CHAPTER ONE

PRE -TRIAL PROCEEDINGS

1.1. The First Hearing

In generall, at 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. In certain circumstances, 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.

1.1.1. Non -Appearance of parties

An appearance involves coming before the court so that the court can adjudicate the case or take any other action it deems necessary. A party to a suit is not mandatorily required to appear personally at the hearing.

A party may appear through an agent or pleader. (Art. 66 and 68 of cic. P.c).

Action upon Non-appearance

If a party is ordered by the court to appear on a certain date, he has to appear. Non appearance results in affirmative action on the part of the court depending on who appears or who fail to appear the court will either struck out, dismiss, adjourn or proceed to hear the case in the absence of the non-appearing party.

- ✓ **Action Upon non-appearance of both parties**

Where both parties, i.e., party plaintiff and party 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))

Action where defendant does not appear

If a plaintiff appears and the 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. This is because such non-appearance may be due to the fact that the defendant did not receive notice of the proceedings. Hence, where the defendant does not appear, the first question the court must ask is whether he/she was duly served or not. Then, it is up to the plaintiff to convince the court that he/she has duly served the defendant.

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

- ✓ **Action where plaintiff does not appear**

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.

If there is admission, even though the plaintiff fails to appear, the court shall pass a decree based on that admission. If no admission by the defendant, the dismissal is mandatory, and the defendant cannot demand the suit to continue. But, sometimes the defendant may assert a claim of counterclaim or set off. In such a case, the court will proceed to hear that part of the case, since as to such counterclaim or set-off, the defendant occupies the position of plaintiff, and the rules relating to the non-appearance of the defendant apply.

1. Effect of Non-appearance

1. The suit may be ***struck out***; (Art. 69(2) or 70(d))(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.)

2. The suit may be ***dismissed***; (Art. 73, 69(2) (2) 70(d) or 73) (Where the plaintiff's suit has been dismissed, he/she will be precluded from bringing a fresh suit in respect of the same cause of action. However, if the plaintiff can show good cause for his non-appearance within one month from the dismissal, the court may, after giving notice of application to the opposite party, order setting aside the dismissal upon such terms and costs as it thinks fit. Accordingly, the court shall appoint a day for proceeding with the existing suit.)

3. The court may proceed ***ex-parte***; (Art. 70(a)) (The very effect of such order is not default decree. Rather, the court will proceed to adjudicate the suit in the absence of the non-appearing party. In effect, the non-appearing party will not have the right to participate in the process of litigation. Whereas, if a third party defendant does not appear, the court enters a default decree.) However, Art. Will apply.

4. The court may issue a ***default Proceeding****;* (Art. 233) (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.)

We regard to several parties failing to appear read on page 11. Art, 75. Dave.

1. Sufficient Cause

Once the court has ordered following the non-appearance of a party, it does not mean that it is final and there is no ground for reviewing it.

A party whose interest is affected due to the order up on non -appearance may apply to the court to set aside the order, provided that he has sufficient reason to justify his/her non appearance.

1.1.2. 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. Where the parties appear in person, the court verifies their identity. It then reads the pleadings and asks the parties on the pleadings.

The defendant may deny or admit the allegations in his statement of defense or at the examination. See Article 241 and 242 of the Cv.Pr.C

The main purpose of the examination at the first hearing is to help the court clarify and develop the issues for trial. The court examines each party, or where the party does not appear, the person accompanying the pleader for the purpose of answering such questions. Since the examination must be conducted by the court and only for this purpose it would not be proper for the court to put a party on the stand, examine him on the entire case and allow the other party to cross-examine him. The examination is simply to determine what admissions and denials are made by the defendant which assists the court in framing the issues.

If a party admits in the pleadings or on the oral examination, the other party may apply to the court for such judgment or order as he may be entitled to as a result of the admissions made by the parties. See Article 242 of the Cv.Pr.C

1.1.3 Ruling on Preliminary Objections

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

Some preliminary objections are listed in Art 244 (2) also sets forth certain preliminary objections. So, when such objections are raised the court is to proceed in accordance with the provisions of Art. 245.

Generally, the acceptance of an objection has two effects. In other words, 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* (that the suit has already been decided by a court previously) or the suit is barred by limitation, the suit will be dismissed.

In other cases, the 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. On the other hand, where the court sustains an objection on pendency, the suit will be struck out and the plaintiff would continue the prior suit.

1.1.4 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. However, if the defendant, at the first hearing of the suit, makes no defence the court will not be compelled to frame and re-cord issues. An issue is something 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.

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. Hence, the court must frame the correct issues, in order for the trial to proceed expeditiously and the parties will be prepared to produce evidence on those issues. Otherwise, if the court fails

to do that, delay and inconvenience are likely to result.

1.2 Adjudication without Trial

1.1.3. Agreement on Issue

Art. 252: - Questions of fact or law may be stated in form of issues

Where the parties agree as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and **enter into an agreement in writing** that, upon the finding of the court in the affirmative or the negative of such issue:

(A) a sum of money specified in the agreement or to be ascertained by the court, or in such manner as the court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement: or

(B) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or

(C) One or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.

