

Civil procedure II

CONTAINS FIVE CHAPTERS

CHAPTER-1. DEALS WITH THE PRE-TRIAL PROCEEDINGS

CHAPTER-2. PROCEDURE TO BE FOLLOWED ON THE PRODUCTION OF EVIDENCE AND HOW JUDGMENTS AND DECREES ARE RENDERED.

CHAPTER-3. THE PROCEDURE FOR REVIEWING JUDGMENT

CHAPTER-4. HOW DECREES WILL BE EXECUTED,

CHAPTER-5. RES JUDICATA AND SPLITTING OF CLAIMS





1) *Pre-Trial Proceedings* = Art. 222-240

procedure exchanging statement of claim & defense with full requirement.

2) *first hearing* Art. 241-256

3) *Full scale trial* Art. 257-273

(production of evidence and giving of judgments)

Chapter I

chapter-1: Pre-Trial Proceedings

the role of the court is mainly hearing the parties to the suit, determining the issues and preparing the case for trial.

3 stages of the proceedings: first hearing, the trial and review

- **first hearing:** 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.
- the court may adjudicate the case at the first hearing without requiring a full-scale 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.

1) Non -Appearance of parties

- The Civil Procedure Code is strict on the requirement of appearance.
- An appearance involves coming before the court so that the court can adjudicate the case or take any other action it deems necessary.
- If one of the parties ordered by the court fails to appear and if the court does not take immediate action, then the case would be delayed. (**Justice delayed amount to Justice denied**)
- A party to a suit is not mandatorily required to appear personally at the hearing b/c A party may appear through an **agent or pleader**.
- Any One of several plaintiffs or defendants may be authorized by writing and signed by party giving authorization in order to appear on behalf of them. Art.66

1.1 Action Upon non-appearance of both parties

- Where both parties plaintiff and defendant fail to appear in court of law, 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)).

1.2. Action where defendant does not appear

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

- **Ex-parte proceeding** may ordered at date of 1st hearing.art.70

- **Default proceeding** may ordered at day for submitting statement of defence.art.233

- **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.

- the Federal Court of Cassation Division has made a very interesting interpretation under file 15835.volume 1-3

- If defendant duly served does not appear at day for submitting statement of defense he/she loses right to submit statement of defense, still have the right to participate in the process of litigation..art.199
- Incase of ex-parte art.70(a) defendant become **out of process of litigation.**

1.3 Action where plaintiff does not appear Art.73

- Where the defendant appears and the plaintiff does not, 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 in which the court shall pass a decree based on that

- However if defendant has **counterclaim or set-off**, the defendant occupies the position of plaintiff, and the rules relating to the non-appearance of the defendant apply
- absence of plaintiff does not dismiss case at day fixed for submission of statement of defense.
- There is interpretation of the law made by the Federal cassation court division under file No.14184 volume 1-3

Effect of Non-appearance

1. The suit may be **struck out**; (Art. 69(2) or 70(d))
2. The suit may be **dismissed**; (Art. 73, 69(2) (2) 70(d) or 73)
3. The court may proceed **ex-parte**; (Art. 70(a))
4. The court may issue a **default Proceeding**; (Art. 233).

1. Effects of **struck out** art.71

- plaintiff may as of right bring a fresh action on the payment of full court fees. art.71(1)
- satisfies the court with **sufficient cause** for his/her non-appearance and then the original suit may continue and the plaintiff is relieved from payment of court fee.
- Elements of **sufficient cause** does no define, so what constitute sufficient cause left for discretion of court.

