1952, Judge Nicasio Yatco issued the corresponding writ. On March 6, 1953, a decision was rendered in Civil Case No. 9616, dismissing the petition for certiorari and prohibition and dissolving the writ of preliminary injunction. On April 23, 1953, the petitioners in Civil Case No. 9616 filed a motion, praying that under the provision of Rule 39, Section 4, of the Rules of Court, the writ of preliminary injunction issued on November 22, 1952, be restored, and on June 1, 1953, Judge Yatco granted the motion in the following order:

> "Acting upon the motion filed by Atty. Amador Gomez under date of April 23, 1953 and after hearing both counsel Atty. Gomez and Assistant Provincial Fiscal Mr. Nestor Alampay on the matter, and the consideration of the facts and the circumstances surrounding the case, the Court, in consideration of Rule 39, Section 4, of the Rules of Court, makes use of its discretion in ordering the suspension of the dissolution of the injunction during the pendency of the appeal of the judgment rendered by this Court in its decision of March 6, 1953, by thereby reinstating the writ of preliminary injunction pending appeal. The Court further took into consideration the importance of the case and the tense situation of the contending parties, at this stage of the proceedings. The Executive Secretary and all other authorities concerned are hereby instructed to abide by this Order, made effective upon receipt hereof, for the maintenance of the status quo."

The First Assistant Solicitor General, in representation of the Acting Executive Secretary, filed an urgent motion for reconsideration dated June 3, 1953, which was denied by Judge Yatco on June 11, 1953. On June 26, 1953, Hon. Marciano Roque, Acting Executive Secretary, through the First Assistant Solicitor General, instituted in this Court the present petition for certiorari with preliminary injunction against Pablo Delgado, Eugenio Zamora, Pio Manalo and Judge Nicasio Yatco of the Court of First Instance of Laguna, for the annulment of the order of June 1, 1953, issued in Civil Case No. 9616.

It is contended for the petitioner that the respondent Judge acted with grave abuse of discretion or in excess or lack of jurisdiction, because when the order restoring the writ of preliminary injunction was issued, there was no pending appeal. It appears, however, that in the petition dated April 23, 1953, filed in Civil Case No. 9616, it was expressly alleged that, in their projected appeal, the petitioners therein would in effect assail the correctness of the decision in said case. Section 4 of Rule 39 provides that "the trial court, however, in its discretion, when an appeal is taken from a judgment granting, dissolving or denying an injunction, may make an order suspending, modifying, restoring, or granting such injunction during the pendency of the appeal, upon such terms as to bond or otherwise as it may consider proper for the security of the rights of the adverse party." Although this provision speaks of an appeal being taken and of the pendency of the appeal, we cannot see any difference, for all practical purposes, between the period when appeal has been taken and the period during which an appeal may be perfected, since in both cases the judgment is not final. As a matter of fact there is authority to the effect that the trial court may restore a preliminary injunction in anticipation of an appeal. (Louisville & N. R. Co. et al. v. United States et al., 227 Fed. 273.)

It is also argued for the petitioner that at the time the order of June 1, 1953, was issued by the respondent Judge, the act sought to be enjoined had already been performed, the cockpit in question having been actually closed on May 24 and 31, 1953. In answer to this argument, it may be recalled that as early as April 23, 1953, the petitioners in Civil Case No. 9616 filed a petition to suspend the decision of March 6, 1953 and to restore the preliminary injunction previously issued, which petition was not resolved until June 1, 1953, with the result that, if there was any closure, it should be deemed to be without prejudice to the action the respondent Judge would take on said petition dated April 23.

Another contention of the petitioner is that the respondent Judge was inconsistent in holding in his decision of March 6, 1953, that the location of the cockpit is in open violation of Executive Order No. 318, and in subsequently restoring the writ of preliminary injunction that would allow the continued operation of said cockpit. It is significant that, under section 4 of Rule 39, the respondent Judge is vested with the discretion to restore the preliminary injunction; and when we consider that the order of June 1, 1953, took into account "the facts and the circumstances surrounding the case," as well as "the importance of the case and the tense situation of the contending parties, at this stage of the proceedings," in addition to the fact that in his order of June 11, 1953, denying the motion for reconsideration filed by the First Assistant Solicitor General on June 3, the respondent Judge expressly stated that he acted "on the basis of the new facts and circumstances registered on record on the date of the hearing" of the petition of April 23 filed by the petitioners in Civil Case No. 9616, we are not prepared to hold that the respondent Judge had acted with grave abuse of discretion. The allegation in the herein petition that the petitioner was not notified of the hearing of the petition of April 23, is now of no moment, since the petitioner, through counsel, had filed a motion for the reconsideration of the order of June 1, 1953.

