to the sheriff requiring the plaintiff to post an indemnity bond. The claimants moved for the reconsideration of this order but the same was denied.

On February 9, 1953, to follow up his claim in line with his interest, Juan Planas filed another third party claim with the sheriff requesting the latter to turn over to him all the materials that were dismantled and brought down from the houses that had been demolished, alleging to be the owner thereof, and to require the judgment creditor to put up the necessary indemnity bond for his protection. The sheriff failed to act on this third party claim. Instead, in the afternoon of February 10, 1953, Juan Planas received a copy of an urgent motion to quash said second third party claim filed by counsel for the plaintiff. Juan Planas moved for postponement of the hearing of this motion but his motion was ignored, and on February 11, 1953, the court granted the urgent motion and discarded the second third party claim of Juan Planas.

On February 10, 1953, Juan Planas received a copy of an order of the court issued of February 2, 1953 which directs that certain individuals, including Juan Planas, vacate the land of the plaintiff pursuant to the judgment of the court. On February 17, 1953, these individuals, including Juan Planas, filed a joint petition for the reconsideration of the order of February 2, 1953 but this joint petition was denied. Hence, this petition for certiorari seeking to set aside the orders above adverted to.

The question to be determined is whether the respondent Judge acted with grave abuse of discretion when he ordered the quashing and discarding of the first and second third party claims interposed by petitioners on January 28, 1953, and February 9, 1953, and in ordering petitioner Juan Planas to vacate the land of the plaintiff not being a party to the case of forcible entry and detainer instituted by Madrigal & Co. Inc., against Concepcion L. Planas and Iluminado L. Planas.

The duty of the sheriff in connection with the execution and satisfaction of a judgment of the court is governed by Rule 39 of the Rules of Court. With regard to the proceedings to be followed where the property levied in execution is claimed by a third person, section 15 provides that if such person makes an affidavit of his title thereto or right to the possession thereof, stating the grounds of such right or title, and serves the same upon the officer making the levy, the officer shall not be bound to keep the property unless the judgment creditor, on demand, indemnify the officer against such claim by a bond in a sum not greater than the value of the property levied on. If the third party claim is sufficient, the sheriff, upon receiving it, is not bound to proceed with the levy of the property, unless he is given by the judgment creditor an indemnity bond against the claim (Mangaoang v. The provincial Sheriff, L4869, May 26, 1952). Of course, the sheriff may proceed with the levy even without the indennity bond, but in such case he will answer for any damages with his own personal funds. (Waite v. Peterson, et al., 8 Phil. 449; Alzua, et al. v. Johnson, 21 Phil. 308; Consulta No. 341 de los abogados de Smith, Bell & Co., 48 Phil. 565.) And the rule also provides that nothing therein contained shall prevent a third person from vindicating his claim to the property by any proper action (Section 15, Rule 39).

In the present case, the provincial sheriff departed from the regular procedure prescribed by the rules. He chose to proceed with the levy even without the indemnity bond in view of the urgent motion to quash filed by the judgment creditor in the main case. It should be remembered that the court, after proper hearing, wherein the parties were allowed to submit documentary evidence, found the third party claims to be without merit and ordered that they be discarded and quashed. Indeed, the court found that Juan Planas, the third party claimant, is the son of defendants Concepcion L. Planas and Illuminado L. Planas, and a stockholder of a firm of which Concepcion L. Planas was the principal stockholder. It also found that since the filing of the ejectment case against the spouses Planas up to December 29, 1952, the four houses claimed by Juan Planas were registered in the name of his mother, Concepcion L. Planas, in the assessment rolls of Pasay City, and that it was only on said date that said assessments were transferred to Juan Planas. On the other hand, the answer submitted by spouses Planas in the ejectment case contains a clear averment that the four houses now in dispute were contradicted and were the property of said spouses. Likewise, the letter of Atty. Arcadio Ejercito, counsel of Concepcion L. Planas, sent to the provincial sheriff in connection with the demolition of the four buildings in question, contains an averment which indicates that said buildings belonged to said defendant. This circumstantial evidence must have engendered in the mind of the court the conviction that the claim of ownership put up by Juan Planas at so late an hour is but an eleventh hour attempt to thwart and frustrate the execution of the judgment rendered in the ejectment case.

