

FRANK B. INGERSOLL, ADMINISTRATOR OF THE ESTATE OF JOSE CARLOS CHUNG MUY CO, PLAINTIFF AND APPELLANT, VS. VENTURA CHUI-TIAN LAY ET AL., DEFENDANTS AND APPELLEES.—CHUN GUN PAN, D...*G.R. No. 4238. November 04, 1908*

Ponente: WILLARD, J.

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The plaintiff, as administrator of the estate of Jose Carlos Chung Muy Co, brought this action in the Court of First Instance of the city of Manila, alleging in his complaint that after the death of the said Jose Carlos, and on the same day, the defendants embezzled and appropriated to their own use P53,140 which belonged to the estate, and he asked that, in accordance with the provisions of section 711 of the Code of Civil Procedure, judgment be entered against them for double that amount, or P106,280. The defendants denied all the allegations in the complaint.

The court below acquitted the defendants Ventura Chui Tian Lay and Lim Ki of the complaint, and ordered judgment against the defendant Chun Gun Pan for P2,174.16, double" the amount of P1,087.08 which the court said belonged to the estate and which this defendant had converted to his own use and for which he had failed to account to the estate. The plaintiff and Chun Gun Pan have appealed.

So far as the appeal of the plaintiff is concerned, the question presented is purely one of fact. Three witnesses for the plaintiff testified that about four days before the death of Jose Carlos, his son, Chung Kiat, at the request of the deceased, opened the safe in the room where they were and took therefrom a sum of money which he, Chung Kiat, counted and which amounted to P53,000, and that he then replaced the money in the safe. Jose Carlos died about 4 o'clock in the morning of October 19, 1905. Two witnesses testified that the defendants came there during that forenoon, opened the safe, took this amount of money therefrom, wrapped up the bills, amounting to P50,000 in a handkerchief, and carried it away. These two witnesses and four others testified that as the defendant Chun Gun Pan, who had the bills wrapped up in a handkerchief, got into the vehicle which was waiting for them in the street, the handkerchief struck against a post of the carromata and the bills fell to the ground.

Six witnesses, including in this number two of the defendants, testified that the three defendants were present in the house of Jose Carlos in the forenoon of October 19; that the defendants Chun Gun Pan and Chui-Tian Lay were relatives of the deceased, and that the persons there assembled had a conference in which it was decided that the safe be opened for the purpose of seeing what money there was with which to defray the funeral expenses. Thereupon Chun Gun Pan opened the safe, its contents were taken out, and an inventory then made by Keh Yong Keng in a small book, which inventory was signed by these persons and which was produced and identified in court.

According to this inventory, the contents of the safe were the following:

One pair gold spectacles.

Cash on hand, according to the day book.....

P272.58

One bag containing.....

481.50

One bag containing old Mexican money.....

293.00

One gold coin worth.....

40.00

Account of Lee Pan Leun.....

500.00

One set of gold buttons (five).

The witnesses for the defense testified that the defendants carried away from the house on the 19th no money or other property.

The defendant Chun Gun Pan further testified that the deceased sent for him on October 18 and told him to take care of his business after he died, and then gave him the key to the safe.

It is seen from the foregoing statement that the witnesses on one side have not told the truth, and the only question in the case is, which witnesses shall be believed? The court below gave credence to the testimony of the defendants' witnesses, and after reading all of the evidence in the case, we are entirely satisfied with this conclusion. We agree with that court that the evidence is riot sufficient to show the existence in the safe of P53,000 at or prior to the death of the deceased. According to the testimony of the son, Chung Kiat, this money was taken out and counted four days before the death of Jose Carlos because the latter thought that he was going to die. Lim Tau, who says he was present at the time, states that Jose Carlos said that it should be counted because they were going to China. It, moreover, seems strange that the fact that the safe contained this amount of money should be disclosed by Jose Carlos to the two witnesses Lim Tau and Gaw Siong Huy, one of whom was employed to take care of him during his sickness and the other who seems to have been nothing more than an acquaintance.

According to the testimony of Chung Kiat, his father had money, P10,000, in the Chinese Bank; he had had an account in the Hongkong and Shanghai Bank, and it seems improbable that if he had such an amount in cash he would have kept it in this safe instead of depositing it in some bank. That he was not suspicious of banks, as claimed in the brief of the appellant, is indicated by the fact that he had these deposits above mentioned.

According to the testimony of the son, his father not only had what the appellant calls a large foundry business, but he also was engaged in the business of buying and selling timber, opium, and tobacco, and that he had loaned money to other persons. It seems strange that with such an extensive business he should have kept this amount of money in the safe, instead of using it in the various businesses in which, according to the son, he was engaged and where some profit might have been derived therefrom. The plaintiff attempted to explain the origin of this money by offering the evidence of witnesses who stated that in 1899 he had bought in Cavite a large number of cannon balls from the Government and the witnesses said that he ought to have made from this purchase over a 100,000

pesos. Of course it is impossible to believe that this P53,000 was a part of the 100,000 pesos which he is said to have made in 1899; that is, that he had kept that money intact for six years. If he made that amount of money at that time, he of course invested it in his business, and the only evidence to show that he had realized any cash from this business shortly before his death was the testimony of the son who stated that he had sold a house for P8,000.

The defense presented in evidence the books of account kept by the deceased. They were examined by an expert who reported that it appeared from these books that at the time of the death of Jose Carlos there should have been on hand in cash P282.66. It will be noticed that this corresponds, within P10, with the amount in the inventory made by the defendants when the safe was opened. It is true, as the plaintiff claims, that these books related only to the foundry business, and he claims that there is nothing to show that this P53,000 might not have proceeded from the other businesses in which the deceased was engaged. But, if the foundry business was large, as the plaintiff says, the balance of P282 in cash is significant in that it shows that the deceased invested his profits of the business in the business itself and was not accustomed to keep a large amount of cash on hand. If he did not keep a large amount of cash on hand in connection with the foundry business, it is not reasonable to think that he would keep such an amount as P53,000 on hand in connection with his other business.

