

**LA COMPANIA GENERAL DE TABACOS DE FILIPINAS, PLAINTIFF
AND APPELLEE, VS. MATEO JIMENEZ AND SOCORRO FORTICH,
DEFENDANTS AND APPELLANTS.***G.R. No. 42277. August 30, 1935*

Ponente: GODDARD, J.

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The plaintiff instituted this action in the Court of First Instance of Occidental Misamis for the purpose of collecting from the defendants the sum of P17,500 with interest at 10 per cent per annum from February 18, 1928, until paid and to foreclose a mortgage on real estate executed by the defendants as security for the payment of that sum.

In the year 1922 the defendant, Mateo Jimenez, was designated as consignee of the plaintiff's vessel at Oroquieta, Misamis, and for his services he was to receive a commission of 5 per cent of the amount collected on outbound freight and 2¹/₂ per cent of the amount collected on inbound freight. Aside from his collections on outgoing freight the plaintiff intrusted him with considerable sums of money to be paid out for copra delivered to its warehouse in Oroquieta, where it was weighed by an employee of the plaintiff. The real estate mortgage, mentioned above, was executed as security for the payment of the sums received by him for freight, less his commission, and those received by him to pay for copra, less the amount paid out for that purpose. There was a mortgage on eight parcels of land executed on May 8, 1927, which the register of deeds of Misamis refused to register on account of certain defects appearing therein. In order to cure said defects the defendants, on June 3, 1927, executed another mortgage on the real property described in the mortgage of May 8, 1927. This latter instrument was registered under Act No. 3344, relating to land not registered under the Torrens System nor under the Spanish Mortgage Law. Later the plaintiff discovered that Jimenez was short in his accounts in the sum of P17,500 and on February 18, 1928, the latter executed a public document, Exhibit B, acknowledging his indebtedness in that amount in which he bound himself to pay said sum within three years from that date with interest at 10 per cent per annum. In that document it was stated that the sum acknowledged therein to be due was secured by the mortgage of May 8, 1927. Upon the evidence of record the trial court correctly held that the reference to the mortgage of May 8, 1927, was an error as that instrument was never registered and was substituted by the one of June 3, 1927. From the evidence before this court it is clear that both parties intended to refer to the later mortgage, which was executed in lieu of the defective one of May 8, 1927. To assume otherwise would be absurd. Furthermore, as stated above, the mortgage of June 3, 1927, was executed to secure the payment of the balance of the funds entrusted to the defendant and as his indebtedness of P17,500 grew out of the breach of that trust it follows that even though the document of acknowledgment contained no reference to that mortgage the plaintiff could not be prevented from instituting foreclosure proceedings.

The dispositive part of the decision of the trial court reads as follows:

"Dictese sentencia condenando al demandado Mateo Jimenez a pagar a la demandante, dentro de tres meses a contar de la fecha en que quede firme esta sentencia, la cantidad de P17,500 mas sus intereses vencidos a raz6n

de diez por ciento al ano desde el 18 de febrero de 1928 hasta su eompleto pago; y en el caso de incumplimiento dentro del plazo fijado en esta sentencia, ordenese la venta en publica subasta de los bienes hipotecados para que el producto de dicha venta sea destinado a la satisfaccion de esta sentencia, y de no ser suficiente para cubrir la sentencia, se dictara una orden de ejecucion contra los bienes de los demandados hasta su eompleto pago.

"Se absuelve a la demanaante de las reconvencciones presentadas por los demandados.

"Se condena, ademas, a los demandados al pago de las costas del juicio."

Defendants' first assignment of error reads:

"The court a quo erred in refusing to admit the second amended answer of the defendants."

The defendants state that the purpose of the second amended answer was to deny under oath the due execution of the mortgage of June 3, 1927 (Exhibit A). This answer appears on pages 35 to 43 of the Bill of Exceptions. The denial of the due execution of Exhibit A reads as follows:

"Que niegan de un modo general y especifico todas y cada una de las alegaciones en todos y cada uno de los parrafos de la demanda, particularmente la debida ejecucion de los Exhibits A y B que se hacen partes integrantes de la demanda." Neither of the defendants swore to this answer. It is sworn to by the attorney of the defendants. The oath reads as follows:

"I, Cristino G. Abasolo, after being duly sworn to, do depose and say:

"That I am the attorney for the defendants in the above entitled action; that the contents of the foregoing second amended answer are true and correct according to my best knowledge and information." This is not the denial under oath required by section 103 of our Code of Civil Procedure. The defendants know whether Exhibit A was duly executed or not. If it was not it is difficult to even imagine how an attorney could be aware of that fact of his own knowledge. If the mentioned documents are found to have been duly executed neither the defendants nor their attorney can be held for perjury in view of the language used in the oath of the former. There is no positive statement that the defendants did not sign Exhibits A and B or that they were otherwise false or fabricated. An oath of this kind made upon "best knowledge and information" is not sufficient and therefore the second amended answer did not deny under oath the due execution of Exhibits A and B. To hold that said answer is a compliance with the provisions of section 103 would be to virtually repeal that section.

In the case of *Songco vs. Sellner* (37 Phil., 254, 256), this court held that "* * * under section 103 of the Code of Civil Procedure it is necessary that the genuineness and due execution of the instrument shall be specifically denied before an issue is raised upon this point. This means that the defendant must declare under oath that he did not sign the document or that it is otherwise false or fabricated. * * *"

The first assignment of error should be and is hereby overruled.

The defendants' other assignments of error question the trial court's finding of facts and its order of foreclosure of the mortgage, Exhibit A.

In view of the fact that the defendant, Mateo Jimenez, signed Exhibit B on February 18, 1928, in which he acknowledged an indebtedness to the plaintiff in the sum of P17,500; that he also signed Exhibit D, on May 16, 1928, an itemized statement of his 'account with the plaintiff covering the full term of their business relations, which exhibit shows a balance against him in the sum of P40,476.68 and that he prepared in his own handwriting and signed Exhibit C on June 27, 1928, in which he accounts for this latter sum with a liquid balance against him in the sum of P17,500, it is evident that all of the remaining assignments of error should be and are, therefore, overruled.

The judgment of the trial court is affirmed with costs in both instances against the appellants with the understanding that in case the defendants do not pay the amount thereof within the time fixed therein the real property described in the mortgage, Exhibit A, will be sold at the foreclosure sale.

Malcolm, Villa-Real, Imperial, and Butte, JJ., concur.

Judgment affirmed.

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