

**INCHAUSTI & CO., PLAINTIFF AND APPELLANT, VS. GREGORIO YULO, DEFENDANT AND APPELLEE.***G.R. No. 7721. March 25, 1914*

Ponente: ARELLANO, C.J.

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<!--;This suit is brought for the recovery of a certain sum of money, the balance of a current account opened by the firm of Inchausti & Company with Teodoro Yulo and after his death continued with his widow and children, whose principal representative is Gregorio Yulo. Teodoro Yulo, a property owner of Iloilo, for the exploitation and cultivation of his numerous haciendas in the province of Occidental Negros, had been borrowing money from the firm of Inchausti & Company under specific conditions. On April 9, 1903, Teodoro Yulo died testate and for the execution of the provisions of his will he had appointed as administrators his widow and five of his sons, Gregorio Yulo being one of the latter. He thus left a widow, Gregoria Regalado, who died on October 22d of the following year, 1904, there remaining of the marriage the following legitimate children: Pedro, Francisco, Teodoro, Manuel, Gregorio, Mariano, Carmen, Concepcion, and Jose Yulo y Regalado. Of these children Concepcion and Jose were minors, while Teodoro was mentally incompetent. At the death of their predecessor in interest, Teodoro Yulo, his widow and children held the conjugal property in common and at the death of this said widow, Gregoria Regalado, these children preserved the same relations under the name of Hijos de T. Yulo continuing their current account with Inchausti & Company in the best and most harmonious reciprocity until said balance amounted to two hundred thousand pesos. In this state of affairs the creditor firm tried to obtain security for the payment of the disbursements of money which until that time it had been making in favor of its debtors, the Yulos.

First. Gregorio Yulo, for himself and in representation of his brothers Pedro, Francisco, Manuel, Mariano, and Carmen, executed on June 26, 1908, a notarial document (Exhibit S) whereby all admitted their indebtedness to Inchausti & Company in the sum of P203,221.27 and, in order to secure the same with interest thereon at 10 per cent per annum, they especially mortgaged an undivided six-ninth of their thirty-eight rural properties, their remaining urban properties, lorchas, and family credits which were listed, obligating themselves to make a formal inventory and to describe in due form all the said properties, as well as to cure all the defects which might prevent the inscription of the said instrument in the registry of property and finally to extend by the necessary formalities the aforesaid mortgage over the remaining three-ninths part of all the property and rights belonging to their other brothers, the incompetent Teodoro, and the minors Concepcion and Jose.

Second. On January 11, 1909, Gregorio yulo in representation of Hijos de T. Yulo answered a letter of the firm of Inchausti & Company in these terms: "With your favor of the 2d inst. we have received an abstract of our current account with your important firm, closed on the 31st of last December, with which we desire to express our entire conformity as also with the balance in your favor of P271.863.12." On July 17, 1909, Inchausti & Company informed Hijos de T. Yulo of the reduction of the said balance to P253,445.42, with which balance Hijos de T, Yulo expressed its conformity by means of a letter of the 19th of the same month and year. Regarding this

conformity a new document evidencing the mortgage credit was formalized.

Third. On August 12, 1909, Gregorio Yulo, for himself and in representation of his brother Manuel Yulo, and in their own behalf Pedro Yulo, Francisco Yulo, Carmen Yulo, and Concepcion Yulo, the latter being of age at the time, executed the notarial instrument (Exhibit X). Through this, the said persons, including Concepcion Yulo, ratified all the contents of the prior document of June 26, 1908, severally and jointly acknowledged and admitted their indebtedness to Inchausti & Company for the net amount of two hundred fifty-three thousand four hundred forty-five pesos and forty-two centavos (P253,445.42) which they obligated themselves to pay, with interest at ten per cent per annum, in five installments at the rate of fifty thousand pesos (P50,000), except the last, this being fifty-three thousand four hundred forty-five pesos and forty-two centavos (P53,445.42), beginning June 30, 1910, continuing successively on the 30th of each June until the last payment on June 30, 1914. Among other clauses, they expressly stipulated the following:

"Fifth. The default in payment of any of the installments established in clause 3, or the noncompliance of any of the other obligations which by the present document and that of June 26, 1908, we, the Yulos, brothers and sisters, have assumed, will result in the maturity of all the said installments, and as a consequence thereof, if they so deem expedient Messrs. Inchausti & Company may exercise at once all the rights and actions which to them appertain in order to obtain the immediate and total payment of our debt, in the same manner that they would have so done at the maturity of the said installments."

