

ASIA BANKING CORPORATION, PLAINTIFF AND APPELLEE, VS. FRED J. ELSER, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF THE DECEASED HENRY W. ELSER, DEFENDANT AND APPELLANT.

G.R. No. 30266. March 25, 1929

Ponente: VILLA-REAL, J.

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VILLA-REAL, J.:

This is an appeal taken by the defendant, Fred J. Elser, as special administrator of the testate estate of Henry W. Elser, from the judgment of the Court of First Instance of Manila, the dispositive part of which is as follows:

"Wherefore, judgment is rendered in favor of the plaintiff, and the defendant, in his capacity as special administrator, is hereby ordered to pay to it the sums hereinafter enumerated, to wit: Fifty-eight thousand and nine hundred pesos (P58,900) upon the first cause of action, with legal interest from July 29, 1927; three thousand eight hundred twenty-four pesos and ninety-eight centavos (P3,824.98) same date; and eight hundred nine pesos and sixty-six centavos (P809.66), the amount claimed as the third and last cause of action, with eight per cent interest from September 14, 1923.

"Judgment is rendered in favor of the defendant upon his counterclaim, and the plaintiff is ordered to pay him the amount of six thousand fifty-one pesos and fifty-four centavos (P6,051.54) with legal interest from September 19, 1927, when the said counterclaim was filed. The defendant shall further pay the costs. So ordered." In support of his appeal, the appellant assigns the following alleged errors as committed by the court below in its judgment, to wit:

"1. The lower court erred in holding that by virtue of the sheriff's sale on execution, Exhibit 1, title to the credits which are the subject matter of this case passed from Yangco, Rosenstock & Co., Inc., to the plaintiff Asia Banking Corporation.

"2. The lower court erred in holding that the plaintiff Asia Banking Corporation acquired anything by virtue of the sheriff's sale on execution, Exhibit 1.

"3. The lower court erred in holding that by virtue of the execution of the contract Exhibit B between Luis R. Yangco and Henry W. Elser, the latter had become a debtor of Yangco, Rosenstock & Co., Inc.

"4. The lower court erred in holding that Yangco, Rosenstock & Co., Inc., accepted Henry W. Elser as a debtor of said corporation in substitution of Luis R. Yangco,"

The following facts were proven at the trial without any objection:

Prior to the month of February, 1922, Luis R. Yangco had 935 shares in the corporation known as Yangco, Rosenstock Co., Inc., of the par value of P100. At the same time, said Luis R. Yangco was indebted to said corporation in the amount of "P58,9000, which is the value of the unpaid subscription of 589 shares of the par value of P100. On February 25, 1922, the said Luis R. Yangco entered into the following contract, Exhibit B, with Henry W. Elser:

"Know all men by these presents that:

"We, Luis R. Yangco, single, of legal age and a resident of the City of Manila, party of the first part; and Henry W. Elser, married, of legal age and also a resident of the City of Manila, party of the second part;

"DO HEREBY STATE, COVENANT AND AGREE :

"First. That Luis R. Yangco, party of the first part, is the holder in due course of nme hundred and thirty-five shares (935) of the corporation known as Yangco, Rosenstock & Co., Inc., of the par value of one hundred pesos (P100) each.

"Second. That for and in consideration of the sum of forty-five thousand pesos, (P45,000) Philippine currency, payable as hereinbefore will be stated, and subject to the conditions enumerated below, Luis R. Yangco, the party of the first part, does hereby sell, transfer and convey to Mr. Henry W. Elser, the party of the second part, all his rights, title and interest in the 935 shares of Yangco, Rosenstock & Co., Inc., mentioned in the first paragraph of this instrument,

"Third. The sum of forty-five thousand pesos (P45,000) referred to in the preceding paragraph shall be paid as follows:

" (a) Five thousand pesos, (P5,000) Philippine currency, upon signature of this deed by the parties hereto.

"(b) Fifteen thousand pesos, (P15,000) by assuming the liability of Mr. Luis R. Yangco to the Philippine National Bank of the same amount.

"(c) The balance of twenty-five thousand pesos (P25,000) will be paid in installments of one thousand pesos (P1,000) each during the first twelve (12) months after the date of this instrument, and two thousand pesos (^2,000) a month thereafter, until the whole amount has been paid in full. Promissory notes of each installment will be signed by Mr. Elser this date. All "unpaid amounts from this date, to bear at the rate of eight per cent (8%) per annum.

