

ANTONIA VALENCIA Y ORUS, PLAINTIFF AND APPELLEE, VS. JUAN JIMENEZ Y MIJARES AND GABRIEL FUSTER Y FUSTER, DEFENDANTS AND APPELLANTS.

G.R. No. 4406. October 23, 1908

Ponente: TRACEY, J.

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TRACEY, J.:

MEMORANDUM ON MOTION TO DISCONTINUE.

After this case had been finally submitted to this court, and was awaiting decision, a petition was presented in behalf of the plaintiff, not through her attorneys of record but through a new attorney, in the following words:

"The plaintiff, Doña Antonia Valencia y Orus, through her advocate, appears and respectfully shows:

"For weighty reasons now known to the plaintiff but whereof she was ignorant when this action was begun, she can not continue claiming either ownership or possession of the lands in question in this suit.

"Wherefore this plaintiff asks this honorable court to revoke the judgment appealed from in all its parts, absolving the defendants fully from the demands in this suit, without making any award of costs."

By the judgment of the court below the plaintiff had been awarded the real property in suit, together with damages for its Retention.

This motion must be denied, for several reasons.

First. The plaintiff is a resident of Barcelona, Spain, and she originally authorized the bringing of this action in a correspondence direct between herself and, her attorneys, Coudert Brothers of Manila,. at whose request she gave a power of management thereof to one of the assistants in their office, Jose Moreno Lacalle. As a foundation for the present motion there was filed a later power of attorney from her to Buenaventura Guamis, revoking the earlier power to Jose Moreno Lacalle, which it fully recited, and empowering Guamis to revoke in her name the aforesaid antecedent power, and secondly, "himself or through his substitutes, whom he may name, to appear in legal form before the Supreme Court of the city of Manila, or any other tribunal which may have cognizance of the case, and present a fitting instrument in writing discontinuing the action brought to nullify the sale of the lands aforesaid which was presented before the Court of First Instance of Manila against Don Juan Jimenez y Mijares and Don Gabriel Fuster y Fuster, with the power of ratification in the said petition making manifest his wish to renounce the continuance of the said suit."

The affidavit of Buenaventura Gqamis says:

"(4) As appears front the aforesaid document 'A,' at the foot of tie sixth page (tie power of attorney to him), it is the intention and desire of the said Doña Antonia Valencia y Orus to discontinue this action and renounce the continuation of the same * * *

"(6) By virtue of the powers conferred by the said document 'A,' this deponent hereby confers power on Mr. C. W. Ney, practicing lawyer in this capital city, to take in the name and representation of the said Dona Antonia Valencia y Orus proceedings necessary to procure the final discontinuance of this action."

It is obvious that the motion does not comply with the power granted by the plaintiff nor fall within its terms. The notice of motion does not ask for the discontinuance or cessation or abandonment of the suit, but on the contrary prays for a judgment absolving the defendants of the claim set up in the complaint, without any costs. Such a judgment would be one upon the merits and would preclude the plaintiff from any claim which she might hereafter, on fuller advices, see fit to make against these defendants. Such action, possibly so prejudicial to her interests, her power of attorney has not authorized any person to take in her behalf. The two things, a discontinuance and a judgment of absolution on the merits, are not only different in degree but in kind, and in the opinion of the majority of this court the one does not include the other.

Second. If, however, it might be that the motion for a judgment upon the merits could be considered as including the other kind of relief, that is, a mere discontinuance, on the principle that the greater includes the less, then the relief asked for can not be granted because it is tied up with the condition that there shall be no award of costs. The award of costs is at the disposal of the court, not of the parties, especially to the prejudice of the defendants, who are third persons, not before us on this motion and whom we can not presume to accept terms so unfavorable to them in their character as innocent purchasers.

