

INTESTATE ESTATE OF THE DECEASED SPOUSES MAGDALENO FAJARDO AND CANDELARIA FIRMALINO. PETRONILA FAJARDO, PETITIONER AND APPELLEE, VS. MELCHOR FAJARDO, OPPONENT AND APPELLANT.

G.R. No. 32195. August 19, 1930

Ponente: ROMUALDEZ, J.

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ROMUALDEZ, J.:

This is an appeal from the order of the Court of First Instance of Capiz dated May 15, 1929, granting the petition for judicial administration of the estate of the spouses Magdaleno Fajardo and Candelaria Fimalino, and appointing Juana Fimalino as administratrix of the estate.

The questions raised by the appeal are found in the appellant's assignments of error following:

"1. In overruling Melchor Fajardo's objection to the institution of intestate proceedings in connection with the estate of his deceased parents, Magdaleno Fajardo and Candelaria Fimalino, and in not denying the application for administration and in not dismissing the proceedings.

"2. In not permitting the opponent Melchor Fajardo to adduce evidence that each of the two heirs, Melchor Fajardo and Petronila Fajardo, had been in possession of realty formerly belonging to their parents, Magdaleno Fajardo and Candelaria Fimalino, for a prescriptive period.

"3. In not permitting the opponent to adduce evidence that the distribution of their real estate made by the deceased parents of the applicant and the opponent between said two heirs, and of which each is in possession, was just and equitable."

Appellant and appellee are brother and sister, and the sole heirs of the decedent spouses whose succession now engages our attention.

While the appellant alleges that his father had long before death divided his estate between his children, the parties herein, the latter entering upon the possession and enjoyment thereof, the appellee denies any such partition.

The evidence shows that the appellant took possession of certain lands belonging to his deceased father before the latter's death, paying the land tax and appropriating the fruits thereof for his own personal use.

While the appellee, too, now holds certain land from the same predecessor, it has not been shown that such tenure dates back to her father's lifetime. And both she and her husband have testified that they took possession thereof only after her father's death.

The record, then, does not bear out the allegation that the late Magdaleno Fajardo divided his estate between his two children who are the parties herein.

At any rate, it does not appear that if such a partition was made, it was made in accordance with law and is therefore enforceable.

There are only two ways in which said partition could have been made: By an act inter vivos, or by will. In either case there were formalities which must be followed. Manresa thus comments on articles 1056 et seq. of the Civil Code:

"A testator may therefore partition his estate either by an act inter vivos or by will; that is, following the proper formalities of one, or the other of these acts." (Commentaries on the Spanish Civil Code, vol. VII, p. 694, 5th edition.)

If the partition was made by an act inter vivos, it should have been reduced in writing (sec. 335, No. 5, Code of Civ. Proc.) in a public instrument (article 1280, Civil Code) because it was a conveyance of real estate. If by last will and testament, the legal requisites should have been observed. Neither appears in the record to have been done.

No application can therefore be made of the doctrines laid down in *Fule vs. Fule* (46 Phil., 317); *Fule vs. Fule* (52 Phil., 750); and *Garcia vs. Tolentino* (25 Phil., 102), where, neither the existence nor the formalities of the partition being in issue, the court was under the necessity of holding that the partition was enforceable.

Finding no error in the judgment appealed from, the same is hereby affirmed, with costs against the appellant. So ordered.

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

Villamor, J.: reserves his vote.

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