

**PACIENCIA DE JESUS ET AL., PETITIONERS, VS. INIGO S. DAZA,
JUDGE OF FIRST INSTANCE OF BATANGAS, ET AL., RESPONDENTS.***G.R. No. L-353. August 31, 1946*

Ponente: HILADO, J.

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Petitioners pray for the writs of certiorari and mandamus whereby they would have this Court annul the order of the respondent judge dated January 29, 1946, entered in civil case No. 3174 of the Court of First Instance of Batangas in the matter of the estate of the deceased Gavino de Jesus, which order petitioners denominate "a writ of possession," and command the respondent provincial sheriff of Batangas and the respondents Justina S. Vda. de Mang-Japus and Gregorio Leynes to return to said petitioner? the possession of the two parcels of land covered by original certificates of title Nos. 1292 and 1344, issued by the Register of Deeds of Batangas and mentioned in their petition.

Among other things, it is alleged in the petition and admitted in the respondents' answer that petitioners are some of the testamentary heirs of the late Gavino de Jesus whose estate is the subject matter of the aforesaid special proceeding No. 3174; that respondent Justina S. Vda. dc Manglapus purchased from Sixto de Jesus and Natalia Alfonga, co-heirs of the petitioners, the rights, interest, and participation of the said Sixto de Jesus and Natalia Alfonga, in the said testate estate, particularly, the two parcels of land above referred to, which parcels of land were assigned to the said Sixto de Jesus and Natalia Alfonga as their shares in the same testate estate in the project of partition which was already submitted to the probate court for approval—according to the respondent judge's order of March 11, 1946 (Appendix 1 of respondents' answer) it had already been approved;—that on September 4, 1945, when the project of partition was approved, respondent Justina S. Vda. de Manglapus, presented within the special proceeding a petition for approval by the probate court of said sale to her of the right, interest, and participation of Sixto de Jesus and Natalia Alfonga, particularly, of the said two parcels of land; that the probate court approved said sale; that on September 9, 1945, "after learning of the aforesaid sale on September 4, 1945," petitioners instituted an action in the Court of First Instance of Batangas against respondent Justina S. Vda. de Manglapus for legal redemption under article 1067 of the Civil Code, said action being civil case No. 3960 of the Court of First Instance of Batangas—in connection with this action for legal redemption, respondents in paragraph 4 of their answer, after admitting the institution of said action for legal redemption, allege that on March 11, 1946, the Court of First Instance of Batangas issued an order dismissing the amended and supplemental complies in said civil case No. 3960 (they attach a copy of the order of dismissal as Appendix 1 of their answer), but petitioners in their reply aver that within the period prescribed by law they had perfected an appeal from said order of dismissal.

From what appears in the allegations of the parties, as well as their appendices and annexes, the said case for legal redemption is still pending appeal.

Respondent Justina S. Vda. de Manglapus, by a petition dated January 17, 1946 (Annex A of petition) filed in the testate estate of the deceased Gavino de Jesus already alluded to, asked the Court of First Instance of Batangas to

order the provincial sheriff of said province to take immediate possession of the parcels of land in controversy and to deliver them to her afterwards. The respondent judge, acting upon said motion, entered- his order of January 29, 1946 (Annex B-1 of petition) in the same estate proceeding whereby he directed the said provincial sheriff "to make the physical delivery of the parcels of land acquired by purchase by Justina S. Vda. de Mang-lapus to the authorized representative, Dr. Gregorio Leynes of Balayan, Batangas," In compliance with said order, the provincial sheriff addressed a notice to Sixto de Jesus, Felina de Jesus, Elena de Jesus, Paciencia de Jesus (the last four being the present petitioners) in which he advised them of the aforesaid order of January 29, 1946, attaching a copy thereof to his notice, and required them to be present at the municipal building of Balayan, Batangas, where the said delivery of possession was to take place on February 15, 1946, at 9 o'clock a. in., and in paragraph 6 of the petition, petitioners themselves allege that on February 15, 1946, the respondent provincial sheriff of Batangas "did deliver possession of said two parcels of land to the respondent Gregorio Lcyncs, representative of respondent Mrs. Justina S. Vda. de Manglapus."

In this connection it is asserted in paragraph 6 of the respondents' answer that when the provincial sheriff of Batangas delivered the possession of the two parcels of land in question to respondent Gregorio Leynes as such representative of respondent Justina S. Vda. de Mang-lapus "no objection whatsoever was made by the petitioners."

