was only then that it informed the court that the accused was re-arrested and that while he was detained, he made good his escape. Since at that time his bond was still valid and binding, and notwithstanding the re-arrest of the accused the surety kept silent, it must be presumed that the surety chose to continue with its liability under the bond and should be held accountable for what may later happen to the accused. It has been held that "The subsequent arrest of the principal on another charge, or in other proceedings, while he is out on bail does not operate *ipso facto* as a discharge of his bail x x x. Thus if, while in custody on another charge, he escapes, or is again discharged on bail, and is a free man when called upon his recognizance to appear, his bail are bound to produce him." (6 C. J. p. 1026.)

This case should be distinguished from the recent case of People v. Mamerto de la Cruz, G. R. No. L-5794, July 23, 1953, wherein this Court said: "It has been seen that if the sureties did not bring the person of the accused to court, which they were powerless to do due to causes brought about by the Government itself, they did the next best thing by informing the court of the prisoner's arrest and confinement in another province and impliedly asking that they be discharged. On its part, the court, by keeping quiet, and indeed, issuing notices of the hearing direct to the prisoner through the Sheriff of Camarines Norte and ignoring the sureties, impliedly acquiesced in the latter's request and appeared to have regarded the accused surrendered." No such step was taken by the surety in this particular case for it failed even to inform the court of the apprehension made of the accused by the constabulary authorities.

Wherefore, the order appealed from is reversed, without pronouncement as to costs.

Paras, Bengzon, Pablo, and *Padilla J.J.,* concur.
Tuason, Reyes, Jugo, and *Labrador, J.J.,* concur in the result.

MONTEMAYOR, *J.* concurring:

I concur in this opinion penned by Mr. Justice Bautista because it is in accordance with and follows the view maintained in my dissenting opinion in the case of People vs. Mamerto de la Cruz, G. R. No. L-5794, despite an attempt to disitnguish the present Diet case from the Cruz case.

XX

Consolacion C. Vda. De Verzosa, Paz Verzosa, Jose Verzosa, Vicente Verzosa, Crispulo Verzosa and Raymundo Verzosa, Plaintiffs-Appellants, vs. Bonifacio Rigonan, Segundo Nacnac, Nemesio Seguno, Clerk of the Court of First Instance of Ilocos Norte and Ludovico Rivera, Provincial Sheriff of Ilocos Norte, Defendants-Appellees, G.R.No. L-6459, *April* 23, 1954, *Bautista Angelo, J.:*

PLEADING AND PRACTICE; MOTION TO DISMISS; RES ADJUDICATA; PROOF OF THE EXISTENCE OF PRIOR JUDGMENT.—Where, in a motion to dismiss, it is stated that there is a former judgment which bars said action and a copy of the decision is attached to the motion, which is not disputed, the said copy of the decision may be considered as sufficient evidence to prove the existence of the prior judgment between the same parties because under Sec. 3, Rule 8, a motion to dismiss may be proved or disproved in accordance with Rule 123, Sec. 100, which provides: "When a motion is based on facts not appearing of record the court may hear the matter on affidavits or depositions presented by the respective parties but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

Conrado Rubio and *Hermenegildo A. Prieto* for appellants.
Bonifacio Rigonan for appellees.

DECISION

BAUTISTA ANGELO, *J.*:

Plaintiffs instituted this action in the Court of First Instance of Ilocos Norte praying that judgment be rendered (1) declaring null and void the actuations of the clerk of court and of the sheriff of said province on the ground that they are in contravention of law; (2) declaring null and void the order of the court dated July 18, 1941 on the same ground; (3) ordering defendants to pay plaintiffs damages in the amount of ₱10,000; and (4) ordering defendants to pay the costs of action.