"Fourth. It is to be understood that Mr. Henry W. Elser has the right to pay the balance of P25,000 before maturity of the promissory notes signed this date.

"Fifth, This is made subject to the following conditions:

"(a) That Mr. Henry W. Elser assumes any personal liability of Mr. Luis R. Yangco to any third person in relation with the business of Yangco, Rosenstock & Co., Inc.

"(b) That Mr. Henry W. Elser will release the personal security of Mr. Luis R. Yangco to guarantee the accounts of Yangco, Rosenstock & Co., Inc., with the Philippine National Bank.

"(c) That Mr. Henry W. Elser will assume the liability of Mr. Luis R, Yangco in the sum of fifty-eight thousand nine hundred pesos (P58,900) for subscribed stock, which now appears in the name of said Luis R. Yangco, in the books of the corporation" known as Yangco, Rosenstock & Co., Inc.

"Sixth. It is hereby agreed that Mr. Luis R. Yangeo, will hold and retain in his possession all of the stocks sold hereby, as security for the payment of the purchase price of the stocks herein sold or any balance thereof; and also as security until the other party, Mr. Elser has complied all his obligations in releasing the liabilities of Mr. Luis R. Yangco with the corporation Yangco, Rosenstock & Co., Inc., and other liabilities in favor of third persons related with the business of said corporation, and the personal guarantee in favor of the Philippine National Bank. Provided, however, that Mr. Yangco will release to Mr. Elser stock equal to one-half of all installments and cash payments made by Mr. Elser.

"In testimony whereof, the parties to this instrument signed the same, in this City of Manila, this 25th day of February, nineteen hundred and twenty-two.

(Sgd.) "LUIS R. YANGCO

"HENRY W. ELSE

"Signed in the presence of:

(Sgd.) "J. REYES

"C. L. DAVID

"UNITED STATES OF AMERICA PHILIPPINE ISLANDS ss.

CITY OF MANILA

"In the above-mentioned City of Manila, this 25th day of February, 1922, A. D., before me, the undersigned notary public in and for the said city, personally appeared Messrs. Luis R. Yangco and Henry W. Elser, known to me to be the same persons who executed the foregoing instrument, and acknowledged the same to be an act of their own free will and deed. Mr. Yangco exhibited to me his personal cedula No. F-39017, issued at Manila, the 21st day of February, 1922, and Mr. Elser exhibited to me his personal cedula No. FT2056, issued at Manila, this 4th day of January, 1922.

"In witness whereof, I have hereunto set my hand and caused my official seal to be fixed in the City of Manila, the above-mentioned.

(Sgd.) "P. J. SEVILLA

"Notary Public

"My Commission Expires December 31,1922

"Doc. No. 80, Book III

"Fol. 95, Series 1922."

Before the execution of the above-mentioned contract, Henry W. Elser had entered into negotiations with the principal stockholders of the corporation Yangco, Rosenstock & Co., Inc., in order to substitute Luis R. Yangco as a stockholder, so that the said Henry W Elser, his brother E. E. Elser, and C. W. Rosenstock might put more capital into the corporation. On March 1, 1922, the directors of Yangco, Rosenstock & Co., Inc., held a meeting in which, by virtue of the contract Exhibit B above-mentioned, Henry W. Elser was elected president of said corporation and a member of the board of directors thereof in place of Luis R. Yangco. Henry W. Elser having become mentally deranged, C. W. Rosenstock was appointed guardian of his property, and as such kept on paying to Luis R. Yangco and the Philippine National Bank, the sums which Henry W. Elser had contracted to pay by virtue of the aforesaid contract Exhibit B. On March 7,1923, he filed his accounts as such guardian with the Court of First Instance, in which it appeared that on February 14, 1923, he paid to Luis R. Yangco the sum of P1,852.25 as principal and interest of the November and December installments. On March 9, 1923, the said guardian presented to the Court of First In-stance his inventory and balance sheet, wherein he reported as an asset of his ward the following item:

Stocks and bonds (subscribed for)..... P58,900.00

And as a liability: Subscription to stock of Yangco, Rosenstock & Co., Inc.... P58,900.00

On March 19, 1923, in approving the said accounts presented by the guardian, the court stated in its order that all the interested parties had expressed their conformity thereto in writing. On April 25, 1923, the said guardian presented a balance sheet wherein the same entries were made as those set forth above, except that the amounts of the promissory notes issued to Luis R. Yangco had been reduced to the sum of P2,500. On August 3, 1923, the said guardian presented his final account Wherein the same items with reference to the stock of Yangco,

Rosenstock & Co., Inc., appeared as hereinbefore quoted which final account was approved by the court on August 6, 1923.

