

**BACHRACH MOTOR CO., INC., PLAINTIFF AND APPELLANT, VS.
ESTEBAN ICARANGAL AND ORIENTAL COMMERCIAL CO., INC.,
DEFENDANTS AND APPELLEES.***G.R. No. L-45350. May 29, 1939*

Ponente: MORAN, J.

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On June 11, 1930, defendant herein, Esteban Icarangal, with one Jacinto Figueroa, for value received, executed in favor of the plaintiff, Bachrach Motor Co., Inc., a promissory note for one thousand six hundred fourteen pesos (P1,614), and in security for its payment, said Esteban Icarangal executed a real estate mortgage on a parcel of land in Pangil, Laguna, which was duly registered on August 5, 1931, in the registry of deeds of the Province of Laguna. Thereafter, promissors defaulted in the payment of the agreed monthly installments; wherefore, plaintiff instituted in the Court of First Instance of Manila an action for the collection of the amount due on the note. Judgment was there rendered for the plaintiff. A writ of execution was subsequently issued and, in pursuance thereof, the provincial sheriff of Laguna, at the indication of the plaintiff, levied on the properties of the defendants, including that which has been mortgaged by Esteban Icarangal in favor of the plaintiff. The other defendant herein, Oriental Commercial Co., Inc., interposed a third-party claim, alleging that by virtue of a writ of execution issued in civil case No. 88253 of the municipal court of the City of Manila, the property which was the subject of the mortgage and which has been levied upon by the sheriff, had already been acquired by it at the public auction on May 12, 1933. By reason of this third-party claim, the sheriff desisted from the sale of the property and, in consequence thereof, the judgment rendered in favor of the plaintiff remained unsatisfied. Whereupon, plaintiff instituted an action to foreclose the mortgage. The trial court dismissed the complaint and, from the judgment thus rendered, plaintiff took the present appeal.

The sole question before us is whether or not plaintiff-appellant is barred from foreclosing the real estate mortgage after it has elected to sue and obtain a personal judgment against the defendant-appellee on the promissory note for the payment of which the mortgage was constituted as a security.

In *Hijos de I. de la Rama vs. Sajo* (45 Phil., 703), the mortgage creditor, instead of instituting proceedings for the foreclosure of his mortgage, filed a personal action for the recovery of the debt. The mortgage debtor objected to the action, alleging that, if it be allowed, he would be subjected to two suits, one personal and another for the foreclosure of the mortgage. We answered this objection, laying down the rule that "in the absence of statutory provisions, the mortgagee may waive the right to foreclose his mortgage and maintain a personal action for the recovery of the indebtedness." And we emphasized the doctrine in the later part of our decision by saying that "the rule is well established that the creditor may waive whatever security he has and maintain a personal action, in the absence of statutory provisions to the contrary." (P. 705.)

It is true that in *Matienzo vs. San Jose* (G. R. No. 39510, June 16, 1934), a decision of three justices of this court ruled that "apart from special proceedings regulated by statute, an unsatisfied personal judgment for a debt is no

bar to an action to enforce a mortgage or other lien given as security for such debt." But this decision cannot be made to prevail over a decision given by this court in *bane*. Besides, the rule laid down in the *De la Rama* case is more in harmony with the principles underlying our procedural system.