2.effect of dismissal Art.74; (Art. 73, 69(2) 70(d))

- *plaintiff precluded from bringing a fresh suit in respect of the same cause of action unless he **show good cause** for his non-appearance within one month from the dismissal.*
- *If he show sufficient cause the court make an order setting aside the dismissal and shall appoint day for proceeding with the suit.*

3. Effect of *ex-parte proceeding* (Art. 70(a))

defendant become out of process of litigation, but has two chance

- 1. Subsequent appearance after adjournment ex-part proceeding and show good cause for his previous non-appearance.Art.72*
 - 2. Apply to the court with sufficient cause within one month of the day when he become aware of ex-part decree or order.art.78*
- 4) Effect default Proceeding;** (Art. 233). *Defendant loses right to submit statement of defense but the proceeding will continuo.*

Trial of suit

Procedure at.1st Hearing

Examination of parties

Non-appearance of parties

Reading of pleading

Identify from each part whether he admit or denies facts of case.art.241

Make an order or give judgment on admission art.242

Decide on preliminary objection if any under art.244

Framing of Issues Art.246-256)

Discontinuance of suits(compromise & withdrawal)

● Activities

1. Mr.X has claim amount 60,000birr from A,B,and C for the breach of contract,then he brought his statement of claim as per Art.222,the court accept his claim and issue summons requiring A,B,C to appear with their statement of defence.after summons duly served they appear with their statement defence& submitted to court.Then after court gave adjournment for first hearing.
 - a) What action do take if Mr.X and Mr.A,B,C does not appear on such day?
 - b) Mr.X appear but Mr.A,B,C does not appear.what action do you take?
 - c) Mr.A&B appear and admit only 20,000 birr denied the left, however mr.X & C does not appear. what action do you take?
 - d) What is your decision if Mr.X has **sufficient cause** for his non-appearance under (a) & (c).

chapter two



THE TRIAL AND OTHER PROCEDURES

1. the production of evidence(how witness and documentary evidence are brought before the court)
2. the conduct of trial, and
3. the giving of the judgment and passing the decree.

2.1 Production of Evidence to the Court

What is Evidence?

evidence is some thing, which serves to **prove** or **disprove** the **existence** or **non-existence** of an alleged fact.

Why it produced to the court?

- evidence is the means of satisfying the court of the truth or untruth of disputed fact between the parties in their pleadings.
- Evidence is produced to **prove factual allegation** that are **affirmed** by one party and **denied** by the other.
- It is **reconstruction of past event** to arrive at the truth and help the court to give valid judgment.
- **production of evidence may contains: oral testimony, documentary evidence, exhibit ,Judicial notice etc**

- the parties have primarily responsibility for presenting their evidence.
- Accordingly 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.** Art. 223(1/a) and 234[2],
- witnesses will voluntarily appear at the trial, and they may testify without any further formalities.
- However when witness does not appear the court will issue a summon to that witness requiring him to appear.**art.111**
- 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. Art. **264** of Cv.Pr.C

- 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. 112[1] .
- where the court finds that the sum is **not sufficient** to cover the expenses it can order the party to pay an additional sum in to the court.
- If he does not do so, the court may discharge the witness or order the required sum to be levied **from the attachment and sale of the party's movable property** or may order both the levy and the discharge.

- The summons must specify the **time and place** at which the witness is required to attend and whether his attendance is required for the purpose of **giving evidence** or **producing a document**, or both. Art. 114.
- *When the witness who has been duly served fail to comply with summons the court may order issue of warrant with or without bail for attendance of such person. art. 118*
- When witness is not in a position to testify in court because of physical incapacity **or other causes**, **may be examined on commission. art. 122**
- An examination **on commission** is the **examination of a witness by a person specifically authorized to examine the witness. the expences covered by party** whose benefit the commission is issued

Order of Proceeding

- **Burden of proof** means the obligation to provide evidence necessary to establish a disputed fact or a degree of belief in the mind of the court.
- There are **Two concepts under burden of proof**:
- **1) Burden of persuasion** is the ultimate burden of convincing the court of an issue, and it does not shift during the trial.
- **2) The burden of going forward** with the evidence is on the plaintiff at the start of the trial. shift to the defendant if defendant admits the allegations of the statement of claim and has raised what we have called affirmative defenses.

Art.259.

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.
 - Most of the time the plaintiff shall be entitled to begin and then defendant reply.

