

**THE PHILIPPINE NATIONAL BANK, PLAINTIFF AND APPELLEE, VS.
THE PHILIPPINE VEGETABLE OIL CO., INC., DEFENDANT AND
APPELLEE. PHIL. C. WHITAKER, INTERVENOR AND APPELLANT.**

G.R. No. 25400. January 14, 1927

Ponente: MALCOLM, J.

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MALCOLM, J.:

This appeal involves the legal right of the Philippine National Bank to obtain a judgment against the Philippine Vegetable Oil Co., Inc., for P15,812,454, and to foreclose a mortgage on the property of the Philippine Vegetable Oil Co., Inc., for P17,000,000, and the legal right of Phil. C. Whitaker as intervenor to obtain a judgment declaring the mortgage which the Philippine National Bank seeks to foreclose to be without force and effect, requiring an accounting from the Philippine National Bank of the sales of the property and assets of the Philippine Vegetable Oil Co., Inc., and ordering the Philippine Vegetable Oil Co., Inc., and the Philippine National Bank to pay him the sum of P4,424,418.37.

In 1920, the Philippine Vegetable Oil Co., Inc., which will hereafter be called the Vegetable Oil Company, found itself in financial straits. It was in debt to the extent of approximately P30,000,000. The Philippine National Bank was the largest creditor. The Vegetable Oil Company owed the bank P17,000,000. Over P13,000,000 were due the other creditors. The Philippine National Bank was secured principally by a real and chattel mortgage for P3,500,000. On January 10, 1921, the Vegetable Oil Company executed another chattel mortgage in favor of the bank on its vessels Tankerville and H. S. Everett to guarantee the payment of sums not to exceed P4,000,000.

This was the precarious situation which in the latter part of 1920 and the early part of 1921 confronted the Vegetable Oil Company, its General Manager Phil. C. Whitaker, the Philippine National Bank, and the various creditors of the Vegetable Oil Company, Bankruptcy was imminent. On January 1, 1921, Mr. Whitaker made his first offer to pledge certain private properties to secure the creditors of the Oil Company (Intervenor's Exhibit 1). In February of the same year, a creditors' meeting was held. At the instance of Mr. Whitaker but inspired to such action by the bank, a receiver for the Vegetable Oil Company was appointed by the Court of First Instance of Manila on March 11, 1921. (Case No. 19644, Court of First Instance of Manila.)

During the period when a receiver was in control of the property of the Vegetable Oil Company, a number of events occurred. The first was the agreement perfected by the Vegetable Oil Company, Mr. Whitaker, and some of the creditors of the Oil Company on June 27, 1921, whereby the creditors transferred to Mr. Whitaker a part of their claims against the Vegetable Oil Company in consideration of the execution by Mr. Whitaker of a trust deed of his property. The Philippine National Bank was not a direct party to the agreement although the officials of the bank had full knowledge of its accomplishment and the general manager of the bank placed his O. K. at the end of the final draft. (Intervenor's Exhibit 10.) The next move of the bank was to obtain a new mortgage from the Vegetable Oil Company on February 20, 1922. Shortly thereafter, on February 28, 1922, the receivership for the Vegetable Oil Company was terminated. The bank suspended the operation of the Vegetable Oil Company in

May, 1922, and. definitely closed the Oil Company's plant on August 14, 1922.

Out of the foregoing facts which are not in dispute and others which are in dispute, arose the action of the Philippine National Bank of May 7, 1924, to foreclose its mortgage on the property of the Vegetable Oil Company. The Vegetable Oil Company on its part countered with certain special defenses which need not be described and with the interposition of a counterclaim for P6,000,000. Phil. C. Whitaker presented a complaint in intervention. The judgment rendered was in favor of the plaintiff and against the defendant which was ordered to pay the sum of P15,787,454.54, representing the liquidation between the plaintiff and the defendant, with legal interest beginning with May 8, 1923, together with P25,000 attorney's fees, and costs, with the addition of the usual order to foreclose the mortgage. The counterclaim of the defendant and the complaint in intervention were dismissed.

The trial judge in his decision announced and answered three questions, viz: (1) Whether the execution of the mortgage, Exhibit A of the plaintiff, was the free act of the defendant; (2) whether this mortgage was null and without force because at the time of its execution all the property of the defendant was under the control of a receiver appointed by the court and neither the approval of the receiver nor of the court had been obtained; and (3) whether the plaintiff had failed to comply with the contract, that it was alleged to have celebrated with the defendant and the intervenor, that it would furnish funds to the defendant so that it could continue operating its factory. Much the same analysis of the issues is made by the intervenor as appellant. The first error, in relation with the sixth error of the assignment of errors, concerns the holding that the mortgage, Exhibit A, has been legally and validly executed by the Philippine Vegetable Oil Co., Inc. The second, third, fourth, and fifth errors, in relation with the sixth error of the assignment of errors, concern the holding that the Philippine National Bank had not bound itself to finance the operation of the Philippine Vegetable Oil Co., Inc. In this later connection, the main point at issue between the Philippine National Bank and Phil. C. Whitaker as disclosed by the amended answer of the Philippine National Bank to the complaint in intervention, and the opening sentence of the memorandum for intervenor-appellant filed in this court, is whether the Philippine National Bank ever made any contract binding the bank to provide the necessary operating capital to the Philippine Vegetable Oil Co., Inc., and whether Mr. Whitaker has established his right to recover damages from the bank by reason of the latter's alleged refusal to finance the operation of the Philippine Vegetable Oil Co., Inc. It results, therefore, in the appeal dividing into two main subjects, the first, the validity of the Philippine National Bank-Philippine Vegetable Oil Co., Inc., mortgage of February 20, 1922, and the second, the alleged agreement of the Philippine National Bank to finance the Philippine Vegetable Oil Co., Inc. These two topics we propose to discuss separately and in order. Parenthetically, it may be said that our mode of approach will be to sweep aside technicalities and to resolve in a broad and liberal manner the various perplexing questions which are before the court.

