

## **MACONDRAY &#038; CO., INC., PLAINTIFF AND APPELLANT, VS. PRAXEDES R. DE SANTOS, DEFENDANT AND APPELLEE.**

*G.R. No. 42416. April 09, 1935*

Ponente: GODDARD, J.

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### **GODDARD, J.:**

In this case the defendant demurred to the complaint, the trial court sustained the demurrer and gave the plaintiff five days within which to amend, if it so desired. Within the time designated the plaintiff excepted to the order sustaining the demurrer and gave notice that it elected to stand upon its complaint and thereupon the lower court, upon motion of the defendant, dismissed the complaint with costs against the plaintiff. In due time the plaintiff excepted to the order dismissing the complaint and moved for a new trial. Upon the denial of this motion the plaintiff excepted and upon appeal to this court alleges that the trial court erred:

"I. In sustaining the demurrer of the defendant to the plaintiff's complaint;

"II. In dismissing the case;

"III. In not rendering judgment in accordance with the prayer of the plaintiff's complaint;

"IV. Conceding, but not admitting, that the case falls under the provisions of Act No. 4122, the lower court erred in not finding that the said law is unconstitutional in that it confiscates property without due process of law., and denies the equal protection of the laws to the plaintiff.

"V. In not granting the plaintiff's motion for new trial."

The complaint alleges, for a first cause of action, that on January 11, 1934, the defendant executed and delivered to the plaintiff a promissory note for the sum of P1,000, with interest thereon at the rate of 12 per cent per annum, payable in installments as set forth in said promissory note and in case of default in the payment of the principal or interest an additional sum equal to 20 per cent of the total amount due was to be paid as attorney's fees; that to guarantee the payment of this note the defendant executed a duly registered chattel mortgage on a Willis 77, Sedan, automobile; that one of the conditions of said mortgage is that if the mortgaged property be lost, destroyed or damaged, for any cause whatsoever, the mortgagee would immediately have the right to foreclose and declare the whole amount of the principal and interest, secured by said mortgage, due and payable; that on January 21, 1934, the mortgaged automobile, while in possession and control of the defendant, met with an accident resulting in its total wreck and loss; that by reason of the failure of the defendant to replace or to restore the automobile to its former condition or to pay the value thereof plaintiff foreclosed its mortgage and what remained of the wrecked automobile was sold at public auction for the sum of P50; that after applying this amount to the account of defendant there was an unpaid balance of P980.39 plus interest at 12 per cent per annum from March 24, 1934, until paid, and 20 per cent of the amount due as attorney's fees, which defendant refused to pay in spite of demand therefor.

As a second and alternative cause of action, the plaintiff reproduces the allegations contained in the first cause of

action and alleges that another condition of the abovementioned chattel mortgage is that the defendant agreed to use extraordinary care and diligence in the preservation and maintenance of the mortgaged property and further engaged to pay any and all damages for deterioration, reasonable wear and tear excepted, resulting directly or indirectly from carelessness or neglect of any kind on the part of the mortgagor and alleges further that through the carelessness, neglect or reckless imprudence of the defendant and or her agents while the automobile was in her possession or under her control the same was totally wrecked by reason of which the plaintiff was damaged in the sums mentioned in the first cause of action and therefore the plaintiff prays that defendant be sentenced to pay the plaintiff the above-mentioned sum of ₱980.39 with interest at the rate of 12 per cent per annum from March 24, 1934, until paid, and 20 per cent of said sum as attorney's fees and the costs of this case.

The defendant, as the only ground of her demurrer, alleges that under the provisions of Act No. 4122, article 1454-A of the Civil Code, there is no cause of action against her. That article of the Civil Code reads as follows:

"Art. 1454-A. In a contract for the sale of personal property payable in installments, failure to pay two or more installments shall confer upon the vendor the right to cancel the sale or foreclose the mortgage if one has been given on the property, without reimbursement to the purchaser of the installments already paid, if there be an agreement to this effect.

"However, if the vendor has chosen to foreclose the mortgage he shall have no further action against the purchaser for the recovery of any unpaid balance owing by the same, and any agreement to the contrary shall be null and void."

Granting that there was a contract between the parties for the sale of personal property payable in installments, which does not clearly appear in the record before this court, the complaint does not allege nor does it appear in the record that there was a failure to pay two or more installments. On the contrary the promissory note, copied in the complaint, was executed January 11, 1934, and, according to the complaint, on or about January 21, 1934, the automobile, while in the possession of the defendant, was wrecked and by reason of the failure of the defendant to replace said automobile or to pay the value thereof the plaintiff foreclosed the mortgage on what remained of the wrecked automobile and brought this suit to recover the balance due on the promissory note executed in its favor.

In order to apply the provisions of article 1454-A of the Civil Code it must appear that there was a contract for the sale of personal property payable in installments and that there has been a failure to pay two or more installments.

In view of the above, the trial court erred in sustaining the demurrer. The appellant's first, second, third and fifth assignments of error are sustained. Wherefore it is not necessary to pass upon the fourth assignment of error.

The order of the trial court dismissing the complaint is hereby set aside and this case will be remanded to the trial court for further proceedings in accordance with law, with the costs of this appeal against the defendant-appellee.

Malcolm, Abad Santos, Hull, Vickers, Butte, and Diaz, JJ., concur.

Order set aside and case remanded for further proceedings.

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