

1 Phil. 663

[ G.R. No. 931. January 27, 1903 ]

**PEDRO REGALADO, PLAINTIFF AND APPELLANT, VS. FELIX DE LOS SANTOS ET AL., DEFENDANTS AND APPELLEES.**

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

**COOPER, J.:**

On the 4th day of May, 1891, Don Jos6 Regalado Santa Ana on the one part and Don Felix de los Santos y Baviera, Don Gil Javier y Amancio, y Dofia Geronima Cabajug y Vito of the other part, entered into a contract of loan with a mortgage, in the city of Iloilo, before a notary public of the same place, by the terms of which tlje latter acknowledged themselves jointly and severally bound to pay to the former the sum of \$5,259.33, to be paid within the term of one year from the date of the contract, with interest at the rate of 15 per cent per annum, and as security for the payment of the debt the said Don Felix de los Santos, Don Gil Javier, and Dona Geronima Cabujug mortgaged to the said Don Jos6 Regalado Santa Ana certain tracts of land situated in the Island of Negros, to wit, the hacienda called "San Pablo," the property of Don Felix de los Santos; and another called "Santa Cruz," the property of Dona Geronima Cabajug.

The said Don Felix de los Santos also obligated himself to deliver to the said creditor the amount which he might recover from a mortgage credit constituted by a writing made and entered into on the same day, which he held against his father, Don Pedro de los Santos, for the sum of \$4,326.78, with interest at 15 per cent per annum, payable in three years, secured by a mortgage of a certain hacienda called "San Roque," situated in the pueblo of Cadiz Nueva.

On the 17th day of September, 1900, in the city of Iloilo, D. Jose Regalado Santa Ana, the holder of the mortgage, on the one part, and D. Pedro Regalado Montelibano on the other part, entered into a contract before a notary public, by which the said above-named mortgage with the interest due thereon from the 4th day of December, 1891, was

transferred and assigned to Don Pedro Regalado Montelibano, and in this contract so entered into Don Jose Regalado Santa Ana acknowledged the receipt from Don Pedro Regalado of the amount of \$5,259.33, as well as an amount corresponding to the interest of 15 per cent per annum due on the principal.

On the 3d day of November, 1900, Don Pedro Regalado Montelibano by virtue of the right which he had acquired by the transfer and assignment above mentioned instituted against the defendant an executive action before the judge of the Court of First Instance of Iloilo.

The suit having been admitted, the Court of First Instance proceeded to embargo the mortgaged property. The defendants entered their opposition to the proceedings in due time and form, which was based upon the following points:

(1) That the mortgaged property being situated in the Island of Negros the court of Iloilo was without power to issue execution.

(2) That the notice of the transfer or assignment of the debt was not given to the defendants as is required by law.

(3) That it is not stated in the mortgage document that the parties expressly submitted themselves to the jurisdiction of the court of Iloilo.

(4) That the requisites of the law with reference to the inscription in the mortgage registry of property have not been complied with.

(5) That it is not alleged in the complaint that there is any fixed amount due to the creditor.

(6) That the appraisement of the mortgaged property was not made before the embargo as is required by law.

(7) That by reason of the transfer or cession of the credit by Don Jose" Regalado Santa Ana to Don Pedro Regalado Montelibano the debt of the defendants was extinguished, and therefore Don Jose" Regalado had nothing to transfer.

(8) That article 169 of Regulations for the Execution of the Mortgage Law was not complied with in that it is not stated in the complaint that the creditor is liable to indemnify any loss or damage caused the debtor or third persons interested by reason of the malice or negligence in the true statement of facts, and of the circumstances the judge must take into consideration to authorize the proceedings and to continue them.

On the 10th day of February, 1902, the Court of First Instance of Iloilo rendered a judgment in which it found as a matter of fact that the mortgaged property was situated in the Island of Negros, and that no part was situated in the Province of Iloilo, and also finding that the value of the mortgaged property was not shown, nor had any appraisalment of the same been made, and basing his judgment upon these facts declared that the Court of First Instance did not have the competency, and was without jurisdiction, to try the case, and dismissed the executive action; raised the preventative embargo, and ordered the property in question to be returned to the control of the defendants, and directed that Augustin Yulo, the administrator in whose custody the property had been placed, should render to the defendants an exact and true account of the rents, products, and profits of the mortgaged property, and condemning the plaintiff to the payment of costs, damages, and injuries which had been occasioned to the defendants by the proceedings.

Against this judgment Don Pedro Regalado has interposed an appeal to this court.