I. Validity of the Philippine National Bank—Philippine Vegetable Oil Co., Inc., mortgage of February 20, 1922.

At the outset, the appellee challenges the right of Phil. C. Whitaker as intervenor to ask that the mortgage contract executed by the Vegetable Oil Company be declared null and void. Appellee is right as to the premises. The Vegetable Oil Company is the defendant. The corporation has not appealed. At the same time, it is evident that Phil. C. Whitaker was one of the largest individual stockholders of the Vegetable Oil Company, and was until the inauguration of the receivership, exercising control over and dictating the policy of that company. Out of twentyeight thousand shares of the Vegetable Oil Company, Mr. Whitaker was the owner of 5,893 fully paid shares of the par value of P100 each. He it was who asked for the appointment of the receiver. He it was who was the leading figure in the negotiations between the Vegetable Oil Company, the Philippine National Bank, and the other creditors. He it was who pledged his own property to the extent of over P4,000,000 in an endeavor to assist in the rehabilitation of the Vegetable Oil Company. He is injuriously affected by the mortgage. In truth, Mr.

Whitaker is more vitally interested in the outcome of this case than is the Vegetable Oil Company. Conceivably if the mortgage had been the free act of the Vegetable Oil Company, it could not be heard to allege its own fraud, and only a creditor could take advantage of the fraud to intervene to avoid the conveyance.

We find no merit in appellee's objection and pass on to consider the main question on its merits.

The mortgage, Exhibit A, was executed on February 20, 1922, by "Philippine Vegetable Oil Co., Inc., By E. G. Abry, Secretary-Treasurer" "Philippine National Bank By E. W. Wilson, General Manager." E. G. Abry, according to his testimony, was employed as secretary-treasurer of the Vegetable Oil Company after a conference with Mr. Wilson and continued in this position during the period when the Vegetable Oil Company was under the control either of a receiver or of the bank. The other signature to the instrument was that of E. W. Wilson, General Manager of the Philippine National Bank.

At this time, E. W. Wilson and Miguel Cuaderno, a Director of the Philippine National Bank, were serving as Directors of the Vegetable Oil Company. Messrs. Wilson and Cuaderno were elected to these places after Mr. Wilson had on July 26, 1921, in a letter to Mr. Whitaker relative to the reorganization of the Vegetable Oil Company, suggested the resignation of two members of the Board of Directors so that the bank might "have rather a close working relationship with the Philippine Vegetable Oil Co." (Intervenor's Exhibit 4). The resolution of the Board of Directors of September 2, 1921, naming Messrs. Wilson and Cuaderno "to represent the Philippine National Bank in the Board of Directors of the Philippine Vegetable Oil Co. as members thereof" did so with the understanding "that neither one of them has any interest other than that of the bank's in the Philippine Vegetable Oil Co., and that in accepting these directorships they are doing it solely for the bank." According to the testimony of Major Randall, Mr. Wilson became President of the Vegetable Oil Company on September 12, 1921.

It has been said that the mortgage was executed on February 20, 1922. That is undeniable. The allegation of the plaintiff's complaint is "That the defendant, on the 20th day of February, 1922, duly executed to the plaintiff a mortgage." The mortgage in question recites: "THIS MORTGAGE, executed at the City of Manila, Philippine Islands, this twentieth day of February, nineteen hundred and twenty-two." However, the mortgage was not ratified before a notary public until March 8, 1922, and was not recorded in the registry of property until March 21, 1922.

To add one more date, it will be recalled that the receivership ended on February 28, 1922. In other words, as partially interpretative of the situation, the mortgage was executed by the Philippine National Bank, through its General Manager, and another corporation before the termination of the receivership of the said corporation, but was not acknowledged or recorded until after the termination of the receivership.

In the complaint of Phil. C. Whitaker filed in the Court of First Instance of Manila in which it was prayed that a receiver be appointed to take charge of the Philippine Vegetable Oil Co., Inc., it was alleged "that the largest individual creditor of said corporation is the Philippine National Bank, the indebtedness to which amounts to approximately P16,000,000, a portion of which indebtedness is secured by mortgage on the major part of the assets of the corporation." The order of the court appointing a receiver contained a similar recital. The Philippine National Bank held the mortgage mentioned, and possibly two others not mentioned, when the receivership proceedings were initiated.

It must be evident to all that the Philippine National Bank could legally secure no new mortgage by the accomplishment of documents between its officials and the officials of the Vegetable Oil Company while the property of the latter company was in custodia legis. The Vegetable Oil Company was then inhibited absolutely from giving a mortgage on its property. The receiver was not a party to the mortgage. The court had not authorized the receiver to consent to the execution of a new mortgage. Whether the court could have done so is

doubtful, but that it would have thus consented is hardly debatable, considering that it would desire to protect the rights of all the creditors and not the rights of one particular creditor. The legal conclusion is axiomatic. (Code of Civil Procedure, secs. 173 et seq., *Compañía General de Tabacos vs. Gauzon and Pomar* [1911], 20 Phil., 261.)

To all this the appellee as well as the trial court have answered that while it is true that the document was executed on February 20, 1922, at a time when the properties of the mortgagor were under receivership, the mortgage was not acknowledged before a notary public until March 8, 1922, after the, court had determined that the necessity for a receiver no longer existed. But the additional fact remains that while the mortgage could not have been executed without the dissolution of the receivership, such dissolution was apparently secured through representations made to the court by counsel for the bank that the bank would continue to finance the operations of the Vegetable Oil Company (See testimony of Judge Simplicio del Rosario). Instead of so doing, the bank within less than two months after the mortgage was recorded, withdrew its support from the Vegetable Oil Company, and in effect closed its establishment. Also it must not be forgotten that the hands of other creditors were tied pursuant to the creditors' agreement of June 27, 1921.