You have to note here that agreement on an issue plays a great role in facilitating the trial proceeding of the suit. Because, in doing that, parties will have the opportunity to compromise on some issues of the litigation and point out those issues which needs the decision of the court.

1.1.4. 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. This rule is provided under Art. 254 of the Civil Procedure Code.

1.2.3 Deposition of issues at the First Hearing

Unlike what we have seen above, some times parties may be at issue but their issue could be adjudicated with out 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; the court is authorized under Art. 255 to determine the issues at the first hearing, and pronounce judgment accordingly.

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.

1.3 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. Or, 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.

1.1.5. Compromise (Art. 274(1))

Compromise is basically an agreement reached by parties to a dispute. 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.

The judgment will be res judicata and will prevent a further suit by the plaintiff on the claim

Valid requirements of compromise agreement: (Art. 276) of civ. P. code.

1.1.6. Withdrawal of suit

In the above discussion, we have already seen how parties to the litigation settle their disputes through compromise agreement. In cases where such compromise agreement made out of the court, we have already said that plaintiff must notify the court that he has withdrawn the suit. However, the code did not simply put compromise as the only means of discontinuance of the proceedings of civil litigation. A case may also be discontinued by a party by way of withdrawal or abandon any of his claim against any or all defendants.

Ordinarily, a party may withdraw the suit or abandon any of his claims against any or all defendants. Such withdrawal of suit can be made with the permission of the court or out of court permission. Hence there are two

types of withdrawal of suit; namely, *withdrawal with leave* and *withdrawal with out leave*. (Art. 278(2)(a)&(b).

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.

On the other side space, a party may withdraw a suit with out leave for two reasons. The first reason is in case 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 on it. The other reason is also if the party simply withdraws the suit with out asking any permission to the court on that issue. Therefore, the ultimate outcome of withdrawal without leave to file a fresh suit is clear i.e., he can not institute a fresh suit in respect to the cause of action. However, according to Art. 279 of the civil procedure code, 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

2.1 Ordinary Proceedings

2.1.1 Production of Evidence to the Court

Before we directly embark on the essence of the production of evidence, it is good to have a clear image on the purpose of Civil and Criminal Procedure Codes; accordingly let us have a bird's eye view on the following purposes:

1. Entrenching expedite trial by eliminating worthless evidence. This approach would ultimately enable the courts not to waste their time by receiving worthless information.

2. The second purpose is exclusion of prejudicing and inherently unreliable information from trial. Accordingly, if a piece of evidence, though relevant, could endanger or prejudice the trial of fact, it would not be admitted as evidence.

3. The third purpose of procedural law is protecting the privacy of the parties on learning the truth for purposes of litigation. 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.

Generally, the law does not exclude the relevant testimony of any person who has the capacity to observe and remember the matters on which that person testifies, the ability to communicate this knowledge and an understanding of the obligation to tell the truth. However, when any of these factors are in doubt, it is up to the judge to admit or exclude such whiteness.

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.

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.

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. However, if either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, affidavit may not be given. Note here that 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]

So, 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.

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

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

The first is the rule of authentication.

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 the Civil Procedure Code.]

Art, 233(1), & 234(1), 264 (1)Art.267 of civ. P. code are related and about production of documentary evidendence

Before we wind up this section let us discuss, the procedure of admission of documentary evidence by the court. The rules are provided in Arts.139-141 of the Civil Procedure Code.

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.

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. Primary responsibility for the attendance of witnesses and the production of documents rests with the parties. However, the court, in the exceptional circumstance, may by its own motion, demand the production of evidence.

2.1.2 Conduct of The Trial

In this section, we will consider the rules governing how this evidence is to be introduced.

1. Order of Proceeding

What is burden of proof?

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. Two concepts are involved under burden of proof: burden of persuasion and burden of going forward

with the evidence. Burden of persuasion is the ultimate burden of convincing the court of an issue, and it does not shift during the trial. The burden of going forward with the evidence is on the plaintiff at the start of the trial. But this burden may shift to the defendant if defendant admits the allegations of the statement of claim and has raised what we have called affirmative defences.

Art. 258[1] of the Civil Procedure Code

Art. 259 of the Civil Procedure

2. Production of Evidence by the Parties

What is the manner of examining witnesses?

With what manner witnesses are examined?

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

Art. 263 of the Civil Procedure Code stipulate the form of questions as follows:

1. 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.

2. No leading question shall be put to a witness with out the permission of the court.

3. 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.

4. No question shall be put in re-examination except for the purpose of clarifying matters, which have been raised in cross-examination.

According to Art.263 [2] of the Civil Procedure Code, there are three situations where the court could do so. These are:

1. When the witness is being examined as to what are called introductory matters. The evidence of each witness shall start with his name, age, occupation and address, and to save time, the examiner can simply start “your name is……, isn’t it?” Obviously this is not objectionable, since the substance of the witness’s testimony is not involved.