"Fifteenth. All the obligations which by this, as well as by the document of June 26, 1908, concern us, will be understood as having been contracted in solidum by all of us, the Yulos, brothers and sisters.

"Sixteenth. It is also agreed that this instrument shall be confirmed and ratified in all its parts, within the present week, by our brother Don Mariano Yulo y Regalado who resides in Bacolod, otherwise it will not be binding on Messrs. Inchausti & Company who can make use of their rights to demand and obtain the immediate payment of their credit without any further extension or delay, in accordance with what we have agreed."

Fourth. This instrument was neither ratified nor confirmed by Mariano Yulo.

Fifth. The Yulos, brothers and sisters, who executed the preceding instrument, did not pay the first installment of the obligation.

Sixth. Therefore, on March 27, 1911, Inchausti & Company brought an ordinary action in the Court of First Instance of Iloilo, against Gregorio Yulo for the payment of the said balance due of two hundred fifty-three thousand, four hundred forty-five pesos and forty-two centavos (P253,445.42) with interest at ten per cent per annum, on that date aggregating forty-two thousand, nine hundred forty-four pesos and seventy-six centavos (P42,944.76).

Seventh. But, on May 12, 1911, Francisco, Manuel, and Carmen Yulo y Regalado executed in favor of Inchausti & Company another notarial instrument in recognition of the debt and the obligation of payment in the following terms: "First, the debt is reduced for them to two hundred twenty-five thousand pesos (P225,000) ; second, the interest is likewise reduced for them to 6 per cent per annum, from March 15, 1911; third, the installments are increased to eight, the first of P20,000, beginning on June 30, 1911, and the rest of P30,000 each on the same date of each successive year until the total obligation shall be finally and satisfactorily paid on June 30, 1919," it being expressly agreed "that if any of the partial payments specified in the foregoing clause be not paid at its maturity, the amount of the said partial payment together with its interest shall bear interest at the rate of 15 per cent per annum from the date of said maturity, without the necessity of demand until its complete payment;" that "if during two consecutive years the partial payments agreed upon be not made, they shall lose the right to make use of the

period granted to them for the payment of the debt or the part thereof which remains unpaid, and that Messrs. Inchausti & Company may consider the total obligation due and demandable, and proceed to collect the same together with the interest for the delay above stipulated through all legal means." (4th clause.)

Thus was it stipulated between Inchausti & Company and the said three Yulos, brothers and sisters—by way of compromise so that Inchausti & Company might, as it did, withdraw the claims pending in the special proceedings for the probate of the will of Don Teodoro Yulo and of the intestacy of Dona Gregoria Regalado—stipulating expressly however in the sixth clause that "Inchausti & Company should include in their suit brought in the Court of First Instance of Iloilo against Don Gregorio Yulo, his brother and joint coobligee, Don Pedro Yulo, and they will procure by all legal means and in the least time possible a judgment in their favor against the said Don Gregorio and Don Pedro, sentencing the later to pay the total amount of the obligation acknowledged by them in the aforementioned instrument of August 12, 1909; with the understanding that if they should deem it convenient for their interests, Don Francisco, Don Manuel, and Dona Carmen Yulo may appoint an attorney to cooperate with the lawyers of Inchausti & Company in the proceedings of the said case."

Eighth. Matters being thus on July 10, 1911, Gregorio Yulo answered the complaint and alleged as defenses: first, that an accumulation of interest had taken place and that compound interest was asked for in Philippine currency at par with Mexican; second, that in the instrument of August 12, 1909, two conditions were agreed one of which ought to be approved by the Court of First Instance, and the other ratified and confirmed by the other brother Mariano Yulo, neither of which was complied with; third, that with regard to the same debt claims were presented before the commissioners in the special proceedings over the in-hheritances of Teodoro Yulo and Gregoria Regalado, though later they were dismissed, pending the present suit; fourth and finally, that the instrument of August 12, 1909, was novated by that of May 12, 1911, executed by Manuel, Francisco and Carmen Yulo.

Ninth. The Court of First Instance of Iloilo decided the case "in favor of the defendant without prejudice to the plaintiff's bringing within the proper time another suit for his proportional part of the joint debt, and that the plaintiff pay the costs." (B. of E., 21.)

The plaintiff appealed from this judgment by bill of exceptions and before this court made the following assignment of errors:

I. That the court erred in considering the contract of May 12, 1911, as constituting a novation of that of August 12, 1909.

