47 Phil. 464

[G.R. No. 22825. February 14, 1925]

TESTATE ESTATE OF LAZARO MOTA, DECEASED, ET AL., PLAINTIFFS AND APPELLANTS, VS. SALVADOR SERRA, DEFENDANT AND APPELLEE.

D E C I S I O N

VILLAMOR, J.:

On February 1, 1919, plaintiffs and defendant entered into a contract of partnership, marked Exhibit A, for the construction and exploitation of a railroad line from the "San Isidro" and "Palma" centrals to the place known as "Nandong." The original capital stipulated was P150,000. It was covenanted that the parties should pay this amount in equal parts and the plaintiffs were entrusted with the administration of the partnership. The agreed capital of P150,000, however, did not prove sufficient, as the expenses up to May 15, 1920, had reached the amount of P226,092.92, as per statement Exhibit B, presented by the administrator and O. K.'d by the defendant.

January 29, 1920, the defendant entered into a contract of sale with Venancio Concepcion, Phil. C. Whitaker, and Eusebio R. de Luzuriaga, whereby he sold to the latter the estate and central known as "Palma" with its running business, as well as all the improvements, machineries and buildings, real and personal properties, rights, choses in action and interests, including the sugar plantation of the harvest year of 1920 to 1921, covering all the property of the vendor. This contract was executed before a notary public of Iloilo and is evidenced by Exhibit 1 of the defendant, paragraph 5 of which reads as follows:

> "5.
> The party of the first part hereby states that he has entered into a contract with the owners of the 'San Isidro' Central for the construction, operation, and exploitation of a railroad line of about 10 kilometers extending from the 'Palma' Central and 'San Isidro' Central to a point known as 'Nandong,' the expenses until the termination of which shall be for the account of the 'San Isidro' Central, and of which expenses, one-half shall be borne by the 'Palma' Central with the obligation to reimburse same within five (5) years with interest at the rate of 10 per cent per annum to the said 'San Isidro' Central. *The vendee hereby obligates himself to respect the aforesaid contract and all obligations arising therefrom.*"

Before the delivery to the purchasers of the *hacienda* thus sold, Eusebio R. de Luzuriaga renounced all his rights under the contract of January 29, 1920, in favor of Messrs. Venancio Concepcion and Phil. C. Whitaker. This gave rise to the fact that on July 17, 1920, Venancio Concepcion and Phil. C. Whitaker and the herein defendant executed before Mr. Antonio Sanz, a notary public in and for the City of Manila, another deed of absolute sale of the said "Palma" Estate for the amount of P1,695,961.90, of which the vendor received at the time of executing the deed the amount of P945,861.90, and the balance was payable by installments in the form and manner stipulated in the contract. The purchasers guaranteed the unpaid balance of the purchase price by a first and special mortgage in favor of the vendor upon the *hacienda* and the central with all the improvements, buildings, machineries, and appurtenances then existing on the said *hacienda*.

Clause 6 of the deed of July 17, 1920, contains the following stipulations:

> "6.
> Messrs. Phil. C. Whitaker and Venancio Concepcion hereby state that they are aware of the contract that Mr. Salvador Serra has with the proprietors of the 'San Isidro' Central for the operation and exploitation of a railroad line about 10 kilometers long from the

> 'Palma' and 'San Isidro' centrals to the place known as 'Nandong;' and hereby obligate themselves to respect the said contract and subrogate themselves into the rights and obligations thereunder. They also bind themselves to comply with all the contracts heretofore entered by the vendor with the customers, coparceners on shares and employees."

Afterwards, on January 8, 1921, Venancio Concepcion and Phil. C. Whitaker bought from the plaintiffs the one-half of the railroad line pertaining to the latter, executing therefor the document Exhibit 5. The price of this sale was P237,722,15, excluding any amount which the defendant might be owing to the plaintiffs. Of the purchase price, Venancio Concepcion and Phil. C. Whitaker paid the sum of P47,544.43 only. In the deed Exhibit 5, the plaintiffs and Concepcion and Whitaker agreed, among other things, that the partnership "Palma" and "San Isidro," formed by the agreement of February 1, 1919, between Serra, Lazaro Mota, now deceased, and Juan J. Vidaurrazaga for himself and in behalf of his brothers, Felix and Dionisio Vidaurrazaga, should be dissolved upon the execution of this contract, and that the said partnership agreement should be totally cancelled and of no force and effect whatever.