As has been said, the inventory was written by Keh Yong Keng according to the testimony of the defendants' witnesses. In rebuttal the plaintiff introduced evidence tending to show that Keh Yong Keng was not in Manila on the 19th day of October, but was in Bacoor, Cavite. One of the witnesses who testified to this fact was a witness who had already testified in the case stating that he was present when the money fell on the sidewalk. His story was that he had met Keh Yong Keng on the street on Monday preceding the Thursday when Jose Carlos died, and that the witness noticing that Keh Yong Keng was not looking well, asked him what the trouble was, and was told that he was suffering from a venereal disease. Witness then told him that he knew of a man in Bacoor, Cavite, who could cure him; and that Keh Yong Keng went to Cavite for that purpose. It transpired that this person in Cavite was not a doctor but a storekeeper. The plaintiff introduced another witness who kept a store in Bacoor and who stated that on the 19th day of October he had loaned Keh Yong Keng P1 with which to pay for the medicine which this man had prescribed for him, and he produced a book of account which showed an entry to that effect on that date. Both of these witnesses testified that Keh Yong Keng was in Bacoor for about a week.

It is stated by the plaintiff that no attempt was made to impeach this evidence. It is true no further evidence was presented by the defense, but at the close of the rebuttal testimony the following incident occurred:

"Mr. GALE. That is all we have to offer in rebuttal.

"Mr. AITKEN. If your honor cares we can offer witnesses that will flatly contradict this rebuttal testimony.

"THE COURT. I do not see the necessity of it, this lining up of witnesses against each other.

Mr. AITKEN. Then we rest."

We agree with the court below that this rebuttal testimony is too improbable to be entitled to belief. It seems very strange that this Keh Yong Keng should have gone to the expense of making a trip to Bacoor for the purpose of being cured by a person who was not a doctor, when he undoubtedly could have found relief in Manila, and it seems more improbable that having determined upon such a trip, and having decided to incur the necessary expense, it should have been necessary for him to borrow P1 to pay for the medicine which he knew he would have to buy.

The judgment of the lower court acquitting the defendants Ventura Chui-Tian Lay and Lim Ki of the complaint, must be affirmed.

It remains to consider the appeal of the defendant Chun Gun Pan. It is suggested by the plaintiff that this appeal can not be considered because this defendant never presented a bill of exceptions, citing the cases of Naval vs. Benavides (8 Phil. Rep., 250), and Ullman vs. Ullman & Co. (10 Phil. Rep., 459).

It appears, however, from the bill of exceptions that when the court below allowed it he declared that it was a bill presented by the plaintiff and by the defendant, Chun Gun Pan. This certificate made the document the defendant's bill of exceptions and he is entitled to rely upon it for the prosecution of his appeal.

Section 711 of the Code of Civil Procedure, under which this action is brought, is as follows:

"If a person, before the granting of letters testamentary or of administration on the estate of a deceased person, embezzles, or alienates any of the money, goods, chattels, or effects of such deceased person, such person shall be liable to an action in favor of the executor or administrator of such estate for double the value of the property sold, embezzled, or alienated, to be recovered for the benefit of such estate."

The court below found, "that Chun Gun Pan took possession of the estate of the deceased Chung Muy Co at the time of his death and in doing so that he took possession of the money in the safe, and that this amount is admittedly the sum of P1,087.08, and that he has converted it to his own use and has alienated it from the estate and has failed to account to the estate for that amount, or any part of it." It may be doubted whether even under this finding of fact the case would be brought under section 711. But however that may be, we think that the evidence does not show any conversion of this money by Chun Gun Pan to his own use or any alienation of it by him. Upon the question as to what became of the money after it had been taken from the safe and counted, we reject, as the court below rejected, the evidence of the plaintiff's witnesses to the effect that the defendants carried it away. When the testimony of the other witnesses is examined, it is seen that no one of them states that Chun Gun Pan carried away this money or any part of it. On the contrary, the witness Hermenegildo Alvarez Chong Idong testified that after it had been counted, all "of it, including the other property, was returned to the safe; that the safe was locked, and that the defendant Chun Gun Pan kept the key thereof. Chun Gun Pan testified that he had never taken any amount of money belonging to the deceased and appropriated it to his own use.

It does appear, however, that Chun Gun Pan took possession of the business and carried it on for some time, until an administrator was appointed but that he did this at the request of the deceased made the day before his death. The property that he thus took in charge included not only the money in the safe but that connected with the foundry business. There is no evidence to show that he appropriated any part of this property, either the money in the safe or that connected with the foundry, to his own use. It appears on the contrary that he was holding the same merely as the agent of the persons interested therein. If he is guilty of embezzlement with reference to this money in the safe, he is also guilty of embezzlement with reference to all the personal property used in connection with the foundry. But it is apparent from what has been said that no embezzlement can be charged against him for these acts. He is, of course, bound to account to the administrator for his management of the business and for all the property received by him. That accounting can be secured in a proper proceeding brought by the administrator for that purpose, and the acquittal of the defendant of a complaint founded upon section 711 will be no bar to such a proceeding.

The judgment of the court below, so far as it acquits the defendants Ventura Chui-Tian Lay and Lim Ki of the complaint is affirmed. It is reversed so far as it orders judgment against Chun Gun Pan, and he is hereby acquitted of the complaint, without costs. No costs will be allowed to any of the parties in this court. So ordered.

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

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