

5 Phil. 260

[ G.R. No. 1642. November 11, 1905 ]

**JUAN NOEL, PLAINTIFF AND APPELLEE, VS. MARIANO LASALA, DEFENDANT AND APPELLANT.**

**D E C I S I O N**

**MAPA, J.:**

This is an action on two promissory notes, copies of which are contained in the complaint, for the sum of 9,000 pesos with interest at the rate of 10 per cent per annum, from the 1st day of November, 1895.

The first promissory note reads as follows:

“I acknowledge to have received from Juan Noel the sum of seven thousand pesos which I promise to pay to him or to his order within two years from this date, together with interest at the rate of ten per cent per annum.”

The second note is as follows:

“I acknowledge to have received from Juan Noel the sum of two thousand pesos which I promise to pay to him or to his order within two years from date, with interest at the rate of ten per cent per annum.”

Both notes are dated November 1, 1895, and appear to have been executed by the defendant.

The complaint was filed February 5, 1903. The defendant was summoned

on the same day, and on the 20th of said month he entered an appearance.

About two months later, to wit, on the 14th day of April, 1903, the plaintiff moved for judgment by default on the ground that the defendant had failed to answer or demur to the complaint. On July 17 of the same year the defendant presented a demurrer alleging that the action brought by plaintiff was barred by the statute of limitations under article 950 of the Code of Commerce. At the time the demurrer was filed, no action had been taken upon the motion for judgment by default presented by the plaintiff. This motion was decided July 23, when judgment by default was entered against the defendant.

On the 31st of the same month counsel for defendant asked the court to set aside the judgment and presented an affidavit stating that he *was under the impression that he had prepared, signed, and filed in court a demurrer to the complaint within the time prescribed by the rules;* that the judgment by default was entered by reason of such error, inadvertence, or excusable negligence on his part, and that the defendant had a good defense. This motion was overruled by the court, to which ruling the defendant duly excepted.

Judgment by default having been entered, plaintiff introduced in evidence the two "promissory notes set out in the complaint, and alleged (page 8 of the bill of exceptions) that *the said promissory notes, with interest thereon, had become due and payable, and had been executed for a valuable consideration.*

The court then entered judgment against the defendant in the sum of 15,993.75 pesos, being principal and interest up to the date of the judgment. The defendant excepted to the said judgment after his motion for a new trial had been overruled.

The appellant relies upon three assignments of error. The first error assigned is that the court, in overruling the motion to set aside the judgment by default, erred because there was no default, and admitting that there was such default, it was due to error, accident, or excusable negligence.

This contention can not be sustained. Section 128 of the Code of Civil Procedure reads in

part as follows:

“In case a defendant fails to appear at the time required in the summons, or to answer at the time provided by the rules of court, the court shall, upon motion of the plaintiff, order judgment for the plaintiff by default which shall be entered upon the docket.”

Section 6 of the rules of the Court of First Instance provides that the defendant shall serve and file his answer or demurrer to the complaint within ten days after he has entered his appearance upon proper notice to the adverse party.

In the case at bar the defendant appeared on February 20, 1903, and on April 14, when the plaintiff moved for judgment by default, he had neither answered nor demurred to the complaint. He demurred to the complaint on the 17th of July of the same year. He was therefore in default, and the court properly entered judgment accordingly. It is immaterial that, at the time the demurrer was filed, judgment by default had not been entered. The motion for judgment by default was presented prior to the filing of the demurrer. Such motion, even though the defendant had never been given notice thereof, entitled the plaintiff to judgment by default. The defendant allowed the time prescribed by the rules to expire without either answering or demurring to the complaint.

The filing of the demurrer after the expiration of the time provided therefor could not have any retroactive effect prejudicial to plaintiff's rights.

The erroneous belief on the part of the defendant that he had demurred within the time prescribed by the rules, when, as a matter of fact, no demurrer had actually been presented, could not be considered error, accident, or excusable negligence. He should have known better than anyone else whether or not he had actually demurred. Nothing except his alleged belief was offered to show that he had been led into error. This in itself shows that the court below properly overruled the

motion to set aside the judgment by default.

The second assignment of error is that the judgment was not supported by the evidence.

The complaint is based upon the two notes referred to, and contains a literal copy thereof, the originals having been introduced in evidence at the hearing of the case. The defendant did not answer or demur to the complaint within the time prescribed by law. He did not deny the genuineness of the said notes. On the contrary, he impliedly admitted the due execution of the same by discussing in his brief in an affirmative manner the question as to whether or not the notes were barred by the statute of limitations. We are therefore of the opinion that section 103 of the Code of Civil Procedure is applicable to this case. That section provides as follows:

“Where an action is brought upon a written instrument, and the complaint contains or has annexed a copy of such instrument, the genuineness and due execution of the instrument shall be deemed admitted, unless specifically denied under oath in the answer.”

We hold that under this section the two promissory notes upon which this action is based, and the genuineness of which the defendant admits, are sufficient evidence of defendant's indebtedness to the plaintiff.

The appellant's last assignment of error is that the judgment is based upon a cause of action which is barred by the statute of limitations. He alleges that the notes are mercantile instruments, they being payable to order and having all the other requisites prescribed in article 531 of the Code of Commerce. In this connection the appellant calls our attention to the provisions of article 950 of the Code of Commerce, providing that actions upon promissory notes will be barred unless brought within three years from the date of their maturity.

Promissory notes payable to order and drawn as pre- scribed in article 531 of the Code of Commerce shall be considered mercantile instruments when they arise from mercantile transactions as required in article 532, and not otherwise. There is nothing in the notes indicating that such was the case in this particular instance. For this reason they can not be considered mercantile instruments, and the provisions of article 950 of the Code of Commerce are not applicable thereto.

The judgment of the court below is affirmed, and the defendant is hereby ordered to pay to the plaintiff the sum of 9,000 pesos represented by the two notes, with interest from the 1st of November, 1895, at the rate of 10 per cent per annum until paid, and the costs of this instance. After the expiration of twenty days from the date hereof, let judgment be entered in conformity herewith, and the case remanded to the trial court for proper action. So ordered.

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

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