So it results that the "Hacienda Palma," with the entire railroad, the subject-matter of the contract of partnership between plaintiffs and defendant, became the property of Whitaker and Concepcion. Phil. C. Whitaker and Venancio Concepcion having failed to pay to the defendant a part of the purchase price, that is, P750,000, the vendor, the herein defendant, foreclosed the mortgage upon the said *hacienda*, which was adjudicated to him at the public sale held by the sheriff for the amount of P500,000, and the defendant put in possession thereof, including what was planted at the time, together with all the improvements made by Messrs. Phil. C. Whitaker and Venancio Concepcion.

Since the defendant Salvador Serra failed to pay one-half of the amount expended by the plaintiffs upon the construction of the railroad line, that is,

P113,046.46, as well as Phil. C. Whitaker and Venancio Concepcion, the plaintiffs instituted the present action praying: (1) That the deed of February 1,1919, be declared valid and binding; (2) that after the execution of the said document the defendant improved economically so as to be able to pay the plaintiffs the amount owed, but that he refused to pay either in part or in whole the said amount notwithstanding the several demands made on him for the purpose; and (3) that the defendant be sentenced to pay the plaintiffs the aforesaid sum of P113,046.46, with the stipulated interest at 10 per cent per annum beginning June 4, 1920, until full payment thereof, with the costs of the present action.

Defendant set up three special defenses: (1) The novation of the contract by the substitution of the debtor with the conformity of the creditors; (2) the confusion of the rights of the creditor and debtor; and (3) the extinguishment of the contract, Exhibit A.

The court *a quo* in its decision held that there was a novation of the contract by the substitution of the debtor, and therefore absolved the defendant from the complaint with costs against the plaintiffs. With regard to the prayer that the said contract be declared valid and binding, the court held that there was no way of reviving the contract which the parties themselves in interest had spontaneously and voluntarily extinguished. (Exhibit 5.)

Plaintiffs have appealed from this judgment and as causes for the review, they allege that the trial court erred: (*a*) In holding that Messrs. Whitaker and Concepcion, upon purchasing the "Palma" Central, were subrogated in the place of the defendant in all his rights and obligations under the contract relating to the railroad line existing between the "Palma" and the "San Isidro" centrals and that the plaintiffs agreed to this subrogation; (*b*) in holding that the deed Exhibit A of February 1, 1919, had been extinguished in its entirety and made null and void by the agreement Exhibit 5 dated December 16, 1920; (*c*) in absolving the defendant from the complaint and in sentencing the

plaintiffs to pay the costs; and (*d*)
in not sentencing the defendant to pay the plaintiffs the sum of P118,046.46, with legal interest at 10 per cent per annum from June 4, 1920, until full payment, with costs against the defendant.

Taking for granted that the defendant was under obligation to pay the plaintiffs one-half of the cost of the construction of the railroad line in question, by virtue of the contract of partnership Exhibit A, the decisive point here to determine is whether there was a novation of the contract by the substitution of the debtor with the consent of the creditor, as required by article 1205 of the Civil Code. If so, it is clear that the obligation of the defendant was, in accordance with article 1156 of the same code, extinguished.

It should be
noted that in order to give novation its legal effect, the law requires that the creditor should consent to the substitution of a new debtor. This consent must be given expressly for the reason that, since novation extinguishes the personality of the first debtor who is to be substituted by a new one, it implies on the part of the creditor a waiver of the right that he had before the novation, which waiver must be express under the principle that *renuntiatio non praesumitur*, recognized by the law in declaring that a waiver of right may not be performed unless the will to waive is indisputably shown by him who holds the right.

