to Policarpio Bayore in the year 1930, and that the latter is alive and the marriage still subsisting. May this counterclaim be decided by the summary judgment proceedings? Our answer must be in the negative, first, because an action to annul marriage is not an action to "recover upon a claim" or "to obtain a declaratory relief," and, second, because it is the avowed policy of the State to prohibit annulment of marriages by summary proceedings. An action "to recover upon a claim" means an action to recover a debt or liquidated demand for money. This is the restricted application of the rule in jurisdictions where the proceeding has been adopted. In Virginia this proceeding is limited to actions "to recover money"; in Connecticut, New Jersey, and New York, to recover a debt or liquidated demand; in Michigan, for an amount arising out of contract, judgment, or statute; in Columbia, to recover sums of money arising *ex contractu;* in Illinois, for the payment of money; in Delaware, to sums for the payment of money, or recovery of book accounts, or foreign judgments; and in England, in actions upon bills and promissory notes, etc. (Yale Law Journal, Vol. 38, p. 423.) In federal courts the proceeding has been used in patent, copyright, and trade mark cases, and in cases arising upon statutes or undisputed contracts or instruments. (See cases cited in I Moran 719-726, rev. 1952 ed.)

The fundamental policy of the State, which is predominantly Catholic and considers marriage as indissoluble (there is no divorce under the Civil Code of the Philippines), is to be cautious and strict in granting annulment of marriages (Articles 68 and 101, Civil Code of the Philippines). Pursuant to this policy, the Rules of Court expressly prohibits annulment of marriages without actual trial (Section 10, Rule 35). The mere fact that no genuine issue was presented, and we desire to expedite the dispatch of the case, can not justify a misinterpretation of the rule we have adopted or a violation of the avowed policy of the State.

We find that the trial court committed an error in annulling the marriage of plaintiff to defendant in a summary judgment proceeding without the formality of a trial. The trial court's error is not, however, limited to this. In spite of the fact that a genuine issue of fact was raised by plaintiff's pretense that she entered the marriage in good faith, this issue was ignored and the court declared her rights to properties obtained during the marriage forfeited, and the custody of one of the children denied to her. These constitute an abuse of judicial discretion amounting to excess of jurisdiction, properly the subject of a proceeding by certiorari.

The judgment entered in the case is hereby annulled, and the lower court ordered to proceed in the case according to the Rules.

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

XVI

Nicanor Padilla, Plaintiff-Appellee, vs. Andres De Jesus, Pablo De Jesus. Josefa De Jesus, Doroteo Celis, Jr., Natividad De Jesus, Romeo Morales and Manuel De Jesus, Defendants-Apellants, No. L-6008, August 31, 1954, *Bautista Angelo, J.*

EJECTMENT; JURISDICTION; EXISTENCE OF ANOTHER ACTION TO ANNUL MORTGAGE OF THE PROPERTY DOES NOT DEPRIVE THE MUNICIPAL COURT TO TRY CASE OF EJECTMENT.—The circumstance that there is pending in the court of first instance a case in which defendants are seeking the annulment of the deed of mortgage of the property in question, executed by their father without their knowledge and consent, cannot and does not deprive the municipal court of its jurisdiction to try the ejectment case filed against them by the plaintiff, in the light of the fact averred in the complaint for ejectment, and supported by evidence, that plaintiff is the exclusive owner of the property in question, having purchased it at an auction sale in 1948.

Macario Guevarra for defendants and appellants.

Padilla, Carlos & Fernando for plantiff and appellee.

DECISION

BAUTISTA ANGELO, *J.:*

On August 24, 1950, plaintiff filed an action for ejectment in the Municipal Court of Manila against defendants to recover the possession of a parcel of land located at Paco, Manila.

On September 7, 1950, defendants filed a motion to dismiss on the grounds, (1) that there is another case pending in the Court of First Instance of Manila between the same parties and over the same subject-matter; (3) that the claim sought by plaintiff has been condoned; and (3) that the court has no jurisdiction over the subject-matter of the action. Plaintiff filed an opposition to this motion but the same was denied.

On November 27, 1950, defendants filed their answer setting up certain special defenses and a counterclaim. Plaintiff filed a motion to dismiss the counterclaim, to which defendants filed a written opposition. After the reception of the evidence, the court rendered judgment ordering the defendants to vacate the property involved and to pay the plaintiff a monthly rental of ₱100 from October, 1949 up to the time the defendants shall have vacated the property, and the costs of action.