Most of the provisions of our Code of Civil Procedure are taken from that of California, and in that jurisdiction the rule has always been, and still is, that a party who sues and obtains a personal judgment against a defendant upon a note, waives thereby his right to foreclose the mortgage securing it. (*Ould vs. Stoddard*, 54 Cal., 613; *Felton vs. West*, 102 Cal, 268; *Craiglow vs. Williams*, 514 Cal. App., 45; 188 Pac, 76, following doctrine in *Biddel vs. Brizzolara*, 64 Cal., 354; 30 Pac, 609; *Brown vs. Willis*, 67 Cal., 235; 7 Pac, 682; *Barbieri vs. Ramelii*, 84 Cal., 154; 23 Pac, 1086; *Toby vs. Oregon Pac. R. Co.*, 98 Cal., 490; 33 Pac, 550; *McKean vs. German-American Sav. Bank.*, 118 Cal., 334; 50 Pac, 656; *Woodward vs. Brown*, 119 Cal, 283; 63 Am. St. Rep., 108; 51 Pac, 2, 542; *Meyer vs. Weber*, 133 Cal, 681; 65 Pac, 1110; *Crisman vs. Lanterman*, 149 Cal, 647, 651; 117 Am. St. Rep., 167; 87 Pac, 89; *Gnarin vs. Swiss American Dank*, 102 Cal, 181; 121 Pac, 726.) The same rule obtains in the States of Idaho, Montana, Nevada and Utah. (See 2 *Johns on Mortgages*, 988, 101a, 1019, 1046.) It is true that this rule is founded on express statutory provisions to that effect. We have here, however, section 708 of our Code of Civil Procedure which provides that a creditor holding a claim against the deceased, secured by a mortgage or other collateral security, has to elect between enforcing such security or abandoning" it by presenting his claim before the committee and share in the general assets of the estate. Under this provision, it has been uniformly held by this court that, if the plaintiff elects one of the two remedies thus provided, he waives the other, and if he fails, he fails utterly. (*Veloso vs. Heredia*, 33 Phil., 306; Cf. *Osorio vs. San Agustin*, 25 Phil., 404.) The same rule applies under the Insolvency Law. (Sec 59, Act No. 1956; *Unson and Lacson vs. Central Capiz*, 47 Phil., 42; *Chartered Bank of India, Australia and China vs. Imperial*, 48 Phil., 931; *O'Brien vs. Del Rosario and Bank of the Philippine Islands*, 49 Phil., 657.) There is indeed no valid reason for not following the same principle of procedure in ordinary civil actions. With the substitution of the administrator or executor in place of the deceased, or of the assignee or receiver in place of the insolvent debtor, the position of the parties plaintiff and defendant in the litigation is exactly the same in special or insolvency proceedings as in ordinary civil actions.

But, even if we have no such section 708 of our Code of Civil Procedure, or section 59 of the Insolvency Law, we have still the rule against splitting a single cause of action. This rule, though not contained in any statutory provision, has been applied by this court in all appropriate cases. Thus, in *Santos vs. Moir* (36 Phil., 350, 359), we said: "It is well recognized that a party cannot split a single cause of action into parts and sue on each part separately. A complaint for the recovery of personal property with damages for detention states a single cause of action which cannot be divided into an action for possession and one for damages; and if suit is brought for possession only a subsequent action cannot be maintained to recover the damages resulting from the unlawful detention." In *Rubio de Larena vs. Villanueva* (53 Phil., 923, 927), we reiterated the rule by stating that " * * * a party will not be permitted to split up a single cause of action and make it the basis for several suits" and that when a lease provides for the payment of the rent in separate installments, each installment constitutes an independent cause of action, but when, at the time the complaint is filed, there are several installments due, all of them constitute a single cause of action and should be included in a single complaint, and if some of them are not so included, they are barred. The same doctrine is stated in *Lavarro vs. Labitoria* (54 Phil, 788), wherein we said that "a party will not be permitted to split up a single cause of action and make it a basis for several suits" and that a claim for partition of real property as well as for improvements constitutes a single cause of action, and a complaint for partition alone bars a subsequent complaint for the improvements. And in *Blossom & Co. vs. Manila Gas Corporation* (55 Phil., 226, 240), we held that "as a general rule a contract to do several things at several times is divisible in its nature, so as to authorize successive actions; and a judgment recovered for a single breach of a continuing contract or covenant is no bar to a suit for a subsequent breach thereof. But where the

covenant or contract is entire, and the breach total, there can be only one action, and plaintiff must therein recover all his damages."

The rule against splitting a single cause of action is intended "to prevent repeated litigation between the same parties in regard to the same subject of controversy; to protect defendant from unnecessary vexation; and to avoid the costs and expenses incident to numerous suits." (1 C. J., 1107.) It comes from that old maxim *nemo bedit bis vexare pro una et eadem cause* (no man shall be twice vexed for one and the same cause). (Ex parte Lange, 18 Wall., 163, 168; 21 Law. ed., 872; also U. S. vs. Throckmorton, 98 U. S., 61; 25 Law. ed., 93.) And it developed, certainly not as an original legal right of the defendant, but as an interposition of courts upon principles of public policy to prevent inconvenience and hardship incident to repeated and unnecessary litigations. (1 C. J., 1107.)