We hold that the action taken by the respondent Judge on this matter is justified. At any rate, the right of Juan Planas to the property is not completely lost, for the rule reserves to him the right to vindicate his claim in a proper action (Section 15, Rule 39). This he did by bringing an action in court asserting his ownership over the property. This action is still pending and will be decided in due time (Civil Case No. 1961).

Anent the order of respondent Judge dated February 2, 1953 which directs that Jose Isla, Carlos Neri, Jose T. Josue, Juan Planas and the San Miguel Brewery, Inc. vacate the land of plaintiff pursuant to the judgment of the court in the ejectment case, which order is now attacked as illegal because they were not parties to that case, the record shows that, before issuing said order, the court conducted a summary hearing to determine the nature of the possession of the property claimed by Juan Planas and other occupants, and that at that hearing respondent Judge summoned all of them to appear to show cause why they should not be ejected from the premises. And after the hearing was over respondent Judge found that Juan Planas and the other occupants were mere transferees or possessors *pendente lite* of the property in question. Respondent Judge found that if they had any right at all to occupy the property, that right is merely subsidiary to that of defendant Concepcion L. Planas. As such, they are bound by the judgment rendered against the latter in consonance with the doctrine laid down in the cases of Brodett v. De la Rosa, 44 O. G., No. 3, pp. 874-875, and Gozon v. De la Rosa, 44 O. G., pp. 1227-1228. Of course, these are questions of fact as to which there may be controversy, but the proper place where this should be threshed out is not in this proceedings, but in an ordinary action. For the present, we are satisfied that the respondent Judge has acted on the matter in the exercise of his sound discretion.

Wherefore, the petition is dismissed, with costs.

Parás, Pablo, Benzon, Montemayor, Reyes, Jugo, Labrador, and Diokno, J.J., concur.

Justice Concepcion concurred in the result.

XIX

The People of the Philippines, Plaintiff-Appellant, vs. Lee Diet, accused, Rizal Surety and Insurance Company, Bondsman-Appellee, G. R. No. L-5256, November 27, 1953, *Bautista Angelo, J.*

CRIMINAL PROCEDURE; BAIL; DISCHARGE OF SURETIES; CASE AT BAR.—R company was the defendant's surety. On the day of the preliminary investigation of the case, the defendant failed to appear. Counsel for the accused appeared and informed the court for the first time that

the whereabouts of the accused was not known due to the fact that he escaped three days before while under the custody of the Philippine Constbaulary. It appears that the accused while out on bail was rearrested on June 8, 1951, by some agents of the constabulary, but during his detention he escaped. For his failure to appear, the Justice of the Peace declared the bond forfeited and required the surety to produce the body of the accused within thirty days with notice and to show cause why judgment should not be rendered against it for the amount of the bond. Two days later, however, the Justice of the Peace reconsidered his order and remanded the case to the Court of First Instance of Cotabato. On August 2, 1951, on the day of the arraignment, the accused again failed to appear, whereupon the provincail fiscal moved for the confiscation of the bond posted by him for his personal liberty. *Held*: It is true that a surety may also be discharged from the non-performance of the bond when its performance "is rendered impossible by the act of God, the act of the obligee, or the act of the law" (U.S. v. Sunico, 40 Phil., 826-832), but even in these cases there still remains the duty of the surety to inform the court of the happening of the event so that it may take appropriate action and decree the discharge of the surety (Section 16, Rule 110). Here no such steps was taken by the surety when the accused was re-arrested by the constabulary authorities. The surety kept silent since it did not take any of the steps pointed out by law if it wanted to be relieved from its liability under the bond. It only gave notice to the court of that fact when the court ordered the appearance of the accused either for arraignment or for trial. It 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.

IBID.; IBID.; WHEN SUBSEQUENT ARREST OF PRINCIPAL DOES NOT OPERATE AS A DISCHARGE OF HIS SURETIES.—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.)