The fact that Phil. C. Whitaker and
Venancio Concepcion were willing to assume the defendant's obligation to the plaintiffs is of no avail, if the latter have not expressly consented to the substitution of the first debtor. Neither can the letter, Exhibit 6, on page 87 of the record be considered as proof of the consent of the plaintiffs to the substitution of the debtor, because that exhibit is a letter written by plaintiffs to Phil. C. Whitaker and Venancio Concepcion for the very reason that the defendant had told them (plaintiffs) that after the sale of the "Hacienda Palma" to Messrs. Phil. C. Whitaker and Venancio Concepcion, the latter from then on would bear the cost of the repairs and maintenance of the

railroad line and of the construction of whatever addition thereto might be necessary. So the plaintiffs by their letter of August 14th, submitted a statement of account to Phil. C. Whitaker and Venancio Concepcion containing the accounts of the "San Isidro" Central, as stated June 30, 1920, saying that they had already explained previously the reason for the increase in the expenses and since the retiring partner, Mr. Serra, had already given his conformity with the accounts, as stated May 15,1920, it remained only to hear the conformity of the new purchasers for the accounts covering the period from May 15 to June 30,1920, and their authority for future investments, or their objection, if any, to the amounts previously expended. Neither can the testimony of Julio Infante in connection with Exhibit 7 be taken as evidence of the consent of the plaintiffs to the change of the person of the debtor for that of Messrs. Phil. C. Whitaker and Venancio Concepcion. This witness testified, in substance, that he is acquainted with the partnership formed by the owners of the "Hacienda Palma" and "Hacienda San Isidro" for the construction of the railroad line; that the cost of the construction thereof was originally estimated at P150,000; that the owner of the "Hacienda Palma" would pay one-half of this amount; that when the "Hacienda Palma" was sold to Messrs. Phil. C. Whitaker and Venancio Concepcion, the latter agreed to pay one-half of the cost of P150,000; that as the cost of construction exceeded P200,000, he, as an employee of Messrs. Phil. C. Whitaker and Venancio Concepcion, could not O. K. the accounts as presented by the plaintiffs, and suggested that they take up in writing their points of view directly with Messrs. Phil. C. Whitaker and Venancio Concepcion. Then the plaintiffs did as suggested, and wrote the letter Exhibit 7 in which they asked the new owners of the "Hacienda Palma" their decision upon the following three questions: 1. Will the "Palma" Central accept the statement of account as presented by the "San Isidro" Central regarding the actual cost of the railroad line "Palma-San Isidro-Nandong? " 2. Is the "Palma" Central willing to continue as co-proprietor of the railroad line for the exploitation of the sugar-cane business of "Nandong" and neighboring barrios, and therefore to pay 50 per cent of the expenses that may be incurred in completing the line?

It was but natural that the plaintiffs should have done this. Defendant transferred his hacienda to Messrs. Phil. C. Whitaker and Venancio Concepcion and made it known to the plaintiffs that the new owners would hold themselves liable for the cost of constructing the said railroad line. Plaintiffs could not prevent the defendant from selling to Phil. C. Whitaker and Venancio Concepcion his "Hacienda Palma" with the rights that he had over the railroad in question. The defendant ceased to be a partner in the said line and, therefore, the plaintiffs had to take the vendees as their new partners. Plaintiffs had to come to an understanding with the new owners of the "Hacienda Palma" in connection with the railroad line "Palma-San Isidro-Nandong." But in all of this, there was nothing to show the express consent, the manifest and deliberate intention of the plaintiffs to exempt the defendant from his obligation and to transfer it to his successors in interest, Messrs. Phil. C. Whitaker and Venancio Concepcion.

The plaintiffs were not a party to the document Exhibit 1. Neither in this document, nor in others in the record, do we find any stipulation whereby the obligation of the defendant was novated with the consent of the creditor, and as it has been held in the case of Martinez *vs.* Cavives (25 Phil., 581), the oral evidence tending to prove such a fact as this is not in law sufficient.

As has been said, in all contracts of novation consisting in the change of the debtor, the consent of the creditor is indispensable, pursuant to article 1205 of the Civil Code which reads as follows:

> "Novation which consists in the substitution of a new debtor in the place of the original one may be made without the knowledge of the latter, but not without the consent of the creditor."