Manner Of Examining Witnesses

- the witness first takes the oath in the form provided in the Third Schedule to the code :**Form of oath of witness**
- "I swear (affirm) that the evidence I shall give before this court shall be the truth,the whole truth and nothing but the truth."
- **Form of oath of interpreter**
- I swear (affirm) that shall truthfully and to the best of my ability interpret the evidence that shall be given before this court (the proceedings before this court)."

- 1. The examination-in-chief; by The party entitled to begin**
- 2. The cross-examination; by opposite party**
- 3. The re-examination by The party entitled to begin**

- *during the examination-in-chief, the proponent tries to develop the testimony of the witness in the light most favorable to him;*
- *during cross-examination, the opponent tries to discredit that testimony;*
- *during re-examination the proponent tries to minimize the effect of cross-examination/ rehabilitate that testimony./*

● Art.263

● Questions put in examination-in-chief shall only relate to facts relevant to the issues to be decided and only to such facts of which the witness has direct or indirect knowledge.

● No leading question shall be put to a witness without the permission of the court.

➤ there are three situations where the court allow leading questions in examination-in-chief :

1. *When the witness is being examined as to what are called introductory matters.*
2. *where the witness cannot remember some or all of the matters as to which the testimony is sought*
3. *to assist child witnesses who have difficulty in testifying.*

- **Question put in cross-examination** shall tend to show to the court what is erroneous, doubtful or untrue in the answers given in examination-in-chief. Leading questions may be put in cross-examination.
- No question shall be put in re-examination except for the purpose of **clarifying matters**, which have been raised in cross-examination.
- **Production of documentary evidence(Art.137-146)**
- Documentary evidence produced to the court with statement of claim or defense Art. 223(1/a) and 234[2],
- Produced before or at 1st hearing.art.137
- The court at any stage of the **suit rejects** any document, which it considers **irrelevant** or otherwise **inadmissible**, recording the grounds of such rejection.art.137

- **Power of the Court during production of Evidence**

Adversarial system vs "inquisitorial system"

Adversarial system

- Employed by common law countries.
- It is party-lead system in which the judge has no investigative role.
- judge acts as an impartial umpire, policing the rules of the *trial game* there by ensuring fair play.

➤ **'Inquisitorial system'**

- Employed by civil law system.
- the court has the task of making inquiry. It question witnesses, directs the police investigation, commissions the service of expert witness and examines all relevant evidences.

Many systems are a hybrid of each including ours

Judgment and Decree (art.180-184)

➤ After suit has been heard 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. Art.180 civ.pro.

➤ **judgment**" shall mean the statement given by a court of the grounds of a decree or order; art.3 of civ pro.c.

➤ the judgment shall be reduced to **writing**, **signed by the member or members of the court** and be pronounced by the judge or by the presiding judge.

➤ 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

- Concise statement of case.
- points for determination,
- the decision thereon and the reasons for such decision
- where several issues have been framed, the court shall state its decision on each separate issue unless the decision on any one or more issues is sufficient for the decision of the case.
- **Decree**
- It is **operative** part of the judgment,
- **the judgment itself cannot be executed.**
- **Decree** shall mean the **formal expression** of any preliminary or final adjudication which, so far as concerns the court expressing it conclusively determines the rights of the parties concerning all or any of the matters in dispute in the suit;
- The parties can take copies of the judgment or decree or both from registeral.



- Name of judge
- Name of parties(appear,not appear)
- We considered case & gave the following judgment.

Judgment

- Concise statement of case(statement claim& defense)
- points for determination, summary of evidence, the decision on issue and the reasons for such decision.

Decree

Defendant should pay such amount of money or refrain from doing such act.....

signature

Special Proceedings

- There are 3 type of procedure under civ pro.code

1. Normal procedure
2. Summary procedure
3. Accelerated procedure

special pro.



