

JOSE M.A ARROYO, GUARDIAN OF TITO JOCSING, AN IMBECILE, PLAINTIFF AND APPELLEE, VS. FLORENTINO HILARIO JUNGSAY ET AL., DEFENDANTS AND APPELLANTS.

G.R. No. 10168. July 22, 1916

Ponente: TRENT, J.

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TRENT, J.:

The plaintiff in this case is the guardian of one Tito Jocsing, an imbecile, appointed by the court to succeed Jungsay, the former guardian, who absconded with the funds of his ward. The defendants are the absconding guardian and his bondsmen. From a judgment in favor of the plaintiff and against the defendants for the sum of P6,000, together with interest and costs, the bondsmen appealed.

The principal question presented for our consideration is whether the appellants should be credited with P4,400, the alleged value of certain property attached as that of the absconding guardian, all of which is in the exclusive possession of third parties under claim of ownership.

The appellants in contending for the credit, rely upon article 1834 of the Civil Code, which gives to the surety the benefit of a levy (excusion), even when a judgment is rendered against both the surety and the principal. But, according to article 1832, before the surety is entitled to this benefit, he must point out to, the creditor property of the principal debtor which can be sold and which is sufficient to cover the amount of the debt. Upon this point Manresa, in vol. 12, pp. 263-265, says:

"As explicitly stated in the article under consideration, it is not sufficient that the surety claim the benefit of discussion in time, nor that in so doing he designate property of the debtor wherein to satisfy the debt. It is also necessary that another condition be fulfilled, to wit, that such property be realizable and that it be situated in Spanish territory. This is not only logical, but just, because the attachment of property situated a great distance away would be a lengthy and extremely difficult proceeding and one that, if actually not opposed to, yet does not very well accord with the purpose of the bond, that is, to insure the fulfillment of the obligation and at the same time furnish the creditor with the means of obtaining its fulfillment without hindrance or delays. The same may be said of property that is not readily realizable, and as the surety is the sole person who benefits by the discussion and the one most interested in avoiding difficulties in its execution, it is he, therefore, who should designate the property out of which the recovery is to be made, it being unquestionably convenient for him that the property he designates unite the conditions indicated in order to facilitate the payment of the debt, whereby he will be freed from the subsidiary obligation inherent in the bond."

In *Hill & Co. vs. Bourcier and Pond* (29 La. Ann., 841), where provisions similar to our Civil Code were under consideration, the court said:

"The surety has the right, under certain circumstances, to demand the discussion of the property of the principal debtor. Where suit is brought against the surety alone, he may interpose the plea, and compel the creditor to discuss the principal debtor. The effect of this is to stay proceedings against the surety until judgment has been obtained against the principal debtor, and execution against his property has proved

insufficient. When the suit is brought against the surety and the principal debtor the plea of discussion does not require or authorize any suspension of the proceedings; but the judgment will be so modified as to require the creditor to proceed by execution against the property of the principal, and to exhaust it before resorting to the property of the surety. (Bernard vs. Custis, 4 Martin, 215; Banks vs. Brander, 13 La., 276.)

"In either case, the surety who desires to avail himself of this right must demand it in limine, 'on the institution of proceedings against him.' He must, moreover, point out to the creditor property of the principal debtor, not incumbered, subject to seizure; and must furnish a sufficient sum to have the discussion carried into effect. (R. C. C, 3045, 3046, 3047.) A plea which does not meet these requirements must be disregarded. (Robechot vs. Folse, 11 La., 136; Banks vs. Brander, 13 La., 276.)"

The property pointed out by the sureties not sufficient to pay the indebtedness; it is not salable; it is so incumbered that third parties have, as we have indicated, full possession under claim of ownership without leaving to the absconding guardian a fractional or reversionary interest without determining first whether the claim of one or more of the occupants is well founded. In all these respects the sureties have failed to meet the requirements of article 1832 of the Civil Code.

Where a guardian absconds or is beyond the jurisdiction of the court, the proper method, under article 1834 of the Civil Code and section 577 of the Code of Civil Procedure, in order to ascertain whether such guardian is liable and to what extent, in order to bind the sureties on his official bond, is by a proceeding in the nature of a civil action wherein the sureties are made parties and given an opportunity to be heard. All this was done in the instant case.

The judgment appealed from, being in accordance with the law, the same is hereby affirmed, with costs against the appellants. So ordered.

Torres, Johnson, Moreland, and Araullo, JJ., concur.

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