2. The second situation is where the witness cannot remember some or all of the matters as to which the testimony is sought.
3. The third situation is to assist child witnesses who have difficulty in testifying.

In addition to every effort made to show that the witness has omitted facts or is not relating the facts correctly; there are methods of impeaching credibility. Some of these methods are: showing

1. That the witness is biased in favor of the proponent or against the opponent,
2. That he has made prior statements inconsistent with his testimony in court,
3. That he has a poor reputation for telling the truth,
4. That he has been convicted of certain criminal offences reflecting on his trustworthy.

When we come back to documentary evidence, there are no express provisions of the Civil Procedure Code governing the introduction of the documents into evidence. (However, Art.138 and 142 of the civil p. code are relevant.)

3. Power of the Court during production of Evidence

Art. 266 of the Civil Procedure Code

Art. 267 of the Civil Procedure Code

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. Note that this position is inferred from the very reading of Art. 268 in tandem with Art.118 [2] [b] of the Civil Procedure Code.

As to recording evidence, according to Art. 269 of the Civil Procedure Code:

1. The evidence of each witness shall start with his name, age, occupation and address and an indication that he has been sworn or affirmed.

2. The evidence of each witness shall be taken down in writing by the presiding judge or, if he is for some reason unable to record, by a judge or clerk under his personal direction and superintendence.

3. The evidence shall be divided into examination-in-chief, cross-examination, and re-examination

with a note as to where the cross-examination and re-examination begin and end.

4. The evidence shall ordinarily be taken down in the form of a narrative, but the presiding judge may in his discretion take down or cause to be taken down any particular question and answer.

5. When completed, the record shall be signed by the court.

2.1.3 Judgment and Decree

On the basis of Art 273, we are coming closer to the culmination the life of a civil suit. That is, once we address issues with regard to pre-trial stage and trial stage; now we will embark on the final section which deals with 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. Once the court renders judgment, the judgment shall be reduced to writing, signed by the member or members of the court and be pronounced by the judger or, where there are more than one judge, by the presiding judge.

Art. 181(1) is about dissenting opinion of the judge.

What should judgment contain?

At this juncture, it is important to note that the court may not give judgment on any matter not specifically raised by the parties. Note, 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.

Which are the issues on which judgment should be given?

Since the judgment itself cannot be executed, it is necessary that the court, after delivering the judgment, reduce the operative part of the judgment. Accordingly, the decree must contain(Art. 185 of civ.p.code)

1. The number of the suit,
2. The names and description of the parties,
3. The particulars of the claim,
4. A clear order to do or to abstain from doing something or to pay a definite sum of money or to deliver a

particular thing or surrender or restore immovable property.

5. The amount of costs incurred, and by whom or out of what property they are to be paid,
6. Such particulars as are necessary to render the decree susceptible of execution; and
7. Where the decree can be executed by the personal obedience of the judgment debtor, the time within which it shall be executed.

If the judgment was for the defendant, it would seem that the decree should state matters (1), (2), (3) and (5) and that the judgment in the suit was for the defendant.

Summary

On the basis of Art 273 the stage of judgment and decree is the culmination of the life of a civil suit. That is, once issues addressed with regard to pre-trial stage and trial stage; it is inevitable to embark on the final section which deals with 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. Once the court renders judgment, it shall be reduced into writing, signed by the member or members of the court and be pronounced by the judge or, where there are more than one judges, by the presiding judge.

As to the contents of the judgment, it shall contain the points for determination, the decision thereon and the reasons for such decision. And, in case 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

Since the judgment itself cannot be executed, it is necessary that the court, after delivering the judgment, reduce the operative part of the judgment. Once the operative part of all judgments is reduced to the form of decree, it must be signed and dated by the judge or judges who passed it, exclusive of any dissenting judge.

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.

2.2 Special Proceedings

Generally, summary procedure refers to a procedure by which the plaintiff may prosecute his claim without the necessity of instituting a full-scale suit. Similarly, accelerated procedure 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. Although the procedures are different and applicable in different kinds of cases, they are related in the sense that the questions involved in both kinds of cases may be determined without full-scale suit.

2.2.1 Summary Procedure

Where summary procedure is available, the plaintiff has the option to employ it, but he/she is not obliged to do so.

In Ethiopia, on the basis of Art 284 of the Civil Procedure Code, 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 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.

Therefore, a procedure is provided by which the plaintiff may recover the claim without the expense attendant upon bringing an ordinary suit. The crucial question is the liquidated amount of the debt. The plaintiff must be entitled to recover a specific sum of money ascertained at the time of suit. If the defendant accepted goods under a contract, but refused to pay the price, a summary suit for the price would be proper, since the amount claimed is liquidated.

In a nutshell, as we have discussed, 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. He may not appear and defend unless he applies and obtains such leave from the court. If the defendant or one of the several

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.

The purpose of the procedure is to enable the plaintiff to avoid a full-scale suit, and this has been accomplished. Once the judgment has been entered in favor of the plaintiff, the court should be able to pass the same kind of decree as in any other case.

- (Art. 286 of civil procedure code)

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.

