

VICTORIA SEOANE, ADMINISTRATRIX OF THE INTESTATE ESTATE OF EDUARDO FARGAS, PLAINTIFF AND APPELLEE, VS. CATALINA FRANCO, ADMINISTRATRIX OF THE INTESTATE ESTATE OF MANUEL FRANCO, ...

G.R. No. 7859. February 12, 1913

Ponente: MORELAND, J.

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MORELAND, J.:

This is an appeal from a judgment of the Court of First Instance of Zamboanga in favor of the plaintiff, holding that the right of action upon the mortgage debt which was the basis of the claim presented against the plaintiffs estate had prescribed.

The mortgage in question was executed on the 13th of October, 1884, to secure the payment of the sum of P4,876.01, the mortgagor agreeing to pay the sum "little by little." The claim appears to have been presented to the plaintiff's intestate on the 8th of August, 1911. Nothing has been paid either of principal or of interest.

We are of the opinion that this case falls within the provisions of article 1128 of the Civil Code, which reads as follows:

"1128. When the obligation does not fix a term, but it can be inferred from its nature and circumstance that there was an intention of granting it to the debtor, the courts shall fix the duration of such a term.

"The courts shall also fix the duration of a term when it may have been left at the will of the debtor."

The obligation in question seems to leave the duration of the period for the payment thereof to the will of the debtor. It appears also that it was the intention of the instrument to give the debtor time within which to pay the obligation. In such cases this court has held, on several occasions, that the obligation is not due and payable until an action has been commenced by the mortgagee against the mortgagor for the purpose of having the court fix the date on and after which the instrument shall be payable and the date of maturity is fixed in pursuance thereof. The case of *Eleizegui vs. The Manila Lawn Tennis Club* (2 Phil Rep., 309), in which the opinion was written by the Chief Justice of the court, is the leading case upon the subject. In that case the question was over the duration of a lease concerning "a piece of land for a fixed consideration and to endure at the will of the lessee." In discussing the question the court said (p. 310):

"With respect to the term of the lease the present question has arisen. In its discussion three theories have been presented: One which makes the duration depend upon the will of the lessor, who, upon one month's notice given to the 'lessee, may terminate the lease so stipulated; another which, on the contrary, makes it dependent upon the will of the lessee, as stipulated; and the third, in accordance with which the right is reserved to the court to fix the duration of the term."

The clause on which the case turns is as follows (p. 312):

"Mr. Williamson, or whoever may succeed him as secretary of the club, may terminate this lease whenever desired without other formality than that of giving a month's notice. The owners of the land undertake to maintain the club as tenant as long as the latter shall see fit."

Considering the case the court said (p. 314):

"The Civil Code has made provision for such a case in all kinds of obligations. In speaking in general of obligations with a term it has supplied the deficiency of the former law with respect to the 'duration of the term when it has been left to the will of the debtor and provides that in this case the term shall be fixed by the courts. (Art. 1128, sec. 2.) In every contract, as laid down by the authorities, there is always a creditor who is entitled to demand the performance, and a debtor upon whom rests the obligation to perform the undertaking. In bilateral contracts the contracting parties are mutually creditors and debtors. Thus, in this contract of lease, the lessee is the creditor with respect to the rights enumerated in article 1554, and is the debtor with respect to the obligations imposed by articles 1555 and 1561. The term within which performance of the latter obligation is due is what has been left to the will of the debtor. This term it is which must be fixed by the courts.

"The only action which can be maintained under the terms of the contract is that by which it is sought to obtain from the judge the determination of this period, and not the unlawful detainer action which has been brought—an action which presupposes the expiration of the term and makes it the duty of the judge to simply decree an eviction. To maintain the latter action it is sufficient to show the expiration of the term of the contract, whether conventional or legal; in order to decree the relief to be granted in the former action it is necessary for the judge to look into the character and conditions of the mutual undertakings with a view to supplying the lacking element of a time at which the lease is to expire."