To place emphasis on the outstanding facts, it must be repeated that the mortgage was executed while a receiver was in charge of the Vegetable Oil Company. A mortgage accomplished at such a time by the corporation under receivership and a creditor would be a nullity. The mortgage was definitely perfected subsequent to the lifting of the receivership pursuant to implied promises that the bank would continue to operate the Vegetable Oil Company. It was then accomplished when the Philippine National Bank was a dominating influence in the affairs of the Vegetable Oil Company. On the one hand was the Philippine National Bank in person. On the other hand was the Philippine National Bank by proxy. Under such circumstances, it would be unconscionable to allow the bank, after the hands of the other creditors were tied, virtually to appropriate to itself all the property of the Vegetable Oil Company.

Whether we consider the action taken as not expressing the free will of the Vegetable Oil Company, or as disclosing undue influence on the part of the Philippine National Bank in procuring the mortgage, or as constituting deceit under the civil law, or whether we go still further and classify the facts as constructive fraud, the result is the same. The mortgage is clearly voidable.

The setting aside of the mortgage of February 20, 1922, will not necessarily result in the Philippine National Bank being left without security. It is our understanding that before the receivership was thought of, the bank was the holder of three mortgages on the property of the Vegetable Oil Company, the first dated April 11, 1919, for an uncertain amount; the second, dated November 18, 1920, for P3,500,000; and the third, dated January 10, 1921, for P4,000,000. These mortgages remain in effect and may be foreclosed.

Addressing ourselves directly to the first two questions discussed in the decision of the trial court and to the first and sixth errors assigned by the intervenor as appellant, we rule that the Philippine National Bank-Philippine Vegetable Co., Inc., mortgage of February 20, 1922, has not been legally executed by the Philippine Vegetable Oil Co., Inc.

II. Alleged agreement of the Philippine National Bank to finance the Philippine Vegetable Oil Co., Inc.

Before it need be decided if the intervenor has a right to recover damages from either the plaintiff or the defendant because of the plaintiff's refusal to finance the operations of the defendant, it must be determined if the Philippine National Bank ever entered into any valid agreement by which it bound itself to provide the necessary operating capital of the Philippine Vegetable Oil Co., Inc. The question presents both legal and factual aspects. The legal inquiry relates to the applicability or non-applicability of the Statute of Frauds as found in section 335 of our Code of Civil Procedure. The question of fact goes on the assumption that the oral evidence can be received

without violating the Statute of Frauds and then, of course, comes down to the weighing of the evidence.

The broad view is that the Statute of Frauds applies only to agreements not to be performed on either side within a year from the making thereof. Agreements to be fully performed on one side within the year are taken out of the operation of the statute. As intervenor's theory proceeds on the assumption that Mr. Whitaker has entirely performed his part of the agreement, equity would argue that all evidence be admitted to prove the alleged agreement. Surely since the Statute of Frauds was enacted for the purpose of preventing frauds, it should not be made the instrument to further them.

As preliminary to a presentation of the evidence, it is well to have an understanding of the applicable law. The Charter of the Philippine National Bank, Act No. 2612, section 20, as amended by Act No. 2938, provides that "The General Manager of the Bank, shall, among others, have the following powers and duties: * * * (b) To make, with the advice and consent of the board of directors, all contracts on behalf of the said bank and to enter into all necessary obligations by this Act required or permitted." Predicated on our general liberal point of view, we feel free to take into consideration the applicable law although no special defense to this effect was interposed by the Philippine National Bank to intervenor's complaint

Let us now look into the evidence in detail. We may properly begin with the applicable resolutions of the Board of Directors of the Philippine National Bank.

In the minutes of the Board of Directors of the Philippine National Bank of October 4, 1921, is found the following:

"Philippine Vegetable Oil Co.—On motion of Director Westerhouse, duly seconded, the following resolution was adopted by the Board: Be it resolved, that the General Manager be, and he is, hereby authorized to finance the operation of the Philippine Vegetable Oil Co. under the Receivership to the extent of P500,000 to be secured by copra and oil and to be further secured by P500,000 pledged by Phil. C. Whitaker in his creditor's agreement."

Under date of October 28, 1921, is found the following:

"The following additional loans with which to buy more copra were approved by the Board, at the recommendation of the Oil Factory Committee. Philippine Vegetable Oil Co. F. W. Carpenter, Receiver, P. V. O., P200,000."

Under date of December 5, 1921, is found the following:

"After a long discussion and careful deliberation, and on motion of Director Westerhouse, duly seconded by Director Seaver, the following was unanimously approved by the Board: To protect the large investments of the Bank, it is the sense of the Board of Directors to continue financing the operation under receivership of the Philippine Vegetable Oil Co., the Philippine Manufacturing Co., the Cristobal Oil Co., and the Santa Ana Oil Mills, in as modest and economical way as is consistent with prevailing conditions, the General Manager to report and secure the approval of the Board for necessary credits from time to time, and that the Board also recommends that the Oil Committee continue studying the advisability of financing the operation of other oil mills indebted to the Bank."

Other portions of the minutes of the Board of Directors disclose that the Board authorized advances to the Vegetable Oil Company to the extent of more than P1,000,000.

Logically, our review of the evidence should stop here. No contract entered into by the General Manager of the Bank would be valid unless made with the advice and consent of its Board of Directors. What the Board of Directors had decreed was that the Vegetable Oil Company be financed under the receivership to the extent of

P500,000, a sum which was later increased. The Board not alone specified the amounts of the loans but cautiously added that the General Manager "report and secure the approval of the Board for necessary credits from time to time." There was no indication in any action taken by the Board of Directors that it had ever consented to an agreement for practically unlimited backing of the Vegetable Oil Company, or that it had ratified any such promise made by its General Manager.