Third. By the affidavit of Charles C. Cohn, one of the plaintiff's original attorneys, it appears that, after the entry of judgment in this action, the said attorneys caused to be entered upon the records of the Court of First Instance in which the judgment was rendered a statement of their claim to a lien thereon, with lawful fees and disbursements in this action, and caused written notice thereof to be delivered to the adverse party. Under section 37 of the Code of Civil Procedure this sufficed to give them a lien upon the judgment, inasmuch as the decree was one, in part, for the payment of money. Their further claim thereon is expressed in that section in the following words:

"* * * and shall have the same right and power over such judgments, decrees, and executions to enforce his lien as his client had or may have to the extent that may be necessary for the payment of his just fees and disbursements."

Under the, American practice this clause gives the attorneys an interest in the judgment and power over it and to enforce it like to that of their clients. It must therefore entitle them to carry on the action for the purpose of securing their proper compensation.

Without passing on the particular steps required to enable the attorneys to carry their lien into effect or on the reasonableness of the fees claimed by them, or of the contract providing therefor, we only hold that their lien is alleged to have been properly created so as to give them a right and standing in the action which prevents its discontinuance against their protest and without a suitable provision for their protection.

Fourth. The motion is not made by one of the attorneys of record. Certain motions, of their very nature, may be made by an attorney who has not appeared in the case, where the interest of the client is adverse to that of the attorney of record. Of that character is a motion for substitution of attorneys, but not such a motion as the present one, which goes to the merits and final disposition of the cause and which no one is entitled to make other than the attorney who duly appears of record in this court. By section 32 of the Code of Civil Procedure the right is secured to a party litigant to change attorneys. The method of such change is not indicated. The proper practice in this case on the part of the plaintiff would have been a motion for a substitution of attorneys, on which the question of their compensation would naturally have arisen and on the determination of which the attorney finally

appearing of record could have moved a discontinuance.

The justices sitting in this case do not all agree on each of the aforesaid grounds, but they are unanimously of the opinion that the motion must be denied. decision.

DECISION.

This action was brought in the Court of First Instance of the city of Manila to set aside a sale of real estate valued at P95,697.10 for unpaid taxes amounting to P2,934.76 to the defendant Jimenez, and also the transfer of a one-half interest therein by him to the defendant Fuster, on two grounds, first, that the defendants had secured title under the tax sale by conspiracy with one Vicente Ablaza, plaintiff's agent, who allowed the property to go to sale while having in his hands ample funds for the payment of taxes; and, second, that the tax sale was invalid by reason of defects in the proceedings to impose the tax.

The first cause of action was opened up, but was not persisted in at the trial and the case comes before us on the questions only of the irregularity of the proceedings for the sale. The most serious of these are the following:

(1) The statement of the owner, filed by Ablaza, as her agent, gave her name as "Doffa Antonia Valencia y Orus." In the assessment roll for the year 1901 the name given was "Valencia, Antonio." In the roll of 1902 it was "Valencia, Antonia," while the tax deed had it "Antonia Valencia."

(2) The correct description given in the owner's filed statement read:

"Bounded in front, on entering, 280.55 meters, by Calle de Lemery; on the right, on entering, 142.40 meters, by the property of Don Nicolas del Rosario; on the left, on entering, 65.10 meters, by Calle Corcuera, and at the rear, 288.70 meters, by the estuary and canal de la Reina,"

In the roll of 1901 it is stated as—

"A piece of land with improvements, situated blocks 24, 25, 26, and part 28 fronting Calle Lemery, solar de Nicolas del Rosario, izquierda Calle Corcuera and espalda Canal de la Reina."

In the roll for 1902:

"A piece of land with improvements, known as blocks 24, 25, 26, and part of 28 fronting izquierda Calle Corcuera, espalda Calle de la Reina, Calle Lemery, solar de Nicolas del Rosario."

In the notice of sale under "Inscription," "Kind of property—land and improvement;" "Street and number," it reads, "Rear of Canal de la Reina, left of Corcuera;" "Lots, 24, 25, 26, 28;" "Block,——",

The description in the final deed is correct whereas in the tax certificate it was copied from that in the notice of sale, and is defective.