2.summary procedure :-

- refers to a procedure by which the plaintiff may prosecute his claim without the necessity of instituting a full-scale suit. It provides for the **immediate hearing** of certain kinds of cases **speedily and without a full-scale suit**, because the nature of the case **requires and renders suitable an immediate disposition**.
- *summary procedure is available where the plaintiff seeks only to **recover a debt or liquidated demand in money payable by the defendant**.*

● For example

1. Claim Upon a contract, express or implied such as on a **bill of exchange, promissory note or other simple contract debt**, or
 2. On a bond or contract written for payment of a liquidated amount of money, or
 3. On a guarantee where the claim against the principal is in respect of a debt or liquidated amount.
- plaintiff has to endorse his statement of claim “Summary Procedure” and submits an **affidavit**, prepared by him or any other person who can **swear positively** to the facts, verifying his cause of action and the amount claimed, and stating that in his belief there **is no defense** to the suit.
 - Special summons sent to defendant 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.

- If defendants fails to make such an application within the time fixed by the summons, the plaintiff is entitled to a decree for an amount not exceeding the sum claimed in the statement of claim together with interest if any, and costs against the defendant or such of the defendants as have failed to apply for leave to defend.
- an application for leave to appear and defend is to be supported by **an affidavit**, which states whether the defence alleged goes to the **whole or part only** and, if so, to what part, of the plaintiff's claim.
- *Where, after hearing an application by a defendant for leave to appear and defend the suit, the court refuses to grant such leave, the plaintiff shall be entitled to judgment as against such defendant.* Art.287

Accelerated Procedure

➤ 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.

- *Application should supported by an affidavit*
- *It must specify the capacity in which the applicant acts and must indicate the provisions of the law under which it is made.*
- *It is One party proceeding (no opposite party)*
- *Court can give judgment based on application and evidence.*

matters concerning such as:

- *change of name (Arts 42 and 43 of Civil Code),*
- *withdrawal of interdiction (Arts 377 Civil Code),*
- *opposition to marriage.*
- Where an application is made for the correction or cancellation of records or entries in the registers (Arts 121,127, 1623 and 1630 Civil Code) or for approval or confirmation (Arts 146,628,633,749,763,766,767 and 804 Civil Code)
- **This procedure designed to facilitate the disposition of cases where the claim is not likely to be disputed or where the nature of the claim is such that an immediate decision is required and feasible.**

• Other Procedural Matters

➤ procedures come when a proceeding is initiated by the plaintiff and the defendant demand a **temporary relief until the case is disposed.**

➤ The life of such relief depends on the **original claim.**

➤ Arrest and Attachment before Judgment

➤ This involves arrest and attachment prior to the time a judgment has been rendered.

➤ it different from part of the proceedings in *execution.*

➤ **security for appearance(diffendant)**

➤ **security for the production of property.**

➤ **1) Arrest before Judgment (Art.147)**

❖ ***purpose is to require the defendant to furnish security rather than to detain him.***

- With intent to **delay the case or avoid the process** of the court or obstruct or delay execution of any judgment that may be entered against him, has left or is about to leave the local limits of the court's jurisdiction or has disposed of or removed property from such limits; or
- Is about to leave Ethiopia under circumstances affording a reasonable probability that the plaintiff may be obstructed or delayed in the execution of any decree that may be passed against the defendant. Art.147

- **Art.150.***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.***
- **2) Attachment before Judgment {Art.151-153}**
- *The rules related to **security for production of property** are designed to **prevent the defendant** from disposing of or removing his property so as to **prevent execution.***
- *Shall no affect right before attachment.*

3) Temporary Injunctions, Interlocutory Orders and Appointment of Receiver .

- A **temporary injunction** 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;
 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.

- 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.
- the order is effective until the disposal of the suit or further order.

- *Any order for an injunction may be discharged, or varied, or set aside by the court, on application made thereto by any party dissatisfied with such order.art.158.*

- **A Habeas Corpus Art.177-179**

- is a petition filed with a court by a person who objects to his own or another's detention or imprisonment.
- The petition must show that the court ordering the detention or imprisonment made a legal or factual error.

Cost of proceeding art.462

Chapter three



REVIEW OF JUDGMENTS

there are three ways of reviewing a judgment.