2.2.2 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 of the Civil Procedure Code, 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. Furthermore, 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.

- (Art. 300, 301, 302, 303, 304, 305, 306 of civil procedure code)

In a nutshell, you have to understand that, the provisions discussed in this section are 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. They provide an expeditious remedy in appropriate cases and avoid full scale proceedings where such proceedings are unnecessary and perhaps undesirable.

2.3 Other Procedural Matters

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.

2.3.1 Arrest and Attachment before Judgment

This section is different because it involves arrest and attachment prior to the time a judgment has been rendered

2.3.2 Arrest before Judgment

Before we embark on the essence of the subject matter, notice that 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.

In line with Art 147 of the Civil Procedure Code, to bring about the legal penetration of this law, first and foremost a warrant of arrest may be issued against the defendant where the court is satisfied that the defendant:

1) 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

2) 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.

Note that the purpose of these provisions is to require the defendant to furnish security rather than to detain him. The defendant may avoid arrest by paying the officer entrusted with the execution of the warrant the sum specified in the warrant, sufficient to satisfy the plaintiff's claim, which is a sum specified in the warrant, sufficient to satisfy the plaintiff's claim, which sum will be held by the court until the suit is disposed of or until further order.

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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.

2.3.3 Attachment before Judgment

The rules related to security for production of property are designed to prevent the defendant form disposing of or removing his property so as to prevent execution. 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.

When we come back to the attachment of property, according to Art 152 of the Civil Procedure Code:

1.Where the defendant fails to show good cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the court, the court may order that the property specified, or such portion thereof appears sufficient to satisfy any decree which may be passed in the suit, be attached.

2.where the defendant shows such cause or furnishes the required security after the property specified or any portion of it has been attached, the court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

However, you have to note that on the basis of Art 153 of the Civil Procedure Code, 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.

2.3.4 Temporary Injunctions, Interlocutory Orders and Appointment of Receiver

To achieve the objective of litigation, the following three remedies, that we are going to discuss hereunder, should be employed in the right manner.

2.3.5 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. 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.

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.

(Art. 154 of civil procedure)

With regard to injunction to restrain repetition or continuance of breach, Art 155 of the Civil Procedure Code provides that: …….

(Art. 157, 158, 159 of civil procedure code)

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.

Finally you have to note that on the basis of Art 156 (2) of the Civil Procedure Code, 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.

2.3.6. Interlocutory Orders

On the basis of Art 165 of the Civil Procedure Code, an 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, 161/1(b), 162, 163, 164 of civil procedure code are related to this issue).

2.3.7. 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. On the basis of Art 166 of the Civil Procedure Code the court may appoint a receiver whenever it appears to be just and convenient both before and after the decree.

To achieve its objective, 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.

2.3.6 Habeas Corpus

A Habeas Corpus petition 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.

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 how this application being entertained by the court of law. The

procedure is governed by Articles 177-179 of Ci.Pr.C of Ethiopia.

2.3.7. Procedure in Arbitration and conciliation

Arbitration is a dispute resolution process in which the disputing parties present their case to a third party intermediary (or a panel of arbitrators) who examine all the evidence and then make a decision for the parties. This decision is usually binding. Like court-based adjudication, 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 is generally not as formal as court adjudication, however, and the rules can be altered to some extent to meet the parties' needs.

Arbitration is most commonly used for the resolution of commercial disputes, particularly in the context of international commercial transactions. Arbitration can be either voluntary or mandatory and can be either binding or non-binding.

- Advantages and disadvantages of 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.

2.3.7 Cost

It is obvious that court litigation requires 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.

Summary

The law of evidence is concerned with one of the most complex undertakings in the entire litigation process. This complex undertaking is the reconstruction of past

events to arrive at the truth. Truth is not sought in an absolute sense. Evidence is produced to prove factual allegation/s that is/are affirmed by one party and denied by the other. Since the trial stage is basically the stage where oral testimony and documentary evidence are examined, it is necessary to have a procedure by and through which all necessary oral evidence and documentary can be brought before court.

At this juncture, it is important to note that, since the parties have the primary responsibility for presenting their cases, the court shall evidence in its own motion only in exceptional circumstances, that is, only where a witnesses or documents who is/are likely to be able to prove the alleged fact has not been called or mentioned by either party.

Accordingly, 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. Where the court finds that the sum is not sufficient to cover the expenses or that the witness must be detained for more than one day, the court will order the party who has requested the issuance of the summons to pay an additional sum in to the court

Unless the court otherwise directs, in line with Art. 120 of the Civil Procedure Code, a witness who has been summoned shall attend each hearing until the suit has been disposed of, and the court may require a witness in attendance to execute a bond that he will attend until the suit is disposed of.

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 by commission. Furthermore, where the witness resides outside the local limits of the court issuing the commission, the commissioner may apply to any court within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such court may, in its discretion, issue such process as it considers reasonable and proper.

As you know, documentary evidence is classified as real proof as opposed to oral

testimony. Real evidence includes written documents and demonstrative evidence. Where a person is summoned for the sole purpose of producing a document, he may simply produce the document without personally appearing in court.