On June 18, 1923, Henry W. Elser died, and on June 21 of the same year, C. W. Rosenstock was appointed special administrator of his estate by the court. Later, on August 24, 1923, C. W. Rosenstock was appointed executor of the testate estate of said deceased.

On September 20, 1923, the plaintiff-appellee, the Asia Banking Corporation, obtained a judgment against Yangco, Rosenstock & Co., Inc., in civil case No. 24464 of the Court of First Instance of Manila, for the sum of P112,152.28, with interest and costs. At that time Yangco, Rosenstock & Co., Inc., was insolvent, although not officially declared so.

On September 26, 1923, C. W. Rosenstock, as executor of Henry W. Elser's testate estate, filed with the court an inventory of the latter's property, including therein as an asset of the estate the unpaid subscription of 589 shares, the value of which was P58,900. On the same date, the said C W. Rosenstock presented his final report as special administrator, in which report the same items appeared in regard to the unpaid stock subscription of Yangco, Rosen-stock & Co., Inc.

On October 30, 1923, plaintiff Asia Banking Corporation secured a writ of execution of the judgment in its favor against Yangco, Rosenstock & Co., Inc., and had the sheriff of the City of Manila levy upon the assets of said corporation, including the P58,900 credit, which is the value of the unpaid subscription of the 589 shares of Luis R. Yangco, payment of which had been assumed by Henry W. Elser by virtue of the contract Exhibit B; and by agreement between the judgment creditor and the judgment debtor, the property attached was sold in a lot by the aforesaid sheriff at public auction and knocked down to the said judgment creditor, as the highest bidder, for the sum of P50,000.

On September 7, 1925, the aforementioned executor filed his report with the Court of First Instance, accompanied by a certificate of Clark & Larkin, certified public accountants, wherein the following appears:

Yangco, Rosenstock & Co.—Guarantee:

Guarantee to Philippine National Bank of credit granted Yangco, Rosenstock & Co., Inc., guaranteed personally by C. W, Rosenstock E. E. Elser and L. R. Yangco. H. W. Elser substituting his own personal guarantee for that of Luis R. Yangco by virtue of contract entered into between L. R. Yangco and H. W. Elser dated February 25, 1922.

Total amount of liability..... P193,149.69

Accrued interest..... 35,226.39

228,376.08

Liability of the Estate is equal to 1/3 of

P228,376.08.....P76,125.36

Unpaid Stock Subscription: Yangco, Rosenstock & Co., Inc..... 58,900.00

San Juan Construction Co., Inc..... 3,000.00

P61,900.00

On February 29, 1928, the said executor presented to the court his report, audited by Clark & Larkin, certified public accountants, for the period from July 1, to December 31, 1927, and in the certificate of said auditors the following appears under the heading of "Contingent Liability":

Unpaid Stock Subscription:

Yangco, Rosenstock & Co., Inc.....P58,900.00

San Juan Construction Co., Inc..... 3,000.00
61,900.00

(From the records it appears that the shares of stock of Yangco, Rosenstock & Co. were originally subscribed for by Luis R. Yangco, and later assumed by H. W. Elser in the same document covering the guarantee to the P. N. B.)

After the acquisition by the plaintiff Asia Banking Corporation of the aforesaid credit against Henry W. Elser for the unpaid subscription to the capital stock of Yangco, Rosenstock & Co., Inc., it presented in due form to the committee of claims of the estate of Henry W. Elser, a claim for the sum of ₱58,900, which was the value of said credit. The widow of Henry W. Elser, who is the mother of the herein defendant Fred J. Elser, presented a written opposition to the allowance of said claim upon the sole ground that when Henry W. Elser purchased from Luis R. Yangco his shares in Yangco, Rosenstock & Co., Inc., the former was incompetent to do so, he having been at the time of unsound mind, and incapable of giving his consent to such, or any other, contract or agreement whatsoever. The committee approved and allowed said claim, and the defendant appealed to the Court of First Instance of Manila, which rendered the judgment appealed from.

We shall pass upon the legal questions raised in this appeal inverting the order in which the errors are alleged to have been committed by the lower court in its judgment, beginning with the third and fourth assignments of error, which will be considered together as being closely related to each other.

