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A CRITICAL STUDY OF ARTICLES 1755 AND 1756 OF THE SPANISH CIVIL CODE

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I

INTRODUCTION

Our Civil Code in its Article 1755 provides that "interest shall be due only when it has been expressly stipulated;" the same Code in its Article 1756 provides that "a borrower who has paid interest without it being stipulated cannot recover it or charge it to the capital."

It is obvious that the foregoing Articles under consideration speak of interest, the conditions under which it may be paid, and the effect of its payment when made without previous agreement. All of which presuppose a previously existing debt —a loan of money or some other fungible things—brought into life by a valid contract express or implied. Such being the case, the study of the nature of simple loan and its main characteristics, as a proper approach to the subject, becomes necessary.

A. *Nature of Simple Loan (Prestamo Mutuo).*

Simple loan is a principal, real and unilateral contract. It is a principal contract because it does not need of any preparatory contract in order that it may exist, nor is it a contract accessory to any other. It is a real contract because more consent is not sufficient to determine its perfection, but it requires the delivery of the thing loaned. It is unilateral because simple loan, in its genuine condition of simple or without interest, does not produce any other obligation than that of the borrower—the obligation to return the thing of the same kind and quality as that received by him. (Sanches Roman, Vol. 4, p. 839.)

"A simple loan may be gratuitous or made under a stipulation to pay interest." (Article 1740 par. 3, C. C.) It is

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evident, therefore, that by virtue of the above quoted provisions the contracting parties are at liberty to make stipulations or not regarding payment of interest. If they take advantage of that liberty and the debtor covenants to pay interest, the loan is onerous; otherwise, it is gratuitous, and becomes, according to Pothier, a contract of beneficence.

"A loan means the delivery by one party and the receipt by another of a given sum of money, upon an agreement express or implied, to repay the sum loaned, with or without interest." (People vs. Concepcion 44 Phil. 126.) "A contract of loan, as that term is used in the statute, signifies the giving of a sum of money, goods, or credits to another, with a promise to repay, but not a promise to return the same thing. It has been defined as an advancement of money, goods or credits upon a contract or stipulation to repay, not to return, the thing loaned at some future day in accordance with the terms of the contract. The moment the contract is completed, the money, goods or chattels given cease to be the property of the former owner and become the property of the obligor to be used according to his own will, unless the contract itself expressly provides for a special or specific use of the same. At all events, the money, goods or chattels, the moment the contract is executed, ceased to be the property of the former owner and become the sole property of the obligor." (Tolentino et al vs. Gonzales Sy Chian 50 Phil. 558.)

B. *Characteristics of this Contract.*

In the discussion of the unilateral character of loan, there is noticeable the absence of reciprocity of obligation. Because altho the lender binds himself to deliver the subject-matter of loan, the delivery is not an obligation assumed by him under contract, but such obligation to deliver, according to Manresa, is a condition "sine qua non" for its existence. In the words of Sanches Roman, Volume 4, pp. 37-38, "uno tiene solo derechos, y el otro solo obligaciones correlativos; es decir, que el derecho esta en la esfera del acreedor y la obligación en la esfera del deudor, en cada uno de los cuales, el acreedor assume toda actividad de su derecho y acción para exigir el cumplimiento de la obligación correlativa, y el deudor, por el contrario, assume tambien toda la actividad de su compromiso y obligación para satisfacer la prestación debida; con en la relación, termino activo el uno, por ejercicio de su acción, termino pasivo el otro, por el cumplimiento de su prestación."

Another characteristic of simple loan is the transfer of ownership, for according to Article 1753 of the Civil Code, the borrower becomes the owner of the thing loaned, and "puede fazer dellas lo que quissiere, bien asi como de lo suyo" (Law 2, Title 1, Partida V.) "But when the inquiry is made as to who can transfer it, there rises the question of capacity to execute this kind of contract. The code is silent about this point; however, from the viewpoint of existing legislation it should be governed by the general rules of contract—Articles 1263 etc. C. C. But, on the other hand, when the thing which is the subject-matter of loan perishes after the contract has been perfected by reason of causes not imputable to the lender, it perishes at the risk of the borrower pursuant to the provisions of Law 10, Title 1, Partida V: "se pierde para aquel que la recibe prestada e non para el otro que la presto." This is not explicitly provided in Article 1753 C. C., but it must be so inferred from the above cited law and from the ownership that the borrower acquires over the property loaned.

