

SILVESTRA BARON, PLAINTIFF AND APPELLANT, VS. PABLO DAVID, DEFENDANT AND APPELLANT,*G.R. Nos. 26948 and 26949. October 08, 1927*

Ponente: STREET, J.

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These two actions were instituted in the Court of First Instance of the Province of Pampanga by the respective plaintiffs, Silvestra Baron and Guillermo Baron, for the purpose of recovering from the defendant, Pablo David, the value of palay alleged to have been sold by the plaintiffs to the defendant in the year 1920. Owing to the fact that the defendant is the same in both cases and that the two cases depend in part upon the same facts, the cases were heard together in the trial court and determined in a single opinion. The same course will accordingly be followed here.

In the first case, i. e., that in which Silvestra Baron is plaintiff, the court gave judgment for her to recover of the defendant the sum of P5,238.51, with costs. From this judgment both the plaintiff and the defendant appealed.

In the second case, i. e., that in which Guillermo Baron is plaintiff, the court gave judgment for him to recover of the defendant the sum of P5,734.60, with costs, from which judgment both the plaintiff and the defendant also appealed. In the same case the defendant interposed a counterclaim in which he asked credit for the sum of P2,800 which he had advanced to the plaintiff Guillermo Baron on various occasions. This credit was admitted by the plaintiff and allowed by the trial court. But the defendant also interposed a cross-action against Guillermo Baron in which the defendant claimed compensation for damages alleged to have been suffered by him by reason of the alleged malicious and false statements made by the plaintiff against the defendant in suing out an attachment against the defendant's property soon after the institution of the action. In the same cross-action the defendant also sought compensation for damages incident to the shutting down of the defendant's rice mill for the period of one hundred seventy days during which the above-mentioned attachment was in force. The trial judge disallowed these claims for damages, and from this feature of the decision the defendant appealed. We are therefore confronted with five distinct appeals in this record.

Prior to January 17, 1921, the defendant Pablo David had been engaged in running a rice mill in the municipality of Magalang, in the Province of Pampanga, a mill which was well patronized by the rice growers of the vicinity and almost constantly running. On the date stated a fire occurred that destroyed the mill and its contents, and it was some time before the mill could be rebuilt and put in operation again. Silvestra Baron, the plaintiff in the first of the actions before us, is an aunt of the defendant; while Guillermo Baron, the plaintiff in the other action, is his uncle. In the months of March, April, and May, 1920, Silvestra Baron placed a quantity of palay in the defendant's mill; and this, in connection with some that she took over from Guillermo Baron, amounted to 1,012 cavans and 24 kilos. During approximately the same period Guillermo Baron placed other 1,865 cavans and 43 kilos of palay in the mill. No compensation has ever been received by Silvestra Baron upon account of the palay thus placed with the defendant. As against the palay delivered by Guillermo Baron, he has received from the defendant advancements amounting to P2,800; but apart from this he has not been compensated. Both the plaintiffs claim

that the palay which was delivered by them to the defendant was sold to the defendant; while the defendant, on the other hand, claims that the palay was deposited subject to future withdrawal by the depositors or subject to some future sale which was never effected. He therefore supposes himself to be relieved from all responsibility by virtue of the fire of January 17, 1921, already mentioned.

The plaintiffs further say that their palay was delivered to the defendant at his special request, coupled with a promise on his part to pay for the same at the highest price per cavan at which palay would sell during the year 1920; and they say that in August of that year the defendant promised to pay them severally the price of P8.40 per cavan, which was about the top of the market for the season, provided they would wait for payment until December. The trial judge found that no such promise had been given; and the incredulity of the court upon this point seems to us to be justified. A careful examination of the proof, however, leads us to the conclusion that the plaintiffs did, some time in the early part of August, 1920, make demand upon the defendant for a settlement, which he evaded or postponed, leaving the exact amount due to the plaintiffs undetermined.