The question to be decided under the third and fourth assignments of error is whether Henry W. Elser became indebted to Yangco, Rosenstock & Co., Inc., in place of Luis R. Yangco, in the amount of P58,900, the value of the 589 shares at a par value of P100 per share, which said Luis R. Yangco had subscribed for but had not paid up.

Article 1205 of the Civil Code provides as follows:

"ART. 1205. Novation which consists in the substitution of a new debtor in the place of the original one may be made without the knowledge of the latter, but not without the consent of the creditor."

There is no question about Luis R. Yangco's being indebted to Yangco, Rosenstock & Co., Inc., in the sum of P58,900, which is the par value of 589 shares at P100 per share, for which he had subscribed. Neither is it disputed that when Luis R. Yangco, by virtue of the contract Exhibit B above quoted, sold, to Henry W. Elser for P45,000 the 935 shares he held in Yangco, Rosenstock & Co., Inc., at the par value of P100 per share, he did so on the condition that Elser would assume his debt in the sum of P58,900, the unpaid stock subscription appearing in the name of Luis R. Yangco upon the books of said corporation. Said P58,900, then, was a part of the contract of sale. Therefore, the contract is binding between Luis R. Yangco and Henry W. Elser.

The appellant contends that said contract is not binding as between Henry W. Elser and Yangco, Rosenstock & Co., Inc., because the latter corporation was not a party to said contract.

Article 1205 of the Civil Code quoted above requires the creditor's consent in order that a new debtor may validly be substituted for the original debtor. Now, then, did Yangco, Rosenstock & Co., Inc., consent to the substitution of Henry W. Elser as the new debtor for Luis R. Yangco, the original debtor? We have seen that before the contract Exhibit B was executed by and between Luis R. Yangco and Henry W. Elser, there was an understanding between the latter and the principal stockholders of Yangco, Rosenstock & Co., Inc., to the effect that the aforesaid Henry W. Elser was to be substituted for the said Luis R. Yangco as stockholder, in order to increase the

capital of the corporation by the contribution of the said Henry W. Elser. The execution of said contract Exhibit B, which took place on February 26, 1922, was known to the directors of Yangco, Rosenstock & Co., Inc., and in the special meeting of March first of the same year, the directors of said corporation, by virtue of the said contract Exhibit B, elected Henry W. Elser president of the corporation and member of the board of directors in place of Luis R. Yangco.

The aforecited article 1205 of the Civil Code does not state that the creditor's consent to the substitution of the new debtor for the old be express, or given at the time of the substitution, and the Supreme Court of Spain, in its judgment of June 16, 1908, construing said article, laid down the doctrine that "article 1205 of the Civil Code does not mean or require that the creditor's consent to the change of debtors must be given simultaneously with the debtor's consent to the substitution; its evident purpose being to preserve the creditor's full right, it is sufficient that the latter's consent be given at any time and in any form whatever, while the agreement of the debtors subsists." The same rule is stated in the *Enciclopedia Juridica Espcmola*, volume 23, page 503, which reads: "The rule that this kind of novation, like all others, must be express, is not absolute; for the existence of the consent may well be inferred from the acts of the creditor, since volition may as well be expressed by deeds as by words." The understanding between Henry W. Elser and the principal director of Yangco, Rosenstock & Co., Inc., with respect to Luis R. Yangco's stock in said corporation, and the acts of the board of directors after Henry W. Elser had acquired said shares, in substituting the latter for Luis R. Yangco, are a clear and unmistakable expression of its consent. When this court said in the case of *Estate of Mota vs. Serra* (47 Phil., 464), that the creditor's express consent is necessary in order that there may be a novation of a contract by the substitution of debtors, it did not wish to convey the impression that the word "express" was to be given an unqualified meaning, as indicated in the authorities or cases, both Spanish and American, cited in said decision.

It therefore' appearing clearly and conclusively from the acts performed by Yangco, Rosenstock & Co., Inc., that the latter consented to the substitution of Henry W. Elser for Luis R. Yangco as debtor to said corporation in the amount of P58,900, being the value of 589 shares for which said Luis R. Yangco had subscribed, and which still remain unpaid, there was a novation by the substitution of debtors, which is perfectly valid and lawful, placing Henry W. Elser under obligation to. Yangco, Rosenstock & Co., Inc., for said debt.