We will consider the question upon which the judgment of the Court of First Instance is based:

The action being instituted both for the purpose of obtaining a personal judgment against the defendants and to obtain an order for the sale of real estate in satisfaction of the debt, is, in its nature, a mixed action. The addition of mortgage to a contract of loan produces hypothecary or mixed action. (Judgment of November 22, 1858, Supreme Court.)

By paragraph 4, of article 46, Spanish Code of Civil Procedure, it is provided that in mixed actions jurisdiction is vested in the judge of the place where the property is situated or the residence of the defendant, at the election of the plaintiff. As the mortgaged property is situated in Negros, which is also the place of residence of all the defendants, in the absence of any stipulation to the contrary in the contract and in the absence of an express or tacit submission to the particular judge, the action should have been brought in Negros.

It is claimed by the plaintiff that the competency of the Court of First Instance of Iloilo to try the case has been expressly conferred by a certain clause contained in the contract of debt and mortgage, which reads as follows:

“Payment to be made in current silver to the exclusion of other values in this city (Iloilo) at the house of the creditor, to whose domicile the contracting parties (debtors) expressly submit themselves, renouncing all other domicile.”

It is contended that this clause is sufficient to show an express submission by the defendant to the jurisdiction of the Court of First Instance of Iloilo under the provisions of articles 40 and 41 of the Spanish Code of Civil Procedure, which read as follows:

“ART. 40. Any judge tacitly or expressly agreed upon by the litigant parties shall have jurisdiction over any action brought before and submitted to him,” etc.

“ART. 41. An express submission is made when the litigant parties clearly and in definite terms renounce the right to present the matter before the proper court and unequivocally designate the judge agreed upon to determine the question.”

Was the clause in question such an express submission to the jurisdiction of the court of Iloilo as is defined in article 41 of the Spanish Code of Civil Procedure? The clause in question not only made the debt payable in Iloilo but the debtors renounced their own domicile and expressly submitted themselves to the domicile of the plaintiff, at Iloilo. It is evident that the object of the latter part of the clause was not to make the debt payable at such domicile, because the parties had already stipulated in express terms that this should be the case. In order to give every part of the clause effect this part must be construed to mean that the parties intended to submit themselves to the jurisdiction of the court at Iloilo.

By designation of the judge is meant the designation of the court. Manresa says: “It is not to be understood from this that it is necessary to designate the judge by name; on the contrary, we believe that this should not be done because it might give rise to doubts and questions. If the parties interested, waiving their own forum, should say that they submit to Mr. So and So, Judge of Alicante, for instance, if So and So should for any reason cease to hold this office, the question would immediately arise as to whether the submission was to be regarded as extended to his successor.”

The defendants also contend that by the provisions of article 170, General Regulations for the Execution of the Mortgage Law, the judge of competent jurisdiction must be the judge of the place in which the mortgaged property is situated, “no change of venue being admissible.” A sufficient answer to this objection is, that the mortgage was executed in 1891, while the Mortgage Law was enacted in 1893, a date subsequent to the date of the mortgage. Under article 175 of this law creditors who had their right recorded before the law went into effect were given the option to select the summary procedure provided for in the act. But the plaintiff has not availed himself of this option. The suit brought by him is an

executive action under Chapter XV of the Civil Code of Procedure, in force at the date of the mortgage.

The judge in dismissing the case based his ruling also on the grounds that the value of the mortgaged property was not shown.

Article 127 of the Mortgage Law requires that there must appear in the mortgage the value of the estate as appraised by the contracting parties; but for the same reason as before stated, the plaintiff has not elected to pursue the summary action, this provision must be held not to apply; and even in the summary action, where the creditor whose debt was contracted before the date of the Mortgage Law has elected to enforce his claim under the summary action, an appraisal may be made in accordance with the Code of Civil Procedure. (General Regulations Execution Mortgage Law, article 175.)

An appraisal in the executive action under the Code of Civil Procedure is made after the order directing the sale of the property. This stage in the proceedings had not been reached when the case was dismissed.

There are other questions presented in the record not passed upon by the Court of First Instance and unnecessary for us to consider in the decision of the case.

For the error committed in dismissing the case the judgment of the Court of First Instance is reversed, and it is ordered that the case be reinstated and its status as it existed at the date of the rendition of the judgment of dismissal be restored, and costs of this appeal is adjudged against the appellees.

*Arellano, C. J., Torres, Willard, and Ladd, JJ., concur.*

*Mapa, J., did not sit in this case.*