

W. R. MACFARLANE, PLAINTIFF AND APPELLANT, VS. B. A. GREEN, DEFENDANT AND APPELLEE.

G. R. No. 31141. March 11, 1930

Ponente: VILLA-REAL, J.

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VILLA-REAL, J.:

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This is an appeal by the plaintiff W. R. Macfarlane from a decree of the Court of First Instance of Bataan, the dispositive part of which reads as follows:

"By virtue of all the foregoing, the court hereby declares that the sale at public auction of the Abucay Plantation made by the sheriff of the Province of Bataan on October 27,1928, is null and void; that all proceedings taken by said sheriff relative to said sale are null and void and the sale is hereby disapproved; and it is ordered that within fifteen days the plaintiff or his attorney-in-fact render an account of all the sums of money by him received in payment of the resale of the Manhattan Hotel, and of the amounts paid in connection with the mortgage credit of sixty thousand pesos P60.000), interest, costs, and expenses."

The appellant assigns the following alleged errors on appeal, as incurred by the court below in its decision, to wit:

"1. The lower court erred in refusing to confirm the sale at public auction of the Abucay Plantation situated in Abucay, Bataan, and mortgaged by the defendant to the plaintiff.

"2. The lower court erred in admitting parol evidence of a certain alleged agreement between the defendant and J. F. Bromfield, the plaintiff's attorney-in-fact to the effect that should the plaintiff resell the defendants property situated in Manila and known as Manhattan Hotel, after deducting all expenses and disbursements, the plaintiff would apply to the defendant's debt any sum he might realize over and above P65,000 for which said Manhattan Hotel was sold at public auction.

"3. The lower court erred in denying the plaintiff's motion for a new trial."

The following pertinent facts are necessary for the solution of the only question to be decided in this appeal:

By an instrument dated December 1, 1921, the defendant mortgaged to the plaintiff for the sum of P60,000, two parcels of land, one situated in the City of Manila, and the other in the Province of Bataan, stating therein that the land in the City of Manila Was subject to a first mortgage in the sum of P40,000 in favor of the Philippine Postal Savings Bank.

When the mortgage fell due, the plaintiff brought two actions, one in the City of Manila for the foreclosure of said mortgage in so far as it affects the land located in the city, and the other in the Court of First instance of Bataan as to the land in said province. In each of said cases judgment was rendered in the amount of P60,000.

In the cause instituted before the Court of First Instance of Manila, civil case No. 22285, a writ of execution was issued and at public auction held on September 18, 1925, the mortgaged property known as the Manhattan Hotel was sold for P65,000 to the plaintiff who was the highest bidder. On April 15, 1926, it was resold by the plaintiff to Florence Daland Cadwallader for P135,000.

After said execution sale upon the judgment in civil case No. 22285 of the Court of First Instance of Manila, nothing was done with respect to the judgment rendered in the case instituted in the Court of First Instance of Bataan, until the period for execution was about to lapse, when the plaintiff prayed for the execution of said judgment. The defendant objected to the issuance of the writ of execution but the court, by order of September 26, 1928, directed that the same should issue, and the provincial sheriff of Bataan levied attachment on said mortgaged property, known as Abucay Plantation, and on October 21, 1928, sold it at public auction for the sum of P33,000 to the plaintiff as the highest bidder. When the plaintiff asked, for the approval of said sale, the defendant objected, alleging among other grounds that he had withdrawn his protest when the sale at public auction of the Manhattan Hotel in the City of Manila took place, because there was an agreement between him and the plaintiff's attorney-in-fact that the sale of the said property to the plaintiff was on the understanding that should the latter succeed in reselling the property for a higher price, the difference would be credited to the defendant.

Defendant B. A. Green testified at the trial on this oral agreement without timely objection from the plaintiff, as follows:

"A short time after nine in the morning, the deputy sheriff approached the main door of the courtroom and read the order of sale. He then called for bidders for the property. Only one answered, and that was Mr. Bromfield, who bid in the name of Mr. Macfarlane for P65,000. The sheriff called for other bids, and just as he was, about to award the property to Macfarlane, shortly before the sale, I said to him: 'Just a moment, Mr. Sheriff. Just then, Bromfield held me by the arm saying: Wait a bit; I want to speak to you.' So I said to the sheriff: 'Wait a moment, I will speak with Mr. Bromfield.' We then moved away about three or four meters from the sheriff, and Bromfield called to Sellner to come. Then he turned to me and asked: 'Why Will you object to the sale? What is the use of making more trouble in this case?' I told Bromfield I could not permit the property to be sold for P65,000, unless he agreed to the conditions we had already discussed several times, and that any excess at the resale should be credited to me. 'You know/ he answered, 'that I do not want to assume that responsibility; but look here, I will put the matter up to Mac' (meaning Macfarlane); 'I am pretty sure he does not mean to get any profit from the resale and he said 'Any excess over the selling price will be credited to you. I then told him, 'I can't wait so long, Brommy (Bromfield); that would mean two or three months, and I should lose my right to protest against the sale and its approval. I must have an agreement with you in behalf of your principal, right now, or lose my right to protest against the sale of this property, or its approval.' But Bromfield again said to me, 'You know very well that Mac would credit any excess at the resale to you; but that I am unwilling to assume the responsibility because I am only acting as a friend, without commission or compensation for these things. 'In that case, said I, 'the protest must go on. You must enter into this agreement with me, in representation of Macfarlane.' Then Bromfield, hesitating a bit, said: 'Very well, I agree to credit you with the excess of the resale over the cost to Mr. Macfarlane and expenses."