II. That the court erred in rendering judgment in favor of the defendant.

III. And that the court erred in denying the motion for a new trial.

"No one denies in this case," says the trial judge, "that the estate of Teodoro Yulo or his heirs owe Inchausti & Company an amount of money, the object of this action, namely, P253,445.42" (B. of E. 18). "The fact is admitted," says the defendant, "that the plaintiff has not collected the debt, and that the same is owing" (Brief, 33). "In the arguments of the attorneys," the judge goes on, "it was really admitted that the plaintiff had a right to bring an action against Gregorio Yulo, as one of the conjoint and solidary obligors in the contract of August 12, 1909; but the defendant says that the plaintiff has no right to sue him alone, since after the present suit was brought, the plaintiff entered into a compromise with the other conjoint and solidary debtors, the result being the new contract of May 12, 1911, by virtue of which the payments were extended, the same constituting a novation of the contract which gave him the same privileges that were given his conjoint and solidary codebtors. This (the judge concludes) is the only question brought up by the parties." (B. of E., 19.)

And this is the only one which the Supreme Court has to solve by virtue of the assignments of errors alleged.

Consequently, there is no need of saying anything regarding the first three defenses of the answer, nor regarding the lack of the signature of Mariano Yulo ratifying and confirming the instrument of August 12, 1909, upon which the appellee still insists in his brief for this appeal; although it will not be superfluous to state the doctrine that a condition, such as is contained in the sixteenth clause of the said contract (third point in the statement of facts), is by no means a suspensive but a resolutive condition; the effect of the failure of compliance with the said clause, that is to say, the lack of the ratification and confirmance by Mariano Yulo being not to suspend but to resolve the contract, leaving Inchausti & Company at liberty, as stipulated, "to make use of its rights to demand and obtain the immediate payment of its credit."

The only question indicated in the decision of the inferior court involves, however, these others: First, whether the plaintiff can sue Gregorio Yulo alone, there being other obligors; second, if so, whether it lost this right by the fact of its having agreed with the other obligors in the reduction of the debt, the proroguing of the obligation and the extension of the time for payment, in accordance with the instrument of May 12, 1911; third, whether this contract with the said three obligors constitutes a novation of that of August 12, 1909, entered into with the six debtors who assumed the payment of two hundred fifty-three thousand and some odd pesos, the subject matter of the suit; and fourth, if not so, whether it does have any effect at all in the action brought, and in this present suit.

With respect to the first it cannot be doubted that, the debtors having obligated themselves in solidum, the creditor can bring its action in toto against any one of them, inasmuch as this was surely its purpose in demanding that the obligation contracted in its favor should be solidary having in mind the principle of law that, "when the obligation is constituted as a conjoint and solidary obligation each one of the debtors is bound to perform in full the undertaking which is the subject matter of such obligation." (Civil Code, articles 1137 and 1144.)

And even though the creditor may have stipulated with some of the solidary debtors diverse installments and conditions, as in this case, Inchausti & Company did with its debtors Manuel, Francisco, and Carmen Yulo through the instrument of May 12, 1911, this does not lead to the conclusion that the solidarity stipulated in the instrument of August 12, 1909 is broken, as we already know the law provides that "solidarity may exist even though the debtors are not bound in the same manner and for the same periods and under the same conditions." (Ibid., article 1140.) Whereby the second point is resolved.

With respect to the third, there can also be no doubt that the contract of May 12, 1911, does not constitute a novation of the former one of August 12, 1909, with respect to the other debtors who executed this contract, or more concretely, with respect to the defendant Gregorio Yulo: First, because "in order that an obligation may be extinguished by another which substitutes it, it is necessary that it should be so expressly declared or that the old and the new be incompatible in all points" (Civil Code, article 1204) ; and the instrument of May 12, 1911, far from expressly declaring that the obligation of the three who executed it substitutes the former signed by Gregorio Yulo and the other debtors, expressly and clearly stated that the said obligation of Gregorio Yulo to pay the two hundred and fifty-three thousand and odd pesos sued for exists, stipulating that the suit must continue its course and, if necessary, these three parties who executed the contract of May 12, 1911, would cooperate in order that the action against Gregorio Yulo might prosper (7th point in the statement of facts), with other undertakings concerning the execution of the judgment which might be rendered against Gregorio Yulo in this same suit. "It is always necessary to state that it is the intention of the contracting parties to extinguish the former obligation by the new one" (Judgment in cassation, July 8, 1909). There exist no incompatibility between the old and the new obligation as will, be demonstrated in the resolution of the last point, and for the present we will merely reiterate the legal doctrine that an obligation to pay a sum of money is not novated in a new instrument wherein the old is ratified, by changing only the term of payment and adding other obligations not incompatible with the old one. (Judgments in cassation of June 28, 1904 and of July 8, 1909.)

