

CRESENCIA HERNANDEZ, PLAINTIFF AND APPELLEE, VS. ZACARIAS ANDAL, DEFENDANT AND APPELLANT.

G.R. No. L-273. March 29, 1947

Ponente: TUASON, J.

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TUASON, J.:

The plaintiff, Cresencia Hernandez, the intervenors, Maria and Aquilina Hernandez, and Pedro and Basilia Hernandez who are not parties here, are brother and sisters. They acquired in common by descent from their father a parcel of land of which he died seized and known as lot No. 120073 of the Batangas cadastral survey.

On January 23, 1944, the intervenors sold 1800 square meters of this parcel, a portion which is particularly described in the deed of conveyance Exhibit A, to Zacarias Andral, the defendant, and Andral's wife in consideration of P860. This portion purports to be the combined shares of the intervenors in the larger parcel, allotted to them in a verbal partition alleged to have been made (time not stated) among the five brother and sisters.

After the sale, on a date as to which the evidence is in disagreement but which is not now important, the plaintiff attempted to repurchase the land sold to Andral. According to her original complaint, dated February 3, 1944, she offered the purchasers P150 as price of repurchase, this being, according to that complaint, the amount Andral had paid for Maria Hernandez's and Aquilina Hernandez's shares, but Andral, it is alleged, refused to part with the property.

On April 8, the plaintiff filed a supplemental complaint. She alleged that when the cause was called for trial on March 8, she announced in open court that she was willing to repurchase her sister's share from Andral for P860 and reimburse Andral for his expense; that Andral asked for continuance until the 29th stating that he had made other expenses; that on the 29th she brought P860 to repurchase the land in question but the case was again postponed because the plaintiff's sisters had intervened; and that meanwhile, on the 26th, Andral resold the land fictitiously to the vendors for P970.

It results that on the date last mentioned Andral executed a deed of sale for P970 in favor of the intervenors, an amount which included Andral's expenses as well as the normal sale price. The document of repurchase gave as reason for the transaction the fact that it had been agreed that in the event trouble should arise the sellers should return to the buyer what they had received and pay the latter his expenses.

On February 14, 1944, the defendant filed his answer alleging that Maria and Aquilina Hernandez had sold him their respective portions of the inherited land for P860 and that he had no objection to disposing of those portions in favor of the plaintiff for P860 plus the expenses he had incurred in the execution of the deed of sale amounting to P50, but that he was unwilling to accept P150, which was all the plaintiff offered him besides his expenses.

On April 4, 1944, Maria and Aquilina Hernandez's answer in intervention was filed. The intervenors alleged that there had been a partition among them and their brother and sisters "with the share of each delineated and marked,

and after partition and delineation everyone took exclusive, separate and independent possession of his portion in the partition." They charged the plaintiff with bad faith in that "it was upon her request for chance that the sale to the defendant, about to take place last November, was delayed till January of this year when she finally informed the intervenors that they could sell to the defendant, or she could pay only P150 and could not raise the amount of P860 offered by the defendant."

Cresencia Hernandez, the plaintiff, was the only witness to testify on her own behalf. Substantially she reiterated the allegations in her two complaints. Zacarias Andal, the defendant, also testified. He said that he was in possession of the land in question until he returned it to the intervenors. He declared that the plaintiff offered to repurchase the land from him long after he had bought it, that is, when she was about to file her action. He stated that after he came from Candelaria, Tayabas, with the document of sale he showed it to the plaintiff: that was on the 23d of January. He was able to do this because he lived near Cresencia and passed by her house on his way home from Candelaria. He said that Cresencia Hernandez upon being shown the document merely exclaimed, "Oh, so you already have a document." When asked whether the land "described in the complaint of the herein plaintiff has been the object of partition among the co-owners Pedro, Basilia, Cresencia, Maria and Aquilina surnamed Hernandez," counsel for the plaintiff objected on the ground that the best evidence was the document of partition, and the objection was sustained. The same objection and the same ruling were made on the same ground when the witness was queried how it was that the land he had bought from Maria and Aquilina Hernandez had been specified in the deed of sale, Exhibit A.