It should be stated that the palay in question was placed by the plaintiffs in the defendant's mill with the understanding that the defendant was at liberty to convert it into rice and dispose of it at his pleasure. The mill was actively running during the entire season, and as palay was daily coming in from many customers and as rice was being constantly shipped by the defendant to Manila, or other rice markets, it was impossible to keep the plaintiffs' palay segregated. In fact the defendant admits that the plaintiffs' palay was mixed with that of others. In view of the nature of the defendant's activities and the way in which the palay was handled in the defendant's mill, it is quite certain that all of the plaintiffs' palay, which was put in before June 1, 1920, had been milled and disposed of long prior to the fire of January 17, 1921. Furthermore, the proof shows that when the fire occurred there could not have been more than about 360 cavans of palay in the mill, none of which by any reasonable probability could have been any part of the palay delivered by the plaintiffs. Considering the fact that the defendant had thus milled and doubtless sold the plaintiffs' palay prior to the date of the fire, it results that he is bound to account for its value, and his liability was not extinguished by the occurrence of the fire. In the briefs before us it seems to have been assumed by the opposing attorneys that in order for the plaintiffs to recover, it is necessary that they should be able to establish that the plaintiffs' palay was delivered in the character of a sale, and that if, on the contrary, the defendant should prove that the delivery was made in the character of deposit, the defendant should be absolved. But the case does not depend precisely upon this explicit alternative; for even supposing that the palay may have been delivered in the character of deposit, subject to future sale or withdrawal at plaintiffs' election, nevertheless if it was understood that the defendant might mill the palay and he has in fact appropriated it to his own use, he is of course bound to account for its value. Under article 1768 of the Civil Code, when the depositary has permission to make use of the thing deposited, the contract loses the character of mere deposit and becomes a loan or a commodatum; and of course by appropriating the thing, the bailee becomes responsible for its value. In this connection we wholly reject the defendant's pretense that the palay delivered by the plaintiffs or any part of it was actually consumed in the fire of January, 1921. Nor is the liability of the defendant in any wise affected by the circumstance that, by a custom prevailing among rice millers in this country, persons placing palay with them without special agreement as to price are at liberty to withdraw it later, proper allowance being made for storage and shrinkage, a thing that is sometimes done, though rarely.

In view of what has been said it becomes necessary to discover the price which the defendant should be required to pay for the plaintiffs' palay. Upon this point the trial judge fixed upon P6.15 per cavan; and although we are not exactly in agreement with him as to the propriety of the method by which he arrived at this figure, we are nevertheless of the opinion that, all things considered, the result is approximately correct. It appears that the price of palay during the months of April, May, and June, 1920, had been excessively high in the Philippine Islands, and even prior to that period the Government of the Philippine Islands had been attempting to hold the price in

check by executive regulation. The highest point which was touched in this season was apparently about P8.50 per cavan, but the market began to sag in May or June and presently entered upon a precipitate decline. As we have already stated, the plaintiffs made demand upon the defendant for settlement in the early part of August; and, so far as we are able to judge from the proof, the price of P6.15 per cavan, fixed by the trial court, is about the price at which the defendant should be required to settle as of that date. It was the date of the demand of the plaintiffs for settlement that determined the price to be paid by the defendant, and this is true whether the palay was delivered in the character of sale with price undetermined or in the character of deposit subject to use by the defendant. It results that the plaintiffs are respectively entitled to recover the value of the palay which they had placed with the defendant during the period referred to, with interest from the date of the filing of their several complaints.

As already stated, the trial court found that at the time of the fire there were about 360 cavans of palay in the mill and that this palay was destroyed. His Honor assumed that this was part of the palay delivered by the plaintiffs, and he held that the defendant should be credited with said amount. His Honor therefore deducted from the claims of the plaintiffs their respective proportionate shares of this amount of palay. We are unable to see the propriety of this feature of the decision. There were many customers of the defendant's rice mill who had placed their palay with the defendant under the same conditions as the plaintiffs, and nothing can be more certain than that the palay which was burned did not belong to the plaintiffs. That palay without a doubt had long been sold and marketed. The assignments of error of each of the plaintiffs-appellants in which this feature of the decision is attacked are therefore well taken; and the appealed judgments must be modified by eliminating the deductions which the trial court allowed from the plaintiffs' claims.

