**justification behind court inspection:-**

As to power of inspection, according to Art. 272 of the Civil Procedure Code:The court may at any stage of the suit inspect any property or thing concerning which any question arises and shall in such a case draw up a process-verbal of its proceedings which shall form part of the record.

**Open' and 'in camera' trial:-**

In line to Art. 261[3], witnesses must give their evidence in open court, unless the court otherwise directs, for good cause to be recorded.

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

## C Judgment and Decree:-

According to Art 180 of the Civil Procedure Code, the court shall pronounce judgment in open court either at once or, as soon after as may be practicable, on some future day to be fixed by the court.

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

## Q .What should judgment contain?

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

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

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

Lastly, on the basis of Art 184(1) of the Civil Procedure Code, after the decree has been passed, certified copies of the judgment or decree

or both shall be furnished to the parties on application to the registry of the court which passed it and the date be mentioned thereon.

**Judgment and Decree (art 273 & 180-191)**

It is the end of the litigations or deposal or resolution of the issue of the case.

It shall be speedy (art 180) and in open court accessible to the public.

It shall be given in a written form and signed by the judge. What is more, it shall include a descending opinion, if any. (art 181 (2)

Principle and rules of judgment or pillars of judgment?

There are three basic guiding principle for the judges while they provide a resolution to the issue of the case they are;

A) Clear or inclusive judgment to all prayers of the parties: the judge shall never miss a judgment on what is prayed (claimed) by the parties. Thus, the judge shall give a dispositions specifically to each and every claims of the parties or avoid silence on specific place.

**Provided** that, silence on prayers of the parties amounts to denial of what was expressly prayed by the parties. See cassation decision file no. 39104 v. 18 decided

on march 24/04 a party aggravated by unclear decision of the court can appeal to the appellate court.See art 5(3)

B) No judgment other than what was prayed: no valid judgments other than the relief sought.

C) Judgment based on relevant laws: no more judgment based on custom, sympathy, concise, the economic status of the parties, or through any other bias.

Since judges are not the **advisor** s of the parties to add or reconsider the judgment, rather judges may order the amendment of the pleading under art 91 if it is found necessary. See cassation decision file no. 63383 v. 1

What is more, judges shall mention clear legal backups for their resolution, if no legal backup they shall mention custom, if not reasonable natural justice.

**Judgment vs. Decree:-**

Judgment

a detail parts, opinion, analysis of the case and a decree. That include the brief of the case and include; ( the claim & defenses of parties, hearing, evidence adduced by parties, issues and analysis of the case ) it is the reason that the judge reach to the final decisions.

Parties to the case shall be accessible to the copy of the judgment of the case.(art 184)

## Judgment

a detail parts, opinion, analysis of the case and a decree. That include the **brief** of the case and include; ( the ***claim*** & defenses of parties, hearing, evidence adduced by parties, issues and analysis of the case ) it is the reason that the judge reach to the final decisions.

- Parties to the case shall be accessible to the **copy** of the judgment of the case. (art 184)

## Decree

it is the operative part , slim or conclusion of the judgment & comes after the judgment. it is the exculpatory or a clued part of the judgment. Unlike, the judgment of the case it is informative part of the final conclusion. it makes easier to determine the **execution**. (see art 378)

# Decree

**Decrees have different modes that are based on the subject matter of the case and includes;**

**In case of movables:** judges may decide to hand over the property to judgment creditor; to pay the compensations or may order evictions. See art 399 cum 185.

**In case of direct payment or installment:** e.g maintenance payment. See art 186 cum 394-396

**In case of immovable properties and their fruits:** the court may order eviction from the property or payment of the fruits value. See art 187 cum 402.

**In case of set-off** : see art 191.

# 2 Special Proceedings:-

## A) Summary Procedure article 284

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

According to art 284 Summary procedure is available where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant and arising:

1 upon contract,

2 upon bond or contract written or

3 on guarantee where the claim against the principal is in respect of a debt or liquidated amount.

Statement of claim should **contain** "**Summary** Procedure" and an **affidavit**.

The defendant must obtain the leave to defend the suit.

-Once the judgment has been entered in favor of the plaintiff, the court should be able to pass the **decree**.

-Application for leave to appear and defend is to be supported by an affidavit-Art 286

-Judgment for part of the claims-Art 288

-Once the court allows the defendant to defend himself, the suit will be turned to ordinary procedure.

Summary procedure is **designed** for cases where the defendant is not likely to have any defence to the plaintiff‘s claim, and before instituting suit under this procedure, the **plaintiff** should be required to swear that he believes this to be so.

The statement of claim is not served on the defendant.

Instead the court serves a special summons in the form set forth in the Second Schedule No 17 or in such other form to be prescribed. The summons advises him that he has been sued for a sum of money on a specified obligation and that he must obtain leave to defend the suit.

The plaintiff must be served with notice of the application and with a copy of the defendant's affidavit.

Following the application, the court will hold a **hearing**, at which time the defendant may be examined on oath and required to produce relevant deeds, books, documents and the like.

If the defence applies only to part of the claim or part of the claim is admitted, the court enters a judgment for the plaintiff in the amount of the admitted claim of such terms as to suspending execution or the payment of any amount realized by attachment, or taxation of costs as it may think fit.

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

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

# B) Accelerated Procedure

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

As it is clearly indicated under Art 301 a party entitled to have his case heard under accelerated procedure must file a written, dated and signed application within the period fixed by law for the making of such applications, or where no period is fixed, within **fifteen** days from the occurrence of the facts on which the application is based.

The application must specify the capacity in which the applicant acts and must indicate the provisions of the law under which it is made; it must also be supported by an affidavit stating the reason of it.

In addition, it has to include the required documentary evidences as the applicant wishes to submit.

The proceeding at this point is ex-parte, and the defendant is not served with notice.

If the applicant is not qualified to act in the proceedings or if it is not in the proper form or not filed within the prescribed time, or if the court considers that the subject matter of the application cannot be properly disposed of under the accelerated procedure, the application will be **dismissed**. However, a dismissal of the application does not operate as res judciata as to the subject matter of the application, but a fresh application may **not** be made on the same ground to be dealt by and through accelerated procedure.

There is no provision by which an interested party has the opportunity to appear and oppose the granting of the application.

However, a number of cases in which an application is authorized involve only one party, and where **another** party would be interested, he could move the court to modify or set aside its order granting the application.

As to the right to **appeal**, Art 306 of the Civil Procedure Code provides that **unless** otherwise provided by the law under which the application is made, no appeal shall lie from any decision under this chapter other than a judgment under Arts 309-311. And, where an appeal lies, from a judgment given under this chapter it shall be made within **ten** days from the giving of such judgment and such judgment shall not be enforced until the period for **appeal** has **expired** or the appeal has been decided.

The **scope of application** of accelerated procedure is provided under Art 300 of the Civil Procedure Code.

However, if the court concludes that a case could properly be disposed of in accelerated procedure, applications other than those **expressly** referred to in the code may be **heard** under accelerated procedure.

## 3 Other Procedural Matters:-

They are not the major **problems** of procedure but for the most part they consist of technical rules or special procedures.

A few are more complex and are **not** essentially procedural in nature.

These procedures come when a proceeding is initiated by the plaintiff and the plaintiff and the defendant demand a temporary **relief** until the case is disposed. The life of such relief depends on the original claim.

## A) Arrest and Attachment before Judgment:-

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

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

### ii) Arrest before Judgment:-

These rules are applicable only to suits **not** involving immovable property.

If the suit involves immovable property, the defendant's interest in such property may be considered sufficient security for his appearance.

Art 147 to bring about the legal penetration of this law, first and foremost a warrant of arrest may be issued against the defendant where court satisfied by 147

- Where defendant is about to leave or has left the limits of the court's jurisdiction, a clear intent **must** be shown.

- Where the contention is that the defendant is about to leave Ethiopia, a warrant may be issued irrespective of a show of intent so long as the circumstances under which he is about to leave afford a reasonable probability that any decree passed against him will be obstructed or delayed in execution.

The application may be made at **any** stage of the suit, that is, before or after it has come to trial, so long as a judgment has not been rendered, and the application may be supported by affidavit or other evidence on oath.

The **purpose** of these provisions is to require the defendant to furnish security rather than to detain him.

Assuming that the defendant is arrested, he may show the cause why an order requiring the depositing of security should not be entered.

If he has not shown good cause, the court must order him to either deposit in court money or other property sufficient to satisfy the claim against him or to furnish security for his appearance by way of a surety.

On the basis of Art 150 of the Civil Procedure Code, in case of refusal to furnish security: *In case of refusal to comply with an order under Art 148 or 149(4) the court may order the defendant to be detained in the civil prison until he complies with the order or until the decision of the suit or where a decree is passed against the defendant, until the decree satisfied: Provided that the defendant may not be so detained for more than six months.*

Application by surety to be discharged is provided under Art 149,Accordingly, a surety for appearance may at any time apply to be discharged.

He has an absolute right to be discharged upon request, and when he is discharged, the defendant must find another surety. If the defendant is **unable** to find another surety, the court will order him to deposit in court money or other property sufficient to satisfy any decree that may be passed against him, if he is able to do so.

Once he has found a surety and that surety has been discharged, he is only required to find **another surety** or deposit property if he can. Where he has been ordered to deposit property and has **failed** to do so, he may be **detained** in prison.

**ii) Attachment before Judgment:-**

Under this procedure, in line with Art 151 of the Civil Procedure Code, the action is taken entirely against the property, and it is applicable to all suits, including those involving immovable property.

Such action is to be taken where the court is satisfied that the defendant, with the intent to obstruct or delay the execution of any decree that may be passed against him, is about to **dispose** of the **whole** or any **part** of his property or is about to remove such property from the local limits of the court‘s jurisdiction.

The crucial question is the defendant‘s intent.

The court must be satisfied that the defendant has the intent to obstruct or delay execution of the decree, and the decision will depend on the state of mind of the particular defendant.

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

The application may be made at any stage of the suits, and the allegations may be proved by affidavit or otherwise.

The plaintiff must, unless the court otherwise directs, seek the attachment of specific property, and in his application, he must indicate that property and its estimated value.

Where satisfied the court may either direct the defendant to furnish security of a **specified** amount, or to **produce** the property or its **value** or a portion as may be sufficient to satisfy the decree, or it may order that he appear and show **cause** why he should not furnish security.

The court may also order conditional attachment of property. Art 153 in any event, the court will order the attachment to be withdrawn whenever the defendant

**furnishes** the security required together with security for the costs of the attachment, or when the suit is dismissed. .

Under Art 153(5) where property has been attached **prior** to judgment and a decree is subsequently passed in favor of the plaintiff, it is not necessary for him to apply for reattachment of the property.

But an application for execution must still be made, and if the application for **execution** is not made within the limitation period, the attachment is ineffective.

**Objections** to the attachment of the property may be preferred by a **third party** on the ground that the property belongs to him or by the judgment debtor on the ground that the property is exempted form attachment.

The **defendant** also may claim that the property attached prior to judgment is exempted, although his failure to assert the claim at that time should not bar him from doing so **after** a decree has been entered and an application for execution filed.

**Attachment** before judgment does not affect the rights existing before the attachment of persons not parties to the suit, nor does it bar any person‘s holdings a decree against the defendant from applying for the sale of the property under attachment in execution of his decree against the defendant.

Under this rule, if the defendant becomes insolvent prior to the rendering of the decree, the property would pass to the receiver.

Therefore, until proceedings in execution have been instituted, prior rights of third parties in the attached property should not be affected.

## B) Temporary Injunctions, Interlocutory Orders and Appointment of Receiver

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

## I) Temporary Injunctions:-

An injunction is an order restraining a party form doing a particular act or requiring him to do such an act; and the plaintiff may ask for injunctive relief as part of the final decree. It is issued during the pendency of the suit to prevent certain action from taking place that would prejudice the other party to the suit.

The Code authorizes the issuance of a temporary injunction in **two** kinds of situations:

1) Where action taken with respect to property will prejudice the other party; Art 154

2) Where, in a suit to restrain the breach of a contract or the commission of an act, the defendant is threatening to breach the contract or do the act pending litigation,Art 155.

We will first consider the issuance of a temporary injunction to prevent dealing with property.

In this regard, an injunction may be granted if the court is satisfied that:

1) The property in dispute is in danger of being wasted, damaged or alienated by a party to the suit;

2) The property in dispute is in danger of being wrongfully sold in execution of a decree, or;

3) The defendant threatens or intends to remove or dispose of this property with a view to defraud his creditors.

While a party may apply for a temporary injunction, although the suit was not brought to obtain injunctive relief, the fact that the suit was originally brought to obtain such relief may be significant in determining whether a temporary injunction should be granted.

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

The provision authorizing the issuance of a temporary injunction where defendant intends to remove or dispose of his property in fraud of his creditors should be construed to be applicable only where a creditor on a pre-existing obligation is suing to prevent such conduct, and the threatened removal or disposal might take place before the claim is litigated.

Where the plaintiff is suing to recover on an unascertained claim, he should proceed by way of attachment, since that will ensure that property is available to satisfy any decree that may be rendered in his favor.

Where the **contention** is that property is in danger of being wasted, damaged or alienated, the injunction may be issued only against a party to the suit who is threatening to do such act. The Party should be construed to include **anyone** who would be bound by the judgment.

