

## **BENITO RABAJANTE, PETITIONER, VS. P. M. MOIR, JUDGE OF FIRST INSTANCE OF THE EIGHTH JUDICIAL DISTRICT, AND TOMASA RANCES, RESPONDENTS.**

*G.R. No. 9378. October 06, 1914*

Ponente: MORELAND, J.

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### **MORELAND, J.:**

This is a proceeding begun under section 513 of the Code of Civil Procedure to set aside an order of the Court of First Instance of the Province of Albay upon the ground that it was rendered upon default and that the petitioner was unjustly deprived of a hearing by fraud.

It appears from the record that the petitioner and his mother, Tomasa Rances, were the son and widow of Vidal Rabajante, who died leaving a last will and testament in which he divided his property between them, the will providing that certain real estate given by the testator to the son during the lifetime of the testator and certain debts paid by him for the son during the same period be taken into consideration in the division of the property and that they be regarded as advances and deducted from the share to which the son would otherwise be entitled.

The will was duly probated and commissioners were appointed to partition the real property between the petitioner and the respondent. They proceeded to a division of the real estate without taking into consideration that portion of the will relating to the advances to the petitioner and divided the property equally between the petitioner and the respondent.

Before the report of the commissioners partitioning the property was approved by the court, their attention was called to the provisions in the will relative to the advances and they thereupon changed their report by deducting from the property which they had allowed him the value of the advances. In making this deduction it was found that the amount of the advances exceeded the value of the property which the petitioner would have received if there had been no advances, and accordingly, the commissioners reported that all of the property described in the will be turned over to the widow. This report was duly approved by the court, which entered a judgment thereon turning the property over to the widow.

Upon ascertaining that the order just-mentioned had been entered turning the property over to his mother, the petitioner immediately made an application to the court to set aside the order upon the ground that it was made without notice to him and that it was obtained by the mother by fraud, misrepresentation, and deceit. The application came on for a hearing, the parties were heard, and the court found, upon all the facts and circumstances of the case, that the petitioner had received notice of the hearing on the commissioners' report; that no fraud had been practiced by anybody upon him; that he was not entitled to the relief asked for; and, accordingly, denied his motion.

Thereupon petitioner brought this proceeding for the purposes already mentioned.

A mere statement of the case is sufficient to show the lack of grounds for the proceeding. It will be seen from a

reading of section 513 that the remedy granted thereby is available only in case the Court of First Instance which made the order "has finally adjourned so that no adequate remedy exists in that court." The section reads:

"Procedure in cases of defaults caused by fraud, accident, or mistake. When a judgment is rendered by a Court of First Instance upon default, and a party thereto is unjustly deprived of a hearing by fraud, accident, mistake, or excusable negligence, and the Court of First Instance which rendered the judgment has finally adjourned so that no adequate remedy exists in that court, the party so deprived of a hearing may present his petition to the Supreme Court within sixty days after he first learns of the rendition of such judgment, and not thereafter, setting forth the facts and praying to have such judgment set aside. \* \* \* "

It is clear that, if the Court of First Instance which rendered the judgment or made the order is still in session, the party aggrieved should present his petition directly to that court. This is precisely what he did. He obtained from that court a reconsideration of the order complained of, presented the facts upon which he based his relief, and the court, after full consideration, found that he had failed to prove the facts necessary to obtain relief and, therefore, denied it. This being the case, the remedy under section 513 is not available. The condition precedent to the right to that remedy, viz., that the court which made the order "has finally adjourned so that no adequate remedy exists in that court" is not present. The petitioner could have. excepted to the order denying his motion and could have taken his appeal therefrom as provided by law. That was his only remedy.

The petition is denied, with costs against the petitioner.

Arellano, C. J., Torres, Johnson, Carson, and Araullo, JJ., concur.

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