The trial judge also allowed a deduction from the claim of the plaintiff Guillermo Baron of 167 cavans of palay, as indicated in Exhibits 12, 13, 14, and 16. This was also erroneous. These exhibits relate to transactions that occurred nearly two years after the transactions with which we are here concerned, and they were offered in evidence merely to show the character of subsequent transactions between the parties, it appearing that at the time said exhibits came into existence the defendant had reconstructed his mill and that business, relations with Guillermo Baron had been resumed. The transactions shown by these exhibits (which relate to palay withdrawn by the plaintiff from the defendant's mill) were not made the subject of controversy in either the complaint or the cross-complaint of the defendant in the second case. They therefore should not have been taken into account as a credit in favor of the defendant. Said credit must therefore be likewise disallowed, though this feature of our decision will of course be without prejudice to any proper adjustment of the rights of the parties with respect to these subsequent transactions that they have heretofore or may hereafter effect.

The preceding discussion disposes of all vital contentions relative to the liability of the defendant upon the causes of action stated in the complaints. We proceed therefore now to consider the question of the liability of the plaintiff Guillermo Baron upon the cross-complaint of Pablo David in case R. G. No. 26949. In this cross-action the defendant seeks, as stated in the third paragraph of this opinion, to recover damages for the wrongful suing out of an attachment by the plaintiff and the levy of the same upon the defendant's rice mill. It appears that about two and one-half months after said action was begun, the plaintiff, Guillermo Baron, asked for an attachment to be issued against the property of the defendant; and to procure the issuance of said writ the plaintiff made affidavit to the effect that the defendant was disposing, or attempting to dispose of his property for the purpose of defrauding the plaintiff. Upon this affidavit an attachment was issued as prayed, and on March 27, 1924, it was levied upon the defendant's rice mill, and other property, real and personal.

Upon attaching the property the sheriff closed the mill and placed it in the care of a deputy. Operations were not resumed until September 13, 1924, when the attachment was dissolved by an order of the court and the defendant

was permitted to resume control. At the time the attachment was levied there were, in the bodega, more than 20,000 cavans of palay belonging to persons who held receipts therefor; and in order to get this grain away from the sheriff, twenty-four of the depositors found it necessary to submit third-party claims to the sheriff. When these claims were put in the sheriff notified the plaintiff that a bond in the amount of P50,000 must be given, otherwise the grain would, be released. The plaintiff, being unable or unwilling to give this bond, the sheriff surrendered the palay to the claimants; but the attachments the rice mill was maintained until September 13, as above stated, covering a period of one hundred seventy days during which the mill was idle. The ground upon which the attachment was based, as set forth in the plaintiffs affidavit, was that the defendant was disposing or attempting to dispose of his property for the purpose of defrauding the plaintiff. That this allegation was false is clearly apparent, and not a word of proof has been submitted in support of the assertion. On the contrary, the defendant testified that at the time this attachment was secured he was solvent and could have paid his indebtedness to the plaintiff if judgment had been rendered against him in ordinary course. His financial condition was of course well known to the plaintiff, who is his uncle. The defendant also states that he had not conveyed away any of his property, nor had intended to do so, for the purpose of defrauding the plaintiff. We have before us therefore a case of a baseless attachment, recklessly sued out upon a false affidavit and levied upon the defendant's property to his great and needless damage. That the act of the plaintiff in suing out the writ was wholly unjustifiable is perhaps also indicated in the circumstance that the attachment was finally dissolved upon the motion of the plaintiff himself.

The defendant testified that his mill was accustomed to clean from 400 to 450 cavans of palay per day, producing 225 cavans of rice, of 57 kilos each. The price charged for cleaning each cavan of rice was 30 centavos. The defendant also stated that the expense of running the mill per day was from P18 to P25, and that the net profit per day on the mill was more than P40. As the mill was not accustomed to run on Sundays and holidays, we estimate that the defendant lost the profit that would have been earned on not less than one hundred forty work days. Figuring his profits at P40 per day, which would appear to be a conservative estimate, the actual net loss resulting from his failure to operate the mill during the time stated could not have been less than P5,600. The reasonableness of these figures is also indicated in the fact that the twenty-four customers who intervened with third-party claims took out of the camarin 20,000cavans of palay, practically all of which, in the ordinary course of events, would have been milled in this plant by the defendant. And of course other grain would have found its way to this mill if it had remained open during the one hundred forty days when it was closed.