On June 2, 1951, defendants filed a motion for reconsideration and the same having been denied, they brought the case on appeal to the Court of First Instance where they filed another motion to dismiss based on the same grounds set forth in the municipal court. This motion was also denied for lack of merit.

On August 14, 1951, defendants filed their answer wherein they reiterated the same special defenses and counterclaim they set up in the municipal court. Plaintiff moved to dismiss the counterclaim, and this motion was granted.

When the case was called for hearing on March 14, 1932, defendants moved for postponement on the ground that their principal witness could not be present. Counsel for the plaintiff objected to the postponement. However, the parties agreed to hear the testimony of one L. G. Marquez, an expert witness for the plaintiff, who testified and was cross-examined by counsel for the defendants. Thereafter, upon agreement of the parties, the continuation of the hearing was set for March 24, 1952.

When the case was called for the continuation of the hearing on said date, neither the defendants, nor their counsel, appeared, whereupon the court allowed the plaintiff to present his evidence, and on March 15, 1952, it rendered decision ordering defendants to vacate the property and to pay a monthly rental of ₱200 from October, 1940 until the time they shall have actually surrendered the property, with costs.

On April 14, 1952, defendants filed a motion for reconsideration and new trial, accompanied by affidavits of merits, on the ground that their failure to appear on March 24, 1952 was due to "mistake and excusable negligence" as provided for in Section 1 (a), Rule 37, of the Rules of Court. And when this motion was denied, defendants took the case directly to this Court imputing three errors to the lower court.

Defendants contend that the municipal court has no jurisdiction to entertain the case because, in their answer, they averred that, long before the filing of the present cast of ejectment, they had filed against the plaintiff in the Court of First Instance of Manila a case in which they seek the annulment of the deed of mortgage executed by Roman de Jesus, their father, without their knowledge and consent, on a property which belonged to the spouses Roman de Jesus and Maria Angeles, and that, inasmuch as the annulment case, wherein the ownership of the property is in issue, is still pending determination, the municipal court has no jurisdiction over the ejectment case upon the theory that the same cannot be determined without first pausing upon the question of ownership of the property.

This contention cannot be sustained in the light of the facts averred in the complaint which appear supported by the evidence submitted by the plaintiff. These facts show that the plaintiff is the exclusive owner of the property in question having purchased it at the auction sale carried out by the sheriff sometime in October, 1948, and that because of the failure of the mortgagor, or his successors in interest, to redeem it within the period of redemption, the Register of Deeds of Manila issued Transfer Certificate of Title No. 23590 in favor of the plaintiff. The facts also show that after plaintiff had become the owner of the property he found the defendants occupying it without having entered into a contract of lease with him, or having made any arrangement for its occupancy, or without paying any rental therefor, and for this reason, he filed this ejectment case against them before the municipal court. These facts clearly show that this case comes within the jurisdiction of the municipal court. The circumstance that there is pending in the court of first instance a case in which defendants are claiming one-half of the property as heirs of the deceased wife of the mortgagor cannot and does not deprive the municipal court of its jurisdiction. The most that could be done in the light of the present situation is to suspend the trial of the ejectment case pending final determination of the annulment case, but the pendency of the latter cannot have the effect of removing the former from the jurisdiction of the municipal court.

This case may be likened to that of Fulgencio v. Natividad, 45 O. G. No. 9, 3794, decided on February 14, 1948, in which petitioner pleaded that, before the complaint for detainer was filed against him, he had brought an action in the proper court to compel the respondents to resell to him the lot and the house erected thereon upon payment of the purchase price, and, therefore, the case does not come within the jurisdiction of the municipal court. In overruling this plea, this Court said: "Granting that petitioner has the right to repurchase the property, he cannot invoke it until after the competent court shall have rendered judgment as prayed for by him. Hence the allegation in the detainer case that he had brought an action in the proper court to compel the resale to him of the lot and the house erected thereon, did not raise the question of title to the property and for that reason did not remove the case from the jurisdiction of the municipal court. As already stated, the plea of another pending action to compel the resale to the petitioner of the property involved in the detainer case is an admission that the title thereto is not vested in him. Such being the case, the municipal court had jurisdiction to try and decide the detainer case."

A different consideration, however, should be made in connection with the second issue to the effect that the lower court erred in denying the motion for reconsideration of the defendants notwithstanding the explanation given by them of their failure to appear at the continuation of the trial and the affidavits of merit attached to the motion showing unmistakably that such failure was due to "mistake and excusable negligence" and not for purposes of delay.

