

**J. M. PO PAUCO, PLAINTIFF AND APPELLANT, VS. J. G. TAN JUNCO, DEFENDANT AND APPELLEE.***G. R. No. 24996. September 04, 1926*

Ponente: STREET, J.

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This case appears before us on appeal for the second time, for the revision of the judgment rendered in the lower court in the determination of a supplemental motion pursuant to a judgment entered in this court upon a prior appeal.

The facts necessary to an understanding of the case are these: The original action was instituted in the Court of First Instance of Iloilo by J. M. Po Pauco against J. G. Tan Junco, for the purpose of recovering damages for the breach of certain alleged contracts whereby the defendant had obligated himself to deliver to the plaintiff a quantity of sugar of the harvest of 1920. The defendant answered, denying that the contracts mentioned in the complaint had been made, and alleged that another contract, different from those set forth, had been made between the parties on January 31, 1920, and that this contract had been completely performed on the part of the defendant. By way of counterclaim the defendant sought to recover a balance upon account current due to the defendant from the plaintiff. Upon hearing the cause the trial judge resolved practically all the issues of the controversy in accordance with the contentions of the plaintiff and gave judgment for the plaintiff to recover of the defendant the several sums of money set forth in the dispositive part of the court's decision, amounting all together to more than P26,000. Upon appeal to this court the judgment was reversed, and the defendant was absolved from the complaint. In our opinion we declared that the defendant had a right to have the account liquidated under his cross-complaint, according to the balance shown in current account between the parties. Meanwhile the lower court had ordered the execution of the judgment against the defendant notwithstanding the appeal, and the sheriff had levied upon and sold the furniture and effects in a store belonging to the defendant in Sibalom, Antique, as well as a quantity of lumber, fourteen cattle, and five pigs belonging to him. As a consequence of the reversal of the judgment then before us it was foreseen that the defendant would be entitled to call the plaintiff to account for the damage caused by the execution of the judgment pending the appeal; and we pointed out that the proper proceeding to recover such damages would be by motion in the case upon the return of the record to the court below, in accordance with the rule stated in *Hilario vs. Hicks* (40 Phil., 576), and not by an independent action as had been suggested by the attorneys for the defendant. The cause was accordingly remanded to the court of origin for further proceedings in conformity with the opinion (*Po Pauco vs. Tan Junco*, G. R. No. 20915,[1] not reported).

Upon the return of the record to the lower court the attorneys for the defendant presented a motion on January 16, 1924, in which after setting out the facts relative to the execution prematurely levied upon the defendant's property, and the reversal of the judgment in this court, the defendant asked the court (a) to require the plaintiff to make restitution and to compensate him for the use of the property of which he had been deprived; (b) to pay to the defendant the just value of the property appearing from the return of the sheriff to have been sold to third

persons; and (c) to pay damages in the amount of P5,000.

In conjunction with the hearing of this motion, the court had before it the question of determining the true state of account between the parties. Both matters were dealt with in a decision of January 12, 1925. In this decision the trial judge found a balance of account in favor of the defendant in the amount of P6,506.60. Judgment was accordingly given in favor of the defendant to recover this amount, with lawful interest from July 29, 1920, the date of the filing of the defendant's cross-complaint. His Honor also found that the property seized by the sheriff under execution in favor of the plaintiff had a value of P7,100.21, at the time it was taken; and he accordingly gave judgment for the amount representing the value of said goods, or P7,100.21, also with lawful interest from the date of the filing of the complaint.

After the aforesaid decision was rendered, the court, upon motion of the plaintiff, granted a new trial and reset the matters for hearing upon a certain date, in order to permit the plaintiff to introduce additional proof. Upon going over the case again, in the light of the added proof, the trial judge reached the same conclusion as before; and the previous decision was reinstated. From this judgment the present appeal has been prosecuted by the plaintiff.

When a case comes before a Court of First Instance upon supplemental proceedings, after the remand of the record from this court upon a previous appeal, the whole record must be considered to be before the court without the necessity of the presentation of the record as proof by the litigants ; and it is the duty of the court to consider the record in connection with the new proof adduced before him in the supplemental proceedings. The rule to be applied in such a situation is identical with that which obtains when a new trial is granted in a Court of First Instance or is ordered by the Supreme Court. All the competent and admissible evidence previously taken in the case may be used as a matter of course by either party. (Sees. 147, 505, Code of Civil Procedure.) The trial court therefore committed error in ignoring certain exhibits contained in the original record, when he was passing upon the matters now under consideration. Moreover, the entire record in the case was not at first brought up to this court upon appeal, with the result that when the case came before us for consideration, it was necessary to require the elevation to this court of the entire record. Unnecessary delay has been thereby occasioned and the determination of the cause unduly retarded. With the whole record before us, including the proof submitted at the two hearings of the defendant's motion on January 16, 1924, We proceed to consider the points now presented for determination.