The principal question raised by the petitioners is whether or not the respondent judge, presiding the probate court, had jurisdiction to order the delivery of the possession of the aforesaid parcels of land to respondent Justina S. Vda. de Manglapus, represented by her authorized representative, Gregorio Leynes, within the same estate proceeding and not in an independent ordinary action.

Rule 91, section 1, provides in "part as follows:

"SECTION 1. When order for distribution of residue made. Testimony taken on controversy preserved.—When the debts, funeral charges, and expenses of administration, the allowances to the widow, and inheritance tax, if any, chargeable to the estate in accordance with law, have been paid, the court, on the application of the executor or administrator, or of a person interested in the estate, and after hearing upon notice, shall assign the residue of the estate to the persons entitled to the same, naming them and the proportions, or Darts, to which each is entitled. and such persons may demand and recover their respective shares from the executor or administrator, or any other person having the same in his possession. * * *" (Italics supplied.)

From the admitted fact that the probate court had already approved that project of partition without any reservation as to payment as to payment of debts, funeral charges, expenses of administration, allowances to the widow, of inheritance tax, it would appear that the estate was ready for distribution, pursuant to Rule 91, section 1. Neither party has made any representation to the contrary in this case. Upon this hypothesis, this case will be decided.

The very fact that petitioners lodged an action for legal redemption with the Court of First Instance of Batangas, thus commencing civil case No. 3960 of said court, carries with it an implied but necessary admission on the part of said petitioners that the sale to respondent Justina S. Vda. de Manglapus of the shares of Sixto de Jesus and Natalia Alfonga in the oft-repeated estate, particularly, the two parcels of land in question, was valid. The sale was duly approved by the probate court. By the effects of that sale and its approval by the probate court the purchaser stepped into the shoes of the sellers for the purposes of the distribution of the estate, and Rule 91, section 1, confers upon such purchaser, among other rights, the right to demand and recover the share purchased by her not only from the executor or administrator, but also from any other person having the same in his possession. It is evident that the probate court, having the custody and control of the entire estate, is the most logical authority to effectuate this provision within the same estate proceeding, said proceeding being the most

convenient one in which this power and function of the court can be exercised and performed without the necessity of requiring the parties to undergo the inconvenience, delay and expense of having to commence and litigate an entirely different action. There can be no question that if the executor or administrator has the possession of the share to be delivered the probate court would have jurisdiction within the same estate proceeding to order him to deliver that possession to the person entitled thereto, and we see no reason, legal or equitable, for denying the same power to the probate court to be exercised within the same estate proceeding if the share to be delivered happens to be in the possession of "any other person," especially when "such other person" is one of the heirs themselves who are already under the jurisdiction of the probate court in the same estate proceeding.

The probate proceeding over the testate estate of the deceased Gavino de Jesus was a proceeding in rem (*Manalo vs. Paredes and Philippine Food Co.*, 47 Phil., 938; 40 Cyc, 1265; 23 C. J., 1006, section 27; *Michigan Trust Co. vs. Ferry*, 175 Fed., 667, 674; 99 C. C. A., 221). And by the publication of the notice prescribed by the Rules and by the fact that petitioners herein were and are among the testamentary heirs of the decedent, they were and are subject to the jurisdiction of the Court of First Instance of Batangas sitting as a probate court when the said court's order of January 29, 1946, was entered and thereafter. If, even the action for compulsory recognition of a natural child may be instituted and decided within the proceeding for the settlement of the estate of the ancestor (*Severino vs. Severino*, 44 Phil., 343, 348), it would be absurd were we to declare now that for the mere object of ordering the delivery of possession of a portion of the inheritance which has already been assigned to a certain person within the estate proceeding, the probate court lacks jurisdiction to make the order within the same proceeding, but should require the institution of an independent ordinary action.

To be sure, petitioners, by the notice which from aught that appears from the record, they must have been given of the hearing on the approval of the project of partition, and their consequent right to present their opposition or objections thereto, as well as the presentation of any necessary evidence which they might have offered in support of such opposition or objections, had their day in court, no less than if the questions raised thereby had been litigated in a separate action. Indeed, the action for compulsory recognition of a natural child would involve more contentious matters, and normally a greater amount of evidence, than the mere incident involved in the petition of respondent Justina S. Vda. de Manglapus within the testate estate of Gavino de Jesus for the delivery to her of the possession of the parcels of land in controversy. And yet, this Court has held in *Severino vs. Severino* (*supra*), and other cases which need not be cited, that such action for compulsory recognition may be instituted and decided within the proceeding for the settlement of the estate of the ancestor.

