

**H.D. KNEEDLER, IN HIS CAPACITY AS LIQUIDATOR OF KNEEDLER REALTY CO. AND AS SUCCESSOR IN INTEREST THEREOF, PLAINTIFF AND APPELLEE, VS. SIMON PATERNO, VICENTE MADRIGAL, MARIANO VI...**

*G.R. No. L-1349. December 29, 1949*

Ponente: OZAETA, J.

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**OZAETA, J.:**

This is an appeal from a judgment of the Court of First Instance of Rizal:

- (a) Absolving the defendant Vicente Madrigal from the complaint;
- (b) Declaring that the defendant Simon Paterno is indebted to the plaintiff Kneedler Realty Co. in the sum of P81,000, with interest thereon at the rate of 9 per cent per annum computed monthly from October 14, 1941, with exclusion of the interest corresponding to the years 1942 to 1944, until fully paid, plus attorney's fees, costs, and expenses;
- (c) Ordering the defendant Simon Paterno, as soon as the moratorium provided in Executive Order No. 32 is definitely lifted, to deposit in court, in accordance with section 2 of Rule 70 of the Rules of Court, the said sum of P81,000 with interest thereon at 9 per cent per annum, computed monthly, from October 14, 1941, with the exclusion of the interest corresponding to the years 1942 to 1944, until fully paid, plus attorney's fees, costs, and expenses which are not in any way affected by the moratorium; and
- (d) Ordering the register of deeds of the province of Rizal, upon payment of the corresponding fees, to reconstitute transfer certificate of title No. 44470 with the annotation of the mortgage in favor of the plaintiff, taking as a basis transfer certificate of title No. 6555, and declaring null and void transfer certificate of title No. 44470, which had been lost.

On October 14, 1941, the Kneedler Realty Co. sold to Simon Paterno a parcel of land situated in the municipality of Pasay (now Rizal City), containing an area of 6,830.81 square meters, and more particularly described in transfer certificate of title No. 6555, for the sum of P111,000. Paterno made an initial payment of P30,000 and agreed to pay the balance of P81,000 in eleven monthly instalments of P7,000 each and a twelfth instalment of P4,000, with interest at 9 per cent per annum. To guarantee the payment of the said balance of P81,000 plus interest, attorney's fees, and cost of collection, Paterno mortgaged the same property to the Kneedler Realty Co., and the mortgage was duly annotated on the new transfer certificate of title No. 44470 issued in his name by virtue of the deed of sale. The last mentioned transfer certificate of title was subsequently lost.

On May 24, 1946, this action was commenced to foreclose said mortgage. On June 26, 1946, the defendant Simon Paterno wrote to the plaintiff H.D. Kneedler, in his capacity, as liquidator of the Kneedler Realty Co., as follows:

"Dear Sir:

With reference to our conversation of the 22nd instant and the suit you instituted against myself, Vicente

Madrigal, and the Registers of Deeds of Manila and Rizal, Civil Case No. 7729, I beg to confirm the arrangement we have entered into in settlement of that suit.

I acknowledge an indebtedness to you of P81,000, together with interest at the rate of 5 per cent per annum from exclusive of the time of the Japanese occupation. Of this amount I will pay you P5,000 upon, your accepting this letter and the dismissal of that suit. The balance, I will pay as follows:

P20,000.00 within 90 days

20,000.00 within 180 days

20,000.00 within 270 days

Balance—within 360 days

With interest at 5 per cent per annum on unpaid balances.

These payments will be guaranteed by Don Vicente Madrigal.

In case you accept the foregoing, kindly advise me and send me a copy of your motion to dismiss the case, whereupon I will send you Mr. Vicente Madrigal's guaranty.

Very truly yours,

(Sgd.) SIMON PATERNO "

Because Paterno refused to sign a mortgage to guarantee the new schedule of payments as contained in the foregoing letter, the plaintiff did not move to dismiss this case.

On July 6, 1946, the defendants Paterno and Madrigal filed their answer, wherein they admitted the purchase by Paterno of the property in question and the execution by him of a mortgage thereon to guarantee the payment of P81,000 plus interest, attorney's fees, and cost of collection, as alleged in paragraph III of the complaint; but averred as a special defense "that during the Japanese occupation Simon Paterno paid to the Japanese Enemy Property Custodian as liquidator of the Kneidler Realty Co., the entire amount, in Japanese currency, due and owing under the mortgage referred to in paragraph III of the complaint."