At the trial, each party introduces the oral and documentary evidences they think necessary to support their side of the issue. In this regard the party who initiates the case has the burden of proof to provide evidence necessary to establish a disputed fact or a degree of belief in the mind of the court. This reflects the general rule that the party who has the burden of proof has the right to begin. However, if the defendant raises a counter claim or any affirmative defence, the burden of proof for the existence of the claim (if not admitted) or such affirmative defence, will shift to the defendant. In all other cases, the plaintiff has the burden of proving that he has a cause of action, and the defendant has the burden of proof on the question of whether he has a valid defence.

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

So much so that, the three stages of examination of witness are expected to be employed at different times, in different ways and for different purposes.

The rationale behind this investigation is that as a result of the process, everything the witness knows about the case will be brought to the attention of the court, and the court will be in a better position to determine whether or not the witness is telling the truth than if he merely testify in a narrative manner.

Thus, 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, and during re-examination, the proponent tries to minimize the effect of cross-examination.

In this regard, the primary responsibility for the examination of witnesses rests on the parties, though as we will see, the court is

also given broad power with respect to the examination of witnesses.

When we come back to the role of the court, under the adversarial system of litigation, which our system of litigation has adopted, the role of the court is minimal. Although Ethiopia has adopted the adversarial system of litigation and the principle of party presentation, this is modified by giving the judge a potential degree of control over the conduct of the litigation.

The principle of party presentation which is one of the hallmarks of the adversarial system is modified in our code and the court has the 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. In addition to this, the court has the power to call evidence, which is not mentioned by either party.

Taking in to consideration the role of the court, at this juncture it is important to note that Art. 262 of the Civil Procedure Code is now applicable in a manner that is suitable to the Federal Arrangement adopted by the FDRE Constitution. This means, every state is empowered to use its language as a working language of its courts. The Constitution also gives a right to individuals who do not know the language of the court to have an interpreter. So currently, it is not only the inability to speak Amharic but also other working language of the court that will entitle to have interpreter.

With regard to the manner of production of evidence, a word should be said about the kind of evidence that the court may consider in arriving at its decision. In line with Art. 261[3], witnesses must give their evidence in open court, unless the court otherwise directs, for good cause to be recorded. If it is found necessary, evidence may only be heard in camera, that is, the judge will take evidence in chambers in the presence of the parties or their advocates.

Finally, the court has to primarily base its decision on the evidence that has been presented in open court or in camera and the evidence presented on commission in accordance with the provisions of the code. Secondly, the judge may only base his decision on evidence that he believes to be competent and relevant.

CHAPTER THREE

REVIEW OF JUDGMENTS

Basically, there are three ways of reviewing a judgment. These are reviewing before the court; which rendered the judgment, before an appellate court and before the court of cassation.

3.1 Reviews by Court of Rendition

The judgment rendered by the court of first instance court may sometimes be exposed to review for different reasons. Depending on the reason behind revision of the judgment, the court of rendition, the appellate court or the court of cassation may revise the judgment of the court of rendition. Following this we are going to see the conditions whereby the court of rendition revises its own judgment. Generally, there are three bases; namely, Procedural Irregularity, Newly Discovered Evidence and Opposition in which the court of rendition will revise its own decision.

3.1.1 Procedural 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.

The very existence of procedural irregularity by itself will not guarantee the revision of the judgment of the court of rendition. In order for the court of rendition to review its judgment; 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.

One important thing as far as setting aside of judgment is, concerned where the proceedings are set-aside only some 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.

Another important point that we have to remind at this point is, 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.

3.1.2 Newly Discovered Evidence

The more common proceeding in the lower court will be one to obtain review of the judgment on the ground of newly discovered evidence. (Art. 6 of civ. P. code)

Just like what we have seen in procedural irregularity, discovering of new evidence by itself is not enough for some one to claim for revision of the judgment of the trial court. There are three criteria that should be fulfilled, so that the court of rendition can review its own judgment.

These are:

- ➢ the evidence must be discovered *after the judgment is rendered*,
- ➢ the newly discovered evidence *must affect the decision*, and
- ➢ 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.

- ❖ These three conditions are cumulative.

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. Moreover, the evidence must be of the nature such as to materially affect the substance of the decree and the evidence must be such as to suggest improper conduct, which tainted the judgment with fraud. i.e., forgery, perjury, bribery or the like.

3.1.3 Opposition

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

Per 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

If we go through 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.

- ☞ *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. This is because; this article is one of the provisions of the civil procedure code that cause the delay of court litigations. A party with interest knowing the proceeding purposely fails to act before the judgment. He or she will wait until judgment is entered. After the judgment has entered, he or she will wait until the judgment reach to the point of execution. It will oppose the judgment when the judgment is about to be executed that nullifies the former proceeding.

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.

To sum up, a judgment rendered by trial court, may be reviewed in three ways. Those are: by court of rendition, by appellate court or by court of cassation. The court of rendition may review its own judgment if it is proved that there was procedural irregularity, discovery new evidence and opposition.