Out of consideration for the parties, however, we will go further and will examine the remaining evidence.

Passing in review intervenor's exhibits, we first notice Mr. Whitaker's letter to the Hongkong and Shanghai Banking Corporation of January 1, 1921. He there confirms his undertaking to assume an obligation to pledge and mortgage specified personal holdings. The offer is made "contingent upon its acceptance by the other unsecured creditors * * *. A further condition to the foregoing offer is that the banks parties to the proposed arrangement supply, subject to the approval of their representatives on the Board of Directors of the P. V. O. Co., funds sufficient to enable the P. V. O. Co., to continue its operations during the full term for which my personal secured undertaking remains in effect." The condition named related to all the banks and not to the Philippine National Bank, (Intervenor's Exhibit 1.) The trust deed by Mr. Whitaker in favor of H. C. Sanford makes the purposes and uses among others "To secure the Philippine National Bank against such losses as it may sustain, not exceeding a total of P500,000, on such sums as it shall, from time to time and within three years from July 1, 1921, advance to the Philippine Vegetable Oil Company to enable the latter to resume business and continue the manufacture of vegetable oil." This recital is specific as to P500,000 and is general as to further advances, and is made in a document to which the Philippine National Bank was not a party. (Intervenor's Exhibit 2.) The creditors' agreement is of similar tenor. (Intervenor's Exhibit 3.) One of the paragraphs in the preamble of the power of attorney from the Roman Catholic Archbishop of Manila to Phil. C. Whitaker mentioned that Mr. Whitaker "has also arranged with the Philippine National Bank for the funds necessary to enable said Oil Company to resume its business and continue in the manufacture of vegetable oil." Although this proxy may have been procured at the instance of the Philippine National Bank, yet obviously it did not bind the officials of the bank. (Intervenor's Exhibit 5.) The letter of Mr. Wilson as General Manager of the Philippine National Bank of June 8, 1921, addressed to Mr. Whitaker stated: "I see no good reason why you should use your property to secure unsecured obligations, and not provide for the operation of the plant." Merely a friendly warning, (Intervenor's Exhibit 8.) Mr. Wilson's letter to Mr. Whitaker of April 19, 1923, stated: "The agreement you refer to enabled the Bank to put its securities in first-class shape. In order to do this, however, it was necessary for it to furnish certain money for operating the plant, and an additional mortgage was executed. * * * It is my judgment that it was good business for the Philippine National Bank to operate the plant as long as it had the P500,000 guarantee. However, the bank put into the undertaking a great deal more money than it originally intended. Then, too, the guarantee was not as good as we thought, because the first lien on the property was not being paid off as rapidly as we thought it would be." Here was merely an expression of gratification regarding the additional mortgage and emphasis on the P500,000 guarantee. (Intervenor's Exhibit 7.) We discover nothing further of interest in the exhibits.

The only oral testimony in point is that given by A. D. Gibbs and Phil. C. Whitaker. Mr. Gibbs, testifying as to a meeting of the creditors of the Vegetable Oil Company, said: "Mr. Wilson stated in substance that if the negotiations which were then pending between Mr. Whitaker and the other creditors, whereby the other creditors were to refrain from throwing the P. V. O. Co. into, insolvency or from bringing action against it, could be carried out, that his bank would finance the P. V. O. Co., and keep it in operation." Mr. Whitaker, testifying as to the same meeting, said: "Mr. Wilson stated that he had looked into the affairs of the P. V. O. as far as the short time he had had permitted, and that the P. V. O. had evidently made good money in the past and if allowed to resume would make good again in the future, that the P. N. B., as the largest creditor, contemplated financing a resumption of the company's operations if the company could be kept out of insolvency." Giving to this testimony

its broadest effect, we still discover no definite agreement binding on the bank but only a general intimation proffered by the General Manager of the Bank in conference that his bank contemplated financing the operations of the Vegetable Oil company.

That is all the evidence, documentary and oral, at all pertinent to the issue. We are clear that taking it entirely into consideration it discloses no binding promise, tacit or express, made by the Philippine National Bank to continue indefinitely its backing of the Vegetable Oil Company.

Mr. Whitaker was in no way personally responsible for any part of the obligations of the Vegetable Oil Company. Nevertheless, he signed the creditors' agreement. That was a praiseworthy act. We sympathize with him in the situation in which he finds himself. The various creditors have a large amount of his property. The Philippine National Bank has taken over the assets of the Vegetable Oil Company. The latter company has ceased operations. Mr. Whitaker has not made himself the successor in interest of the Vegetable Oil Company and so cannot recover from it in these proceedings. But sympathy cannot be transmuted into legal authoritativeness. If Mr. Whitaker has any other remedy, that is for him to determine. Here we cannot give him redress for he has not made out his case except insofar as he has been successful in overturning the last mortgage of the Philippine National Bank on the property of the Vegetable Oil Company.