It should be recalled that when this case was called for hearing on March 14, 1952, counsel for defendants moved for postponement on the ground that their principal witness was sick and could not appear. Counsel for the plaintiff objected to the postponement. However, the parties agreed to hear the testimony of one L. G. Marquez, a witness for the plaintiff, who testified and was cross-examined by counsel for defendants. Thereafter, upon agreement of the parties, the continuation of the hearing was set for March 24, 1952. And when the case was called for continuation on that date, neither defendants, nor their counsel, appeared. Nevertheless, the court allowed the plaintiff to present his evidence, and thereafter rendered decision accordingly. But when, days after, defendants filed a motion for reconsideration explaining that their failure to appear was due to "mistake and excusable negligence" of their counsel, supporting their claim with the requisite affidavits of merit, the court curtly denied the motion.

We believe that, in the light of the circumstances of the case, the court did not act properly when it denied said motion for reconsideration considering the explanation given by defendants and their counsel in their affidavits of merit. This is what counsel says in his affidavit: "That upon motion of the undersigned affiant, the Honorable Judge Higinio Macadaeg postponed the hearing of said case on March 24, 1952, but the undersigned affiant in noting the date of the postponement on his diary or memorandum, committed an honest mistake by noting it down opposite March 25, 1952, instead of March 24, 1952, consequently he was not able to appear in court on the proper date, and so with the defendants, as they were of the belief that the hearing was on March 25, 1952 and not on March 24, 1952." And these facts also appear in the affidavits subscribed to by the defendants.

These facts, which are not contradicted, constitute in our opinion a proper ground for a new trial under Section 1 (a), Rule 37, for, no doubt, they contsitute "mistake or excusable negligence which ordinary prudence could not have guarded against and by reason of which such aggrieved party has probably been impaired in his rights." This is more so considering that, according to the answer, defendants have a meritorious defense.

Wherefore, the decision appealed from is reversed. It is ordered that this case be remanded to the lower court for a new trial with the understanding that the new trial should await the final termination of the annulment case pending in the Court of First Instance of Manila (Civil Case No. 11267), without pronouncement as to costs.

Paras, Bengzon, Montemayor, Jugo and Pablo, J.J., concur.

Concepcion and Padilla, J.J., took no part.

LABRADOR, J., dissenting:

I dissent.

The land subject of the action appears to have been conjugal property of the deceased Roman de Jesus and his wife, whose successors in interest are the defendants-appellants. The deceased Roman de Jesus mortgaged the property to plaintiff-appellee, it is true, but the mortgage affected only his undivided one-half share in the property. The action by the defendants-appellants to annul the mortgage over their undivided one-half share necessarily involved both title to the property and the right to the possession thereof. The present action of plaintiff-appellee really and actually, under the circumstances, involves or should involve both the title and the right to possession. The action by the defendants-appellants to annul the mortgage over their share bars the present action, therefore. And as the issue really involved is title, the municipal court which entertain-

ed the action of unlawful detainer has no jurisdiction. The action should, therefore, be dismissed on two grounds, lack of jurisdiction and pendency of another action between the same parties over the same cause. Nothing can be gained by the continuation of the case in the court below.

XVII

In re: Will and Testament of the deceased Reverend Sancho Abadia. Severina A. Vda. De Enriquez, et al., Petitioners-Appellees, vs. Miguel Abadia, et al., Oppositiors-Appellants, No. L-7188, August 9, 1954, Montemayor, J.

1. WILLS; PROBATE OF WILL; VALIDITY OF WILL AS TO FORM DEPENDS UPON LAW IN FORCE AT TIME OF EXECUTION; TITLE OF LEGATEES AND DEVISEES UNDER WILL VESTS FROM TIME OF EXECUTION. — The validity of a will as to form is to be judged not by the law in force at the time of the testator's death or at the time the supposed will is presented in court for probate or when the petition is decided by the court but at the time the instrument was executed. One reason in support of the rule is that although the will operates upon and after the death of the testator, the wishes of the testator about the disposition of his estate among his heirs and among the legatees is given solemn expression at the time the will is executed, and in reality, the legacy or bequest then becomes a completed act.