For non-payment of a note secured by mortgage, the creditor has a single cause of action against the debtor. This single cause of action consists in the recovery of the credit which execution of the security. In other words, the creditor in his action may make two demands, the payment of the debt and the foreclosure of his mortgage. But both demands arise from the same cause, the non-payment of the debt, and, for that reason, they constitute a single cause of action. Though the debt and the mortgage constitute separate agreements, the latter is subsidiary to the former, and both refer to one and the same obligation. Consequently, there exists only one cause of action for a single breach of that obligation. Plaintiff, then, by applying the rule above stated, cannot split up his single cause of action by filing a complaint for payment of the debt, and thereafter another complaint for foreclosure of the mortgage. If he does so, the filing of the first complaint will bar the subsequent complaint. By allowing the creditor to file two separate complaints simultaneously or successively, one to recover his credit and another to foreclose his mortgage, we will, in effect, be authorizing him plural redress for a single breach of contract at so much cost to the courts and with so much vexation and oppression to the debtor.

We hold, therefore, that, in the absence of express statutory provisions, a mortgage creditor may institute against the mortgage debtor either a personal action for debt or a real action to foreclose the mortgage. In other words, he may pursue either of the two remedies, but not both. By such election, his cause of action can by no means be impaired, for each of the two remedies is complete in itself. Thus, an election to bring a personal action will leave open to him all the properties of the debtor for attachment and execution, even including the mortgaged property itself. And, if he waives such personal action and pursues his remedy against the mortgaged property, an unsatisfied judgment thereon would still give him the right to sue for a deficiency judgment, in which case, all the properties of the defendant, other than the mortgaged property, are again open to him for the satisfaction of the deficiency. In either case, his remedy is complete, his cause of action undiminished, and any advantages attendant to the pursuit of one or the other remedy are purely accidental and are all under his right of election. On the other hand, a rule that would authorize the plaintiff to bring a personal action against the debtor and simultaneously or successively another action against the mortgaged property, would result not only in multiplicity of suits so offensive to justice (*Soriano vs. Enriques*, 24 Phil., 584) and obnoxious to law and equity (*Osorio vs. San Agustin*, 25 Phil., 404), but also in subjecting the defendant to the vexation of being sued in the place of his residence or of the residence of the plaintiff, and then again in the place where the property lies.

In arriving at the foregoing conclusion, we are not unaware of the rule prevailing in certain States of the American Union; to the effect that, in cases like the one at bar, the creditor can pursue his remedies against the note and against the security concurrently or successively. The reason given for the rule seems to be that the causes of action in the two instances are not the same, one being personal and the other, real. But, as we have heretofore suited, the creditor's cause of action is not only single but indivisible, although the agreements of the parties, evidenced by the note and the deed of mortgage, may give rise to different remedies. (*Frost vs. Witter*, 132, Cal., 421.) The cause of action should not be confused with the remedy created for its enforcement. And considering,

as we have shown, that one of the two remedies available to the creditor is as complete as the other, he cannot be allowed to pursue both in violation of those principles of procedure intended to secure simple, speedy and unexpensive administration of justice.

Judgment is affirmed, with costs against the appellant.

Avancena, C. J., Villa-Real, and Concepcion, JJ., concur.

Imperial and Laurel, JJ., see dissenting opinion.

Diaz, J., concurs with Justice Imperial, and vote to reverse the appealed judgment.

DISSENTING OPINION

IMPERIAL, J.:

The legal question raised is whether the plaintiff, as mortgagee, has waived its right to foreclose a real estate mortgage by its commencement of a personal action to collect the secured debt or loan; in other words, whether it is precluded from bringing foreclosure suit after instituting a personal action for the recovery of the indebtedness represented by the note.

