

LUCIO HERRERA, PLAINTIFF AND APPELLEE, VS. IGNACIO NEIS AND BRUNO TEVES, DEFENDANTS.—BRUNO TEVES, APPELLANT.*G.R. No. 5995. February 10, 1911*

Ponente: TRENT, J.

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On the 5th day of April, 1906, the Court of First Instance of the Province of Cebu, in a civil action pending before it, in which Lucio Herrera, the present plaintiff, was plaintiff, and one Santiago Roldan Sy Cangjo was defendant, for the recovery of the sum of P4,826.62 and the interest on the same at 6 per cent per annum until the sum should be fully paid, issued a writ of attachment against the goods of Santiago Roldan Sy Cangjo for the purpose of assuring the collection of the judgment, if one should be obtained in the action. On or about the 25th of April, 1906, the said Santiago Roldan Sy Cangjo obtained the release of said attachment by giving an undertaking signed by the defendants in this case, Ignacio Neis and Bruno Teves, in the following form:

"Whereas the plaintiff above named asked for writ of attachment against the goods of the defendant in the sum of P5,000; and,

"Whereas the Court of First Instance, on the 5th day of January, 1906, issued the mandamus prayed for by the plaintiff for the said sum of P5,000, unless the defendant give an undertaking conditioned that he pay the judgment which might be obtained against him in said suit, if any, in accordance with section 424 of the Code of Procedure in Civil Actions:

"Therefore, we, the undersigned, Ignacio Neis and Bruno Teves, of full age, residents and property holders of Cebu, for the purpose of securing the dissolution of the said attachment, hereby obligate ourselves, jointly and severally, in the sum of P5,000, and promise that, in case the judgment in this case be favorable to the plaintiff, the defendant, on demand, shall redeliver to the officer of the court the property attached in order that it may be applied to the payment of the judgment, and that, in case this is not done, the defendant and his sureties, on demand, will pay to the plaintiff the full value of the goods so released from attachment. Furthermore, the said defendant and his said, sureties, on demand, will pay the sum demanded in the complaint, with all the costs and damages which the court shall find in his judgment against the defendant: Provided, always, That said amount shall not exceed the sum of P5,000.

"Dated at Cebu, the 21st day of April, 1906."

In consideration of the execution of said undertaking, the Court of First Instance dissolved the attachment and the property released was delivered to Santiago Roldan Sy Cangjo.

On the 8th of September, 1906, the court entered a judgment in favor of the plaintiff, Lucio Herrera, against the defendant, Santiago Roldan Sy Cangjo, for the sum of P4,826.62, with interest thereon at the rate of 6 per cent per annum from the 1st day of October, 1904. An appeal was taken from this judgment, which appeal resulted in an affirmance of the same by the Supreme Court.[1] An execution was thereafter issued upon this judgment against the property of Santiago Roldan Sy Cangjo and there was recovered thereon only the sum of P1,650, there being

no other property found belonging to the defendant from which any other or further sum could be obtained.

This action was begun against the sureties to recover the sum of P3,176.62, with interest on P4,826.62 at 6 per cent per annum from the 1st day of October, 1904, until the date on which the sum of P1,650 was recovered by the sheriff on the execution, and also interest at the rate of 6 per cent per annum on P3,176.62 until the sum is fully paid. The sum of P3,176.62 is the difference between the amount of the judgment obtained against Santiago Roldan Sy Cangjo, namely, P4,826.62, and the sum of P1,650 paid by the sheriff to the plaintiff by virtue of the execution issued on said judgment.

The defendant Ignacio Neis did not appeal.

Section 440 of the Code of Procedure in Civil Actions provides as follows:

"At any time, after the commencement of an action upon which an order of attachment has been made, the defendant may upon reasonable notice to the plaintiff, apply to the judge or justice of the peace who granted the order of attachment, or to the judge of the court in which the action is pending, for an order to discharge the attachment, wholly or in part; and the judge or justice of the peace shall, after hearing, on due notice to both parties, discharge the order of attachment provided the defendant shall execute an obligation to the plaintiff with surety to be approved by the judge, or justice of the peace, to the effect that in case the plaintiff recover judgment in the action, the defendant will, on demand, redeliver the attached property so released to the officer of the court, to be applied to the payment of the judgment, or, in default thereof, that the defendant and surety will, on demand, pay to the plaintiff the full value of the property released. The judge or justice of the peace making such order may fix the sum for which the undertaking must be executed, and for that purpose may take such steps as he finds necessary to determine the value of the property attached, which obligation shall be filed with the other papers in the cause, and upon its approval by the judge or justice of the peace and the making of the order by him for the discharge of the attachment, all of the property so released, and all of the proceeds of the sale thereof, shall be delivered to the defendant, the obligation aforesaid standing in place of the property so released."

It is evident from the section just quoted that the only condition which, under the law, needs to be placed in a bond given on the dissolution of an attachment is "that in case the plaintiff recover judgment in the action, the defendant will, on demand, redeliver the attached property so released to the officer of the court, to be applied to the payment of the judgment, or, in default thereof, that the defendant and surety will, on demand, pay to the plaintiff the full value of the property released."

The bond given by the defendants in this case, and upon which this action is brought, contained the condition above mentioned and also the following condition:

"Furthermore, the said defendant and his said sureties, on demand, will pay the sum demanded in the complaint, with all the costs and damages which the court shall find in his judgment against the defendant: Provided, always, That said amount shall not exceed the sum of P5,000."

