

**IN THE MATTER OF THE ESTATE OF HENRY W. ELSE, DECEASED.  
VICENTE E. REYES, CLAIMANT AND APPELLEE, VS. C. W.  
ROSENSTOCK, EXECUTOR AND APPELLANT.**

*G.R. No. 23718. August 28, 1925*

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**STATEMENT**

On or about April 30, 1923, the plaintiff obtained a judgment against Henry W. Elser, who was then living, for the sum of P64,242.69, and for the foreclosure of a certain real mortgage on property in Manila and the sale thereof to satisfy the judgment. Pending proceedings to appeal to this court from the judgment, Elser died June 18, 1923, and in the ordinary course of business C. W. Rosenstock was appointed as executor of his estate, and later the appeal was perfected by him as executor, and the judgment of the lower court was affirmed by this court and the case returned to the court of its origin for further proceedings.[1] Execution was issued, and on May 17, 1924, the mortgaged property was sold by the sheriff of Manila at public auction for P13,000. On June 2, 1924, the sale was duly confirmed, and no appeal was taken from the order of confirmation. The plaintiff duly applied for and on July 25, 1924, obtained a deficiency judgment against the Elser estate for the sum of P68,700.88, with interest at 12 per cent per annum on P64,242.69 of said sum from July 8, 1924. After obtaining the deficiency judgment, the plaintiff at once applied to the Court of First Instance for the appointment of a committee on claims to examine and approve his claim against the Elser estate, of which the defendant was duly notified, and to which he duly objected.

After a hearing the court appointed Jose de Guzman and P. D. Carman as commissioners.

August 29, 1924, the plaintiff, based upon his deficiency judgment, filed with the commissioners his proof of claim, to which the defendant objected. September 19, 1924, the plaintiff's claim was allowed in full by the commissioners, as a claim against the Elser estate, to which the defendant excepted. December 8, 1924, the defendant filed a motion for a reconsideration, which was denied, and from an order approving the allowance of the committee on claims, the defendant prosecutes this appeal, assigning the following errors:

"I. The Court of First Instance erred and exceeded its jurisdiction in entering the order of August 21, 1924, reappointing the committee on claims and appraisals in the above-entitled proceeding, for the purpose of hearing and deciding the claim of Vicente E. Reyes against the estate.

"II. The Court of First Instance erred in entering the order of November 18, 1924, declaring the appeal of the executor from the decision of the committee allowing the claim of Vicente E. Reyes to have been presented out of time, and ordering the executor to pay the said claim of Vicente E. Reyes out of the funds of the estate."

**JOHNS, J.:**

There is no dispute about any material fact. The question presented is a legal one which involves the construction of section 708 of the Code of Civil Procedure, which is as follows:

"Mortgage debt due from estate.—A creditor holding a claim against the deceased, secured by mortgage or other

collateral security, may abandon the security and prosecute his claim before the committee, and share in the general distribution of the assets of the estate; or he may foreclose his mortgage or realize upon his security, by ordinary action in court, making the executor or administrator a party defendant; and if there is a judgment for a deficiency, after the sale of the mortgaged premises, or the property pledged, in the foreclosure or other proceeding to realize upon the security, he may prove his deficiency judgment before the committee against the estate of the deceased; or he may rely upon his mortgage or other security alone, and foreclose the same at any time, within the period of the statute of limitations, and in that event he shall not be admitted as a creditor, and shall receive no share in the distribution of the other assets of the estate; but nothing herein contained shall prohibit the executor or administrator from redeeming the property mortgaged or pledged, by paying the debt for which it is held as security, under the direction of the court, if the court shall adjudge it to be for the best interest of the estate that such redemption shall be made."

It is important to note that the original judgment against Elser was rendered on April 30, 1923, and that he was living at the time it was rendered, and that he died on June 18, 1923, pending his appeal to this court, or forty-nine days after the rendition of the judgment.

