

ARCADIO MAXILOM, PLAINTIFF AND APPELLEE VS. GAUDENCIO TABOTABO, AS EXECUTOR OF THE ESTATE OF DIEGO TABOTABO, DECEASED, DEFENDANT AND APPELLANT.

G.R. No. 3505. December 20, 1907

Ponente: JOHNSON, J.

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JOHNSON, J.:

Some time in the year 1901 one Fausto Tabotabo died, leaving certain assets and liabilities. On the 21st day of October, 1901, Diego Tabotabo, father of Fausto Tabotabo, upon petition, was declared the universal heir of the said Fausto Tabotabo, and accepted the inheritance pure and simple, taking possession of the same. Later the said Diego Tabotabo died in the Province of Cebu, without having the liabilities of the said deceased Fausto Tabotabo.

Luter the court appointed commissioners in the estate of the said Diego Tabotabo, in accordance with the provisions of section 669 of the Code of Procedure in Civil Actions. This commission was (duly organized for the purpose of considering claims against the estate of the said Diego Tabotabo. The plaintiff herein presented a claim of indebtedness before the said commission for the sum of 1,062.37 pesos, Mexican currency, which claim the said commission allowed against the said estate. From this decision of the said commission the executor appealed to the Court of First Instance. The case was duly tried in the Court of First Instance, which court affirmed the decision of the said commission and allowed the claim against the estate of the said Diego Tabotabo. From this decision of the Court of First Instance the defendant appealed to this court and made the following assignment of errors:

First. The court committed an error in permitting the plaintiff, Arcadio Maxilom, to testify as a witness during the trial of said cause.

Second. The court committed an error in not declaring that the action of the plaintiff was prescribed.

Third. The court committed an error in rendering a decision against the defendant, basing the same upon the declaration of the said plaintiff, Arcadio Maxilom.

With reference to the first above-noted assignment of error, the defendant and appellant relies upon the provisions of section 383 of the Code of Procedure in Civil Actions. Said section, among other things, provides that the following persons can not be witnesses:

"7. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator or other representative of a deceased person, or against a person of unsound mind, upon a claim or demand against the estate of such deceased person or against such person of unsound mind, can not testify as to any matter of fact occurring before the death of such deceased person or before such person became of unsound mind."

The defendant and appellant failed to make a motion for a new trial in the lower court; therefore we can not examine the evidence for the purpose of ascertaining whether or not the facts set out in the decision of the court

are sustained by such evidence; but, in view of the fact that the above assignment of error is based upon the admissibility of certain testimony offered by witnesses, to which objection was made and an exception taken during the trial, we are permitted to examine such testimony for the purpose of ascertaining whether the testimony offered was of a class which is prohibited by said paragraph 7 of section 383.

During the trial of the cause in the lower court the plaintiff appeared as a witness and was asked certain questions concerning an open account (Exhibit B) existing between the plaintiff and the deceased Fausto Tabotabo prior to the latter's death. The defendant objected to this testimony upon the theory that said paragraph 7 of section 383 prohibited the said plaintiff from testifying concerning the claim against the estate of the deceased, because the action was prosecuted against the executor or administrator of such deceased person. The lower court overruled this objection, the defendant excepted, and now relies upon said exception for the purpose of having the decision of the lower court reversed.

It is clear from an examination of the record that the plaintiff was a party to an action against an executor or administrator of a deceased person upon a claim against the estate of such deceased person. It seems clear also from said section 383 that he was absolutely prohibited from being a witness in said action for the purpose of giving testimony concerning such claim or demand. We are of the opinion and so hold that said paragraph 7 of section 383 absolutely prohibits a party to an action against an executor or administrator of a deceased person from testifying to any matter of fact occurring before the death of such deceased person, upon a claim or demand against the estate of such deceased person.

The present case very clearly exemplifies the wisdom of the provisions of said paragraph 7. Said Exhibit B represented a settlement of the accounts between the plaintiff and the said Fausto Tabotabo, in which they both agreed on the 18th day of March, 1899, or about two years before the death of the said Fausto Tabotabo. This account was signed by both the plaintiff herein and the deceased Fausto Tabotabo, showing upon its face that there was due at that time from Fausto Tabotabo to the plaintiff herein the sum of 312.37 pesos, Mexican. Notwithstanding this settlement, made by the plaintiff and the said deceased Fausto Tabotabo, several years after, in the year 1906, the plaintiff presented a claim against the estate of the deceased for the sum of 1,062.37 pesos, Mexican currency, alleging and attempting to prove that credits to the amount of 750 pesos, Mexican currency, which entered into the settlement of the said accounts made on the 18th day of March, 1899, had never, in fact, been received, and that therefore instead of there being due from the said Fausto Tabotabo the sum of 312.37 pesos, there was actually due the sum of 1,062.37 pesos.

If testimony of the character offered by the plaintiff should be allowed, then all sorts of fictitious claims might be presented and allowed by designing persons, without any protection whatever on the part of the estate of deceased persons. Provisions similar to the article above quoted have been adopted in practically all of the States of the United States. Article 1880 of the Code of Procedure of California is very similar in its terms to the provisions of said section 383. The supreme court of California has held many times, under the section of the code of California, that "Parties to an action against an executor or administrator, upon a claim or demand against the estate of deceased persons," can not be witnesses. (*Blood vs. Fairbanks*, 50 Cal., 420.)

In the very early history of the common law parties interested in actions or proceedings were prohibited from giving testimony during the trial of said actions, or proceedings. The theory of this original disqualification was that persons interested were likely to bear false witness. Long experience, however, has demonstrated that this rule worked greater hardship than good. Liberal rules for cross-examination have made it possible to disclose in the presence of the court whether or not interested witnesses were actually falsifying. However, the original common law rule is still in force, in the majority of the states of the United States in actions where the adverse party is deceased. As was said by Brickell, chief justice, in the case of *Louis vs. Easton* (50 Ala., 471), in

discussing this Maine question, "If death has closed the lips of one party, the policy of the law is to close the lips of the other."

With reference to the second above-noted assignment of error, the objection that the claim presented by the plaintiff was prescribed, not having been raised in the lower court, it can not be raised here. (*Domingo vs. Osorio*, 7 Phil. Rep., 405.)

With reference to the third above-noted assignment of error, we are of the opinion, for the reasons stated in the discussion of the first above-noted assignment of error, that the lower court erred in rendering a judgment against the defendant based upon the testimony of the plaintiff Arcadio Maxilom.

For all of the foregoing reasons, the judgment of the lower court is hereby reversed and for the reason that the court committed an error in admitting the testimony of the plaintiff contrary to the provisions of paragraph 7 of section 383,1 and believing that but for this error the plaintiff might have presented other proof in support of his claim, the cause is hereby remanded to the court below, ordering that a new trial be granted in said cause by said court. Without any statement as to costs, it is so ordered.

Arellano, C. J., Torres, Mapa, Carson, Willard, and Tracey, JJ., concur.

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