

**FELIPE GUINTO ET AL., PLAINTIFFS AND APPELLANTS, VS.
FERNANDO LIM BONFING AND CAMILA ABENDAN, DEFENDANTS
AND APPELLEES.***G. R. No. 23781. March 16, 1926*

Ponente: STREET, J.

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This action was instituted in the Court of First Instance of Cebu by the four plaintiffs, bearing the surname of Guinto, against Fernando Lim Bonfing and Camila Abendan for the purpose of obtaining a judicial declaration to the effect that the plaintiffs are owners in equal shares of a lot, with the improvements thereon, situated in the burnt district of Cebu, and to compel the defendant Bonfing to surrender the possession of the same to the plaintiffs and to pay a sum of money by way of indemnity for the exclusion of the plaintiffs therefrom. It appearing that the four plaintiffs are minors, the court, on the motion of their attorney, appointed Dalmacio Rallos as their guardian ad litem for the purpose of their proper representation before the court. Upon hearing the cause on the merits the court absolved the defendants from the complaint, without costs; and the plaintiffs appealed. It appears that the four plaintiffs are the minor children of Mariano Guinto (died, July, 1915) by his wife, Camila Abendan, one of the defendants in this case. Before his marriage with Camila Abendan, Mariano Guinto had acquired the lot in question, and he therefore held the same as separate property. On November 9, 1913, the two spouses united in the execution of the document Exhibit A, whereby they sold this land, with its improvements, to one Estanislao Labucay for the sum of P1,500, with stipulation for the exercise of right of repurchase for the period of two years, or until November 9, 1915. As Mariano Guinto died before the period for redemption expired, he was unable to effect the repurchase; and as the date for the consolidation of the property in the purchaser approached, his widow, Camila Abendan, made an arrangement with the defendant Fernando Lim Bonfing by which the latter undertook to supply the money necessary for the redemption of the property; and on the date mentioned the redemption was effected by the payment of P1,900 to Labucay. Though the money was paid directly by Bonfing to Labucay, the parties treated Camila Abendan as the person redeeming, and in order presumably to secure the rights of Bonfing a document was executed on the same date, whereby Camila Abendan, in the character of owner, sold the property to Bonfing under a contract of sale with pacto de retro for eighteen months. However, the period stipulated for the redemption of the property in this contract passed without the exercise of the power of redemption by Camila Abendan, and under the contract the property consolidated in the purchaser.

Meanwhile Camila Abendan had been paying rent for the use of the property; and this she continued to do for some time at the rate of P22.80 per month until November 9, 1916, when she ceased to make further payments. Accordingly, after the expiration of the period of redemption, Bonfing instituted an action in the Court of First Instance of Cebu (civil case No. 2576) for the purpose of recovering the property as well as the sums for which Camila Abendan was in arrears for rent. In this action the minor children, plaintiffs in the present action, were joined as codefendants with their mother, but no service of process appears to have been made upon any of them,

and no guardian ad litem was appointed in that action to represent them in the proceeding. An appearance, however, was entered in their behalf by an attorney, though no authority therefor is shown. In the same proceeding Camila Abendan appeared and, after a demurrer had been overruled, answered. An answer was also filed in behalf of the minors by the same attorney representing the mother, though no authority is shown authorizing the interposition of such answer for them by said attorney. Upon hearing the cause in the case mentioned (No. 2576) judgment was rendered in favor of the plaintiff Bonfing; and in due time the judgment was carried into effect, with the result that the lot in question was taken from the defendants and placed in the possession of Bonfing.

In the present action the four plaintiffs, minor children of the deceased, Mariano Guinto, who were named as codefendants with the mother in the action (No. 2576) above- mentioned, seek to recover the property, and the contention for them is that they inherited the property from their father and that their rights have not been cut off by the judicial proceeding above mentioned. Camila Abendan is of course a formal defendant only in the present action, having no interest in the property that could now be asserted by her. The defendant Bonfing relies upon the title which he is supposed to have acquired by purchase from Camila Abendan, and also upon the judgment entered in his favor in civil case No. 2576, the record of which was introduced in this case by both parties.