1. Reviews by Court of Rendition
2. Review by appellate court
3. Review by cassation bench.

1)Reviews by Court of Rendition



the court of rendition will revise its own decision when there are:

- 1.Procedural
Irregularity(Art.207)**
- 2.Newly Discovered
Evidence(art.6)**
- 3.Opposition(Art.358)**

3.1.1.Procedural Irregularity (Art.207)

- To say there are **procedural irregularities** there should be **non-compliance with the provisions of the civ.pro Code**, and such irregularities **substantially affect** the disposition of the case.
- if the irregularity does not affect the court's decision on the merits, the proceedings will not be set aside.
- *procedural irregularity* is different from *mistake*.
- *b/c the mistake can be corrected in simple way.(art.208)*
- **The mistake can't substantially affect** the disposition of the case.
- For example: the judgment stated that the defendant was liable for Eth. \$ **5000**, and the decree reads **Eth. \$ 500**.
- ❖ **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.**

● 3.1.2 Newly Discovered Evidence (Art.6)

➤ a party may apply for review of the judgment 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.

● **three criteria should be fulfilled**, for the court of rendition to review its own judgment.

1. the evidence must be discovered ***after the judgment is rendered***,
2. the newly discovered evidence ***must affect the decision***&
3. the evidence *must be* nature of improper conduct such as **forgery, perjury, bribery** which tainted the judgment with fraud.

Form of application

- Follow a form memorandum of appeal,
- supported by an **affidavit** containing **strict proof** that the new evidence relates to **forgery, perjury, bribery**.

- 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 applicant has evidence which satisfies the requirements for review, the court **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.

- **3.1.3.Opposition** (Art.358-360)
- *Any person whose **interests are affected** by a judgment in the suit may, if he was not a party to the suit, can file opposition to the judgment before the judgment is executed.*
- ***Three criteria should be fulfilled:***
 1. He should or **could have been made a party to suit;**
 2. His **interests are affected** by the judgment rendered in his absence and
 3. He is filed **prior to execution** of the decree

● Form of opposition



- Shall be form of petition on the payment of court fee.
- Should contain **ground of opposition** and **nature of relief sought**.
- Supported by **affidavit** of the truth of fact.
- ❖ the court may **then confirm, vary or set aside** the judgment after rehearing of case.

3.2 Review by appellate court

➤ An appeal means a review of the case and *not a retrial* of the case by the appellate court.

➤ Appeal may lie:

➤ 1st Instance court → High court → supreme crt

(when High Court **varies or reverse** the judgment of the 1st Instance Court)

1st Instance court → High court → cassation bench

(when High Court **confirm** the judgment of the 1st Instance Court)

High court → supreme crt → cassation bench

(for case in which High crt consider in its first Instance Jurisdiction and if there is fundamental error of Law)

- Either party may appeal against any **final judgment** rendered by the **subordinate court**.
- ***Appellant***= party taking the appeal
- ***respondent***. the party against whom the appeal is lodged.
- **Two Types of Appeal**
 1. Appeal from final Judgment and
 2. Appeal on Orders (Interlocutory Appeal).
- An interlocutory appeal is an appeal from an interlocutory matter on which the court has rendered a decision, but the decision does **not finally dispose of the case**.

● Examples

- an 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.
- ❖ No appeal lies from any decision or order of any court on interlocutory matters, but any such decision or order may be raised as a ground of appeal when an appeal is made against the final judgment

- 
- There are exceptional case where appeal permitted from interlocutory decision.
 - person may appeal from any order directing his **arrest or detention**,
 - transferring property from one party to another or
 - refusing to grant an application for Habeas Corpus

Grounds of Appeal-----

- In the memorandum of appeal, the appellant must set forth his grounds of appeal, on which he objects to the judgment from which the appeal is taken.
- They must be stated **concisely and without argument**; where there is more than one ground, each ground shall be set forth **separately and numbered consecutively**.

