

IN RE WILL OF IGNACIO ABUTON Y PONCOL, DECEASED. TEODORA GUINGUING, PETITIONER AND APPELLEE, VS. AGAPITO ABUTON AND CALIXTO ABUTON, OPPONENTS AND APPELLANTS.*G.R. No. 23035. October 13, 1925*

Ponente: STREET, J.

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In the course of the administration of the estate of Ignacio Abuton, deceased, resident of Oroquieta, Province of Misamis, it appeared that the deceased died testate on March 8, 1916, leaving two sets of children by two different wives, the first of whom was Dionisia Olarte, who died about twenty years ago, and by whom the deceased had twelve children, three of whom died without issue. The second wife was Teodora Guinguing, to whom the testator was married on July 14, 1906, and by whom he had four children, all still living. A will of the testator, executed on November 25, 1914, was probated in court and allowed on October 9, 1917 (Exhibit A); and one Gabriel Binaoro was appointed administrator. In due course of proceeding Binaoro submitted to the court an inventory of the properties belonging to the deceased at the time of his death. In this inventory he included only the lands which the testator had devised to the children of the second marriage, omitting other lands possessed by him at the time of his death and which were claimed by the children of the first marriage as having been derived from, their mother. Accordingly, on March 14, 1922, Teodora Guinguing, in representation of herself and her four minor children, presented a motion in court, asking that the administrator be required to amend his inventory and to include therein all property pertaining to the conjugal partnership of Ignacio Abuton and Dionisia Olarte, including property actually in the hands of his children by her which (the motion alleged) had been delivered to said children as an advancement. The purpose of the motion was to force the first set of children to bring into collation the properties that had been received by them, in conformity with article 1035 of the Civil Code; and the motion was based partly on the supposition that Ignacio Abuton had never in fact effected a liquidation of the conjugal property pertaining to himself and Dionisia Olarte. This motion was formally opposed by two of the children of the first marriage, namely, Agapito and Calixto Abuton y Olarte.

Upon hearing the proof the trial judge found that no property had been acquired by the testator during his second marriage and that the administration was concerned only with property that had been acquired before the death of the first wife. The trial judge further found that after the death of the first wife the testator had liquidated the ganancial estate pertaining to them and had divided among the first set of children all of the property that pertained to the first wife in the division, with the exception of the home-place in the poblacion, in which the testator had continued to reside till death. The share pertaining to the testator in said division was, so the court found, retained in his own hands; and this property constituted the proper subject matter of the present administration proceedings. Accordingly an order was entered to the effect that the administrator should include in the inventory of the estate of Agapito Abuton all of the property of which the testator was possessed at the time of his death. From this order the two opponents of the motion appealed.

We entertain serious doubts as to whether the order in question here was really such a final order as to be

appealable under Section 783 of the Code of Civil Procedure, since the making of the inventory is necessarily of a preliminary and provisional nature, and the improper inclusion of property therein or the improper omission of property therefrom is not absolutely decisive of the rights of persons in interest. But, passing this point without decision, we proceed to consider whether there is any merit in the errors assigned to the order which is the subject of the appeal.

The contention made in the first assignment of error, to the effect that an order of the character of that appealed from cannot be made by a court without formal notice being given to all persons in interest, in the same manner as if a new action had been begun, is clearly untenable, since all the heirs are already virtually represented in the administration and are bound by all proper orders made therein, so far and so far only as such orders have legal effect. This is not inconsistent with the proposition that contested claims of ownership between the administrator and third persons should be tried in separate proceedings, which is entirely true. The question here is merely between some of the heirs and the administrator, as representative of all persons in interest. Besides, it should be pointed out, the inclusion of a property in the inventory does not deprive the occupant of possession; and if it is finally determined that the property has been properly included in the estate, the occupant heir is liable for the fruits and interest only from the date when the succession was opened (art. 1049, Civ. Code). The provisions of the Civil Code with reference to collation clearly contemplate that disputes between heirs with respect to the obligation to collate may be determined in the course of the administration proceedings.

The second and third assignments are directed to the supposed errors of the court in having based its findings as to the property belonging to the estate of Agapito Abuton in part upon the recitals of his legalized will (Exhibit A) and in part upon the recitals of a previous will (Exhibit 1), which had been superseded by the last. This older will appears to have been produced by the representatives of the first set of children in the proceedings for the probate of the will which was admitted, and was attached to that expediente. It is said in appellants' brief that this document was not introduced in evidence at the hearing of the present controversy.

It was not error, in our opinion, for the trial court to look to the recitals of the legalized will for the purpose of determining *prima facie* whether a certain piece of property should or should not be included in the inventory without prejudice of course to any person who may have an adverse title to dispute the point of ownership. The use made of the superseded will (Exhibit 1) in the appealed order is of more questionable propriety, but we are of the opinion that the facts stated by the court can be sufficiently made out from the other evidence submitted at the hearing.

As we gather from the record, the crux of the controversy consists in the fact that among the properties remaining in possession of Ignacio Abuton at the time of his death was a piece of land covered by a composition title No. 11658, issued in 1894 in the name of Dionisia Olarte. At the same time that this title was issued, Agapito Abuton procured two other titles, Nos. 11651 and 11654, covering adjacent properties to be issued in his own name. From the circumstance that title No. 11658 was issued in the name of Dionisia Olarte the opponents appear to believe that this land was her particular property and should now vest exclusively in her heirs. This conclusion is erroneous. There is nothing to show that the land covered by title No. 11658 was not acquired by the spouses during their marriage, and the circumstance that the title was taken in the name of the wife does not defeat its presumed character as ganancial property. Therefore, in liquidating the ganancial property of the first marriage it was within the power of the surviving husband "to assign other property to the first set of children as their participation in the estate of their mother and to retain in his own hands the property for which a composition title had been issued in the name of the wife.

Upon the whole we are unable to discover any reversible error in the appealed order, and the same is accordingly affirmed, with costs. So ordered.

Avanceña, C. J., Malcolm, Villamor, Ostrand, Johns, and Villa-Real, JJ., concur.

Romualdez, J., concurring: I concur, without prejudice to the right of the appellants over the properties in question.

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