It may be asked, however, if it would not be more just and proper to withhold possession from the purchaser, the respondent Justina S. Vda. de Manglapus, pending the final outcome of civil case No. 3960 of the Court of First Instance of Batangas wherein petitioners are seeking the legal redemption of the parcels of land in controversy. We have carefully considered this phase of the case and have come to a conclusion adverse to petitioners. Among other reasons, the following brought us to our conclusion:

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As already stated, the very interposition of the action for legal redemption necessarily implies admission of the validity of the sale.

- Article 1067 of the Civil Code, rather than justifying the withholding of the possession from the purchaser, clearly sanctions his taking possession of what he has purchased, as his rights are absolute until and unless resolved by the timely and valid exercise of the right of redemption.

- The sale to respondent Justina S. Vda. de Manglapus of the two parcels of land in question by Sixto de Jesus and

Natalia Alfonga took place after the project of partition had been approved by the court (order of the probate court of March 11, 1946, in civil case No. 3960, the legal redemption case, Appendix 1 of respondents' answer), on account of which article 1067 of the Civil Code cannot support petitioners' claim, said article referring to a sale by any of the heirs of his hereditary right to a stranger before partition. But even supposing that the approval of the project of partition by the court was made after the sale to respondent Justina S. Vda. de Manglapus of said two parcels of land by Sixto de Jesus and Natalia Alfonga, still that approval related back to the date of the project of partition.

"To give 'approval' is in its essential and most obvious meaning to confirm, ratify, sanction, or consent to some act or thing done by another. *State vs. Rhein*, 127 N. W., 1079, 1081; 149 Iowa, 76." (3 Words and Phrases, Permanent Edition, 829.)

" 'Ratification' operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification. * * *" (30 Words and Phrases, Permanent Edition, 131.)

Unquestionably, petitioners are not "third persons" as regards the project of partition and its approval by the court, for the simple reason that they, as co-heirs, were parties to the same project of partition as well as to the case wherein the same was approved, so that the rule of law that approval or ratification relates back to the date of the act approved or ratified applies to its full extent.

- If petitioners were in possession of the controverted parcels of land some time during the Japanese occupation, as seems to have been intimated in this case, their possession was merely precarious and, of course, in such a case they were acting at their risk. The petition does not allege that any reservation at all was made, or caused to be made, by petitioners in the project of partition as regards any crop of sugar cane that they might have planted on the two parcels of land in question. If they had planted such a crop, as represented in their memorandum (which, of course, can not take the place of evidence), they did so precariously and at their risk, and the fact that they do not allege having reserved any claim or right thereto in the project of partition, or in relation thereto, justifies the conclusion that they must have waived any such claim or right in consideration of the terms and conditions of the project of partition stipulated in their favor.

- Even in a proper case of legal redemption, to allow the redemptioner to have possession of the property pending final judgment in the case may lead to a positive injustice towards the purchaser—the redemptioner may in the meantime enjoy the use or usufruct of the property and even if the case is finally decided in his favor, he may allege that he has no means of exercising the right of redemption and, therefore, is forced to waive it, which, of course, would redound to the positive detriment and prejudice of the purchaser and to the enrichment of the redemptioner at the former's expense.

We, therefore, conclude that, without prejudice to the final result of the legal redemption case, the instant petition should be, as it is hereby, dismissed, with costs to petitioners. So ordered.

Moran, C. J., Pablo, Brioncs, Padilla, and Tuason, JJ.,

DISSENTING

PERFECTO, J., with whom concurs PARAS, J.:

In special proceedings No. 3134 of the Court of First Instance of Batangas, two parcels of land situated in

Ba-layan, covered by original certificates of title Nos. 1292 and 1344, were assigned to Sixto de Jesus and Natalia Alfonga as their shares, as heirs of the late, Gavino de Jesus.

On September 4, 1945, when the project of partition was approved, respondent Manglapus presented a petition for the approval of the sale to her of said parcels of land by the heirs of Sixto de Jesus and Natalia Alfonga. The sale was approved.

Upon learning of the sale, five days later, on September 9, petitioners filed a civil action as co-heirs for legal redemption under article 1067 of the Civil Code.