To support the affirmative of the proposition the majority decision cites the case of *Hijos de I. de la Rama vs. Sajo* (45 Phil., 703), and asserts that the said case has expressly held that a real estate mortgagee who has brought an ordinary personal action for the recovery of a debt stated in a note should be deemed to have waived the foreclosure suit and is estopped thereafter from bringing an action upon the mortgage. I have read the aforesaid decision and have come to the conclusion that the doctrine relied upon is neither found nor laid down therein. The said case had to do with the mortgage of real and personal property executed to secure the payment of P35,000. Instead of filing foreclosure suit, the plaintiff mortgagee instituted a personal action to recover only the amount of the note and interest thereon. The question raised was whether it could maintain the personal action there being, as there was, a mortgage contract. The defendant contended that the action did not lie, for otherwise he would be subjected to another real action, that upon the mortgage. Resolving this legal question, this court spoke thus: "The appellant argues, however, that if the plaintiff may waive his right under the mortgage and maintain a personal action, he is liable to be subject to two actions. That contention, in our judgment, is without merit. * * * The rule is well established that the creditor may waive whatever security he has and maintain a personal action, in the absence of statutory provisions in the contract. In this jurisdiction there are no statutes covering the question. * * * While it is true in some jurisdictions, by virtue of statutory provisions, that when a mortgage is given to secure the payment of an indebtedness the action brought to recover a judgment for said indebtedness must be one for the foreclosure of the mortgage, yet we are of the opinion that in the absence of statutory provisions the mortgagee may waive the right to foreclose his mortgage and maintain a personal action for the recovery of the indebtedness. There is no statutory provision in this jurisdiction prohibiting a personal action to recover a sum of money even though a mortgage has been given as security for the payment of the same." It will be noted that all that was said and held in said case is that the mortgagee may waive the foreclosure suit and bring the personal action for the sole purpose of recovering the debt. The doctrine now sought to be established, "to the effect that in such case the mortgagee waives in fact and in law his action upon the mortgage and that he is already estopped from bringing the latter should he have previously instituted the personal action, has not been enunciated. We should not lose sight of the material difference between "to be able to waive" and the fact that he has waived or that he has in law actually waived the action upon the mortgage. If that decision had simply said that the mortgagee "may waive" the foreclosure suit, it was doubtless because there are cases, as the present, where should the creditor fail in his personal action and the debt remains unpaid notwithstanding the execution of the judgment obtained, there is no

doubt that said mortgagee may yet maintain a foreclosure suit for the purpose of executing the security. This idea is corroborated by the language in the said decision that "There is no statutory provision in this jurisdiction prohibiting a personal action to recover a sum of money even though a mortgage has been given as security for the payment of the same "

The only existing prohibition against the simultaneous or alternative institution of the two cumulative actions available to a real estate mortgagee is found in section 708 of the Code of Civil Procedure providing that the filing of a claim against the property of a deceased person, secured by a mortgage, implies the waiver of the latter, and the creditor cannot thereafter make use of his right to bring a real action, and vice versa. But this rule is only applicable to actions arising from mortgages upon property of deceased persons. In other cases the mortgagee may not only bring real and personal actions but may avail himself thereof successively as long as the indebtedness, upon the commencement of the second action, has not been fully paid.

"Where there is a principal debt or obligation with some other obligation as collateral to or security therefor, each gives rise to a separate cause of action for which different actions may be brought, although there can be but one satisfaction, of the amount of the debt. This rule applies in the case of a principal debt with a collateral note or bond, and also in the case of a note or bond with a mortgage given as security therefor, unless it is otherwise provided by statute." (Ford vs. Burks, 37 Ark., 91; Fairchild vs. Holly, 10 Conn., 474; White vs. Smith, 33 Pa., 186; Anderson vs. Neef, 32 Pa., 379; Jordan vs. Massey, 134 S. W., 804; Clark vs. Young, 2 Law. ed., 74; McGuilough vs. Hellman, 8 Or., 191; Milwaukee First Nat. Bank vs. Finck, 76 N. W., 608; 1 C. J., p. 1115, sec. 294.)

Upon the other hand, the majority decision does not give importance to the doctrine enunciated in the case of Matienzo vs. San Jose (G. K. No. 39510), where the same legal question was squarely passed upon in the sense that in this jurisdiction the mortgagee is not precluded from availing himself of both actions, that for the recovery of the debt or note, and that to foreclose the mortgage when the debt has not yet been paid. We said in that case: "Apart from special proceedings regulated by statute, an unsatisfied personal judgment for a debt is no bar to an action to enforce a mortgage or other lien given as security for such debt."