When B. A. Green came to this part of his testimony, counsel for the plaintiff interrupted him with the following petition to the court: "We ask that this testimony be struck from the record because it is not the best evidence, and the power of attorney must be in writing."

It thus appears that the petition of plaintiffs counsel refers to Bromfield's authority to enter into a compromise with said B. A. Green upon the public auction sale of the Manhattan Hotel, and not to the manner in which said compromise was made. Counsel for the plaintiff having admitted the existence of said authority, the court below denied the petition to expunge that portion of the testimony. When his turn came, the plaintiff's counsel

cross-examined B. A. Green at great length upon the compromise between him and Bromfield, as attorney-in-fact for the plaintiff at the public auction sale of the Manhattan Hotel.

As the plaintiff's counsel did not object to defendant B. A. Green's testimony regarding the compromise between him and Bromfield, as attorney-in-fact for the plaintiff, to the effect that said defendant withdrew his protest against the public auction sale of Manhattan Hotel because Bromfield, in his representative character, agreed to credit said B. A. Green with any profit that might be realized from the resale after covering cost and expenses borne by Macfarlane; and as he cross-examined the witness upon these very points after his motion to strike out had been denied, he waived his right, under section 335 of the Code of Civil Procedure, to object to any parol evidence upon a compromise relative to real property, which said section declares to be invalid unless set forth in writing.

In *Tongco vs. Vianzon* (50 Phil., 698), this court laid down the following doctrine:

"Waiver BY Cross-Examination.—A waiver is accomplished when the adverse party undertakes to cross-examine the interested person with respect to prohibited matters."

While it is true that this doctrine refers to a witness's incapacity to testify upon a matter of fact which took place before the death of a person against whose estate, executor, or administrator, a proceeding is pending, the same rule is applicable to the instant case, because although it deals with the inadmissibility of parol evidence concerning a compromise by the law held invalid unless reduced to writing, the aim in view is the same, which is, to exclude evidence not allowed by law; and, as in both these cases the right of the adverse party to object to the presentation of said evidence is personal, he may waive said right, either by not objecting to the presentation of the evidence or by cross-examining the witness permitted to testify by the court notwithstanding his opposition.

In *Abrenica vs. Gonda and De Gracia* (34 Phil., 739), this court laid down the following doctrine:

"Effect of Failure to Object.—When no timely objection or protest was made against the admission of parol evidence in respect to a contract relative to real estate, and when the motion to strike out said evidence came too late; and if, on the other hand, the party against whom such evidence was presented cross-questioned the witnesses who testified in respect to the contract, the said party will be understood to have waived the benefits of the law, and such parol evidence is competent and admissible."

In the instant case counsel for the plaintiff made timely objection to the testimony of B. A. Green about the aforesaid compromise or agreement between him and the plaintiff's agent. Said objection, however, was not as to the inadmissibility of parol evidence on said compromise, but as to the inadmissibility of such evidence on the existence of the authority of said agent, which was later admitted by counsel, thus rendering unnecessary all evidence to that effect.

For the foregoing considerations, we are of opinion and so hold: (1) That failure to object to parol evidence, not admissible because it relates to an agreement unenforceable under the law unless in writing, imports a waiver of the personal right to object, and renders said evidence admissible; and (2) that the cross-examination of a witness permitted by the court to testify, notwithstanding a timely objection upon an agreement unenforceable under the law unless in writing, imports a waiver of said objection and renders said parol evidence admissible, if no exception was taken.

Therefore, it having been shown that Bromfield, as attorney-in-fact for plaintiff W. R. Macfarlane, entered into an agreement or compromise with defendant B. A. Green, in consideration whereof the latter withdrew his protest against the public auction sale of the Manhattan Hotel, upon condition that in case of resale any profit, after covering cost and expenses to the plaintiff, would be credited to said defendant, said plaintiff is responsible for the

fulfillment of this obligation contracted by his representative in his behalf, and he must therefore render an account of the proceeds of the sale of Manhattan Hotel to the defendant in order to determine the state of the accounts between them.

By virtue whereof, and finding no error in the order appealed from, the same is hereby affirmed in its entirety, with costs against the appellant. So ordered.

Johnson, Malcolm, Villamor, Ostrand and Johns, JJ., concur.

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