In consequence of this ruling, counsel for the defendant and intervenors did not call any more witnesses but only announced that he had witnesses ready to prove that a parol partition among the five brother and sisters had been made, mentioning the names of six such witnesses. Counsel for the plaintiff again objected asserting that "under the Rules of Court agreement affecting real estate may not be proved except by means of writing subscribed by the person against whom the proof is offered." Upon this objection, the court ruled that under Rules 74 and 123 of the Rules of Court (Statute of Frauds) as well as under article 1248 of the Civil Code, a parol evidence of partition was inadmissible, adding that to decide the case it had enough with the testimony and evidence offered by the parties.

Thereafter the court handed down its decision declaring that the resale of the land by Zacarias Andal in favor of Maria and Aquilina Hernandez was illegal and in bad faith. It, however, did not seem to have found as a fact the allegation that the resale was simulated. The court then made this judgment:

"(a) declarando nulo y sin valor alguno el documento de reventa otorgado por el demandado Zacarias Andal en 26 de marzo de 1944, a favor de Maria y Aquilina Hernandez sobre el terreno cuestionado que se presento como Exhibito 2 de dicho demandado, y consiguientemente se anulan tambien todas las transacciones posteriores que las mencionadas Maria y Aquilina Hernandez hayan hecho sobre el terreno cuestionado despues del 26 de marzo de 1944, asi como tambien cualquiera anotacion en la Oficina del Registrador de Titulos de Batangas que haya anotado dicha reventa por el demandado Zacarias Andal a favor de las terceristas Maria y Aquilina Hernandez en el citado dia 26 de marzo de 1944; y

"(b) se ordena al aqui demandado Zacarias Andal, que otorgue una escritura de reventa a favor de la aqui demandante Cresencia Hernandez, de las participaciones de las terceristas en el terreno descrito en la demanda suplementaria previo pago de P860 mas la cantidad de P50 como gastos de documentacion. Se absuelve al demandado de los daños y perjuicios que reclama la demandante. Se absuelve tambien a la demandante de la contra-demanda de las terceristas.

"Sin especial pronunciamiento en cuanto a las costas."

The defendant and the intervenors are appealing from the foregoing decision and in their joint brief made one

assignment of error:

"The lower court erred in refusing to admit oral evidence for proving a contract of partition among the heirs on the ground that it was not admissible."

Before proceeding with a discussion of the questions raised we are tempted to point up some seeming incongruities in the above-quoted judgment. Although Zacarias Andal is no longer interested in the case, as far as the land is concerned, and even though the intervenors have become again the absolute owners and are now in full possession of the property, while Andal has already gotten his money back, the judgment would have Andal execute a deed of resale in favor of the plaintiff and receive from her the price of repurchase. The judgment is silent as to the intervenors with reference to the execution of the deed of sale or the receipt of the sale price. And the lower court made no finding and expressed no opinion as to whether the offer of P150 instead of P860, not to mention Andal's expenses, by the plaintiff as price of repurchase was sufficient compliance with article 1067 of the Civil Code on which the court rested the plaintiff's cause of action.

However, in this decision we are concerned mainly with the application of section 21 of Rule 123 and section 1 of Rule 74 both of the Rules of Court. Article 1248 of the Civil Code has no bearing on the case.

There is a conflict of authority as to whether an agreement of partition is such a contract as is required to be in writing under the statute of frauds. One line of authorities holds the affirmative view; other authorities say no. The reason for the rule that excludes partition from the operation of the statute of frauds is that partition is not a conveyance but simply a separation and designation of that part of the land which belongs to each tenant in common. (27 C. J., 206.) The differences in the conclusions reached are "due perhaps to varied phraseology of the statutes" in the several states. (40 Amer. Jur., 15.) However the case may be, as enacted in the Philippines, first in section 335 of the former Code of Civil Procedure, and now in Rule 123, section 21, of the Rules of Court, the law has been uniformly interpreted in a long line of cases to be applicable to executory and not to completed or executed contracts. (27 C. J., 206.) In this jurisdiction performance of the contract takes it out of the operation of the statute. (Gomez vs. Salcedo, 26 Phil., 485; Almirol and Cariño vs. Monserrat, 48 Phil., 67.) The statute of frauds does not declare the contracts therein enumerated void and of no legal effect, but only makes ineffective the action for specific performance. (Almirol and Cariño vs. Monserrat, *supra*.) In the United States, even in those states where the affirmative view of the question has been followed, "the weight of authority upholds the rule that an oral partition is effective when several possession is taken under it by the respective parties to the agreement." (27 C. J., 206.)