But this is not all. When the attachment was dissolved and the mill again opened, the defendant found that his customers had become scattered and could not be easily gotten back. So slow, indeed, was his patronage in returning that during the remainder of the year 1924 the defendant was able to mill scarcely more than the grain belonging to himself and his brothers; and even after the next season opened many of his old customers did not return. Several of these individuals, testifying as witnesses in this case, stated that, owing to the unpleasant experience which they had had in getting back their grain from the sheriff in the third-party proceedings, they had not come back to the mill of the defendant, though they had previously had much confidence in him.

As against the defendant's proof showing the facts above stated the plaintiff submitted no evidence whatever. We are therefore constrained to hold that the defendant was damaged by the attachment to the extent of P5,600, in profits lost by the closure of the mill, and to the extent of P1,400 for injury to the good-will of his business, making a total of P7,000. For this amount the defendant must recover judgment on his cross-complaint.

The trial court, in dismissing the defendant's cross-complaint for damages resulting from the wrongful suing out of the attachment, suggested that the closure of the rice mill was a mere act of the sheriff for which the plaintiff was not responsible and that the defendant might have been permitted by the sheriff to continue running the mill if

he had applied to the sheriff for permission to operate it. This singular suggestion will not bear a moment's criticism. It was of course the duty of the sheriff, in levying the attachment, to take the attached property into his possession, and the closure of the mill was a natural, and even necessary, consequence of the attachment. For the damage thus inflicted upon the defendant the plaintiff is undoubtedly responsible.

One feature of the cross-complaint consists in the claim of the defendant (cross-complainant) for the sum of P20,000 as damages caused to the defendant by the false and alleged malicious statements contained in the affidavit upon which the attachment was procured. The additional sum of P5,000 is also claimed as exemplary damages. It is clear that with respect to these damages the cross-action cannot be maintained, for the reason that the affidavit in question was used in course of a legal proceeding for the purpose of obtaining a legal remedy, and it is therefore privileged. But though, the affidavit is not actionable as a libelous publication, this fact is no obstacle to the maintenance of an action to recover the damage resulting from the levy of the attachment.

Before closing this opinion a word should be said upon the point raised in the first assignment of error of Pablo David as defendant in case R. G. No. 26949. In this connection it appears that the deposition of Guillermo Baron was presented in court as evidence and was admitted as an exhibit, without being actually read to the court. It is supposed in the assignment of error now under consideration that the deposition is not available as evidence to the plaintiff because it was not actually read out in court. This contention is not well founded. It is true that in section 364 of the Code of Civil Procedure it is said that a deposition, once taken, may be read by either party and will then be deemed the evidence of the party reading it. The use of the word "read" in this section finds its explanation of course in the American practice of trying cases for the most part before juries. When a case is thus tried the actual reading of the deposition is necessary in order that the jurymen may become acquainted with its contents. But in courts of equity, and in all courts where judges have the evidence before them for perusal at their pleasure, it is not necessary that the deposition should be actually read when presented as evidence.

From what has been said it results that the judgment of the court below must be modified with respect to the amounts recoverable by the respective plaintiffs in the two actions R. G. Nos. 26948 and 26949 and must be reversed in respect to the disposition of the cross-complaint interposed by the defendant in case R. G. No. 26949, with the following results: In case R. G. No. 26948 the plaintiff Silvestra Baron will recover of the defendant Pablo David the sum of P6,227.24, with interest from November 21, 1923, the date of the filing of her complaint, and with costs. In case R. G. No. 26949 the plaintiff Guillermo Baron will recover of the defendant Pablo David the sum of P8,669.75, with interest from January 9, 1924. In the same case the defendant Pablo David, as plaintiff in the cross-complaint, will recover of Guillermo Baron the sum of P7,000, without costs. So ordered.

Avanceña, C. J., Johnson, Malcolm, Villamor, Romualdez, and Villa-Real, JJ., concur.

DISSENTING AND CONCURRING OPINION

JOHNS, J.:

The plaintiff Silvestra Baron is the aunt of the defendant, and Guillermo Baron, the plaintiff in the other action, is his uncle. There is no dispute as to the amount of palay which each delivered to the mill of the defendant. Owing to the fact that they were relatives and that the plaintiffs reposed special trust and confidence in the defendant, who was their nephew, they were not as careful and prudent in their business dealings with him as they should have been. Plaintiffs allege that their respective palay was delivered to the defendant at his mill with the understanding and agreement between them that they should receive the highest market price for the palay for that season, which was P8.50 per cavan. They further allege that about August first they made another contract in and

by which he promised and agreed to pay them P8.40 per cavan for their palay, in consideration of which they agreed to extend the time for payment to the first of December of that year. The amount of palay is not in dispute, and the defendant admits that it was delivered to his mill, but he claims that he kept it on deposit and as bailee without hire for the plaintiffs and at their own risk, and that the mill was burned down, and that at the time of the fire, plaintiffs' palay was in the mill. The lower court found as a fact that there was no merit in that defense, and that there was but little, if any, palay in the mill at the time of the fire and that in truth and in fact that defense was based upon perjured testimony.