3.2 Reviews by Appeal to a Higher Court

The most common method of obtaining review of a judgment is by way of an appeal.

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. When an appeal has been taken, the 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. Frequently, the 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.

The party must make his application to set aside the proceedings in that court, and if his application is denied, he may then appeal. Under Art. 211(1), it is provided that an error in the judgment or decree may be made a ground of appeal, evengthough an application was not made to the subordinate court. However, since a remedy is available in the subordinate court, it would seem that the appellate court could not hear the appeal until that remedy was exhausted, so that even where the irregularity occurs with respect to the judgment or decree, an application would have to be made to the subordinate court before the appeal could be taken

3.2.1Right of 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 the case was tried in the High Court, an appeal lies to the Supreme Court. Where, on appeal, the appellate court

confirms the judgment, a further appeal does not lie. If, however, the judgment is varied or reversed, a second appeal lies to the next highest court

3.2.2 Types of Appeal

An application to the appellate court may be of two types. These are Appeal on Judgment and Appeal on Orders (Interlocutory Appeal).

1. Appeal on Judgment

As we have seen earlier, a case may be adjudicated in the first hearing or it may require full-scale trial. The judgment rendered by the court could also be on interlocutory matters or on the merit of the case. So, 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 interlocutory appeal is simply 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.

Examples of interlocutory matters would be 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.

Under the Civil Procedure Code, interlocutory appeals are not permitted. 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. Thus, there can be but one appeal that form the final judgment, and at such time all objections, both as to interlocutory matters and the final disposition, may be raised. See article 320(3) of Cv.Pr.C

However, a person may appeal from any order directing his arrest or detention, or transferring property from one party to another or refusing to grant an application for Habeas Corpus. See article 320(4) of Cv.Pr.C. Although such orders may be considered interlocutory in nature, 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.

These are the only exceptions permitted, and in all other cases the court must reject any appeal taken on an interlocutory matter.

3.2.3 Grounds of Appeal

(Art. 327 & 329 of civ. P. code)

In appeal the appeallant cannot raise a new evidence except court permission.

Objection as to jurisdiction and indispensable parties are raised before the appeallate court.

3.2.4 Instituting Memorandum of Appeal

1. Memorandum of appeal

Art. 327 of civil procedure code.

2. Time for appeal

The other important requirement to apply for reviewing of judgment in the appellate court is period of limitation. Normally, the memorandum must be filed within 60 days from the time of the delivery of judgment. See article 323(2) of the Cv.Pr.C. However, this may not be true all the time. Some substantive laws may fix the period of limitation even less than 60 days. (for example the provisions of labour proclamation No. 377/2004 Art. 154(1) & 138(3), within 30 days).

Effect failure to apply the memorandum within the period of limitation (art. 324(1) of cvp, 325 and 326 of the same code).

3. Cross-objections

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.

Question: can you identify the distinction between cross-objection and cross-appeal?
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 distinction refers solely to whether the successful party filed an appeal to challenge certain aspects of the decree, in such case i.e., cross-appeal or whether he made his attack only in response to an appeal filed by the other party, that is, by a cross-objection.

4. Additional Parties

As you can remember from your previous knowledge, we considered the power of the trial court to bring in additional parties. 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. Where it 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) of the Cv.Pr.C

5. Stay of execution

The fact that an appeal has been taken does not operate to stay the proceedings or to prevent execution of the decree. 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 subordinate 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 of the Cv.Pr.C

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, and
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. 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.

In summary, there are two approaches to the granting of a stay: granting a Stay as of course and 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.

3.2.5 Procedure on Appeal

1. Hearing of Appeal (Art. 337, 338 and 339 of civ. P. code)

2. Framing of Issues (Art. 343 of civ. P. code)

3. Additional Evidence

In principle the introduction of a new evidence by the parties before the appeallate court is not permissible.

However, there are three situations where the introduction of new evidence on appeal is authorized. These are where:

1. the subordinate court refused to admit evidence that ought to have been admitted;
2. the appellate court requires and 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 345of the Cv.Pr.C

4. Review of Findings of Fact

Basically, there are two approaches on this issue. The first approach is, that the appellate court will be dependent on the findings of fact made by the subordinate court. The other approach is, the appellate court may determine on the findings of facts. 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.

3.2.6 Judgment on Appeal

1. Reversal for substantial error

The judgment may confirm, vary or reverse the decree or order from which the appeal is taken. . See article 348 of the Cv.Pr.C

See article 211 of the Cv.Pr.C It follows that the decree should only be reversed or varied if the subordinate court committed "substantial error" which affected its decision.

It is only where the error substantially prejudiced the unsuccessful party that the judgment will be reversed or varied. 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 being given. In such a case the appellate court is directed to quash the proceedings and order a retrial.

The point to stress is that 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 (to send back)

One of the powers of the appellate court is to remand the suit to the trial court. Remand is a legal term which has two related but distinct usages. Its sourse is from the Latin ***re-*** and ***mandare***, literally "**to order**."