On general principle, independent and in spite of the statute of frauds, courts of equity have enforced oral partition when it has been completely or partly performed.

"Regardless of whether a parol partition or agreement to partition is valid and enforceable at law, equity will in proper cases, where the parol partition has actually been consummated by the taking of possession in severalty and the exercise of ownership by the parties of the respective portions set off to each, recognize and enforce such parol partition and the rights of the parties thereunder. Thus, it has been held or stated in a number of cases involving an oral partition under which the parties went into possession, exercised acts of ownership, or otherwise partly performed the partition agreement, that equity will confirm such partition and in a proper case decree title in accordance with the possession in severalty.

"In numerous cases it has been held or stated that parol partitions may be sustained on the ground of estoppel of the parties to assert the rights of a tenant in common as to parts of land divided by parol partition as to which possession in severalty was taken and acts of individual ownership were exercised. And a court of equity will recognize the agreement and decree it to be valid and effectual for the purpose of concluding the right of the parties as between each other to hold their respective parts in severalty.

"A parol partition may also be sustained on the ground that the parties thereto have acquiesced in and ratified the partition by taking possession in severalty, exercising acts of ownership with respect thereto, or otherwise recognizing the existence of the partition.

"A number of cases have specifically applied the doctrine of part performance, or have stilted that a part performance is necessary, to take a parol partition out of the operation of the statute of frauds. It has been held that where there was a partition in fact between tenants in common, and a part performance, a court of equity would have regard to and enforce such partition agreed to by the parties." (40 Amer. Jur., 15-18.)

It is on the effects of Rule 74, section 1, of the Rules of Court on a parol partition that there are sharp divergences of opinion among the members of this Court. This section reads:

"If the decedent left no debts and the heirs and legatees are all of age, or the minors are represented by their judicial guardians, the parties may, without securing letters of administration, divide the estate among themselves as they see fit by means of a public instrument filed in the office of the register of deeds, and should they disagree, they may do so in an ordinary action of partition. If there is only one heir or one legatee, he may adjudicate to himself the entire estate by means of an affidavit filed in the office of the register of deeds. It shall be presumed that the decedent left no debts if no creditor files a petition for letters of administration within two years after the death of the decedent."

It is contended that under this rule a verbal partition is entirely void and cannot be validated by any acts of the parties short of the execution of a public document and its registration.

As a general proposition, transactions, so far as they affect the parties, are required to be reduced to writing either as a condition of jural validity or as a means of providing evidence to prove the transactions. Written form exacted by the statute of frauds, for example, "is for evidential purposes only." (Domalagan vs. Bolifer, 33 Phil., 471.) The decisions of this Court which we have noticed were predicated on this assumption. The Civil Code, too, requires the accomplishment of acts or contracts in a public instrument, not in order to validate the act or contract but only to insure its efficacy so that after the existence of the acts or contracts has been admitted, the party bound may be compelled to execute the document. (Hawaiian Philippine Co. vs. Hernaez, 45 Phil., 746.)

Is section 1 of Rule 74 constitutive and not merely evidential of partition? In other words, is writing the act that confers legal validity upon the agreement? There are no indications in the phraseology of this rule which justify an affirmative answer to these questions. It must be noted that where the law intends a writing or other formality to be the essential requisite to the validity of the transaction, it says so in clear and unequivocal terms. Thus, the statute of frauds as originally enacted in England and as enacted in some of the states, uses the words "utterly void" with reference to certain transactions. Under the terms of such statute transactions required to be in writing are absolutely void and not merely voidable if not made in the manner indicated. Again article 633 of the Civil Code says that donation may be valid only when made in a public document. Article 146 of the Mortgage Law makes known its intention to have the execution of a public instrument and its registration in the registry indispensable to the validity of the contract by using this phrase: "in order that voluntary mortgages may be legally created in a valid manner." Article 1765 of the Civil Code also employs for the same purpose similar expression with reference to the execution of a public document: "in order that mortgage may be validly constituted." And with respect to the formalities of last wills and testaments, section 618 of Act No. 190 makes this emphatic statement: "No will shall be valid to pass upon any estate real or personal nor charge or affect the same, unless it be written etc." Other examples might be mentioned.