The words "Lots" and "Blocks" were proved to refer to a plan made by the assessor and collector and kept in his office for his own use, but to which individuals might have access, on which it was shown as lots 24, 25, 26, and part of 28 in block 1. This plan was made after the filing of the declaration by the property owners but before the assessment.

(3) The amount of the taxes in these several documents is set down in columns, the cents being divided from the dollars, but without any dollar-mark,

(4) The only proof of the fixing of the notices of sale was a recital in the certificate of the city assessor and collector that the notice was posted "at the main entrance of said municipal building and at five other public places in the city of Manila,⁷⁷ without specifying the places, and also a recital in the deed that a copy was posted

in the proper barrio.

(5) The tax certificate did not fully recite the proceedings and give the details required by sections 78 and 80 of Act No. 82, but, on the contrary, showed the defects in the description and notice of sale, whereas the final deed substantially complied with the statute.

The American law does not create a presumption of the regularity of any administrative action which results in depriving a citizen or taxpayer of his property, but, on the contrary, the due process of law to be followed in tax proceedings must be established by proof and the general rule is that the purchaser of a tax title is bound to take upon himself the burden of showing the regularity of all proceedings leading up to the sale. The difficulty of supplying such proof has frequently lead to efforts on the part of legislatures to avoid it by providing by statute that a tax deed shall be deemed either conclusive or presumptive proof of such regularity.

Those statutes attributing to it a conclusive effect have been held invalid as operating to deprive the owner of his property without due process of law. But those creating a presumption only have been sustained as affecting a rule of evidence, changing nothing but the burden of proof. (*Turpin vs. Lemon*, 187 U. S., 51.)

The tax law applicable to Manila does not attempt to give any special probative effect to the deed of the assessor and collector, and therefore leaves the purchaser to establish the regularity of all vital steps in the assessment and sale. By sections 84 and 86 of Act No. 82 it is enacted that no tax shall be declared invalid for irregularities unless they "shall have impaired the substantial rights of the taxpayer."

The first apparent defect in this assessment is the error in the name of the owner.

In *Marx vs. Hanthorn* (148 IT. 6., 172), where it does not even appear that under the law of the State of Oregon the tax was a personal one, the tax sale was held bad because the owner's name had been written in the roll as "Ida F. Hanthorn" instead of "Ida J. Hanthorn."

Under the Municipal Law of the Philippines, sections 74 to 78, the tax is primarily a personal one and is enforceable against realty only in the event of a deficiency of personalty, whereas in the city of Manila its character is somewhat qualified by the provision in section 47 of the charter making the levy on personality a cumulative remedy only. Nevertheless, the requirement of the statute is so imperative that the rule of the *Hanthorn* case is manifestly applicable here.

But we deem it unnecessary to take up in detail the several irregularities and to determine the effect of each one upon the validity of the tax sale. The most vital requisite of such an assessment is that the property shall be so described as to be easily identified both by the owner and by the persons desiring to bid therefor. The descriptions prior to those in the deed are all more or less defective, but those in the assessment roll for 1902 and in the final notice of the tax sale are so confused and inadequate as not only to fail to give notice to a stranger of the location of the property, but as to be incapable of verification by a person familiar with it. This is especially true of the description in the notice of sale, which of all the steps in the procedure is the one calling for a most definite and intelligible description. It is settled doctrine that, where one sale embraces two different taxes, a vital defect in either tax invalidates the whole sale, so that, considered apart from the notice of sale, the rather understandable description in the roll of 1901 does not cure the vice in that of 1902. We are satisfied that the failure to adequately describe the property both in the tax roll and in the notice of sale amounted to an "irregularity, informality, and failure that impaired the substantial rights of the taxpayer," within the meaning of sections 84 and 86 of the Municipal Code, and upon this failure we are content to rest our judgment, affirming that part of the judgment of the Court of First Instance declaring the sale and deed of the assessor and collector of the city of Manila to Juan Jimenez y Mijares, and the deed of the latter to Gabriel Fuster y Fuster, invalid and awarding to the plaintiff the

possession of the property described in the complaint.

