

**EMILIO CUSTODIO, ADMINISTRATOR OF THE ESTATE OF THE
DECEASED SIMEON CALINAWAN, PLAINTIFF AND APPELLANT, VS.
ANDRES CALINAWAN, DEFENDANT AND APPELLEE.***G. R. No. 10270. January 03, 1917*

Ponente: ARAULLO, J.

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On November 8, 1911, Emilio Custodio, as the administrator of the estate of Simeon Calinawan, deceased, filed a complaint, in the Court of First Instance of Surigao, against Andres Calinawan, wherein he requested that judgment be rendered against the latter by ordering him to deliver to the plaintiff, as such administrator, the properties described in the complaint and which, as therein alleged, were unlawfully held by the defendant against the will of the other lawful heirs of said decedent. The defendant interposed a demurrer which was sustained by the court, who dismissed the complaint. The parties stipulated to the filing of a new complaint in the name of the children of Simeon Calinawan, amending the previous complaint. This stipulation was approved by the court.

Consequently, on May 10, 1912, an amended complaint was filed by Saturnino Calinawan and Florencio Calinawan against Andres Calinawan, all of whom alleged that they were heirs of the decedent Simeon Calinawan. The plaintiffs asked for a partition of the real and personal property enumerated in the complaint and left by their common predecessor in interest, and for the adjudication and delivery to the plaintiffs of such part thereof as might be awarded to them in said partition. To this amended complaint the defendant filed a new demurrer, on the grounds that the facts therein alleged did not constitute a sufficient cause of action, and that the court lacked jurisdiction to try the case. By an order of the 21st of the same month, the court sustained the demurrer on the grounds that in said amended complaint the special remedy of partition was relied upon, which, pursuant to section 181 of Act No. 190, applies solely to real estate, and that all the personal property described in paragraphs (e) to (k) of the complaint should be stricken out, and, accordingly, authorized the plaintiffs to amend their complaint, in the sense indicated, within the period granted by law.

The plaintiffs filed a motion praying the court to set aside the said order, to which they excepted, and to issue another order overruling the demurrer and directing the defendant to answer the complaint. A copy of this motion was duly received by the defendant's counsel. On August 30, 1913, the court, deciding upon said motion, issued an order in which he overruled the said motion on the ground that the previous order was in accordance with law, and stated that the plaintiffs might amend their complaint within the legal period. Neither the plaintiffs nor their counsel were notified of the latter order.

In this state of the case, on November 13th of the same year, 1913, the defendant presented a motion in which he alleged that a sufficient length of time had elapsed since the last said order given by the court was issued, and that the plaintiff had not amended their complaint. They therefore asked that another order be issued dismissing the complaint and assessing the costs against the plaintiffs. The latter, in turn, filed on the same date a motion

whereby they stated their intention to appeal against the said orders to the Supreme Court on the ground that they did not acquiesce in the orders of the court of October 21, 1912, and August 30, 1913, respectively, whereby, the demurrer to the amended complaint was sustained and all references made in the latter to personal property was ordered to be stricken out and whereby the plaintiffs' motion of October 23, 1912, was overruled.

On November 14, 1913, the court, deciding upon the de-fendant's above-mentioned motion, issued an order dismissing the case, with the costs against the plaintiffs.

From this order plaintiffs appealed and forwarded to this court the proper bill of exceptions. They alleged that the lower court erred: (1) In issuing the order of October 21, 1912; (2) in issuing the order of August 30, 1913; and (3) in issuing the order of November 14, 1913, dismissing the case.

In the amended complaint of Saturnino and Florencio Calinawan against Andres Calinawan, dated May 10, 1912, it was alleged that the plaintiffs and the defendant Andres Calinawan, were heirs of Simeon Calinawan and Dominga Mocende, who, at their death, left the real and personal property specified in the, complaint; that said properties, with the exception of about two hectares of land and a wardrobe, were in the possession of the defendant, who was unlawfully retaining the same, excluding the plaintiffs from the possession and enjoyment thereof, and appropriating their products to himself. Petition was made that the court order a partition of this property between the plaintiffs and the defendant as the lawful heirs of the two aforesaid de-cedents, and the adjudication and delivery to each one of them of the part thereof to which they might be respectively entitled.