Section 1 of Rule 74 contains no such express or clear declaration that the required public instrument is to be constitutive of a contract of partition or an inherent element of its effectiveness as between the parties. And this Court had no apparent reason, in adopting this rule, to make the efficacy of a partition as between the parties

dependent on the execution of a public instrument and its registration. On the other hand, the opposite theory is not without reasonable support. We can think of possible factors against the proposition that a public document and its registration were contemplated as necessary ingredients to give life to a contract of partition so that without them no oral partition can bind the parties.

- In the first place, the Rules of Court of which the rule under consideration forms a part were promulgated by the Judicial Department under authority to deal with matters of procedure exclusively. For this court to prescribe what is to be a binding agreement between coheirs in the settlement of their private affairs which in no way affect the rights of third parties would be to transcend its rule-making power. We bring out this limitation upon the authority of this court to make rules, as an aid to interpretation, as a method of arriving at the conclusion that section 1 of Rule 74 was meant to be remedial and not a rule of substantive law of far-reaching importance and serious juridical and practical implications. It is to be presumed that the framers of the Rules of Court realized the bounds of this court's functions and did not intend to trespass on purely substantive rights of the parties to the partition. To the extent the execution and registration of a notarized instrument are made essential elements to validity to protect innocent third parties, the rule is legitimate and necessary; legitimate because decedents' estates are placed under the jurisdiction of the courts to administer and distribute. The interests of third parties eliminated, the rule loses its character as one of procedure and practice and invades the realm of substantive law.

Section 596 of Act No. 190, which is the precursor of section 1 of Rule 74, is enlightening and instructive. The former after stating that heirs may apportion and divide the estate among themselves as they may see fit by agreement duly executed in writing by all of them, adds the words "and not otherwise." These words, in our opinion, were expressive of an intention to make the written formality inherent element of the validity of a parol partition. But what is far more to the point is that by logical process of deduction the elimination from the new rule of the words "and not otherwise" imports the casting away from the prescribed public document of its jural character which the document enjoyed in the former code. At the same time, the inclusion of the aforesaid words in the old provision serves to emphasize the necessity of a positive and clear language if a given contractual formality is to be the exclusive basis of the contract's binding effect on the parties. It is of course unnecessary to say that the attaching of jural character to the prescribed public instrument in section 596 of Act No. 190 is no argument for contending that such document must be clothed with the same raiment in the new Rules. Act No. 190 was a mixture of procedural and substantive provisions, having been enacted by the legislative body itself which, unlike this court, was unhampered and untrammelled, except by the fundamental law, in the choice of its subjects of legislation.

- The civil law looks upon the rote of public instruments in acts and contracts with greater liberality with a view to better adaptation to human frailties and idiosyncrasies. In their blind faith in friends and relatives, in their lack of experience and foresight, and in their ignorance, men, in spite of laws, will make and continue to make verbal contracts. The advantages of an air-tight policy concerning such contracts fall far short of compensating for the resulting damage, injustice, inconveniences and confusion. So even though articles 1278, 1279 and 1280 of the Civil Code have made provision for public instrument for all transactions and contracts whose object is the creation, modification or extinction of real rights in immovables, it has been recognized and held that verbal contracts may be effective between the parties. A leading case on this subject is *Thunga Chui vs. Que Bentec* (2 Phil., 561), Mr. Justice Willard writing the decision. It was said in that case that when the essential requisites for the existence of a contract are present, the contract is binding upon the parties, and, although required to be in writing by article 1280 of the Civil Code, the plaintiff can maintain an action on the verbal agreement without first bringing an action under article 1279 to compel the execution of a written instrument. It says that "article 1279 does not impose an obligation, but confers a privilege upon both contracting parties, and the fact that the plaintiff has not made use of same does not bar his action." It further says that article 1279, far from making the