III. Result

We announce the following conclusions:

- (1) Plaintiff is entitled to a money judgment against the defendant for P14,183,679.37 with legal interest thereon beginning with May 8, 1924. Exhibit C-1 shows that after May 6, 1924, when Exhibit B-1 was formulated, two further payments were made on the promissory note for P16,869,975.59, which further reduced the principal from P15,760,312.85 as totalled in Exhibit B-1 to P14,183,679.37 as evidenced by Exhibit C-1. As interest has already been charged up to May 7, 1924, legal interest should begin to run from that date instead of from May 8, 1923, as fixed by the trial court.
- (2) The Philippine National Bank-Philippine Vegetable Oil Co., Inc., mortgage of February 20, 1922, has not been legally executed by the Philippine Vegetable Oil Co., Inc., and consequently cannot be given effect. But the prior mortgages held by the Philippine National Bank of April 11, 1919, November 18, 1920, and January 10, 1921, remain in force and may be foreclosed.
- (3) The Philippine National Bank will obviously have a preferred claim when the three mortgages above mentioned shall be foreclosed. The remainder of the assets of the Philippine Vegetable Oil Co., Inc., if any, should then be applied to the payment pro rata of the unsecured claims, among them that of Mr. Whitaker and the unsecured part of the debt to the Philippine National Bank. Intervenor Whitaker is entitled to an accounting of the proceeds of the Vegetable Oil Company's properties caused to be sold by the Philippine National Bank and of the business operations of the Vegetable Oil Company since March 11, 1921.
- (4) Intervenor Whitaker has failed to establish an agreement binding the Philippine National Bank to provide the necessary operating capital to the Vegetable Oil Company, and so is not entitled to recover damages from the Philippine National Bank. Nor can intervenor Whitaker recover P4,424,418.37 from the Vegetable Oil Company since he is not the legatee of the assets of that company. The trial judge accordingly committed no error in dismissing intervenor's complaint.
- (5) No pronouncement is made with reference to intervenor Whitaker's possible rights in connection with the creditors' agreement since that agreement is not here in question and the parties thereto are not before the court.

The case will be remanded to the lower court for the entry of judgment and further proceedings as herein

indicated. Judgment affirmed in part and reversed in part, without special finding as to costs in either instance.

Ostrand, Johns, Romualdez, and Villa-Real, JJ., concur.

AVANCEÑA, C. J., with whom concurs VILLAMOR, J., concurring and dissenting in part:

In regard to the validity of the mortgage given by the defendant in favor of the plaintiff, I concur in the dissenting opinion of Mr. Justice Johnson.

The insinuation made in the majority opinion of undue influence, deceit and fraud on the part of the plaintiff as grounds for declaring this mortgage void, is absolutely unsupported by the record. Supposing that undue influence, which is a general and abstract conception, exists to some extent, it does not constitute a cause for annulment of the contract so far as it affects the consent, unless the same amounts to violence, or intimidation, or constitutes fraud, or produces substantial error on the part of the other contracting party. (Art. 1265, Civil Code.) The mere intervention of the two representatives of the plaintiff in the Board of Directors of the defendant, does not alone constitute undue influence. These two representatives of the plaintiff did not make the majority of the Board of Directors of the defendant and, on the other hand, no act has been proved to have been executed by them in connection with the mortgage which might be considered as undue influence. Neither has it been shown that, anything was done which might constitute a fraud on the part of the plaintiff in the execution of this mortgage. Fraud is not presumed. The only thing which can be considered in connection with this point is the supposed promise given to the defendant to finance its operations. But, according to the majority opinion, there is no indication of any act of the Board of Directors of the plaintiff corporation which might imply consent to an agreement to give unlimited support to the defendant, nor ratification of any promise to this effect made by the general manager. In order to annul a contract for fraud it must have been committed by one of the contracting parties. (Art. 1269, Civil Code.) On the other hand, the general manager of the plaintiff as also admitted in the majority decision, only intimated generally that the plaintiff corporation would finance its operations. Moreover, it was proven that the plaintiff did in fact furnish the defendant with capital in order that it might continue operating for some time, and continued to furnish it with capital even after the execution of the mortgage, which, at any rate, is a compliance with the supposed promise. It is evident that, if the plaintiff, either directly or through its general manager, did not make any promise to furnish capital to the defendant without any limitation for its operation, and did in fact furnish it with capital to some extent, it cannot be said to have acted fraudulently. The plaintiff was not bound to take a chance when it was clearly seen that the defendant was running behind and, in defense of its interests and in consideration of its resources, it had a right to stop when it deemed it unwise to continue any longer. Furthermore, any unfulfilled promise made to the defendant by the general manager of the plaintiff, without the authorization of the latter, does not constitute such fraud and cause for the annulment of the contract. Upon this theory, at most, it might be an incidental fraud committed by a third party, which is not sufficient cause for the annulment of a contract, but only for an action for damages against the said third party. (Art. 1270, Civil Code.) At any rate, the appellant-intervenor cannot seek the annulment of this mortgage under the provisions of article 1302 of the Civil Code, according to which only those persons who are principally or subsidiarily bound by the contract may bring the action. The appellant, not having been a party to this mortgage and not being a representative of any of those who have intervened therein, is not, principally or subsidiarily, bound by virtue thereof, and, consequently, has no action and cannot impugn its validity. (Decisions of Supreme Court of Spain of April 18, 1901 and November 23, 1903.)

The appellant's allegation that the mortgage affects him and the foreclosure thereof would injure him, does not give him the right to bring an action for annulment, but, for rescission, if any, which is not the one brought herein. Commenting on this aspect of the question, Manresa in vol. 8, p. 780, 2d ed., says: "Third persons need not bring

an action for annulment, as provided for in this article (1302, Civil Code)." The contract really injures or it does not. If it does, whether or not the act or contract is valid or void, they may bring an action for rescission. If it does not, whether or not it is valid or void, they cannot have any interest in the matter.

I concur with the majority in all other respects and vote for the affirmation of the appealed judgment in all its parts.

DISSENTING OPINION

JOHNSON, J.,

I cannot agree with all of the facts stated in the decision nor with the conclusions drawn therefrom. I find it necessary therefore to dissent. My dissent is based upon the following grounds:

A. Legality of the mortgage

First. That the mortgage in question was executed by the Philippine Vegetable Oil Co., Inc., to the Philippine National Bank and is a valid subsisting contract.

Second. That the statement that the mortgage was executed upon property in custodia legis is not supported by the facts of record.