With respect to the last point, the following must be borne in mind:

Facts.—First. Of the nine children of T. Yulo, six executed the mortgage of August 12, 1909, namely, Gregorio, Pedro, Francisco, Manuel, Carmen, and Concepcion, admitting a debt of P253,445.42 at 10 per cent per annum and mortgaging six-ninths of their hereditary properties. Second. Of those six children, Francisco, Manuel and Carmen executed the instrument of May 12, 1911, wherein was obtained a reduction of the capital to 225,000 pesos and of the interest to 6 per cent from the 15th of March of the same year of 1911. Third. The other children of T. Yulo named Mariano, Teodoro, and Jose have not taken part in these instruments and have not mortgaged their hereditary portions. Fourth. By the first instrument the maturity of the first installment was June 30, 1910, whereas by the second instrument, Francisco, Manuel, and Carmen had in their favor as the maturity of the first installment of their debt, June 30, 1912, and Fifth, on March 27, 1911, the action against Gregorio Yulo was already filed and judgment was pronounced on December 22, 1911, when the whole debt was not yet due nor even the first installment of the same respecting the three aforesaid debtors, Francisco, Manuel, and Carmen.

In jure it would follow that by sentencing Gregorio Yulo to pay 253,445 pesos and 42 centavos, the sum demanded as capital by virtue of the instrument of August 12, 1909, this debtor, if he should pay all this sum, could not recover from his joint debtors Francisco, Manuel, and Carmen their proportional parts of the P253,445.42 which he had paid, inasmuch as the three were not obligated by virtue of the instrument of May 12, 1911, to pay only 225,000 pesos, thus constituting a violation of Gregorio Yulo's right under such hypothesis, of being reimbursed for the sum paid by him, with the interest of the amounts advanced at the rate of one-sixth part from each of his five codebtors. (Civ. Code, article 1145, par. 2). This result would have been a ponderous obstacle against the prospering of the suit as it had been brought. It would have been very just then to have absolved the solidary debtor who having to pay the debt in its entirety would not be able to demand contribution from his codebtors in order that they might reimburse him pro rata for the amount advanced for them by him. But such hypothesis must be put out of consideration by reason of the fact that occurred during the pendency of the action, which fact the judge states in his decision. "In this contract of May last," he says, "the amount of the debt was reduced to P225,000 and the attorney of the plaintiff admits in his plea that Gregorio Yulo has a right to the benefit of this reduction." (B. of E. (19.) This is a fact which this Supreme Court must hold as firmly established, considering that the plaintiff in its brief, on page 27, corroborates the same in these words: "What effect," it says, "could this contract have over the rights and obligations of the defendant Gregorio Yulo with respect to the plaintiff company? In the first place, we are the first to realize that it benefits him with respect to the reduction of the amount of the debt. The obligation being solidary, the remission of any part of the debt made by a creditor in favor of one or more of the solidary debtors necessarily benefits the others, and therefore there can be no doubt that, in accordance with the provision of article 1143 of the Civil Code, the defendant has the right to enjoy the benefits of the partial remission of the debt granted by the creditor."

Wherefore we hold that although the contract of May 12, 1911, has not novated that of August 12, 1909, it has affected that contract and the outcome of the suit brought against Gregorio Yulo alone for the sum of P253,445.42; and in consequence thereof, the amount stated in the contract of August 12, 1909, cannot be recovered but only that stated in the contract of May 12, 1911, by virtue of the remission granted to the three of the solidary debtors in this instrument, in conformity with what is provided in article 1143 of the Civil Code, cited by the creditor itself.

If the efficacy of the later instrument over the former touching the amount of the debt had been recognized, should such efficacy not likewise be recognized concerning the maturity of the same? If Francisco, Manuel, and Carmen had been included in the suit, they could have alleged the defense of the nonmaturity of the installments since the first installment did not mature until June 30, 1912, and without the least doubt the defense would have prospered,

and the three would have been absolved from the suit. Cannot this defense of the prematurity of the action, which is implied in the last special defense set up in the answer of the defendant Gregorio Yulo be made available to him in this proceeding?

