

TOMAS CABIGAO, PLAINTIFF AND APPELLANT, VS. PETRONA LIM AND HER HUSBAND, EUGENIO EVANGELISTA AND LUISA LIM, DEFENDANTS AND APPELLANTS.

G.R. No. 20832. February 11, 1924

Ponente: OSTRAND, J.

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OSTRAND, J.:

The following facts appear from the record of the present case:

On August 11, 1917, the plaintiff entered into an agreement with the defendant Petrona Lim by which he bound himself to sell her one-half of a certain tract of mangrove land for the sum of P14,000 on the condition that she convert the entire tract, including the part of it retained by the plaintiff, into fish ponds. The agreement is evidenced by a notarial document which describes the land in detail by courses and distances and gives the area of the same as 90 hectareas, 19 areas and 1 centidrea. In the same document the plaintiff also promises to execute a deed in favor of Petrona Lim as soon as the whole tract is converted into fish ponds, but no definite time is fixed for the completion of the work. Of the purchase price, the sum of P10,000 was paid in cash and the balance, P4,000 was made payable on or before December 31, 1918.

On August 27, 1917, the same parties executed another document which modified the original agreement by fixing Petrona Lim's share of the land at 61½ hectares, stating as a reason for such modification that at the time of the execution of the document of August 11th, the plaintiff represented to Petrona Lim that the total area of the land described in the document was 123 hectares; but that it had subsequently been ascertained that the area was only 90 hectareas 19 areas and 1 centiarea.

On May 10, 1918, still another document was executed. This document is signed by Tomas Cabigao, Luisa lim and Petrona Lim and in it Cabigao acknowledges having received from Petrona Lim the sum of P4,000, the balance of the purchase price of the land as agreed upon in the document of August 11th, and a further sum of P2,100 from Luisa Lim. In the same instrument it is also stated that in consideration of P2,100 paid to him by Luisa Lim, Tomas Cabigao agrees to sell her all of his remaining right, title and interest in the land above mentioned, with the right, on his part, to repurchase the same within the period of one year from the date of the document.

On January 2, 1919, the present action was brought. In his complaint the plaintiff sets forth four causes of action and asks:

(1) That the document of August 11, 1917, be declared null and void because it does not set forth the dimensions of the dikes or the number and sizes of the dams to be constructed in the proposed fish ponds; and, further, that no time is fixed for the completion of the construction of the fish ponds and that the agreement, therefore, is incapable of performance. As an alternative to the cancellation of the contract, the plaintiff asks that the contract be ordered modified by supplying the omissions pointed out;

(2) That the defendant Petrona Lim be ordered to pay the plaintiff the sum of P1,090, the value of nipa alleged to have been cut on the land by her and that it be declared that the plaintiff has the sole right to the fish to be found in the ponds on the land until the completion of the work to be performed by Petrona Lim under the terms of the agreement of August 11, 1917;

(3) That the document of August 27, 1917, be declared null and void because no consideration for it moved from the defendant to the plaintiff, and, also, because the latter's signature thereto was obtained by fraud and deceit; and that the defendant Petrona Lim be ordered to pay the plaintiff damages in the sum of P10,000 annually from the year 1918 for losses suffered by the plaintiff by reason of said defendant's failure to convert the land into fish ponds within a reasonable time; and

(4) That the document of May 10, 1918, be declared null and void on the ground that the transaction evidenced by it is usurious, and, on the further ground, that it does not set forth the true agreement between the parties, inasmuch as the alleged sale, with the right to repurchase, was intended as security for a loan and therefore is only an equitable mortgage. In regard to this transaction, the plaintiff also alleges in his complaint that he never had any dealings with Luisa Lim and that the money stated in the document to have been received from Luisa Lim was in reality furnished by Petrona Lim and amounted only to P1,000; that the balance of the P2,100 consisted in interest on the loan at the rate of 20 per cent per annum, together with a discount of 15 per cent on the P4,000, the said P4,000 having been paid by Petrona before the payment had become due.

In their answers the defendants deny all allegations of the complaint which attack the validity of the documents above mentioned and maintain, in substance that these documents were duly executed and that they correctly express the true terms of the various agreements between the parties.