At the time said document became a mortgage, the property covered thereby was not in custodia legis. It is true that at the time the document was signed on the 20th day of February, 1922, the property was then in the hands of a receiver. At that time, however, the said document was not a mortgage; it was nothing more nor less than an evidence of indebtedness. It did not contain all the requisites of a mortgage. Two additional requisites, under the law, were necessary: (a) It was not a public document at that time and (b) it had not been registered in the registry of property, which is a prerequisite to its becoming a mortgage (art. 1875, Civil Code). The property included in said document passed out of the hands of the receiver on the 28th day of February, 1922, and back into the hands of its owner, the Philippine Vegetable Oil Company, as its private property. The document became a public document by acknowledgment before the notary public on the 18th day of March, 1922. Even that act was not sufficient to make said document a mortgage. It even then was only an evidence of an indebtedness existing between the parties thereto. One thing more, under the law, was necessary in order to give said document the dignity of a mortgage. Under the law, it had to be registered in order to become a mortgage. The document was registered on the 21st day of March, 1922, nearly a month after the property had ceased to be in custodia legis, and thus it became a mortgage. At the time said document became a mortgage the property was not in custodia legis. Therefore the reason given in the majority opinion for pronouncing said mortgage illegal and void fails, under the facts and the law. (Arts, 1857-1875, Civil Code. Olivares vs. Hoskyn & Co., 2 Phil., 689; McMicking vs. Kimura, 12 Phil., 98; Susara vs. Martinez, 17 Phil., 254; Lozano vs. Tan Suico, 23 Phil., 16; Borcelis vs. Golingco, 27 Phil., 560; Legarda and Prieto vs. Saleeby, 31 Phil., 590; Lim Julian vs. Lutero, G. R. No. 25235.[1])

From the foregoing facts and the law it becomes clear that, that part of the majority opinion which declares the mortgage null and void because it covered property in custodia legis cannot be supported.

Third. I cannot give my conformity to that part of the majority opinion which charges that said mortgage did not express the free will of the Philippine Vegetable Oil Co., Inc. The Philippine Vegetable Oil Co. not only signed said mortgage voluntarily, before witnesses, but nearly three weeks later ratified its due execution before a notary public. And not only that, the Philippine Vegetable Oil Co., Inc., recognized the validity of said document, by later, making payments thereon.

Fourth. Neither can I give my conformity to that part of the majority opinion which imputes to the Philippine National Bank bad faith, undue influence, deceit and constructive fraud in procuring the execution of said mortgage. The record clearly shows that the mortgage was given to secure the payment of a preexisting indebtedness for a valuable consideration. In addition to the fact that the Philippine Vegetable Oil Co. had recognized the validity of said mortgage by making payments thereon, there is nothing in the record which shows, in the slightest degree, that it had, prior to the commencement of the present action, even intimated that the mortgage was illegal and void. It may be added that the failure of the Philippine Vegetable Oil Co., Inc., to appeal is an additional proof of its belief that the defense of illegality is not well founded.

In my opinion, the facts of record and the law applicable thereto fully support the conclusions of the lower court that the mortgage had been legally executed, was a valid subsisting contract of mortgage, and in ordering the foreclosure of the same. That part of the judgment appealed from should therefore be affirmed.

B. The right of the intervenor, Phil. C. Whitaker

There is still another conclusion of the majority opinion to which I cannot give my conformity, and that is, the right of the intervenor to recover some damages for the breach of contract by virtue of which the Philippine National Bank obligated itself to continue the operations of the Philippine Vegetable Oil Co., Inc. As I read the record, it fairly bristles with facts in support of the contention, of Phil. C. Whitaker, that the Philippine National Bank did promise and did obligate itself to furnish sufficient funds with which to continue the operation of the Philippine Vegetable Oil Co., Inc., and that in lieu of said promises and obligations he did, out of his private funds, and property, obligate himself to pay a portion of said indebtedness against the Philippine Vegetable Oil Co., which indebtedness he was theretofore under no obligation to pay. (See creditors' agreement and mortgage in favor of creditors.) Except for the agreement of the Philippine National Bank to continue the operation of the Philippine Vegetable Oil Co., Inc., I find nothing in the record to support a consideration of said creditors' agreement, by virtue of which Phil. C. Whitaker promise to pay, out of his private property an indebtedness of about P4,000,000 of the Philippine Vegetable Oil Co., Inc. The Philippine National Bank admitted that its manager made such an agreement with Phil. C. Whitaker, but that the same was never ratified by its Board of Directors.

After a very careful reading and a re-reading of the entire record I am fully persuaded that at the time Phil. C. Whitaker entered into the alleged contract with the Philippine National Bank, by virtue of which the latter was to furnish adequate funds for the continued operation of the Philippine Vegetable Oil factory, that all parties then concerned fully understood and believed that such a contract had been made and entered into with full and sufficient consideration. Every document which was executed at that time and prior thereto gives ample evidence that such a contract existed.

C. Proof that all parties concerned believed that the Philippine National Bank had agreed to furnish sufficient funds for the continued operation of the Philippine Vegetable Oil Company, Inc.

First. Phil. C. Whitaker honestly believed that the Philippine National Bank had entered into a valid contract with him, by virtue of which said bank was to furnish sufficient funds for the continued operation of the Philippine Vegetable Oil factory. In fact, that was one of the precedent conditions upon which he had obligated his private property to the extent of nearly P4,000,000 for the payment of a portion of the debts of said Oil Company. That fact appears not only from Exhibit 1 but from many other exhibits found in the record, besides the declaration of Phil. C. Whitaker during the trial of the cause. There is nothing in the record which intimates that his testimony should not be accepted. On the first day of January, 1921, and nearly six months before the creditors' agreement was consummated and during the pendency of the creditors' agreement in Exhibit 1 Mr. Whitaker said: "A further

condition to the foregoing offer (the creditors' agreement) is that the banks, parties to the proposed arrangement, supply, subject to the approval of their representatives on the Board of Directors of the Philippine Vegetable Oil Co., funds sufficient to enable the Philippine Vegetable Oil Co. to continue its operations during the full terms for which my personal secured undertaking remains in effect." His belief that such a contract had been entered into is also indicated in Exhibit 6 in which he threatened the Philippine National Bank with an action "in case it should cease to finance the Philippine Vegetable Oil Co. as contemplated."