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

Note that on a motion for a temporary injunction, the court does not determine the merits of the plaintiff's claim. This must await the **trial**.

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

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

On the basis of Art 156 (2), Where property has been attached, the attachment remains in effect for a maximum of one year, and if the disobedience or breach continues, the property is **sold**, and out of the proceeds the court awards such compensation to the other party as it thinks fit.

## II) Interlocutory Orders:-Art 165

Interlocutory order may be broadly defined as any order that the court considers necessary or expedient to be made pending the determination of the suit. The court may at any time make such orders upon application by one party and notice to the other; this includes orders for the custody of a minor and the payment of alimonies.

✓ Art 160 of the Civil Procedure Code, **where movable** property which is involved in the suit or which has been attached before judgment is subject to speedy or natural

decay or otherwise should be sold at once, the court may order the sale of the property, in such manner and on such terms as it thinks fit.

Under this rule, the court may order the sale of securities where market conditions indicate that a **drop** in value is likely.

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

✓Finally, where the subject matter of the suit is all about deposit in court, Art 164 : *Where the subject matter of the suit is money or some other property capable of delivery,*

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

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

**III) Appointment of a Receiver:-** In order to preserve the subject matter of the suit pending a determination of the rights of the parties, the court may appoint a receiver to deal with property during the pendency of the suit.

In considering whether a receiver should be appointed after an application to that effect is made, the court is directed to consider:

1) The amount of the debt claimed by the applicant;

2) The amount which may possibly be obtained by the receiver when dealing with the property and;

3) The probable cost of his appointment.

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

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

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

In such authorization, on the basis of Art 166 of the Civil Procedure Code, the receiver may be **given broad powers.**

The court by its order may authorize him to exercise control over the property to the extent of bringing and defending suit, realizing, managing,

protecting, preserving, and improving the property, collecting the rents and profits and disposing of them, and executing documents as owner.

His **powers** will be specified in the order of appointment, and he should be deemed to possess those powers until discharged by the court, even after the decree has been issued.

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

After a receiver has been appointed, on the basis of Art 168, he must furnish such security as the court may direct, account for what he receives fromthe property, submit his accounts as directed by the court, and pay the amount due as the court directs.

However, on the basis of Art 169 , if he has caused damage to the property by willful default or gross negligence, the court may direct that **his** property be **attached** and apply the proceeds to make good any amount due from him or any loss or damage.

In such a case, the fact that the receiver has **dealt improperly** with the property does not affect the rights of the other parties in that property.

## C) Habeas Corpus:-177-179

In Latin, Habeas is to mean, "You have the body". Prisoners often seek release by filing a petition for a writ of Habeas Corpus. A writ of Habeas Corpus is a judicial mandate to a prison official ordering that an inmate be brought to the court so it can be determined whether or not that person is imprisoned lawfully and whether or not he should be released from custody.

The petition must show that the court ordering the **detention** or imprisonment made a **legal** or factual error.

According to **Article 15(2)i** of the Ci.Pr.C, we can see that the High Court is given an **exclusive** jurisdiction to try suits regarding to Habeas Corpus. On the other hand, the

Federal Courts Proclamation No. 25/1996 in its Article **5(10)** clearly stated that the power of adjudication to application for Habeas Corpus is vested on the **Federal Courts.**

Furthermore, inferring from the cumulative understanding of Articles **11** & **14** of the proclamation, we can understand that the **material jurisdiction** is given to the **High court of the Federal.**

The procedure is governed by Articles 177-179 of Ci.Pr.C of Ethiopia.

According to article 177 of the code, an application for Habeas Corpus may be made by the person restrained otherwise than in pursuance of an order duly made under the Ci.Pr.C or the Criminal Procedure Code. If such person is unable to make the application, **any person** on his behalf can do so.

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

On such day, the court investigates the truth of the application and check whether the restraint is **unlawful**. If it is proved that it is **unlawful** the court then must order the **immediate release** of the person under custody.

# D) Procedure in Arbitration and conciliation

Decision is usually binding.

Arbitration is **adversarial**.

The presentations are made to prove one side right, the other wrong. Thus, the parties assume that they are working against each other, not cooperatively.

Arbitration can be either **voluntary** or **mandatory** and can be either **binding** or **non-binding**.

It is important to understand that there are issues that are not subject to arbitration. Article 315(2) of the Ci.Pr.C of Ethiopia clearly states that: administrative contracts as defined in Art. 3132 of the Civil Code or in any other case where it is prohibited by law are not subject to Arbitration.

According to Art. 316 of the Ci.Pr.C, the court may appoint an arbitrator, if the law requires it.

Once the arbitrator is assigned, the procedure to be followed by arbitration tribunals will be governed by art. 317 of the Ci.Pr.C

## E) Cost

This cost includes all expenses which the court litigation requests.

This could be related with payment of court fee, attorney fee, transportation fee, clerical expenses and other costs, which are directly related with the very existence of the litigation.

Normally, it is the judgment creditor who claims for recovering the costs of litigation. However, it is **not all** the time that the judgment creditor succeeds to get what he claimed.

According to Art. 462 of the Ci.Pr.C of Ethiopia, it is

the discretionary power of the court to decide as to whom or out of property and to what extent such costs are to be paid.

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

This judgment, like the **judgment is appeallable.**

# CHAPTER THREE

# REVIEW OF JUDGMENTS

Either of the parties to the litigation may not be satisfied by the decision of the first instance court. For that reason he/she/they may wish to find out the mechanism to review the judgment.

Reconsideration of a judgment, i.e. only rectification or correction of the judgment of the lower courts.

Q. Why the judgment of the lower court is reviewed by the appellate court?

The main purpose of review of the judgments are;

- To rectify the error of the judgment
- The mechanism to control freak and balance (for judicial accountability and transparency)
- To serve the justice

Basically, there are three ways of reviewing a judgment. These are:-

1) Reviewing before the court of rendition
2) Review before an appellate court and
3) Review before the court of cassation.

## 1) Reviews by Court of Rendition

It is review of the judgment by the court that provide the first decision or known as by the trial court. It is narrow and have only five grounds to review the pervious judgment of the trial court. The grounds are;

a) Oppositions (art 358- 360)
b) Discovery of improper and new evidences (art 6)
c) Procedural irregularities (art 207-211)

d) Remand &

e) Review for set aside for unduly served summon ( art 78 & 405)

In **principle**, a court or a judge may not rectify his own decision after he provide the final decision to the case;

**provided** that, in **exceptional case** the judge may review his own decision when there exist the **following five grounds.**

## 1.1) Procedural Irregularities:-(art 207-211).

Procedural irregularity is distinguished from what is called a *mistake*. The court may; on its own motion or on motion of the parties, correct any **clerical** or arithmetical mistakes in the summons, judgment, decree or order or any errors

arising in those documents from any accidental slip or omission, and such mistakes or errors do **not constitute irregularities.**

Procedural irregularity is quite different from mistake, both in its concept and effect.

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

Procedural irregularities also includes;

Vague judgment: when it is difficult to identify the decree holder & debtor.

Court fee: when the proceeding started without the payment of the court fee. See v.1 file no. 17352.

Change of the presiding judge: parties can request to correct such procedures.

Where such irregularity has occurred *prior* to the taking of the preliminary objections or during the course of the proceedings, the party affected must raise his objection at that time.

Where it has occurred subsequently, the court may refuse to give judgment, or if it has already rendered judgment, it may set it aside.

@ The very existence of procedural irregularity by itself will not guarantee the revision of the judgment of the court of rendition, :- such **irregularity** must ***substantially affect*** the decision of the case on the merits. However, if the irregularity does not affect the court's decision on the merits, the proceedings will not be set aside.

On the other hand, also, even if the irregularity might have **affected** the judgment that was given, the proceedings will not be set aside if the irregularity can be **corrected**.

- Where the proceedings are set-aside in part, any step taken **prior** to the occurrence of the irregularity shall not be affected. For instance, if an irregularity occurred at the trial, the proceedings of the trial would be set aside, but those which took place at the first hearing will remain binding.

- **Unless** an application to set aside the proceedings on grounds of irregularity has been made to the trial court, the occurrence of the irregularity may not be taken as a ground of appeal. The only **exception** would be an irregularity arising from an alleged lack of ***material jurisdiction*** or ***one alleged to exist in the judgment or decree.***

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

## 1.2) Newly Discovered Evidence:- (Art 6)

Article 6 of Cvi. Pr. C, a party may apply for review of the judgment in the court of rendition on the ground of newly discovered evidence where:

1. no appeal has been taken from the judgment or no appeal lies;

2. subsequent to the issuance of the judgment, he discovers new and important matter such as forgery, perjury or bribery, which despite the exercise of due diligence, was not within his knowledge at the time of giving the judgment; and

3. had such matter been known at the time of giving the judgment, it would have materially affected the substance of the decree or order the review of which is sought.

In criminal cases judgment may be given in false evidences. But once the offender convicted by such

false evidences there is no possibility in criminal law to review the judgment on the ground of discovery of new and improper evidences, but the civil case does have the option to review on such ground under art 6.

There are **three** criteria that should be fulfilled, so that the court of rendition can review its own judgment ( **eelement** of article 6);-

a) the evidence must be discovered *after the judgment is rendered*,

b) the newly discovered evidence *must affect the decision,* and

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

Three criteria are **interrelated** to each other. If one of the criterions **failed**, the court of trial **will not** be in a position to review the judgment.

a) the evidence must be discovered after the judgment is rendered:-

The party who alleges such evidences as a ground of review shall show his **vigilance enough** or he shall show that he never aware or obtained the evidences during the first trial or the evidences during the trial were forged.

b) the newly discovered evidence must affect the decision: If the defendant, after the judgment is rendered, finds out the fact that the plaintiff had produced a bribed witness in the trial court, he may have the right to apply to the court of rendition for revision.

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

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

However, if the defendant **concealed** the identity of the witness when asked by the court knew of any witnesses

to the transaction, review would be proper due to the fraudulent conduct of the defendant. Or, if the witness testified on **behalf** of the defendant, and the plaintiff later discovers that the witness was bribed to commit perjury, review would also be proper.

Therefore, it should also be stressed that the evidence must not have been within the knowledge of the applicant at the time the judgment was given.

**Finally, there are some important points as far as newly discovered evidence is concerned:-**

✓ An application for review by the court of rendition, on the ground of newly discovered evidence, cannot be filed if an appeal has been taken. In such a case, the evidence could be brought to the attention of the appellate court which would consider it in deciding the appeal.

✓ Anapplication could **not** be filed even if the appeal were filed too late and were thus dismissed.

However, if an appeal was taken and dismissed on the ground that an appeal did not lay from the decision, an application for review could be filed, since such an application is authorized whenever an appeal *cannot* be taken.

## Δ Procedure to follow:

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

• It must be filled within one month from the time the evidence, which was the basis of the application, was discovered.

• There is no period of limitation related to the discovery of the evidence, and an application for review party.

• If the court finds that the application for review should be granted, that is, that the applicant has evidence which satisfies the requirements for review, it gives notice to the opposite party so that he can appear and be heard in support of the decree. After hearing him, the court will make such order as the rehearing of the case as it thinks fit.

• No appeal lies from the order of the court granting or rejecting an application for review.

## 1.3 Opposition:-(art 358- 360)

Relevant articles; 41,418,421,447 &455.

Opposition can be raised by a person who, though not a party, is affected by the judgment.

Any person who should or could have been made a party to a suit and whose interests are affected by a judgment in the suit may, if he was not a party to the suit, file opposition to the judgment before the judgment is executed.

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

1. He/she should or could have been made a party;
2. His/her interests are affected by the judgment rendered in his absence; and

3. He/she is filed prior to execution of the decree.

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

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

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

If a person liable to make contribution or indemnity was aware of the suit, he could have intervened under Art. 41.

If he was not aware of the suit, this provision enables him to come in after judgment, since he could have been made a party and his interests will be affected by the judgment.

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

Although there is no requirement to this effect in the Code, it is submitted that, except for indispensable parties, the application to file opposition should be **rejected** if the applicant was **aware** of the suit prior to judgment.

Because it cause the **delay** of court litigations.

However, it is also hard to deny a party with real interest which opposes the judgment of the court before it is executed because of **two reasons:-**

First, eventhough he or she was aware of the litigation, it is hard to prove its awareness of the litigation.

Second, if it is found that he was aware of the proceeding, it is difficult to deny him opposition as the code does not deny him to file opposition when he is aware of the litigation.

The person filing the opposition has the opportunity to raise objections to the judgment and may, if he so desires, **introduce** evidence.

Per article 360 of the Cv.Pr.C, the court may then confirm, vary or set aside the judgment.

# Intervention VS Opposition

## Intervention (art 41)

- before judgment

- the party claims while intervening by stating that his/ her interest will be affected by his absence from the proceeding.

## Opposition (art 358)

-After judgment, but before execution (when a person are not aware of the case is at the pending or shall show the party is unable to defend the case)

-the party claims by stating that his/her interest is affected by the judgment of the decision.

-if a party fails to exercise his/her right under art 41 he/ she can oppose under art 358

Intervention under art 41 and opposition under art 358 are similar in;

a) parties are indispensable: such as spouse, co-hires, co-legatees joint owners, partners & joint and several creditors.

b) mandatory joiner: see art 39 & 40.

can a person who is denied under art 41 can come up through art 358?

