

**CONSTANZA YAFLEZ DE BARNUEVO, PLAINTIFF AND APPELLANT,
VS. GABRIEL FUSTER, DEFENDANT AND APPELLANT..***G.R.No. 7487. December 29, 1913*

Ponente: JOHNSON, J.

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On the 7th of February, 1875, Gabriel Fuster and Conatanza Yanez were joined in a Catholic or canonical marriage in the city of Malaga, Spain. In February of 1892, Gabriel Fuster came to the Philippine Islands, settled, and acquired real and personal property. Toward the middle of 1896, Constanza Yanez came to Manila, where her husband was residing, and here lived with him in conjugal relations until the month of April, 1899. On the 4th day of that month and year they made an agreement, in a public document, by which they "resolved to separate and live apart, both consenting to such separation, and by virtue thereof the husband authorized the wife to move to Spain there to reside in such place as the said lady pleases." (B. of E., p. 13.) In the same document, the husband under took to send his wife the sum of 300 pesetas monthly for her support, payable in Madrid, Spain, from the month of June of the said year 1899. The husband complied with this obligation until August, 1899, after which time he ceased to make further payments.

In the beginning of March, 1909, the wife returned to the Philippines, but the husband had absented himself therefrom in the early days of February of the same year. On the 11th of March, 1909, the wife commenced divorce proceedings against her husband, alleging as cause of action the adultery committed by him in or about the year 1899 with a certain woman that she named in the complaint and with whom he had lived and cohabited and by whom he had had two children. She prayed that she be granted a decree of divorce; that the court order the separation of the properties of the plaintiff and the defendant, to date from the date of the said decree; that the conjugal society be therefore liquidated, and after the amount of the conjugal property had been determined, that one-half thereof be adjudicated to her; furthermore, as to the amount of pension owing for her support but not paid to her, that the defendant be ordered to pay her the sum of 36,000 Spanish pesetas, that is, 7,220 Spanish dollars, which, reduced to Philippine currency at the rate of exchange on the date of the complaint, amounted to P12,959.90.

The defendant denied that either he or his wife was a resident of the city of Manila, as they had their domicile in Barcelona, Spain, and he alleged that both of them were natives and subjects of Spain. He admitted that he was married to Constanza Yanez; he also admitted having executed the document of the 4th of April, 1899, in which the had undertaken to make an allowance for the support of his wife in Madrid, but he denied the other paragraphs of the complaint. As a special defense with regard to the allowance, he alleged: "That in or about the month of May, 1900, he wrote to his wife, the plaintiff, instructing her to return to Manila, with a view of joining her husband and being maintained by him in his own house; that the communication was ignored by the plaintiff, who, against the will of the defendant, continued to live separately from him; that from the year 1901, the defendant did not know her address; that since 1900, the plaintiff has lived in comfort and has known where her husband resided; that the plaintiff, during all of the time referred to, in addition to disposing of valuable property

belonging to her husband, possessed and still possesses property of her own, acquired by her, in greater amount than that owned by her husband; and that in any case the action has prescribed by operation of law." (B. of E., pp. 7 and 8.) As to the divorce, he admits that he had by the plaintiff two children that have died. He expressly denied the contents of paragraph 5 of the complaint, relating to the charge of adultery and also those of paragraphs 6, 7, and 8, concerning the possession of real and personal property of the conjugal partnership, the statement of their amount, and their qualification as being all conjugal property. As a special defense, he alleged that prior to the year 1899 he conferred powers of attorney upon the plaintiff to administer and collect property and credits pertaining to him 'to the value of about 200,000 pesos; that the plaintiff accepted and exercised the said power of attorney, attached the property and collected the credits without ever having rendered any account of them. As a special preferred defense, he alleged that neither the trial court nor any other court in the Philippine Islands had jurisdiction over the subject matter of the complaint, because, as to the allowance for support, since neither the plaintiff nor the defendant are residents of Manila, or of any other place in the Philippine Islands, the agreement upon the subject was neither celebrated, nor was it to be fulfilled, in the Philippine Islands; and as to the divorce, because the action therefor ought to be tried by the ecclesiastical courts. In conclusion, he prayed that the court find: That the court was without jurisdiction over the two causes of action; that even if it had jurisdiction, it could not order the payment of the sum claimed as arrears of alimony; that, after all, the action with regard to this cause of action has prescribed; and as to the prayer for a decree of divorce, the defendant should be acquitted, while on the other hand the plaintiff should be required to render to the defendant an accounting, supported by proofs, of her operations as his attorney and administratrix of his property in Spain.