This section provides for three separate distinct proceedings. First, a creditor holding a claim against the deceased, secured by mortgage or other collateral security, may abandon his security and prosecute his claim before the committee and share in the general distribution of the assets of the estate; or, second, he may foreclose his mortgage or realize upon his security, by an ordinary action in court, making the executor or administrator a party defendant; and if there is a deficiency judgment, after the sale of the mortgaged property, he may prove his deficiency judgment before the committee on claims against the estate of the deceased, or, third, he may rely exclusively upon his mortgage and foreclose it at any time, within the period of the statute of limitations, and if he relies exclusively upon the mortgage, he shall not be admitted as a creditor of the estate, and shall not share in the distribution of the assets of the estate.

In the instant case, the plaintiff proceeded under and fully complied with all of the requirements of the second provision. He obtained his judgment and decree of foreclosure during the lifetime of the deceased.

On his own motion and as executor of the estate, Rosenstock was substituted as a defendant and prosecuted the appeal. After the judgment was affirmed, the plaintiff promptly issued an execution and sold the property. After applying the proceeds of the sale to the satisfaction of the judgment, the plaintiff promptly applied for and obtained a deficiency judgment. When the deficiency judgment was obtained, the plaintiff petitioned the court to appoint a committee on claims. His petition was granted and the committee was appointed. The plaintiff then appeared before the committee and presented his claim based upon the deficiency judgment, and it was allowed, and the allowance of his claim was confirmed by the court. The defendant had notice of all of such proceedings, to all of which he objected and duly excepted. Hence, plaintiff's claim comes, squarely under the second provision of section 708 of the Code of Civil Procedure above quoted.

Defendant contends that the claim in question is a contingent claim, and that as such it should have been presented to the original committee on claims of the estate, and that because it was not presented it is barred.

In his brief appellant says:

"At all times prior to May 17, 1924, his deficiency judgment, his present claim, was a mere contingent claim. The holder of a contingent claim is not a creditor and it is not known until the happening of the contingency, that he will ever become one; the Code nowhere calls him a 'creditor;' he is merely 'a person' who has a contingent claim (see section 746, Code of Civil Procedure). It is true that claimant-appellee during all of 'the time previously limited' was a mortgage creditor of the estate, but as such creditor, he elected not to surrender and prove his claim as he might have done under section 708, or to present the possibility of his requiring a

deficiency judgment, to the committee in the form of a contingent claim. But claimant-appellee, on August 2, 1924, when he applied to the court to have the committee recommissioned did not apply as a creditor with a mortgage credit which he had failed to present, but he applied as the holder of a claim which had been contingent during all of 'the time previously limited' and had not been presented as required by section 746 of the Code of Civil Procedure, and which had then become absolute, after the expiration of 'the time previously limited.' There is no remedy in section 690 for a holder of a contingent claim who has not presented it before 'the time previously limited' has expired. Section 690, as we have seen, is a remedy for a 'creditor' of an estate, who was a creditor before the expiration of 'the time previously limited;' but to have been a creditor, he must have had a claim which he could have presented and proved, before the committee; moreover, it must have been the same claim which he now seeks to have allowed and not a mere contingent claim. The holder of a contingent claim is not a creditor. Therefore it must be concluded that section 690 does not provide for recommissioning the committee to hear a contingent claim that has become absolute. Provision for that proceeding is made in section 748 of the Code of Civil Procedure, but a jurisdictional fact required by that section is that the contingent claim must have been presented to the committee before the expiration of 'the time previously limited' and mentioned in the committee's report as provided in section 746 of the Code.

"Let it be said again that before the court can have jurisdiction under section 690 to recommission the committee, an application must be made by a creditor who was a creditor before the expiration of 'the time previously limited,' and is a creditor at the time the application is made, by virtue of one and the same claim. But claimant-appellee does not fit that requirement. In so far as his present claim was concerned, he was a mere contingent claimant and therefore not a creditor of the estate, prior to the expiration of 'the time previously limited.' "

Words & Phrases, volume 2, page 1498, says:

"A 'contingent claim' is one which has not accrued, and which is dependent on the happening of some future event.