The sum of P6,506.60, which the court found to be the amount due to the defendant upon current account is in our opinion excessive. The easiest way to get at the true balance is to begin with the amount of P60,519.99, representing the balance claimed by the plaintiff as due to him from the defendant, and with certain reservations and deductions admitted by the defendant to be owing by him to the plaintiff. This amount includes an item of P3,943.39, due to the plaintiff for supplies furnished to the defendant by the plaintiff. It is true that this item was not originally put in issue by the cross-complaint of the defendant, but its justice is here admitted by the defendant; and it was partly in order that this matter might be settled that we thought it advisable to return the case, upon the former appeal, with directions for the lower court to ascertain the true balance. But the defendant's criticisms upon some of the items contained in the gross balance of P60,519.99 are undoubtedly well founded; and we proceed to exclude therefrom the following items, namely, P3,000 for a returned check; P116.35 for hemp; P16 for returned salmon; P204 for hides; P1,641.85 which represents interest charges to which the plaintiff is not entitled; P494.50, the value of 21.5 piculs of sugar belonging to the defendant which was sold by the plaintiff; and lastly, P15.82 which represents the amount paid for the telegraphic transfer of money by the plaintiff to the defendant. With respect to the last item it appears that the plaintiff had promised to supply money to the defendant, but when the defendant presented himself personally and called upon the plaintiff for the money, the latter was not in a position to supply all the money at once, with the result that a large part of it had to be remitted

later by telegraphic transfer. If the plaintiff had been able to comply with his commitment upon demand made, this charge would not have been incurred. The necessity for the expense therefore arose from the default of the plaintiff, and the propriety of charging it to the defendant is not apparent.

Upon deducting the foregoing items from the gross indebtedness, there appears a balance due to the plaintiff from the defendant of P54,931.47, which we believe to be as nearly correct as can be made out upon the record before us. But as against this indebtedness the defendant is entitled to credit for P57,573.18, the price of sugar delivered by the defendant to the plaintiff on and prior to April 9, 1920. Deducting from this the balance found to be due to the plaintiff, we have a balance of P2,641.71, representing the true net balance owing from the plaintiff to the defendant, and upon which the defendant is entitled to interest, at the lawful rate, from July 29, 1920, the date of the filing of the cross-complaint.

This brings us to the discussion of the question as to the damages to which the defendant is entitled by reason of the premature execution of the reversed judgment. The property levied upon and sold was personalty; and part of it was purchased at the sheriff's sale by the plaintiff or his representative, while the remainder was sold to third persons. The property bought in by the plaintiff consisted of wood, office furniture and livestock, having a value at the time of the seizure of about P2,798.40. The property bid in by outsiders consisted for the most part of the stock of goods taken from a store belonging to the defendant. These goods had a value, as the trial judge found, of P4,501.81. In estimating the damages the trial court made no distinction between the property sold to strangers and that which was bought in by the plaintiff, and he accordingly gave judgment for the defendant to recover the full value found by him, or P7,100.21.

We are of the opinion that no error was committed in giving judgment against the plaintiff for the full value, at the time of seizure, of the property purchased by him.

Upon the reversal of the judgment, it was primarily the duty of the plaintiff in the execution to make specific restitution of the property which the plaintiff had bought in, and to pay to the defendant reasonable compensation for depriving him of its use in the meantime, according to the doctrine stated in *Hilario vs. Hicks* (40 Phil., 576, 584.) In accordance with this idea the defendant, in his motion of January 16, 1924, demanded restitution and an allowance for the use of this property. But in the course of the trial of the case, it became evident that specific restitution had become impracticable, owing partly to the disposal or use of the property by the plaintiff. It is true that just before the last trial an attempt was made by the plaintiff to effect a tender of some of this property to the defendant through the medium of the sheriff; but the sheriff demanded payment of his fees by the defendant, and the latter rightly refused to entertain the offer. Specific restitution of the property having thus become impracticable, the plaintiff was undoubtedly liable for the full value of the property, and the court committed no error in holding him liable for the value of the property, in lieu of specific restitution.

We are of the opinion, however, that his Honor fell into error in giving judgment against the plaintiff for the full value of the property which was sold to third persons. In *Hilario vs. Hicks* (40 Phil., 576, 584), we expressly held that, under circumstances similar to those now under consideration, the defendant in execution can recover by way of damages only the amount realized at the sheriff's sale. In this connection we there said: "We note, furthermore, that, as to the properties which were sold by the sheriff to third persons, the trial judge apparently held the creditors liable for the full value as fixed by him upon evidence adduced at the hearing. This was erroneous, as the liability of the creditors in regard to those parcels does not extend beyond the amount which was realized at the sheriff's sale \* \* \*" (at p. 591).