The averments of the complaint are: Luis Verzosa, on February 5, 1931, executed a real estate mortgage for the sum of ₱3,500 in favor of Ignacio Valcarcel on a parcel of land situated in the municipality of Dingras, Ilocos Norte. On July 13, 1932, the mortgage creditor filed an action to foreclose the mortgage (Civil Case No. 3537) and after trial, at which the parties submitted a compromise agreement, the court rendered decision in accordance with said agreement. On April 20, 1934, a writ of execution was issued by the clerk of court ordering the sheriff to sell at public auction the property described therein for the satisfaction of the judgment. On November 28, 1934, or seven months after the issuance of the writ, the sheriff returned the writ with a statement of the action he had taken thereon. On December 12, 1934, the clerk of court issued another writ of execution, and the sheriff, acting thereon, announced the sale of twenty parcels of land belonging to the judgment debtor instead of the parcels of land described in the writ. On January 15, 1935, the sheriff sold several parcels of land to Bonifacio Rigonan and Rafael Valcarcel, and on May 21, 1936, the sheriff issued a final deed of sale in their favor.

On March 10, 1936, counsel for judgment creditor requested the clerk of court to return the writ to the sheriff so that other property may be levied in execution for the satisfaction of the balance of the judgment which remained unsatisfied, which request was granted. And on October 15, 1936, the sheriff sold other parcels of land in favor of Bonifacio Rigonan and Irineo Ranjo, the latter in behalf of Rafael Valcarcel, heir of the judgment creditor who had already died.

On July 7, 1938, counsel for judgment creditor again requested the clerk of court for an alias writ of execution, but instead of submitting to the court said request for resolution, the clerk of court issued a decree reiterating the original writ which was carried out by the sheriff. On February 17, 1941, Rafael Valcarcel sold to Bonifacio Rigonan and Segundo Nacnac one of the parcels of land sold by the sheriff for ₱100, and on July 18, 1941, an order was issued placing Bonifacio Rigonan in possession of said property.

The present action was instituted on September 19, 1950 praying for the nullification of the actuations of the clerk of court and the provincial sheriff as stated in the early part of this decision.

Defendants filed a motion to dismiss on the following grounds: (1) that the action of the plaintiffs has prescribed; (2) that there is a former judgment which bars said action; and (3) that the complaint states no cause of action. Copy of the decision above referred to was made a part of the motion.

The above motion having been submitted to the court for decision, the latter found that the action had already prescribed it ap-

pearing that the actuations which are sought to be nullified took place more than ten years ago. As regards the ground that there is a prior judgment which bars the present action, the court ruled that the same cannot be entertained because it involves a question of fact which does not appear admitted in the complaint. The court expressed the opinion that no affidavit or evidence can be considered on a motion to dismiss because the sufficiency of a complaint should be tested on the basis of the facts alleged therein. The court, however, allowed the plaintiffs to amend their complaint within five days from receipt of the order in accordance with the discretion given to it by the rules of court.

Taking advantage of this grace, plaintiffs submitted an amended complaint wherein they reiterated the same facts with some clarifying modifications. Defendants reiterated their motion to dismiss on the same grounds. And finding no substantial difference between the original and the amended complaints, the court ordered the dismissal of the case without pronouncement as to costs. After the case had been taken to the Court of Appeals, it was later certified to this Court on the ground that the appeal involves purely questions of law.

A cursory reading of the amended complaint will reveal that the actuations of the clerk of court, as well as of the sheriff, which are sought to be nullified are: the writ of execution issued by the clerk of court on December 12, 1934, as well as the sales and other actuations executed by the sheriff by reason of said writ of execution; the decree of the clerk of court issued on May 21, 1936, as well as the sales and other actuations of the sheriff made in pursuance thereof; the decree of the clerk of court issued on July 7, 1938, as well as the actuations of the sheriff made in compliance with said decree; and the assignment made by Rafael Valcarcel of his right and interest in the land sold on February 17, 1941 to defendants Bonifacio Rigonan and Segundo Nacnac. And as a necessary consequence, plaintiffs also asked for the nullification of the order of the court dated July 18, 1941 placing Bonifacio Rigonan in possession of the land sold to him.

It appears from the above recital that the acts and decrees which are sought to be nullified took place more than ten years prior to the filing of the present action, and since under Article 44 of Act No. 190 an action of this nature prescribes in ten years, it follows that the action of the plaintiffs is already barred by the statute of limitations. If the aforesaid acts can no longer be nullified, it also follows as a legal consequence that no action can be taken on the order of the court issued on July 18, 1941 directing the sheriff to place Bonifacio Rigonan in possession of the parcel of land sold to him because of the principle that possession must follow ownership unless ordered otherwise.