The case of *Barretto vs. The City of Manila* (7 Phil. Rep., 416) dealt with a case where the terms of a donation did not fix the time of the performance of the condition placed upon the donation, and the court held that the period must be determined by the court in a proper action in accordance with article 1128 of the Civil Code, saying (p. 420):

"The contract having fixed no period in which the condition should be fulfilled, the provisions of article 1128 of the Civil Code are applicable and it is the duty of the court to fix a suitable time for its fulfillment. *Eleizegui vs. The Manila Lawn Tennis Club*, 2 Phil. Rep., 309' (11 Phil. Rep., 624.[1])

In the case of *Levy Hermanos vs. Paterno* (18 Phil. Rep., 353) the court said (p. 355):

"The defendant having bound himself to pay his debt to the plaintiffs in partial payments, as set forth in the note in question, it is seen that the obligation is one of payment by installments, since its fulfillment cannot be required immediately nor does its existence depend upon the happening of any particular event. But, though the obligation is one of payment by installments, nevertheless no fixed day was specified for its fulfillment, so that the period for payment is undetermined or was not fixed by the parties when they executed the contract. Besides, it is evident that the term for payment was granted for the exclusive benefit of the defendant and for his own convenience, as by the language of the document, the plaintiffs gained nothing by the fact that the debt was not immediately demandable. Nor was any interest stipulated on the debt during the time that it should remain unpaid by the defendant. For the foregoing reasons, and in whatever manner this case be considered, it is unquestionable that it falls within the provisions of article 1128 of the Civil Code. * * *

"The obligation being manifestly defective with regard to the duration of the period granted to the debtor, that is, to the defendant, that defect must be cured by the courts through judicial decision which shall determine the said duration, under the power expressly granted them for such purpose by the legal provisions just above transcribed.

"The trial court, therefore, acted in accordance with the law in exercising the said power in the present case, by fixing the duration of the period on the basis that the payment of the debt should be made at the rate of P200 a

month; and we see no abuse of judicial discretion in fixing such a rate, considering the importance of the obligation and the absence of any stipulation of interest in favor of the creditors."

From these decisions it is clear that the instrument sued upon in the case at bar is one which leaves the period of payment at the will of the mortgagor. Such being the case, an action should have been brought for the purpose of having the court set a date on which the instrument should become due and payable. Until such action was prosecuted no suit could be brought for the recovery of the amount named in the instrument. It is, therefore, clear that this action is premature. The instrument has been sued upon before it is due. The action must accordingly be dismissed.

Ordinarily, when an action of this sort is dismissed the plaintiff may at once begin his action for the purpose of fixing a date upon which the instrument shall become due. From the undisputed facts in this case and from the facts and conditions that very probably cannot be charged hereafter, it is our present opinion that such action is itself prescribed. Section 38 of the Code of Civil Procedure reads as follows:

"SEC. 38. To what this chapter does not apply.—This chapter shall not apply to actions already commenced, or to cases wherein the right of action has already accrued; but the statutes in force when the action or right of action accrued shall be applicable to such cases according to the subject of the action and without regard to the form; nor shall this chapter apply in the case of a continuing and subsisting trust, nor to an action by the vendee of real property in possession thereof to obtain the conveyance of it: Provided, nevertheless, That all rights of action which have already accrued, except those named in the last preceding paragraph, must be vindicated by the commencement of an action or proceeding to enforce the same within ten years after this Act comes into effect."

This section evidently covers all rights of action of whatever kind or nature, except those which have special limitations and are referred to in subsequent sections. A right of action to fix a day for the determination of the time of payment is included within the terms of this section. The mortgage in question having left the period of payment to the will of the mortgagor, an action could have been maintained by the mortgagee at any time after its execution for the naming of a date on which the instrument must be paid in full. That right of action accrued as soon as the instrument was executed. Such action, therefore, falls within the provisions of section 38, and not having been, commenced within the ten years next following the 1st day of October, 1901, such action cannot, under the facts as they now appear, be maintained.

While the expression of an opinion as to the prescription of the action to fix a date for the maturity of the obligation in question is unnecessary for a complete resolution of the case before us, still we do not hesitate to express that opinion for the reasons which we have heretofore given in one or two other cases, particularly that of *Lichauco vs. Limjuco* (19 Phil. Rep., 12). That case went off upon the finding of the court that the action could not be maintained by the plaintiff, Lichauco, on behalf of his brothers and sisters and upon that finding the complaint was dismissed. While the merits in that case were not necessarily before us, we nevertheless took up the facts as they appeared and expressed our opinion of what the result of the case would be upon the merits if it subsequently came before us upon the same facts. In that case we said (p. 17):

"We believe, however, that, for the information of the parties interested in the subject matter of this action and to the end that unnecessary litigation may be avoided, the opinion of the court should be given upon the facts presented in this case. Knowing what our opinion is upon these facts it is probable that the heirs will not care to pursue the litigation further unless, which is somewhat unlikely, they are able to present new facts. We, therefore, proceed to a consideration of the case upon the merits as presented by the record."

The judgment is affirmed, with costs against the appellant. So ordered.

Arellano, C. J., Torres, Mapa, and Trent, JJ., concur.

[1] Barretto vs. City of Manila.

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