Mr. Manresa in his commentaries on articles 1205 and 1206 of the Civil Code (vol. 8, 1907 ed., pp. 424-426) says as follows:

"Article 1205 clearly says in what this kind of novation must consist, because in stating that another person must be substituted in lieu of the debtor, it means that it is not enough to extend the juridical relation to that other person, but that it is necessary to place the latter in the same position occupied by the original debtor.

"Consequently, the obligation contracted by a third person to answer for the debtor, as in the case of suretyship, in the last analysis, does not work as a true novation, because the third person is not put in the same position as the debtor—the latter continues in his same place and with the same obligation which is guaranteed by the former.

"Since it is necessary that the third person should become a debtor in the same position as the debtor whom he substitutes, this change and the resulting novation may be respected as to the whole debt, thus untying the debtor from his obligation, except the eventual responsibilities of which we shall speak later, or he may continue with the character of such debtor and also allow the third person to participate in the obligation. In the first case, there is a complete and perfect novation; in the second, there is a change that does not free the debtor nor authorize the extinguishment of the accessory obligations of the latter. In this last hypothesis, if there has been no agreement as to solidarity, the first and the new debtor should be considered as obligated severally.

"The provisions of article 1205 which require the consent of the creditor as an indispensable requisite in this kind of novation and not always that of the debtor, while not making it impossible to express the same, imply the distinction between these two forms of novation and it is based on the simple consideration of justice that since the consequences of the substitution may be prejudicial to the creditor, but not to the debtor, the consent of the creditor alone is necessary.

"The two forms of this
novation, also impliedly recognized by article 1206 which employs the word 'delegate,' as applied to the debt, are the *expromission and the delegation*. Between these, there is a marked difference of meaning and, as a consequence, a logical difference of requisite and another clear difference as to their effects, of which we shall speak later.

"In the *expromission*,
the initiative of the change does not emanate from the debtor and may be made even without his consent, since it consists in a third person assuming his obligation; it logically requires the consent of this third man and of the creditor and in this last requisite lies the difference between novation and payment, as the latter can be effected by a third person even against the will of the creditor, whereas in the former case it cannot.

"In the delegation, the debtor
offers and the creditor accepts a third person who consents to the substitution so that the intervention and the consent of these three persons are necessary and they are respectively known as *delegante, delegatario*, and *delegado*.
It must be noted that the consent need not be given simultaneously and that it may be given afterwards, as for example, that of the creditor *delegatario* to the proposition of the debtor accepted by the *delegado*.

"Delegation
notably differs from the mere indication made by the debtor that a third person shall pay the debt; in this case, there is no novation and the former is not acquitted of his obligation and his relations with the third person are regulated by the rules of agency. The French Code in article 1276 expressly provides for this case, as well as the inverse one where the debtor points out somebody else to answer for the payment, declaring that there is no novation in either case. The same sound criterion is impliedly accepted by our Code."

In the case of E. C. McCullough & Co. *vs.*

Veloso and Serna (46 Phil., 1), it appears that McCullough & Co., Inc., sold to Veloso a real estate worth P700,000 on account of which Veloso paid P50,000, promising to pay the balance at the times and manner stipulated in the contract. He further bound himself to pay 10 per cent of the amount of the debt as attorney's fees in case of litigation. To secure the unpaid balance of the purchase price he executed a first mortgage upon the property in favor of the vendor. Subsequently, Veloso sold the property for P100,000 to Joaquin Serna who bound himself to respect the mortgage in favor of McCullough & Co., Inc., and to assume Veloso's obligation to pay the unpaid balance of the purchase price of the property at the times agreed upon in the contract between Veloso and McCullough & Co., Inc.

Veloso had paid on account of the price the amount of P50,000, and Serna also made several payments aggregating the total amount of P250,000. But after this, neither Veloso nor Serna made further payments and thus gave cause for a litigation. The court in deciding the case said:

> "The defendant contends that having sold the property to Serna, and the latter having assumed the obligation to pay the plaintiff the unpaid balance of the price secured by the mortgage upon the property, he was relieved from this obligation and it then devolved upon Serna to pay the plaintiff. This means that as a consequence of the contract between the defendant and Serna, the contract between the defendant and the plaintiff was novated by the substitution of Serna as a new debtor. This is untenable. In order that this novation may take place, the law requires the consent of the creditor (art. 1205 of the Civil Code). The plaintiff did not intervene in the contract between Veloso and Serna and did not expressly give his consent to this substitution. Novation must be express, and cannot be presumed."