First Assistant Solicitor General Ruperto Kapunan, Jr. and *Solicitor Meliton G. Soliman* for appellant.

Padilla, Carlos & Fernando for appellee.

DECISION

BAUTISTA ANGELO, *J.*:

On May 25, 1951, Lee Diet was charged before the Justice of the Peace Court of Cotabato, Cotabato, with the crime of uttering false U.S. gold coins in connivance with some counterfeiters. On the same date, the Justice of the Peace issued a warrant for his arrest and fixed the bail bond for his provisional liberty at ₱12,000. Thereupon, the bond was put up by the Rizal Surety & Insurance Company and the accused was released.

The Justice of the Peace set the preliminary investigation of the case for June 14, 1951. On this date the accused failed to appear. Counsel for the surety however appeared and informed the court that the whereabouts of the accused was not known due to the fact that he escaped three days before while under the custody of the Philippine constabulary. It appears that the accused while out on bail was re-arrested on June 8, 1951, by some agents of the constabulary for questioning regarding his alleged subversive activities, but during his detention he escaped. For his failure to appear, the Justice of the Peace declared the bond forfeited and required the surety to produce the body of the accused within 30 days from notice and to show cause why judgment should not be rendered against it for the amount of the bond. Two days later, however, the Justcie of the Peace reconsidered his order and remanded the case to the Court of First Instance of Cotabato.

On July 2, 1951, the Provincial Fiscal filed the corresponding information against the accused. The arraignment and trial of the accused were set for August 2, 1951, but on said date the accused again failed to appear, whereupon the Provincial Fiscal moved for the confiscation of the bond posted by him for his provisional liberty. Counsel for the surety objected giving as reason for the non-appearance of the accused the same reason given by him before the Justice of the Peace Court of Cotabato. The court denied the motion holding in substance that the reason given by counsel for the surety for the non-appearance of the accused was satisfactory and had the effect of relieving it from its liability under the bond. Hence this appeal.

The only question to be determined is whether, while the accused was out on bail, was picked up by the constabulary authorities in the province for questioning in connection with subversive activities, and thereafter escaped from their custody, will excuse the surety, the Rizal Surety & Insurance Company, from the non-performance of its obligation under the bond.

It is a well-settled doctrine that a surety is the jailer of the accused. "He takes charge of, and absolutely becomes responsible for the latter's custody, and under such circumstance, it is incumbent upon him, or rather, it is his inevitable obligation, not merely a right, to keep the accused at all times under his surveillance in as much as the authority emanating from his character as surety is no more nor less than the Government's authority to hold the said accused under preventive imprisonment." (People v. Tuising, 61 Phil. 404.)

When the surety in this case put up the bond for the provisional liberty of the accused it became his jailer and as such was at all times charged with the duty to keep him under its surveillance. This duty continues until the bond is cancelled, or the surety is discharged. The procedure for the discharge of a surety is clear in the Rules of Court. Thus, it is there provided that the bail bond shall be cancelled and the sureties discharged of libaility (a) where the sureties so request upon surrender of the defendant to the court; (b) where the defendant is re-arrested or ordered into custody on the same charge or for the same offense; (c) where the defendant is discharged by the court at any stage of the proceedings, or acquitted, or is convicted and surrendered to serve the sentence; and (d) where the defendant dies during the pendency of the action. (Section 16, Rule 110.)

It is true that a surety may also be discharged from the non-performance of the bond when its performance "is rendered impossible by the act of God, the act of the obligee, or the act of the law" (U.S. v. Sunico, 40 Phil., 826-832), but even in these cases there still remains the duty of the surety to inform the court of the happening of the event so that it may take appropriate action and decree the discharge of the surety (Section 16, Rule 110). Here no such steps was taken by the surety when the accused was re-arrested by the constabulary authorities. The surety kept silent since it did not take any of the steps pointed out by law if it wanted to be relieved from its liability under the bond. It only gave notice to the court of that fact when the court ordered the appearance of the accused either for arraignment or for trial. It

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-