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 of Civ. Pro. Code
- the name of the court which **gave the judgment** appealed from, the date of the judgment in the number of the suit in which it was given,
- the grounds of appeal, that is, the reasons for which the judgment should be **reversed or varied**, and
- the nature of the **relief sought**, e.g., the appellant wants the judgment to be reversed or he wants it to be varied in certain respects.

● Time of appeal

➤ the memorandum must be filed within **60** days from the time of the delivery of judgment. Art 323(2)civ.pro

➤ When appellant can not file his the memorandum within 60 days and has good cause then he can file **appeal out of time** .Art.324

➤ period of limitation for appeal is only 30 days under labour pro.377/2003 154(1) and 138(3)

➤ Stay of execution

● 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. Art.332-334 civ.Pro.

Procedure on Appeal

1. Hearing of Appeal

- appellate court can **dismiss the appeal** without calling on the respondent to appear if it **agrees with the judgment of the subordinate** court. Art 337 of the Cv.Pr.C
- If appeal does not dismissed the appellate court is to cause the memorandum of appeal to be served on the respondent. Fix a day for the appeal and summon the respondent to appear, advising him that if he does not appear, the appeal will proceed. Art.338
- **Framing of Issues:**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 remand them to the subordinate court. Art.343

● Judgment on Appeal

- the appellate court pronounces judgment after it has heard the parties or their pleaders.
- The judgment may **confirm, vary or reverse** the decree or order from which the appeal is taken.
Art **348** of the Cv.Pr.C
- Appellate court should only be **reversed or varied** if the subordinate court committed "**substantial error**," which affected its decision. Art. 211 civ.pro.c
- *The appellate court should **give its own reasons** for is confirming, varying or reversing the judgment of the subordinate court.*
- *Where the decree is **varied or reversed**, the judgment of the appellate court **must specify the relief to** which the appellant is entitled.*

● **The Second Appeal**

➤ **second appeal** means an appeal against the judgment of the appellate court, which **varied or reversed** the judgment appealed from.



(when High Court **varies or reverse** the judgment of the 1st Instance Court)

Restitution the judgment in favor of one party will have been executed, and such judgment will have been reversed appellate court, the successful appellant is entitled to restitution, and he must make his application for restitution in the court of first instance. Art.349 civ.pro.c

3.3 Revision in Court of Cassation

the **court of cassation** only reviewed the decision of the lower courts if it has **fundamental error of law**, not error of fact.

*A party may take an application for revision in Court of Cassation, only after he has **exhausted all his rights of appeal**.*

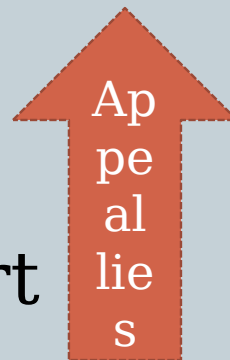
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the Federal Supreme Court

- have the highest and final judicial power over Federal matters. Art. 80(1) of FDRE const.
- exercise ***power of Cassation*** over **any final court decision containing a basic error of law** Art. 80(3/a)

the State Supreme Courts

- have the highest and final judicial power over state matters. Art. 80(2) of FDRE const.
- *has power of cassation over any final court **decision on State matters** which contains a ***basic error of law***. Art. 80(3/b) of FDRE const.*

- There are two arguments regarding power of federal & state cassation.
- 1st Federal Supreme Court **should not have** the power to exercise its court of **cassation over state matters**. For their argument, they cite that state supreme court has the highest and final judicial power over state matters. Art. 80(2) of FDRE const.
- 2nd strong argument: “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 Federal Proclamation no. 454/2005 also, it 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. This indicates that the Federal Supreme Court has a power to exercise its court of Cassation even on cases that are **purely State matters**.
- Do you think that the state Supreme Court exercise its **power of Cassation over case** that are **Federal subject matter** in which state supreme court **confirm** in its appellate jurisdiction from the judgment given by state High court? Explain!

● **Activities**

1) What different b/n opposition of judgment and objection to attachment of property in execution?

Art.358 vs Art.418

Group

1+10

2+9

3+8

4+7

5+6