In Martinez *vs.* Cavives (25 Phil., 581), it was held that:

> ” * * * The consent of the new debtor is as essential to the novation as is that of the creditor. * * *
>
> “There is no express stipulation in any of the documents of record that the obligation of the defendant was novated, and the parol evidence tending to show that it was novated is not sufficient in law to establish that fact.”

The same doctrine was upheld in the case of Vaca *vs.* Kosca (26 Phil., 388):

> “A new debtor cannot be substituted for the original obligor in the first contract without the creditor’s consent.”

The supreme court of Spain has constantly laid down the same doctrine with regard to novation of contracts:

> “The obligations and rights in a contract cannot be novated with regard to a third person who has not intervened in the execution thereof.” (Decision of June 28, 1860.)
>
> “Novation by the change of debtors cannot be effected without the express approval of the creditor.” (Decisions of February 8, 1862 and June 12, 1867.)
>
> “Novation should not be established by presumptions but by the express will of the parties.” (Decisions of February 14, 1876 and June 16, 1883.)
>
> “In order that novation of a contract by subrogation of the debtor may take effect and thus liberate the first debtor from the obligation, it is necessary that the subrogation be made with the consent of the creditor.” (Decision of March 2, 1897.)

> "It is undeniable
> that obligations judicially declared, as well as those acquired by any other title, can be novated by substituting a new debtor in place of the primitive, only when the creditor gives his consent to the substitution." (Decision of November 15, 1899.)

> "Novation
> can in no case be presumed in contracts, but it is necessary that it should result from the will of the parties, or that the old and the new one be altogether incompatible." (Decision of December 31, 1904.)

> "An
> obligation cannot be deemed novated by means of modifications which do not substantially change the essence thereof, nor when it is not extinguished by another obligation, nor when the debtor is not substituted." (Decision of March 14, 1908.)

> "The consent of
> the creditor required in a novation consisting of the change of debtors (art. 1205, Civil Code) must appear in an express and positive manner and must be given with the deliberate intention of exonerating the primitive debtor of his obligations and transfer them wholly upon the new debtor." (Decision of June 22, 1911.)

In the decision in the case of Martinez *vs.* Cavives, *supra*, the following decisions of the several courts of the United States are cited, wherein this question was decided in the same manner:

> "In Latiolais, admrx. *vs.*
> Citizens' Bank of Louisiana (33 La. Ann., 1444), one Duclozel mortgaged property to the defendant bank for the triple purpose of obtaining shares in the capital stock of the bank, bonds which the bank was authorized to issue, and loans to him as a stockholder. Duclozel subsequently sold this mortgaged property to one Sproule, who, as one of the terms of the sale, assumed the liabilities of his vendor to the bank. Sproule sold part of the property to Graff and Chalfant. The debt

becoming due, the bank brought suit against the last two named and Sproule as owners, Duclozel was not made a party. The bank discontinued these proceedings and subsequently brought suit against Latiolais, administratrix of Duclozel, who had died.

"The court said:
'But the plaintiff insists that in its petition in the proceeding first brought the bank ratified the sale made by Duclozel to Sproule, and by the latter to other parties, in treating them as owners. Be that so, but it does not follow in the absence of either a formal and express or of an implied consent to novate, which should be irresistibly inferred from surrounding circumstances, that it has discharged Duclozel unconditionally, and has accepted those parties as new delegated debtors in his place. *Nemo presumitur donare*.

"

'Novation is a contract, the object of which is: either to extinguish an existing obligation and to substitute a new one in its place; or to discharge an old debtor and substitute a new one to him; or to substitute a new creditor to an old creditor with regard to whom the debtor is discharged.