In cases where the borrower could not comply with his obligation of returning the thing of the same kind, quantity, and quality as that which he received in loan, the law provides for a form of subsidiary compliance consisting in the payment of the value of the thing: "tanto precio por ende quanto montare o valiere aquello que le presto" (Law 8, Title 1, Partida V). And where the contract is made under a stipulation to pay interest and the lender defaults in the fulfillment of his obligation, he shall be liable to pay the interest agreed upon or, in its absence, the legal rate which is 6% per annum. (Article 8 of the Law of March 14, 1856). But in order that the interest may be charged, the stipulation regarding the payment thereof must be in writing. (Article 2, Law of March 14, 1856.)

C. *Distinction Between a Loan and a Deposit.*

Manresa, in his Commentaries on the Civil Code (Vol. XI p. 664), states that there are three points of difference between a loan and an irregular deposit. The first difference consists of the fact that in an irregular deposit the only benefit is that which accrues to the depositor, while in a loan the essential cause for the transaction is the necessity of the borrower. The second difference lies in the fact that in an irregular deposit the depositor has a preference over other creditor in the distribution of the debtor's property. The third difference is that in an irregular deposit, the depositor can demand the return of

the article at any time, while the lender is bound by the provisions of the contract and cannot seek restitution until the time for payment, as provided in the contract, has arisen.

II

CONTRADICTION BETWEEN ARTICLES 1755 AND 1756 OF OUR CIVIL CODE

Manresa in commenting upon Article 1756 of the Spanish Civil Code states the following: "Confrontados este y el anterior, descubrese la contradicción existente entre ellos; porque si el devengo de interéses, a tenor del art. 1755, solo cabe mediante estipulación expresa, como en terminos de derecho estricto, no ha de poder reclamarlos, o por lo menos imputarlos al capital, quien los pago sin haberlos pactado? No ya en las antiguas leyes patrias, que establecieron en una u otra forma la tasa del interes (Fuero Juzgo, Fuero Real y Novisima Recopilación), ni siquiera en el Projecto de 1851, ni en la ley de 1856, categorica afirmación del principio de libertad, encuentrase una disposición semejante." (XI Manresa p. 654.)

Distinguished commentators of the civil law such as Del Viso and Falcon affirm with cogent reasons that the provisions of Article 1756 is not in conformity with the spirit and letter of article 1755; on the contrary they take for granted their obvious contradiction.

It is a universal and well-recognized principle of law that what has been paid for that which is not owing should be returned to its owner. Now, if the loan is considered always as gratuitous and the demandability of interest requires an express previous agreement regarding the same, the borrower should have the right which the code denies him. Justice and equity demand that the borrower should be given the right to the devolution of that which has been paid.

III

EXPLANATION OF ARTICLE 1755

Article 1755 C. C.—"Interest shall be due only when it has been expressly stipulated."

A. *Basis of the Article.*

The basis of this Article is historical. Loans made with stipulation to pay interest has been regulated in ancient legisla-

tion. From the laws of Licinia, Duelia, Menenia, Sempronia and others that may be cited in Roman Law, the history of legislation in all countries is replete with similar provision. Teodosious, the Great, followed the footsteps of Constantine who fixed the rate of interest at 50 per cent on loans of fruits and 12 per cent on loans of money. Justinian established a gradual scale of rate ranging from 4 to 12 per cent according to the dignity of the borrower. And altho in different scale, the Fuero Juzgo and the Fuero Real also regulated the payment of interest. In the 16th century Don Carlos y Dña. Juana issued a decree which became the Law 20 Title 1 of the Novisima Recopilación fixing 10 per cent as the legal rate of interest. This however, was reduced to 5 per cent by Philip IV.

