

## **IDONAH SLADE PERKINS, PLAINTIFF AND APPELLEE, VS. EUGENE ARTHUR PERKINS, DEFENDANT AND APPELLANT.**

*G. R. No. 35787. September 12, 1932*

Ponente: HULL, J.

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### **HULL, J.:**

The parties to this action are husband and wife, married in Manila in 1914, and the wife has entered suit for separate maintenance.

This is an appeal from the order of the Court of First Instance of Manila, granting certain amounts for maintenance and P1,000 for expenses for litigation. The item relating to the expenses of litigation has become moot due agreement between the parties. A prior order of the court for monthly allowance for maintenance is not here on appeal. The order here complained of is for certain items of debts, advances, and living expenses existing at the time of the order fixing the monthly allowance. Appellee, in her brief, has moved to dismiss the appeal contending that the order is interlocutory, relying upon the language of this court in the case of *Mendoza vs. Parungao* (49 Phil., 271).

"In the case now before us, the order of the Court of First Instance of Nueva Ecija of November 27, 1925, may be considered as an order for the payment of P50 monthly as an advance payment on account of such share of the conjugal property as may be found from the liquidation to belong to Gorgonio Parungao. This order, however, being of an interlocutory character and not final (sec. 123, Act No. 190) no writ of execution can be issued thereon (sec. 443, Act No. 190; 23 C. J., 314) ; but its unjustified disobedience may constitute contempt of court and, after the proper proceedings prescribed by law in such cases, may be punished as such."

Appellant claims that appellee is estopped from any right to the motion to dismiss, by allowing the bill of exceptions to be approved, by allowing the appellant to go to the expense of printing the bill of exceptions and the expense and trouble of preparing and printing his brief, which was filed on August 31, 1931, and on account of not raising the question as to the right to appeal until October 27, 1931, when appellee's brief was filed.

Appellant relies on 3 Corpus Juris, p. 689, where it is said:

"Waiver of Objections to Right of Appeal.-The right to object to the taking of an appeal or the issuance of a writ of error may be waived by appellee or defendant in error whenever the objection is founded upon some act or omission on the part of appellant or plaintiff in error, which may be pleaded by his opponent as an estoppel to the right of review. This waiver may arise from express stipulation, or it may be implied from some act on the part of appellee or defendant in error, such as joining issue on the appeal or writ of error, or from some other act showing acquiescence or evincing an intention to treat the appeal or writ of error as valid." (Citing numerous decisions.)

Thus, in *Luengo & Martinez vs. Herrero* (17 Phil., 29) wherein the appellees made a motion in their brief, to dismiss the appeal, this court ruled that the motion came too late, saying:

"These questions were presented to this court for the first time on the hearing of the case upon its merits. They

should have been raised and determined by motion before the case was called for hearing. Before the hearing of the case upon its merits all preliminary questions should be disposed of, and when such questions as these are raised for the first time upon the hearing of the case on its merits they come too late."

We believe this point of appellant well taken, and will therefore consider the appeal on its merits.

Article 148 of the Civil Code reads in part:

"The obligation to give support may be enforced whenever the person having a right to claim it requires such assistance for his or her maintenance; such allowance, however, shall only be paid from the date of the filing of the complaint," and the character and the nature of the support is defined in article 142. The pertinent portion thereof reads:

"By support is understood all that is necessary for food, shelter, clothing and medical attendance, according to the social standing of the family."

In the opinion of the court, some of the items are clearly without the rules laid down in the Code, while others may be partly within the rules. Some, in their entirety, long precede the date of filing of this suit.

While the item known as the "Manila Hotel" is evidently allowable in part, being for ordinary necessities of life, it covers a period both before and after the filing of the suit. Others, such as the claim for money loaned to the wife, are not within the rule (13 R. C. L., 1209; Ramirez and De Marcaida vs. Redfern, 49 Phil., 849). It is impossible, from the evidence of record, for this court to state how much should be allowed. It is also noted that no allowance has as yet been made for the period from the filing of suit to the date of allowance of temporary maintenance two months thereafter.

The court notices with considerable regret the heated and acrimonious tone of the remarks of the counsel for appellant, in his brief, in speaking of the action of the trial judge. We desire to express our opinion that excessive language weakens rather than strengthens the persuasive force of legal reasoning. We have noticed a growing tendency to use language that experience has shown not to be conducive to the orderly and proper administration of justice. We therefore bespeak the attorneys of this court to desist from such practices, and to treat their opposing attorneys, and the judges who have decided their cases in the lower court adversely to their contentions with that courtesy all have a right to expect.

It being impossible for this court to state the amount that should be allowed, the case must be remanded for further proceedings in accord with the views herein expressed, and it is so ordered. No pronouncement is made regarding costs.

Avanceña, C. J., Street, Malcolm, Villamor, Ostrand, Villa-Real, Abad Santos, Imperial, and Butte, JJ., concur.

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