enforceability of the contract dependent upon any special intrinsic form, recognizes its enforceability by the mere act of granting the contracting parties an adequate remedy whereby to compel the execution of public writing or any other special form whenever such form is necessary in order that contract may produce the effect which is desired according to whatever its object. This doctrine was iterated and reiterated in a series of decisions perhaps longer than that on any other legal topic. And it has been extended even to verbal contracts involving land registered under the Torrens Act. Do the Rules of Court adhere to this salutary principle? We can perceive no sufficient ground for the new Rules to depart from it. No considerations of public policy enter into a partition of hereditary estate among coheirs greater than those involved in a contract between strangers which operates to create, transmit, modify or extinguish property rights in land. If as between strangers the creation, transmission, modification or extinction of real rights may be lawfully effected by parol agreement notwithstanding the requirement that it be put in writing, the new rule could not be more intransigent when the transaction is between co-heirs and there is no change of ownership but simply designation and segregation of that part which belongs to each heir.

The requirement that a partition be put in a public document and registered has, in our opinion, for its purpose the protection of creditors and at the same time the protection of the heirs themselves against tardy claims. Note that the last sentence of the section speaks of debts and creditors. The object of registration is to serve as constructive notice, and this means notice to others. It must follow that the intrinsic validity of partition not executed with the prescribed formalities does not come into play when, as in this case, there are no creditors or the rights of creditors are not affected. No rights of creditors being involved, it is competent for the heirs of an estate to enter into an agreement for distribution in a manner and upon a plan different from those provided by law.

It is said that the findings, conclusions and judgment in the appealed decision are not assigned as errors and that for this reason the appeal should be dismissed. We do not think that the premise of this objection is exactly correct. The evidence on parol partition tendered by the defendant and intervenors was ruled out and they specifically complain of this exclusion as error. In this manner the assignment of error squarely meets and attacks the opinion and judgment of the trial court. A superficial analysis of the case will show that on the validity of the alleged partition hangs the result of the entire litigation, and on that validity depends in turn the competence of the excluded evidence. These two inter-related points are the core of the whole case. All other points are incidental to and revolve around them. If a completed oral partition may be enforced, as the defendant and the intervenors contend and as we opine, their evidence should be allowed, and if allowed and it establishes their allegation, the plaintiff's cause of action vanishes.

If the appellants' assignment of error be not considered a direct challenge to the decision of the court below, we still believe that the objection takes a narrow view of practice and procedure contrary to the liberal spirit which pervades the Rules of Court. The first injunction of the new Rules (Rule 1, section 2) is that they "shall be liberally construed in order to promote their object and to assist the parties in obtaining just, speedy, and inexpensive determination of every action and proceeding." In line with the modern trends of procedure, we are told that, "while an assignment of error which is required by law or rule of court has been held essential to appellate review, and only those assigned will be considered, there are a number of cases which appear to accord to the appellate court a broad discretionary "power to waive the lack of proper assignment of errors and consider errors not assigned. And an unassigned error closely related to an error properly assigned, or upon which the determination of the question raised by the error properly assigned is dependent, will be considered by the appellate court notwithstanding the failure to assign it as error." (4 C. J. S., 1734; 3 C. J., 1341, footnote 77.) At the least, the assignment of error, viewed in this light, authorizes us to examine and pass upon the decision of the court below.

The judgment is reversed and the case is remanded to the court of origin for further proceeding and a new decision not incompatible with this decision, with costs of this appeal against the appellee.

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

FERIA, J.:

I reserve the right to express my view and write a dissenting opinion later.

DISSENTING

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

Is oral evidence admissible to prove partition of land? The answer of the appellants is in the affirmative. Thus their only assignment of error is as follows: "The lower court erred in refusing to admit oral evidence for proving a contract of partition of the land among the heirs on the ground that it was not admissible." Since no other question, either of fact or of law, is raised by the appellants, I deem it unnecessary, under the circumstances of this case, to pass upon said assignment.

A small parcel of land containing some 5,568 square meters was inherited by four sisters and a brother. It was surveyed and is still assessed as a single lot, not in the name of the co-owners, but in that of an uncle. It appears that on January 23, 1944, two of the sisters sold a portion of the lot to the defendant Andal who was neither a relative nor an adjoining owner. The vendors stated:

"Este terreno es parte del terreno referido en la declaracion Tax No. 53379 en nombre de nuestro tio Juan Dimasacat y esta amillarado todo el terreno en P290. El referido terreno ya se vio en el Juzgado de Primera Instancia de Batangas en 29 de Septiembre de 1941, at nagcaro-on ng decreto noong ika 6 ng Noviembre, 1941, na doon ay ipinasiya ang pagbibigay ng Titulo sa aming magcacapatid." (Exhibit A.)