Thus, it was not prayed for in the complaint that a partition be made between the plaintiffs and the defendant of only the real property, as a special remedy, in accordance with section 181 of Act No. 190, as the trial court erroneously understood and so stated in his order of October 21, 1912; but, under said complaint, action was brought by the plaintiffs for the partition and distribution of hereditary estate, referred to in the provisions contained in chapters 29, 30, and 40 of part II of Act No. 190. Consequently, the lower court erred in his order of October 21, 1912, by sustaining the demurrer interposed by the defendant to the said amended complaint and ordering the plaintiffs to strike out of the latter the parts thereof relating to the personal property; and he likewise erred in overruling, by the order of August 30, 1913, plaintiffs' motion in which petition was made for the annulment and setting aside of the previous order.

In the case of Del Val vs. Del Val (29 Phil, 538) this Supreme Court said:

"The courts of the Islands have jurisdiction to divide personal property between the common owners thereof and that power is as full and complete as is the power to partition real property." * * *

The dismissal decreed by the court, on defendant's motion, in the order of November 14, 1913, from which appeal was also taken, was based on the fact that the plaintiffs had not amended their complaint as they were directed to do by the previous order of August 30, 1913, notwithstanding the long period of time that had elapsed since the issuance of the last mentioned order until November 13, 1913, the date when the defendant filed the petition aforementioned.

The plaintiffs, not having been notified of the order of August 30, 1913, the period allowed by law for the amendment of their complaint, to which this order referred, did not elapse, nor did the overruling of their motion of October 23, 1912, also mentioned in said order, produce any legal effect as to them until the moment when they learned that the order had been issued, that is, until November 13, 1913, on which date the defendant requested the dismissal of the case and the plaintiffs hastened to appeal to the Supreme Court from both of said orders.

From Rule 9 of the Rules of the Courts of First Instance, cited by the trial judge in the order of dismissal appealed

from and which directs that when a demurrer to the complaint is overruled the defendant shall answer within five days after service on him of written notice of the order, which notice the plaintiff shall give, it cannot be inferred, as the lower court erroneously understood that the plaintiff need not be notified of the ruling or order sustaining the demurrer filed to his complaint, or of any motion in connection with said demurrer, or of any other motion made by any of the parties in the case, for Rule 3 of the Rules above mentioned clearly and positively prescribes as follows:

"As soon as any order or decision is filed by the judge the clerk shall give notice by mail or personally to both parties."

In the present case, this rule was violated by a failure to notify the plaintiffs of the order of August 30, 1913, overruling their motion whereby they asked for the setting aside of the other order of October 21, 1912, which sustained the demurrer filed by the defendant to the amended complaint of May 10, 1912, in which latter order it was stated that the plaintiffs might amend their complaint within the period granted by law. Said violation gave rise to the circumstance that the plaintiffs, not knowing the issuance of the said order, took no steps whatever in the matter until the defendant moved for the dismissal of the case and until they learned, by this action on the latter's part, that that order had been rendered. The impropriety of the order of dismissal appealed from is, therefore, apparent.

For the foregoing reasons, after setting aside the said order as well as those of October 21, 1912, and August 30, 1913, also appealed from, we hold that there are no grounds on which to sustain the demurrer filed by the defendant to the amended complaint of May 10, 1912. No special finding is made in respect to the costs in both instances. In accordance with said amended complaint, the title of this case shall be changed by substituting the present title for that of "Saturnino Calinawan and Florencio Calinawan, plaintiffs, vs. Andres Calinawan, defendant." So ordered.

Torres, Johnson, Carson, Moreland, and Trent, JJ., concur.

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