

PILAR SALUNGA ET AL., PLAINTIFFS AND APPELLANTS, VS. EMILIANO C. EVANGELISTA ET AL., DEFENDANTS AND APPELLEES.

G.R. No. 5314. October 02, 1911

Ponente: ARELLANO, C.J.

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ARELLANO, C.J.:

The object sought by the complaint filed in this suit, on February 18, 1907, is the annulment of the partition of an estate, agreed upon and signed on July 8, 1895, and recorded in a public instrument on October 23 of the same year.

The estate is shown to have been left by Santiago Canciller Evangelista, who, during' his lifetime, contracted three marriages; one, on October 3, 1863, with Eusebia Sangco; another, on October 6, 1877, with Antonia Alonso; and the third, on November 8, 1886, with Pilar Salunga.

The first marriage did not last long, for Eusebia Sangco died on January 18, 1865. There was no issue by this marriage, and no property.

The second marriage lasted six years. Between the 18th of January, 1865, when the first wife died, and the 6th of October, 1877, when Santiago C. Evangelista contracted his second marriage with Antonia Alonso, there elapsed more than twelve years and eight months, during: which time Santiago G. Evangelista had by this same Antonia Alonso, he being a widower and she a spinster, five children, named Emiliano, Ygnacia, Pedro, Ambrosio and Luisa, all of them having the status of natural children, the first born on February 9, 1867, and the last, on June 21, 1876. During his marriage with this woman, he had three other children, Quintin, Juan and Graciana; making a total of eight children.

By the third marriage, with Pilar Salunga, he had five children: Rosario, Natividad, Honorio, Jose and Virginia, not including another daughter who died before her father. Santiago Canciller Evangelista died on March 10, 1895.

The following facts are undisputed: First, that at the dissolution of the second marriage there was conjugal property valued at P41,539; and, second, that at the death of Santiago Canciller Evangelista, he left from his third marriage conjugal property worth P46,234.

Of the children of the second marriage, the first five were all, at their father's death, of legal age, but the last three had not yet attained their majority and because of their being minors, remained subject to the guardianship of their elder brother Emiliano, under the surveillance of a protutor and the authority of a family council, in accordance with the provisions of the Civil Code, which was then in force. The five children of the last marriage were all minors; but at their father's death, they were not placed under guardianship, inasmuch as, in the absence of their father, in conformity with the provisions of the Civil Code, they remained subject to the parental authority of their mother, Pilar Salunga.

Emiliano C. Evangelista, as guardian, was the legal representative of his two brothers, Quintin and Juan, and his

sister Graciana; and Pilar Salunga, by virtue of her parental authority, was the legal representative of all her five minor children.

Santiago C. Evangelista having died without leaving a will, judicial proceedings were begun for the purpose of having his above named children declared to be his intestate heirs. This action was initiated, jointly and in perfect accord, by the eight children of the second marriage and Pilar Salunga, as the legal representative of her five children, and all these children were declared by the court, by order of September 26, 1895, to be the intestate heirs of Santiago C. Evangelista. As aforesaid, the public instrument of partition was signed before a notary, on the 23d of the following month of October, by the children of the second marriage, who were of age, by Emiliano C. Evangelista, in his own right and as the legal representative and protutor of his aforesaid two brothers and sister, and by Pilar Salunga, in her own right and in representation of her minor children. The instrument of partition is Exhibit A of the complaint.

The copy of the instrument, Exhibit A, was taken from a record kept in the existing registry, and in transcribing this copy the error was inadvertently made of setting down that the first wife of Santiago C. Evangelista died "on January eighteenth, eighteen hundred and seventy-five." So that the children born, Emiliano, in 1867, Ignacia, in 1868, Pedro, in 1870, and Ambrosio, in 1871, could not have been born as natural but as illegitimate children, having been conceived by their mother, Antonia Alonso, through intercourse with a man who was then married. But the death certificate was presented, which expresses the true date; "the eighteenth of January, eighteen hundred and sixty-five" (Exhibit 1), and the plaintiffs' attorney expressly stated that he had no objection whatever to its introduction in evidence.

In February, 1907, twelve years after the partition had been made, this complaint was filed attacking it as null and void and it is the widow who presented the complaint in her own behalf. She directed it against all the children of her deceased husband, including those whom she had by him; but afterwards Honorio, Jose and Virginia, children of Pilar Salunga, represented by their guardian ad litem, Emiliano Kerr, joined in the complaint and were also admitted as plaintiffs.

Subsequently, another daughter, Natividad Evangelista, assisted by her husband, Gualberto Santos, joined in the complaint and was also admitted as a plaintiff. The child who did not join with her mother in the suit was the other daughter, Rosario, likewise married. So that Pilar Salunga, with four of her children of the last marriage, attacks the eight children of the second marriage.

The first question of nullity raised by the plaintiffs is that of the first five children of the second marriage, Emiliano, Ignacia, Pedro, Ambrosio and Luisa, having taken part in the inheritance, they being neither the legitimate nor the legitimized children-of Santiago C. Evangelista,

They shared in the inheritance because, although they were born as natural children, yet later, through the subsequent marriage of Santiago C. Evangelista with their mother Antonia Alonso, they became, by provision of law and by such posterior marriage, ipso jure legitimized children and their condition was exactly equal, in the eyes of the law, to that of legitimate children, in so far as their right to inherit from their father is concerned. But the plaintiffs also deny that they are the natural children of Santiago C. Evangelista.

The Court of First Instance, upon the trial, decided this first question in the sense that the five said defendants were the natural children of Santiago G. Evangelista, were legitimized afterwards by the subsequent marriage of the latter with his second spouse, Antonia Alonso, undoubtedly their mother, and that they had the same right to inherit from their father which the plaintiffs recognized as belonging to the other three children had by Santiago G. Evangelista during his marriage with Antonia Alonso; and the grounds of its judgment are: first, that with respect to the third of the said children, Ambrosio, there is documentary proof in the record that he is a natural son

of the spouses Santiago and Antonia; second, that with regard to all these children, the best and most conclusive proof is the judicial order of September 26, 1895, which declared them to be the heirs of Santiago G. Evangelista, jointly and upon equal shares with the legitimate children; third, that the legal presumption is that, in the proceedings in which that order was issued, all the required legal formalities were observed, and that the court based its ruling on the evidence adduced therein; and, fourth, that the constant possession of the surname Evangelista, the fact of their always having lived in their father's house, and that of the latter's having maintained and educated them at his expense, indicate a recognition on his part; .not the Civil Code, but the laws prior to the same being applicable in judging of this matter.