On May 7, 1919, the plaintiff deposited the sum of P2,100 with the clerk of the Court of First Instance, filing, at the same time, a statement to the effect that the amount deposited was to be applied to the redemption from Luisa Lim of the plaintiff's right, title and interest in the land in question in the event that the court should find that the document of May 10, 1918, evidenced a sale with the right to repurchase and not a loan; and that in view of the questions pending before the court, the sum was so deposited instead of being tendered directly to Luisa Lim.

After trial, the court of First Instance of Bulacan, on May 22, 1922, rendered a decision in which it found (a) that the document of August 11, 1917, evidenced a valid contract; (b) that the document of August 27, 1917, was fraudulent; (c) that the transaction between Tomas Cabigao and Luisa Lim, evidenced by the document of May 10, 1918, was merely a loan and not a sale with the right to repurchase; (d) that previously to the trial of the case, the defendant Petrona Lim had converted some 57 hectares of the land into fish ponds; (e) that fish to the value of 911,750 had been taken from the fish ponds and sold by her in 1920; and (f) that the same defendant also had removed nipa to the value of P1,150 from the land.

The final or dispositive clauses of the decision read as follows:

"Wherefore, the court declares null and void and of no effect the document dated August 27, 1917; it is also decreed that the transaction evidenced by the document dated May 10, 1918, in so far as Tomas Cabigao and Luisa Lim are concerned, must be held to be merely one of a loan of the sum of P2,100 and not one of a sale with right of repurchase; the court hereby fixes the period of 100 days within which Petrona Lim and her husband Eugenio Evangelista must convert into fish ponds the 33 hectares, approximately, remaining of the 90 hectares 19 areas and 1 centiarea, the dikes to be built in the same form, and with the same height and thickness as those made on the 57 hectares already converted into fish ponds; the spouses Petrona Lim and Eugenio Evangelista are hereby sentenced to deliver one-half of the 57 hectares already converted into fish ponds to the plaintiff Tomas Cabigao, and in case they cannot come to an agreement as to the manner of making the partition, it is ordered that any of them inform the court in order for it to appoint an expert

partitioner; Petrona lam and her husband are hereby, further, sentenced to pay to Tomas Cabigao the one-half belonging to the latter of the sale of the fishes of the year 1920, which one-half amounts to P5,875, as well as one-half of the amounts obtained in the following years up to the making of the partition of the fishery of 57 hectares; Petrona Lim and her husband are, further, ordered to repay to Tomas Cabigao the value of the nipa sold from the land which amounts to P1,150; the clerk is ordered to place at the disposal of Luisa Lim and to pay to her the sum of P2,100 deposited with him, the contract being held to be one of simple loan and not of sale with right of repurchase; Petrona Lim and her husband are, further, ordered to pay the costs, and the parties are required to take charge of the fishery as receivers, pending this action, upon the giving of such bond as may be fixed by the court."

Immediately upon being notified of this judgment, the defendants filed their exceptions and moved for a new trial on the ground that the evidence was insufficient to justify the decision. Before these motions had been acted upon by the court, each of the defendants filed another motion asking that a new trial be granted on the ground of newly discovered evidence.

The motions of Luisa Lim were denied on August 17, 1922 and exception duly taken. The motions of Petrona Lim were ruled upon by the court on the same date, in an order of which the final clause reads as follows:

"Wherefore, the court orders a new trial in order that the defendant Petrona Lim and her husband may present such documentary and oral evidence as they may deem fit for the purpose of proving the area of the land in question, any other kind of evidence not bearing on this point to be rejected and the plaintiff to be, of course, given the right to present evidence of this nature to contradict the evidence adduced by said defendants. All the evidence heretofore introduced is maintained in all its parts; the document Exhibit X-5 is rejected, as being irrelevant and not new evidence, in the opinion of the court."

On August 22, 1922, the defendant Petrona Lim excepted to as much of the foregoing order as denied the admission of Exhibit X-5 and certain other evidence. Subsequently, the plaintiff excepted to the reopening of the case.

In the meantime, the court, under date of August 17th, issued an order, the final clause of which is as follows:

"Wherefore, that part of the decision dated May 22, 1922, having reference to the appointment of receivers is set aside and in lieu thereof it is declared that Petrona Lim and her husband Eugenio Evangelista shall not, without permission of this court, sell any fish from the fish ponds already constructed, and if any purchaser presents himself, they must inform the court as to the price offered by such purchaser, and if the court, after hearing the counsel for Tomas Cabigao, orders the sale of the fish, one-half of the price shall be paid to Petrona Lim and the other half to Tomas Cabigao or his attorney. The judgment must be understood to have been modified in this sense only, all other provisions thereof will remain in effect."

