

INCHAUSTI & CO., PLAINTIFF AND APPELLEE, VS. BENITO DE LEON, DEFENDANT AND APPELLANT.*G.R. No. 7887. January 31, 1913*

Ponente: TRENT, J.

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This is a suit for the foreclosure of a mortgage on real estate in the Province of Sorsogon. The defendant appeared and demurred to the complaint. The demurrer was overruled, the defendant failed to answer within the time specified by the rules of the court, and was, on motion, declared in default. Upon the evidence presented by the plaintiff after the entry of the default, judgment was rendered decreeing a foreclosure of the mortgage in the event of the failure of the defendant to satisfy the judgment before the first day of the next succeeding term of the court. This judgment is dated March 15, 1911. On April 6, the defendant appeared by counsel and excepted to the decision of the court, and moved for a new trial. On the 5th of June the motion for a new trial was denied. The defendant then presented his bill of exceptions.

It is contended on behalf of the appellant that the court below erred in ordering judgment by default (a) because it was not stated in the order overruling the demurrer that the defendant would be in default in the event of his failure to answer within the period prescribed by the rules of the court; and (b) because no notice was given the defendant of plaintiff's motion for default judgment.

In support of the first point, counsel cites *Ward vs. Ward* (59 Cal., 139), a case to the effect that where it is not stated in the summons that judgment will be given in default if defendant fails to appear within the prescribed time, no judgment by default can be taken. The validity of orders overruling demurrers was in no way involved in that case, and for this reason it is obvious that the doctrine therein announced is not applicable to the case at bar. If the summons in the case under consideration had failed to contain a notice that unless the defendant appeared and answered, the plaintiff would take judgment by default, the result might have been different; as section 392 of Act No. 190 provides that the summons must contain:

"3. A notice that unless the defendant so appears and answers, plaintiff will take judgment by default, and demand from the court the relief applied for in the complaint."

Rule 9 of the Courts of First Instance, and which is applicable to the question under consideration, provides:

"When a demurrer to the complaint is overruled the defendant shall answer within five days after the service on him of written notice of the order, which notice the plaintiff shall give."

Rules of court promulgated by authority of law and not in conflict with law have the force and effect of law. The law requires that summonses must contain the notice as provided in the above section. No provision of law, no rule of court, or approved practice requires such a notice to be inserted in the order overruling a demurrer. Such being the case, the appellant's first alleged error is not well taken.

With reference to the second alleged error, it is sufficient to say that this court has held that a defendant whose

demurrer to the complaint has been overruled and who fails to answer within the time prescribed by the rules of the court is not entitled to a notice of the motion to declare him in default, (Duran vs. Arboleda, 20 Phil. Rep., 253.) For the foregoing reasons the judgment appealed from is affirmed, with costs against the appellant.

Arellano, C. J., Torres, Johnson, and Moreland, JJ., concur.

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