We find this judgment to be in accordance with the law, in so far as the first question is concerned, which is still insisted upon in this second instance, the plaintiffs alleging in their appeal that the lower court erred by not excluding from among the heirs of the deceased Santiago C. Evangelista, the five aforementioned defendants; but we find sufficient grounds in the judicial order of September 26, 1895, cited in the judgment and whose effectiveness must be given due weight in the present decision, to induce us to decide against this assignment of error.

By this judicial order were brought to a close the proceedings that were initiated by those who, in the matter of the estate of Santiago C. Evangelista, were interested in being declared to be his heirs so that they might obtain extrajudicially a valid partition of his estate.

The proceedings just mentioned were carried out in conformity with the provisions of the Ley de Enjuiciamiento civil, or law of civil procedure, then in force, to wit, the following:

"Art. 962. The intestate heirs who are descendants of the deceased, may obtain a declaration of their right by proving, by means of the proper documents or of such other proof as be available, the death of the person whose succession is in question and their relationship to him, and by testimony of witnesses, that such person died without leaving a will, and that they or those whom they designate are his sole heirs.

"Art. 963. The said testimony shall be taken after summoning the promotor fiscal, or prosecuting attorney, if there be one, to whom the record shall afterwards be submitted for six days in order that he may render an opinion upon the matter.

"Art. 964. The aforementioned proceedings having been had, (those specified in the preceding articles), the judge, without further procedure, shall issue an order acceding to, or denying the petition for a declaration of intestate heirs, as he may deem proper; in the latter case he shall reserve the petitioner's right for its determination after trial.

"This order shall be appealable in any event."

The evidence shows that Pilar Salunga, in her own right and as the legal representative of her children, was one of those who presented the petition for the declaration of heirs; that the prosecuting attorney of the court was heard; that neither the latter official nor the plaintiff Salunga offered any objection whatever to the documentary and oral evidence which was produced by the other children of the second marriage, whose filiation is now impugned, to prove their relationship with the deceased; and that the court, in view of all the evidence introduced, held:

"That he should declare and did declare the legitimate children of Don Santiago Canciller Evangelista, namely, Don Emiliano, Dona Ignacia, Don Ambrosio, Don Pedro, Dofia Luisa, Don Quintin, Don Juan, and Dona Graciana Canciller Evangelista y Alonso, had by his wife, Dofia Antonia Alonso, in second wedlock, and his children Rosario, Natividad, Honorio, Jose and Virginia, had by his wife, Dofia Maria Pilar Salunga, in third wedlock, to be the intestate heirs of the said Don Santiago Canciller Evangelista."

Had Maria Pilar Salunga then made, as she had opportunity to do, the opposition she now does, the judge would

have denied the petition presented by the first five children of the second marriage for a declaration of intestate heirs and would have reserved their right for determination, through the proper proceedings, and they then could have brought such proceedings, wherein ample discussion could have been had of all that is now discussed; but the declaration of intestate heirs was not denied and was made, pursuant to the petition of the said five children in agreement with the others and with Pilar Salunga, the present plaintiff; and, as they all consented, including Pilar Salunga, to the said declaration, and did not avail themselves of the right to appeal allowed by law, the said judicial order became final, just as a judgment rendered in a declaratory action, in case of a denial of the petition, would have become final, and neither the said judicial order nor the declaration made in its dispositive part may subsequently be impugned. Although it is merely an order issued in proceedings in Voluntary jurisdiction, the ruling of September 26, 1895, declarative of the status of legitimate children and favorable to the five defendants, whose filiation is now impugned, once it was consented to and became final, is now *res adjudicata* as against Pilar Salunga and all the other children of Santiago C. Evangelista who took part in the judicial proceeding.

If the said judicial ruling of September 26, 1895, declarative of filiation and of the status of legitimate heirs, had been rendered in an ordinary trial, such as would have been had if the order, instead of decreeing, had denied such filiation and such status of heir, alleged in that judicial proceeding, it not only would become, as against Pilar Salunga and the rest of the children of Santiago C. Evangelista, *res adjudicata*, but would have been final by reason of the provision contained in the second paragraph of article 1252 of the Civil Code, according to which

"In questions relating to the civil status of persons, and in those regarding the validity or nullity of testamentary provisions, the presumption of *res adjudicata* shall be valid against third persons, even if they should not have litigated."

"In questions that relate to civil status - says Manresa— and among them enter those of paternity and filiation, of the validity of marriages, declarations of incapacity, etc., the position and, sometimes, the legal capacity of a person, the basis of all juridic life, is determined wherein separate applications must not be made by distinguishing that the interested person lacks the capacity to treat with some persons and is competent to treat with others, or vice-versa, for the sole reason of the former having litigated while the latter have not." (8 Manresa, Commentaries on the Civil Code, 558 and 559.)

Although the authority of *res adjudicata*, aforementioned, is limited, as having been acquired in a proceeding in voluntary jurisdiction, what may not be denied is that the said judicial ruling is entirely effective against all who took part in the said proceeding in voluntary jurisdiction, as did Pilar Salunga and the children of Santiago C. Evangelista, and is like a judgment that has assumed the authority of *res adjudicate* and none of them may afterwards discuss the same question in an ordinary trial, provided by law in case of an adverse ruling on the petition or for all such persons as may have been unable to take part in the said proceeding; or any other in the matter of a declaration of the intestate heirs of the predecessor-in-interest to a hereditary succession. Once that the judicial orders and rulings have become final, by being consented to through the proper remedies not having been invoked against them, they become *res adjudicata*. (Decision of the supreme court of Spain of November 13, 1895.)

