

**J. NORTHCOTT & CO., INC., PLAINTIFF AND APPELLEE, VS.
MARIA VILLA-ABRILLE, DEFENDANT AND APPELLANT.***G. R. No. 16190. March 17, 1921*

Ponente: STREET, J.

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J. Northcott & Co., Inc., instituted this action in the Court of First Instance of Manila for the purpose of recovering a sum of money alleged to be due upon a promissory note executed in favor of said company by the defendant, Maria Villa-Abrille. At the hearing the trial court gave judgment in favor of the plaintiff for the recovery of the sum of P807.66, the balance due upon the note, with interest at 10 per cent per annum from January 15, 1918, until paid. From this judgment the defendant appealed.

The only point seriously insisted upon under the single error assigned upon this appeal has reference to the defense of "former suit pending." The facts necessary to make this contention intelligible appear to be these:

The defendant, Maria F. Villa-Abrille, is a resident of the municipality of Davao, in the Province of Davao, Department of Mindanao and Sulu, and in October of the year 1917 she there solicited from the West Coast San Francisco Life Insurance Company a policy of insurance upon her life in the sum of P15,000. At that time said insurance company was represented in Davao by J. Northcott & Co., Inc., the present plaintiff, who agreed to write the policy and received the sum of P100 in cash in part satisfaction of the first premium. For the balance the insured executed and delivered the promissory note now sued upon, in the amount of P833.90, payable on January 15, 1918. When the policy of insurance was later delivered, the defendant claimed that its terms were not in accordance with the previous understanding of the parties, in that it was only in the amount of P10,000, instead of P15,000, and contained different stipulations and conditions from those stated in her application. The company did not accede to this contention, and as a result the insured presently instituted an action in the Court of First Instance of Davao to compel the insurance company to issue to her a policy of insurance in conformity with the alleged agreement, or if this should be found impracticable, to rescind the contract altogether. J. Northcott & Co., Inc., was joined in said action as a party defendant, in their character as general agent of the insurance company.

In our opinion it is quite clear that the pendency of the prior action brought by Maria F. Villa-Abrille to secure the reformation of the policy of insurance, or in the alternative, to obtain a decree rescinding the same, is not a good defense to the action upon the premium note. In the first place, it is obvious that if she obtains the relief which she directly and immediately seeks, the contract of insurance will remain in force, though with its provisions in a certain manner changed. In this case the obligation to pay the premium note would be in no wise affected. On the other hand, if she should fail in the primary object of her action, and should obtain a decree declaring the contract rescinded, the insurance company would indeed have to restore the full amount paid to it by way of premium. (Art 1303, Civ. Code.) But this result rests in contingency; and the mere possibility that the former action may have such issue as to defeat the liability of the maker of the note does not constitute a good ground for the plea of former action pending. In order to constitute matter for plea in abatement on this ground, it is necessary not only that the first action may but that it must be determinative of the liability involved in the second.

It is to be admitted of course that if either the insurance company or J. Northcott & Co. had filed a cross-complaint in the prior action instituted in Davao, and had there asked for judgment on the past-due premium note, the defense of former suit pending could be sustained. But it does not appear that any such cross-complaint was filed.

In *Mutual Life Insurance Co. vs. Hargus* (99 S. W., 580), a situation was presented very similar to that now before us. There, the general agent of an insurance company brought an action against the person insured to recover on the note given for the first premium. Later, the insured instituted an action to cancel the policy. It was held that the pendency of the former action supplied no ground for abating the second. Still more nearly in point, perhaps, is the decision in *Garza & Co. vs. Jesse French Piano & Organ Co.* (126 S. W., 906), where the purchaser of a piano instituted an action against the seller to rescind the contract. Subsequently the seller sued the purchaser to recover the purchase price and to foreclose a mortgage given to secure payment. It was held that the pendency of the first action could not be pleaded in abatement to the second. In *National Fire Insurance Co. vs. Hughes* (189 N. Y., 84), an action was brought upon a fire policy to recover a loss sustained by fire. Pending this action the company filed suit against the person insured, plaintiff in the first action, for the purpose of reforming the policy. It was held that the pendency of the first action was no obstacle to the prosecution of the second. The ratio decidendi of this case is set forth in the syllabus as follows:

"While the actions are between the same parties, the actions are not for the same thing. One is a legal action to recover on a contract, and the other is an equitable action to reform the contract itself. While the actions relate to the same subject-matter, the purpose of the actions is entirely different, and the relief demanded antagonistic and inconsistent; and hence there is not another action pending between the same parties for the same cause of action."

These decisions all proceed upon the idea that before the pendency of one action can operate to abate a second there must be substantial identity not only as to parties but of causes of action and of issues. One of the recognized tests of such identity is to discover whether a judgment in the prior action would be conclusive as to the liability sought to be enforced in the second and would operate as a bar to the latter. In other words, if a final judgment in the prior action, be it of whatsoever character it may, would support the plea of *res judicata* in the second, the two suits may be considered identical; otherwise not. This condition is not fulfilled in the case now before us.

In conclusion it may be observed that the defense of former action pending does not go to the merits. Even when sustained, the result is merely the dismissal of the action, and the defendant is not absolved altogether from the demand. In other words the defense is more or less of a dilatory nature and hence is not much favored by the courts. It is therefore accepted doctrine that all of the conditions requisite to the validity of the defense must be strictly fulfilled.

The judgment appealed from must be affirmed; and it is so ordered, with costs against the appellant.

Mapa, C. J., Aravillo, Malcolm, and Villamor, JJ., concur.

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