**No,** he can not, but he can appeal for the refusal of the court ; **provided** that, a person denied his/her right under art 41 means his/ her right to oppose under art 358 is denied.

can parties oppose declaratory judgment?

Declaratory judgments are an **accelerating procedure.** See art 305 &306

e.g. certificate of heir; exparte-hearing, change of name, marriage declarations, declaration of absence.

In **principle**, Declaration judgment are not subject to opposition. See v. 15 file no. 79871, February 11/05 & v.15 82679 march 227/05

In **exceptional** cases when declaration judgment affects the interest of the opposing parties, they can oppose. E. g. filiations declaration.

While opposing parties oppose declaration judgment they shall submit their opposition with affidavit and by paying the appropriate court fee. See art 359 cum 205.

**Difference between investigations of claims to attached property and oppositions:-**

There are certain differences between opposition under art 358 and opposition of the investigation of claims to the attached property under art 418.

Art 418

-the opposing parties interest are affected by the execution order , but nothing is affected by the judgment.

-the execution court by mistake attach the property of the opposing party to 3rd party in belief that the latter is the judgment creditor.

-The opposing party summit his statement of opposition or objection to the execution court

Art 358

- the opposing party interest is affected by the trial court judgment.

-the opposing party right or property is affected on the judgment to other party due to his/her absence.

-the opposing party shall submit his objection to the rendition court.

-The opposing party shall claim by stating that I am not & I should not be the party to the case or I am not the decree holder or creditor. Since the opposing party is indifferent to the out come of the case.

-the opposing party does not any interest or agenda in advance on the outcome of the case. Such person has a **preferential** right or priority right.

-the opposing party shall claim by stating that I should be a party to the case.

-The opposing party have **interest** on the **outcome** of the case.

# 1.4 Review for Set aside for unduly served summon (art 78 & 405)

The rendition court  review its own judgment after checking whether the summon is duly served or not.

The **conditions** under art 78 are

a) when one of the party of the case are not served at all. See v.6 file no. 35403

b) when one of the parties are duly summoned but the party have a good reason for his absence before court of law. See v. 12 file no. 54080.

Good cause can include serious illness, morn, mistake of the day of hearing.

**All reviews results** in set aside or annul or vacate the previous judgment and then **new trial** or proceeding will be conducted;

provided that, a party to the case shall request the set aside of the decision with in one month from the day of his/ her awareness. See v. 13 file no. 76601 & v. 18 101478.

## 1.5) Remand (art 341 &343)

## 2) Reviews by Appeal to a Higher Court:-320-349.

An appeal may be defined as an application by a party to a higher, or as it is called, an appellate court, asking that court to set aside or revise a decision of a subordinate court.

An appellate court reviews the decision of the subordinate court to determine whether that court committed such **errors** in its **hearing** and **disposition** of the case, which guarantee the appellate court to **reverse** the decision.

An appeal, then, means a review of the case and not a retrial of the case by the appellate court.

Grounds for appeal will involve **errors of law** allegedly committed by the subordinate court.

As a rule, the appellate court does not hear additional evidence on the appeal, and where the introduction of additional evidence is permitted, it is **limited** to **exceptional** circumstances.345

Is all matters are appealable?

as a **rule**, all matters are appealable, **except** it is unappealable due to **waiver** of the right by the parties or nonappealable on **statue**. (a contrary reading of proc no. 25/96.

Who may appeal and against whom? the party taking the appeal is called the appellant, and the party against whom

the appeal is lodged is called the respondent; **provided** that, no extrinsic parties can appeal to the appellate court see art 320 (1), thus. It is **limited** to;

- Party plaintiff and defendant
- Intervening parties & Interpleader ( usually by court order see art 41 ,43 & 32(2)
- Auction purchasers, transfer of rights
- Parties opposing the attachments (see art 158 and v. 17 file no. 10632)

= Appeal is against respondents under art 32(2), 33(3) cum art 224.

**Burden of proof:-**

The judgment appealed from is presumed to be correct, and the **burden** is on the **appellant** to show that it should be reversed or varied.

Thus, **provided** that, where there was an appeal and a cross-appeal, the appellant would have the burden of showing that the portion of the judgment he was attacking was **erroneous**, and the cross-appellant would have the same burden with respect to that portion of the judgment which he was attacking.

Is there a possibility that both parties of the case may appeal?

It is also possible that **both** parties may be dissatisfied with the decision and if so, both may appeal. For example, the court may have entered judgment for the plaintiff, but may have awarded him a lesser amount of damage than he or she claimed; provided that, the defendant may appeal from the decision on the issue of liability, and the plaintiff may appeal from the decision on damages. Thus, it is known as **cross- appeal.**

The plaintiff would be the ***cross appellant*** and the defendant would be the ***cross respondent.***

Can a party who proceeded on alternative theories of liability, and the court found in his favor on one theory, but not on the other, and gave him all the relief sought. Can he appeal on the other theory he lost?

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

In multi-party litigation, any or **all** parties may appeal if they are adversely affected by the decision. But, the parties appealing need **not** make all the other parties respondents to the appeal. See art 331

Where an appeal lies, but a remedy is available in the court, which gave the judgment or order, **no appeal** may be lodged until such remedy has been **exhausted**. This would include the situation, where procedural irregularities have occurred in the subordinate court .See article 320(2)

Is there appeal on the merit of the case in one party hearing (exparte) ?

in **principle**, **no appeal** lies on the merit of one party hearing, except on errors of law. See v. 8 file no. 36412,

## Is there a second appeal?

There is **one** appeal as of right. Where the case was tried in the First Instance Court, an appeal lies to the High Court in whose area of jurisdiction that the First Instance Court lays;

Where, on appeal, the appellate court confirms the judgment, a further appeal does not lie. **provided** that, If, however, the **judgment is varied or reversed**, a

**second appeal lies** to the next highest court. See art 321(2)

## Is there any option for a party who does not have a second appeal?

Such party have only one option. Thus, he/ she can bring his/her grievances to the **cassation bench.**

Is there any circumstance that allow a third appeal as a right?

There is no provision for a third appeal under Ethiopian civil procedure code.

Suppose that the issue is the subject matter of a state which has Social court structure in which it is initially instituted in the Social Court, and the state and judgment was for the plaintiff. On appeal, the Woreda Court **reverses** and gives judgment for the defendant. Since the decision of the Social Court was reversed on appeal, a second appeal which lies to the High Court is possible.

**provided** that, no matter how the High Court disposes of the case, i.e., whether it confirms or reverses the decision of the Woreda Court, a further appeal does not lie to the Supreme Court.

Is there a zigzag appeal? From state court to federal court & back to state court?

Strictly forbidden and the parties shall keep the line or jurisdictional hierarchy of the courts.

Is there courts delegation in case of appeal?

Ethiopia follows the diagonal delegation, accordingly delegations are take place;

FFIC to SHC

FHC to SSC

Only in federal maters SSC may **conditionally** delegate its jurisdiction to FSC.

Q. What are the different forms of appeal?

An application to the appellate court may be of **two** types;

1) Appeal on Judgment and

2) Appeal on Orders (Interlocutory Appeal).

## 1) Appeal on Judgment

Any application for review of orders made by the court at **any** level of the litigation is not considered as appeal on judgment **unless** it is proved that such judgment is on the merit of the case; **provided** that, regardless of the length of the procedure, i.e., with out trial (at the first hearing) or after trial (full-scale trial), if the case is adjudicated on its merits, then any application for appeal on such judgment can be considered an appeal on Judgment.

## 2) Appeal on Orders (Interlocutory Appeal)

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

Is it possible to appeal on interlocutory orders of the court under Ethiopian civil procedure?

As a rule, **interlocutory** appeals are **not** permitted. No appeal lies from any decision or order of any court on interlocutory matters; such as order on a motion for adjournment, a decision on preliminary objections, a ruling on the admissibility of evidence and a decision on an application to sue as a pauper. (see art **320**(3).

**Provided** that, any such decision or order may be raised as a ground of appeal when an appeal is made against the **final judgment.** (see art 273, & 242, on compromise see art 274 & 277, on dismissal see art 73 & 245).

Thus, a person may appeal from any order directing his arrest or detention, or transferring property from one party to another (see art 404) or refusing to grant an application for Habeas Corpus. See article 320(4) **provided** that, they are the **only exceptions** permitted & such orders may be considered interlocutory in nature, but they do involve

restraint of a person or deprivation of property, and it was decided that a person should be entitled to an immediate ruling on the validity of the detention or transfer.

Moreover, parties may appeal on interlocutory orders on **disposition** (see v. 15 file no. 89893)

No appeal lies on denial of pauperism or court fee exemption (see art 468 & see v.6 file no. 23744).

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

# A) Ground of Appeal (art 327-29)

In the memorandum of appeal, the appellant must set forth his grounds of appeal, the grounds on which he objects to the judgment from which the appeal is taken. They must be stated **concisely** and without **argument**;

provided that, a mere grievance, trivial, or harmless errors does not constitute as a ground of appeal .

° **The errors that constitute as a ground of appeal are includes; Art. 328.**

- Errors in relation to procedure (e.g. if the court does not accept objections)

-Plain errors (e.g. fairness errors or due process errors or practically based errors)

-Errors arising from fact appreciation

-Error on evidence weighting or measurement ( includes a problem in interpreting the evidences)

-Error on law (when proper legal back up is/are not used to decide the case ).

It is very important that the appellant state all his objections to the decree in the memorandum of appeal. See Article 327

## B) General Rules on Appeal:-

The court may decide the case on any ground it thinks proper, the appellant may **not** ordinarily present arguments on a ground that he **did not** raise in his memorandum of appeal; (see art 327 (3) :- **provided** that; **except** where the court permits the introduction of new evidence, the appellant may **not** raise any fact, which was not in evidence in

the subordinate court. (see art 329)+345.

These rule is known as preservatory rule ( no De More Review), i.e. no new fact, evidence, annex, issue or argument cannot be raised; See art 345,346,328,329.

**provided** that, forgetting any of the above things to raise in the lower court are deemed as waived. See v.6 file no. 25026 & v. 8 file no. 37761.

As the exceptions to the preservatory rules under art 345 parties may submit evidence but only through ***affidavit*** (see art 205) & parties shall show their **vigilances** where;

- The trial court **refused** to accept evidences. (see art 223 & 137)

- Just new evidences that a party **come across** after the judgment of the trial court.

- The evidences are **important** for carriage of justice. ( see v. 15 file no. 72980.

**Fact** in evidence should be construed to include any objection or issue that was **not** raised in the lower court; **provided** that, An objection or issue cannot be raised for the first time on appeal, and an appeal should be limited to a review of the questions decided by the lower court.

Similarly, certain objections are waived, if not raised during the trial court, i.e., at the first hearing, and, of course, they cannot be raised on appeal too.

Q. Is there any exceptions to the above general rules on appeal?

There are certain **exceptions** to the general rule and includes;

1) lack of material jurisdiction, which goes beyond the power of the court to proceed at all, may never be waived, and **it is specifically** provided that this objection may be raised on appeal, even though it was not raised in the court below.

2) Failure to join an indispensable party: since the absence of such a party affects the power of the court to hear the case, the objection may be taken at any time.

3) New legal argument on appeal: on an issue that was decided on the lower court. It is **not** objected (**possible**) to raise it even though this argument was not made in the court below. Since the appellate court, can decide the case on the basis of any rule of law it considers applicable.

It cannot be said that the case is being retried, because different legal arguments to sustain a party's position on an issue are raised on appeal; **provided** that, what cannot be raised ordinarily are new issues and new objections to the action of the subordinate court.

## C) Instituting Memorandum of Appeal:-

## 1) Memorandum of appeal:

A party takes an appeal by filing in the registry of the appellate court memorandum of appeal signed by him or his pleader.

The memorandum of appeal must contain, the requirements stated under Art.327.

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

Where the memorandum is not in the proper form, it may be rejected or returned to the appellant for the purpose of being amended within a specified time, or it may be amended then and there. See article 330

## 2) Time for Appeal (art 323-26)

The memorandum must be filed within 60 days from the time of the delivery of judgment. See article 323(2)

However, this may not be true all the time, in which most of the time;

- In civil cases 60 days (including holydays)

- In labour cases 30 days (proclamation no. 377/2004, art 138 (3) & 154(1)

- Bankruptcy laws 15 days (see proc. No. 986)

**Effect of failure to apply the memorandum within the period of limitation:-**

The time limit must be observed scrupulously, since it is in the **nature** of, a period of limitation. See art 324(1)

The party shall submit the application for leave or lapse to

appeal out of time & shall be in writing and must show the cause why the appellant did not appeal within the prescribed period with necessary supportive evidences. See Article 325 & 326. see also v. 13 file no. 74185. **e.g.** delay of copy of the judgment (see art 184), illness, prison, national call, mourn .

If the court is satisfied that the appellant was prevented by **good** cause from appealing in time, it records an order granting the application, and the appellant shall file his memorandum of appeal within 10 days of such order;

**provided** that, no appeal lies from a decision dismissing an application for **leave to appeal out of time**. See Article 326.

What if the lapse of appeal period of limitation is due to the negligence of parties advocate/ lawyer?

No appeal lies or cannot be raised as a good cause for delay

of the memorandum of appeal submission.See art 326/2.