The first question which arises upon the foregoing facts is, What rights did Bonfing acquire by the document in which Camila Abendan sold the property to him on November 9, 1915? The answer to this of course is that he acquired only such rights as Camila Abendan possessed and was able to convey. In this connection it will be borne in mind that she obtained the money from Bonfing by which the property was redeemed from the prior contract of sale made by herself and husband under the former sale to Labucay. The redemption of this property by her had the effect of revesting the property in the vendor, or vendors; but as Mariano Guinto was then dead the title reverted to the persons in whom the reversionary interest was then vested, namely, the heirs of Mariano Guinto, since the property belonged to him exclusively and was not a part of the conjugal estate. Camila Abendan was the natural guardian of the children and in effecting the repurchase of the property she must be taken to have acted in the interest of all the parties in interest, including herself and the children. Certainly, it cannot be conceded that she acquired any interest adverse to her own children other than such as the law concedes to the widow. But the defendant relies upon *Alfonso vs. Natividad* (6 Phil, 240, 245), as authority for the proposition that the repurchase of the land by Camila Abendan after the death of her husband gave the sole ownership to her. The validity of this proposition as applied to the present case cannot be admitted; and one point which distinguishes the present case from the case cited is that the property there in question pertained to the conjugal estate, whereas the property with which we are now concerned was the separate property of the husband. The most that can be conceded to Camila Abendan as a result of the repurchase from Labucay is that she acquired a lien upon the redeemed property to the extent necessary to reimburse her for the outlay. This equitable right undoubtedly passed to Bonfing, even supposing that he had not independently acquired an equitable lien, as he probably had, by advancing the money directly to Labucay to redeem the property from the latter. Moreover, it is to be remembered that, as widow of Mariano Guinto, Camila Abendan had the usufruct of an undivided one-fifth part of the property which of course passed to Bonfing. The undivided four-fifths pertaining to the children was not, and could not be conveyed by her to Bonfing, and that interest remained undisturbed in them.

But it is claimed,—and this brings us to the second contention of the defendants,—that the interest of the children in the property, if any such existed, was destroyed by the judgment in civil case No. 2576, which is relied upon as *res judicata* against them. This proposition cannot be admitted, for the reason that these children were not brought before the court in said case in a manner necessary to give the court jurisdiction over them. In an action in court an infant must appear either by his general guardian or guardian ad litem appointed by the court in which the action is brought. (Sec. 116, Code of Civ. Proc.) The record in the case referred to shows that the children were

not represented by anybody other than the attorney interposing an answer in their behalf, which act was merely officious. We are not unmindful of the fact that the complaint in civil case No. 2576 alleges that Camila Abendan had been appointed legal guardian of her minor children, and although this allegation is denied in both answers we may assume it to be true. But it will be noted that Camila Abendan did not purport in her answer to be speaking in the role of guardian for them; nor does any such fact appear in the answer filed in their behalf. It furthermore appears that only Camila Abendan was served with process, while the law expressly requires that a minor shall be personally served, and if he is under 13 years of age also his father, mother, or guardian. (Sec. 396, Code of Civ. Proc.) It is clear therefore that the minor defendants in that case—plaintiffs in the case now under review—were not properly before the court, and hence they were not affected by the judgment.

As already suggested, the defendant Bonfing has a lien upon the undivided interest of the plaintiffs to the extent necessary to reimburse him for such part of his outlay as is proportional to the value of their part in relation to the whole, with interest thereon at the lawful rate from November 9, 1915. At the same time he is bound to account to the plaintiffs for four-fifths of the income produced by the property from the date of the filing of the complaint. Upon examining the data pertinent to this problem, including the agreed statement as to the income-producing power of the property since December 26, 1918, we find that the two items very nearly compensate each other, and we hereby declare that Bonfing's lien has been satisfied by the income which he has received from the property to the date of the entry of this judgment.

Judgment will therefore be entered reversing the appealed decision and declaring the proprietary interest of the parties as follows: The four plaintiffs, Felipe, Jose, Cesar and Carolina Guinto are owners in common of an undivided four-fifths of the property described as lot No. 2186 of the Cebu burnt area district and as more particularly described in transfer certificate of title No. 1348 of the office of the register of deeds for the Province of Cebu, with the improvements thereon, and they are also the owners of the nude property in the remaining undivided fifth of the same property, subject to the usufructuary right of the widow so long as the same shall subsist. The defendant, Fernando Lim Bonfing, is the owner of the usufructuary interest of Camila Abendan in an undivided one-fifth of this property, so long as the same shall subsist, and he will be required to account to the plaintiffs for their share of the income hereafter. We note that the defendant Bonfing has obtained a transfer certificate of the Torrens title to the property to be issued to himself; and he will be required to surrender the same in order that another may be issued defining the interest of the litigants in conformity with this decision. No express pronouncement will be made as to costs. So ordered.

