

JOSE MA. IBÁÑEZ DE ALDECOA, PLAINTIFF AND APPELLANT, VS. JOSE FORTIS ET AL., DEFENDANTS AND APPELLEES.

G. R. No. 5938. September 16, 1910

Ponente: MORELAND, J.

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MORELAND, J.:

The question before the court arises upon an appeal from a judgment of the Court of First Instance of the city of Manila entered upon an order sustaining a demurrer and dismissing the complaint.

The action was brought by the plaintiff personally against the defendant personally. The plaintiff's cause of action, however, shows that the action should have been brought by the plaintiff as administrator of the estate of Antonio de Inchasagarri against the defendant as administrator of the estate of Julian Almenara. The complaint prays that a sale of certain goods belonging to the estate represented by the defendant be set aside upon the ground that said property was bought by the defendant himself, for his own benefit, in violation of law.

The body of the complaint shows, in substance, that Antonio de Inchasagarri at the time of his demise was a creditor of Almenara, and, on the latter's death, presented a claim against his estate, which was duly allowed in form of law; that it was ascertained eventually that there was not sufficient property to pay all of the debts outstanding against the estate of Almenara, and therefore the careful conservation of the property of the estate became a matter of prime importance to all the creditors; that this action was brought on the theory that a certain portion of the property of the estate of Almenara having been bought by the defendant for his own personal use and benefit, he being at the time administrator of the estate, said estate was by that transaction defrauded of assets which ought to have gone to pay the legitimate debts of the estate, among which was that held by the plaintiff as administrator of the estate of said Inchasagarri.

That the action was wrongfully brought in the name of the plaintiff personally is beyond question. That the demurrer to the complaint, based upon that ground, should have been sustained is equally beyond question. This court has repeatedly held, however (*Balderrama vs. Compania General de Tabacos de Filipinas*, 13 Phil. Rep., 609; *Molina vs. La Electricista*, 6 Phil. Rep., 519; *Serrano vs. Serrano*, 9 Phil. Rep., 142), that where a demurrer to a complaint is sustained and the complaint dismissed, the court, in dismissing the complaint, should give the plaintiff an opportunity to amend in such way as to eliminate the objection presented by the demurrer (sec. 101, Code of Civil Procedure). This was not done by the court below.

The judgment appealed from should be and is hereby modified in that particular and the cause remanded to the lower court, with instructions that the plaintiff be given five days within which to present an amended complaint after due notice of this decision. If an amended complaint is not filed within that time, the lower court shall enter an order dismissing the complaint upon the merits. It is so ordered.

Arellano, C. J., Torres, Johnson, and Trent, JJ., concur.

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