More than four months later, on January 17, 1946, Manglapus filed in the probate case a petition for the court to order the sheriff to make physical delivery of the parcels of land to her on account of the fact that petitioners, who are the occupants, would not vacate them. On January 29, the respondent judge ordered the issuance of the writ of possession prayed for, and on February 15, the sheriff delivered the two parcels of land to Gregorio Leynes, representative of Manglapus.

In praying for the writ of possession, Manglapus alleged that the judicial administrator, Sixto de Jesus, notwithstanding an order dated January 4, 1946, refused to intervene regarding the delivery of the two parcels of land to said Manglapus.

Petitioners were in possession of the parcels of land since the first half of 1944, when they evacuated thereto for the purpose of keeping themselves away from the Japanese; and, because of hard times, made plantings thereon, as the administrator Sixto de Jesus could not attend to the lands on account of the fact that he was living in Manila, and the petitioners had still unharvested sugar crop on the lands when the possession thereof was delivered by the sheriff to Gregorio Leynes.

On April 12, 1944, Sixto de Jesus, by himself and as attorney in fact for his mother and co-heir Natalia Alfonga, executed a deed of promise to sell to respondent Manglapus the rights, interests, and participation, among others, on the two above-mentioned parcels of land, and on August 9, 1944, executed a deed of absolute sale of the two parcels of land to Manglapus in consideration of the sum of ₱5,000 which said respondent promised to pay.

Although in the order of the lower court dated March 11, 1946 (Appendix 1), a pronouncement is made to the effect that no absolute sale had been consummated before September 4, 1945, but simply a promise to sell, it is a fact that the pronouncement can not prevail over the unequivocal statement made by respondent Manglapus, through her attorneys, in her reply to the petitioners' memorandum dated April 17, 1946, wherein it is expressly stated that Sixto de Jesus, in his own behalf, and as attorney in fact for his mother, "executed a deed of absolute sale in favor of said respondent" Manglapus.

Upon the facts in this case, it seems evident that petitioners are entitled to the redemption sought by them under article 1067 of the Civil Code.

"ART. 1067. If either of the heirs should sell his hereditary rights to a stranger before the partition, any or all of his co-heirs may be subrogated to the rights of the purchaser by reimbursing him for the purchase price, provided it be done within the period of one month, to be counted from the time they were informed thereof."

Therefore, it seems more proper not to disturb petitioners in the actual possession of the two parcels of land in question until the civil action for redemption shall have been finally decided, much more taking into consideration the fact that the judicial administrator, Sixto de Jesus, refused to intervene in the delivery of said two parcels, and petitioners, at the time the order complained of was issued, had in said parcels of land sugar crop to be harvested.

The order of January 29, 1946, causing the issuance of the writ of execution complained of, if not utterly illegal

was, at least, issued with grave abuse of discretion, and if can not be justified under the provisions of section 1 of Rule 91 of the Rules of Court, which authorize the recovery by the heirs of their respective shares from the executor or administrator, or any other person having the same in his possession. The right is not executory when there is a controversy concerning said possession. Of course, if the share is in the possession of either the administrator or executor, who are both officers of the court, either of them may be compelled by the court to deliver it to the respective heirs. In the present case, the parcels of land in question were not in the possession of any officer of the court, petitioners not being either executors or administrators. Section 1 of Rule 91 only recognizes the right of the heirs to "demand and recover" but that right, when there are conflicting claims, can only be enforced by proper judicial proceedings in which all the parties shall have their day in court.

Our vote is for the granting of the petition.

RESOLUTION ON MOTION FOR RECONSIDERATION

November 13, 1946

HILADO, J.:

Petitioners' counsel has filed a "petition for reconsideration" dated September 11, 1946, asking this Court to reconsider its decision in the instant case. In said petition counsel attacks the jurisdiction of the probate court to issue its order of January 29, 1946, directing the provincial sheriff "to make the physical delivery" of the parcels of land in question to respondent Manglapus. In support of his stand counsel avers that nowhere in the Rules regarding settlement of estates of deceased persons can there be found a provision authorizing the probate court to issue such an order. This contention is untenable because that power is necessarily embodied in Rule 91, section 1, as already declared in our decision.

