

**MARIA SETON DONNA, PLAINTIFF AND APPELLEE, VS. M. INOUE,
AS ADMINISTRATOR OF THE ESTATE OF K. S. OHTA, DEFENDANT
AND APPELLANT.**

G.R. No. 14989. January 30, 1920

Ponente: STREET, J.

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STREET, J.:

The complaint in this case was presented on June 10, 1918, in the Court of First Instance of the city of Manila by the plaintiff, Maria Seton Donna, against M. Inouye, as administrator of the estate of K. S. Ohta, to recover upon five promissory notes, aggregating P30,000, together with the stipulated attorney's fee, interest, and costs. Judgment having been rendered in favor of the plaintiff, the defendant appealed.

The notes in question had their origin in a sale of real property and were executed and delivered on or about August 3, 1916, by I. Ihara, as vendee, to one A. A. Addison, the vendor, representing the deferred payments upon the purchase price of said property. The name of K. S. Ohta, signed to each of said notes, is placed at the left of the signature of Ihara; and just below the name of Ohta is added the word "guarantor."

It is not pretended that anything has ever been paid upon the principal amount of either of the notes in question, and interest on the same has only been paid down to October 3, 1917. By reason of the nonpayment of the interest accruing since the latter date, the maturity of the notes has been accelerated under a special stipulation contained in the notes; and for this reason all of the notes were past due when proceedings were begun in this case.

Since the notes were executed the guarantor Ohta has died, and a claim founded on the notes was duly presented to the committee appointed to pass on the claims against his estate. It was apparently there contended by the attorney representing Ohta's administrator that, inasmuch as Ohta had signed in the character of guarantor only, the liability against his estate was contingent and that consequently the claim should not be allowed against the estate for payment unconditionally but should be dealt with as provided in sections 746-749 of the Code of Civil Procedure. The commissioners, however, allowed the claim unconditionally, and the administrator appealed to the Court of First Instance, where the complaint in this case was presently filed by the plaintiff in due form.

The trial judge found that all the conditions necessary to a recovery upon the notes by the plaintiff had been fulfilled and he further more took judicial notice of the fact that the principal debtor, Ihara, had already been sued in his court on the same notes and that judgment had been rendered therein against Ihara in favor of the plaintiff. Judgment was accordingly rendered in the present action to the effect that the plaintiff should recover of the defendant M. Inouye, as administrator of the estate of K. S. Ohta, the sum of P30,000, with interest thereon at the agreed rate of 8 per cent per annum from the 4th day of October, 1917, and for the further sum of P30,000, as stipulated expenses of collection, with interest thereon at the rate of 6 per cent per annum from December, 5, 1917, (supposedly the date when the claim was first presented against the estate) or for such parts of said amounts as should remain unpaid after the execution of the property of Ihara, the principal debtor. Furthermore, in order to secure to the defendant administrator the benefit of the exhaustion of the property of Ihara, as contemplated in

article 1830 of the Civil Code, it was ordered that execution should not issue against the administrator until a return should be made by the sheriff upon execution against Ihara, showing that the judgment against him remained unsatisfied in whole or in part. The defendant, as already stated, appealed from this judgment.

So far as we can see there is no merit in the appeal. On the part of the appellant it seems to be supposed that the order of the lower courts to the effect that the writ of execution should not issue until execution against the principal debtor should be returned unsatisfied in whole or in part, was not in proper form to secure to the defendant the full benefit of the right of exhaustion of the property of the debtor secured by article 1830 of the Civil Code. On the contrary we think that the order of the lower court is in exactly the form in which it should have been expressed, especially in view of article 1832 of the same Code which shows that it is the duty of a surety, or guarantor, entitled to the benefit of the exhaustion of the principal's property to point out to the creditor property of the principal which may be taken to satisfy the debt.

The circumstance that the trial court took judicial knowledge of the fact that the principal debtor has been sued in another action pending in the same court and that judgment had been entered against him in that action is in our view quite immaterial to the determination of the present case, for even supposing that no action had as yet been brought against Ihara, it would have been proper for the lower court to stay the execution in this case until the principal debtor should have been sued and his assets exhausted. The lower court, therefore, could have closed its eyes to the existence of the earlier judgment against Ihara and yet its judgment in the present case would have been the same in substance as it actually is.

Nor is there anything in the suggestion of the appellant that the amount of the judgment is uncertain or indefinite. This contention is based on the circumstance that the trial court, after awarding judgment for the sum of P30,000, with interest at 8 per cent, and for P3,000 with interest at 6 per cent, added the words "or for such parts of said amounts as may remain unpaid after the execution in Civil Case No. 15671 of this court (i. e., the action against Ihara) is returned by this sheriff." This was merely equivalent to saying that the judgment against the administrator should be credited with whatever should be made out of the property of the principal debtor; and it would have been the duty of the sheriff to allow such credit in this case even in the absence of directions to that effect. The addition of these words to the judgment certainly could not have the effect of rendering the judgment indefinite in its amount.

The notes sued upon in this case are executed upon a type-written form and begin with the words: "We will jointly and severally pay (Pagaremos en mancomun et solidum) ; and it is questionable whether, in view of subsection 2 of article 1831 of the Civil Code, Ohta was entitled to the benefit of the exhaustion of Ihara's property. The trial judge evidently thought that the written word "guarantor," placed below the name of Ohta, was used in the English sense to indicate a strictly subsidiary liability and that this indication of the character in which Ohta signed had the effect of destroying the solidarity of the contract as regards him. Whether the trial judge was correct in this view need not be considered by us, because the judgment of the court upon this point was favorable to the defendant Ohta and the plaintiff did not see fit to appeal.

As will be seen by reference to the judgment of the trial court, interest was allowed from December 5, 1917, at the rate of six per centum per annum upon the stipulated sum of P3,000, as expenses of collection in case of litigation. We are unable to see the propriety of allowing interest upon this item prior to the date when judgment was rendered in the lower court, which was on November 22, 1918. The stipulation in question was of course intended to include the attorney's fee, among other expenses; and the agreement contemplated that liability should not exist until the services should be rendered and expenses incurred.

From what has been said it is manifest that the judgment must be modified by proving that interest on the said

sum of P3,000 shall only be computed from November 22, 1918, instead of from December 5, 1917. With this modification the judgment appealed from is affirmed, with costs against the appellant. So ordered.

Arellano, C. J., Torres, Johnson, Araullo, Malcolm, and Avanceña, JJ., concur.

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