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[G.R. No. 1114. March 31, 1903]**THE UNITED STATES, COMPLAINANT AND APPELLEE, VS. BARTOLOME OSTREA ET AL., DEFENDANTS AND APPELLANTS.****D E C I S I O N****MAPA, J.:**

It sufficiently appears from the record that the defendants, at the time in question, went to the house of Juan Rodriguez, alleged to have been broken into, with the intent of making an entrance there at all cost, even against the will of the said Juan Rodriguez. It does not, however, appear to be certain that they did in fact succeed in entering, as the record is not very explicit upon this point. It is evident that they succeeded in entering the first door of the house, either violently by breaking it open, as alleged by the complainant, or because they found it already open, as testified by the defendant Bartolome Ostrea. It does not appear, however, whether this door formed an integral part of the house or whether, on the contrary, it was an outer door, separate and independent from the body of the house. We are inclined to believe that the latter is the fact, in view of the testimony in the case. The complainant calls this first door the *front* door, and adds that upon seeing it had been broken by the accused he immediately closed the second door and *did not allow them to enter his house*. In another part of his testimony he states that when they (the accused) saw that *they could not enter the house* they went away. The other witness for the prosecution, Benigno Sebastian, testifies that Bartolome Ostrea called to his wife, who was in the house, but that *he could not get in*, because the doors were closed. Bartolome Ostrea, on his part, in his testimony at the trial says that the first door was open, and that the following door *at the entrance to the house* was closed. From this statement it would appear that the second door was that at the entrance to the house in question.

In view of the terms in which these witnesses expressed themselves and the lack of other more precise data in the record it may be concluded that, notwithstanding the fact that the

defendants entered the first door, they did not succeed in entering the house. It is possible that this conclusion is not in conformity with the facts as they really occurred, but it is the legal conclusion from the data disclosed by the record and upon which alone we must rely for our decision.

In consequence, the defendants are only responsible for the crime of an attempted forcible entry into the dwelling, and not for a consummated entry, as considered by the court below in the judgment appealed. It has been proven that in the execution of this act the defendants employed violence and intimidation, and for nearly half an hour tried to push open the door at the entrance to the house, and that Bartolome Ostrea fired several shots from his revolver upon seeing that Rodriguez refused to open the door. The latter says that Ostrea fired three or four shots. The other witnesses for the prosecution only heard one. It is a matter of indifference, however, whether one or more shots were fired for the purposes of considering the circumstance of intimidation, more especially in view of the fact that Bartolome himself admits that he discharged the revolver which he carried, although he adds that he only fired in the air.

The concurrence of this circumstance brings the act in question within the sanction of paragraph 2 of article 491 of the Penal Code. In favor of the accused we must consider the mitigating circumstance of drunkenness (No. 6 of art. 9 of the Penal Code), as it appears from the testimony of the complainant himself and that of Benigno Sebastian that they were drunk at the time in question, and that they are not habitual drunkards. In the present case we must also consider as mitigating the circumstance that the complainant, Juan Rodriguez, is the father-in-law of Bartolome Ostrea, by virtue of the provisions of paragraph 1 of article 10, for, in view of this close relationship, it is not considered that the defendant would regard himself as a stranger in the home of the complainant, to which it is to be presumed he ordinarily had free access as a member of the Rodriguez family. The fact, sufficiently proven in the case, that he believed his wife, the daughter of the said Rodriguez, was in the house at the time in question, may also have contributed to lead him to believe, although erroneously, that he had a right to enter the house.

Upon the grounds set forth, and in view of the provisions of articles 66 and 75, paragraphs of article 91, and article 92 of the Penal Code, we condemn each of the defendants to a fine of 325 pesetas, or to subsidiary imprisonment, in case of nonpayment, at the rate of one day for each 12 1/2 pesetas. The judgment appealed, thus modified, is affirmed, with the costs of this instance to the defendants. So ordered.

Arellano, C. J., Torres, Cooper, Willard, and Ladd, JJ., concur.

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