## 3. Cross-objections (art 340)

The party in whose favor judgment on the merits was entered may have certain objections to the decree, which he may want to raise in the appellate court, and if so, he may file what is called a **cross-appeal.**

However, the objections may be such that he is **unwilling** to file an appeal in order to raise them; he is relatively satisfied with the judgment as it is. **But**, when the other party appeals from the decree, he may decide that he now wants to raise such objections. **It is, therefore**, **provided** that; the respondent may, upon payment of the prescribed court fee, take any cross-objection to the decree or order which he could have

taken by appeal notwithstanding that he did not appeal from any part of the order or decree.

This is analogous to the provisions relating to counter-claim and set-off.

**Difference between cross- appeal & cross-objections;-**

There is no substantive distinction between a cross-objection and a cross-appeal, and the same grounds of attack may be raised by both methods.

The cross-objections must be filed in the form of a memorandum of appeal within **one month** from the time when the respondent is served with the summons to appear and defend the appeal. The **cross-objection** may be heard and determined notwithstanding that the original appeal is not proceeded with. See Article 340.

## cross- appeal

common forms of appeal and both parties appeal without waiting one another.

there is no any provocation and trigger between the parties to appeal. Since both submit the application of appeal separately.

## cross- objections( art 340)

it is one party appeal , but the other party does not have an interest to appeal even if s/he have a grievance on the decision.

the other party appeals due to the provocation or trigger or anger by the appeal of the party who appeals first. ጭራሽ በአንተ ብሶ ይግባኝ ትላለህ ስለዚ ህ እኔም እላለሁ::

However, if the original appeal were **not** validly filed, there would be no opportunity for the respondent to present cross-objections.

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

**4) Additional Parties :-** As the same vein with the trial court; the appellate court has the same kind of power with respect to persons who were parties to the original suit but who were not made parties to the appeal; **Provided** that, if the appellate court concludes that such a person is interested in the result of the appeal, it may direct that he be made a respondent. See article 40(5).

## 5. Stay of Execution :-

As a **rule**, an appeal has been taken does not operate to stay the proceedings or to prevent execution of the decree; **provided** that, execution can be stayed only upon a showing that **substantial loss will result if** the stay is not granted and that appellant's furnishing security for the performance of the decree.

A stay of execution may be ordered by the appellate court or by the court or by the president of the court, which rendered the decree if an application, is made to that court before the expiration of the time allowed for appeal. See article 332-334.

**Both** the appellate court and the subordinate court are **authorized** to grant stays; **provided** that, the subordinate court should only order a stay if an appeal has not been taken. Once an appeal has been taken, any stay should be granted by the appellate court.

In **principle**, the rules authorize only the granting of a stay of execution, and do **not** authorize the setting aside of an execution that has already taken place; **provided** that, after the decree has been executed, an application for a stay of execution cannot be entertained.

Where the case is before the **appellate** court, the president may grant a temporary stay for a period not to exceed 15 days, as may the president of the court, which passed the decree if an appeal, has not yet been taken. See art 334.

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

1. Substantial loss may result to the party applying for the stay unless the order is made;

2. the application has been made without unreasonable delay,

3. money has been deposited, security given or a surety produced by the applicant, guaranteeing due performance of the decree as may ultimately be binding upon him;

provided that; the parties must be heard on the application although the court may, on application supported by affidavit, make an ex parte order of stay pending the hearing of the application.

There are **two** approaches to the granting of a stay:

1) granting a Stay as of course and

2) granting a stay only in exceptional cases.

The Civil Procedure Code adopts the **latter** approach. The fact that an appeal has been taken does not prevent execution of the decree, and it is only where the appellant demonstrates that substantial loss will result if execution is not stayed that the appellate court will interfere with the execution of the decree.

# D) Procedure on Appeal

## a. Hearing of Appeal

The memorandum of appeal is filed in the appellate court, and it serves as the pleading that originates the appellate proceedings. Thus, the appellate court may decide the case solely on the basis of the grounds set forth in the memorandum of appeal.

It fixes a day for hearing the appellant or his pleader, and following the hearing, it may dismiss the appeal without calling on the respondent to appear if it agrees with the judgment of the **subordinate** court. See article 337.

Where the appellate court believes that the appeal is groundless there is no reason to proceed further, and the court is authorized to dismiss the appeal.

**On the day of the appeal;**

1) The appellant is to be heard first since he has the burden of proof on the appeal.

2) If he has not made out a case justifying further argument, the court may dismiss the appeal at that time.

If the court does not dismiss the appeal, the respondent is then heard in rebuttal, and the appellant is entitled to reply. The court may, however, require the respondent to submit a written reply to the memorandum of appeal and the appellant to submit a written counter-reply. See article 339.

### b) Framing the issue (see art 343)

If, during hearing the appeal, the appellate court concludes that the subordinate court has omitted to frame or try an issue or to determine any question of fact

which is **necessary** for the decision of the suit on the **merits**, the appellate court may frame those issues and **refer them to the subordinate court,** which is to take the evidence on those issues. See article 343.

### c) additional evidences (see art 345 cum 329)

As a **rule**, the parties are not permitted to produce additional or new evidence in the appellate court;

**provided** that, all issues must be raised at the trial court so that the court can render a final judgment on the merits.

**Exceptionally**, there are **three** situations where the introduction of new evidence on appeal is authorized. These are where: see art 345 (1)

1) The subordinate court refused to admit evidence that ought to have been admitted;

2) The appellate court requires any document to be or any witness to be examined to enable it to pronounce judgment; or

3) There is substantial cause, justifying the production of the evidence. See article 345.

## d) Review of the finding of fact

In Ethiopia, the appellate court is **not** bound to accept all findings of **fact** made by the **subordinate** court, and there are no express provisions of the Code dealing with the effect that is to be given to such findings.

**There are two approaches on the review of the finding of fact;**

a) Either that the appellate court will be dependent on the findings of fact made by the subordinate court or

b) The appellate court may determine on the findings of facts.

@ If the appeal is not to be a retrial of the case, it follows that to some extent, the appellate court must **accept** the subordinate court's findings of fact.

What if the decision of the trial court rests on primarily through oral evidence and based conflicting oral testimonies? And what if the base of the decision of the trial court is primarily on written evidence?

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

2) Where the evidence is primarily **oral**, and the decision depends on the court's resolution of conflicting oral testimony, the findings of **fact** made by the **subordinate** court should **not** ordinarily be **disturbed**.

3) Where the findings rest on written evidence or undisputed oral evidence, the appellate court is in as good position to draw those inferences and should not be bound by the **findings** of the **subordinate** court.

Where the evidence supporting the finding is primarily oral and involves the resolution of conflicting oral testimony, the finding of the subordinate court should ordinarily be accepted.

Where the issue was decided entirely on the basis of written evidence, it may be reviewed fully by the appellate court.

The more difficult case is where the finding depends on both written and oral evidence.

-Where the evidence supporting the finding is primarily oral and involves the **resolution** of conflicting oral testimony, the finding of the subordinate court should ordinarily be **accepted**.

-Where the issue was decided entirely on the basis of written evidence, it may be reviewed fully by the appellate court.

Where, although there was conflicting oral testimony, it appears that the written evidence or undisputed oral evidence was such as clearly to **outweigh** the disputed oral evidence, the appellate court can **disregard** the findings in light of the **written** or **undisputed** oral evidence.

# E) Judgment on Appeal:-

Article 348 the judgment of the appellate court may confirm, vary or reverse the decree or order from which the appeal is preferred.

## 1. Reversal for substantial error:-

Whether the decree should be reversed or varied as a result of an error committed by the trial court, it is important to determine whether the error amounts to what is called a **procedural irregularity.**

If the error is such as to amount to a **mere irregularity**, the Code directs the appellate court to **correct** it, but also provides that the decree may **not** be reversed on that ground. See article 211. **provided** that, the decree should **only** be reversed or varied if the subordinate court committed "substantial error," which affected its decision.

## What is the effects of errors which does not affect the outcome of the case & the power of the appellate court in such issues?

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

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

## 2. Remand (see art 341 cum 342)

One of the powers of the appellate court is to remand the suit to the trial court.

It is an **action** by an **appellate** court in which it remands, or **sends back, a** case to the trial court or lower appellate court for  further action.

Thus, the case is said to be remanded.

**Usually the case remanded for the lower courts are due to;**

1) If the trial judge has made an error, which requires a new trial or hearing. (e.g.  If a trial court refuses to allow a party to introduce certain evidence (believing it to be inadmissible).

2) If the appellate court decides that the evidence should have been admitted and that the exclusion of the evidence was prejudicial to the party offering it, the appellate court

would likely remand the case for new trial and order the evidence introduced.

**There are two type of remand;**

1) Remand of case by appellate court ( art 341)

When the trial court disposed the suit up on a preliminary point and if the decree or order is reversed in appeal. (sub 1)

In here the appellate court remanded the case to the trial court and the appellate court may frame or may not frame issues while remanding the case to the trial court.

Remand by reversing the trial court dismissal on preliminary objections under art 244 & 245; **provided** that, the appellate court remand the case by stating that the trial court shall pass to the merit of the case. Since the preliminary objections are overruled by the appellate.

see v. 9 file no. 43331 See v. 12 file no. 58540.

## 2) Remand of case with new issues (art 343)

When the trial court has omitted to frame or try any issue or to determine any question of fact , which appears necessary to the appellate court essential to the right decision of the suit (sub 1)

remand by reversing the decision of the trial court, due to wrong issues are identified by the trial court while deciding on the merit of the case;

**provided** that, the appellate court order the trial court to conduct retrial by framing issues (in here, the trial court is **denied** even to frame the issue of the case, but rather based on the issue framed by the appellate court.

@ Therefore, under art 341 the remand is ordered by the appellate court due to the decision of the trial court was on a ***preliminary point*** and the **substantive** issues in the case have **not** yet determined.

**Preliminary point"** should be construed to mean not only objections not going to the merits, but any issue which rendered a decision on some remaining issue unnecessary;

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

To conclude, the **effect** of reversal is remand. art 182 & 121 also indicated that the effect of omitted issue and omitted prayer is remand.

## 3. Powers of Appellate Court:-

The appellate court is given broad powers with respect to its disposition of case. Where the evidence on the record is sufficient to enable the appellate court to pronounce

judgment, it may, after resettling the issues, if necessary, finally determine the case **notwithstanding** that its decision proceeds on a different basis than to decision of the subordinate court. . See article 342 of the Cv.Pr.C

The appellate court may pass any decree or order, which ought to have been made by the subordinate court and may make any order or decree that the case may require. It does not matter that such order was **not** requested by either party.

In this connection, reference should be made to the court's power under Art. 40(5) to join as a respondent any person who was a party to the original proceedings, but who was not a party to the appeal. The court may join him as respondent and issue a decree or order affecting him.

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

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

## 4. Pronouncing of judgment:-

The provisions regarding the pronouncing of judgment, equally applicable to the judgment of the appellate court. In addition, there are special requirements for the giving of a judgment of appeal.

The judgment of the appellate court must contain the following contents as a special requirement:

a) the points for determination, i.e. the grounds of appeal as set forth in the memorandum of appeal.

b) further questions, if any, developed by the appellate court,

c) The appellate court should give its own reasons for deciding as it has even where it is confirming the judgment of the subordinate court.

d) The final decision of the court

e) Where the decree is varied or reversed, the judgment of the appellate court must specify the **relief** to which the appellant is entitled.

***It should be noted that,*** as with the **judgment** of the **subordinat** court the operative part of the judgment must be reduced to a decree. The decree may specify how and by whom the costs incurred in the suit are to be paid, and this would include **both** the costs in the original suit & on appeal.

## F) Effects of appeal

### 1. Effect of appeal on several parties (art 331)

In case of indispensable parties or co-defendant and plaintiffs the benefit or any outcome of the case is for or against the interest of all indispensable parties: the **appellant** is presumed as the representative of all co-defendant or plaintiffs.

provided that, the indispensable parties, who are not willing to appeal are also joined the proceeding in the appellate court through mandatory joiner.

## 2. Effects of appeal on execution of decree

As a rule, **appeal is not a** bar per se or does **not** have effects on the execution of the decree; unless, there is stay of execution (see art 332-36)

### Who shall grant stay of execution?

It is granted only when the decree debtor or the appellant faces irreparable damage .

### Execution Order by the Appellate Court

The appellate court may either give the necessary direction for execution itself or may delegate the execution to the subordinate court. See article 183(1) (f).

Certified copies of the judgment or decree or both are to be furnished to the parties on application & court, which passed the decree appealed from.

The parties on the appellate court must file with the original proceedings in the suit, and an entry of the judgment the appellate court will be made in the **register** of civil suits.

## G) Second Appeal:-

Second appeal, is an appeal against the judgment of the appellate court, which varied or reversed the judgment appealed from.

If the appellate court **confirmed** the judgment of the first instance court, although on a different ground, a second appeal **does not lie.**

The second appeal is a review of the decision of the first appellate court varying the judgment appealed from and **not** a review of the decision of the trial court.

## What is the ground or conditions of second appeal, is it errors or reversal or varying of judgment by the first appellate court?

The **rule** is that the second appeal should be limited to that aspect of the decision of the appellate court varying or reversing the judgment of the first court.