The new trial of the case took place on November 23, 1922, both the plaintiff and the defendants appearing in court, and on March 23, 1923, a decision was rendered in which the court, after a brief discussion of the various motions filed and of the rulings thereon, said:

"The question, therefore, now to be decided is whether the new evidence introduced by Petrona Lim's counsel has completely changed the findings of fact and the conclusions of law in the decision of this court of May 22, 1922.

"After an examination of the evidence which was confined to the question of the area of the land which formed the subject-matter of the original contract between Tomas Cabigao and Petrona Lim executed on August 11, 1917, her counsel presented evidence to the effect that after a new survey of the land covered by said contract was made, the same was found to contain about 100 hectares and not 90 hectares, 19 areas and 1 centiarea, as appears in the Torrens title copied in said deed of August 11, 1917.

"The court finds no difficulty in admitting the testimony of the surveyor who made the new survey, but although the result was 100 hectares or whatever it may be, the contract of August 11, 1917, must supply the basis for the partition upon which the contracting parties have agreed, that is, whatever may be the area of the property involved in the contract, Petrona Lim is bound to convert all the land into fish ponds and once this is done, one-half should be for her and the other half for Tomas Cabigao.

"It is true that evidence was introduced to the effect that in the declaration of ownership for the purposes of taxation, Tomas Cabigao erroneously stated that the land contained 123 hectares; but the fact is that, if at the execution of the contract of August 11, 1917, Cabigao had represented to the other contracting party that the mangrove or nipa land contained 123 hectares, it is very strange that the notary did not state this area in the document, but only stated the area given in the Torrens title which, at the time of the execution of the contract, must have been before the notary himself and the contracting party, Petrona Lim. In view of these circumstances it is not probable that at that time Tomas Cabigao made Petrona Lim believe the area was 123 hectares, instead of 90 hectares as indicated in the Torrens title; this is not credible because Petrona Lim has shown herself to be more educated than Tomas Gabigao and, consequently, it is not to be presumed that she did not read the certificate of title, nor is it likely that the notary, who authorized the document, failed to notice the area shown in the certificate. The court can, therefore, not believe the testimony to the effect that at the execution of the original contract Tomas Cabigao misled Petrona Lim as to the area of the land, the Torrens title being, as it was, before her. The mangrove land which is the subject-matter of the above-mentioned contract clearly determines the boundaries; and if Tomas Cabigao has some mangrove land in other places that were acquired from other persons, this has nothing to do with the contract, nor can Petrona Lim now claim, as she seems to do, that those lands should be included in the above-mentioned contract of August 11, 1917. The court, therefore, will not make an analysis of the evidence inasmuch as the original contract is so clear as to leave no room for doubt as to its meaning. The contract is to the effect that the mangrove land covered thereby is to be divided into halves after it is converted into fish ponds.

It does not matter whether this land contains 90 hectares or a larger area; the contract is even favorable to Petrona Lim because for the same amount paid by her, according to said contract, she finally gets more land after it is converted into fish ponds. The price of P14,000 paid by Petrona Lim with the obligation to convert the land into fish ponds is not an excessive price for the 50 hectares which, according to the evidence, the land contains, because while it is true that it is expensive to build the embankments of the fish ponds, yet, according to the knowledge gained by this court from the cases submitted to it for decision and from some sales made in certain testamentary proceedings, which were approved by this court, the price of a fishery, after it is completely built, is about P1,000 per hectare; consequently, although Petrona Lim may incur many expenses for the one-half belonging to Cabigao, yet, she obtains in exchange a fishery of 50 hectares which may be worth P50,000 when she may have paid only P14,000.

"The court, in order to shorten this decision, reproduces herein as a part hereof, the one entered on May 22, 1922, with the modifications above-mentioned with regard to the receivers.