The judgment of the Court of First Instance not only awarded the plaintiff the real estate, but also the rents and profits thereof, both from the time the defendants took possession until the commencement of the action, and those accrued during the pendency of the action which have been collected by the defendant Gabriel Fuster y Fuster as receiver. This part of the judgment should be modified.

By article 451 of the Civil Code, the possessor of property in good faith is entitled to the profits thereof until his possession is legally interrupted. By article 448, the possessor under claim of ownership is presumed to have a just title. By article 448, good faith is always presumed, while bad faith must be affirmatively proved. By article 435, possession acquired in good faith does not lose that character until the occurrence of something showing that the possessor is not ignorant of the weakness of his title.

That portion of the present action having been abandoned which involved the direct charge of conspiracy on the part of the defendants, they are entitled, as the case stands, to the benefit of these articles of the code unless they can be charged with actual bad faith. Applying the standard of the Spanish law expressed in these articles, there is not sufficient in the case to establish such a charge although it is somewhat indicated in the evidence. It may be urged, however, that the tax deed derives its force from the law under which it is given and must take as an incident its quality and effects from that law, so that the holder thereof acquires no other status in respect of good faith than such as the American law attributes to him in that character. The rule of that law is usually stated to be that the holder of a tax title is not a purchaser in good faith (Cooley on Taxation, pp. 218, 220), qualified, however, in this important particular, that in respect of improvements he who, without actual knowledge of defects, holds a deed regular on its face, is considered in good faith and is entitled to rely upon that deed without an investigation of the proceedings upon which it is founded. But, if the deed itself exposes an irregularity, he must take notice of it. (Madland vs. Benland, 24 Minn., 372; O'Mulcahy vs. Florer, 27 Minn., 499; Bedell vs. Shaw, 59 N. Y., 46; Lynch vs. Brudie, 63 Pa., 206.) We have to seek the meaning of the term "good faith" in the cases on the subject of improvements because, in the American system, it can not arise in connection with rents and profits, which are recoverable by the successful plaintiff in any event without regard to it.

In the present instance, the final deed is regular on its face, and in the opinion of the majority of the court, in the absence of actual notice, sufficed to protect the holders thereof, although the preliminary certificate of sale which they had held and surrendered showed in its recital that the sale was irregular. Therefore, Applying either the Spanish or the American criterions as to good faith, the plaintiff may not recover the rents and profits down to the time when it is plain that the defendants were advised of the vice of their title.

This limit is fixed at the date on which, after being informed by the beginning of an action, they voluntarily appear therein and assert their claim. (Judgments of the supreme court of Spain of November 23, 1900, and October 12," 1901.)

The defendants first pleading in this case, the demurrer, was served on the 16th of May, 1906, and the plaintiff is entitled to recover the rents and profits from that date until the termination of the action, and the receiver must account to her therefor.

In conclusion, so much of the judgment of the Court of First Instance as awards to the plaintiff the possession of the property in suit, declaring void the deed from the city assessor and collector to Juan Jimenez y Mijares, together with the deed of the latter to the defendant Gabriel Fuster y Fuster, and also so much thereof as directs the payment to the plaintiff of the rents and profits of the property from the 16th of May, 1906, and also awards to the defendants the sum of P2,934.76, with interest from the 17th of December, 1904, to the 26th of April, 1906, being the amount of the tax with interest deposited under the statute as a condition to maintain the action, but

thereafter withdrawn under stipulation, is affirmed; but so much of said judgment as directs payment to the plaintiff of the rents and profits of the real estate prior to the 16th day of May, 1906, amounting to P4,337.73, is revoked.

This action is hereby remanded to the Court of First Instance for the purpose of taking such accounts and conducting such other proceedings herein as may be necessary to carry out the aforesaid judgment, but without costs of this instance. So. ordered.

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

WILLARD, J., concurring in part:

I agree to the denial of the motion, on the ground that the plaintiff is not entitled to have the case dismissed without costs.

Upon the merits I agree to the declaration that the tax sale is invalid, but not to that part of the opinion which allows the plaintiff to recover rents.

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