

**MARCELA PERIZUELO, ET AL., PLAINTIFFS-APPELLEES, VS.
TEODORO S. BENEDICTO ET AL., DEFENDANTS-APPELLANTS.***G.R. No. L-3800. January 17, 1908*

Ponente: TRACEY, J.

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Prior to 1886 Ciriaco Perizuelo, the owner of the lands in controversy, appears to have orally apportioned some of them among his children, Mariano, the father of the plaintiff, taking one of the parcels and Juliano certain others, including a one-third interest in a house in Zarraga, and to all of them, except the house in Zarraga, he obtained a royal title in 1888.

In 1890, being then a widower and about to remarry, Ciriaco made a second and complete apportionment and division of his estate among his children, confirming the lands already held by them and adding others thereto, but without any written transfer of title, either public or private. This division is found to have been "just and equitable."

In 1902 he died intestate and no administration was applied for on his estate until 1906. In 1904 the defendant, Benedicto, took out an attachment in an action pending against Juliano Perizuelo, and after the affirmance of a judgment in his favor in this court (Benedicto vs. Perizuelo, 5 Phil. Rep., 632) in 1906, he issued an execution under which all the lands in suit, already held under the attachment, were sold to the defendant Ubaldo Roblez, who, under a sheriff's certificate dated April 26, 1906, went into possession of them.

In the meantime, in January, 1906, while the attachment was outstanding, Juliano, on a petition of the heirs, had been appointed administrator of the property of the father, Ciriaco, and an inventory of the estate was made and commissioners appointed. The heirs then being of full age, on the 14th of February, 1906, executed an agreement, which was the next day approved by the court, whereby the estate was partitioned, all the lands here in question, including those previously allotted to Juliano, going to the plaintiff. Claiming under this partition, she brings this action and relies upon the invalidity or incompleteness of the earlier partitions, whereas the defendant, claiming through the sheriff's sale, seeks either to sustain them or to establish Juliano's ownership of the royal title, in either case subjecting some part of the property to the execution sale.

The difficulty in the case as presented to this court, arising out of the lack of any proofs before us, is much lessened by the painstaking opinion of the judge of the Court of First Instance, in which the facts, as he understood them, are detailed at great length, but in which it is stated that the evidence before him was on different points indefinite, especially in respect to dates, some of which he could not ascertain with precision. We accept, however, his approximation to these dates, and his recital of facts as the foundation of our judgment.

The defendant makes his first stand upon the Spanish royal title of 1888 as having been transferred to Juliano, and therefore being subject to execution against him. The trial court found as a fact that this royal title was understood to have passed from Ciriaco to Juliano, who mortgaged in 1894 as security for a debt of 1,000 pesos, said to be an obligation of his father, but he further found that Juliano did not receive it for himself but held it for the benefit of

all the owners of the property therein described, and that the transfer, whatever it may have been, was not in writing, although it took place after the institution of the Civil Code in these Islands in 1889. This last finding is fatal to the claim of the defendant, founded on the royal title, because article 633 of the Civil Code requires a public writing, in order to transfer real property by gift, so that the oral assignment was inoperative.

The same requirement of the code serves to dispose of the second defense resting on the oral partition by Ciriaco among his children, before his marriage in 1890. This partition was not valid as a donation because not contained in a public writing, nor in any writing at all, but only expressed by spoken words. Nor can it be given effect as partition or distribution of lands under articles 1056 and 1057 of the Civil Code, for the reason that, as we read the judge's findings, it was not so intended, having been made as a present gift and not a provision in contemplation of death, whether estate or inestate. Consequently it is not necessary for this court to pass upon the question most fully discussed by counsel, whether article 1056, literally made applicable to a partition before death, made by a testator, can be extended to a similar act by a parent who afterwards dies inestate, nor to interpret the decision in this point of June 13, 1903, by the supreme court of Spain.

A different question arises out of the first partition or allotment of lands made before 1886, as the Civil Code was not then in force in these Islands, and it is contended that by the antecedent law such arrangements were sustained when proved, if the value of the donation did not exceed 500 gold mararedises. (Escriche Tit. Donación; Manresa, Commentaries on Civil Code, art. 633; Scaevola, art. 633.)

It may be the burden of proof as to the value of the property ordinarily falls on the party seeking to establish the excess, and the intimation of the trial judge is that no evidence had been given on this subject. Were the findings in relation to this old transaction explicit, they might perhaps suffice as a foundation for a reversal of the judgment. They fall short, however, of a justification for an imputation of error to the court below and a reversal would have to be based on what is practically an assumption of fact. The trial judge says that the proof of this partition "depends solely on the testimony of a single witness;" that "it is impossible, under the proofs, to fix the date when the heirs entered into possession of what they considered their respective portions" or "when such were set over to them," but that since 1884 or 1886 they had held "portions of said lands as theirs," assigning as a reason for his conclusion a local custom rendering such partitions common. It is, moreover, clear from his recital that not all of the lands were then divided nor does it appear that this partition was fair or respected either the rights of the infants or those of the natural heirs to their several shares. As a final apportionment it is discredited by the subsequent and complete partition made in 1890, with which, as well as with the holding of the royal title in a single name, it is not altogether consistent. In short, there is only the most shadowy evidence of the fact of the first partition, and none whatever to show that it was of such a nature as to comply with the requirements of the law. We do not think that the findings before us oblige or permit us to accept it as an adjudged fact.

The trial judge expressly declined to pass on the effect of the attachment and execution upon the undivided share of Juliano under the partition of 1906. The point is not brought us by an appropriate assignment of error and is not determined by us.

The judgment of the trial court is affirmed with costs of this instance. So ordered.

Arellano, C.J., Torres, Johnson, Carson and Willard, JJ., concur.

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