The legal presumption stands, so long as the contrary is not proven, that the judge would not have made that declaration of children and of heirs, if during the course of the proceeding it had not been sufficiently proven, to his satisfaction and with the approval of the prosecuting attorney "who rendered an opinion favorable to the petition," as shown by the record: first, that the five aforementioned defendants were natural children; second, that they were recognized by Santiago Canciller Evangelista, expressly or tacitly (a tacit recognition being then sufficient pursuant to the very famous Law 11 of Toro) as children of his own had with her who afterwards became his second wife, Antonia Alonso; third, that he subsequently married the latter, which even in this trial has been fully proven; fourth, that, by operation of the law, the mere fact of the subsequent marriage made those

children legitimate; and, fifth, that, by an express provision of the law, the children legitimized by a subsequent marriage were entirely equal to legitimate children with respect to the quality of heirs by force of law, and were the legitimate children of him who engendered and recognized them, and he could not have denied them as his children and heirs, if he had made a will. All these facts and conclusions of law having been assented to by Pilar Salunga, in her double personality aforesaid, may she now repudiate such acts of hers judicially performed? May her children, then legally represented by her, now disown, under the pretext that they were minors, what was consented to by, and awarded in judgment to, their legal representative?

It is beyond all doubt that Pilar Salunga, in her own personality, that is, in her own right as widow with respect to her half of the community property, can not deny or attack the legal personality of those with whom she executed the contract of partition; this doctrine is firmly established in civil jurisprudence. So that her suit can not prosper on account of this principle. The first question of her appeal is decided against her, in the sense that the five defendants, whose affiliation and right to inherit she now seeks to disown and impugn, are and must be legitimate children and heirs of Santiago C. Evangelista, as they were declared to be by a final order assented to by herself and which has acquired the authority of *res adjudicata*.

The result is: that Pilar Salunga may in no manner repudiate the contract of partition by virtue of which she accepted as her half of the conjugal assets, the properties, valued at P23,117, that were adjudicated to her, as set forth on page 43 of her Exhibit A.

With respect to her children, then minors, inasmuch as it is a controvertible point as to whether that declaratory order of September 26, 1895, is binding upon them, that is, whether they must abide by what was therein declared as being *res adjudicata*, we will suppose that they are not obliged to do so; rather, on the contrary, that they still possess the right of action for the disavowal of the filiation and quality of heirs declared in that order, in behalf of the five defendants concerned in this matter.

Of Pilar Salunga's children, then minors, Rosario, as well as her husband Tomas Olson, was declared to be in default (p. 52 of the record), and Natividad, Honorio, Jose and Virginia joined in the complaint and were represented, Natividad, by her husband Gualberto Santos, and the other three, by their guardian ad litem, Emiliano Kerr. Hence, the only true plaintiffs, with respect to this first question, are the four children of Pilar Salunga, named Natividad, Honorio, Jose, and Virginia, to whom, jointly with Rosario, property to the value of P16,591.15 was adjudicated. (*Id.*)

The entire opposition consists, briefly, in the fact that the baptismal and birth certificates do not state that they are the natural children of Santiago C. Evangelista, and in the averment that there is no proof that the latter lived conjugally with Antonia Alonso. All this is presumed to be proven in that judicial proceeding. What the plaintiffs should have proved, after said judicial declaration, is that they did not possess the status of natural children and could not be recognized as such, and that, consequently, they could not acquire the condition of children legitimized by a subsequent marriage.

Against these true plaintiffs are the grounds of the judgment, aforementioned, which are in thorough harmony with the facts proved at trial and the legal provisions bearing on the matter, such provisions being understood to be those which governed at the time of the birth of the said children, and not those of the Civil Code, which was then not yet in force and under which, nevertheless, all the contentions of the complaint are made.

Pursuant to Rule 1 of the transitory provisions of the Civil Code, "rights arising under the legislation prior to this code, out of matters carried out under its rules, shall be governed by such prior legislation, even if the code should regulate them in another manner, or does not recognize the same;" so that the status of natural children, of the children whose filiation is impugned, the recognition of such children and their rights, including hereditary rights,

can not, because of their having arisen from acts done prior to the enactment of the code, be governed in any other manner than by the legislation prior to the code, and on such legislation is based the judicial opinion contained in the said findings of the judgment which are reproduced and adopted in this decision.

The provision of article 1081 of the Civil Code, providing for the nullity of a partition made with a person who was believed to be an heir without being so, has no application to the present case, because it is not only a supposition that the said five defendants were heirs, but they really were so and are so, according to the trial had at that time and to the evidence then and now adduced, and no error whatever has been shown, either in the order of September 26, 1895, or in the partition of October of the same year, or in any of the many proceedings, both judicial and extra judicial, in which the five defendants, whose rights are now in discussion, were always held to be true natural children legitimized by a subsequent marriage.

The second question raised by the plaintiffs in their appeal is that relating to the nullity of the partition, on account of the damage alleged to have been suffered by the minor children of Pilar Salunga.

The trial court decided it in a negative sense. There is, says the court, absolutely no proof that the said minors suffered damage to the extent of more than the fourth part. It has not been proved what was the value of the property when it was adjudicated. In determining said value, the plaintiffs took as appraisement the purchase prices. If the value of the property of an estate, were always the price at which it was acquired, the appraisement of the same by experts would really be needless. Moreover, the proper action in this case is not one of nullity, but one of indemnity for the damage caused, or the heirs may consent to a new partition; in accordance with article 1077 of the Civil Code.

All these findings are in strict agreement with the facts proven at trial, and with the law.

It is an evident fact that this question does not in the least affect either the eight children of the second marriage or the widow, Pilar Salunga, or the defendant in default, Bosario C. Evangelista. The plaintiffs, at the end of the trial, amended the complaint and only then alleged that the appraisement of the property caused "great detriment to the interests of the minors, the herein plaintiffs," (B. of e. p. 15), and, more explicitly, in their brief:

"That maliciously and to the detriment of the minors born of the third marriage, the property awarded to them was appraised at a price that exceeds by four or five times its true and just value, while, on the other hand, the property awarded to the children of the second marriage was appraised at a price which only reaches a fourth or fifth part of its true and just value * * *." (Brief, p. 20.)