After due trial His Honor Judge Eulalio Garcia declared proven the alleged payment to the Japanese Enemy Property Custodian but held that such payment was null and void and that therefore the obligation in favor of the plaintiff had not been extinguished. Hence the judgment in favor of the plaintiff.

The plaintiff never admitted the alleged payment of the mortgage to the Japanese and insists in his brief before this court: "In the absence of documentary proof plaintiff appellee cannot accept the allegation of payment and wishes to invite the attention of the Court to the contradictions in the testimony of Mr. Paterno with regard thereto . . . ."

It is therefore necessary for us to examine and analyze the evidence on the alleged payment.

Mr. Simon Paterno testified in substance as follows; that he made the payment to the "Alien Property Custodian" of the Japanese authorities by means of two checks, one for P81,000 and the other for 15-odd thousand pesos to cover the interest; that he did not have the (cancelled) checks nor the stubs thereof; that the stubs were burned in the house of Mr. Madrigal on General Luna Street, Manila, during the liberation; that he was issued a receipt in Japanese characters, which was also burned; that the checks were issued by Mr. Madrigal for his account because he (Paterno) did not have enough money at that time. On cross-examination he further testified that during the occupation he lives on Aviles Street, and Mr. Madrigal at 1666 General Luna Street, Paco, Manila, in the garage of which he had his office; that all the papers including the receipt in Japanese characters were burned in said garage; that the two checks were issued at the same time in November or December, 1943, on the Yokohama

Specie Bank; that two checks were necessary because the Japanese required him to issue separate checks for the principal and; the interest; that the checks were prepared by Mr. Silvino Panganiban and that he delivered them to the Japanese in company with Mr. Bayani.

Mr. Silvino Panganiban, chief of the Finance Department of Madrigal & Co., testified that he was the one who prepared the two checks after ascertaining from Mr. Madrigal that the latter had authorized the issuance thereof for the account of Mr. Simon Paterno; that said checks were issued against the Yokohama Specie Bank in favor of the "Japanese Military Administration" for P81,000 and 15-odd thousand pesos, respectively; that the stubs of said checks, which were kept in a cabinet in the office at 1666 General Luna street, were burned; that said checks were not returned but that he had examined the bank statement and found that they had been collected. On cross-examination he testified that there was only one occasion when they had a transaction with "the Japanese Military Administration, and that was when they issued the checks in question; that said transaction occurred in, March, 1943, and he was sure of that; that in the months of January, February, and March, 1943, Madrigal & Co. issued not less than ten nor more than thirty checks a month; that the statement of account (factura) presented to him contained a computation of the interest and the total amount to be paid to the Japanese Military Administration, and that it was the usual practice of Madrigal & Co. to issue one check for the principal and another for the interest; that he did not remember whether Mr. Paterno instructed him to prepare two checks but that he did prepare two checks because it was the practice in the office when paying an indebtedness with interest to prepare always one check for the principal and another for the interest; that witness did not know whether the Japanese Military Administration had issued a receipt for the said two checks; that he did not have to verify the payment from such receipt because it was not an account of Madrigal & Co, but that of Mr. Paterno; that the latter, however, signed a voucher for said checks as a proof that he had received them; that Mr. Paterno did not deliver to him any receipt signed by the Japanese Military Administration, nor did he as finance officer of Madrigal & Co. see any receipt in Japanese characters in favor of Mr. Paterno or of Madrigal & Co. for the said two checks.

The last witness for the defendants was Constancio B. Bayani, who testified that he was bookkeeper of the Canlubang Sugar Estate; that in the months of January, February, and March, 1944, he went several times to the office of the Japanese Military Administration to accompany Mr. Simon Paterno; that they went there to deliver two checks for the Kneedler property; that he remembered that one of the checks was for P81,000 and the other for P15,000 more or less; that those checks were in payment of the balance of the purchase price of the property of Kneedler which Mr. Paterno had bought; that he knew it because he was in charge of the real estate department at that time; that two days before he testified at the trial of this case he went to the office of the [American] Alien Property Custodian to examine the records of the Yokohama Specie Bank, to see the records of the checks of said bank; that he was there informed that it was possible to obtain an authorization to see the records of the Yokohama Specie Bank but that it would take at least two weeks because the records of the Yokohama Specie Bank were so disarranged that it took Solicitor General Tanada two months to find a record of said bank. On cross examination he testified that the last time he went with Mr. Paterno to the Japanese Military Administration was when they delivered the two checks in the month of February, 1944; that as chief of the real estate department he knew that to cancel an annotation of a mortgage on the back of the title a document of cancellation of mortgage had to be executed.