In deciding the case, the Court of First Instance of the city of Manila held itself to have jurisdiction, decreed the suspension of life in common between the plaintiff and defendant, ordered the latter to pay the former P5.010.17, directed that the communal property be divided between the parties, with costs against the defendant, and in event that the parties could not agree to the division, it was to be effected by commissioners according to law.

Both parties appealed from this judgment, but notwithstanding the appeal, the partition of the property, by means of commissioners, was proceeded with. These latter, after various vicissitudes, rendered their report and account of the partition to the court, who then rendered final judgment, from which, also, both parties appealed.

I. DEFENDANT'S APPEAL.

The first error assigned is the utter lack of jurisdiction of the trial court and of all other courts of the Islands to try the case, either with regard to the fulfillment of the contract to furnish alimony, or to decree a divorce or suspension of life in common between the spouses: lack of jurisdiction over the persons and over the subject matter of the litigation; and over the persons of the contending parties, because neither of the spouses was a resident of the Philippines on the date of the complaint.

The lower court did not commit this error attributed to him. The defendant had not proved that he had elsewhere a legal domicile other than that which he manifestly had in the Philippines during the seventeen years preceding the date of the complaint. On the contrary, it plainly appears, without proof to the contrary, that during this not inconsiderable period, extending from the year 1892 until a month prior to the arrival of his wife in the Philippines in March, 1909, he had constantly resided in the said Islands, had kept open house, and had acquired in the city of Manila quite a little real property which is now the object of the division of the conjugal society. It is also plainly shown, without proof to the contrary, that his wife resided in this city of Manila from the middle of 1896 until April, 1899, at which time she was permitted by him to change her residence. It is affirmed by the defendant in point five of his answer to the complaint, that in May, 1900, he sent a letter instructing the plaintiff to return to Manila to live with her husband and to be supported by him in his house, but that the plaintiff, against the will of the defendant, continued to live apart from him. (B. of E., p. 7.) It is also affirmed in the said answer,

that during all of the time referred to in the complaint, and especially since, 1900, the plaintiff knew where her husband resided. (B. of E., p. 7.) It is also very evident that the contract, by virtue of which he authorized his wife to move to Spain and reside there in such place as was agreeable to her, was executed in these Islands, "in the city of Manila on the 4th of April, 1889," as is to be seen in the heading of the document. (B. of E., p. 12.) Finally, at page 11 of his brief, he says that the record shows him to be a Spanish subject, inscribed in the consulate of his nation, and cites article 26 of the Civil Code, the Treaty of Paris and the Philippine Bill.