Petitioners are attempting to impugn the validity of said order of January 29, 1946, by claiming the right to possess the said parcels of land. It will be recalled that, by its order of September 4, 1945, the probate court approved the project of partition in the testamentary estate of Gavino de Jesus. On that same day the court approved the sale of the two parcels of land in dispute, which constitute the shares of Sixto de Jesus and Natalia Alfonga, in favor of respondent Manglapus. In approving the project of partition, the court definitely adjudicated said properties to Sixto de Jesus and Natalia Alfonga, and by approving the sale thereof to Manglapus on the same day, the court, which still retained jurisdiction over the case and over the final distribution of the estate, in effect, amended the partition as submitted to it in the project of partition, with the consequence that the respondent Justina S. Vda. de Manglapus stepped into the shoes of Sixto de Jesus and Natalia Alfonga as the person to whom that portion of the inheritance was adjudicated by the court. The petitioners are obviously not the owners of the parcels of land in controversy. In fact, in claiming the right of redemption under article 1067 of the Civil Code, they necessarily admit that they are not such owners. Even the existence of that right of redemption is actually the subject of a pending case, namely, civil case No. 3960 of the Court of First Instance of Batangas, which has been appealed to this court and docketed here as G. R. No. L-527.[1] As between the owner of a piece of property, as an admitted purchaser unquestionably is, and the claimants of a mere contingent right to acquire the same through legal redemption, there can be no question as to who has the better right to possess that property pending the decision of the case concerning such redemption.

Rule 123, section 5, among other things, provides that matters capable of unquestionable demonstration, or which ought to be known to judges because of their judicial functions "shall be judicially recognized by the court without the introduction of proof." In the Unpublished decision of this court in *Dizon and Co. vs. Pineda* (G. R.

No. 34679), the following passage appears:

"* * * And supreme Court has taken judicial notice of its record in a previous case in connection with the conduct of a litigant or witness on a similar matter," (Moran, *The Law of Evidence in the Philippines*, Revised and Enlarged Edition, p. 11.)

In G. R. No. L-527, *De Jesus vs. Manglapus*, which is the same civil case No. 3960 of the Court of First Instance of Batangas mentioned in the petition for certiorari and mandamus herein, concerning precisely the legal redemption of which we are here speaking, we find on page 14 of the brief of appellants therein, who are the petitioners in this case, the statement that the sale to Manglapus would have been null and void without the court's approval of the project of partition. This means that the approval of the project of partition had to precede the taking effect of the sale. On page 19 of the same brief, appellants quote from paragraph 2 of their own supplemental complaint alleging that Sixto de Jesus and Justina S. Vda. de Manglapus supplemented the promise to sell therein alleged with an "addendum wherein it is provided that, in case, on the date the absolute sale and payment of said interests, rights and participation would be finally executed and paid * * *." (Italics supplied.) This necessarily implies that at the time of execution of said addendum the absolute sale was yet to be subsequently executed. Indeed, it being admitted on all sides that vendors and vendee submitted the deed of sale to the probate court's approval, it is very plain that they made the sale subject to a condition precedent, namely, the same judicial approval. In other words, by the agreement of the parties, the sale was not to take effect until and unless thus approved (Civil Code, article 1114). And this approval came after the approval of the project of partition. Hence, besides the reasons stated in our decision, the foregoing additionally show that we are dealing with a case in which the sale was made after the partition, which means that article 1067 of the Civil Code is unavailable to petitioners, since said article expressly refers to a sale before the partition.

Petitioner also challenges the jurisdiction of the court below to issue its order of January 29, 1946, "because the condition precedent of 'demand' required by' section 1 of Rule 91 of the Rules of Court was not complied with by the respondent Mrs. Manglapus." This is not an action of unlawful detainer under Rule 72, section 2, where formal demand is made a condition precedent to the filing of the action. The right conferred by Rule 91, section 1, is to demand and recover, and this right is conferred alike to an heir and to any other interested person with regard to the portion of the estate to which one or the other may be entitled. The provision says:

"* * * and such persons may demand and recover their respective shares from the executor or administrator, or any other person having the same in his possession."

In the first place, Rule 91, section 1, far from expressly requiring demand (as does, for instance, Rule 72, section 2, in cases of ejectment for failure to pay rent due or to comply with the condition of the lease), confers a right which by the terms in which the provision is couched, is exercisable by direct resort to the court. The provision refers to two cases. Firstly, where the possession is with the executor or administrator and secondly, where it is with any other person; but the right given to the party to demand and recover is exactly the same in the two cases. In fact, the preposition "from"—the only one used in the provision—refers both and equally to the "executor or administrator" and to the "other person." Now, it can not be legitimately contended that the probate court would not have jurisdiction to order its agent, the executor or administrator, to deliver the possession to the party, though such party, before asking for that order, should not first make formal demand upon the executor or administrator. The jurisdiction and power of the court in such a case to order the delivery without such previous formal demand is based upon the principle that in an estate proceeding, the executor or administrator is constantly and completely under the jurisdiction and control of the probate court. Likewise, if the "other person," as happens in the instant case, should be also within the constant and complete control and jurisdiction of the probate court for being one of the heirs of the decedent, who has previously appeared and actively participated in the proceedings, there being an

identity of reasons, the provision should be similarly construed. Consequently, for the claimant to be entitled to an order of the probate court for such "other person" or heirs to surrender the possession of the share pertaining to said claimant, no previous formal demand upon him is required.