The following commentary on article 1140 of the Civil Code sufficiently answers this question: "\* \* \* Before the performance of the condition, or before the execution of a term which affects one debtor alone proceedings may be had against him or against any of the others for the remainder which may be already demandable but the conditional obligation or that which has not yet matured cannot be demanded from any one of them. Article 1148 confirms the rule which we now enunciate inasmuch as in case the total claim is made by one creditor, which we believe improper if directed against the debtor affected by the condition or the term, the latter can make use of such exceptions as are peculiarly personal to his own obligation; and if against the other debtors, they might make use of those exceptions, even though they are personal to the other, inasmuch as they alleged them in connection with that part of the responsibility attaching in a special manner to the other." (8 Manresa, Sp. Civil Code, 196.)

Article 1148 of the Civil Code.—"The solidary debtor may utilize against the claims of the creditor all the defenses arising from the nature of the obligation and those which are personal to him. Those personally pertaining to the others may be employed by him only with regard to the share of the debt for which the latter may be liable."

Gregorio Yulo cannot allege as a defense to the action that it is premature. When the suit was brought on March 27, 1911, the first installment of the obligation had already matured of June 30, 1910, and with the maturity of this installment, the first not having been paid, the whole debt had become mature, according to the express agreement of the parties, independently of the resolutory condition which gave the creditor the right to demand the immediate payment of the whole debt upon the expiration of the stipulated term of one week allowed to secure from Mariano Yulo the ratification and confirmation of the contract of August 12, 1909.

Neither could he invoke a like exception for the shares of his solidary codebtors, ;Pedro and Concepcion Yulo, they being in identical condition as he.

But as regards Francisco, Manuel, and Carmen Yulo, none of the installments payable under their obligation, contracted later, had as yet matured. The first payment, as already stated, was to mature on June 30, 1912. This exception or personal defense of Francisco, Manuel, and Carmen Yulo "as to that part of the debt for which they were responsible" can be set up by Gregorio Yulo as a partial defense to the action. The part of the debt for which these three are responsible is three-sixths of P225,000 or P112,500, so that Gregorio Yulo may claim that, even acknowledging that the debt for which he is liable is P225,000, nevertheless not all of it can now be demanded of him, for that part of it which pertained to his codebtors is not yet due, a state of affairs which not only prevents any action against the persons who were granted the term which has not yet matured, but also against the other solidary debtors who being ordered to pay could not now sue for a contribution, and for this reason the action will be only as to the P112,500.

Against the propriety and legality of a judgment against Gregorio Yulo for this sum, to wit, the three-sixths part of the debt which forms the subject matter of the suit, we do not think that there was any reason or argument offered which sustains an opinion that for the present it is not proper to order him to pay all or part of the debt, the object of the action.

It has been said in the brief of the appellee that the prematurity of the action is one of the defenses derived from the nature of the obligation, according to the opinion of the commentator of the Civil Code, Mucius Scaevola, and consequently the defendant Gregorio Yulo may make use of it in accordance with article 1148 of the said Code. It

may be so and yet, taken in that light, the effect would not be different from that already stated in this decision; Gregorio Yulo could not be freed from making any payment whatever but only from the payment of that part of the debt which corresponds to his codebtors Francisco, Manuel, and Carmen. The same author, considering the case of the opposing contention of two solidary debtors as to one of whom the obligation is pure and unconditional and as to the other it is conditional and is not yet demandable, and comparing the disadvantages which must flow from holding that the obligation is demandable with these which must follow if the contrary view is adopted, favors this solution of the problem:

"There is a middle ground, (he says), from which we can safely set out, to wit, that the creditor may of course, demand the payment of his credit against the debtor not favored by any condition or extension of time." And further on, he decides the question as to whether the whole debt may be recovered or only that part unconditionally owing or which has already matured, saying, "Without failing to proceed with juridical rigor, but without falling into extravagances or monstrosities, we believe that the solution of the difficulty is perfectly possible. How? By limiting the right of the creditor to the recovery of the amount owed by the debtors bound unconditionally or as to whom the obligation has matured, and leaving in suspense the right to demand the payment of the remainder until the expiration of the term of the fulfillment of the condition. But what then is the effect of solidarity? How can this restriction of right be reconciled with the duty imposed upon each one of the debtors to answer for the whole obligation? Simply this, by recognizing in the creditor the power, upon the performance of the condition or the expiration of the term of claiming from any one or all of the debtors that part of the obligation affected by those conditions." (Scaevola, Civil Code, 19, 800 and 801.)