The provisions applicable to the first appeal are therefore, as a general proposition, applicable to the second appeal. See art 321(2)

## H) Restitution

As a **rule** an appeal does **not** prevent execution of the decree unless a **stay** is ordered for sufficient cause. It may be, then, that the judgment in favor of one party will have been executed, and, on appeal, that judgment will have been reversed;

The successful **appellant** is entitled to restitution, and he must make his **application** for restitution in the court of first instance. That court must cause such restitution to be made, as will, so far as possible, place the parties in the same position as they would have occupied but for the decree or part of the decree that has been varied or reversed. See article 349

**In order to effect such restitution, the court may make any order, including;**

- Refund of costs and for the payment of interest,
- Damages and compensation and
- Manse profits, which a party is entitled to as a result of the variation or reversal.

However, where the appellate court has required the respondent to post security for restitution, it would seem that the application for restitution should be made to the

appellate court. In all other cases, it is to be made to the court of first instance.

The decision of the court on the application for restitution is appealable, and since the Code contains nothing to the contrary, we may assume that it will be appealable in Ethiopia as well.

## 3) Revision in Court of Cassation:-

According to Art. 80 (1) & (2) of the Federal Constitution of Ethiopia, the Federal Supreme Court and the State Supreme Courts have the highest and final judicial power over Federal and State matters, respectively.

provided that, the Federal Supreme Court has the constitutional right to exercise power of Cassation over any final court decision containing a basic error of law. Similarly, the State Supreme Court also has given the

same power on State matters. See art 80 (3) (a) cum art 80(b) of the Constitution.

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

Supreme Court have power to exercise its court of Cassation?

While some said that the Federal Supreme Court should not have the power to exercise its court of cassation over state matters. For their argument, they cite the constitutional provision which indicates that the

State Supreme Court has the highest and final judicial power on state matters.

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

**The Reconciling Point:** the Federal Proclamation no. 454/2005, clearly defines that the decision made by the Federal Supreme Court on issues of law has a binding effect not only on Federal matters but also on State matters. **provided** that, the Federal Supreme Court has a power to exercise its court of Cassation even on cases that are purely State matters.

In court of cassation both at Federal and State Courts, a party may take an application for revision in Court of Cassation, only when;-

a) he/she has exhausted all his rights of appeal;

b) unlike the appellate court, the court of cassation only reviewed the decision of the lower courts if it has an error of law, not error of fact.

Q. what are the procedures in cassation court?

Even if Ethiopian civil procedure code does not provides the procedures, The usual procedures in the cassation bench are;

1) hearing on the petition, before the cassation court

2) If the court believes that the petition is without merit, it will dismiss it.

3) If it believes that it should be granted, the court of cassation declares the petition admitted and gives notice to the respondent by the method previously discussed.

4) then, upon appearance of the parties, on the date which is fixed by on summon already served to the respondent, give chance to the parties to argue orally.

5) Finally, the court will render judgment on the issue. By its decision the court may confirm, vary or reverse the decision of the lower court decision.

# CHAPTER FOUR

# EXECUTION OF DECREES (see art 371-403)

Both parties have different interests following the judgment.

While the judgment debtor wishes to review the judgment by way of appeal, if there is such possibility, the judgment creditor becomes interested to

execute the judgment, if there is some thing to be executed.

**Execution**‘ may be defined as the process by which a *decree*, the *operative part of the judgment,* is enforced against a person who has failed to comply with its

terms.

Normally, the decree **includes** a clear order that the party against whom it is rendered shall do or refrain from doing something or shall pay a definite sum of money or shall deliver a particular thing or shall surrender or restore immovable property.

## 1) Jurisdiction in Execution:-

Execution is essentially a **separate** proceeding. A decree can be executed either by the good will of the judgment debtor or by the order of the court.

As a rule, the court which ***rendered*** the decree or to whom execution was ***delegated*** by the appellate court or ***referred*** by the court of cassation will execute it; **provided** that, in certain circumstances, it may be transferred for execution to **another** court. (see art 371(1)

If the beneficiary is interested in executing a decree, he has to appeal to that effect to the court, which has jurisdiction.

## 1.1) Transfer for Execution:-372

If execution by that court is not **feasible**, the court may, upon its own motion or application of the decree holder, send the decree to another court for execution.

**Provided** that, the execution are directly transferred to another court up on the **fulfillment** of the conditions stated under art 372(2).

Therefore, if the court, which has a jurisdiction to execute a judgment, decided to transfer its power to any other court, based on the above conditions, it shall send a copy of the decree, a certificate stating that " satisfaction of the decree

has not been obtained by execution within its jurisdiction, or the extent of partial satisfaction".

Such transfer may be made without notice to the judgment-debtor, since he will be notified of the execution proceedings by the transferee court.

Do you think that the court, which has no local jurisdiction, can execute a judgment?

**As a rule**, the lack of local jurisdiction is **waived** if not raised and does **not** constitute grounds for reversal on appeal **unless** it has caused **injustice**, the transferee court should **not** refuse to execute the decree on that ground.See art 373(2).

If the decree is clearly illegal, it would seem that the transferee court should be able to refuse to execute it. Except in these circumstances, the transferee court should execute the decree without further inquiry.

## Can the transferee court made any modification on the terms of decree?

**As a rule**, the transferee court cannot alter, vary or add to the terms of the decree; **provided** that, the **only exception** is where the decree is ambiguous. In such a case, the transferee court can resolve the ambiguity.

Therefore, if the decree has been **appealed** and **modified** by the **appellate** court, the transferee court can execute it as modified by the appellate court. See article 374.

Hence, if the transferee court is directed to execute the decree, and in doing so, it has the **same powers** as if it had **passed** the decree itself.

It **retains** the power to execute the decree notwithstanding that an appeal has been taken from the judgment in the suit.

But as an exception, the transferee court may **not transfer** the decree for execution to still another court.

It can **only** refuse to execute the decree if it concludes that the transferring court lacked material jurisdiction to render it or that the decree is clearly illegal.

It cannot **suspend** execution **except** to grant a temporary stay so that, an application for a stay can be made to the transferring court.

It is bound by any order passed by the **transferring** court, although it may deal with property as to which it has issued an order of execution.

## 1.2) Powers of the Court uponExecution:- 375

**In principle**, the court can **not** execute a decree simply because it has a jurisdiction to that effect; Provided that, an **application** by the decree-holder to the court which issued the decree is **important**.

However, once an **application** is made the court executing the decree has complete control over the proceedings, and **all questions** arising between the parties in the suit in which the decree was passed concerning the execution, discharge or satisfaction of the decree must be determined by that court and not by a separate suit. (see art 375(1).

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

A compromise intended to govern the liability of the judgment-debtor under the decree and to affect the time and **manner** of enforcement can be recorded and

enforced under this rule, and a **separate** suit cannot be brought on the compromise agreement.

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

Is the execution courts decree are appealable?

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

What if there is a pending suit, can the execution court grant a stay of execution?

where a suit by the judgment-debtor against the decree-holder is pending in any court, the court which issued the decree may, on such terms as to **security** or otherwise as it thinks fit, **stay the execution** of the decree until the

pending suit has been decided. See article 377.

NB. The other suit may be pending in **any court** and need not be pending in the court which issued the decree. **However**, only the court, which issued the decree, may stay execution; execution may **not** be stayed by the court in which the other suit was filed.

## 2) Proceedings in Execution:- ( 378 - 393)

### 2.1) Application for Execution:-

### A) General provisions:-

An **application** for execution is the **first** step to proceeding for execution, in case the decree is not satisfied by the judgment-debtor. He **does not file** a separate suit and that the general provisions applicable to the **institution** of suits are **not** applicable to proceedings in execution.

Because the proceedings in execution are a **continuance** of the **original** suit, and the original suit is **not** finally closed until the decree is satisfied.

There is **no fixed** time stated for application.

But the application may be made as soon as the judgment-debtor is in default.

If he has been given time to satisfy the decree, the application may be made when the time has passed without the decree's having been satisfied; otherwise, it may be made upon the passing of the decree. See article 378.

What should be the forms of the application for execution?

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

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

**Where the application seeks the attachment of immovable property, it shall contain;**

- A description of the property in accordance with Art. 225(2).

- A specification of the judgment-debtor's interest in such property to the extent believed or ascertained by the applicant.

- If such a description is **lacking**, the application should be returned to the applicant with directions to furnish the description within a prescribed period of time. See article 379(2).

## B. Application by joint decrees

The **rule** is, any one of the beneficiaries may apply for the execution of the whole decree for the benefit of all, or where one has died for the benefit of the survivors and the legal representative of the deceased. See article 380(1)

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

If there are **several** parties, so that a **representative** class **suit** may have been justified under Art. 38, **one holder** of the joint decree should be able to file the

application on **behalf** of the others. Or, if one of the decree-holders is outside of the **jurisdiction**, the other should be able to apply for execution.

## C. Application by transferees

A right may be **transferred** to any other person for different reasons and at different times.

Such transfer could be made by the operation of law or by agreement of parties.

° If a decree is transferred by assignment in writing or by operation of law, **t**he transferee may apply for execution. Once the application is granted the decree may be

executed in the same manner and subject to the same conditions as if the application were made by the **original** decree-holder.381/1.

° Where the decree has been transferred by assignment and the **assignee** applies for execution, notice of the application shall be given to the original decree-holder and the judgment-debtor; the decree shall **not** be executed until the **court** has heard any objection either may have to its execution. See article 381(3).

The **purpose** of such notice is to permit the raising of defences to execution by the assignee, e.g., the assignee did not satisfy his agreement with the assignor or the judgment-debtor to pay the assignor.

NB. *such notice is not necessary where the transfer has been made by operation of law.*

Where a decree for the payment of **money** against two or more persons has been transferred to one of them, either by assignment or operation of law, the transferee judgment-debtor **cannot** execute the decree against the other judgment-debtor.

The **purpose** of this rule is to force the transferee judgment-debtor to proceed against his **co-debtors** by way of a suit for contribution, which is considered an a more appropriate procedure.

## D) Application against sureties and representatives

Where the judgment-debtor **dies** before the decree has been fully satisfied, the **decree-holder** may apply to the court, which passed it for execution against the legal representative of the deceased judgment-debtor. See Art. 383 .

Where any person has become **liable as surety**: for the execution of a decree or any part thereof; for the restitution of any **property** taken in execution of a decree; or for the payment of any **money** or the fulfillment of any **condition** imposed on any person, under an order of the court in proceeding consequent thereon, the decree or

order may be executed against him to the extent to which he has rendered himself personally **liable** and

he shall be deemed to be a party within the meaning of Art. 375, **provided** that such notice as the court in each case thinks sufficient shall be given to him.

## 2.2) Period of Limitation for application of execution

### What is the period of limitation for the first application for execution?

Under Ethiopian Civil Procedure there is **no** specified period in which the first application to execute the decree must be filed. Since the **decree** creates an obligation for the benefit of the decree-holder;the **ordinary period** of limitation for the **enforcement of obligations**, which is **ten** years, should be applicable, and if the application is filed more than ten years after the date of the decree sought to be executed, it should be barred by limitation.

The Code does provide a period of limitation for a second application, and all matters relating to a second application are governed by the Code.

Per article 384 , once an application to execute a decree, other than one granting an injunction, has been made, **no fresh** application may be entertained after the expiration of ten years from:-

1. the date of the decree sought to be executed, or

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

of the default.

There is **no** restriction on the **number** of applications that the decree-holder may make within the **ten** years period.

## What is the effect of failure to comply the formal requirements of the application for execution?

If these conditions have **not** been complied with, the court must **reject** the application; or if the defect can be remedied, it must allow the applicant to do so on such terms as it shall fix; **provided** that, Any amendment so made shall be dated and signed by the presiding judge. The application is then deemed to be one in accordance with the law, and the amendment relates back to the time when the application was originally filed. See article 385.

## 2.3) Process of Execution

**A). Receipt of application and examination of the judgment-debtor:-** Where the application for execution is **admitted**, the **same** procedure as to the **summoning** of the defendant

in the **trial court will be applied.** i.e., a copy is served on the judgment-debtor together with a summons requiring him to appear before the court on a day fixed in the summons to show **causes** why the decree should **not** be **executed**.

Once the judgment debtor appears before the court, the proceeding is oral one; **Provided** that, the judgment debtor is not allowed to bring any **written** respond to the application. See art 386(1) and (2).

If the judgment-debtor does **not appear,** the court orders the decree to be **executed** and issues process for such execution.

- Where the application made for execution of a decree for the payment of **money**, the court must order the judgment-debtor to be arrested and brought before the court for the purpose being examined as to his means. See art 386(3,4.

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

What if the judgment debtor does not have anything to pay for the decree holder?

Where the court considers that the judgment-debtor does **not have the means** to **pay** the amount due, it may **not** issue any process for execution; **Provided** that, the burden should be on the **decree**-holder to persuade the court that the judgment-debtor has sufficient means.

If the court cannot issue process because it considers that the judgment-debtor **cannot** pay the amount due, it should not dismiss the application, because it may issue process at any subsequent time on being **satisfied** that the **judgment-debtor** has a means to pay such amount.

Q. What is the effect of inability of the judgment deter to execute the decree of the court?

✓ In the event that the judgment-debtor has not shown causes why the decree should not be executed, the **court** will issue **process** for execution of the decree in such manner as the nature of the relief granted may require; **provided** that, in addition to issuing process for execution, the court is authorized to order the detention of the judgment-debtor as a means of forcing him to comply with the decree based on the conditions stated under and his detention in a **civil** prison for a period not to exceed **six** months. article 389.

