

GLICERIA MARELLA, PLAINTIFF AND APPELLANT, VS. VICENTE REYES, ADMINISTRATOR OF THE INTESTATE ESTATE OF FILOMENO ENCARNACION, AND JOSE T. PATERNO, DEFENDANTS AND APPELLEES.

G.R. No. 4389. November 10, 1908

Ponente: TRACEY, J.

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TRACEY, J.:

In the inventory of the estate of Filomeno Encarnacion there were included the four parcels of land which are the subject of this action, which is brought against his administrator to have them excluded from the inventory as being the property of the plaintiff. The administrator did not oppose the relief asked for, but Jose T. Paterno, who was a creditor of the deceased for a claim allowed by the commissioners in the amount of P51,595.02, made two motions—one to be substituted in the administrator's place as defendant, and the other to be allowed to intervene as a codefendant. The intervention was allowed and judgment was rendered in the Court of First Instance of Batangas adverse to the plaintiff.

The case presents two questions. First, was the intervention proper? Second, should the real property claimed by the plaintiff have been excluded from the inventory?

The appellant attacks the procedure for intervention, which was merely upon motion and not by a cross-complaint, as apparently required by a literal reading of section 121 of the Code of Civil Procedure.

Since the decision by this court of the case of Behn, Meyer & Co. vs. Banco Español-Filipino,[1] on September 9, 1908, where it appears from the record, as it may be inferred from the decision a similar procedure was sustained, it must be understood that this court allows such an intervention, accepting, in the case of a defendant who unites in the defense, an answer instead of a complaint in accordance with the nature of the remedy, rather than with the literal wording of the section.

The intervener did not lose the benefit of the order of intervention by reason of his subsequent motion to be substituted, which was properly denied.

In refusing to order the exclusion of this land from the inventory, the judge based his decision largely upon the rejection of what he considered decisive testimony given by the plaintiff in person. She presented herself at the trial as a witness, was sworn, examined and cross-examined without objection as to her competency, nor does that question appear to have been raised until stated by the judge in his decision. He says :

"The evidence given by the plaintiff in this suit can not be considered. (See subdivision 7 of section 383, Act No. 190.) All of the acts sworn to by her took place before the death of Filomeno Encarnacion, and the fact, that his wife was present and is still living is not sufficient to render the plaintiff a competent witness, because it has not been shown that the widow of the deceased herself took part in the liquidation of accounts or was a party to the transaction, inasmuch as the money which the plaintiff lent she lent to the deceased and not his

wife, Andrea Goco."

The section cited from the Code of Civil Procedure reads as follows:

"SEC. 383. * * *

"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."

Had the opposing party interposed an objection to this witness on the ground of incompetency, her testimony could not have been received. His omission to object to her operated as a waiver. The acceptance of an incompetent witness to testify in a civil suit, as well as the allowance of improper questions that may be put to him while on the stand is a matter resting in the discretion of the litigant. He may assert his right by timely objection or he may waive it, either expressly or by silence. In any case the option rests with him. Once admitted, the testimony is in the case for what it is worth and the judge has no power to disregard it for the sole reason that it could have been excluded, if it had been objected to, nor to strike it out on his own motion. The disqualification of witnesses found in rules of evidence of this character, is one not founded on public policy but for the protection and convenience of litigants, and which consequently lies within their control.

Filomeno Encarnacion died in 1901. The plaintiff testified that on different occasions she lent him money and that in 1898 he and his wife, Andrea Goco, stated their account with her, resulting in a balance in her favor, which they promised to pay and as a guaranty of payment to give her their title papers consisting of a possessory information; that in 1899 they came to her house saying that as they had no money to pay their debt, it would be better that she should take the land therefor, permitting them, however, to continue cultivating it, upon the condition that after deducting the working expenses, one-half of the crop should go to her; that this was an oral agreement, not reduced to writing on account of the confusion of the revolution and war with the United States; that thereafter on demanding her one-half of the product of the land, Andrea Goco told her that there had been no crops owing to the impossibility of farming, on account of the death of their animals; and that, thereafter Andrea Goco, then a widow, stated the case to the administrator, to whom and to the commissioners, the plaintiff presented her claim, showing a balance in her favor of P1,814. She also produced before them the possessory information in the name of the deceased. Her testimony is corroborated and, indeed, her contention is substantially proved independently of what she said, by her brother, Juan Goco, and Aguedo Cebrera, and is confirmed by Emiliano Encarnacion, who stated that when as a creditor he demanded of the widow of the deceased the title papers of the land for use in court, she replied that she did not have them for the reason that she had delivered them to the plaintiff as guaranty of a debt which she and her husband had owed her and that she made no Claim to this land.

Upon the authority of cases heretofore decided in this court, we hold that the contract made between the deceased and his wife, on one part, and the plaintiff on the other, although not in writing, was valid, and that the delivery of the title deeds of the property was equivalent in its effect to a delivery of the property itself. (Civil Code, arts. 1280 and 1464; Soriano vs. Cortes, 8 Phil. Rep., 459; Guerrero vs. Miguel, 10 Phil. Rep., 52.)

Consequently the land should have been excluded from the inventory and the plaintiff should have her relief.

The judgment of the Court of First Instance is hereby reversed without the costs of this instance. So ordered.

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

[1] 11 Phil. Rep., 253.

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