" 'It is never presumed. The
intention must clearly result from the terms of the agreement or by a full discharge of the original debt. Novation by the substitution of a new debtor can take place without the consent of the debtor, but the delegation does not operate a novation, unless the creditor has expressly declared that he intends to discharge with delegating debtor, and the delegating debtor was not in open failure or insolvency at the time. The mere indication by a debtor of a person who is to pay in his place does not operate a novation. *Delegatus debitor est odiosus in lege*.

"

'The most that could be inferred would be that the bank in the exercise of a sound discretion, proposed to better its condition by accepting an additional debtor to be and remain bound with the original one.'

> "In Fidelity L. & T. Co. *vs.* Engleby (99 Va., 168), the court said: 'Whether or not a debt has been novated is a question of fact and depends entirely upon the intention of the parties to the particular transaction claimed to be novated. In the absence of satisfactory proof to the contrary, the presumption is that the debt has not been extinguished by taking the new evidence in the absence of an intention expressed or implied, being treated as a conditional payment merely.'
>
> ""In Hamlin *vs.* Drummond (91 Me., 175; 39 A., 551), it was said that novation is never presumed but must always be proven. In Netterstorn *vs.* Gallistel (110 111. App., 352), it was said that the burden of establishing a novation is on the party who asserts its existence; that novation is not easily presumed; and that it must clearly appear before the court will recognize it."

Notwithstanding the doctrines above quoted, defendant's counsel calls our attention to the decision of the supreme court of Spain of June 16, 1908, wherein it was held that the provisions of article 1205 of the Code do not mean nor require that the consent of the creditor to the change of a debtor must be given just at the time when the debtors agree on the substitution, because its evident object being the full protection of the rights of the creditor, it is sufficient if the latter manifests his consent in any form and at any time as long as the agreement among the debtors holds good. And defendant insists that the acts performed by the plaintiffs after the "Hacienda Palma" was sold to Messrs. Phil. C. Whitaker and Venancio Concepcion constitute evidence of the consent of the creditor. First of all, we should have an idea of the facts upon which that decision was rendered by the supreme court of Spain.

A partnership known as "La Azucarera de Pravia" obtained a fire insurance policy from the company "La Union y Fenix Español," by virtue of which, said company insured in consideration of an annual premium of 3,000 *pesetas*, the buildings, machinery and other apparatuses pertaining to the "Pravia Factory" for ten years

and for half their value, and another insurance from another insurance company insuring the same property and effects for the other half of their value.

Later, “La Azucarera de Pravia,” with other sugar companies, ceded all its property to another company known as “Sociedad General Azucarera de España,” in which in consideration of a certain amount of stock that the said “Sociedad General Azucarera de España” issued to the “La Azucarera de Pravia,” the latter was merged with the former. After the cession, “La Union y Fenix Español” sued the “Sociedad General Azucarera da España” demanding the payment of the premium that should have been paid by the “La Azucarera de Pravia,” which payment the “Sociedad General Azucarera de España” refused to make on the ground that the “La Azucarera de Pravia” was not merged with the “Sociedad General Azucarera de España,” but merely transferred its properties to the latter in consideration of the stock that was issued to the “La Azucarera de Pravia.” It was further contended by the “Sociedad General Azucarera de España” that even if it were true that in the contract of cession it appeared that the “La Azucarera de Pravia” was merged with the “Sociedad General Azucarera de España,” nevertheless, there was no such merger in law, for in truth and in fact, the “La Azucarera de Pravia” had ceded only its property, but not its rights and obligations; that the existence of the partnership known as “La Azucarera de Pravia” was proven by its registration in the mercantile register, which was not cancelled, nor did it contain any statement to the effect that the “La Azucarera de Pravia” had been extinguished or had ceased to do business even after the cession of properties to the “Sociedad General Azucarera de España.” Another argument advanced by the “Sociedad General” was that at the time the “Azucarera de Pravia” ceded its properties to the “Sociedad General Azucarera de España,” the insurance company “La Union y Fenix Español” did not assent to the subrogation of the “Sociedad General Azucarera” into the rights and obligations of the “Azucarera de Pravia,” assuming that there had been such a subrogation or substitution of a debtor by another.