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

A decree for the payment of **money**, including a decree for the payment of **money** as an **alternative** to some other relief, may be executed by the attachment and sale of the judgment-debtor's property; See article 394.

The property attached may be **movable** or **immovable**, and there is no requirement that the decree-holder first proceed against movable property.

The **value** of the property attached **must** be, as nearly as may be, **correspondant** with the amount due under the **decree**.

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

## C. Execution of cross-decrees

It may be that an application is made by a decree-holder against the judgment-debtor for execution of a decree for the payment of **money** at the same time that the judgment-debtor has applied for execution of a decree for the payment of **money** against the decree-older, which was obtained in a separate suit.

Some how, it is similar to **counter** claim brought by the defendant when the plaintiff institute a case against him.

Where **both** parties have made such applications, their decrees are called ***cross-decrees***, and the execution of such decrees is governed by **special** rules.

**Requirements to apply special rules on execution of cross-decree:-** In order for the rules relating to cross-decrees to apply, the following conditions must be satisfied:

1) Both decree-holders must make **application** to the same court for execution of their decrees;

2) The decrees must be obtained in separate suits;

3) Both decrees must be for the payment of definite sums of **money**;

4) The parties must be the same in the sense that the decree-holder in one of the suits was the judgment-debtor in the other suit and the parties were involved in both suits in the same capacities; and

5) Both decrees are capable of execution at the same time by the court. The holder of a decree passed against several persons jointly and severally may also treat it as a cross-decree in relation to a decree passed against him singly in favor of one or more of such persons.

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

**In such a case, the following rules will be applicable:-**

1) If the sums due under both decrees are equal, the court enters satisfaction upon both decrees.

2) Where the sums are unequal, execution may be taken out **only** by the holder of the decree for the larger sum and for only so much as remains after deducting the smaller sum.

Can the court execute the cross-decrees passed by different courts?

The provisions for execution of cross-decrees are necessarily **limited** to the situation where **both** decrees were issued by the same court;

An application for execution must be made to the **court**, which **issued** it, a court would not be capable of execution a decree that had been passed by **another** court and, therefore, could **not** apply those provisions.

Q. If so, does it mean there is no possibility to execute the cross decrees of different court?

However, these days there is **specialization** of benches especially in Federal Courts. There are benches that assigned to entertain only a certain kind of cases. There are **benches** established only to the execution of judgment entered by **different courts.** In Federal Courts, two benches in ***Lideta*** and ***Arada*** division established only to the execution of judgment entered by **d/t courts**.

Application of the execution of judgment is **fully** the **responsibility** of these benches. The **court** that has given the judgment does not entertain the execution of the judgment it has entered. **Therefore**, there is a chance, at least in Federal Court Structure in Addis Ababa, for the application of the execution of joint decree that entered by different courts.

## D. Execution of other decrees

### i. execution in case of movable property

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

**However** this rule is applicable **only** to **property** in the possession of the judgment-debtor.

If the property is in the possession of **someone else, t**he decree-holder must proceed to attach that property. This is so that the person in possession may have the opportunity to raise an **objection** to the attachment.

ii. Execution in case of immovable property 402:-

Immovable property, possession is to be delivered by the **execution officer** to the decree-**holder** or such person as he may appoint to receive delivery on his behalf.

The execution officer may remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession. See article 402.

ii) Execution in case of the decree is for the joint possession of immovable property:-

Physical possession is **not** delivered.

Instead, a **copy** of the decree is affixed in some **conspicuous** part of the property and the substance of the decree is proclaimed by beat of drum of some other customary mode.

**Presumably**, the judgment-debtor will then **permit** the decree-holder to enter into possession peaceably.

If the judgment-debtor **resists** the possession of the decree-holder, the decree-holder may **obtain** the assistance of the **court** against such resistance. See article 402 (2).

The court, instead of ordering such **attachment** and **sale**, may order the arrest or detentionof the judgment-debtor if he is not already under arrest in the **civil** prison.

But, the maximum period of detention should not exceed six months. (See Article 389.

# 3) Attachment and Sale:-(404-455)

Most decrees are for the payment of money, and this is the **primary** method by which such decrees are executed. Although coercive methods against the judgment-debtor may be employed, it is only by attachment and sale that the court can guarantee satisfaction to the decree-holder.

## 3.1. Methods of and Objections to Attachment:-

### A) Methods of attachment

When the decree-holder **files** his application for execution, he must indicate whether he wishes the decree to be executed by the attachment and sale of property, and if he does, the application for attachment must be accompanied by certain particulars.

Note also that the application for attachment must be for the attachment of **specific property**.

Certain property is **exempt** from attachment.

There is **no** minimum amount of property that the judgment-debtor can retain but exemptions are made so that the judgment-debtor will **not** be deprived of the necessities of life and the opportunity to earn a livelihood. See article 404.

**Exemptions** represent an attempt to leave the judgment-debtor with the minimum amount of property that he needs to subsist and to earn a livelihood.

On the whole, relatively little property is **exempted** from attachment, and it is likely that the decree-holder will receive some satisfaction despite these exemptions.

**Depending on the nature of the property and the person who has control over it, different methods of attachment are to be employed.**

i) Movable property in the possession of the judgment-debtor, (other than agricultural produce,)

Attachment is made by physical seizure of the property; and keeping the in a safe place and be responsible for its custody. See article 406

ii) Agricultural produce,

Attachment is made by the affixing of warrant rather than by physical seizure.See article 407 of the Cv.Pr.C

iii) Debt not secured by a negotiable instrument or is a debt owed to the judgment-debtor under another decree,

Attachment is made by a written order prohibiting the judgment-debtor from recovering the debt and his debtor from paying him until further order of the court.

## Procedure to be followed after the property has been attached Art. 415

Attachment is to be withdrawn only under one of the following circumstances:-

1. When the amount decreed with costs and all charges and expenses resulting from the attachment of the property have been paid into court; or

2. When satisfaction of the decree is otherwise made through the court or certified to the court; or

3. When decree which is the subject of the attachment is set aside or reversed.

If, **due to the default** of the decree-holder, the court is unable to proceed further with the application for execution after property has been attached, it may **dismiss** the application or, for sufficient cause, **adjourn** the proceedings to a further date.

If the application is **dismissed**, the attachment automatically **ceases** to be effective. See article 417.

## B) Objections to attachment

The most important part of the attachment procedure is that relating to the **investigation** of claims to the attached property and **objections** made to the attachment.

Property may **not** be subject to attachment either because it is exempted from attachment or because it is **not** the property of the judgment-debtor. See article 418.

The judgment-debtor may file an objection to the attachment on the ground that the property is exempted from attachment, and

The person claiming that the property belongs to him rather than to the judgment-debtor may prefer a claim to it.

Similarly where a debt allegedly owing to the judgment-debtor, a share in the capital of a corporation or property in the possession of a third party has been attached, the garnishee, officer of the corporation or party in possession may file an **objection** to the attachment or prefer a claim to the property.

**Only** the judgment-debtor can raise the objection that the property is **exempted** from attachment, since the exemption is for his benefit.

By the same token, the judgment-debtor should **not** be able to prefer a claim to the property on behalf of a third party. He should notify the third party, who can then file his own claim.

A **claim** or **objection** is made by presenting a **written** application to the court executing the decree.

Upon receipt of the application, the court proceeds to investigate the claim or objection; where the claimant or objector was **not** a party to the original suit, he becomes a **party** to the proceedings for the purpose of the court's hearing his claim or objection, and is subjected to the power of the court with respect to examination and the like as if he were a party.

If the court finds that the **claim** or **objection** was designedly or unnecessarily delayed, it will **not** make the investigation, and the claim is, in effect, **rejected**. See article 418(1). If the court is **satisfied** , It is to **release** the property, wholly or to the extent it thinks fit, from the attachment.419

The court is **not required** to prepare an **opinion** with the order, but it would be **good** practice to do so.

# 3.2 Sale of property

Once a property has been attached and, in case of objection, found to be subject to attachment, the court proceeds to order the sale of the property of such portion as may be necessary to satisfy the amount of the decree, and the **proceeds** of the sale or a sufficient portion thereof, will be paid to the decree-holder.

While there are **general** rules governing all sales, there are some procedures **especially** applicable to the sale of movable property and other procedures especially applicable to the sale of **immovable** property.

## 1. Special Provisions as to the Sale

## A. General rules (Art. 422, 424, 423, 426, 430, 427, 428 )

Unless otherwise directed, all sales must be conducted by an **officer** of the court or a person appointed for this purpose and made by *public auction.* ( **PRINCIPLE**)

**EXCEPTION** Sale by private contract article 422.

The **decree-holder** is to make an **application** for an order of **sale**, which must be accompanied by a statement **signed** and **verified** in the manner prescribed for the signing and verification of **pleadings** and containing, insofar as they are known or can be ascertained, the matters required to be specified in the proclamation of sale.

For the purpose of determining such matters, the court may summon and examine any person whom it thinks able to supply such information and may require him to produce any

document in his possession or power; it may also appoint an **expert** to **estimate** the value of the property to be sold. See article 424.

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

1. the property to be sold and the estimated value thereof;

2. any **encumbrance** to which the property is liable;

3. the amount for the **recovery** of which the sale is ordered;

4. the terms and conditions of the sale and the manner in which and the time within the purchase price shall be paid;

5. all other information which the court considers material for a purchaser to know in order to judge the nature and value of the property. See article 423.

NB. No sale may take place, **without** the consent in writing of the judgment-debtor, until at least 30 days after publication of the proclamation in the case of **immovable** property, and 15 days after publication in the case of **movable** property. See article 426.

The **only exception** is where the property is subject to **decay** or is of a kind that must be **stored** at a **cost** in excess of its value. In such cases the property may be sold immediately after attachment.

As long as there has been a **proclamation** which has been **published**, the sale is not **void**.

The **decree**-holder may **not** **bid** at the sale **without** the written **permission** of the court, and a copy of the order granting permission must be given by the court to the **auctioneer**. The **purpose** of this restriction is to enable the court to impose conditions on the decree-holder

if it" thinks fit. See article 430.

At any time before the property is knocked down, that is, before the auctioneer hammers the sale to a close and declares the highest bid, the sale must be **stopped** if the debt and costs, including the costs of the sale, are tendered to the auctioneer or proof is given to his satisfaction that this amount has been paid into the court which ordered the sale. See article 427.

Thus, before the sale is completed, the **judgment**-debtor can still **save** the property by paying the amount of the

debt and the costs If there is a question as to whether the amount has been paid into court, the auctioneer should stop the bidding until he has an opportunity to determine 'whether it has been so paid.

At the **second** sale, the **highest bid**, whatever its amount, must be accepted and the property is sold. See article 428(1).

## B. Sale of Movable Property ( Art. 432, 401(4), 436-438 )

The rules **specifically** applicable to the sale of **movable** property. Where the property to be sold is **agricultural** produce, the sale is to be held in certain places.

If the produce is a growing crop:- the sale is to be held on or near the **land** on which the crop has grown.

If the crop has been cut or gathered,:- it must be held at or near the threshing **floor or place** for treading out grain or the like or **fodder** stack on or in which it is deposited. See article 432.

The following rules govern the delivery and transfer of the property to the purchaser.436-438.

## C. Sale of Immovable Property

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

1) To enable the judgment-debtor to "save" the property if at all possible;

2) To protect the interests of all persons having a claim to the property;

3) To protect persons who would be adversely affected by a fraudulent or improper sale of the property;

4. To establish the ownership of the property in the purchaser;

5. To enable the purchaser to gain possession of the property without the necessity of a separate suit;

6. To determine all claims to possession of the property expeditiously.

## 2. Setting Aside the Sale:- 444 & ff

The most significant difference between a sale of immovable property and a sale of movable property is that in certain circumstances a sale of immovable property can be set aside. Once the immovable property is sold, the court for the following reasons set aside the sale.

**There are basically three situations where this can be done.**

a) The judgment-debtor has no saleable ( capable of being sold ) interest in the property;

b) Another person has an interest in the property;

c) There is material irregularity or fraud in the conduct of the sale, resulting in substantial injury to the applicant.

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

When the purchaser applies to that effect, on the ground that the judgment-debtor had no saleable interest in the property. It is important to state that the judgment-debtor or decree-holder may **not** apply on this ground. However, if the decree-**holder** purchased with permission, he is in the position of a purchaser and may apply.

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

The application is authorized **only** where the judgment-debtor had no saleable interest in the property.

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

The second situation which initiates the setting aside of sale of immovable property is in case where there is a person who has an **interest** in the property that has been sold claims for setting aside the decision.

The civil procedure code enables the **rightful owner** or a person, who has an **interest superior** to that of the

purchaser, to protect that property or interest **without** having to **institute** a suit against the purchaser.

So, a transferee of the property from the judgment-debtor **before** the sale, the **holder** of a contract for sale made **prior** to the execution sale or a prior **mortgage** may have the sale set aside under this rule.

If the **judgment-debtor** were **not** the owner, the person who was would assert his claim when the attachment was made, but if he did not, he may have the sale set aside under this rule.

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

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

A sale of immovable property may also be set aside on the **ground** of a material irregularity or fraud in the publishing or conducting of the sale provided that the applicant satisfies the court that he has sustained **substantial injury** by reason of such irregularity or fraud.

The application to set aside on this ground may be made by the decree-holder, any person entitled to share in a **rateable distribution** of **assets**, or by **any** person whose **interests** are affected by the sale. See articles 445.