But it was not proved, as well said in the judgment, what was the value of the said property at the time of the appraisement, nor is it sufficient to advance the argument of the purchase price, because, were it so, it would have been useless to proceed with an appraisement of the property at the time of the partition. It should have been proved at the trial that, in appraising the property, the subject of the partition, at a value greater or less than that stated in the titles of acquisition, the appraisers proceeded unjustly, or, as alleged in the brief, maliciously, inasmuch as at the time of the award or adjudication of the property the prices still remained the same, or because all the changes they made were not in harmony with the real facts, did not represent its value at the time.

The conclusion of the lower court is that it was not proven what was the value of the property when it was awarded; and this court finds no reasons to conclude otherwise.

There is absolutely no proof that the said minor suffered injury to the extent of more than the fourth part, so concludes the lower court; and we find no premises whereupon to establish a different conclusion or that that injury exceeding the fourth part, prejudicial to the minors of the third marriage, existed.

Supposing, for a moment, that such minors of the third marriage did really suffer "injury exceeding the fourth

part, taking into consideration the value of the things at the time they were awarded," which is the case prescribed by article 1074 of the Civil Code, withal, not on this account would there be reason to ask for the cancellation of the said partition.

The code does not allow the nullification of a partition, except in the case, before mentioned, of article 1081, that is, where the "partition was made with a person who was believed to be an heir, without being so;" for all the other cases in the articles 1074 to 1078, inclusive, the code only grants an action for rescission. And though, practically, in certain cases, nullity and rescission produce the same effects, in reality and in a strict sense of law they are distinct actions, inasmuch as an act that is null is supposed never to have existed, while the rescindable act is supposed to have been valid at its origin, though it afterwards became ineffective.

Although the injury alleged on the part of the minors of the third marriage, be a fact sufficiently proved in the manner required by law, the petition praying that the partition be declared null or be annulled, is improper.

And were it asked that the said partition in its entirety be declared rescinded, such petition would also be improper, for two reasons:

One, because in paragraph 1 of article 1077, it is provided that "a defendant heir may choose between indemnifying for the damage or consent to a new division;" and the other, because paragraph 3 of the same article prescribes that "if a new division is made it shall not include those who may not have been prejudiced nor those who did not receive more than was proper."

Only the four manors of the third marriage, Natividad, Honorio, Jose and Virginia, whom it is alleged were prejudiced to the extent of more than the fourth part, are these who would be entitled to an indemnity for the injury they are supposed to have suffered; but Pilar Salunga could not, in her original complaint, nor can she in her amended complaint, properly ask that the partition be rescinded for a cause that does not affect her in the least, for the reason that she does not complain of injury because of the award that was made to her, neither does her daughter Rosario, nor do Santiago C. Evangelista's eight children of the second marriage.

The second question, therefore, can not but be decided adversely to the plaintiffs. The complaint is dismissed in so far as it concerns the declaration of nullity, asked for therein, of the partition, and is disallowed in so far as it has bearing on the rescission of the partition because of injury, which is what was probably meant to be asked for as the true object of the complaint, according to law.

The third question relates to the nullity of the said partition, on account of the failure to include in the inventory on which it was based, certain property then in the possession of some of the interested parties.

The trial court also decided this question adverse to the plaintiffs. Neither would an action for nullity be proper here, said the court. This property should be included in the inventory and distributed in the same manner as was the rest. (B. of e., p. 19.)

As already stated, an action for a declaration of nullity is improper except in the case specified in article 1081.

Neither is an action for rescission applicable. "The omission," prescribes article 1079, "of one or more objects or securities of the inheritance does not give rise to the rescission of the division by reason of lesion, but only to complete or increase the estate with the objects or securities omitted." The parties themselves who signed the contract of partition here concerned, stipulated therein that:

"If other property be discovered which belonged to the said deceased (the spouses Evangelista and Alonso) and is not comprised within this partition, a distribution thereof shall be made among the interested parties

proportionately and in accordance with the common law." (Exhibit A, p. 53.)

The fourth question refers to the nullity of the partition, for the reason that the minors were not duly represented therein.

The trial court elucidated this question, making a distinction between the minors of the second marriage and those of the third.

"With regard to those of the second marriage, said the court, it is of record that the protutor signed the instrument of partition, and, moreover, no action whatever is exercised here in their name, since they are now of age." (B. of e., p. 19.)

In fact, those who were minors of the second marriage are Quintin, Juan and Graciana, and were born, the first in 1877, the second in 1879, and the third in 1880. In 1907, the date of the complaint, they were, respectively, 29, 28, and 27 years of age. They being of age and their own masters and the only persons who might, if they chose, bring up this question, they did not institute any action whatever against the partition; nor is this defect of representation a radical vice which may be objected to by anyone except the party concerned. Consequently, neither Pilar Salunga nor her children are entitled to prosecute this action for a declaration of nullity.

The findings of the judgment, respecting all these causes for nullification, are by the present decision affirmed. There is no basis for the nullification of the partition, since the five defendants, EmiJiano, Ygnacia, Ambrosio, Pedro and Luisa C. Evangelista took part therein and were, all of them, legitimate parties as the true children and legitimate heirs of the spouses Santiago C. Evangelista and Antonia Alonso. There are no grounds upon which to rescind the partition on account of the alleged damage to the extent of more than the fourth part of the property awarded to the minor children of Santiago C. Evangelista, had by Pilar Salunga, nor because of the failure to include in the inventory certain property which should form a part of the hereditary estate, nor because of undue representation of the minor children of the second marriage who, after they became of age, brought no action whatever.

Obviously, Pilar Salunga, in her own right, could show no reason nor authority in law why she should present, in her name, the complaint herein concerned, and much less the present appeal; wherefore this appeal of Pilar Salunga, who could have suffered no harm whatever from the judgment from which she appealed, is entirely improper.