In treating lightly of the doctrine laid down in the latter case, the majority decision states that it is not binding upon the court because the decision was signed by three justices only, without considering, however, that while it was promulgated by a division of three justices, before the law it was a decision of the Supreme Court. We have repeatedly said that the decisions promulgated by a division of this court, under the former law, have the same legal force and weight as though rendered by the Supreme Court, for the obvious reason that the Supreme Court is only one and is by law authorized to work in divisions and decide cases within the latter's jurisdiction. It is strange to state that a rule or doctrine enunciated in a decision rendered by one of the former divisions of this court neither binds nor constitutes a precedent of the Supreme Court, as it is now constituted, just because the decision has been promulgated and authorized by three justices. I can not find persuasive force in the argument or imagine any weighty reason to view a rule or doctrine thus enunciated with indifference or disregard. The doctrine, when sound and based upon the law, has the same legal and convincing force as any decision promulgated with the concurrence of seven justices. What is persuasive in a decision of a constituted court of justice is not the number of votes of the justices composing it, but the legal grounds upon which it rests. When a decision subscribed by seven votes is erroneous and without support either in the law or in the facts, evidently it has less persuasive value than another decision authorized by three votes only under the old law.

The majority decision states:

"For non-payment of a note secured by mortgage, the creditor has a single cause of action against the debtor. This single cause of action consists in the recovery of the credit with execution of the security. In other words,

the creditor in his action may make two demands, the payment of the debt and the foreclosure of his mortgage. But both demands arise from the same cause, the non-payment of the debt, and, for that reason, they constitute a single cause of action. Though the debt and the mortgage constitute separate agreements, the latter is subsidiary to the former, and both refer to one and the same obligation. Consequently, there exists only one cause of action for a single breach of that obligation. Plaintiff, then, by applying the rule above stated, cannot split up his single cause of action by filing a complaint for payment of the debt, and thereafter another complaint for foreclosure of the mortgage. If he does so, the filing of the first complaint will bar the subsequent complaint. By allowing the creditor to file two separate complaints simultaneously or successively, one to recover his credit and another to foreclose his mortgage, we will, in effect, be authorizing him plural redress for a single breach of contract at so much cost to the courts and with so much vexation and oppression to the debtor."

This part of the majority decision involves various propositions that will bear clarification or rectification. In fine, it is affirmed that a contract of, real estate mortgage implies a single action or a single cause of action only; that while the contract includes the loan, which is the principal, and the mortgage, which is the accessory, when the creditor elects to bring the action for the recovery of the debt, he may not institute the other for the foreclosure of the mortgage; and that if the commencement of the actions is authorized the result would be vexatious and oppressive upon the debtor.

The first point is of transcendental importance and should not constitute a doctrine in this jurisdiction because it undermines the foundation of the institution of real estate mortgage consecrated by the civil law. All the countries that have adopted the civil law inspired by the Roman Law, and even those that have based it on Anglo-Saxon and American principles have recognized and proclaimed that the contract of mortgage supposes and implies two contracts, one the principal, which is the loan, and the other the accessory, which is the mortgage properly so-called. (Arts. 1857, 1858 and 1861, Civil Code; 1 C. J., p. 1115, sec. 294.)

Commenting on paragraph 1 of article 1857 of the Civil Code (vol. 12, p. 341), Manresa has the following to say:

"This requisite arises from the object and purpose of said contracts and from the accessory character which distinguishes them, for both the pledge and the mortgage are purely accessory contracts and as such, like all others of the same kind, cannot exist without a principal obligation, prior or coetaneous, for which they serve as a security, from which it follows that without said principal obligation, such contracts cannot subsist or come about. Hence, altho there is a promise to constitute a pledge or a mortgage, this promise is not demandable while the obligation to be secured in any of said forms has no existence or has not been constituted.