The economic progress of the time was marked by the corresponding evolution of usury in its varied forms which may be given by way of a summary, thus:

(a) USURA LUCRATIVA, was regarded that which was paid by reason of the benefit derived from the loan; COMPENSATORIA, that which was received for the loss of the profit which has not been realized by reason of the loan; PUNITORIA, that which has been paid by reason of the default of the debtor. All of them may be either:

1. MENTALES, if founded upon the mere expectation of the creditor or lender; or,

2. MANIFIESTAS, if provided in the contract; or

3. PALIADAS, if it originated from other contract, for instance, the so-called CONTRATO-TRINIO.

(b) PACTOS USURARIOS were the MOHATRAS and the TRAPAZAS which if not existing in reality, they are no other than to bind by twice or thrice as much as the amount actually received in loan, or to buy on credit for a price highly incomensurate with the value of the thing and then sell it on cash basis for a price two thirds lower than the purchase price. Pacto comisorio and contracts denominated "CONTRATO-TRINIO" fall under this classification.

The futility of the remedies heretofore adopted in order to put an end to the ravages of usury prompted the passage of the Law of March 14, 1856. Its Article 1 provides for the abolition of all rates of interest on the capital given as a loan; Article 2 provides that interest may be conventionally agreed upon in simple loan, but such agreement shall be null and void if not

made in writing. The last of its articles provides for the repeal of all other laws inconsistent with the provisions hereof. (Manresa Vol. XI, pp. 640-641.)

B. *Operation of the Article.*

Now, when Article 1755 provides that "interest shall be due only when it has been expressly stipulated," shall it be understood in accordance with precedents (Article 1649 of the Proyecto de 1851 and article 2 of the Law of March 14, 1856) that the stipulation for the payment of interest in order to be enforceable should be in writing? "In pursuance with that rule of statutory construction that where the law does not distinguish the interpreter should not distinguish, we are of the belief that such requisite is not required by this article as it is by the above-cited laws, exception, however, is made as to those cases where the law of evidence requires the execution of written instrument to prove the existence of an obligation; in all other cases the stipulation may be made irrespective of form. The word employed by the legislator should be considered as synonymous with consent, and since consent may be either expressed or implied, the only thing required is that such stipulation should be expressed." (Manresa Vol. XI p. 642.)

C. *Reason for Article 1755—*

The reason for the Article is based upon the very nature of simple loan. According to the Bouvier's Law Dictionary a loan, in general, implies that a thing is lent without reward; a bailment of an article for use or consumption without reward. From this definition of loan, it can be seen that simple loan is generally considered gratuitous in the absence of an express stipulation to the contrary. Being always gratuitous, an express previous agreement, therefore, is made an essential requirement for the demandability of interest.

IV

EXPLANATION OF ARTICLE 1756

Article 1756 C. C.—"A borrower who has paid interest without it being stipulated cannot recover it or charge it to the capital."

A. *Operation of Article 1756.*

This Article is not susceptible of construction; it is clear, simple, and self-explanatory. Its operation may be illustrated

by the following example: "A" and "B" entered into a contract whereby the former loaned to the latter the sum of ₱1,000 which sum is to be paid within two years after the execution of the contract. There was no stipulation with respect to the interest, but "A," after the lapse of one year from the execution of the contract, paid "B" the amount of ₱60 as the interest on the ₱1,000 for one year. Now can "A" recover the ₱60 or can he charge that to the capital? According to Article 1756 "A" cannot recover the said amount, neither can he charge that to the capital.

B. *Reasons for Article 1756.*

Certain authors believe that the borrower, actuated by the scruples of conscience and by the desire not to remain oblige to the creditor, pays interest even if not stipulated, in which case, therefore, he should not be permitted to recover it.