Granting these facts, there can be no doubt that the defendant, although a Spanish subject, was a resident of these Islands. Article 26 of the Civil Code that he cites itself provides that "Spaniards who change their domicile to a foreign country, where they may be considered as natives without other conditions than that of residents therein, shall be required, in order to preserve the Spanish nationality, to state that such is their wish before the Spanish diplomatic or consular agent, who must record them in the registry of Spanish residents, as well as their spouses, should they be married, and any children they may have." From this provision, which is the exclusive and irrefutable law governing the defendant, we are to conclude that the domicile of the defendant and the plaintiff is fully proven, irrespective of the Treaty of Paris. Without this supposition of having acquired his domicile and residence in these Islands, he could not have required his wife to return to live with him therein because this requirement could only be based on article 58 of the Civil Code of Spain, according to which the wife is obliged to follow her husband wherever he wishes to establish his residence, or on article 48 of chapter 5 of the Marriage Law in force in the Philippines, which imposes upon the wife the duty of obeying her husband, living in his company, or of following him to wherever he transfers his domicile or residence. And just because he was absent for a month before his wife returned to the Philippines, he cannot be understood to have surrendered his habitual domicile of more than seventeen years, without having established any other afterwards, and without making any declaration in legal form, before he absented himself, of it being his intention to change his domicile, while at the same time he retains here his house, real property and all manner of means of subsistence. Section 377 of the Code of Civil Procedure leaves to the election of the plaintiff the bringing of a personal action like the one at bar either in the place where the defendant may reside or be found, or in that where the plaintiff resides.

The litigating spouses have gained not only domicile (domicilio) but also residence (vecindad) in Manila. In this litigation the defendant claims that, born as he says Jin Mallorca, in the Balearic Islands, he is not subject, in his marriage, to the rules governing conjugal property, that are in force in the territories of Spain that are governed by the common law of Castile (as the Philippines in their day), because they are opposed to the Foral Law in force in the said Islands and which is respected by the Civil Code. Even if this defense could be sustained herein, paragraph 2 of article 15 of the said Civil Code would be applicable. It provides: "For the purposes of this article, residence (vecindad) will be acquired: By residence of ten years in common law provinces or territories, unless before the termination of that time he manifests his will to the contrary; or by a residence of two years, if the interested person declares this to be his will * * * In any case, the wife will follow the condition of her husband * * *." On no occasion had the defendant manifested his will to the contrary, not even as he was leaving, after a residence of seventeen years, a month before the return of his wife to these Islands. On the contrary, when he inscribed himself in the Spanish consulate, he declared his intention of continuing to reside in the Islands as a Spaniard and not as a Mallorquin, subject as such to the common law of Spain.

In an endeavor to demonstrate the lack of jurisdiction of the courts of these Islands over the subject matter of the complaint, that is, to try an action for divorce between two Catholic Spaniards, he alleges in his appeal: That both litigants are Spanish subjects and that they contracted a Catholic marriage; that in accordance with article 9 of the Civil Code of Spain (the same as that of these Islands) the laws relating to family rights and duties, or to the status, condition and legal capacity of persons, govern Spaniards although they reside in a foreign country; that, in consequence, "all questions of a civil nature, such as those dealing with the validity or nullity of the matrimonial

bond, the domicile of the husband and wife, their support, as between them, the separation of their properties, the rules governing property, marital authority, division of conjugal property, the classification of their property, legal causes for divorce, the extent of the latter, the AUTHORITY to decree it, and, in general, the civil effects of marriage and divorce upon the persons and properties of the spouses, are questions that are governed exclusively by the national law of the husband and wife, and, in our case, by the Spanish law by virtue of article 9 as above set out." (Brief, p. 12.) The appellant and defendant continues his argument, saying: That by the express provision of article 80 of the Civil Code of Spain, "jurisdiction in actions for divorce and nullification of canonical marriages lies with ecclesiastical courts," while that of civil tribunals is limited to civil marriages; that this being so, the action for divorce brought by the plaintiff in this cause does not fall within the jurisdiction of the civil courts, according to his own law of persons, because these courts ought to apply the Spanish law in accordance with the said article 9 of the Civil Code of Spain, and this Spanish law grants the jurisdiction over the present cause to the ecclesiastical courts, in the place of which no tribunal of these Islands can subrogate itself. Says this appellant: "If a law of a foreign country were of rigorous application in a given case, a North American tribunal would have no jurisdiction to apply it in a case where the said law conferred jurisdiction upon an ecclesiastical court and therefore the North American tribunal in applying it would have to exercise a faculty which that law reserved to the ecclesiastical court." (Brief, pp. 13, 14, and 15.)