Finally, even supposing *arguendo* that demand would have been otherwise necessary in this case, the very position taken by petitioners in denying the right of respondent Manglapus, under well-settled rules of law, made the demand unnecessary. Indeed, it would have converted the demand into an idle performance and a meaningless requirement. For what rational need could there have been for Manglapus to demand the possession from them when we all know that they would have refused to surrender that possession anyway? It is a well known rule that, even in ordinary contentious litigations, a demand is not necessary where defendant's liability is predicated upon a precedent debt or duty, or where there is a present and unconditional duty to perform some particular act, or, as sometimes stated, where the bringing of the action itself is sufficient demand. (1 C. J., 978, 979.) That "precedent duty," that "present and unconditional duty" in this case was to surrender the possession of the property to the party (respondent Manglapus) to whom the probate court had adjudicated it.

"SECTION 80. 4. Circumstances Obviating Necessity for Demand.— A demand, although otherwise essential, need not be made where it sufficiently appears that if made it would be merely useless ceremony and would not be complied with. Thus no demand is necessary where defendant could not comply therewith, particularly where by his own act he has disabled himself from complying; or where he has stated in advance that he would not comply, or has repudiated his obligation; or where he denies plaintiff's right or his own liability, which may sufficiently appear, so as to obviate the necessity for any proof of a demand, from the nature of the defense interposed or the position taken by the defendant upon the trial. * * *" (1 C. J., 980, 981; italics supplied.)

We are, therefore, clearly of opinion that the motion for reconsideration should be, as it is hereby, denied. So ordered.

Moran, C. J., Pablo, Bengzon, Briones, Padilla, and Tuason, JJ., concur.

DISSENTING

PERFECTO, J., with whom concurs PARAS, J.:

The interpretation given by the majority to section 1 of Rule 91 seems to us not well-founded.

Said section provides:

"SECTION 1. When order for distribution of residue made. Testimony taken on controversy preserved.—When the debts, funeral charges, and expenses of administration, the allowances to the widow, and inheritance tax, if any, chargeable to the estate in accordance with law, have been paid, the court, on the application of the executor or administrator, or of a person interested in the estate, and after hearing upon notice, shall assign the residue of the estate to the persons entitled to the same, naming them and the proportions, or parts, to which each is entitled, and such persons may demand and recover their respective shares from the executor or administrator, or any other person having the same in his possession. If there is a controversy before the court as to who are the lawful heirs of the deceased person or as to the distributive share to which each person is entitled under the law, the testimony as to such controversy shall be taken in writing by the judge, under oath.

"No distribution shall be allowed until the payment of the obligations above mentioned has been made or provided for, unless the distributees, or any of them, give a bond, in a sum to be fixed by the court, conditioned for the payment of said obligations within such time as the court directs."

Our disagreement refers to the interpretation that should be given to the following words in said section: "such

persons may demand and recover their respective shares from the executor or administrator, or any other person having the same in his possession."

The majority take the position that the right to "demand and recover," as used in the rule, is a final executory as a final and unappealable judgment could be, to such an extent that if the share demanded happens to be in the possession of any person, no matter who he might be, no matter what claims he might have upon the property in his possession, no matter what title he might produce. for possessing it, a mere order of the probate court would obligate him to surrender the property to the person designated by said court.

There can not be any controversy if the share happens to be in the possession of the executor or administrator, not only because both are officers of the probate court and are therefore amenable to its orders, But because they hold the property in their respective capacity as such officers of the court in the same way as a clerk of court is keeping the records thereof. But when the property in question is in the possession of other persons who are not officers or subordinates of the probate court, the latter can not deprive them of the possession of the property by a mere judicial ukase, overruling summarily any adverse claim that they might have on the property or any protest they might advance. These persons can not be deprived of their possession through a writ of execution issued by the probate court, without giving them their day in court.

We vote to grant the motion for reconsideration.

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