Laurent, with whom we concur, is utterly against this opinion. He said: "Motives of delicacy are strange and completely foreign to law, so much so that the impossibility of their having been the inspirer of the legal precept embodied in Article 1756 is very clear, evident, and beyond the possibility of any doubt. There is only one contract * * * in which homage is paid to moral sentiments, and that is the contract of donation. But * * * the idea of donation is not even in a very remote degree suggested by Article 1756; on the contrary the sentiment of gratitude is opposed to the very context of the same article."

Pont and other French authors commenting upon a similar provision of the Code of Napoleon explain the law by supposing that the borrower pays a natural debt, and therefore he who pays voluntarily a natural debt cannot, under the claim of whatever title, recover what in justice he had paid. How unsatisfactory and untenable this reason is can be seen at once without the necessity of examining it carefully. He, who pays that which he does not owe, owes nothing civilly or naturally. This is a legal and well-settled principle. Our Supreme Court, thru Justice Torres, has said the following (Guzman v. Balarag, 11 Phil. 503): "Where the obligation does not show that interest had been agreed upon, a creditor cannot lawfully apply the sums received by him as rent from a property owed by the debtor, to the payment of interest nor to any other purpose except to cover the indebtedness, especially as Article 1755 of the Civil Code provides that interest shall only be payable when it has been expressly stipulated." From this case can it not be in-

ferred that the debtor is with respect to the interest, not bound either naturally or civilly? We think so, because if the rule is otherwise, then the creditor will not be obliged to return the rent from a property owned by the debtor and which is made the security of the debt.

Manresa is of the opinion that the reason for this Article is found in the existence of a tacit convention regarding payment of interest which is converted into an express agreement by the subsequent juridical acts of the parties. He said: "* * * El derecho a la devolución de la paga de lo indebido es un principio juridico universalmente reconocido. Sin embargo, no nos hallamos, forzoso es declararlo asi, frente a un caso de excepcion de este principio; porque al declarar la ley que el prestatario no puede repetir los intereses que ha pagado sin previa estipulación, implicitamente decide que ha pagado lo debido, suponiendo que los intereses estaban debidos en virtud de una convención, que si pudo ser tacita en sus principios, conviertese en expresa, merced a los actos realizados por las partes posteriormente, que exteriorizan de un modo que no deja lugar a dudas el mutuo consentimiento de su voluntad, una de ellas pagando las intereses, la otra recibiendolos. Deducese de aqui la consecuencia de que siendo debidas los intereses, logico es no pueda el prestatario ni reclamarlos ni imputarlos al capital, siendo esta la justificación del Art. 1756." (11 Manresa 655, 3rd Edition.)

We differ with the learned opinion of Manresa for the reason that such tacit agreement which was presumed from the subsequent acts of the parties and which is said to be converted into an expressed agreement cannot be valid and enforceable, because it is against public policy. We believe that such contract would be sanctioning the abandonment of a wholly wrongful invasion of the right of the borrower to the ownership, enjoyment, and possession of the money which was paid without it being due,—a fact which cannot be the basis of a contractual agreement, because it is illegal as against public policy.

It is a fundamental principle that the contracting parties are free to establish any agreements, terms, and conditions they may deem advisable, provided they are not contrary to law, morals, or public policy. (Art. 1255 C. C.)

"The abandonment of a wholly wrongful invasion of another's rights cannot form the basis of a compromise contract

with the owner, as it would be a direct encouragement to the commission of wrong for profit; and as an invariable rule the consideration for an agreement must not, of course, be against public policy." (5 R. C. L. 1890, Fink vs. Smith 170 Pa. St. 124; In re Lenning's State, 183 Pa. St. 485, 38 Atl. 466; Luken's Appeal 22 Atl. 892, 13 L. R. A. 581.)