"The new evidence introduced by Petrona Lam's counsel as to the area of the land does not, in the opinion of the court, change the merits of this case, for although it is true that in the declaration of ownership for the purposes of taxation and in the will of the first wife of Tomas Cabigao it is stated that the mangrove lands contained 123 hectares, yet this fact is, perhaps, due to the calculation having been made approximately, because at that time said lands had not been surveyed for the purpose of obtaining Torrens title, and I believe that the municipality, in preserving the assessment with such an area, has just followed the old declarations of ownership, since they do not cause any damage to the municipality, even supposing that area to be in excess of that which the land actually contains. I believe it would be slighting the education of Petrona Lim and her husband to give credit to the witnesses who have testified in this case to the effect that before the execution of

the contract of August 11, 1917, that is, the original contract, Tomas Cabigao had made Petrona Lim believe that the land, which was the subject-matter of the contract, contained 123 hectares, for what was natural for the notary, as well as for Petrona Lim and her husband to have done, was to demand from Cabigao the title deeds and state the area given in said original document; but far from doing so, the Torrens title precisely was copied; this evidently shows that Tomas Cabigao did not make the statement imputed to him in regard to the area, but limited himself to exhibiting the Torrens certificate of title, for otherwise the technical description of said certificate could not have been copied in the document; therefore, said testimony of the witnesses for Petrona Lim, as well as her own testimony on this particular point, is unworthy of belief.

"As to the claim of Petrona Lim's counsel in his written memorandum that Tomas Cabigao is not entitled to one-half of the product of the part of the fish ponds already constructed, it is not necessary to make any extensive comment, for it is not just, nor logical that Petrona Lim should be the only one to enjoy the product of that part of the land. The reason is one of common sense, because the contract was that the fish should be divided into two equal parts after the construction of the fishery, but inasmuch as all of it had not been built up to the present time, but only a part of it, there is no reason why Tomas Cabigao should not be entitled to one-half of the product of the part already built, for although it was not specified in the contract that it was really one of partnership, yet said contract is in effect one of partnership, the property which is the subject-matter of the contract to be divided by halves and, therefore, the same thing to be done as to its fruits.

"Wherefore, with the modifications established in this decision and in the orders above-mentioned, the court ratifies the decisions rendered May 22, 1922, and its dispositive part, with the above-mentioned modifications concerning the area which must be understood to be that which the land proved to contain in fact, the fishery to be divided between Tomas Cabigao and Petrona Lim, after the same is completed, with all the other pronouncements contained in said rulings."To this decision, the defendant Petrona Lim, on March 31st, filed the following exception and notice of appeal:

"The defendant Petrona Lim, and, on her behalf, the undersigned attorney, respectfully prays the court that her exception to the decision rendered in this case under date of March 22, 1923, of which said defendant has just been notified, be entered and the defendant announces her intention to take an appeal from said judgment to the Supreme Court of these Islands through the corresponding bill of exceptions."

The defendant Luisa Lim, on the same date, excepted and gave notice of appeal in practically the same language as the foregoing.

The plaintiff, on April 12, 1922, filed a motion for a new trial on the ground that the decision of March 23rd was contrary to the law and to the weight of the evidence. This motion was promptly denied and exception duly taken. The three parties have presented separate bills of exceptions and have filed lengthy briefs. The defendant Petrona Lim's assignments of error relate to questions of fact in regard to which this court, as we shall presently see, is not permitted to review the findings of the court below. This appeal is taken from the decision of March 22, 1923 (see notice of appeal, *supra*). An examination of the record shows that no motion for a new trial, based on the insufficiency of the evidence to justify the decision appealed from, was ever filed, nor does it appear that new material evidence has been discovered while the action has been pending in this court. In these circumstances, this court can, under section 497 of the Code of Civil Procedure, only determine questions of law and is prohibited from reviewing the evidence or retry questions of fact.

Counsel argues, however, that a motion for a new trial was presented by Petrona Lim on the ground that the evidence did not justify the decision rendered by the court below on May 22, 1922, and that as that decision was practically identical with that of March 23, 1923, the motion filed should be held to extend to both decisions.

We find no merit in this contention. The motion mentioned was never directly ruled upon by the court, which evidently considered it unnecessary to take any action thereon after having ordered a new trial of the case on the

ground of newly discovered evidence. In the order granting the new trial, the court placed certain special limitations upon the introduction of evidence and to this part of the order Petrona Lim excepted, but she did not except to the failure of the court to pass directly upon the question of the insufficiency of the evidence to justify the decision. The motion relating to that question may, therefore, fairly be considered abandoned.

It may further be noted that the decision of March 23, 1923, is not merely an amendment or reformation of that of May 22, 1922. After the reopening of the case by virtue of the order of August 17, 1922, the case was placed upon the calendar for a new trial, which was duly had on November 23, 1922, and at which new trial all of the parties appeared and some new evidence introduced. The decision of March 23, 1923, was based not only on the evidence submitted at the original trial, but also on that adduced at the new trial.