Moreover, C. W. Rosenstock, as administrator of the property of Henry W. Elser when the latter suffered from mental derangement, as special administrator of the property left by him after his death, and, finally, as executor of the estate recognized by several official acts, the existence of said debt for stock subscribed for and unpaid by Henry W. Elser to Yangco, Rosenstock & Co., Inc.

Touching the first and second assignments of error, while it is true that section 431, in connection with section 450 of the Code of Civil Procedure, requires that in order to levy an attachment, by virtue of a writ of execution, upon a debt or credit in favor of the judgment debtor, the latter's debtor, or whoever holds the credit, be given notice that the debt or credit thus held has been levied upon by furnishing one or the other with a copy of the writ of execution, it refers to debts and credits of persons whose property is not in custody, legis, inasmuch as that cannot be levied upon (23 Corpus Juris, 210, note 21-e) or executed (23 Corpus Juris, 357, vpar. 107). The property of Henry W. Elser, who was indebted to the Yangco, Rosenstock & Co., Inc., in the sum of P58,900, the value of 589 shares of said corporation, subscribed for but unpaid, is, in the hands of his executor, C. W. Rosenstock, appointed as such by the competent court, and therefore it is in custodia legis.

Furthermore, section 700 of the said Code of Civil Procedure provides that any action commenced against a deceased person for the recovery of money or debts and pending at the time the committee has been appointed, shall be discontinued, and any attachment levied upon his estate shall be dissolved, and the claim should be presented to the committee appointed. If the law does not permit the continuance of an attachment levied upon a

decendent's estate during his lifetime, by virtue of a complaint filed against him for the recovery of money or debt, after a committee of claims and appraisal has been appointed while the case is still pending, much less can it be permitted that said estate be levied upon, either by attachment or by execution, once said decendent's estate has passed into the hands of an administrator or executor.

In attaching the debts or credits in favor of the judgment debtor, not only the latter's debtor, or whoever holds the credit, is to be notified, but also the judgment debtor himself in order that the sale of his rights to said debt or credit may be valid. It appears of record that Yangco, Rosenstock & Co., Inc., through its president C. W. Rosenstock, acquiesced in having all the said corporation's property attached sold in a lot, and this acquiescence supplies any defect in the carrying out of the writ.

The Asia Banking Corporation having acquired in the sale at public auction of the property of Yangco, Rosenstock & Co., Inc., all the rights of the latter to said property, including the credit of P58,900 against Henry W. Elser, the filing of the plaintiff's claims with the committee of claims and appraisal appointed by the Court of First Instance in the matter of the estate of Henry W. Elser, was valid and lawful/ and said claim having been admitted by said committee, the herein defendant Fred J. Elser, as special administrator of the estate of Henry W. Elser, is bound to pay said claim.

Briefly, we find: (1) That the understanding between the principal members of the board of directors of the Yangco, Rosenstock & Co., Inc., and Henry W. Elser that the latter would acquire the stock of Luis R. Yangco in the Yangco, Rosenstock & Co., Inc., the acquisition of said stock by said Henry W. Elser from the aforesaid Luis R. Yangco, the former assuming the latter's liability for the sum of P58,900 being the value of 589 shares at P100 par each, subscribed for by the latter but unpaid; the election of Henry W. Elser by the board of directors of the Yangco, Rosenstock & Co., Inc., as president thereof, and his appointment as a member of the board of directors instead of said Luis R. Yangco, by virtue of the contract of sale, all constitute a clear, positive, and unmistakable consent given by said corporation to the substitution of Henry W. Elser for Luis R. Yangco as a debtor to said corporation in the sum of P58,900, the value of the 589 shares subscribed for and unpaid by Luis R. Yangco; (2) that the deceased Henry W. Elser's debt to the Yangco, Rosenstock & Co., Inc., for the sum of P58,900 cannot be executed because said deceased's property is in the hands of a judicial administrator, and, consequently, in custodia legis; (3) that the acquiescence of the Yangco, Rosenstock & Co., Inc., in having all its attached property sold in a lot, cures any defect there may have been in carrying out the attachment; and (4) that the claim of Yangco, Rosenstock & Co., Inc., against Henry W. Elser for P58,900 acquired by the judgment creditor at the public auction sale may be presented to the committee of claims and appraisal of the decendent's estate for collection.

By virtue whereof, and not finding any error in the appealed judgment, the same is hereby affirmed in all its parts, with costs, against the appellant. So ordered.

Villamor, Ostmnd, Johns, and Romualdez, JJ., concur.

Malcolm., J. concurs in the result.

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