

WARNER, BARNES & CO., LIMITED, PLAINTIFF AND APPELLEE, VS. ROMAN JAUCIAN ET AL., DEFENDANTS AND APPELLANTS.

G.R.No. 3631. January 08, 1908

Ponente: WILLARD, J.

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WILLARD, J.:

The plaintiff brought this action in the Court of First Instance of the Province of Albay to foreclose a mortgage of 66,000 on certain real estate situated in said province. A final judgment was entered as prayed for in the complaint and from that judgment the defendants have appealed. The note secured by the mortgage, a copy of which was inserted in the complaint, is as follows:

"1. We promise to pay ten thousand pesos (10,000) on or before the 31st day of August, 1905.

"We promise to pay five thousand pesos (5,000) on or before the 31st day of December, 1905.

"We promise to pay five thousand pesos (5,000) on or before the 30th day of June, 1906, and successively five thousand pesos every six months until the payment of the total sum of sixty-six thousand five hundred pesos is completed.

"2. The total amount of the debt shall be paid to Warner, Barnes & Co., Limited, or to their legal representative, on or before the 31st day of December, 1910.

"3. In case of default, no payment being made on or before any of the days above fixed, all subsequent installments shall then be considered as due; payment of the half yearly installment due on or before the 30th day [of June] in each year may be extended until the 31st day of December of such year.

"4. In the case stated in the foregoing paragraph, the total amount due shall draw interest at the rate of 10 per cent per annum reckoned from the day when the annual payment should have been made.

"5. In case of default in any of the conditions stipulated above¹, in addition to whatever may be due, with interest thereon, we will pay the sum of one thousand five hundred pesos (1,500) as fees hereby agreed to, for the creditor's lawyers.

"Legaspi, twenty-eighth of February, nineteen hundred and five: Corrected—66,500.—Valid.—Roman Jaucian; Cirilo Jaucian.—Signed in the presence of Luis Palomar Baldovi; Basilio Cun."

Judgment by default having been entered against the defendants for failure to appear and answer, they made an application to set aside the default and for leave to answer. That application was denied and to the order denying it the defendants have excepted and have assigned that order as error in this court.

The affidavit upon which the application was made is as follows:

"First. That I am one of the defendants in the above entitled case.

"Second. That the documents which constitute our special defense in the present case are:

"(1) That if it is true that we and the plaintiff did execute a promissory note and the mortgage stated by the plaintiffs, the conditions thereof are, however, as follows: (a) That in case of default in any of the installments stipulated, we bind and subject ourselves in the penalty clause to pay interest, on the whole amount due, at the rate of 10 per cent per annum in addition to 1,500 for the plaintiff's lawyers; (b) that the due date of the main obligation is fixed for the 31st of December, 1910, which has not yet arrived; on said date, in case default should have been made in any of the installments fixed in the promissory note, we should have to pay, besides the principal sum due, interest at the rate of 10 per cent and 1,500 for the lawyer.

"All of which I declare to be true, and in witness thereof I hereby swear."

It is conceded by the appellants in their brief that this affidavit admitted the execution of the note and mortgage, but they claim that, notwithstanding such admission, it presented an issue of fact and that they should have been allowed to answer for the purpose of presenting such issue. It is very apparent that this contention can not be sustained. The only defense suggested by the affidavit is a defense based upon the construction of the note, the execution of which was admitted. It was claimed that the note did not become due until the 31st of December, 1910. This claim necessarily rested upon the note described in the complaint. There is no intimation in the affidavit that there was any other contract between the parties in reference to the matter other than this note and mortgage. Inasmuch as this question, as to the proper construction of the note, is raised by the exception to the final judgment, it is not necessary to consider the exception to the order refusing to allow the defendants' answer, for, under the former exception, they have a right to raise and have decided the only question suggested by their affidavit.

The construction of the note is free from doubt. It is true that the action was brought before the 31st day of December, 1910, but the right to bring it before that time is found in paragraph 3 of the note, in which it is distinctly stated that, if default is made in the payment of any installment, all the subsequent installments shall become due. It was admitted that there had been such default in prior installments. This provision that subsequent installments should become due in the case mentioned is not in any way varied by the provisions of paragraph 4 of the note. It will be observed that the note itself, if paid, according to its terms, bore no interest. The only object of article 4 was to provide that, if default was made, then the note should bear interest as to the entire amount from the time of such default.

The judgment of the court below is affirmed, with the costs of this instance against the appellants. So ordered.

Arellano, C. J., Torres, Mapa, Johnson, and Tracey, JJ., concur.
Carson, J., did not sit in this case.

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