"With respect to the children of Maria Pilar Salunga - continues the trial judge - the mother entered into the contract of Exhibit A, in her own behalf and in that of her minor children who were under her parental authority. It is evident that the mother who, in the absence of the father, exercises the parental authority over her minor children, is their representative; but, pursuant to article 165 of the Civil Code, whenever, in any matter, the father or mother may have an interest opposed to that of their children, not emancipated, a next friend shall be appointed for the latter, to represent them in court or otherwise. In the partition in question, Maria Pilar Salunga was directly interested on account of her half of the conjugal property; she may be considered to have been a coheir; she could not represent her minor children, who needed a next friend to complete their personality. This case comes entirely within the provisions of article 1259 of the Civil Code, which prescribes that no one can contract in the name of another without being authorized by him or being his legal representative; a contract executed in the name of another by one who has neither his authorization nor legal representation, is void, unless it be ratified by the person in whose name it was executed before being revoked by the other contracting party. This court holds that the contract under examination was not validated by the persons in whose names it was executed. The partition concerned is, therefore, null, through the lack of capacity on the part of the executrix to represent her minor children in the said partition. Prescription can not be invoked, and at all events the prescription was interrupted during the time that the courts of justice ceased to be in operation in this province, that is, for a period of more than three years, from June, 1898, to July, 1901."

(B. of e., pp. 19 and 20.)

The complaint not having prospered on the other preceding grounds, it was successful upon this last one, and the partition was finally declared to be null and void. The prescription set up against the complaint was found to be no bar, on account of the term not having been completed that the law requires to make it an effective defense.

The fourth question, in this part thereof, having been decided adversely to the defendants, the latter, in turn, appealed from the judgment and alleged, as assignments of error:

- The finding that there was an opposition of interests between the mother, Pilar Salunga, and her minor children, within the terms of article 165 of the Civil Code;
- The finding that Pilar Salunga was not vested with legal capacity to represent, in the partition, her minor children subject to her parental authority;
- The finding that her minor children should have completed their personality through a next friend, and that, as this was not done, article 1259 of the Civil Code must be applied;
- The finding that the contract of partition had not been validated by the mother who, in the name of her minor children, executed the ratification thereof; and
- The failure to sustain the prescription, or the finding that it had been interrupted.

We shall take up the discussion of this last assignment of error in preference to the preceding ones, inasmuch as, if it is not sustained, the others should have to be judged accordingly. Now, it has been shown that, not only witnesses of the defendants, but even Pilar Salunga herself, testified that, since the partition was made up to the time of the trial, each one of the heirs had been in possession of the land that had been awarded to him, which, up to the date of the complaint, had not been disturbed, either by her or by any of the defendants (pp. 224 and 225 of the record). So that there was singular possession, under the title of exclusive owner, on the part of each one of those who made that partition, since October 23, 1895, the date of the public instrument ratifying the partition agreed upon and signed by them on July 8 of the same year. From October 23, 1895 (and not from March 10, 1895, from which the defendants reckon, the date of the death of Santiago C. Evangelista, when the possession was universal or held in co-ownership), to February 18, 1907, when the complaint was filed, there had elapsed more than the ten years required by law for the prescription of ownership in real properties, as to persons present. The whole question would have rested on the point as to whether this period was really interrupted during three years, as was found in the judgment appealed from; but considerations of another order excuse such a discussion.

The defendants, neither in their written demurrer nor in their answer, made any allegation whatever concerning the prescription, to which they did not refer except in their written argument, presented after the hearing in first instance; and the plaintiffs, replying thereto, said that this question had not been raised during the trial of the case, nor was it contained in the written answer as a special allegation or defense. This has been found to be true.

It is an established doctrine that the defense of prescription, when not alleged in the answer, can not avail in this second instance. (*Aldeguer vs. Hoskyn*, 2 Phil. Rep., 500.)

This court, after stating in the case just above cited, "but the defense of the statute of limitations, to have been

available to the defendant in this case, should have been set up in his answer. This was not done," added: "The court, therefore, made no finding thereon." The lower court, in the present case, made an express finding in its judgment. It might perhaps be said (the defendants do not say so in their appeal) that the fact of there being a finding in the judgment rendered in first instance, and which can not but be impugned as erroneous, in so far as it constitutes a deprivation of an acquired right, is a sufficient reason for setting up, in second instance, the question of prescription. It might also be alleged (but certainly is not alleged by the defendants) that, as it is requisite that the defense be set forth in the answer and be discussed in first instance, when it is not so set forth it is understood to have been waived, but that, in the present case, the unalleged defense of prescription consisting in a lack of action can not be considered as waived, because the lack of action, as well as that of jurisdiction, may be alleged at any stage of the trial.

However, not for these reasons should this court permit an issue to be set up in second instance, when it was not advanced nor argued in first instance. The lower court, in not sustaining the prescription, considered that the same was interrupted during the time that the courts ceased to be in operation, according to its assertion, from June, 1898, to July, 1901. This assertion should have been discussed in first instance, both in relation to the facts and to the application of the legal provisions enacted during the Spanish sovereignty until the exchange of the treaty of peace on April 16, 1899, and during the military occupation until the said month of July, 1901, when the present courts began to operate; and such prescription can not be considered by merely taking into account the facts related in the complaint and the date of the same, nor can the defense of prescription be deemed to be comprised in the objection that "the facts alleged in the complaint do not constitute a right of action" (Code of Civil Procedure, sec. 93), as has already been held by this court in the case of *Domingo vs. Osorio* (7 Phil. Rep., 405).

The said last assignment of error is, therefore, dismissed.

With respect to the errors alleged, the following premises of law and fact must be taken for granted: first, that Pilar Salunga exercised parental authority over all her five minor children on the date of the partition (Civil Code, art. 154); second, that she had the right to represent them in the prosecution of all their actions, and that she really did represent them in the partition of the estate in question (*Id.*, art. 155).

Could she then, legally represent them? If she could not legally represent them, is the partition of property in which she did represent them, by virtue of her parental authority, valid?

These are the questions to be resolved in the present appeal.

The trial court decided them both in the negative. The first, because the mother, Pilar Salunga, had an interest opposed to that of her children, and the latter should have been legally represented in the partition by a next friend judicially appointed, according to the provisions of article 165 of the Civil Code; and as to the second question, because the contract of partition, so executed by one who could not then have the legal representation of the minors, was null, unless it was subsequently ratified by such minors before its revocation by the other participants in the partition, to wit, the other contracting parties, the defendants.