Other writers on the subject state that when a borrower pays interest without it being stipulated, he thereby waives his right not to pay any interest. We do not see any cogency in this reasoning. In the case of Warner vs. Crane 50 Mich. 300, Justice Cooley said the following: "Waiver is a voluntary act, and implies an election by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded or insisted upon. But that action is in no sense voluntary which a party cannot decline to take except at the peril of liberty or property, * * *." The Webster's New International Dictionary defines waiver as the intentional relinquishing or abandoning some known right, claim or privilege. The Bouvier's Law Dictionary gives us the following definition, "waiver is the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it * * *."

With these definitions in mind, we may ask the following question:—Can a right which existence is not known be waived? We think this question should be answered in the negative. Waiver is a voluntary act and implies the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it. How in the world, can a person waive something which existence is not known to him?

V

REMARKS ABOUT ARTICLE 1756

A. *Article 1756 is Against the Principle "Nemo Cum Alterius Detrimento Locupletari Potest."*

To illustrate this proposition let us expound the following case: Supposing that "A" is indebted to "B" in the sum of ₱1,000. In the contract of loan, no stipulation regarding interest was made. "A" unaware of the provisions of Article 1755, paid the interest notwithstanding the absence of an express stipulation to that effect. A few days afterward "A"

brings an action to recover the interest he has paid, invoking in his favor the provisions of Article 1755 of the Civil Code. The court rendered judgment in favor of "B," dismissing the action.

Now, the following questions will come to our mind:

(1) Is the judgment of the court in accordance with law?

(2) Is the said judgment in accordance with equity and justice?

With regard to the first question we are of the opinion that the judgment of the court is in accordance with law, because Article 1756 of the Civil Code provides that "a borrower who has paid interest without it being stipulated cannot recover it or charge it to the capital."

With respect to the second question we are of the opinion that the judgment of the court is not in consonant with the sound principle of justice and equity. "He who pays that which is not owing, owes nothing either civilly or naturally." If there is no obligation on the part of "A" (debtor) to pay the interest, and if "B" (creditor) is not entitled to receive the payment of the same, then it is very evident that the receipt of such interest has enriched "B" at the unjust expense of A."

B. *Article 1756 is an Inducement to the Commission of Fraud.*

In the foregoing hypothetical case, supposing that "B," knowing that "A" is ignorant of the provisions of Article 1755, required him to pay the interest, "B" fully cognizant of the fact that "A" is under no obligation to pay it, because of the absence of any express stipulation in the contract.

Is this not a clear example of fraud? Fraud is defined as any cunning, deception, or artifice, used to circumvent which involves a breach of legal or equitable duty, trust or confidence justly reposed, and is injurious to another, or by which an undue and unconscientious advantage is taken of another. K. K. Kinney, A Law Dictionary and Glossary.)

It may be contended by the creditor that the debtor by virtue of Article 2 of the Civil Code, is presumed to know Article 1756 and therefore ought not have paid interest without the same being previously stipulated. But, may it not be contended also by the debtor that by virtue of the same presumption the creditor should not have accepted the interest so paid because he ought to know that he could not legally accept it by virtue of the provisions of Article 1755.

Now, will it not be permitting the creditor to take advantage of his own wrong, if we shall deprive the debtor of his

right to recover the interest that he has paid without it being stipulated? But Article 1756 provides that "a borrower who has paid interest without it being stipulated cannot recover it or charge it to the capital." Does not Article 1756 of the Civil Code, grant the creditor a protecting mantle to cover and shelter his bad faith and fraudulent act to the prejudice of the debtor? We believe that Article 1756 is really repugnant to the well-settled principle of justice and sound public policy, because it induces a person to commit fraud and at the same time it furnishes the means for the protection and concealment of such fraudulent act from the eyes of the law.

In the above hypothetical case can "A" recover the interest which has been paid? We think that he should be allowed to recover the interest which he has paid. In the leading case of People v. Speir, 77 N. Y. 144, the court said: "There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability, similar to the rights and liabilities in certain cases of express contract. Thus, if one man has obtained money from another, thru the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the law implies a promise from the wrong-doer to restore it to the rightful owner, altho it is obvious that this is the very opposite of his intention * * *."