2. ID.; EXECUTION OF WILLS; LAW SUBSEQUENTLY PASSED, ADDING NEW REQUIREMENTS AS TO EXECUTION OF WILLS; FAILURE TO OBSERVE FORMAL REQUIREMENTS AT TIME OF EXECUTION INVALIDATES WILL; HEIRS INHERIT BY INTESTATE SUCCESSION; LEGISLATURE CAN NOT VALIDATE VOID WILLS. — From the day of the death of the testator, if he leaves a will, the title of the legatees and devisees under it becomes a vested right, protected under the due process clause of the Constitution against a subsequent change in the statute adding new legal requirements of execution of wills, which would invalidate such will. By parity of reasoning, when one executes a will which is invalid for failure to observe and follow the legal requirements at the time of its execution then upon his death he should be regarded and declared as having died intestate, and his heirs will then inherit by intestate succession, and no subsequent law with more liberal requirements or which dispenses with such requirements as to execution should be allowed to validate a defective will and thereby divest the heirs of their vested rights in the estate by intestate succession. The general rule is that the Legislature can not validate void wills (57 Am. Jur., Wills, Sec. 231, pp. 192-193).

Manuel A. Zosa, Luis B. Ladonga, Mariano A. Zosa and *B. G. Advincula* for Oppositors and Appellants.

C. de la Victoria for Petitioners and Appellees.

DECISION

MONTEMAYOR, *J.*:

On September 6, 1923, Father SANCHO ABADIA, parish priest of Talisay, Cebu, executed a document purporting to be his Last Will and Testament now marked Exhibit "A". Resident of the City of Cebu, he died on January 14, 1943, in the municipality of Aloguinsan, Cebu, where he was an evacue. He left properties estimated at P8,000 in value. On October 2, 1946, one Andres Enriquez, one of the legatees in Exhibit "A", filed a petition for its probate in the Court of First Instance of Cebu. Some cousins and nephews who would inherit the estate of the deceased if he left no will, filed opposition.

During the hearing one of the attesting witnesses, the other two being dead, testified without contradiction that in his presence and in the presence of his two co-witnesses, Father Sancho wrote out in longhand Exhibit "A" in Spanish which the testator spoke and understood; that he (testator) signed on the left hand margin of the front page of each of the three folios or sheets of which the document is composed, and numbered the same with Arabic numerals, and finally signed his name at the end of his writing at the last page, all this, in the presence of the three attesting witnesses after telling that it was his last will and that the said three witnesses signed their names on the last page after the attestation clause in his presence and in the presence of each other. The oppositors did not submit any evidence.

The learned trial court found and declared Exhibit "A" to be a holographic will; that it was in the handwriting of the testator and that although at the time it was executed and at the time of the testator's death, holographic wills were not permitted by law still, because at the time of the hearing and when the case was to be decided the new Civil Code was already in force, which Code permitted the execution of holographic wills, under a liberal view, and to carry out the intention of the testator which according to the trial court is the controlling factor and may override any defect in form, said trial court by order dated January 24, 1952, admitted to probate Exhibit "A", as the Last Will and Testament of Father Sancho Abadia. The oppositors are appealing from that decision; and because only questions of law are involved in the appeal, the case was certified to us by the Court of Appeals.

The new Civil Code (Republic Act No. 386) under Art. 810 thereof provides that a person may execute a holographic will which must be entirely written, dated and signed by the testator himself and need not be witnessed. It is a fact, however, that at the time that Exhibit "A" was executed in 1923 and at the time that Father Abadia died in 1943, holographic will were not permitted, and the law at the time imposed certain requirements for the execution of wills, such as numbering correlatively each page (not folio or sheet) in letters and signing on the left hand margin by the testator and by the three attesting witnesses, requirements which were not complied with in Exhibit "A" because the back pages of the first two folios of the will were not signed by any one, not even by the testator and were not numbered, and as to the three front pages, they were signed only by the testator.

Interpreting and applying this requirement this Court in the case of In re Estate of Saguinsin, 41 Phil. 875, 879, referring to the failure of the testator and his witnesses to sign on the left hand margin of every page, said:

> "x x x. This defect is radical and totally vitiates the testament. It is not enough that the signatures guaranteeing authenticity should appear upon two folios or leaves; three pages having been written on, the authenticity of all three of them should be guaranteed by the signature of the alleged testatrix and her witnesses."

And in the case of Aspe v. Prieto, 46 Phil. 700, referring to the same requirement, this Court declared:

> "From an examination of the document in question, it appears that the left margins of the six pages of the document are signed only by Ventura Prieto. The noncompliance with section 2 of Act No. 2645 by the attesting witnesses who omitted to sign with the testator at the left margin of each of the five pages of the document alleged to be the will of Ventura Prieto, is a fatal defect that constitutes an obstacle to its probate."

What is the law to apply to the probate of Exh. "A"? May we apply the provisions of the new Civil Code which now allows holographic wills, like Exhibit "A" which provisions were invoked by the appellee-petitioner and applied by the lower court? But