The supreme court of Spain gave judgment in favor

of the “La Union y Fenix Español” insurance company for the following reasons:

> “1. While it is true that it cannot be strictly said that ‘La Azucarera de Pravia’ was merged with the ‘Sociedad General Azucarera de España,’ the document whereby the property of the ‘La Azucarera de Pravia’ was ceded to the ‘Sociedad General Azucarera de España’ clearly and expressly recites that this company upon taking charge of the immovable property of the ‘La Azucarera de Pravia’ accepted in general, with respect to the property ceded, ‘everything belonging to the same,’ after making provisions about active and passive easements, contracts for transportation and other matters.”

The supreme court held that by virtue of the words hereinabove quoted, the “Sociedad General Azucarera de España” took over the obligation to pay the insurance premiums of the “La Azucarera de Pravia” inasmuch as said insurance pertained to the property that was ceded.

> “2. While it is true that ‘La Union y Fenix Español’ insurance company did not give its consent to the contract of cession at the moment of its execution, yet the mere fact that the said insurance company now sues the ‘Sociedad General Azucarera de España’ is an incontrovertible proof that the said insurance company accepts the substitution of the new debtor.”

By comparing the facts of that case with the defenses of the case at bar, it will be seen that, whereas in the former case the creditor sued the new debtor, in the instant case the creditor sues the original debtor. The supreme court of Spain in that case held that the fact that the creditor sued the new debtor was proof incontrovertible of his assent to the substitution of

the debtor. This would seem evident because the judicial demand made on the new debtor to comply with the obligation of the first debtor is the best proof that the creditor accepts the change of the debtor. His complaint is an authentic document where his consent is given to the change of the debtor. We are not holding that the creditor's consent must necessarily be given in the same instrument between the first and the new debtor. The consent of the creditor may be given subsequently, but in either case it must be expressly manifested. In the present case, however, the creditor makes judicial demand upon the first debtor for the fulfillment of his obligation, evidently showing by this act that he does not give his consent to the substitution of the new debtor. We are of the opinion that the decision of the supreme court of Spain of June 16, 1908, cannot be successfully invoked in support of defendant's contention. Wherefore, we hold that in accordance with article 1205 of the Civil Code, in the instant case, there was no novation of the contract, by the change of the person of the debtor.

Another defense urged by the defendant is the merger of the rights of debtor and creditor, whereby under article 1192 of the Civil Code, the obligation, the fulfillment of which is demanded in the complaint, became extinguished. It is maintained in appellee's brief that the debt of the defendant was transferred to Phil. C. Whitaker and Venancio Concepcion by the document Exhibit 1. These in turn acquired the credit of the plaintiffs by virtue of the debt, Exhibit 5; thus the rights of the debtor and creditor were merged in one person. The argument would at first seem to be incontrovertible, but if we bear in mind that the rights and titles which the plaintiffs sold to Phil. C. Whitaker and Venancio Concepcion refer only to one-half of the railroad line in question, it will be seen that the credit which they had against the defendant for the amount of one-half of the cost of construction of the said line was not included in the sale contained in Exhibit 5. That the plaintiffs sold their rights and titles over one-half of the line, is evident from the very Exhibit 5. The purchasers, Phil. C. Whitaker and Venancio Concepcion, to secure the payment of the price, executed a mortgage in favor of the plaintiffs on the same rights and titles that they had bought and also upon what they had purchased from Mr. Salvador

Serra, In other words, Phil. C. Whitaker and Venancio Concepcion mortgaged unto the plaintiffs what they had bought from the plaintiffs and also what they had bought from Salvador Serra. If Messrs. Phil. C. Whitaker and Venancio Concepcion had purchased something from Mr. Salvador Serra, the herein defendant, regarding the railroad line, it was undoubtedly the one-half thereof pertaining to Mr. Salvador Serra. This clearly shows that the rights and titles transferred by the plaintiffs to Phil. C. Whitaker and Venancio Concepcion were only those they had over the other half of the railroad line. Therefore, as already stated, since there was no novation of the contract between the plaintiffs and the defendant, as regards the obligation of the latter to pay the former one-half of the cost of the construction of the said railroad line, and since the plaintiffs did not include in the sale, evidenced by Exhibit 5, the credit that they had against the defendant, the allegation that the obligation of the defendant became extinguished by the merger of the rights of creditor and debtor by the purchase of Messrs. Phil. C. Whitaker and Venancio Concepcion is wholly untenable.