Remand is, therefore, an action by an appellate court in which it remands, or sends back, a case to the trial court or lower appellate court for action

According to article 341 of the Ci.Pr.C. of Ethiopia, the appellate court may, if it thinks fit, remand the case and may direct which issues shall be tried on remand. This happens if the subordinate court disposed of the case on a preliminary point and its decision on that point is reversed by the appellate court. It is because the decision was on a preliminary point and the substantive issues in the case have not yet determined. On the other hand, the appellate court may try those issues itself, in which case the parties will present their evidence to the appellate court.

Therefore, before the appellate court ordering remand, it must have concluded that the decision on preliminary point should be reversed. It must also conclude that the disposition of the case, as a result of the decision on the preliminary point, was erroneous.

3. Powers of Appellate Court (Art**.** 342 of 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.

(Art. 40(5))

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.

Finally, the court may reverse or vary the decree in favor of a person who is not a party to the appeal.

3.2.7 The Second Appeal

When we say second appeal, it is to mean that it 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. Therefore, to understand the concept, the application for reviewing the judgment of the first instance court, is considered here as first appeal.

The Civil Procedure Code as well as the Federal Court Establishment Proclamation 25/96 does not contain any specific provision regulating the second appeal, and the provisions applicable to the first appeal are therefore, as a general proposition, applicable to the second appeal.

On the second appeal, the party appealing is considered the appellant and the party, in whose favor the previous judgment was varied or reversed, is considered the respondent. The second appeal is to be 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. The question is whether the appellate court commits error in varying or reversing the judgment from which the appeal was taken. 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.

3.2.8 Restitution

As we saw, the taking of 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. In such a case 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 of the Cv.Pr.C

3.3 Revision in Court of Cassation

Question: 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?

We can see different views forwarded on this issue. 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.

If we look at 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.

In court of cassation both at Federal and State Courts, a party may take an application for revision in Court of Cassation, only after he/she has exhausted all his rights of appeal. More over, 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. The parties to the court of cassation are named as "applicant," the one who claims reviewing of the judgment of the lower court, and "respondent," the other litigant party.

CHAPTER FOUR

EXECUTION OF DECREES

Generally, '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.

This chapter will be interested in discussing briefly on three important points, namely, jurisdiction in execution, procedure in execution, and attachment and sale of property.

1.1. Jurisdiction in Execution

It is important to remember that 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. In most of the time, the judgment debtor is not willing enough to execute the

decree. For that purpose the role of the court to execute the will be vital.

Normally, the court, which passed the decree, has a jurisdiction to execute such decree. However, in certain circumstances, it may be transferred for execution to another court.

4.1.1 Transfer for Execution

Art. 372 of civil procedure.

Therefore, if the court, which has a jurisdiction to execute a judgment, decided to transfer its power to any other court based on this article.

Question: Do you think that the court, which has no local jurisdiction, can execute a judgment? Explain.

Since 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. So too, 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.

Other important thing that we should raise at this stage is, the transferee court cannot alter, vary or add to the terms of the decree. The only exception is where the decree is ambiguous.(Art. 374)

4.1.2. Powers of the Court upon Execution

The court can not execute a decree simply because it has a jurisdiction to that effect. Hence, 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.

Following are some other examples of questions that must be raised before the court executing the decree:

1. Claim of compensation for damage caused by the judgment-debtor to property prior to surrendering possession;

2. Claim by the judgment-debtor that the decree-holder took in execution property not included in the decree or in excess of the decree;

3. Claim for refund or deficiency following execution on mortgaged property where an error in the amount of mortgage is subsequently discovered.

4.2. Proceedings in Execution

Once an application for execution is instituted, the court that executes the judgment has to apply certain procedure.

4.2.1 Application for Execution

1. General provisions

As we have repeatedly saying an application for execution is the first step to proceeding for execution, in case the decree is not satisfied by the judgment-debtor. Note that 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. In a sense 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 may be made as soon as the judgment-debtor is in default.

Art. 379 is about formal requirement of application/ for execution.

A transfer of the decree by operation of law may arise in any of the following ways:

1. the decree-holder has died, and the decree has passed by devolution or succession,
2. the decree-holder has become insolvent, and the decree has passed to the assignee or receiver;
3. A judgment has been entered against the decree-holder in another suit, and the decree has been transferred in execution proceedings against him.

4.2.2 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 of the Cv.Pr C, 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

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.

4.2.3. Process of Execution

7. Execution of cross-decrees

Where both parties have made such applications, their decrees are called cross-decrees, and the execution of such decrees is governed by special rules. 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.

4.3. Attachment and Sale

4.3.1. Methods of and Objections to Attachment

9. Methods of 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 of the Cv.Pr.C. Those properties which are exempted from attachment are:

1. the necessary wearing-apparel, cooking vessels, bed and bedding of the judgment-debtor and his family;
2. tools, instruments or implements of any kind used by the judgment-debtor in his profession, art or trade;
3. where the judgment-debtor is an agriculturalist, such cattle and seed-grain as may, in the opinion of the court, be necessary to enable him to earn his livelihood;
4. such amount of food and money as may, in the opinion of the court, be

necessary to sustain the judgment-debtor and his family for a period of three months;

5. pensions and alimonies;
6. two-thirds of the judgment-debtor's salary, or where the salary does not exceed Eth.$ 2 per day, and the judgment-debtor has no other income, the entire salary;
7. any other property declared by law to be exempt from attachment or sale.