The two cases were tried separately in the court below, but all of the evidence in the one case was substituted and used in the other. Both plaintiffs testified to the making of the respective contracts as alleged in their complaint; to wit, that they delivered the palay to the defendant with the express understanding and agreement that he would pay them for the palay the highest market price for the season, and to the making of the second contract about the first of August, in which they had a settlement, and that the defendant then agreed to pay them P8.40 per cavan, such payment to be made on December first. It appears that the highest market price for palay for that season was P8.50 per cavan. The defendant denied the making of either one of those contracts, and offered no other evidence on that question. That is to say, we have the evidence of both Silvestra Baron and Guillermo Baron to the making of those contracts, which is denied by the defendant only. Plaintiffs' evidence is also corroborated by the usual and customary manner in which the growers sell their palay. That is to say, it is their custom to sell the palay at or about the time it is delivered at the mill and as soon as it is made ready for market in the form of rice. As stated the lower court found as a fact that the evidence of the defendant as to plaintiffs' palay being in the mill at the time of the fire was not worthy of belief, and that in legal effect it was a manufactured defense. Yet, strange as it may seem, both the lower court and this court have found as a fact that upon the question of the alleged contracts, the evidence for the defendant is true and entitled to more weight than the evidence of both plaintiffs which is false.

It appears that the plaintiff Silvestra Baron is an old lady about 80 years of age and the aunt of the defendant, and Guillermo Baron is the uncle. Under the theory of the lower court and of this court, both of them at all the time during the high prices held their palay in defendant's mill at their own risk, and that upon that point the evidence of the defendant, standing alone, is entitled to more weight and is more convincing than the combined evidence of the two plaintiffs. In the very nature of things, if defendant's evidence upon that point is true, it stands to reason that, following the custom of growers, the plaintiffs would have sold their palay during the period of high prices, and would not have waited until it dropped from P8.50 per cavan to P6.15 per cavan about the first of August. Upon that question, both the weight and the credibility of the evidence is with the plaintiffs, and they should have judgment for the full amount of their palay on the basis of P8.40 per cavan. For such reason, I vigorously dissent from the majority opinion.

I frankly concede that the attachment was wrongful, and that it should never have been levied. It remained in force for a period of one hundred and seventy days at which time it was released on motion of the plaintiffs. The defendant now claims, and the majority opinion has allowed him, damages for that full period, exclusive of Sundays, at the rate of P40 per day, found to be the net profit for the operation of the rice mill. It further appears, and this court finds, that the defendant was a responsible man, and that he had ample property out of which to satisfy plaintiffs' claim. Assuming that to be true, there was no valid reason why he could not have given a counter bond and released the attachment. Upon the theory of the majority opinion, if the plaintiffs had not released the attachment, they would still be liable to the defendant at the rate of P40 per day up to the present time. When the mill was attached, if he was in a position to do so, it was the duty of the defendant to give a counter bond and release the attachment and resume its operation. The majority opinion also allowed the defendant P1,400 "for injury to the goodwill of his business." The very fact that after a delay of about four years, both of the plaintiffs were compelled to bring their respective actions against the defendant to recover from him

on a just and meritorious claim, as found by this court and the lower court, and the further fact that after such long delay, the defendant has sought to defeat the actions by a sham and manufactured defense, as found by this and the lower court, would arouse the suspicion of any customers the defendant ever had, and shake their confidence in his business honor and integrity, and destroy any goodwill which he ever did have. Under such conditions, it would be strange that the defendant would have any customers left. He is not entitled to any compensation for the loss of goodwill, and P5,000 should be the very limit of the amount of his damages for the wrongful attachment, and upon that point I vigorously dissent. In all other respects, I agree with the majority opinion.

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