In justice to Article 1756 and in defense of "B" it may be contended that the law is for the vigilant; that it protects only those who are conscious of their rights and not those who sleep on their rights. Our answer is the following language of the Supreme Court of the U.S. in the leading case of Western Mfg. Company vs. Cotton 12 L. R. A. (N. S.) 427; 12 R. C. L. 360:— "The law is not designed to protect the vigilant or tolerably vigilant, alone, altho it rather favors them, but is intended as a protection to even the foolishly credulous, as against the machinations of the designedly wicked."

C. *Is Article 1756 a Bar to Recover Interest Paid thru Error or Mistake?*

"A" is indebted to "B" in the sum of ₱1,000. "B", having died his heirs who survived him paid the interest believing that there is an obligation on their part to pay it, notwithstanding

the absence of any express stipulation regarding the payment of the same. Can the heirs of "A" recover the interest that has been paid thru error or mistake?

The most distinguished commentator of the Civil Law, answered the question in the affirmative. He said: "Duranton has propounded the question as to whether or not the borrower has the right to claim the return of interest paid thru error or mistake. The case is completely distinct from that resolved by Article 1756, and therefore, its solution in the affirmative is not doubtful. The example of the heirs who pay interests in the belief that it is due in that famous hypothesis and who demand the reimbursement of the sum thus paid once the error had been discovered, justify our conclusion. (11 Manresa p. 656.)

The opinion of Manresa is admirable and praiseworthy. It is in conformity with the American principles as embodied in the following leading cases:

"A mistake even tho it relates to a matter concerning which the party is charged by law with notice, may afford a sufficient ground for having a judgment set aside." (Jean v. Hennessy, 74 Ia. 348; 15 R. C. L. 710.)

"If a party acting in ignorance of a plain and settled principle of law is induced to give up a portion of his indisputable property, a court of equity will relieve him from the consequences of his mistakes." (5 R. C. L. 898; Underwood v. Brockman, 29 Am. Dec. 407; Burton v. Haden, 108 Va. 51; Jordan v. Stevens, 57 Me. 78.)

We agree with the learned opinion of Manresa not only because of our belief that it is in consonant with the principles of justice and equity, but also because of the provisions of Article 1895 of the Civil Code, which provides that "If a thing is received when there was no right to claim it and which, thru an error, has been unduly delivered, an obligation to restore the same arises."

But the question which may come to our mind is this: Is the opinion of Manresa in accordance with the spirit of Article 1756? We beg to answer this question in the negative because of the principle of law which states "Dura lex sed lex." Article 1756 does not make any distinction between interest paid without any error or mistake. It is a principle of law that when the law does not make any distinction we must not make

any. We must not, therefore, make any distinction in Article 1756 between interest paid thru error and interest paid without error.

VI

CONCLUSION

From the foregoing discussion, it can be seen that the provisions of Article 1756 of our Civil Code is not in conformity with the fundamental principles of justice and equity. We have seen that said Article is not only an inducement to the commission of fraud; it does not only constitute a protecting mantle to shelter and conceal bad faith and fraud, but it is also against the principle "Nemo cum alterius detrimento locupletari potest."

We suggest that said Article (1756) of the Spanish Civil Code should be repealed or modified because of the following reasons:

(1) It is against the well-established principles of equity and justice.

(2) It is not in harmony with article 1755 of the same code.

(3) There is no justifiable reason for the existence of said article. "When the reason for the law ceases, the law ceases." Article 1756 should, therefore, cease.

(4) It does not make any distinction between interests paid thru error or mistake and interest paid without error or mistake; and

(5) Article 1108 of the same code provides: "Should the obligation consist in the payment of a sum of money if the debtor should become in default, the indemnity for losses and damages, in the absence of a stipulation to the contrary, shall consist in the payment of the interest agreed upon, or should there be no agreement, in the payment of interest at the legal rate." This article has sufficiently given us a provision regarding the payment of interest when no stipulation with respect to it has been made. There is therefore no absolute necessity for Article 1756 of the Spanish Civil Code.