Second. The creditors also believed that such a contract existed between Phil. C. Whitaker and the Philippine National Bank. Upon that question the creditors' agreement (Exhibit 3) contains the following significant statement: "the creation of a fund of P500,000 to be deposited as the same accumulates in the Philippine National Bank, to be held by it for a period of three years from July 1, 1921, for the purpose of indemnifying it (the Philippine National Bank) against loss on such sums as it shall hereafter advance to the Philippine Vegetable Oil Co. to enable the latter to resume business and continue the manufacture of vegetable oil, with the understanding, however, that at the end of said three years so much of such funds, if any, as shall not have been used for the purpose of such indemnity shall be delivered to the trustee for distribution pro rata."

Third. The trustee in the mortgage executed and delivered in conformity with the creditors' agreement (Exhibit 2) also believed that such a contract existed, or, otherwise, the following pertinent statement would have found no place therein: "To secure the Philippine National Bank against such losses as it may sustain, not exceeding a total of P500,000 on such sums as it shall, from time to time and within three years from July 1, 1921, advance to the Philippine Vegetable Oil Company to enable the latter to resume business and continue the manufacture of vegetable oil."

Fourth. The Board of Directors of the Philippine National Bank also evidently believed and understood that a contract existed between it and Phil. C. Whitaker, by virtue of which the former was to furnish to the latter sufficient funds for the continued operation of the Philippine Vegetable Oil factory, or otherwise, said Board would not have authorized, by resolution, the President of the Bank to have commenced furnishing funds to the Philippine Vegetable Oil Company for its continued operation. The fact that the bank later refused to comply with such contract does not relieve it, if a contract had actually existed, from the present action for damages.

Fifth. The Archbishop of Manila, who was a large stockholder in the Philippine Vegetable Oil Co., Inc., also believed that Phil., C. Whitaker had such a contract with the Philippine National Bank. In Exhibit 5 the Archbishop says, among other things that Phil C. Whitaker "has also arranged with the Philippine National Bank for the funds necessary to enable said Oil Company to resume its business and continue in the manufacture of vegetable oil." That statement of the Archbishop was made during the pendency of the creditors' agreement.

Sixth. Mr. E. W. Wilson, President of the Philippine National Bank, also believed that the contract between Phil. C. Whitaker and the bank had been consummated. In Exhibit 7 Mr. Wilson recognized the wisdom of such a contract "as long as it (the Philippine National Bank) had the P500,000 guaranty."

Seventh Mr. William A. Randall, Comptroller and Executive Officer of the Philippine Vegetable Oil Co., Inc., in a letter (Exhibit A) written nearly a year after the alleged agreement between Phil. C. Whitaker and the Philippine National Bank, expressly recognized the existence of such a contract with the statement that Phil. C. Whitaker had executed a mortgage in favor of the creditors upon his private property and had thereby guaranteed to the said bank the sum of P500,000 for the continued operation of the Philippine Vegetable Oil factory for a period of three years.

Eighth. An additional reason may be given why the creditors believed that the Philippine National Bank had contracted to furnish adequate funds for the operation of the Philippine Vegetable Oil factory. From Exhibit 3, the

creditors' agreement, it will be noted that the creditors who united in that agreement had unsecured claims against the Philippine Vegetable Oil Co. amounting to P13,110,568.78, and that by virtue of that agreement (Exhibit 3) they accepted a mortgage from Mr. Whitaker for a portion of their claims to be paid within a period of three years, amounting to P4,444,418.37.

It will also be noted that they agreed to accept the obligation of the Philippine Vegetable Oil Co. for the balance of their respective claims, payable without interest fifteen years from July 1, 1921, with the understanding, however that the ad interim surplus earnings of said Vegetable Oil Co., over and above its liabilities and an amount necessary for a reasonable working capital for said company, shall be applied to the pro rata satisfaction of said obligations (par. 6 of Exhibit 3). From Exhibit 3, therefore, it clearly appears that the creditors fully understood that the Philippine Vegetable Oil factory was to be continued in its operation. Otherwise, the Philippine Vegetable Oil Co. then being insolvent, the creditors had no hope of recovering the balance of their claims amounting to about P9,000,000.

Ninth. The Supreme Court. At the time of the first consideration of this appeal the Supreme Court was of the opinion, which fact does not appear in the majority opinion, that the evidence presented by Phil. C. Whitaker in support of his allegation that the Philippine National Bank had entered into a contract with him to furnish money for the operation of the Philippine Vegetable Oil factory, was admissible to show the existence of such a contract. A majority of the court, however, was of the opinion that no liability resulted from the violation of the terms of such contract. The court also at the time decided that the evidence which Phil. C. Whitaker presented in support of his claim was admissible under section 335 of Act No. 190.

Since that time I have again carefully examined the entire record and I am fully persuaded that justice and equity demand that Mr. Phil. C. Whitaker be given an opportunity to show that he is entitled to recover some damages for the following reasons, in addition to what has been stated above: First, that the contract between Phil. C. Whitaker and the Philippine National Bank is an enforceable contract and one upon which he might have maintained a separate independent action without reference to the present action to foreclose the mortgage; second, that the only consideration for his promise to pay the claims of the other creditors of the Philippine Vegetable Oil Co., for the fulfillment of which he turned over to the trustee practically all of his property amounting to several million pesos, was the promise of the Philippine National Bank to furnish money for the continued operation of the Philippine Vegetable Oil factory; third, that except for the promise of the Philippine National Bank to adequately finance the continued operation of the Philippine Vegetable Oil factory, there was no consideration received by Mr. Whitaker for rendering himself personally liable for the personal debts of the Oil Company.