It is true that the earlier decision was by reference incorporated in the later decision and that the modifications effected by the latter were relatively unimportant, but this cannot alter the fact that in regard to the rights of Petrona Lim the two decisions were separate and distinct, both in point of time and in the quantum of the evidence upon which they were based. And, as already stated, the appeal was taken from the later decision and not from that of May 22, 1922.

The defendant Luisa Lim is, perhaps, in a more fortunate position. After the rendition of the decision of May 22, 1922, she moved for a new trial on the ground that the evidence was not sufficient to justify that decision, and, upon the denial of the motion, she took timely exception to the ruling of the court. The new trial granted Petrona Lim was limited to the controversy between the latter and the plaintiff; as to the rights of Luisa Lim, the decision of March 23, 1923, was in no wise different from the earlier one and she can, therefore, with plausible reasons, maintain that the motion and exception referred to apply to both decisions alike.

In the brief filed in her behalf, counsel raises the following points:

(1) That the court below decided the case against her upon a theory different from that presented by the pleadings ; (2) that there is no evidence in support of the finding that the document of May 10, 1918, in so far as Luisa Lim is concerned, evidences a loan and not a sale with the right to repurchase; (3) that the deposit of P2,100 made by the plaintiff with the clerk of the court is of no legal effect and, therefore, should not have been taken into consideration by the trial court; (4) that the court erred in ordering that one-half of the money obtained from the product of part of the land converted into fish ponds be paid to plaintiff during the pendency of the action and (5) that the court erred in denying the motion presented by Luisa Lim on August 28, 1922, in which she offered to prove that she had incurred expenses in stocking the fish ponds, the care of the fish and the litigation with the adjoining land owners, all of which expenses should have been deducted from the plaintiff's share in the returns of the fisheries.

(1) In discussing the first point, counsel insists that the object of the fourth cause of action as set forth in the complaint, was merely the annulment of the agreement of May 10, 1918, and did not include the redemption from the sale with the right to repurchase, nor a declaration that the sale was made for the purpose of securing a loan and, therefore, was only an equitable mortgage.

It is true that paragraph (c) of the prayer of the complaint might lead one to believe that only the annulment of the agreement in question was sought, but examining the allegations of the body of the complaint, especially paragraph (5) of the fourth cause of action, it will be found that facts are stated which, if true, are sufficient to sustain the judgment of the court below in regard to the character of the transactions between the plaintiff and the defendant Luisa Lim, and it is a well-known rule of pleading that the character of the cause of action is not determined by the prayer of the complaint, but by the facts alleged. (21 R. C. L., 489; sec. 126, Code of Civil Procedure.)

The allegations were also sufficient to inform the defendants of the nature of the plaintiff's claims and to enable them to prepare their defense. These requirements fulfilled, the theories entertained by the parties become comparatively unimportant, as far as the soundness of the judgment is concerned. If the complaint was so vague and uncertain as to leave the defendants in doubt in regard to its meaning, timely objection should have been made by demurrer or by a motion to make the complaint more specific.

(2) The second error assigned is argued very strongly and ably by the defendant's counsel and it must be conceded that the question therein involved is not entirely free from doubt. Apparently, due to a misinterpretation of section 9 of Usury Act (No. 2655), plaintiff neglected to present oral evidence as to the character of the transaction in question. The section reads as follows:

"The person or corporation sued shall file its answer in writing under oath to any complaint brought or filed against said person or corporation before a competent court to recover the money or other personal or real property, seeds or agricultural products, charged or received in violation of the provisions of this Act. The lack of taking an oath to an answer to a complaint will mean the admission of the facts contained in the latter."

As will be seen, the section quoted applies only to actions brought "to recover the money or other personal or real property, seeds or agricultural products, charged or received," in violation of the Usury Act. The present action can hardly be said to have been brought for the recovery of property and the contention of the plaintiff that defendants' failure to verify their answers by oath constituted an admission of the truth of the facts stated in the complaint is, therefore, in our opinion, erroneous. In the absence of oral evidence, the court below based its findings, as to the nature of the transaction of May 10, 1918, upon certain circumstances conclusively established by the records. Considering these circumstances in the light of common experience, they are indeed such as to lead one almost irresistibly to the same conclusions as those formed by the trial court.