Upon learning of the sale one week thereafter, a third sister expressed her desire to repurchase said portion of land and, upon refusal of the buyer, she filed a complaint for the purpose of being subrogated to the rights acquired by Andal. The latter, in his answer, is agreeable to the prayer provided that he be reimbursed in the total sum of P910 which he had actually paid. In the meantime, the other two sisters (vendors) intervened in the case, alleging that, before the sale was made to Andal, the plaintiff had been given the option to acquire the lot in question. By way of counterclaim, it was alleged that they had repurchased the lot from Andal at a higher price.

After hearing, the lower court held that inasmuch as the plaintiff is willing to buy, and Andal to sell, the lot at the price fixed by the latter, there is no reason why the former's complaint should not prosper, and Andal was accordingly ordered to convey the property to the plaintiff upon payment by the latter of the total sum of P910. As regards the contention of the intervenors, the court held that their alleged repurchase was fraudulent and, therefore, null and void.

As these pronouncements, necessarily based on findings of fact, have not been assailed, they should be considered final. Hence, it is absolutely futile to decide the question of law raised in appellants' assignment of error, the same having become academic.

Even so, the point whether the sale to Andal took place after a partition is immaterial, in view of his willingness to resell to the plaintiff, not to mention the fact that the latter's right to redeem, as an adjoining owner, maybe based on article 1523 of the Civil Code which provides: "The owners of the adjacent lands shall also have the right of redemption in case of the sale of a rural estate whose area does not exceed one hectare."

The judgment appealed from should be affirmed.

Judgment reversed; case remanded with instructions.

RESOLUTION ON MOTION FOR RECONSIDERATION

July 30, 1947

TUASON, J.:

Plaintiff and appellee has filed a motion for reconsideration. She maintains that she is entitled to judgment because the defendant has no objection to reselling her the land and she is, on the other hand, ready to reimburse him the purchase price. She argues that the buyer having led her to believe that he would make the resale in her favor is estopped from going against his own acts.

Superficially, the decision is obscure as to the relation which Andal's signification in his answer, that he was willing to sell the land to the plaintiff, bears to the dispositive part or judgment. But read in its entirety, analyzed closely, the decision reveals in no uncertain manner that it is anchored on articles 1067 and 1522 of the Civil Code and that all other matters discussed therein revolve around this basic conclusion. With particular reference to Andal's signification above mentioned, the court does not appear to have made or intended to make it an affirmative, separate basis of the judgment. Roughly, the judgment was evolved along this process of reasoning: the plaintiff's right to repurchase the land under the above-cited provisions of the Civil Code was evident, in the court's opinion. But, the court said in the same breath, a complication emerged. The confusion was brought about by the resale of the property by Andal to the original owners. The court seemed puzzled. Then it saw a way out of the perplexity; the resale was illegal and mala fide and hence ineffective. It was illegal, mala fide and ineffective because the defendant had stated in his answer that he had no objection to allowing the plaintiff to buy the land, and because the resale to the intervenors had been consummated during the pendency of the action. Andal's signification in his answer estopped him from alienating the land in favor of others.

It was as estoppel that the court invoked Andal's expression of his willingness to sell the land, citing section 68 (a), Rule 123, Rules of Court. The court looked upon this expression not as a cause of action standing on its own feet but merely as an equitable aid to keep the defendant and intervenors from making a mockery of the plaintiff's right under the aforecited articles of the Civil Code. The Court found that the transaction between the defendant and intervenors had been entered into "con el proposito de desorientar al Juzgado y frustrar en cierto modo la administracion de justicia." The appellee both in her brief and motion for reconsideration treats Andal's willingness to sell in the same light.

To put it differently, the central principle of the case, as the court saw it, was that the evidence on the oral partition was inadmissible and so the plaintiff's right to repurchase the land under articles 1067 and 1522 of the Civil Code was in order. Andal's expression of willingness to sell the land to the plaintiff came into play not as generator of a new obligation in favor of the plaintiff, separate and distinct from the right of coheirs to repurchase shares in property inherited in common and sold to strangers by other heirs, but simply as a factor to prevent the defendant's and intervenors' attempt to nullify that right.