"Such contracts, therefore, fall under the same case as that of guaranty, with respect to which they have this common and analogous character, and, as in the case of guaranty, the pledge and the mortgage cannot have juridical existence without a valid obligation for which they serve as a security, for while the article we are commenting does not expressly require the condition of validity of the obligation which is to be the object of the said contracts, as is done in article 1824 with respect to guaranty, that condition is understood to be imposed, because the void acts among which are to be counted the obligations secured by the pledge or the mortgage, if not valid, cannot produce any juridical effect.

"The pledge and the mortgage being in the same condition as that of guaranty, with respect to their accessory character, it is evident that what we said with respect to this in the preceding title is now applicable to the two contracts aforesaid, without the necessity now or at present to go into further explanation of this common character or essential requisite of one and the other of the aforesaid contracts."

If a contract of real estate mortgage, by its nature, necessarily includes two distinct and separate contracts, namely, the loan and the mortgage, it is obvious and undoubted that the creditor has also two independent and

separate rights, to wit, to recover the debt and to foreclose the mortgage; and if he has two rights it cannot be denied that two actions or causes of action are available to him upon the principle that for every right he has necessarily a corresponding action, and the latter is the correlative of the former. For this reason section 256 of our Code of Civil Procedure provides that the judgment rendered in a foreclosure suit should require, first, that the debtor against whom judgment is rendered should pay his indebtedness to the creditor or deposit it in court, and, secondly, that in default thereof, the mortgaged property should be sold. This procedure marked out for the foreclosure of a mortgage merely corroborates and executes the fundamental idea that a mortgage implies two contracts giving rise to two rights in favor of the creditor who is also entitled to two actions or two causes of action.

It is, consequently, incorrect to state and lay down as a doctrine of the Supreme Court that in a contract of real estate mortgage there is, under the law, but one action, that upon the mortgage.

The second point is refuted by the decision in the case of *Matienzo vs. San Jose*, supra, wherein it was held, soundly because founded upon the law, that with the exception of special proceedings, an unsatisfied personal judgment for debt is not a bar to an action to foreclose a mortgage or any lien given to secure an indebtedness, and by what has been said in the case of *Hijos de I. de la Rama vs. Sajo*, supra, that in this jurisdiction there is no law prohibiting personal and real actions, apart from those cases where the mortgagee has to enforce his right against the property of deceased persons. In laying down the doctrine that upon the commencement of a personal action the mortgagee cannot bring the real action, the majority decision does not cite any authority in support thereof, and I said that it does not cite any authority because the California decisions cited cannot be applied in this jurisdiction inasmuch as in that State there is a positive and express law prohibiting the second action when the mortgagee has elected to exhaust the first.

As to the third point, it is said that the other ground of the rule sought to be established is that, if the second action is permitted, the debtor would be subjected to vexatious and oppressive proceedings. This is likewise incorrect, at least in those cases where, as in the present, the debt has not been paid when an attempt was made to execute the personal judgment obtained by the creditor. In the present case the debtor cannot plead oppression or vexation as he has not yet satisfied his indebtedness, and this is so because when the sheriff tried to execute the judgment, *Oriental Commercial Co., Inc.*, presented a third-party claim alleging that it had acquired ownership of the mortgaged property.

To strengthen the doctrine sought to be established, the majority decision applies the rule of splitting of actions. This is another objectionable feature of the majority decision. The rule of the procedure relied upon is not applicable to the present case because it refers solely to those where there is only one action or cause of action. In the case under consideration it has already been shown that there are two causes of action, for the enforcement of which there is no need of dividing or separating them as they are already separate and independent, in truth, what is intended to be applied to the case is the rule of merger of actions because with the doctrine desired to be established it is sought to enunciate the rule that from two separate and independent actions arising from the complex contract of mortgage, not more than one of them can be instituted, which, as we have said, is not supported by any law, express or implied, in this jurisdiction. For the foregoing reasons, I dissent from the majority decision and vote to reverse the appealed judgment.

DISSENTING OPINION

LAUREL, J.:

In the absence of clear legislative expression, the remedy here is cumulative, not alternative.

The principle of non bis in idem, suggested by the appellees and accepted by the majority, is inapplicable here.

I, therefore, concur in the preceding dissent of Justice Imperial.

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