Another reason, though technical, why the present petition should be dismissed, is that although the petitioner, Hon. Marciano Roque, had ceased to hold the office in virtue of which he instituted the petition, no substitution has been made in accordance with section 18, Rule 3, of the Rules of Court.

Wherefore, the petition is hereby denied, and it is so ordered without costs.

Pablo, Padilla, A. Reyes, Bautista Angelo, Concepcion, Bengzon, Montemayor, Jugo, Labrador and *J. B. L. Reyes, J.J.*, concur.

IV

Federico Magallanes, et al., Petitioners, vs. Honarable Court of Appeals, et al., Respondents, No. L-6851, September 16, 1954, Paras, C.J.

1. PATERNITY AND FILIATION; SUCCESSION; NATURAL CHILDREN NOT LEGALLY ACKNOWLEDGED NOT ENTITLED TO INHERIT. — Natural children not legally acknowledged are not entitled to inherit under article 840 of the old Civil Code.

2. ID.; ID.; ID.; ACTION FOR COMPULSORY RECOGNITION MUST BE BROUGHT WITHIN FOUR YEARS AFTER DEATH OF NATURAL FATHER. — The action for compulsory recognition must be instituted within four years after the death of the natural father.

Vicente Castronuevo, Jr. for petitioner.

Diosdado Caringalao for respondents.

DECISION

PARAS, *C.J.*:

In Civil Case No. 1264 of the Court of First Instance of Iloilo, Maximo Magallanes, et al., plaintiffs vs. Federico Magallanes, et al., defendants, a decision was rendered on May 28, 1951, with the following dispositive part:

> "In view of the foregoing considerations, the Court finds that the preponderance of evidence is that the above properties are of Justo Magallanes and that both plaintiffs and defendants are the legal heirs of Justo Magallanes, therefore, they should share proportionately in the properties in question. Each child of Justo Magallanes from both wives is entitled to 1/7 of the undivided share of the land in question. Inasmuch as the plaintiffs paid ₱220.00 for the mortgages as shown in Exhibits D and C, the other heirs are obliged to reimburse proportionately the said amount of ₱220.00 to the plaintiffs."

Upon appeal by the defendants to the Court of Appeals, the latter Court rendered on April 22, 1953, a decision the dispositive

part of which reads as follows:

> "Wherefore, the decision appealed from is hereby modified in the sense that each of the plaintiffs shall participate in the proportion subject of litigation in the proportion of one-half (1/2) of the share that corresponds to each of the defendants. The latter are further sentenced to pay jointly and severally to plaintiffs said sum of ₱220.00 that they spent for the redemption of the parcels of land under Tax Declarations Nos. 21719 (Exh. D) and 2153 (Exh. G). In the meantime this is not done, the properties mentioned in Exhibits D and G will answer for the payment of this sentence. Without pronouncements as to costs."

Not satisfied with the decision of the Court of Appeals, the defendants have filed the present petition for its review on certiorari.

The findings of fact of the Court of Appeals upon which its decision rests, quoted verbatim, are as follows:

> "(a) That the properties under litigation were not of Damiana Tupin but of her husband, the late Justo Magallanes;
>
> "(b) That plaintiffs Maximo, Gaspar, Baltazar and Bienvenido, surnamed Magallanes, had redeemed from their vendees *a retro* Filomeno Gallo and Soledad Canto (Exh. D) and Jose Capanang (Exh. G) the parcels of land under Tax 21719 and 2153 mentioned in said exhibits and paid for such redemptions the sums of ₱100.00 and ₱120.00, respectively;
>
> "(c) That Enrica Tagaduar, alleged mother of the plaintiffs, did not marry Justo Magallanes in the year 1918 after the death of his first wife Damiana Tupia occurred in 1915. We arrived at this conclusion not only because Justo's sister Aleja Magallanes positively declared 'that until the death of my brother (Justo) he was never married again,' but also because Magallanes himself declared in various documents that he executed in his lifetime and up to 1938, that he was a widower (Exhs. B, C and I), and although it is true that in 1939 his civil status appearing on Exhibit F is that of 'married' (without stating to whom he was married then), it does not follow, even if the statement of such status was not due to a clerical error, that he was precisely married to Enrica Tagaduar who did not pretend that she married him between 1936 and 1938, but in 1918. Plaintiffs-appellees state that according to our jurisprudence:
>
> > 'A man or woman who are living in marital relations, under the same roof, are *presumed* to be legitimate spouses, united by virtue of a legal marriage contract, and this presumption can only be rebutted by sufficient contrary evidence.' (U.S. vs. Uri et al., 34 Phil. 653; U.S. vs. Villafuerte, 4 Phil. 559).
>
> but this doctrine only establishes a presumption that in the case at bar was rebutted by the testimony of Aleja Magallanes and by documents executed by Justo Magallanes himself. In this case it is not a matter of imagining what might have happened to the plaintiffs, as the trial court does without adequate support in the record. Furthermore, and even considering that the plaintiffs are the natural children of Justo Magallanes and that sometime between 1936 and 1939 Justo Magallanes married Enrica Tagaduar, such marriage could not have the effect of automatically legitimizing the children both prior to the marriage, because our Civil Code provides:
>
> > 'Art. 121 Children shall be considered as legitimized by a subsequent marriage *only* when they have been acknowledged by the parents before or after the celebration thereof.'
>
> and the record fails to adequately show that such acknowledgment ever took place.
>
> "(d) That the plaintiffs are the natural children of the late Justo Magallanes by Enrica Tagaduar. The defendants do not deny their status as such and it can be inferred from the records that they enjoyed such status during the lifetime of their deceased father."