Before deciding these questions in the present appeal, the 4th assignment of error of those hereinbefore enumerated, to wit, that the contract had been validated by the mother who, in the name of her minor children, executed the ratification, must be dismissed as being inopportune, and because it does not come within the provisions of article 1259, applied by the lower court, according to which he who can validate and ratify a contract that is null and void for want of authorization or representation, is "the person in whose name it was executed," that is, the minors themselves who appear as the parties executing the same, represented by their mother. If the partition was null (be it said hypothetically), because the mother could not have therein the legal representation of her minor children, neither could she be vested with the legal representation of these minor

children in a subsequent ratification of the said partition. Moreover, what is called a ratification of the partition is nothing more than the public instrument of October 23, 1895, in which the interested parties approved the partition agreed upon and signed on July 8 of the same year, when the children of the deceased Santiago C. Evangelista, who contracted the said partition with the surviving widow, Pilar Salunga, had not yet been declared his intestate heirs.

Having now disposed of the matters of lesser importance of the appeal, the principal question thereof to be decided stands forth more prominently.

If each one of the heirs was already, from October 24, 1895, the exclusive owner of the property which had been awarded to him, and the complaint was unsuccessful in obtaining the annulment of the partition, either on the ground of nullity or on the ground of rescission, by reason of the facts and legal premises herein before explained, could it bring about such annulment through the fact of the mother's having represented her minor children in the contract of partition?

For this act only, must a contract be annulled that was executed in 1895 and from which have been derived rights of ownership and singular possession over real and personal property, in behalf respectively of fourteen persons, who, by means of such contract, had reached an agreement to divide the common inheritance and each of them to be the exclusive owner henceforth of his legitimate portion?

In an affirmative case, must proceedings be initiated: for the making of a new inventory and appraisalment of the hereditary property, after returning the latter, together with its fruits collected during sixteen years, back into the common undivided mass or funds of the estate; for the appointment of a judicial counsel for three of the minor children of the third marriage who are still under age; to require Pilar Salunga to render an account of the fruits collected from the property of her minor children, which fruits she had a right to take as her own by reason of her parental authority, as will be seen further on, but which, because of the nullity of the partition, she could not so take; for a new partition wherein the eight children of the second marriage, Pilar Salunga, as the surviving widow, Rosario, her daughter, together with the latter's husband, Tomas Olson, Natividad, her other daughter, together with the said Natividad's husband, Gualberto Santos, and a counsel appointed by the court in representation of Pilar Salunga's other children, Jose, Honorio and Virginia, be made parties?

Such would be the unavoidable consequences that would result from an annulment of the contract in question, because of the circumstance, aforesaid, of some minor heirs having been represented therein by their mother who in turn took part through her own right by reason of her half of the conjugal property.

The facts to be kept in mind for the determination of the question, are the following:

In a reunion of the family before the family council organized for the guardianship of the three minor children of the second marriage, and which was attended by Pilar Salunga in her own right and as the legal representative of her five minor children of the third marriage, the said family council appointed for the three minors of the second marriage, as guardian, their elder brother, Emiliano; as protutor, a friend of the family; and as expert appraisers, two property owners of the locality in no wise related to the family by blood or marriage. After other resolutions found in the journal of the meetings, kept by the said council, there appears the following one, unanimously adopted by its members:

"Resolved, That as soon as the inventory and appraisalment concerned shall have been made, the guardian (Emiliano), in accord with those of age interested in the estate and with the widow, Dona Maria Pilar Salunga y Dantis, in her own behalf and as the legal representative of her minor children, and with the presence of the other minors over fourteen years of age and the protutor, shall make the division and award, and, in connection wherewith, in a necessary case, he shall request the advice of competent persons and shall pay the necessary

expenses, without prejudice to his recording in the property registry the ownership of the property subject to this requisite, as soon as he shall be able to dispose of the sum considered sufficient for this purpose."

The division and award was made by Emiliano C. Evangelista, in the manner directed in the resolution, and a public instrument of the contract of partition was drawn up before a notary. These facts were fully proven at the trial of this case and were admitted by both the litigating parties.

It is this public instrument of the contract of partition that was annulled in the judgment appealed from, because of the defect that the minor children of the third marriage were represented by their own mother, and not by a next friend or special guardian, as required by article 165 of the Civil Code.

The defendants and appellants aver that this article 165 is not in harmony with article 1060 of the same code.

These articles read as follows:

"Art. 1060. If the minors should be subject to the parental authority, and are represented in the division by the father or by the mother, in a proper case, neither judicial intervention nor approval shall be required."

"Art. 165. Whenever, in any matter, the father or mother may have an interest opposed to that of their children, not emancipated, a next friend shall be appointed for the latter, to represent them in court or otherwise.

"The judge, on petition of the father or of the mother, of the said minor, of the department of public prosecution, or of any other person qualified to appear in court, shall appoint, as the next friend, the relative of the minor to whom the legitimate guardianship should belong in such cases, and, in the absence of the latter, another relative or any person."

It may incidentally be said that if Pilar Salunga had, in 1895, considered that she had in that partition an interest opposed to that of her children, and had requested, she being the first upon whom it devolved to do so, the appointment of a counsel for them, the court would probably have proceeded in strict accordance with article 211 of the said code, which provides as follows:

"Legitimate guardianship of minors, not emancipated, pertains solely -

"1. To the paternal grandfather.

"2. To the maternal grandfather.

"3. To the paternal and maternal grandmothers, in the same order, while they remain widows.

"4. To the eldest of the male brothers of full blood, and, in the absence of the latter, to the eldest of the brothers on the paternal or maternal side."

and then, in consideration of the facts in evidence in this case, the legitimate guardianship of the minor children of Pilar Salunga, in the absence of the persons of the first four degrees of relationship as designated by law, would have devolved upon "the eldest of the brothers on the paternal or maternal side," who is Emiliano C. Evangelista. But, in regard to this point, there is no controversy, nor reason for any, at the present time.

In the opinion of the defendants and appellants, the next friend or counsel required by article 165 of the Civil Code virtually substituted the guardian ad Utem of the former Ley de Enjuiciamiento Civil or law of civil procedure, and which this law required "when the mother and her minor children were determined to maintain a suit; any other construction of article 165 would show article 1060 to be superfluous, or, at least, that both articles were in conflict."

Pilar Salunga, moreover, had waived such rights as might pertain to her in usufruct and, according to a ruling of

the Direccion de los Registros, of the 9th of October, 1901, the wife who renounces all the rights she may have in her husband's estate, may legally represent her minor children in the partition. (Brief, p. 9.)