Appellants assign also as a ground of their appeal the holding of the court that by the termination of the partnership, as shown by the document Exhibit 5, no legal rights can be derived therefrom.

By virtue of the contract Exhibit 5, the plaintiffs and Phil. C. Whitaker and Venancio Concepcion, by common consent, decided to dissolve the partnership between the “Hacienda Palma” and “Hacienda San Isidro,” thus cancelling the contract of partnership of February 1, 1919.

Counsel for appellee in his brief and oral argument maintains that the plaintiffs cannot enforce any right arising out of that contract of partnership, which has been annulled, such as the right to claim now a part of the cost of the construction of the railroad line stipulated in that contract.

Defendant’s contention signifies that any person, who has contracted a valid obligation with a partnership, is exempt from complying with his

obligation by the mere fact of the dissolution of the partnership. Defendant's contention is untenable. The dissolution of a partnership must not be understood in the absolute and strict sense so that at the termination of the object for which it was created the partnership is extinguished, pending, the winding up of some incidents and obligations of the partnership, but in such case, the partnership will be reputed as existing until the juridical relations arising out of the contract are dissolved. This doctrine has been upheld by the supreme court of Spain in its decision of February 6, 1903, in the following case: There was a partnership formed between several persons to purchase some lands sold by the state. The partnership paid the purchase price and distributed among its members the lands so acquired, but after the lapse of some time, one of the partners instituted an action in the court of Badajoz, praying that he be accepted as a partner with the same rights and obligations as the others, for the reason that he had not been allowed all that he had a right to. The court granted the petition which judgment was affirmed by the Audiencia de Caceres.

From that decision the defendant sued out a writ of error alleging infringement of articles 1680 and 1700 of the Civil Code, on the proposition that all contracts are reputed consummated and therefore extinguished, when the contracting parties fulfill all the obligations arising therefrom and that by the payment of the money and the granting and distribution of the lands without any opposition, the juridical relations between the contracting parties become extinguished and none of the parties has any right of action under the contract. The supreme court, holding that some corrections and liquidations asked by the actor were still pending, denied the writ, ruling that the articles cited were not infringed because a partnership cannot be considered as extinguished until all the obligations pertaining to it are fulfilled. (11 Manresa, page 312.)

The dissolution of a firm does not relieve any of its members from liability for existing obligations, although it does save them from new obligations to which they have not expressly or impliedly assented, and any of them may be discharged from old obligations by novation or other form of release. It is often said

that a partnership continues, even after dissolution, for the purpose of winding up its affairs. (30 Cyc., page 659.)

Another question presented by appellee's counsel in his memorandum and oral argument is that as in the partnership articles of February 1, 1919, it was covenanted that the defendant would put up one-half of the cost of the railroad line within five years from that date, that is, from February 1, 1919, with interest at 10 per cent per annum, the present action is premature since, from the execution of the contract until October 25, 1922, the date of the complaint, the five years, within which the defendant could pay his part of the cost of the construction of the line, had not yet elapsed. Suffice it to say that the plaintiffs and the successors in interest of the defendant, by mutual consent, dissolved the partnership on June 16, 1920, cancelling the contract Exhibit A to all of which the defendant consented as evidence by his allegations in his answer. If this is so, there is no reason for waiting for the expiration of the five years which the parties themselves had seen fit to stipulate and therefore the provisions of article 1113, regarding the fulfillment of pure obligations, must be applied in this case.

For all of the foregoing, the judgment appealed from is reversed, and we hold that the defendant Salvador Serra is indebted to the plaintiffs, the Testate Estate of Lazaro Mota, *et al*., in the amount of P113,046.46, and said defendant is hereby sentenced to pay the plaintiffs the said amount, together with the agreed interest at the rate of 10 per cent per annum from the date of the filing of the complaint.

Without special pronouncement as to costs, it is so ordered.

Johnson, Street, Malcolm, Ostrand, Johns, and *Romualdez, JJ*., concur.

Date created: June 17, 2014