Petitioners' main contention is that the Court of Appeals erred in holding that the respondents Maximo, Gaspar, Baltazar and Bienvenido Magallanes, as mere natural children of the deceased Justo Magallanes, without having been legally acknowledged, are entitled to inherit under article 840 of the old Civil Code, which reads as follows:

> "When the testator leaves legitimate children or descendants, and also natural children, legally acknowledged, each of the latter shall be entitled to one-half of the portion pertaining to each of legitimate children who have not received any betterment, provided that it may be included within the freely disposable portion, from which it must be taken, after the burial and funeral expenses have been paid.
>
> "The legitimate children may pay the portion pertaining to the natural ones in cash, or in other property of the estate, at a fair valuation."

Petitioners' contention is tenable. We are bound by the finding of the Court of Appeals in its decision that said respondents are the natural children of Justo Magallanes, that the petitioners do not deny their status as such, and that it can be inferred from the records that they enjoyed such status during the lifetime of their deceased father. Nonetheless, we are also bound by its finding that the record fails to adequately show that said respondents were ever acknowledged as such natural children. Under Article 840 of the old Civil Code, above quoted, the natural children entitled to inherit are those legally acknowledged. In the case of Briz vs. Briz, 45 Phil. 763, the following pronouncement was made: "x x x the actual attainment of the status of a legally recognized natural child is a condition precedent to the realization of any rights which may pertain to such child in the character of heir. In the case before us, assuming that the plaintiff has been in the uninterrupted possession of the status of natural child, she is undoubtedly entitled to enforce legal recognition; but this does not in itself make her a legally recognized natural child." It being a fact, conclusive in this instance, that there was no requisite acknowledgement, the respondents' right to inherit cannot be sustained.

The respondents cannot demand that this suit be considered a complex action for compulsory recognition and partition, under the authority of Briz vs. Briz, *supra*, and Lopez vs. Lapez, 68 Phil. 227, for the reason that the action was not instituted within the four years following the death of the alleged natural father (Art. 137, old Civil Code; Art. 285, New Civil Code). According to the decision of the Court of Appeals, the father, Justo Magallanes, died in 1943, and the present action was instituted seven years later in 1950.

Wherefore, the decision of the Court of Appeals is hereby motified by eliminating therefrom the ruling that the respondents Maximo, Gaspar, Baltazar and Bienvenido Magallanes are entitled to inherit from the deceased Justo Magallanes in the proportion of one half of the share that corresponds to each of the petitioners Federico, Fermin and Angel Magallanes. So ordered without costs.

Pablo, Bengzon, Padilla, Montemayor, A. Reyes, Jugo, Bautista Angelo, Concepcion and *J. B. L. Reyes, JJ.*, concur.

V

Tomas Bagalay, Plaintiff-Appellant, vs. Genaro Ursal, Defendant-Appellee, No. L-6445, July 29, 1954, Padilla, J.

DAMAGES; CLAIM FOR DAMAGES UNDER ARTICLE 27 OF THE CIVIL CODE; PARTY ENTITLED TO DAMAGES ONLY WHEN PUBLIC SERVANT REFUSES OR NEGLECTS TO PERFORM HIS OFFICIAL DUTY WITHOUT CAUSE. — Article 27 of the Civil Code which authorizes the filing of an action for damages contemplates a refusal or neglect without