It is apparent that the trial judge, who entertained the opinion that the alleged payment to the Japanese was invalid, did not take the trouble to analyze the proof Of the alleged payment as carefully and critically as he should if he had held such payment valid.

After such an analysis we are persuaded that the defend ants have not satisfactorily proved the alleged payment.

The proofs above set forth do not produce in us the moral suasion that the defendant Paterno has discharged the burden of proof required of a debtor to entitle him to be relieved by the court from paying his debt. The following are the main considerations that lead us to this conclusion:

- Said defendant has not presented the best evidence of which the case is susceptible. The payment was alleged to have been made by checks on the Yokohama Specie Bank. The records of said bank existed in the office of the Philippine Alien Property Administration of the United States in Manila, and the fact that it would have taken at least two weeks to locate the checks in question was not a sufficient ground for the acceptance of oral testimony as to the alleged payment. The present action was commenced on May 24, 1946, and the trial was not held until October 25, 1946. Defendant then had sufficient opportunity to produce the best evidence available had he exercised due diligence. If the intervening period, of five months between the filing of the complaint and the date of the trial were not sufficient, said defendant could and should have asked the trial court for the postponement of the trial to enable him to locate the necessary documentary evidence in support of his defense.

"It is an elementary principle of the law of evidence that the best evidence of which the case in its nature is susceptible and which is within the power of the party to produce, or is capable of being produced, must always be adduced in proof of every disputed fact. Secondary evidence is never admissible unless it is made manifest that the primary evidence is unavailable, as where it is shown that it has been lost or destroyed, is beyond the jurisdiction of the court, or is in the hands of the opposite party who, on due notice, fails to produce it . . . According to the great weight of authority . . ., where primary evidence is not available so that a fact may be proved by secondary evidence, the proponent of the secondary evidence is required to produce the best secondary evidence which exists and which is in his power to produce." (20 Am. Jur., Evidence, secs. 403, 404, pp. 364, 365.)

- From the records of cases that have come before us, we take judicial notice of the practice of the Japanese to issue a cancellation of mortgage in due form in a case like the present. In the present case, however, no such cancellation of mortgage is claimed to have been issued to the defendant-mortgagor. It is strange that in paying off a mortgage for such a big amount of money (more than P96,000) the defendant Paterno contented himself with a mere receipt in Japanese characters instead of securing a cancellation of the mortgage as other debtors of enemy nationals who made payments to the Japanese did. Thus it appears from defendant's own testimony and that of his witnesses that the Japanese Military Administration did not cancel or release the mortgage in question. Under the circumstances the Court must consider it still subsisting and enforceable.

- Even if the oral evidence adduced in this case be held valid, it is too vague, uncertain, and full of contradictions to be relied on. According to Mr. Paterno the checks were paid to the "Alien Property Custodian" of the Japanese, whereas according to Mr. Panganiban, who prepared said checks, they were paid to the Japanese Military Administration. According to Mr. Paterno the checks were issued in November or December, 1943, whereas according to Mr. Panganiban they were issued in March, 1943, and according to Mr. Bayani in January or February, 1944. While these discrepancies do not necessarily indicate prevarication, they demonstrate the frailty and unreliability of human memory.

In the case of *Lichauco vs. Atlantic, Gulf & Pacific Co.*, G.R. No. L-2016, promulgated August 23, 1949,[1] we rejected as insufficient oral evidence of an alleged indebtedness of P63,000 which the company claimed against the estate of Richard T. Fitzsimmons on the allegation that the latter, as president of said company, had drawn the said amount in current account from the company but that the books and records evidencing the debt were burned during the battle of the liberation. Four witnesses—the chief accountant, the assistant accountant, the president, and the treasurer of the company—testified on the alleged indebtedness. In that case, among other considerations we said:

"Realizing the frailty and unreliability of human memory, especially with regard to figures, after the lapse of more than five years, we find no sufficient basis upon which to reverse the trial court's finding that this claim had not been satisfactorily proven."

In the judgment of the trial court we note two errors in favor of the defendant-appellant, to wit: (1) the exemption of defendant from paying interest during the years 1942 to 1944, for which there was no legal basis, and (2) the suspension of the payment until the lifting of the, moratorium, which law has not been pleaded and invoked by the defendant. But inasmuch as the plaintiff has not appealed from said judgment, we are not justified in modifying it in this respect.

The judgment is affirmed, with costs against the appellant.

Moran, C.J., Paras, Pablo, Bengzon, Padilla, Tuason, Montemayor, Reyes, and Torres, JJ., concur.

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**[1] 47 O.G. (2) 679.**

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