The record is brimming full with evidence that Mr. Whitaker only promised to pay, out of his private property, the debts of the Philippine Vegetable Oil Co. because of his contract with the Philippine National Bank to finance the operation of said Oil Company, hoping thereby to pay the debts of said Oil Company out of the receipts resulting from the operation of said Oil factory and thereby relieve his individual and private property from the obligation which he had imposed upon it. Mr. Whitaker was under no obligation to place his individual and private property in jeopardy for the payment of the debts of the Philippine Vegetable Oil Co., and no doubt would not have entered into his contract with the creditors except for the promise of the Philippine National Bank to adequately finance the continued operation of said Company for a period of three years.

On October 4, 1921, a little over two months after the execution of the creditors' mortgage, the Board of Directors of the Philippine National Bank adopted a resolution, authorizing the President of said bank to finance the operation of the Philippine Vegetable Oil Co. to the extent of P500,000, to be secured by copra and oil and to be further secured by P500,000 pledged by Phil. C. Whitaker in his creditors' agreement. In view of that resolution

on the part of the Board of Directors of the Philippine National Bank, in my judgment, it is idle to contend that the reference in said resolution "and to be further secured by P500,000 pledged by Phil. C. Whitaker in his creditors' agreement" was not a full and complete acceptance and ratification by the Board of Directors of the Philippine National Bank of the creditors' agreement theretofore accepted by the President of the bank.

It seems clear to me, from all of the facts found in the record, that the only reason why the creditors granted to the Philippine National Bank, (now) a first lien, on the property which Mr. Whitaker mortgaged to the creditors, amounting to P500,000, was to cover possible losses on the part of the Philippine National Bank in its continued operation for a period of three years, under the agreement which said bank had with Mr. Whitaker. The proof shows that the bank did furnish funds for the operation of the Oil factory and that during that period no losses occurred to the bank. In fact, the record shows that the bank made a profit of something like P100,000 during that period. Both the creditors and the Philippine National Bank were interested at that time in having the Philippine Vegetable Oil factory continue its operations for the reason that they must have all recognized that the assets of said Oil Company were largely inadequate to cover their respective claims. It was only through the continued operation of said Oil Factory that the creditors and the Philippine National Bank could hope to have their claims paid in full.

My conclusions from all of the record are: First, that the decision of the lower court ordering the foreclosure of said mortgage should be affirmed; and, second, that Phil. C. Whitaker should be given an opportunity to prove whether or not he had suffered any loss or damage from the failure of the Philippine National Bank to furnish adequate funds for the continued operation of the Philippine Vegetable Oil factory. The judgment of the lower court should be modified as herein indicated.

[1] Page 703, ante.

CONCURRING AND DISSENTING OPINION

STREET, J., :

I concur with the majority upon the proposition that the intervenor cannot recover damages from the bank; but I agree with the Chief Justice in the view that the judgment of foreclosure should be affirmed. The discussions contained in the dissenting opinions of the Chief Justice and of Mr. Justice Johnson sufficiently cover the principal features of the case; but there is one other point in the case upon which I wish to challenge the correctness of the position of the majority. Upon inspection of the prevailing opinion it will be seen that the last mortgage executed by the defendant Philippine Vegetable Oil Company, Inc., in favor of the Philippine National Bank, has been declared null and void by the court at the instance of the intervenor, Phil. C. Whitaker, who is a principal stockholder in the defendant company. It will be further observed that the nullity of this contract was originally asserted in the answer of the corporation defendant, but this defense was disallowed by the trial court in giving judgment in favor of the plaintiff for the foreclosure of the mortgage. From this judgment the Philippine Vegetable Oil Company did not appeal; and the adjudication of the validity of the mortgage thereby became conclusive as against the company. There is nothing in the record to suggest that the abandonment of this defense by the corporation itself and its failure to appeal from the judgment was due to anything else than a fair exercise of the judgment of its officers and of the attorney who represented the corporation in the lower court.

But this court concedes to Mr. Whitaker the right to rely upon the defense of the alleged nullity of the mortgage; and, at his instance only, the court has now set the mortgage aside. This, in my opinion, is improper practice. It is

true that corporation stockholders are entitled to defend legal proceedings in behalf of their corporation when its directors or managing agents are willfully or fraudulently neglectful of its interests; and the proper practice in such case is for the stockholders to move the court for leave to intervene in the suit they wish to defend, and to allege, and make a prima facie showing, that the authorized and managing agents of the corporation are derelict in their duties and that the corporation has a meritorious defense to the action (7 R. C. L., p. 334). No such showing has been made in this case, and, on the contrary, all the indications are that the course pursued by the officers of the corporation was adopted in good faith. Under these circumstances there is no propriety in allowing the stockholder to assert in this court a defense which has been abandoned by the corporation. In justification, apparently, of its departure at this point from the ordinary rule of procedure, the opinion of the court contains a statement to the effect that, in dealing with this case, the mode of approach of the court has been to sweep aside technicalities and resolve in a broad and liberal manner the various perplexing questions which are before the court. I agree that rules of procedure should, as a general rule, be applied in furtherance of justice; but when the accumulated experience of courts through a long period of time has determined that in an action against a corporation the right of defense, save in exceptional cases, pertains to the corporation concerned, arbitrary departures from that rule should not be allowed. To do so is to admit the mere caprice of the court as an acceptable criterion for the making of judicial decisions.

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