

FELISA R. DE VICTORIO, PLAINTIFF AND APPELLEE, VS. JACOB VOLZ, DEFENDANT AND APPELLANT.*R-Civil No. 1740. February 18, 1948*

Ponente: TUASON, J.

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This is an appeal on a reconstituted record from a judgment of the Court of First Instance of Manila which affirmed a judgment of the municipal court in an action for unlawful detainer. The appellant was the defendant and was sentenced to vacate the accesoría, on Antipolo Street, which was the subject matter of the suit. The action was commenced in the municipal court on December 22, 1943 and the decision of the Court of First Instance, on appeal, was handed down on May 20, 1944.

Appellant makes three assignments of error, every one of which raises questions of fact and requires a review of the evidence for its proper consideration. But the evidence has not been submitted nor does the appellant tell us how or where it can be obtained, if any copy still exists. Presumably, the evidence or stenographic notes as well as the pleadings and the decision were destroyed.

It was the plaintiff who should have had an interest in the reconstitution of the record. The decision was in her favor and the defendant continued occupying the accesoría. However, instead of reviving the original case, a new action was brought after liberation. And the plaintiff in the new action is Filipina Victorio de Virata, whereas the plaintiff in the first was Felisa R. de Victoria, Mrs. Virata's mother. The substitution of Mrs. Virata for her mother may have been prompted by one of the defenses in the first case, namely, that Mrs. Virata was the owner of the apartment and was the party with whom the defendant had entered into the contract of lease.

The filing of the second action operated as an abatement or abandonment of the first, if it was not independent of the other. At any rate, the defendant was declared in default in the second action on August 15, 1945, and judgment was rendered by the Court of First Instance soon thereafter, judgment which long ago became final. More than this, the defendant has left the premises if he has not actually been evicted therefrom.

It is then obvious that the present appeal has ceased to have any reason for being. It is noteworthy that the petition for reconstitution of the record of the first case was filed after the judgment in the second case had become executory or had been executed already. If it was believed that by prosecuting the present appeal the final judgment in the second action could be invalidated, the appellant is mistaken. The last judgment is no longer subject even to direct attack. All the defenses which the defendant had in the first case could or should have been reproduced in the second. As far as the right to the possession of the house is concerned, there is no question raised in the present appeal which was not or could not have been decided in the last case, except the counterclaim for damages. All defenses as to the possession have been merged in the judgment in that case.

As to the claim for damages in the first action allegedly caused by the filing of the suit against the defendant, we leave the latter's right open for determination in a separate suit, if he cares to file one against the first plaintiff. We cannot pass on that counterclaim on this appeal, even if we wanted, for the reason already adverted to, that it

depends on the evidence which is not before us. If we are to rely on the recital of facts in the decision in the first case, the dismissal of the counterclaim was proper.

The present appeal is dismissed without costs subject to the reservation above stated.

Paras, Perfecto, and Briones, JJ., concur.

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