Unless we take the question itself for granted, the foregoing reasoning cannot be upheld. The question is precisely whether the courts of the Philippines are competent or have jurisdiction to decree the divorce now on appeal, and it is taken for granted that the power to decree it is one of the rights included in the personal statute, but appellant does not prove by any law or legal doctrine whatever that the personal statute of a foreigner carries with it, to wherever he transfers his domicile, the authority established by the law of his nation to decree his divorce, which was what he had to demonstrate.

The authority of jurisdictional power of courts to decree a divorce is not comprised within the personal status of the husband and wife, simply because the whole theory of the statutes and of the rights which belong to everyone does not go beyond the sphere of private law, and the authority and jurisdiction of the courts are not a matter of the private law of persons, but of the public or political law of the nation. "The jurisdiction of courts and other questions relating to procedure are considered to be of a public nature and consequently are generally submitted to the territorial principle * * *. All persons that have to demand justice in a case in which foreigners intervene, a law of their nation which gives jurisdiction in such a case to territorial courts, or to a certain court within or without the territory of their nation.

It is a question that has already been settled in two decisions of the Supreme Court (Benedicto vs. De la Rama, 3 Phil. Rep., 34, and Ibanez vs. Ortiz, 5 Phil. Rep., 325).

In the present action for divorce the Court of First Instance of the city of Manila did not lack jurisdiction over the persons of the litigants, for, although Spanish Catholic subjects, they were residents of this city and had their domicile herein.

The Courts of First Instance of the Philippine Islands have the power and jurisdiction to try actions for divorce. That of the city of Manila did not lack jurisdiction by reason of the subject matter of the litigation.

The second assignment of error is directed against the finding of the court that the defendant had committed adultery with a certain woman in this city from the year 1899 until 1909; the third was against the finding that the adultery was accompanied by public scandal and injured the dignity of his wife; and the fourth for having decreed the divorce, suspension of the married life, and the separation of the properties of the parties.

The evidence relating to the foregoing not being sent up on appeal, we are unable to review it, so we accept the

findings of the trial court.

There is a point of law regarding the claim that the adultery, even though it were proven, would not be a cause for divorce, because no public scandal resulted therefrom nor was there contempt displayed for the wife. (Appellant's brief, p. 26.) The facts must be accepted by this tribunal as they were found by the trial court, since the evidence cannot be reviewed; moreover, the appellee affirms the contrary and maintains that it is a proven fact, public and notorious, an assertion that the trial court must have found to be proven. (Appellee's brief, p. 5.) In law, it is not necessary that adultery, to be a cause for divorce, should be accompanied by public scandal and contempt for the wife. There is no law that requires this. Law 2, title 9, of the Fourth Partida does not require it.

The fifth and sixth assignments of error are directed against the finding of the trial court that there exists conjugal property, a finding that the appellant maintains is without foundation, and that which holds that the property in the hands of the receiver (that sought to be divided) is conjugal property, a conclusion which the appellant claims to be contrary to the law which should be applied to the case and according to which, as alleged in the tenth assignment of error, the whole of the property should be adjudicated to the defendant as being exclusively his.

Facts: The appellant affirms that he is a native of Mallorca in the Balearic Islands and that that is also the condition of his wife, the plaintiff. Law: That although the rule of the Civil Code is that which legally governs conjugal property, yet at the same time it admits, as an exception, the laws, usages, and customs of the Foral Law, according to which, as applied in the Balearic Islands, the law of the family is that of the division of property and that of conjugal property is not known; so that the property pertains exclusively to the spouse who, by whatever title, has acquired it. In support of the facts, appellant cites pages 27 to 37 and 39 to 41 in the bill of exceptions; and of the law, the doctrinal authority of Manresa, Gutierrez, and Alcubilla.