Had such intervention been demanded at that time, he who demanded it would not have saved himself from paying the costs, on account of the uselessness and needlessness of this proceeding, which did not tend to safeguard the interests of minors, except it be when the mother or the guardian had debts to pay to their minors or some suit to maintain against them, or the latter against the former, the minors in all other cases being duly represented, some by the family council and others by the mother who exercised parental authority over her unemancipated children." (Brief, pp. 15 and 16.)

This opinion is entirely incorrect and unacceptable.

In the first place, article 165 of the Civil Code did not substitute the provisions of articles 1040 and 1836 of the Ley de Enjuiciamiento Civil de Filipinas, inasmuch as these two articles, in the case of incompatibility of interests between the father, mother, or guardian and the minor child or incapacitated person, required the representation of a special curator or guardian, but only for the trial or in court, while article 165 of the Civil Code required it in court and out of it; so that, not only in the case of the payment of a debt or of a suit between the father or mother and the minor child must the counsel appointed by the court, the next friend, substitute the said persons in their legal representation, but "always in any matter when such parents have an interest opposed to that of their children," and thus, in the absence of the father or the mother who might exercise the parental authority, "the protutor shall enforce the rights of the minor in and out of court whenever they are opposed to the interests of the guardian." (Civil Code, art. 236, No. 2.)

In the second place, article 1060 of the Civil Code means no more than what its text says, to wit, that judicial approval is not necessary in the division of an estate where minors, subject to the parental authority of the father or the mother, are interested, when they are represented therein by either of their parents exercising such authority over them; and it does not mean that they must always be represented solely by their father or mother, by right of his or her parental authority. If the minors are interested in an estate left to them by one not related to them or by a relative and in which the father or the mother, under whose parental authority they are, have no share whatever, it is well indeed that no one other than such father or mother should represent them in the partition of the estate; and, in this case, the circumstance of their being minors does not make the intervention or the approval of the court necessary on account of the fact that they are represented by their father or mother, as, by general rule, would be required without the assistance of a father or a mother holding parental authority over them. The general rule is laid down in article 1032 of the Ley de Enjuiciamiento Civil de Filipinas, which reads as follows:

"The liquidations and partitions of inheritances made extrajudicially, though by receivers appointed by the testator, must be presented for judicial approval whenever any minor, incapacitated person, etc., has an interest therein as an heir or legatee of an aliquot part."

But if the father or the mother who exercises the parental authority is also a party interested in the partition, and his or her interest be opposed to that of their children, neither of the two can represent them in the partition, because contrary designs and tendencies would attach to contrary interests and would be hard to harmonize in the mind of a single person. The mother has died leaving minor children whose father survives. The minor children are parties to the partition of the estate left at the mother's death, by reason of their hereditary shares. The father is also a party to the partition of the estate, by right of his half of the conjugal property and his usufructuary share pertaining to him as widower. The father can not be the sole person who in his own behalf and before himself, in his own right as the surviving widower and in representation of his minor children by reason of his parental authority, may make, without the intervention of the court or of any other person, the partition of the estate, inventorying and appraising the property at will, distributing and awarding it at his own pleasure and disposing of

the existing co-ownership as best pleases him so that they each may continue thenceforth to be the exclusive owners of their respective parts of the divided property, he of the portion that he wished to take for himself, and the minors, of the shares that their father saw fit to assign to them. The worst of it would be that, if the father and the minor children were the sole heirs and the former were opposed to a division, the actual result would be that the children would remain subject to his will and there would be no one who, in their behalf, could oppose it according to the theory above set out, which is in all respects inadmissible.

The doctrine summed up by Manresa in the following terms is an incontrovertible one, precisely for the proper understanding and application of article 1060 of the Civil Code:

"Whenever the father or the mother have a contrary interest in the estate, the minors must have a defending counsel appointed, in accordance with article 165, and the partition in which they are interested requires judicial approval (resolutions of the Direction of December 18, 1893, and November 24, 1898)." (7 Commentaries on the Civil Code, p. 617.)

In the third place, it is not sufficient that the mother waive, as in fact Pilar Salunga did waive, according to page 73 of Exhibit A, her quota of the usufruct pertaining to her as widow, for the purpose of establishing that all interest in this partition, opposed to that of her minor children, has disappeared. She did not likewise waive her right to her half of the conjugal property, which is the strongest interest that she had in the partition, and this is the point that must be examined closely in order to judge correctly whether such interest is opposed to that of her minor children. In regard to this phase of the question we find nothing that accords with reason in the appellants' brief.

Though the minor children and the father or the mother who exercises parental authority over them, are interested in the partition, either of the parents may very well represent their minor children and take part in the partition on account of their own interest therein, for the reason that article 165, now under discussion, was not then applicable. An example would be no doctrine, however, is established a case where the interest of the minors, or, vice-versa, of the father or of the mother, consisted in a specific legacy; it is evident that here there would be no opposition of interests,, because the father or the mother would lack the freedom of choice and authoritative determination to award such a legacy, and no risk would be run of partiality and injustice. There would be the same absence of opposition if, in the operations relative to an estate, no definitive partitions were made, but aliquot parts of the property were awarded to one and to the other. It is a matter, therefore, in the application of article 165, as to whether there is opposition of interests between the mother and her minor children.

In order to judge of this feature of the case, we must consider the following facts of the partition herein concerned:

It is not alone Pilar Salunga and her minor children who are interested therein, but likewise eight children of the second marriage of Santiago C. Evangelista, and these latter should have for themselves exclusively one-half of the conjugal property of the second marriage, that which pertained to their deceased mother, Antonia Alonso, the other half of the conjugal property being that which they share with their brothers and sisters of the third marriage, just as they equally share with the latter the half of the community property of the last conjugal partnership.

He who effected all the operations of division, under competent professional direction, was Emiliano C. Evangelista. In the partition, one schedule of allotments was not made for Pilar Salunga and another for her minor children, but one alone was made in this form:

"They are to have: the widow, Dona Maria Pilar Salunga y Dantis, as her half of the conjugal property, twenty-three thousand one hundred and seventeen pesos; and her aforementioned minor children, in equal shares, as their legitimate parental portion, sixteen thousand five hundred and ninety-one pesos and fifteen

centavos: equal to the total sum of thirty-nine thousand seven hundred and eight pesos and fifteen centavos. - Award. - The said widow and her children are awarded as aforesaid, proportionally, in payment of their respective credits; 1 * * * (here follow six items of brief descriptions of property, the last one, No. 6, comprising various rural estates, valued at 29,876 pesos)."