Apparently the plaintiff relied upon the clause just quoted and not upon the first condition in the bond. He rested his case without proving the value of the property attached and subsequently returned to the defendant upon the dissolution of the attachment. The trial court called the attention of plaintiff's counsel to the fact that he had failed to prove the value of such property and suggested the necessity of making such proof. In reply to this suggestion, counsel said:

"The sureties say in their undertaking 'we will pay the sum demanded in the complaint, with all the costs and damages which the court shall find in his judgment against the defendant: Provided, always,.That said amount shall not exceed the .sum of P5,000.' The undertaking, as I understand it, contains two promises on the part of the sureties: One, that they will pay the value of the property attached; and the other, that they will respond for

the full amount of the judgment. The undertaking which is the subject of this complaint does not correspond exactly to that required by the Code, as section 440 says that the undertaking shall be for the value of the property attached. The undertaking given is, in addition, for the sum demanded in the complaint, with costs,"

No proof was offered as to the value of the goods attached and subsequently returned to the debtor upon the dissolution of the attachment. The question before us is whether or not the plaintiff may recover upon that provision of the undertaking wherein the signers of said bond obligated themselves, in addition to redelivering the property attached to the sheriff or pay its value, to pay the sum demanded in the complaint, together with costs, and damages, providing the same should not exceed P5,000.

We are of the opinion that the plaintiff can not recover. The bond is a statutory bond. It is made by virtue and because of the law. The consideration for the undertaking given is the release of the property attached by the plaintiff. The law requires that such attachment shall be released when the defendant has given an undertaking to deliver the property or to respond for its value. When such an undertaking is given the defendant is entitled, as a matter of law, to the redelivery of the property attached. When he has given such an undertaking, he has done all that the law requires. He is entitled to his property without the necessity of incurring further obligation.

On the other hand, all that the plaintiff is entitled to, under the law, is to be assured by a proper undertaking that, if he redelivers the property to the defendant, such property will, in case he succeeds, be redelivered to the officer of the court or its value paid to him. When he has received this assurance in due form of law, he has received all to which he is entitled. The law permits him to require no more. On the delivery of an undertaking assuring to him one or the other of these things, he is obligated, by law, to redeliver the property without demanding further liability on the part of the defendant. This being so, what consideration was there for the additional provision incorporated in the undertaking referred to, wherein and whereby the judgment debtor and the sureties agreed to pay any Judgment that might be secured against him under the pleadings? We are satisfied that there was none. Such promise on the part of the sureties and of the judgment debtor was wholly without consideration. It was something over and above that which the law required for the protection of the plaintiff's rights. By such provision the judgment debtor and the sureties promised to do something that they were not under any legal or moral obligation to do. For the doing of it they received no consideration whatsoever.

"Recovery upon a bond may be prevented by a want of consideration." (Mt. Pleasant vs. Hobart, 25 Kan., 719; Lee vs. Wisner, 38 Mich., 82; State vs. Bartlett, 30 Miss., 324; Long vs. Gilliam, 28 Mo., 560.)

In the case of *Bandoy vs. Judge of First Instance* (14 Phil. Rep., 620), this court said:

"Where the form of the bond for the purpose of admitting a defendant in a criminal case to liberty during the pendency of the action is prescribed by law, such form must be followed in substance. The authorities can not impose a greater obligation than that prescribed by such form. The authorities can not vary its terms, so as to impose upon the defendant and his bondsmen greater obligations." (Citing *U. S. vs. Sauer*, 73 Fed. Rep., 671.)

The fact that the conditions of the undertaking given were more onerous than those required by the law does not make the bond void. It is still a valid undertaking and may be enforced to the extent of the statutory requirements.

"A bond which contains all the conditions required by statute, and also conditions in excess of those specified by statute, is valid, so far as it imposes obligations authorized by the statute, and the stipulations which are in excess of it may be rejected as surplusage." (*U. S. vs. Mynderse*, Fed. Cas. No. 15851; *U. S. vs. Humason*, Fed. Cas. No. 15420; *Woods vs. State*, 10 Mo., 698; *Polk vs. Plummer*, 21 Tenn., 500; *Hall vs. Cushing*, 26 Mass., 395,)

"Although a statutory bond is conditioned for the performance of things beyond those specified in the statute, yet it will be good as to those specified in the statute and in the bond, unless the statute prescribes the form of

the bond, and provides that it shall be taken in that form and no other." (Speck vs. Commonwealth, 3 Watts & S., 324; Anderson vs. Foster, 2 Bail., 501.)

The bond under consideration being one provided by statute and the last condition not being required, we must regard it as if it had not been expressed in the bond.

As we have said, the plaintiff relied upon the last condition of the bond. He did not prove the value of the property attached. The court called his attention to this fact and he replied by saying that the sureties said that: "We will pay the sum demanded in the complaint." But he did offer to present this proof before the trial closed. He honestly believed that the defendants had made themselves liable for the whole amount of the claim. The trial court took this view. He found at first that the question was not free from doubt. Under these circumstances we believe that, in the interest of justice, the plaintiff should be given an opportunity to prove the value of said property.

The judgment is, therefore, reversed and a new trial granted for this purpose only. Without any special ruling as to costs. So ordered.

Mapa, Carson, and Moreland, JJ., concur.

Arellano, C. J., dissents.

[1] Herrera vs. Roldan Sy Cangjo, 10 Phil. Rep., 751

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