In dealing with this problem it must be remembered that when the plaintiff in an action of law recovers judgment in a Court of First Instance, the court has power to order the execution of the judgment notwithstanding the taking

of an appeal to the Supreme Court. When execution is thus obtained pending an appeal, the proceeding is lawful and those who act under the process are protected by the law. The situation is entirely different from that where the writ of execution is void absolutely, as where execution is sued out upon a void judgment or upon a judgment that has been paid, or where an execution is levied upon the property of some other person than the defendant in the execution. The doctrine commonly held in matters of this kind is stated as follows in the syllabus to *McCraken vs. Paul* (65 Ark., 553; 67 Am. St. Rep., 948) : "Plaintiff purchasing at his execution sale is, on reversal of the judgment under which the sale was made, entitled to the benefit of the order of restitution, to enable him to restore the property in specie, if he can, and if he cannot he is responsible for its loss. If the property is purchased by a third person, the measure of damages is the price it brought at the sale and interest, and if the defendant is the purchaser, there can be no recovery against the plaintiff, except for money paid, because the defendant has what he claims." The same rule is laid down as having the support of the majority of the courts in 10 R. C. L., p. 1233. The rule for the determination of damages in a case of this kind is therefore not the same as that which would govern in case of a wrongful execution.

In the monographic note appended to *Cowdery vs. London and San Francisco Bank* (96 Am. St. Rep., 115, 143), the author of the annotation (Mr. A. C. Freeman) draws the distinction between the liability of the plaintiff in the execution where the property has been bought in by himself and where it has been sold to third persons, and he lends the weight of his opinion to the rule which holds the plaintiff liable only to the extent of the amount which he received, with interest thereon from the date of the sale. In this same note the writer points out that some of the cases which had been relied upon as supporting a harsher rule were cases where the property had in fact been bought in by the plaintiff in the execution himself. In *Peck vs. McLean* (36 Minn., 228; 1 Am. St. Rep., 665, 668), the Supreme Court of Minnesota said: "There is some variance in the authorities on the question whether a defendant in an erroneous judgment may, after its reversal, recover the full value of his property sold on an execution upon the erroneous judgment before its reversal, or only so much as the plaintiff has realized upon the execution. It seems to us that the decisions holding the latter are more in accordance with principle, for the erroneous judgment is valid until reversed. It is the act of the court, and the party may, until reversal, justify under a regular execution upon it: *Bank of U. S. vs. Bank of Washington* (6 Pet., 8). This is the generally recognized rule. After a reversal, the plaintiff is bound to make restitution,—that is, to return to the defendant whatever he got by means of the judgment; but he cannot be treated as a wrong-doer for causing execution to issue, and the defendant's property to be levied on and sold. It protects him while it remains in force. It may seem a hardship to the defendant in such a judgment that under it his property may be sold for greatly less than its value, and his right of restitution be limited to what came into the hands of the plaintiff. But such hardship, when it occurs, will generally, if not always, be the result of his own acts. If, by failing to appeal, or to obtain a supersedeas on an appeal, he permits the judgment to remain in force and enforceable, he can hardly complain that the other party proceeds to enforce it. To entitle the defendant to restitution, it must appear that the money has been paid to the plaintiff \* \* \* " Substantially the same doctrine is announced in *Thompson vs. Reasoner* (122 Ind., 454).

The conclusion upon this branch of the case must be that, with respect to so much of the property as was sold to strangers, the plaintiff is liable only for the amount which was realized from it at the sale, namely, the sum of P1,681.41. Therefore, summing up the three items of P2,641.71 (representing the balance favorable to the defendant upon current account), P2,798.40 (the value of the personal property purchased at the sheriff's sale by the plaintiff), and P1,681.41 (the amount realized by the property which was sold to third persons), we have a total balance in favor of the defendant of P7,121.52. But from this must be deducted the sum of P453.23 which represents the part of the proceeds of the sale which was applied by the sheriff to the payment of income tax assessed against the defendant. As this money never came to the hands of the defendant, he is not liable for it. But the plaintiff is not entitled to credit for costs and expenses incident to the seizure and sale of the property.

Deduction of the amount paid for income tax of the defendant having been effected, there remains a balance, upon all accounts, in favor of the defendant of P6,668.29. Upon the amount of P2,641.71 the defendant is entitled to interest at the legal rate from July 29, 1920, until satisfaction of the judgment; while upon the amount of P4,026.58, he is entitled to interest at the same rate from the date of the levy of execution, until satisfaction of the judgment.

It being understood that the appealed judgment is modified by reducing the amount of the recovery in favor of the defendant to the sum of P6,668.29, with interest as above stated, said judgment, as this modified, is affirmed, without costs. So ordered.

Avanceña, C. J., Villamor, Ostrand, Johns, Romualdez, and Villa-Real, JJ., concur.

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[ [1]] Promulgated November 14, 1923.

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