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

DISSENTING

OSTRAND, J.,

For various reasons I find myself unable to concur in the majority opinion. not belonging to the estate and before the expiration of the period of redemption. In the earlier case the land was community property; in the present case, while the land was the property of the deceased husband, the house built thereon was, as we shall presently see, community property, if not the exclusive property of the widow.

The decision in the Alfonso vs. Natividad case, *supra*, may or may not be the best law, but it is not indefensible and it has stood unchallenged for nearly twenty years. It must therefore be considered to have become a rule of property and should not now be disturbed. Judicial changes in property rules are retroactive in effect and therefore particularly objectionable.

2. It also seems to me that the court has adopted an ultra-technical attitude in attacking the validity of the judgment of the Court of First Instance in civil case No. 2576. It may well be conceded that the service of the summons upon the minors was irregular and precedents can, perhaps, be found in American jurisprudence for the views expressed in the majority opinion, but I doubt the wisdom of applying such precedents here and do not think it is in harmony with the liberal spirit of our Code of Procedure.

There have been, and still are, many lawyers in this country who are not fully familiar with all of the rules of procedure and if strict technical criteria are to be applied, there are no doubt many old judgments which may be set aside on purely technical grounds and great injustice thereby often wrought. In the case in question (No. 2576) there is no indication of fraud or collusion and there can in the circumstances be no doubt whatever that the result would have been the same if separate copies of the summons had been served on the minors. If service had been so made, there could have been no question as to the validity of the judgment; the presumption is that the lawyer who appeared for the minors in court was duly authorized and inasmuch as the minors had a legally appointed guardian, there was no necessity for appointing a guardian ad litem.

3. From the strict interpretation of the law of procedure applied to civil case No. 2576, the court has gone to the opposite extreme in the present case. The action is brought to recover possession of the property in question, the complaint alleging that the defendant Bonfing had acquired it through fraud and collusion. The defendant Bonfing, as a special defense, pleads *res judicata* through the judgment in case No. 2576. At the trial of the case no effort was made to prove that the former judgment was obtained by fraud nor was it even suggested that the judgment was invalid for irregularity in the service of the summons, but in a memorandum filed after the trial, counsel for the plaintiffs argued that the minors had not been properly represented inasmuch as no guardian ad litem had been appointed. The court below held that this fact had not been alleged and therefore was not in issue and rendered judgment in favor of the defendants upon the issues presented by the pleadings. On appeal to this court the plaintiffs reiterate the argument made in the court below; nowhere in the briefs is it intimated that the service of summons in case No. 2576 was insufficient.

It appears from the record of case No. 2576, introduced in evidence by the defendant, that the lot in question, measuring 297 square meters, was originally the property of Mariano Guinto, but that the house thereon was built after his marriage to Camila Abendan with money furnished by the latter's mother, now deceased. Article 1404 of the Civil Code provides that "buildings constructed during the marriage on land belonging to one of the spouses shall also belong to the partnership, but the value of the land shall be paid to the spouse owning the same."

The house was therefore at least community property if not the exclusive property of the widow. It is true that she on the witness stand stated that the house was built "to be given to the children," but there was no formal donation of it to them, and if so they acquired no title thereto. It is also true that in a transfer certificate of title from the Cebu burnt area district to Mariano Guinto, the latter appears as the sole owner of the land, but the certificate was issued subsequent to the sale of the property to Lim Bonfing, mentions no improvements, and, moreover, under section 70 of the Land Registration Act is subject to the rights of Mariano Guinto's widow "incident to the relations as husband and wife."

From what has been said it is clear that the widow Camila Abendan's interest in the property was much greater than the mere usufructuary right conceded her in the majority opinion and it is not disputed that the defendant Lim Bonfing has acquired all such rights and interests. We have no data in the record from which the exact extent of these rights can be definitely determined; it is possible that evidence might have been brought in showing that the widow was the sole owner of the house instead of only a co-owner. It is also possible that the house is worth more than the 297 square meters of land upon which it is built. The defendant Lim Bonfing may have improved the property and be entitled to reimbursement for such improvements. In regard to none of these things, have we any

evidence before us. It will, perhaps, be said that it was the duty of the defendant Lim Bonfing to present such evidence, but he met successfully the issues raised by the pleadings and at the trial of the case and could neither be expected nor required to do more. Upon the principal issues raised for the first time by this court on appeal he has never had a hearing or his day in court.

Upon the issues presented to the court below, its judgment was correct and should have been affirmed. If this court desired to raise new issues, the case should have been remanded to the court below for a new trial upon such issues. The irregularity of the procedure adopted by this court in the present case is not non-prejudicial, but goes to the merits.

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