In this connection, the most eloquent fact is the great inadequacy of the price alleged to have been paid by Luisa Lim for the plaintiff's interests in the land. The difference between this price and that paid by Petrona Lim a few months previously becomes particularly striking when it is considered that the land bought by Petrona was unimproved while the interests purchased by Luisa consisted in land on which extensive improvements had already been made.

The defendant argues, however, that the price paid for the land is no criterion of its value and is incompetent as evidence upon that point. That is partly true; it has been held that, standing alone, evidence of the price paid for the land furnishes no evidence of the market value, but when it appears that the sale has been made in the course of ordinary business, and that the real price is stated, such evidence is admissible. (22 C. J., 180.) And it has also been held in numerous decisions that a sale of property made under ordinary circumstances is evidence of the value at the time of the sale. (Beans vs. Denny, 141 Iowa, 52; Engel vs. Tate, 170 N. W. [Mich.], 105; Wolff vs. Meyer, 75 N. J. L., 181; Rea vs. Pittsburg & Connellsville railroad Co., 229 Pa., 106; Belka and Belka vs. Allen, 82 Vt, 456; Maxon vs. Gates, 136 Wis., 270; Toronto Suburban R. Co. vs. Everson, 54 Can., S. C., 395.)

In the present case it appears that the plaintiff was greatly in need of money at the time of the sale to Petrona Lim and it is fair to assume that, under these circumstances, the price obtained by him was not in excess of the value of the unimproved property. Evidence thereof must, consequently, be considered admissible for the purpose of showing the minimum market value of the property at the time of the sale.

It has, moreover, frequently been held that evidence as to the revenue of land is admissible for the purpose of determining its value and the court may, therefore, properly take into consideration the fact that the gross revenue of the property interests alleged to have been sold to Luisa Lim amounted to P5,875 for the year 1920 alone, notwithstanding the fact that only a little over one-half of the land had then been converted into fish ponds.

In interpreting the facts appearing in the record, the trial judge may have drawn on his personal experience in other cases to a greater extent than the rules of evidence permit, but leaving reference to other cases, and the experience based on them, out of consideration, we still think that the circumstances above discussed are sufficient to justify the conclusions reached by the trial court.

The presumptions are that a person takes ordinary care of his own business and that he is of sound mind until otherwise proven. (Code of Civ. Proa, sec. 334.) If these presumptions hold good, we must also presume that the plaintiff would not sell his land for less than one-seventh of its value and less than one-half the annual revenue produced therefrom, unless the sale was intended merely as security for a loan, and there is not sufficient evidence in the record to overcome this presumption. In its essential points, the case is very similar to that of *Aguilar vs. Rubiato and Gonzalez Vila* (40 Phil., 570), in which this court held that an alleged sale, with the right to repurchase, was only a mortgage.

(3) In view of our conclusions that the sale in this case is in reality an equitable mortgage, it is unnecessary to discuss the third error assigned by the defendant Luisa Lim.

(4) The only point in the fourth assignment of error which requires mention, is the question of the propriety of the denial of the motion of August 28, 1922, for the reformation of one of the orders of August 17, 1922, in which motion, among other things, the defendant Luisa Lim offered to prove that she had incurred certain expenses in connection with the fishery. As the motion was not accompanied by affidavits or other proof showing the amount of the expenses incurred, there was no evidence before the court upon which the order in question might be amended.

Under the circumstances, there was no error in denying the motion for an amendment to the order, or, in disregarding the mere offer to prove. The court might, of course, have reopened the matter for the reception of evidence, but such action would be purely discretionary and we cannot find that, in this case, there has been any abuse of discretion.

The plaintiff's appeal is wholly without merit. In his brief it is argued that the court erred in not declaring that the document of May 10, 1918, evidenced a usurious contract and therefore was null and void; but there is not a scintilla of evidence in the record showing that the contract was usurious. As already stated, the failure of the defendants to verify their answer by oath, does not, in an action such as the present, signify an admission of the allegations of the complaint.

For the reasons stated, the judgment appealed from is affirmed in toto, without costs. So ordered.

Johnson, Avanceña, Johns, and Romualdez, JJ., concur.