A **transferee** of the interest of the judgment-debtor prior to the sale would **not** be such a person, since his

interests can in **no** way be **affected** by the sale.

He **could** apply to have the sale **set aside as one owning** or **holding** an **interest** in the property since he acquired his interest **prior** to the sale.

However, a transferee from the judgment-debtor **following** the sale who, as we said, ***should not*** be able to apply as one "*owning or holding an interest in the property,*" ***should be able to apply*** as a "*person whose interests are affected by the sale.*"

If the sale is **set aside,** he will be entitled to the property. So, his interests are affected and he should be able to raise a claim of material irregularity or fraud.

The expression, —***interests affected by the sale,*** should be **broadly** construed, since it is only in exceptional circumstances that the sale will actually be set aside.

But where those circumstances exist, any **person** whose interests can reasonably be said to have been affected should be able to apply to have it set aside.

The fact that the property realized **only half** of the **value** stated in the **proclamation** of sale, without more, does not justify setting the sale aside. The material irregularity or fraud must be affirmatively shown.

A material irregularity may be said to have occurred, where there has been a **failure to comply with the provisions of the Code designed to insure** and the best **price** is realized upon the sale and that prospective buyers have all the information necessary to make a proper bid.

Even though a material irregularity or fraud may have occurred, the sale will not be set aside unless the

applicant can prove that he ***suffered substantial injury*** as a result of such irregularity or fraud.

The injury must be proved **independently**, and it is not presumed from the existence of the irregularity or fraud. The **nature** of the irregularity or fraud, however, may determine whether the applicant could have suffered substantial injury.

## 3. Confirmation, Delivery of Possession and Resistance

### A. Confirmation:-

Where no application to set aside is made within **two** months from the date of the sale, the sale becomes **absolute**. It is **not necessary** for purchaser to make an application to this effect. By the same token, if an application to set aside is made and is rejected, the court shall make an order confirming the sale and thereupon the sale shall become **absolute**.

Where a sale of immovable property has becomes **absolute**, the court must issue a **certificate** specifying the property sold, the name of the purchaser and the date on which the sale came absolute. See articles 447(1-3).

Where an **application** to set aside the sale is granted, the court must make an **order** to that effect. Such an order is **not** to be made, i.e., the sale is to be set aside, **unless** notice of the application to set aside has been given to persons **affected** thereby. See articles 446(4).

"Persons affected thereby" should be construed to mean the auction purchaser, the judgment-debtor, the decree-holder and any person entitled to rateable distribution.

Where the sale was aside **without** notice to the purchaser, he was entitled to apply for **confirmation**.

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

## B. Delivery of Possession

Normally it is obvious that **immovable** property **cannot** be seized **physically**.

Where the property is in the possession of the judgment debtor or some person on his behalf, or a person claiming under the title created by the judgment debtor subsequently to the attachment of the property, procedure Under 448 will be applied.

If the property is in possession of other person entitled to possession, delivery is effected as per 449.

## C. Putting into Possession:-450

The one who is ordered by the court to surrender his possession may refuse to do that. Hence, whenever possession is resisted or obstructed, the decree holder for the possession of **immovable** property has to have a remedy to secure its rights.

In such cases, the right holder has to put an **application** to the court of complaining of such resistance or obstruction. The court shall fix a **day** for investigating the matter and shall summon the person against whom the application has been made to **appear** and

answer the charge. See articles 450.

If it is **satisfied** that the resistance or obstruction was occasioned **with out good cause** by the judgment-debtor or some other person at his instigation, it will direct that the applicant be put in the possession of the property.

If the applicant is still resisted or obstructed, in obtaining possession, it may at his instance, also order that the judgment-debtor or some other person at his instigation be detained in a civil prison for a period not exceeding thirty days. See articles 451.

However, if the court is satisfied that the resistance or obstruction was **occasioned** by a person other than the judgment-debtor, claiming in good faith to be in possession on his own account or on account of some person **other** than the judgment-debtor, the court shall make an order dismissing the application.

As long as the court is **satisfied** that the claimant is asserting a **bona fide** claim to possession independent of the claim of the judgment-debtor, it may **not** put the decree-holder or purchaser into possession. See articles 452.

*Art. 452.- Resistance or obstruction by bona fide claimant Where the court is satisfied that the resistance or obstruction was occasioned by any person, other than the judgment-debtor, claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the court shall make an order dismissing the application.*

Therefore, the **crucial** questions are the **status** of the person who is resisting or obstructing possession and the reason why he is doing so.

If the person is the judgment-debtor or one holding for him or claiming through him, the court must **determine** whether there is good cause for his resisting or obstructing possession.

If there is not good cause, i.e., if the person does **not** have a legal right to possession, the court will direct that the decree-holder or purchaser be **put** into possession, and if that order is still resisted, the person resisting may be imprisoned.

But if the person is **not the judgment-debtor** and **not** holding or claiming possession through him, the court must **dismiss** the application.

# CHAPTER FIVE

# RES JUDICATA AND SPLITTING OF CLAIMS:-

## Res Judicata

### General Principles

Res Judicata is a Latin term which literally means —***the matter having been litigated.***

The principle is that **once** a matter has been **litigated**, it may **not** be re-litigated, and issues that have been determined once may not be determined again in subsequent suit.

A party to a suit may seek review of the judgment in accordance with the law, but in the **absence** of such review, the judgment and the decision on the issue in the suit is **final**.

It is important to **distinguish** the principle of res judicata from that of principle of pendency.

**One** and the **same** civil suit may **not** be instituted in **more** than one civil court. And where a suit may be instituted in **any** one of several courts, the court in which the statement of claim was first filed shall have jurisdiction and the suit shall be pending in such court.

The **general** condition for the application of the rule of res judicata is stipulated under Art 5.

It must be remembered that the rule of *res judicata* operates as a **defence** for the person in whose favor the previous suit or issue was decided. On the basis of Art 244 either party who wishes to assert a plea of res judicata must do so by way of a **preliminary** objection at the first hearing. If he fails to do so, the defence will be deemed to have been **waived**.

Once the plea has been asserted and the court is satisfied that it is **well founded**, the suit will be dismissed. In this regard, the only ground for avoiding the **bar** would seem to be that the court, which rendered the first judgment, **lacked judicial or material jurisdiction** to hear the case, and the party against whom the plea is made shall be **able** to **raise** this point.

For our case "Former suit "includes a suit in which an ex parte or default decree was rendered. A suit that has been **withdrawn with leave** does **not** constitute a suit in which the matter was decided; to hold that such a suit operates as res judicata would obviously **negate** the purpose in permitting a fresh suit to be filed. See articles 278.

A decision on an **interlocutory matter** operates as ***res judicata*** as to the issue involved. So, where one party objected that the court did not have the power to order the dispute to be referred to **arbitration** and the court held that it had such power; the decision as to the court‘s power was res judicata.

The **same** is true with decisions in execution proceedings, such as decision on whether a subsequent application is barred by limitation.

For the purpose of Art 5 of the Civil Procedure Code, a criminal proceeding is not a ―***Former suit‖***. As it is clearly indicated under Art 2149 of the Civil Code: ―In deciding whether an offence has been committed, the court shall **not** be bound by an acquittal or discharge by a criminal court.

**This is the general rule.** However, in **practice**, it must be remembered under our legal system an **injured** party may **join** a claim for damages in the criminal proceeding. So much so that, in our case, if the injured party fails to file a claim for damages in the criminal prosecution, the result in the criminal prosecution will be **irrelevant** in the subsequent civil suit.

**NB** If the accused in the criminal prosecution pleaded guilty to the offence, his plea of guilty could be introduced

as evidence in the subsequent **civil** case, since **ordinarily** any statement made by a party to a suit can be introduced against him by the **opposing** party.

As to the **time** when res judicata objection be raised, it should be raised as soon as the first decision is **handed** down by any of the courts without taking in to consideration which suit was **first instituted.**

## 1) Persons Bound:-

### A. Parties to suit

According to Art 5(1) in order a decision to have res judicata effect, the former suit have to involve the same parties or parties under whom the parties in the subsequent suit claim. In both instances, all parties must be litigating under the same title.

Where persons litigate in **good faith** in respect to **public** or **private** rights claimed in **common** for themselves and others, all persons interested in the right are **deemed** to claim under the persons litigating in the original suit.

A **party** who withdraws or whose name is struck off ceases to be a party, and is not bound by the judgment. The same is true as to a party who dies and as to whom the suit abates, eventhough his name erroneously remains on the record. By the same token, a person who was not named in the suit is not a party, although his rights may have been asserted.

**Res judicata may also apply between co-defendants. This will be so where:**

1. there is conflict of interest between them,

2. it is necessary to resolve that conflict in order to give the plaintiff appropriate relief, and

3. there is **actually** a decision of the question as between the **co-defendants.**

## B. Persons Claiming Under the Parties to Prior Suit

One way of defining claiming under and litigating under the **same title** is to say that the party claiming the **benefit** of the prior judgment or sought to be bound by it must be in priority with a party to the former suit.

In order for a person to be **bound** as a **priority**, he must have acquired an interest in the subject matter of the suit by inheritance, succession, or purchase subsequently to the **former** suit or must hold the **interest subordinately** in the sense that his interest is entirely **dependent** on the interest of the *superior holder* and **automatically** comes to an **end** after the interest is extinguished.

Thus, the **heir** is bound by any decision involving the property in a suit by or against the ancestor;

the **purchaser** is bound by any decision involving the property in a suit by or against the seller prior to the time of purchase.

And the **lessee** of land is bound by any decision involving the property rendered in a suit by or against the lessor, since his interest is **dependent** on the interest of the lessor.

## C. Other Situations

May a person should be bound by a judgment in a prior suit where the party in the subsequent suit was not a party to the former suit, and is not claiming under a party to that suit?

The question is whether a **party** who has **raised** a matter once may re-litigate the **same** matter in the subsequent suit involving a different party. Some courts elsewhere have held that, at least in civil suits, he may not do so. So, where the customer sued the manufacturer, claiming damages for injuries caused by allegedly defective products, and in **prior** suit by him against the retailer, the court found that the product was not the cause of his injuries; he was not permitted to sue the manufacturer.

A **party** who has **litigated** a question once should **not** be able to litigate the same question again in a ***subsequent suit even against a different party***. This is a desirable solution in that it prevents **re-litigation** of a question once decided.**However**, when we come back to our legal system, such a result is not clearly authorized by Art 5, and it is questionable whether the courts will apply this expanded concept of res judicata.

## What is the effect of res jdicata in suits where persons have litigated rights claimed in common for themselves and others?

On the basis of Art 5(4) the decision in such case is **binding** on **all** persons interested in that right, who are deemed to claim under the persons who litigated the original suit.

## Matters Directly and Substantially in Issue:-

The principle of ***res judicata*** is applicable **only** where the matter **directly** and **substantially** in issue in the **subsequent** suit was also directly and substantially in issue in the **former** suit.

**Matters** which ought to have been raised in the first suit are deemed to have been **raised**, and consequently **cannot** be raised in the subsequent suit.

Since, **res judicata** operates **only** as to the issues decided in the first suit, it follows that where a suit is dismissed on a ground not related to the merits of the plaintiff's claim, a **subsequent** suit on the same claim is not barred by res judicata.

Examples of **non-merits** determinations that do **not** prevent a subsequent suit would be a **dismissal** of the suit for want of **jurisdiction**, for default of **appearance**, for failure to state **cause of action,** and for failing to post security for costs when required.

The precise issues in the case will depend on what relief is sought by the plaintiff and what defences are asserted by the defendant.

Sometimes the question of what matters are **directly** and **substantially** in issue is tied up with the question of **counterclaim** and set-**off**.

Therefore, his failure to assert the claim in the suit against him does **not** bar a **subsequent** suit on the claim.

But, if he has **asserted** the facts giving rise to the claim

as a matter of defence, an issue has been created, and the decision on that issue ***operates as res judicata.***

On the other hand, where the facts giving rise to the defendant's claim were **not** necessarily involved in the **prior** suit, the **subsequent** suit may be maintained.

Finally, it should be noted that the **decision on certain kinds of issues might not operate as res judicata** because of the **nature** of the issue. A good example is an issue as to the amount due under an obligation to supply maintenance.

Since the extent of the obligation depends on **various** conditions, which may change, a decision on that question in a suit for maintenance could not operate

as **res judicata** in subsequent suit, because the conditions at the time of the subsequent suit may have changed.

The same can be said in custody of the children during divorce. The custody could shift at any time if it is found to the best **interest** of the children.

## 1.1) Matters Which Has Been Heard and Finally Decided:-

### A) Issues Decided by the Court

A number of issues may have been raised in the case, but **not** all of them may have been decided. That is, if an issue has been raised, but has not been decided, that issue is **not res judicata irrespective** of the result of the suit. Where the case has been appealed, the decree of the appellate court must be considered in order to determine what issues have been decided.

The **judgment of the appellate court** will **operate** as res judicata as regards all the findings of the lower court necessary to the decision of the appellate court even if they are not referred to in the judgment of the appellate court.

**Appellate** court may decide the case on a ground different from the ground on which the lower court decided it, and if it does so, **only** its decisions on that ground are res judicata.