The citation from pages 39 to 41 of the bill of exceptions, the only pertinent one, is but an affidavit filed by the defendant in which, under oath, he himself testifies as to the Foral Law in the Balearic Islands. The adverse party says with regard to this: "This affidavit was never presented in proof, was never received by the trial judge, and cannot seriously be considered as an effort to establish the law of a foreign jurisdiction. Sections 300, 301 and 302 of the Code of Civil Procedure, now in force in these Islands, indicate the method by which the law of a foreign country may be proved. We maintain that the affidavit of a person not versed in the law, which was never submitted as proof, never received by the trial court, and which has never been subjected to any cross-examination, is not a means of proving a foreign law on which the defendant relies." (Brief, pp. 6 and 7.)

Furthermore, on the supposition that the defendant could invoke the Foral Law as the law of his personal status in the matter of the regimen of his marriage, and that to allege this he be considered as authorized by article 15 of the Civil Code, we have said before, in dealing with his law of domicile, that paragraph 2 of this article 15 of the Civil Code would be entirely adverse to his claim, and if it be advanced that there is a similar Foral Law in the Philippines by virtue of paragraph 1 of the said article 15, it might be said, though there is not at present any need to say it, that it is not in force. The two findings attacked are in perfect accord with the law. All the property of the marriage, says article 1407 of the Civil Code, shall be considered as conjugal property until it is proven that it belongs exclusively to the husband or to the wife. No proof has been submitted to this effect.

As seventh assignment of error it is alleged that the court below erred in holding in the judgment that the plaintiff had brought to the marriage a dowry of 30,000 Spanish dollars. But the defendant himself adds that the court made no order or decree regarding the alleged dowry. On the other hand, the plaintiff, in her fourth assignment of errors, claimed that the court erred in not confirming the report of the commissioners which gave to the said plaintiff the sum of 30,000 Spanish dollars. It is unnecessary to say anything further.

The eighth error consists in that the court below ordered the defendant to pay to the plaintiff P5,010.17 Philippine

currency, whereas the plaintiff had made no demand in her complaint with respect to this sum; that no arrears of payment are owing for alimony, even though payments had been stipulated in the contract, unless they are claimed by the person who had furnished the actual support, and that alimony is due only when it is necessary; so that.

as the plaintiff has had no need of it for ten years, nor has she stated who has furnished it, there is no reason for awarding her the amount of the arrears for all that time; that as she has allowed ten years to elapse before claiming it, her action prescribed in 1904, that is to say, after five years.

The plaintiff acknowledges that there is no petition or prayer in her complaint as to this cause of action, but she considers that in equity such an omission can be supplied.

Paragraph 3 of section 89 (90) of the Code of Civil Procedure determines one of the requisites of the complaint: "A demand for the relief which the plaintiff claims." The section goes on to say: "If the recovery of money or damages is demanded, the amount demanded must be stated. If special relief, such as an order for the special restitution of property, etc., the ground of demanding such relief must be stated and the special relief prayed for. But there may be added to the statement of the specific relief demanded a general prayer for such further or other relief as shall be deemed equitable."

In the complaint of the case at bar the provisions of paragraph 2 of the said section 89 [90] are complied with by setting forth in its paragraphs 4 and 5 the relation of the cause of action, that is, the contract of the 4th of April, 1899, by which the defendant obligated himself to send to the plaintiff in Spain a certain amount of money monthly, for her support, and the failure to comply with this obligation after the month of August, 1899. Paragraph 6, as a consequence of the promise established in 4 and 5, says as follows: "That the defendant Gabriel Fuster y Fuster actually owes the plaintiff the sum of 36,100 Spanish pesetas, that is, 7,220 dollars, which, reduced at the present rate of exchange, amounts to the sum of P12,959.90, Philippine currency." (B. of E., p. 2.) In the case of default on the part of the defendant "the court shall proceed to hear the plaintiff and his witnesses and assess the damages or determine the other relief to which the plaintiff may be entitled, including the costs of the action, and render final judgment for the plaintiff to recover such sum or to receive such other relief as the pleadings and the facts warrant." The pleadings, not the prayer of the complaint.