It has been said also by the trial judge in his decision that if a judgment be entered against Gregorio Yulo for the whole debt of P253,445.42, he cannot recover from Francisco, Manuel, and Carmen Yulo that part of the amount which is owed by them because they are obliged to pay only 225,000 pesos and this in eight installments none of which was due. For this reason he was of the opinion that he (Gregorio Yulo) cannot be obliged to pay his part of the debt before the contract of May 12, 1911, may be enforced, and "consequently he decided the case in favor of the defendant, without prejudice to the plaintiff proceeding in due time against him for his proportional part of the joint debt." (B. of E., 21 and 22.)

But in the first place, taking into consideration the conformity of the plaintiff and the provision of article 1143 of the Civil Code, it is no longer possible to sentence the defendant to pay the P53,445.42 of the instrument of August 12, 1909, but, if anything, the P225,000 of the instrument of May 12, 1911.

In the second place, neither is it possible to curtail the defendant's right of recovery from the signers of the instrument of May 12, 1911, for he was justly exonerated from the payment of that part of the debt corresponding to them by reason of there having been upheld in his favor the exception of an unmatured installment which pertains to them.

In the third place, it does not seem just, Mucius Scaevola considers it "absurd," that, there being a debtor who is unconditionally obligated as to when the debt has matured, the creditor should be forced to await the realization of the condition (or the expiration of the term). Not only is there no reason for this, as stated by the author, but the court would even fail to consider the special law of the contract, neither repealed nor novated, which cannot be emitted without violating article 1091 of the Civil Code according to which "the obligations arising from contracts have the force of law between the contracting parties and must be complied with in accordance with the tenor of the same." Certain it is that the trial court, in holding that this action was premature but might be brought in due time, regarded the contract of August 12, 1909, as having been expressly novated; but it is absolutely impossible in law to sustain such supposed novation, in accordance with the legal principles already stated, and nevertheless the obligation of the contract of May 12, 1911, must likewise be complied with in accordance with its tenor,

which is contrary in all respects to the supposed novation, by obliging the parties who signed the contract to carry on the suit brought against Gregorio Yulo. The contract of May 12, 1911, has affected the action and the suit, to the extent that Gregorio Yulo has been able to make in his favor the defense of remission of part of the debt, thanks to the provision of article 1148, because it is a defense derived from the nature of the obligation, so that although the said defendant was not party to the contract in question, yet because of the principle of solidarity he was benefited by it.

The defendant Gregorio Yulo cannot be ordered to pay the P253,445.42 claimed from him in the suit here, because he has been benefited by the remission made by the plaintiff to three of his codebtors, many times named above.

Consequently, the debt is reduced to 225,000 pesos.

But, as it cannot be enforced against the defendant except as to the three-sixths part which is what he can recover from his joint codebtors Francisco, Manuel, and Carmen, at present, judgment can be rendered only as to the P112,500.

We therefore sentence the defendant Gregorio Yulo to pay the plaintiff Inchausti & Company P112,500, with the interest stipulated in the instrument of May 12, 1911, from March 15, 1911, and the legal interest on this interest due, from the time that it was claimed judicially in accordance with article 1109 of the Civil Code, without any special finding as to costs. The judgment appealed from is re-versed. So ordered.

Carson, Trent, and Araullo, JJ., concur.

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### **DISSENTING**

### **MORELAND, J.,**

In my judgment the action must be dismissed, as it was brought prematurely. The defendant was entitled to all of the benefits of the contract of May 12, 1911, between the plaintiff and Francisco, Manuel, and Carmen. One of these provisions was that the first payment need not be made until June 30, 1912. The action was commenced on the 27th of March, 1911, and although this date was prior to the date of the second contract, that is, the contract with Francisco, Manuel, and Carmen, said contract was executed before the trial of the action, and some of the beneficial provisions therein contained were to produce their effects from March 15, 1911, a date prior to the commencement of the action. At the time of the trial the defendant could, in my judgment, have interposed, under the allegations of the amended answer, any of the defenses which could have been made use of by Francisco, Manuel, or Carmen if they had been the defendant. That being the case, nothing was due the plaintiff at the time it sued and accordingly its action must be dismissed with costs.

For these reasons I vote to affirm.

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