DISSENTING:

STREET, J., WITH WHOM CONCURS MALCOLM, J.,

I dissent from so much of this decision as holds that this court has no jurisdiction to review the findings of fact stated by the trial court in the decision of May 22, 1922, in so far as affects the appellant Petrona Lim. The reason assigned for this resolution appears to be that no motion for a new "trial, based on the insufficiency of the evidence to justify a judgment, was ever filed by said appellant in time and manner necessary to entitle her to a review of the facts in this court. The facts pertinent to this point are these: After said decision had been notified to Petrona Lim, her attorney on the succeeding day, that is, on June 28, 1922, interposed an exception to said decision and asked for a new trial on the two usual grounds, namely, (1) that the judgment was not justified by the

proof, and (2) was contrary to law. Before this motion had been acted upon, the same appellant, on July 14, 1922, interposed an additional motion to rehear on the ground of newly discovered evidence. On August 17, 1922, the trial judge acted upon this second motion, and granted the application for rehearing in so far only as related to the question of the area of the land. In this order no reference was made to the more general motion of June 28, 1922, based upon the ground that the decision was not justified by the proof. Later, in accordance with the order of August 17, 1922, additional proof was taken upon the point covered by that order, and the court finally, on March 23, 1923, modified the judgment of May 22, 1922, with reference to said point, declaring that the true area of the land was about 100 hectares instead of about 90 hectares as previously determined. With this modification said decision was ratified and in effect repromulgated. Meanwhile various other interlocutory proceedings had taken place and numerous orders had been made which in no wise affect the point now under consideration, and if set forth, would only have the effect of confusing the issue.

Suffice it to say that during the entire period from June 28, 1922, when the general motion for a rehearing was filed by Petrona Lim on the ground that the judgment of May 22, 1922, was not justified by the evidence, until March 23, 1923, said motion of June 28, 1922, remained undetermined by the trial court. And of course it was necessarily held in abeyance during that period by the pendency of the proceedings upon the partial review that had been granted.

I consider the order of March 23, 1923, to be in effect a denial of the general motion to rehear of June 28, 1922, for it ratifies and reestablishes the decision to which that motion was directed. It therefore necessarily overrules the motion. If it be not so considered, then it is quite obvious that the motion of June 28, 1922, has never been determined at all and the appeal is premature. If this view be taken the appeal should clearly be dismissed and the cause remanded in order that said motion may be formally acted upon. But I consider this unnecessary and the more reasonable view of the situation appears to me to be that which is indicated above, namely, that the motion of June 28, 1922, was necessarily and effectively overruled in the decision of March 23, 1923. To the last mentioned decision Petrona Lim promptly interposed a proper exception and announced her intention to appeal to the Supreme Court.

Under these circumstances I see no propriety in excluding this appellant from a review of the facts in this court. In section 2 of the Code of Civil Procedure it is declared that its provisions shall be liberally construed in order to promote its object and assist the parties in obtaining speedy justice; and I know of no more conspicuous instance in which the court has failed to obey the spirit of that provision than is presented in the case now before us.

So far as the merits of the case are concerned, I wish to say that I have examined the record, and in my opinion there is no sufficient proof upon which this court could properly affirm the finding of the trial judge that the contract of August 27, 1917, was obtained by fraud or declare that it suffers from any defect which would justify a court in setting it aside. So obvious is this fact that the attorneys for the plaintiff in this court have not attempted to refute the errors here assigned by the attorney for Petrona Lim in so far as affects said contract. The sole contention for the appellee on this point is that Petrona Lim is not entitled to have the facts here reviewed. In the view I take of the case the contention of this appellant with regard to said contract is well founded, and the judgment should be reversed in so far as it holds said contract to be void.

Before dismissing the case from my attention I wish to point out that the question whether the purported contract of sale with pacto de retro to Luisa Lim was really a straight contract of sale with right to repurchase, as it purports, or was intended as a mere security for a debt is of no practical importance; for even supposing it to be a straight sale with right to repurchase, I consider that the deposit of the necessary amount of money to redeem from said sale was made in court in a manner and under conditions which made it effective as a redemption. It results that the plaintiff in any view of the case was entitled to redeem, and no error was made by the trial court in so

declaring. My objection to the decision made by the court in this case has reference more particularly to the contract of August 27, 1927; and in accordance with that contract I consider that Petrona Lim is entitled, upon compliance with the conditions of the terms of said contract and its predecessor, to have a deed to 61 1/2 hectares out of the whole parcel of about 100 hectares to be converted into fisheries.

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