Estoppel, in the sense in which the court regarded Andal's manifestation that he was willing to sell the land to the plaintiff, partakes of the nature of the rule of evidence. Certainly, it belongs to the adjective branch of the law, and the court regarded it under this criterion. The court's reference in its decision to Andal's signification can not have a meaning other than that the court assigned thereto a subordinate role, subordinate to the asserted right of the plaintiff under the provisions of the Civil Code referred to.

The sole assignment of error in appellant's brief thus inevitably comprehends that part of the appealed decision and judgment which relates to the defendant's expression of willingness to sell the land to the plaintiff. A review of the error specifically assigned necessarily carries with it the consideration of all matters related to and dependent upon that error. Specifically, if there was a lawful partition and the partition bars the plaintiff's right to repurchase the land under the articles relied upon,—the proposition formulated in the assignment of error—then Andal's previous willingness to sell loses its *raison d'être* as estoppel; it disappears with the right which it was intended to uphold and with which it was inextricably bound up.

It should be made clear that we are only construing the decision of the lower court. We have explained the ratio decidendi as it appeared to the court, not the theory of the parties in their pleadings. If the supplemental complaint was intended to present Andal's offer to sell the land to the plaintiff as constituting a new and separate cause of action—a point which cannot be determined with a fair degree of certainty from a reading of that complaint—the court did not see or consider it in that light. And, it should be remembered, it is what the court decided or how the court decided a case that we have to look to as a test for judging whether the questions for review have been formulated in the right manner.

If Andal's statement in his answer was alleged by the plaintiff to serve as an independent cause of action, that is all the more reason, for his own benefit, why the case should be remanded for further proceeding. The new trial as ordered in our decision leaves the door open for the admission of evidence on the allegations in the supplementary complaint as well as on the alleged parol partition. As matters now stand, the plaintiff could ask for judgment on the supplementary complaint only on the untenable hypothesis that no assignment of error has been made relative to this feature of the case. Without the benefit of this technicality, the plaintiff has not made out a case on the supplementary complaint. The evidence is very meager to the point of nullity; many of the allegations have been left untouched, and there are essential points that badly need amplification or clarification. It would be extremely improper, for obvious reasons, to go into these defects and deficiencies in detail in this resolution in anticipation of the new trial.

The motion is denied.

Moran, C.J., Pablo, Hilado, Bengzon, Briones, Hontiveros, and Padilla, JJ., concur.
Feria, J., reserves his vote.

DISSENTING

PERFECTO, J.:

We are of opinion that, as suggested by plaintiff-appellee in her motion for reconsideration, dated April 5, 1947, there is no need of ordering a new trial of the case, and that rather the appealed decision should be affirmed.

This litigation is about a parcel of land very much less than two hectares in area located in a barrio, and assessed for taxation purposes at P290 only, and the amount for redemption of said land is much less than P1,000 of worthless Japanese paper money. The litigation started on February 3, 1944, more than three years ago, and the case had been submitted for our decision about a year ago. It is high time that we put an end to such a litigation, to fight which the parties might have spent more money than the value of the thing in litigation.

Plaintiff and appellee Cresencia Hernandez filed the complaint to compel defendant Zacarias Andal to sell the property to her. In his answer of February 14, 1944, Zacarias Andal stated that he was willing to sell the property to plaintiff, provided the latter would pay him P800 plus expenses amounting to P50. The appealed decision

ordered Zacarias Andal to sell the property to plaintiff who was ordered to pay P860, plus P50 for expenses, which is P60 more than the amount demanded by Andal in his answer of February 14, 1944. Plaintiff did not appeal, thus showing her willingness to pay the amount.

Under the circumstances, we do not see any reason why ununderstandable legal technicalities should block the ending of a litigation which, in substance ceased to exist since plaintiff and appellee manifested her willingness to pay to defendant Andal even more than the amount he demanded.

The legal discussion entered into the majority opinion to support the further delay in finishing the suit might be highly interesting in a law academy, but it will never satisfy the simple sense of justice of the common man.

We vote to grant the motion for reconsideration.

PARAS, J.:

I concur in the foregoing dissenting opinion.

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