

**E. C. MCCULLOUGH & COMPANY, PLAINTIFF AND APPELLEE,
VS. CARSON TAYLOR ET AL., DEFENDANTS AND APPELLANTS.***G.R. No. 8172. August 23, 1913*

Ponente: TRENT, J.

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In this case the defendant and appellant Taylor made a conditional sale of some chattels to one Tuohy under a written contract dated January 26, 1911. The contract price was P750. After acknowledging receipt of a payment of P150, the contract provides that the balance of P600 should be "paid within four months from date hereof, i.e., on or before the 25th day of May, 1911." The contract further provides:

"It is further agreed that the title to the property above described shall remain in the party of the first part until the full payment of the said purchase price."

From the stipulation of facts entered into by the parties, and upon which the case was submitted to the court, it appears that the property was levied upon by the plaintiff in the case at bar, E. C. McCullough & Co., as the judgment creditor of Tuohy, at which time the sum of P650 only had been paid Taylor. Taylor claimed the property, and as McCullough & Co. refused to file a bond with the sheriff, the levy was discharged. Later, however, McCullough & Co., under the same execution, levied upon all the rights of Tuohy in the property. The sheriff sold Tuohy's rights in the property at public auction, they being purchased by his judgment creditor, the plaintiff in the present case, for the sum of P26. The latter thereupon tendered Taylor the P100 still due him upon the purchase price and demanded the delivery of the property, Taylor refusing to accept the one and make the other.

The defendant relies in this instance upon the proposition that Tuohy acquired the property under a conditional sale, and that as he failed to comply with the requirements of the contract by not paying the full amount of the purchase price "on or before the 25th day of May, 1911," his rights to the property were extinguished; in other words, that Tuohy's rights to the property were forfeited by his failure to comply with this condition.

An inspection of the contract does not disclose an express stipulation that the property was to revert to the vendor and that payments already made were to be forfeited upon the vendee's failure to make final payment on or before the specified date. We see nothing in it which would prevent the vendor from suing for the remainder of the purchase price had he so desired and obviously, the vendor could not do this and at the same time demand the return of the goods together with the forfeiture of the payments already made. It might be true that he could have demanded possession of the goods had he so desired after the failure of the vendee to complete payment for the property on or before May 25. As to whether an accompanying demand for the forfeiture of the payments already made would have been sustained does not necessarily arise in this case. But the trend of the cases seems to be that a forfeiture clause must be sufficiently set forth in the contract so that the intention of the parties to that effect is not in doubt.

"A lex commissoria is never presumed: that is to say, unless it is agreed when the contract is made that it shall

be voidable at the vendor's option unless the purchase money is paid by a day fixed, the vendor cannot treat it, on default in payment, as no longer binding; he can only sue for the money and for damages' (Moyle's Contract of Sale in the Civil Law, p. 173.)

In *Carpenter vs. Blandford* (8 B. & C, 575, 108 Eng. Rep., 1156) it was said: "The defendant in this case insists on a forfeiture, which is strictissimi juris."

And in *Irish vs. Lundin* (28 Neb., 84) it is said that forfeitures are odious in law, and are never presumed or enforced except when, clearly and unmistakably expressed.

But assuming, without deciding, that the parties desired and that the contract contains a forfeiture clause, it was waived by the defendant's failure to enforce it at the proper time. The contract was executed on January 25, 1911, at which time only P150 of the purchase price had been paid. When the other P500 was paid does not appear; but we cannot presume that all installments of it were paid before May 25. Indeed, since the vendee still had possession of the property so late as September 6, 1911 (as we shall see), the inference would be the other way. These facts of continued possession and the acceptance of payments up to within two-fifteenths of the purchase price lead to no other conclusion than that the parties had disregarded for the time being the condition that the full purchase price must be paid on or before May 25, 1911, and that they were acting under the last clause above quoted; that the vendor still recognized in the vendee the right to make final payment and perfect his title, and that he did not regard the clause above referred to as having extinguished all rights of the vendee to the property on May 25. In speaking of conditional sales containing a forfeiture clause, *Mechem on Sales*, section 609, says:

"The law has no interests of its own to subserve in insisting upon forfeitures or the other results of default. The remedies it gives are for the benefit of the vendor, and he may waive them if he will. He may do this, moreover, either expressly or by implication, and as the results of default more often work hardship to the buyer than to the seller, the law looks with complacency at least upon those acts of the vendor which may fairly be construed as indicative of his intention not to insist upon a forfeiture of the buyer's rights. If, therefore, the seller, notwithstanding the default, does not avail himself of his appropriate remedy, but so acts as to reasonably warrant the inference that he regards the buyer's right as still subsisting, he will be deemed to have waived the default, and he will not be at liberty to declare a forfeiture until he has in some way put the buyer, whom he has thus misled, in the attitude of a fresh default."