This court has recently decided that the pleadings, not the prayer, exactly, are the essential part of a complaint.

It is not a question of alimony for the present, nor for the future, which constitutes the first cause of action, but of certain sums stipulated in a contract. This contract is a law for the contracting parties, a law which rises superior to those general laws which regulate the nature of the subject matter of the contract (in the present case an entirely voluntary one) and which govern judicial action.

An action arising out of a contract of this nature does not prescribe like all personal ones, but, by the provisions of article 1964 of the Civil Code, after fifteen years. But even though the provisions of article 1966 were applicable, by which an action to compel the fulfillment of an agreement to pay alimony prescribes in five years, yet by section 50 of the Code of Civil Procedure, "when payment has been made upon any demand founded upon contract * * * an action may be brought * * * after such payment * * *." And the parties admit that on the 18th of August, 1908, the plaintiff secured the payment of 6,365.68 pesetas by virtue of the contract of April 4, 1899. So that from August, 1908, until March, 1909, the date of the complaint, the said period of five years had not elapsed.

The ninth assignment of error consists in that the court below erred in empowering the receiver to proceed to the separation of the property and in appointing commissioners to make the partition and distribution between the spouses, since the principal question in this action hinges upon the classification of the property; that it was

erroneously classified as conjugal property, whereas all of it pertained to the husband alone and should be adjudicated to him for the reason that, as it reiterated in the tenth assignment of error, the conjugal partnership was not subject to the provisions of the law governing conjugal property, because such provision are totally foreign to the Foral Law of the Balearic Islands.

The action of the trial court, by the terms of section 184 of the Code of Civil Procedure, was in accordance with law. The only question before this court is the partition of real property. All that referred to in the second decision appealed from, dated September 9, 1911, is urban real estate. Its classification as conjugal property is in accordance with law, as is shown in the foregoing reasoning, and that no consideration of the Foral Law enters into the question has also been demonstrated.

II. PLAINTIFF'S APPEAL.

As the trial court rendered judgment ordering the defendant to pay to the plaintiff only 5,010.17, the petitioner here prays that the judgment be reversed and that in its place this court order the defendant to pay to the plaintiff her claim of P12,959.90, plus the additional sum which the alimony amounts to at the rate of P107.70 per month, dating from the 1st of August, 1909, until the date of payment, with legal interest upon the said P12,959.90 from the date of the filing of the complaint until the date of payment, and, furthermore, legal interest upon each of the monthly payments due after the filing of the complaint, and which will continue to become due until the close of this litigation.

The trial court made the following findings: First, that the total amount of the alimony owing to the plaintiff amounted to 34,200 pesetas; second, that of this sum the plaintiff had collected in Madrid 6,365.68; third, that the remainder, that is, 27,834.32, was equivalent to \$5,566.86 Mexican currency; fourth, that the Mexican peso was worth 90 centavos Philippine currency; fifth, that therefore the sum of \$5,566.86 Mexican currency was equivalent to P5,010 Philippine currency; and finally, as there was no evidence as to the kind of pesetas agreed upon, it was to be presumed that it was that current at the time and place where the agreement was made, which was Mexican pesetas.

In her appeal, the plaintiff contends that these findings are erroneous in that, firstly, the parties had admitted that the pesetas referred to in the contract of the 4th of April, 1899, were Spanish, and in view of this admission the court was not empowered to define them as being different from the kind admitted by the parties; secondly, if he were so empowered, his interpretation should be governed by the terms of the law.

With regard to the first error, the plaintiff says that the statement is made in her complaint that the defendant had obligated himself to pay her a "monthly pension for her support of 300 Spanish pesetas, that is, 60 Spanish dollars, which, reduced to Philippine currency, amounts to P107.70;" that the defendant had admitted this in his answer to the complaint, and that by his finding in a sense other than that accepted and not refuted in the answer of the defendant, the court violated the provisions of section 94 of the Code of Civil Procedure.

