JOSE P. BANZON AND LUCILA ROSAURO, PLAINTIFFS AND APPELLEES, VS. GEORGE C. SELLNER, DEFENDANT AND APPELLANT.

G.R. No. 39260. September 23, 1933

Ponente: VILLA-REAL, J.

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VILLA-REAL, J.:

This is an appeal taken by the defendant herein, George C. Sellner, from the judgment rendered by the Court of First Instance of Bataan, the dispositive part of which reads as follows:

> "Wherefore, the court renders judgment ordering the defendant, George C. Sellner, to pay to the plaintiffs Jose P. Banzon and Lucila Rosauro, within the period of three months from the date of this judgment, the sum of P35,000 with interest thereon at the rate of 10 per cent per annum from March 1, 1931, until fully paid, plus 5 per cent thereof as attorney's fees, with the costs of this suit against the defendant. In case of failure to make the required payment within the above-mentioned period, the parcels of land described in the complaint shall be ordered sold to satisfy the amount of the judgment, with the costs. So ordered."

In support of his appeal, the appellant assigns the following alleged errors as committed by the trial court in its decision, to wit:

> "1. The trial court erred in denying the motion for postponement of the trial based on the ground that the defendant was seriously ill, and in not permitting him to defend himself during the trial of the case.
>
> "2. The trial court erred in rendering judgment for the total amount of the obligation notwithstanding the fact that it was not yet due.
>
> "3. The trial court erred in rendering judgment ordering the defendant to pay the penal clause specified in the mortgage contract in spite of the fact that said contract was novated.
>
> "4. The trial court erred in having abused its discretionary power in each and every proceeding in the instant case.
>
> "5. The trial court erred in rendering judgment in this case and in denying the motion for a new trial."

The first question to decide in the case at bar is procedural in character and consists in whether or not the court a quo erred in denying the motion for postponement of trial filed by the attorney for the defendant, alleging as his ground that said defendant was seriously ill.

In support of his motion for postponement of the trial, the attorney in question presented a medical certificate, not sworn to, issued by Dr. H. H. Steinmetz.

This court has repeatedly held that it is discretionary on the part of the judge trying a case to grant or deny a postponement of the trial thereof, in accordance with the provisions of section 130 of the Code of Civil Procedure, and that unless said motion for postponement, based on the serious illness of the party requesting it, is accompanied with a sworn statement, either in the form of an affidavit or of a medical certificate, the court does

not commit an abuse of discretion in denying it. (Natividad vs. Marquez, 38 Phil., 608.)

The second question to decide is whether the mortgage creditor can institute foreclosure proceedings for the recovery of the full amount of the loan in spite of the fact that all the installments stipulated in the mortgage deed have not yet become due.

Although it is true that in the stipulation of facts entered into by the parties on October 13, 1932, new installments for the payment of the mortgage debt of the defendant George C. Sellner in favor of the plaintiffs-appellees Jose P. Banzon and Lucila Rosauro were established, and according to which the last installment- would be due in May, 1932—said date of maturity not having arrived yet on April 13, 1932, when the present complaint was filed—however, inasmuch as the former two installments had already become due, the payments corresponding to them were demandable and the creditors could foreclose the mortgage to recover the amount thereof. The third installment fell due before the defendant-appellant filed his answer and the plaintiffs could have amended their complaint so as to include the same had it not yet been included, but inasmuch as it was already included therein, and the defendant did not file any demurrer for its exclusion, there was no necessity for the said plaintiffs to amend their complaint for the purpose of including the same.

Although in loans payable in installments which do not contain any clause accelerating the maturity thereof, the payment of an installment cannot be demanded until it is due, however, when, the payment of all the installments including those not yet due is demanded in the complaint and no demurrer for the exclusion of those not yet due is filed, if such installments fall due during the pendency of the suit, they are included therein.

The third question to decide is whether or not the court a quo erred in ordering the defendant to pay the penal clause specified in the mortgage deed under consideration.

The defendant, in maintaining the affirmative, bases his contention on the assumption that the penal clause in question was cancelled when the mortgage deed in question was novated by virtue of the stipulation of April 13, 1932. It should be noted that at the end of the stipulation of facts above-mentioned it reads: "Without prejudice to the rights derived by the plaintiffs from the mortgage on the land described in the complaint." The penal clause referred to above being one of those rights which the plaintiffs reserved for themselves in the said stipulation, they have the right to demand compliance therewith.

In view of the foregoing considerations, we are of the opinion and so hold: (1) That it being discretionary on the part of the judge trying a case to grant or deny a postponement of the trial thereof (sec. 130, Act No. 190), his refusal to grant a motion for postponement based on the alleged serious illness of the party filing it and accompanied with a medical certificate not sworn to, does not constitute abuse of discretion (Natividad vs. Marquez, 38 Phil., 608); and (2) that when a demand for the payment of installments not yet due is included in the complaint for the recovery of installments due on a debt, and a demurrer for the exclusion thereof is not filed, and they fall due during the pendency of the suit, their inclusion is thereby rendered valid and the judgment for the whole amount of the complaint is not erroneous.

Wherefore, not finding any error in the judgment appealed from, and it appearing that the instant appeal is frivolous, the aforesaid judgment is hereby affirmed, with double costs against the appellant. So ordered.

Avanceña, C. J., Malcolm, Hull, and Imperial, JJ., concur.

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