

## MARIANO ALONSO Y DE MESA, PETITIONER AND APPELLANT, VS. VICENTE E, REYES ET AL., OPPONENTS AND APPELLEES.

*G. R. No. 31994. March 22, 1930*

Ponente: OSTRAND, J.

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### OSTRAND, J.:

Felipa Alonso y de Mesa died in 1921 leaving a will, the fifth paragraph of which reads as follows:

"5. Es mi voluntad que la casa de dos pisos senalada con el No. 30 (interior) y edificada en el terreno de la Calle Almanza continue como ahora esta, habitada por mi hermano Mariano, durante su vida, y encargo a mis herederos, caso de que acuerden repartir el lote (a) de esta testamentaria le asignen, si su precio no excede de la participation que le corresponds y en caso contrario que se excluya de la partition, mientras esta condition subsista sin perjuicio de repartirlo despues cuando mi dicho hermano muera,"

On March 29, 1922, the administrator of the estate of the deceased, with the written consent of all of the heirs of the deceased and with the approval of the Court of First Instance, sold the property on Almanza Street, including houses Nos. 11,13,15,17,19,27 and 30, to Henry W. Elser for the sum of P74,242.06, of which only P10,000 was paid in cash, and a promissory note was given for the balance of the purchase money. To secure the payment of the note, Elser, on the same day, executed a first mortgage on the property in favor of the estate.

The note was not paid upon its maturity, and on July 5, 1922, the administrator of the estate instituted an action for the foreclosure of the mortgage. Judgment was rendered in favor of the estate, and at the foreclosure sale, the mortgaged property was purchased by the administrator on behalf of the estate.

On November 21, 1928, Mariano Alonso y de Mesa filed a motion in the testamentary proceedings asking that the administrator of the estate be ordered to pay to said Mariano Alonso the sum of P4,640, with interest at the rate of 12 per cent per annum from March 24, 1922, as compensation for the surrender of his right to occupy house No. 30 referred to in paragraph 5 of the will of Felipa Alonso. The motion was opposed by the administrator and by the other heirs on the grounds that the right granted Mariano Alonso by said paragraph 5 was merely a right of use and habitation and that said right had been extinguished (1) by his having leased the house to another person prior to the sale to Henry W. Elser and (2) by having given his unqualified consent to the sale to Elser. After the hearing of the motion and after the presentation of the evidence of the parties, the movent increased hie claim to P16,198.40.

Upon due consideration, the court below denied the motion, principally on the ground that Mariano Alonso had lost his right to the occupation of the house in question by having rented it out in violation of article 522 of the Civil Code. From this ruling the present appeal was taken.

We can find but very little merit in the appeal. That the right acquired by the appellant under paragraph 5 of the will was a right of use and habitation and not a usufruct cannot be successfully denied, and article 525 of the Civil Code provides that "the rights of use and habitation cannot be leased or transferred to another person in any manner whatsoever." The appellant's own testimony shows that he leased the house in question to one Vicente

Sison before the sale to Elser was made (Transcript of testimony, p. 9). That was, of course, a violation of said article 525 and indirectly also a violation of the fifth paragraph of the will. But that is not all; the appellant gave his consent in writing to the sale of the Almanza Street property, including the house to which he had been given the right of use and occupation. His consent was given without any reservation of special compensation for surrendering his rights in the house, and he received and accepted a one-third share of the purchase money collected from Elser. It can therefore not be said that there was no consideration for the renunciation of his rights in the property in question; on the contrary, he was greatly benefited by the sale. The amount of the purchase price paid by Elser was nearly three times the assessed value of the property, and it certainly cannot be successfully argued that the appellant was ill-advised in renouncing his right of habitation in return for the profits of the sale.

The appealed judgment is affirmed with the costs against the appellant. So ordered.

Johnson, Malcolm, Villamor, Johns, and Villa-Real, JJ., concur.

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