"A 'contingent claim,' within the rule that claims against an estate which are not contingent are barred if not presented within a certain time, is one depending upon something thereafter to happen. Such a claim is not contingent after the happening of the event.

"A 'contingent claim,' within Comp. St., c. 23, secs. 258 et seq., is a claim against a decedent, not absolute or certain, but depending upon some event after the death of the testator or intestate which may or may not happen. A subsisting demand against the estate of a deceased person which had matured and was capable of being enforced during the lifetime of the deceased is not a contingent claim."

Plaintiff's claim comes squarely within the last definition.

Defendant's contention that the claim of the plaintiff is a contingent one is not tenable.

In *Hinlo vs. De Leon* (18 Phil., 221), this court, on page 230 of the opinion, says:

" 'If there is a judgment for a deficiency continues the section above quoted, 'after the sale of the mortgaged premises, or the property pledged, in the foreclosure or other proceeding to realize upon the security, he may prove his deficiency judgment, before the committee against the estate of the deceased \* \* \* \*' "

In *Osorio vs. San Agustin* (25 Phil., 404), this court, on page 409 of the opinion, says:

" \* \* \* In view of the fact that the plaintiff had elected to abandon the security given him by his mortgage and to prosecute his claim before the committee, he forfeited his right to bring an action upon the security in another separate and distinct action. \* \* \* "

There is a clear distinction between the facts in that and this case. In pointing out the distinction, Justice Carson,

in his concurring opinion on page 409, says:

"I concur in the disposition of this case.

"Merely to avoid possibility of misunderstanding, I think it well to point out that under the provisions of section 708 of Act No. 190, part of which is quoted in the opinion, it would appear that in case a creditor elects to rely upon his mortgage he may foreclose his mortgage or realize upon the security by an ordinary action in court, making the executor or administrator a party defendant; and if there is a judgment for a deficiency after the sale of the mortgaged premises or the other property pledged in the foreclosure or other proceeding, he may prove his deficiency judgment before the committee and to that amount he may share in the general assets of the estate of the deceased. In other words, a creditor holding a claim against the deceased person secured by mortgage or other collateral security may rely upon his security and institute an ordinary action based thereon without abandoning his right to present his claim to the committee should the security not be sufficient to pay the debt."

That is this case. The construction for which the defendant contends would nullify the second provision of section 708 of the Code of Civil Procedure, and leave it without any legal force and effect.

The Code of Civil Procedure provides as follows:

"Sec. 689. Court to limit time for presenting claims.—The court shall allow such time as the circumstances of the case require for the creditors to present their claims to the committee for examination and allowance; but not, in the first instance, more than twelve months, or less than six months; and the time allowed shall be stated in the commission. The court may extend the time as circumstances require, but not so that the whole time shall exceed eighteen months.

"Sec. 690. When time may be extended.—On application of a creditor who has failed to present his claim, if made within six months after the time previously limited, or, if a committee fails to give the notice required by this chapter, and such application is made before the final settlement of the estate, the court may, for cause shown, and on such terms as are equitable, renew the commission and allow further time, not exceeding one month, for the committee to examine such claim, in which case it shall personally notify the parties of the time and place of hearing, and as soon as may be make the return of their doings to the court."

The contention of the defendant that the petitioner was not a creditor within the meaning of section 690 is not tenable. Petitioner's claim was based upon a judgment rendered in a court of competent jurisdiction forty-nine days before the death of Elser, and pending the appeal Rosenstock, as executor, on his own motion, was made defendant as such, and the final judgment upon which the property was sold was rendered against Rosenstock as executor of the Elser estate.

The defendant has filed an able and exhaustive brief, but has overlooked the fundamental fact that the original judgment in this case was personally rendered against the deceased while he was still living.

The judgment of the lower court is affirmed, with costs. So ordered.

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

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[1] Reyes vs. Elser (45 Phil., 685).

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