10. 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 of the Cv.Pr.C

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. So too, 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.

4.3.2 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 of civil p. code)

B. Sale of Movable Property

(Art. 432, 401(4), 436- 438 of civil p. code)

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

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. Those are where:

a. The judgment-debtor has no saleable 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.

(Art. 445 of civil p. code)

3. Confirmation, Delivery of Possession and Resistance

A. Confirmation

(Art. 447(1-3) of civil p. code), Art. 446(4)

B. Delivery of Possession

(Art. 448 & 449 of civil p. code)

C. Putting into Possession

(Art. 450, 451 & 452 of civil p. code)

CHAPTER FIVE

RES JUDICATA AND SPLITTING OF CLAIMS

Res Judicata

5.1 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.

According to Art 8 of the Civil Procedure Code:

No court shall try any suit in which the matter in issue is also directly and substantially in issue in previously instituted civil suit between the same parties, or between parties under whom they or any party claim, litigating under the same title, where such civil suit is pending in the same or any other court in Ethiopia having jurisdiction to grant the relief claimed.

The general condition for the application of the rule of res judicata is stipulated under Art 5 of the Civil Procedure Code. Accordingly:

1.No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, and has been heard and finally decided.

2. Any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been directly and substantially in issue in such suit.

3. Any relief claimed in the former suit which has not been expressly granted by the decree passed in such suit shall, for the purpose of this article, be deemed to have been refused.

4. Where persons litigate in good faith in respect of public or private rights claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this article, be deemed to claim under the persons so litigating.

5.1. Persons Bound

D. Parties to suit

All parties must be litigating under the same title.

In line to our procedural set up, 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

The most troublesome questions revolve around what persons are bound because they are claiming under parties who litigated the question under the same title in a previous 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.

C. ----Other Situations

The next question we have to consider is whether 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.

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.

2. 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.

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.

5.1.1 **Matters Which Has Been Heard and Finally Decided**

1. 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.

In summary, it is submitted that the following rules should apply whenever two or more issues have been decided. Where two grounds were asserted to the support the claim or defence, and only one of them were decided in favor of the successful party, the decision on the other ground should not operate as res judicata against him, since he could not have appealed from that decision. Where the case has been appealed, the appellate court should only decide only as many issues as are necessary for the confirmation or reversal of the judgment, and its decision on an issue not necessarily for this purpose should not operate as res judicata notwithstanding that the party in whose favor the case was ultimately decided raised that issue. Where two issues were decided and the case was not appealed, the decision on both issues should operate as res judicata only if both issues involved the merits; if one issue involved the merits and one did not, only the decision on the non-merits issue should operate as res judicata.

2. 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. We can infer from this article that 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.

In a nutshell, once an issue of law has been decided, the decision operates as res judicata with respect to the cause of action involved in the suit in which it was rendered. However, it is not res judicata in a subsequent suit between the same parties 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.

5.1.2. The Scope of Res Judicata

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.

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.

The failure to raise such grounds in a former suit means that they cannot be raised in any subsequent suit. 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.

2. Relief not Granted

The second aspect of the scope of res judicata is provided under Art 5(3) of the Civil Procedure Code. 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.”

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.

5.2 Splitting of Claims

1.2.1. General Principles

According to Art 216 of the Civil Procedure Code:

1. Every suit shall, as far as practicable, be framed so as to afford ground for final decision upon the subject matter in dispute and to prevent further litigation concerning them.

2. Every suit shall include the whole of the claim, which the plaintiff is entitled to make with respect to the cause of action unless he intentionally relinquishes any portion of his claim so as to bring the suit within the jurisdiction of any court.

3. A plaintiff who omits to sue in respect of, or intentionally relinquishes, any part of his claim shall not afterwards sue with respect to the portion so omitted or relinquished.

4. A person entitled to more than one relief with respect to the same cause of action may sue for all or any of such relief, but if omits, except with the leave of the court, to sue for all such relief's, he shall not afterwards sue for any relief so omitted.

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.

Stated simply, a plaintiff may not split his cause of action. In this regard, we can safely say that the rule is designed to prevent the courts from being burdened by multiple suits on what is essentially one wrong and to protect the defendant from harassment by repeated suits. It is not difficult to picture a vindictive plaintiff bringing a number of suits against a defendant who has committed a wrong against him.

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.

Besides, that the plaintiff having a number of causes of action against a defendant is not required to join them in a single suit. A plaintiff may unite several causes of action against a single defendant but he is not

required to do so. The rule only prohibits splitting of a single cause of action.

1.2.2. The Whole of the Claim with Respect to the Cause of Action

What Constitutes the Whole of the Claim?
The question that should be addressed at this stage is then 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