As regards the second ground invoked in the motion to dismiss no affidavit or extraneous evidence can be considered to test the sufficiency of a complaint except the facts alleged in the same complaint. We hold that under Section 3, Rule 8, a motion to dismiss may be proved or disproved in accordance with Rule 123, Section 100, which provides: "When a motion is based on facts not appearing of record the court may hear the matter on affidavits or depositions presented by the respective parties but the court may direct that the matter be heard wholly or partly on oral testimony or depositions." And in our opinion the copy of the decision attached to the motion, which is not disputed, may be considered as sufficient evidence under the rule to prove the existence of a prior judgment between the same parties. In this sense, the second ground of the motion to dismiss may also be entertained to test the sufficiency of the cause of action of the plaintiffs.

Wherefore, the order appealed from is affirmed, without pronouncement as to costs.

Paras, Pablo, Bengzon, Montemayor, Reyes, Jugo, Labrador, Concepcion, and *Diokno, J.J.*, concur.

XXI

DECISION

Salvador E. Bimeda, Petitioner, vs. Arcadio Perez and Hon. Jose T. Surtida, Judge of First Instance of Camarines Sur, 10 Judicial District, Respondents, G. R. No. L-5588, Aug. 26, 1953, Bautista Angelo, J.:

1. CERTIORARI; ERROR OF JURISDICTION DISTINGUISHED FROM ERROR OF JUDGMENT. — As a rule, the errors which the court may commit in the exercise of its jurisdiction are merely errors of judgment. In the trial of a case, it becomes necessary to distinguish errors of jurisdiction from errors of judgment. The first may be reviewed in a certiorari proceeding; the second, by appeal. Errors of jurisdiction render an order or judgment void or viodable but errors of judgment or procedure are not necessarily a ground for reversal (Moan, Comments on the Rules of Court, Vol. 2, 1952 ed., p. 158).

2. IBID; WHERE APPEAL IS AN ADEQUATE REMEDY. — A writ of certiorari will be denied where the appeal is an adequate remedy though less speedy than certiorari. Mere possible delay in the perfection of an appeal and in securing a decision from the appellant court is no justification for departing from the prescribed procedure . . . "unless" there was lack or excess of jurisdiction or abuse of discretion and the delay would work injustice to the complaining party.

Dominador P. Padilla for petitioner.
Ramon Imperial for respondents.

DECISION

BAUTISTA ANGELO, *J.*:

This is a petition for certiorari and mandamus with preliminary injunction seeking to compel respondent Judge to allow petitioner to adduce evidence relative to an alleged irregularity committed by the board of inspectors of precinct No. 6, of Pamplona, Camarines Sur, during the election for municipal mayor held on November 13, 1951. The purpose of the injunction is to restrain respondent Judge from proceeding with the trial of the protest pending determination of the issue raised in this proceeding. This injunction was issued as prayed for.

Petitioner was declared elected municipal mayor of Pamplona, Camarines Sur, with the plurality of one vote, in the elections held on November 13, 1951. Respondent Arcadio Perez contested the election in due time.

In his answer, respondent set up a counter-protest averring, among other things, "That he impugns the electoral returns in Precinct No. 6 of Pamplona as well as the votes therein on the ground of wholesale irregularity, gross violation of the election law by the Board of Inspectors, and wanton disregard by said board of the right of some 20 or more voters in said precinct to vote for protestee; it follows that were it not for such irregularity and violation of law, protestee would have obtained 20 or more votes in his favor."

When trial came, and after protestant had concluded presenting his evidence, protestee proceeded to present his evidence to establish not only his special defenses but also his counter-protest relative to the irregularity which he claims to have been allegedly committed in Precinct No. 6 of Pamplona as stated in the preceding paragraph, but respondent Judge, sustaining the opposition of protestant, ruled out such evidence upon the theory that to permit proof of said