The court has not incurred this error, because it does not appear that the defendant in his answer accepted the fact in the manner alleged in the complaint. The defendant said that he admitted having made the agreement referred to in paragraph 4 of the complaint, and that he stood upon its contents. The contents of the document to which he refers is of the following tenor: "Mr. Fuster binds and obligates himself to pay to his said wife the sum of 300 pesetas, monthly, payable de sucuenta in the city and capital of Madrid, for her support * * *." He did not therefore admit the matter of the Spanish pesetas; that does not appear in the contents of the document—the only thing he admitted in his answer.

As to the second error, the court did not commit it in applying the rule contained in article 1287 of the Civil Code. "The usages or customs of the country shall be taken into consideration in interpreting ambiguity in contracts * *

*." If in the contract the word "pesetas," not being specific, was ambiguous, then it was in harmony with this precept to interpret it as being the peseta then in use or current when and where the agreement was made, Mexican being then the usual and current money in the Philippines. Furthermore, the phrase *de sucuenta* clearly means that it was not "Spanish pesetas" that the contracting parties had in mind, because if the agreement had been a specific one to pay 300 Spanish pesetas in Madrid, everyone would of course understand that the expense of following the fluctuations of change and of the differences in value between the money current in the country, and the Spanish pesetas, would have to be defrayed by the obligated party; whereas, if nothing more than pesetas was mentioned, it was necessary to decide which party should pay for the difference in value so that the 300 pesetas stipulated here should be 300 Spanish pesetas paid in Madrid. Against the reasons of the court below for his decision this court can offer no legal grounds. The rule of interpretation cited is the one applicable and it supports the reasoning of the decision appealed from.

The appellant also alleges as error that the court did not adjudicate to her the 30,000 Spanish dollars which the commissioners proposed in their report. First she characterizes this sum of 30,000 dollars as the dowry of the wife delivered to the husband, then, later, as paraphernal property brought to the marriage.

According to the last instructions of the court to the commissioners, this amount of 30,000 dollars could not enter into the partition, and with reason. If, as was claimed, it was inherited by the plaintiff from her uncle, it really constitutes paraphernal property under article 1381. "Paraphernal property is that which the wife brings to the marriage without being included in the dowry and that she may acquire after the creation of the same without being added thereto." But it is a provision of article 1384 that "The wife shall have the management of the paraphernal property unless she has delivered the same to her husband, before a notary, in order that he may administer said property. In such case the husband is obliged to create a mortgage for the value of the personal property he may receive, or to secure said property, in the manner established for the dowry property." Not even was there offered in evidence the public deed of delivery, nor the equally public mortgage deed that is required by law. So that, therefore, the necessary proof of the obligation to return paraphernal property as here demanded does not exist.

The partition of property decreed in the judgment appealed from of the 9th of September, 1911, should be and is hereby confirmed.

The two judgments appealed from are hereby affirmed, without special pronouncement of costs in this instance.

Arellano, C. J., Torres, Carson, and Trent, JJ., concur.

ARAULLO, J., concurring in case No. 9374, *Del Val vs. Del Val*, page 534, ante.

I concur in the result and with the reasoning of the fore-going decision, only in so far as concerns the return of the record to the lower court in order that it fully and correctly decide all the issues raised therein, allow the parties to raise such questions as may help to decide all those involved in the case, and to present such evidence as they may deem requisite for a complete resolution of all the issues in discussion, because it is my opinion that it is inopportune to make, and there should not be made in the said majority decision the findings therein set forth in connection with articles 428 of the Code of Commerce and 1035 of the Civil Code, in order to arrive at the conclusion that the amount of the insurance policy referred to belongs exclusively to the defendant, inasmuch as this is one of the questions which, according to the decision itself, should be decided by the lower court after an examination of the evidence introduced by the parties; it is the lower court that should make those findings, which ought afterwards to be submitted to this court, if any appeal be taken from the judgment rendered in the case by the trial court in compliance with the foregoing decision.

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