Decision on an issue **must be one** that is necessary for the decision of the case. If the lower court for example decided that a suit is **barred by limitation** and further decides that there was no contract, and the appellate court confirmed the decision as to limitation, the decision on the existence of the contract, even if **confirmed** by the appellate court, would **not operate as res judicata.**

The problem of what issues are res judicata will arise whenever **two** or **more** issues have been decided by the court. The question will be whether the decision on both issues is res judicata Or not.

Where **all** the issues have been decided by the lower court, the answer may depend on whether the party against whom one of the issues was decided may appeal from that decision.

Eg Suppose that A sues B to recover damages for breach of contract. B contends that the parties did not enter in to a valid contract and alternatively, that performance was prevented by force majeure. The court **resolves both issues in B's** favor and dismisses the suit. A does not appeal.

Now the issue would be whether the decision on both issues is res judicata or not?

In this case, since the case was not appealed and since both issues went to the merit of the case, the decision on both should be **res judicata.**

However, where the lower court decides both merits and a non-merits issue, and no appeal is taken, **only** the decision on the **non-merits issue should be res judicata.** When the case is disposed of on the non-merits ground, the suit will be dismissed, and a decision on the merits cannot be said to be necessary to the decision of the case.

So, where in a suit for declaration that a lease was **surrendered**, the court **dismissed** on the ground that the suit could **not be maintained**, but also found that **surrender** had been **effected**, the decision on the matter of **surrender** would not be res judicata.

Once the appellate court decided the **non-merits** ground; there was **no** reason for it to decide on the **merits ground**. Thus, the decision on that issue was not necessary to extend to the decision of the case, and should **not be res judicata.**

## B) Res Judicata and Issues of Law

Another aspect of the problem of ―heard and finally decided‖ concerns the res judicata effect of a decision on an **issue of law** where the rule of law on which the decision was based has **subsequently** been changed.

The change may occur as a result of newly enacted legislation or a later decision of a higher court contrary to the prior decision of a lower court or a later decision of the court that decided that case, which overrules its prior decision.

The question is whether the former decision on the question of law is res judicata in a subsequent suit or not?

The **general principle** is that once an issue has been decided, it cannot be re-litigated in a subsequent suit by parties **bound** by the prior decision **notwithstanding** that the law is changed or the prior decision is found to be erroneous.

As to rights acquired under repealed legislation, Art. 3348 of the Civil Code stipulates that:

1. Unless otherwise expressly provided, legal situations created prior to the coming into force of this code shall remain valid, notwithstanding that this code modifies the conditions on which such situations may be created.

2. Unless otherwise expressly provided, this code shall not affect the consequences having arisen out of such legal situation prior to the coming into force of this code.

When law is changed by subsequent legislation, the former decision operates as res judicata.

This is true because legal **situations** and **rights** existing prior to the enactment of the new legislation are not generally affected by such enactment.

This **principle coupled with the general principle of res judicata** prevents the **re-litigation** of a legal issue decided under repealed law.

However, it is important to observe that the prior decision is not res judicata where at the time of subsequent suit **other facts** have been occurred which brings the subject matter of the suit under the new legislation.

The more difficult question revolves around the effect of a subsequent judicial interpretation contrary to the interpretation in the prior suit.

The **principle** may be stated in another way. The decision on question of ***law litigated between two parties is res judicata*** in any subsequent suit involving the same cause of action, but is not res judicata in a suit involving a different cause of action.

The important point to remember at this stage is that a change in the law or the interpretation of the law on which a decision on an issue was based does not affect the operation of the rule of res judicata.

## 1.2. The Scope of Res Judicata:-

The drafter of the Civil Procedure Code has made it clear that the **scope** of **res judicata is to be very broad.**

There are two **aspects** of this broad scope.

First, any matter on which might and ought to have been made a ground of defence or attack in the suit shall be deemed to have been substantially and materially in issue.

Secondly, any relief claimed in the suit which has **not** been **expressly** granted by the decree passed in the suit shall be deemed to have been refused.

**General overview of the scope of res judicata:-**

## A) Matters to Be Raised

For the **purposes** of ***res judicata,*** the parties are deemed to have asserted all such grounds, which might and ought to have been asserted.

Therefore, **res judicata** applies **not** only to the issues that were expressly decided, but also to the issues that would have been decided if **raised** by the parties.

In effect, **they are deemed to have been decided** adversely to the party seeking to **raise** them in **subsequent** suit, and a case may not be re-opened to permit a party to raise a new claim or defence that he would have raised in the first suit.

Where the plaintiff brings suit on a claim and fails to assert certain grounds that would entitle him to relief. On the basis of the **ground he asserts**, judgment is for the defendant. The plaintiff brings a **subsequent** suit alleging a different ground.

Since he is suing on the **same cause** of action and failed to the ground in the first suit, the ***subsequent suit is barred by res judicata.***

In order for parties to be bound by the judgment in a former suit, they must be litigating under the same title in the subsequent suit.

So, a decision rendered against a person in his **individual capacity does not bar** a suit by him in his **representative capacity,** since in the **second** suit he is suing on behalf of the person whom he represents.

**Finally**, it should be observed that the failure to assert a claim of counterclaim or set-off by the defendant does **not bar his doing so in a subsequent suit.**

By definition, the **defendant** has an option in this regard: he may assert the claim or may raise it in an independent suit.

Since he has this option, a claim of **counter claim or set-off** does not constitute a ―matter which ought to have been made a ground of defence‖ with in the meaning of the rule.

# B) Relief not Granted

The second aspect of the scope of res judicata is provided under Art 5(3).

According to this article: "Any relief claimed in the former suit which has not been expressly granted by the decree passed in such suit shall be deemed to have been **refused**".

This have to be **distinguished** from the situation where

1);-the plaintiff **splits** his cause of action, that is, where he seeks recovery for **only** a part of the damage suffered, and from the situation where 2):-the plaintiff fails to ask for some relief to which he was entitled.

On the basis of Art 216, where a plaintiff sues for **only** a **part** of the **damage**, he may not sue for the remainder.

If he **does not** seek relief to which he was entitled, he may not claim the relief subsequently, for this too involves splitting of a cause of action.

The present rule deals with the situation where relief was in fact **asked** for, but was **not** expressly granted nor refused.

In other words, the present rule applies when the decree is **silent** as to the relief claimed.

In such a case the **relief** is deemed to have been refused notwithstanding the absence of an express ruling to this effect.

# 2) Splitting of Claims

## 2.1. General Principles

In line with article 216, every suit shall as far as **practicable** be framed so as to afford ground for final decision upon the subjects in the dispute and to prevent further litigation concerning them.

The **principles** of res judicata just discussed are designed to implement this **purpose**, particularly that requiring a party to assert all the grounds of attack or defence he may have at the peril of **not** being able to assert them in a subsequent suit.

The **purpose** is further implemented by the rule prohibiting the splitting of cause of action. Every suit must include the whole of the claim, which the plaintiff is entitled to make with respect to the cause of action

If the plaintiff omits to sue in respect of any portion of his claim, he may **not** afterward sue with respect to the portion so omitted.

Plaintiff may not split his cause of action.

Furthermore, as to a party entitled to **more** than one **relief** with respect to the **same** cause of action, he must sue for all those relieves in **one** suit, and if he fails to do so, he may **not** afterwards do so for the relief omitted.

**However**, in certain cases, as it is clearly indicated under Art 216(4), the court may give him **leave** to sue for additional **relief** at another time.

Thus, there **are two aspects** to the rule against **splitting** a cause of action;-

1. the plaintiff **must** include the whole of his claim with respect to the cause of action on which he sues, and

2. the plaintiff **must** seek all the relief to which he is entitled under that cause of action.

There is one situation where the whole of the claim need **not be included**. The plaintiff may intentionally relinquish a portion of his claim so as to bring it within the jurisdiction of a particular court. But if he does so, he may **not** subsequently sue with respect to the portion of the claim that was relinquished.

Besides, that the plaintiff having a number of causes of action against a defendant is not required to join them in a single suit.

The rule **only** prohibits splitting of a single cause of action.

The rule refers to —omitting a portion of his claim.‖ So long as the plaintiff was aware of the claim, the omission of a portion, even if unintentional, bars a subsequent suit with respect to that portion.

what is the effect of the plaintiff's splitting his claim by filing simultaneous suit?

**One** view is to hold that according to Art 11 of the Civil Procedure Code the suit should be **consolidated**, and this may be done whether the suits are pending before the same court or before different courts.

**Another** view is to hold that one must be dismissed, and the one bearing the latter number is deemed filed after wards.

A **third** view is to hold that the plaintiff may select which suit he wants to prosecute; presumably he could amend his statement of claim to add the amount omitted.

The latter procedure seems the soundest. It is sound because there is no reason to deprive the plaintiff a portion of his claim simply because he files separate suits.

Where a suit was brought **only** with respect to a portion of a claim, the plaintiff should be **permitted** to **amend** to **add** the omitted portion.

At this juncture it is important to note that the prohibition is *against the bringing of a subsequent suit* with respect to the omitted portion. It does *not prohibit the plaintiff from asserting an omitted portion* of a claim as a defence in a subsequent suit.

The **rule against splitting** of claims is not **applicable** to proceedings in execution in the sense that the decree-holder may present successive applications for realizing **different** portions of the same decree.

So, the decree-holder may **file** an application to **recover**

possession of the property and a subsequent application to realize the **costs**.

But the rule should be **applicable** to the money decrees, since such decrees may be executed as a **unit**.

If the decree-holder **only** applies for execution of part of a money-decree, he may not later apply for execution of the balance.

## 2.2. The Whole of the Claim with Respect to the Cause of Action

### 1. What Constitutes the Whole of the Claim?

The **rule** prohibits **only** the **splitting** of a **single** cause of action and does **not** require the plaintiff to sue on **all** the causes of action he has against the defendant.

The question is whether the plaintiff has splitted his claim with respect to the cause of action or not? In order to answer this question, the **court** must **determine**:

1. what was the **cause** of action in respect of which the claim was made in the former suit;

2. what was the claim made in the subsequent suit, and

3. whether the claim made in the subsequent suit could have been made in whole or in part in respect of the cause of action in the prior suit.

**The cause of action** may be **defined** as that which **gives occasion** for and **forms** the foundation of the **suit**.

It is the fact which gives rise to the liability of the defendant and the relief claimed by the plaintiff.

Where the facts could give rise to **only one** cause of action, if the plaintiff has **not** included the **whole** of the claim in the prior suit, he may **not** subsequently sue on the rest of his claim.

The rule against splitting of claims is not affected by the fact that the claim is due in installments.

So, where a debt is **payable** in installments and **two** or more are due at the time of suit, the plaintiff must sue to recover the amount due under both installments.

**Nor** does it matter that the ***obligation*** is to be satisfied in two ways.

**Similarly**, where at the time of the suit on a mortgage debt, both principal and interest are due, and the mortgagee sues **only** to recover the interest, a subsequent suit for the **principle is barred.**

## 1. Single and Multiple Causes of Action

The most difficult case is when there is a situation of dispute as to whether the **facts** of the transaction gave rise to one cause of action or to two.

If there are two causes of action, then the **failure** to claim the **relief** to which the party would be entitled under the second cause of action does not amount to a splitting of his claim since he was **not** making a claim with respect to the second cause of action.

However If there is two **properties** and both properties were injured by a **single** act, it would be a single cause of action.

If the court **concludes** that he is suing on a different cause of action, the subsequent suit is **not barred**, this is so because the rule only prohibits the splitting of a claim which the plaintiff is entitled to make with respect a single cause of action.

## 2. Omitting of Relief

A party may be entitled to more than one relief with respect to the same cause of action.

In such a case, he may sue for **all** or **any** of such reliefs. But if he **omits**, **except** with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

The **court** has no discretion to permit a plaintiff to omit part of his claim, but may, in appropriate cases, **permit** a plaintiff to **omit** to sue for some of the relief to which he is entitled. With that **exception**, the rule prohibiting the splitting of relief is the same as the rule of prohibiting the splitting of claims, and some cases may involve both questions.

The **court** must determine whether the relief sought in the subsequent suit existed with respect to the cause of action on the plaintiff sued previously.

If it **did**, and the plaintiff **failed** to ask for it at that time, he may **not do so in the subsequent suit.**

**Moreover**, a party may be entitled to certain relief at **one** time and to other relief at **another** time. If he was only entitled to certain relief at the time of the former suit, he is **not** barred from seeking the relief to which he has subsequently become entitled in the later suit.

**The power of the court to grant the plaintiff leave to omit to sue for part of the claim.**

The court may do so even if the pecuniary value of the relief allowed to be omitted exceeds its pecuniary jurisdiction.

However, before the court do so, it should be convinced that there are very valid reasons for granting such leave and should not permit the plaintiff to avoid the provisions of the code relating to **relinquishment** of the claim in order to bring the case within the jurisdiction of a particular court.

Leave should **only** be given in situations where the plaintiff is entitled to **alternative** reliefs and may

legitimately wish to exercise **one** such relief first.

Example, the **plaintiff** sues to obtain specific performance of a contract.

He is **not** interested in damages at that time, but if specific performance is **not** available, he might wish to claim them later.

Or, he may **not** have ascertained whether he can recover damages, because what he wants to is specific performance.

The **granting** of leave to sue for omitted relief should be done **sparingly** so as **not** to ***defeat*** the purpose of the rule requiring all reliefs to which the plaintiff is entitled to be sought in a single suit.

THANK YOU!!!

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