

DALMACIO FRANCISCO, PLAINTIFF AND APPELLEE, VS. GERONIMO TABADA, DEFENDANT AND APPELLANT.*G.R.No. 3592. January 14, 1908*

Ponente: CARSON, J.

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This action was originally instituted in the court of the justice of the peace of Cebu, under the provisions of section 80 of the Code of Civil Procedure, to recover possession of certain real estate occupied by the defendant as tenant, together with rents due for the occupancy thereof and damages. The original action was filed by Cayetana Ch. Veloso, the alleged owner of the land, and her husband, Dalmacio Francisco, and judgment was rendered in favor of the plaintiffs in the court of the justice of the peace. From this judgment the defendant appealed to the Court of First Instance, where the action was set for trial de novo upon its merits. While the action was pending in the Court of First Instance, the plaintiff, Cayetana Ch. Veloso, died, whereupon Dalmacio Francisco, having been appointed administrator of the estate of the deceased, was permitted to prosecute the action, in the right of the deceased; and as such administrator was substituted for the deceased as plaintiff. Judgment was again rendered in favor of the plaintiff, and from that judgment the defendant appealed to this court.

Appellant assigns a long list of errors committed by the trial court, which may be summarized as follows: Appellant prays that the judgment be reversed:

First, because the complaint does not appear to be verified by the oath of the plaintiff, his agent or attorney;

Second, because the plaintiff administrator was substituted for the original plaintiff, and permitted to prosecute the action in the right of the deceased;

Third, because certain documents were admitted in evidence over the objection of the defendant;

Fourth, because the findings of fact by the trial court are not sustained by the evidence of record.

It is true that section 81 of the Code of Civil Procedure prescribes the verification of the original complaint in summary actions instituted under the provisions of section 80, and the certification of the justice of the peace before whom the action is instituted; we have held, however, in the case of Tarrosa vs. Pearson that in an appeal from the court of a justice of the peace to the Court of First Instance, a new complaint filed in the Court of First Instance need not be verified under oath. (6 Phil. Rep., 644.) Hence if this assignment of error is based on the lack of verification of the new complaint filed in the Court of First Instance, it can not be maintained.

The original complaint filed in the court of the justice of the peace has not been made a part of the record, and it does not appear whether the provisions of section 82 as to verification and certification were complied with or not. No objection was made in the court below on the ground that the original complaint had not been verified, and it may be that the failure to object cured the defect. "It is usually held that the fact that a pleading is not properly verified, as required by statute, is not sufficient to oust the court of its jurisdiction, but is merely an

irregularity, and that as such the objection may be waived if not raised at the proper time and in the proper manner, and can not be raised for the first time after issue joined, or on appeal." (Encl. of Pleading and Practice, vol. 22, p. 1051, and cases there cited; see also concurring opinion, in re Prautch, 1 Phil. Rep., 132.) But there are cases supporting the contrary doctrine (Williamson vs. Williamson, Supreme Ct. Spec. T., 64 How. Pr., N. Y., 450; Bowles vs. Boydstun, Tex. Civ. App. 1891, 41 S. W. Rep., 368) and it is not necessary for us to decide this question at this time. If the original complaint was in fact verified, the mere failure to make that fact appear of record could in no wise prejudice the substantial rights of the appellant nor affect the jurisdiction of the court. If the complaint was not in fact verified, it was the duty of the appellant to make this fact affirmatively appear of record, and where the contrary does not appear, this court will not assume that the court below took jurisdiction over the proceedings without the verification of the complaint required by law.

This was an action to recover the possession of real estate instituted in the lifetime of the original plaintiff. Such actions survive to the executor or administrator of the deceased, who is expressly authorized to prosecute such actions, in the right of the deceased, and the court properly permitted the plaintiff administrator to be substituted in the place of the original plaintiff. (Secs. 702 and 703, Code of Civil Procedure,)

The documents, the admission of which in evidence was objected to by the defendant, appear to have been introduced for the purpose of establishing the relation of landlord and tenant between the original plaintiff and the defendant, and for this purpose they were competent and pertinent to the issue involved in the action. The mere fact that they tend also to establish that the original plaintiff and not the defendant was the true owner of the land (a question not in issue in this action, wherein the only question is whether the occupant stood in the contractual relation of tenant to the plaintiff, and after due demand for payment of rent due, has failed or neglected to make payment of the same) does not render such evidence inadmissible so far as it is pertinent to the real issue involved.

Upon a review of all the testimony we are unable to say that the evidence of record does not sustain the findings of the trial court.

The judgment of the court below should be, and is hereby, affirmed, with the costs of this instance against the appellant.

Arellano, C. J., Torres, Johnson, Willard, and Tracey, JJ., concur.

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