Our examination of the cases upon this point leads us to believe that the learned author has very fairly stated the law.

In *Mosby vs. Goff* (21 R. I., 494), the court, citing several cases, said:

"The cases proceed on the principle that where, on a conditional sale of a chattel, it is agreed that the vendee is to have possession and pay the price within a fixed time, and after the purchase money has become due and remains unpaid, the vendee is permitted to retain possession, and the vendor receives part payment, such receipt is an assent of the vendor to delay, a waiver of any forfeiture, and a recognition of the right of the vendee to acquire title by payment of the residue of the purchase money; and that this right continues until a demand for such payment by the vendor and a neglect or refusal of the vendee to comply with the demand."

We are clearly of the opinion that, even assuming a forfeiture clause in the present case, it was waived by the vendor at the time he had a right to enforce it. A subsequent desire on his part to enforce the forfeiture is a question of evidence and can best be answered by an examination of the record.

At the time the first levy was made, September 1, 1911, the property was in the possession of Tuohy in the De la Rama Building. At the time of the second levy, September 6, 1911, the property was still in the De la Rama Building, "where it was at the time the first levy was made." At the time this action was brought, the property was

in the possession of the defendant Taylor. These facts are taken from the stipulation of the parties above referred to. This stipulation was assented to by both parties, and it must be presumed that an attempt was made to set forth the real facts of the case. Had Taylor taken actual possession of the property between the time of the first and second levy, why was the distinction made that on September 6 the property was still in the De la Rama Building where it was at the time the first levy was made, while it is further stated that at the time this action was brought the property was in the possession of the defendant Taylor? It would be a most strained construction of this instrument to conclude that the one statement was equivalent to the other, especially in view of the fact that it is clearly stated that only five days previous to the second levy the property was in the possession of the vendee, and the further fact that it had not been moved from the place where he kept it. It does not appear that the defendant Taylor exercised any act of ownership or asserted any right of possession to the property until after the vendee's interest had been levied upon by the sheriff on September 6, 1911. It is true that upon the levy of September 1 being made he claimed the property as owner, but it is conceded that he had claimed as owner, i. e., claimed to have legal title, all the time. We therefore hold that the property in question was still in the possession of Tuohy when his interest in it was sold by the sheriff.

Was the interest which Tuohy had in the property capable of being sold at an execution sale? There is a clear distinction between the sale of property itself, where title remains in the vendor until payment of the purchase price, and the sale of the interest of the vendee in such property. None of the cases cited by the appellant refer to the latter proposition. Section 450 of our Code of Civil Procedure expressly authorizes the sale upon execution of "any interest * * * of the judgment debtor." This section has recently been construed by this court as follows;

"This statute authorizes the sale under execution of every kind of property, and every interest in property which is, or may be, the subject of private ownership and transfer. It deals with equitable rights and interests as it deals with legal, without anywhere expressly recognizing or making any distinction between them." (Reyes vs. Grey, 21 Phil. Rep., 73.)

At the close of its decision the lower court said:

"As to the equities of the case, we are not sure that it is less equitable to give plaintiff the benefit of his purchase, even for the small consideration paid, than it would be to construe the instrument as effecting a forfeiture of the vendee's rights after he had paid all but two-fifteenths of the purchase price. If the price paid at the execution sale was small the fault was not plaintiff's. All of the defendants had an equal right to participate at that sale and raise plaintiff's bid if they saw fit. Having failed to do so, they are hardly in a position to complain of the result."

The judgment of the lower court, ordering the delivery of the property to the plaintiff upon its payment to the defendant of the sum of P100, is affirmed with costs. So ordered.

Arellano, C. J., Torres and Carson, JJ., concur.

MORELAND, J., concurring:

I agree to the decision except in so far as it deals with the subject of forfeitures. As to that question I reserve my judgment.

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