Pilar Salunga's interest does not appear to be opposed to, but united with that of her minor children. The joint interest of mother and children is seen in the partition and throughout this entire suit, to be always in various ways and in a parallel manner opposed to that of the eight children of the second marriage, and this is all the opposition that can be shown, an opposition between the property of the one and the other marriage; the children of the second marriage form a group with certain property for the sum of P41,539, and those of the third marriage, jointly with their mother, form another group with certain property aggregating a total value of P46,234. Pilar Salunga neither made nor could have any influence in making her credit or assets of better condition than that of her children, nor could she perform any act whatever that might prejudice her minor children. In reality, between Pilar Salunga and her children, there was no definite partition, but a joint award "proportionately, in payment of their respective credits" of some of the property of the estate, which, after the partition had been made, they continued to hold in co-ownership between themselves in the form of community property, though no longer in co-ownership with the children of the second marriage, by reason of the estate *pro indiviso*. Pilar Salunga's interest necessarily will appear to be opposed to that of her children the day when they proceed to dissolve their co-ownership or community property. So that, in conclusion, it must be said that, in the division already made of the estate, the interest of Pilar Salunga was not opposed to that of her children, inasmuch as all that was then endeavored to be done was to separate the property of one marriage from that of another; but in the division that some day may be made of the community property, that of the last marriage still now held *pro indiviso*, between the mother and the children of this last marriage, necessarily the mother's interest will be opposed to that of her children, and then it will be that the latter can not be represented by Pilar Salunga, but by counsel appointed by the court, in accordance with the provisions of article 165, here concerned. The reason for the joint ownership agreed upon is probably the right of legal usufruct which the mother has in the property of her minor children, through her parental authority. (Civil Code, art. 160.)

A case decided by the Direccion General de los Registros, is quite analogous to the present one: The mother had died, leaving seven children, two of them minors. She had bequeathed to her husband, besides the rights pertaining to him as widower, one-third of her property, the other two-thirds being the inheritance of the seven children. Some disagreements arose and they were submitted to friendly arbitrators, in accordance with the proper agreement to that effect, one of the parties to which was the widower in his own behalf and as the legal representative of the two minor children. The arbitrators rendered their award of partition by notarial instrument. This instrument was presented to the property registry, on account of certain real property being concerned in the partition, but the registrar refused to admit it "because the provision of article 165 of the Civil Code, relative to the appointment of a counsel for the minors who may have interests opposed to those of their parents, had not been complied with." But an appeal having been taken to the said Direccion General, the registrar's ruling was reversed, on the following ground, among others:

"The arbitrators having effected the partition of the estate of the Marchioness of Bedmar (the mother), without the intervention of the said minors nor that of their father, there is no act nor contract of record where for, on account of opposition of interests between the parties, it may have been necessary to appoint a counsel for the children, in accordance with the provisions of article 165 of the Civil Code."

Moreover, the complaint in the case at bar contains a peculiarity. It is understood why Pilar Salunga should demand the rescission of the contract, if she had suffered damage, and its nullity, if there was an introduction of persona as heirs who were not such; but it is not understood how, being herself the cause of this nullity now in

question, instead of being the party sued by her own children, she could properly be the plaintiff who alleges as a cause of action her own fault and brings suit against all the other persons interested, with the intention of dissolving the contract, not because of any responsibility incurred by the other contracting party, but because of her own fault.

The supreme court of Spain decided a case that is also analogous: A mother had herself made a partition, as the mother and the legal representative of her minor daughter, the sole heir of her father who was the predecessor-in-interest of the estate. The partition proceedings were set out in a public instrument executed by her, in the capacity mentioned, and by a creditor for a large sum of money who accepted the acknowledgment of his credit given in that document by the mother. At the same time, on the same date and by the same parties, another instrument was executed in which record was inserted of a partial payment made on account of the debt and of the terms stipulated for the successive payments. Later, the mother brought suit for the nullification of the two public instruments that she had executed, alleging a vice of origin in them both - a lack of judicial approval for the first, and a lack of judicial permission for the second. Her suit having been decided adverse to her in two instances, she raised an appeal in cassation, alleging, as the first assignment of error, that although article 1060 of the Civil Code does not require judicial approval of the partitions wherein a minor has an interest, when represented in the same by the father, or, in a proper case, by the mother, this article had "no application to the case at bar, in accordance with the transitory provisions of the code, inasmuch as it was a question of rights that had been derived from, and of acts that had been performed under the previous legislation; but that, although this were not so, "most likely there was a violation of article 165 of the same code, which requires the appointment of a counsel for the minors when their interest is opposed to that of their parents/" And the supreme court, adopting opinions contained in the judgment of the trial court, held:

"That the mother and representative of the heiress took part, exercising full capacity and her free will, in the execution of the two instruments, there being no conflict between the rights and interests of the mother and of the daughter; that it was a legal doctrine that contracts could not be set aside by the will of but one of the contracting parties, and that no one may go counter to his own acts; that on the hypothesis that the said instruments did contain some defect, the same would be ascribable to the mother herself, who is the person who ought to have seen that they were executed in conformity with all the required formalities; and that there existed no legal provision whereby, on account of the failure to apply for judicial approval of the transactions effected, an annulment might be obtained of the settlement and partition of the estate wherein a minor is interested."

For the foregoing reasons, the judgment appealed from is affirmed, in so far as it disallows the petition for annulment based on the first four grounds of the appeal, and is reversed, in so far as it holds the partition made, shown in Exhibit A, to be null and void and orders that proceedings be instituted for the making of a new partition and for the carrying out of the rest of the judgment, for, the reason that the said plaintiff, Pilar Salunga, lacked the capacity to represent her minor children in the partition herein concerned.

No special finding is made as regards the costs. So ordered.

Mapa, Johnson, Carson, and Moreland, JJ., concur.

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