

BACHRACH MOTOR COMPANY, INC., PLAINTIFF, VS. RICARDO SUMMERS, DEFENDANT.*G. R. No. 17393. July 21, 1921*

Ponente: STREET, J.

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On March 9, 1920, Elias Xboitiz executed a chattel mortgage upon a Nash automobile, bearing the Factory No. 143643, in favor of the Bachrach Motor Company, Inc., to secure a debt for P3,675, payable in twelve installments. In the month of November of the same year, the mortgagor defaulted in the payment of the installment for that month; and as a consequence the Motor Company determined to have the car sold for the purpose of foreclosing the mortgage, in the manner prescribed in section 14 of the Chattel Mortgage Law (Act No. 1508). It accordingly requested Ricardo Summers, as sheriff of the city of Manila, to take the car from the debtor and to expose it to public sale, as provided in said section. Acting in pursuance of this authority the sheriff applied to the mortgagor for the automobile; but the mortgagor refused to surrender possession; and the Motor Company instituted an action of replevin to recover the car. However, its efforts to get possession were again destined to be temporarily baffled, as Aboitiz gave bond for the retention of the automobile *pendente lite*. The Motor Company thereupon filed the present petition in this court for the writ of mandamus to compel the sheriff to seize the car from the mortgagor and sell it. To this petition the sheriff demurred, and the cause is now before us for the determination of the issues thus presented.

The question to which we shall first address ourselves—and which is really the vital point in the case—is whether, after default by the Mortgagor in the performance of the conditions of a chattel mortgage, (the sheriff is unconditionally bound to seize the mortgaged property at the instance of the creditor, and sell it to satisfy the debt. The petitioner supposes that the sheriff must so proceed and that, upon failure to do so, he can be compelled thereto by the writ of mandamus.

In commercial usage the property which is the subject of a chattel mortgage is, as is well known, almost invariably left in the possession of the mortgagor, and this possession is not disturbed until the mortgagor defaults in the payment of the secured debt or otherwise fails to comply with the conditions of the mortgage.

When default occurs and the creditor desires to foreclose, he must necessarily take the mortgaged property into his hands; and his right to do this is clearly implied in the provision which gives the right to sell. Says the statute: "The mortgagee * * * may, after thirty days from the time of condition broken, cause the mortgaged property, or any part thereof, to be sold at public auction by a public officer at a public place in the municipality where the mortgagor resides," etc. (Sec. 14, Act No. 1508.) As will be seen, this provision supposes that the creditor has possession of the mortgaged property, for the power to sell imports a power to make delivery of the thing sold to the purchaser; and without actual possession delivery would be impossible. The right of the mortgagee to have possession after condition broken must therefore be taken to be unquestionable; and to this effect is the great weight of American authority. (11 C. J., 560; 28 Am. & Eng. Encyc. of Law, 2d ed., 782; 5 R. C. L., 462; *St. Mary's Machine Co. vs. National Supply Co.*, 96 Am. St. Rep., 677, 684, note.)

Where, however, the debtor refuses to yield up the property, the creditor must institute an action, either to effect a judicial foreclosure directly, or to secure possession as a preliminary to the sale contemplated in the provision above quoted. He cannot lawfully take the property by force against the will of the debtor. Upon this point the American authorities are even more harmonious than they are upon the point that the creditor is entitled to possession. As was said many years ago by the writer of this opinion in a monographic article contributed to an encyclopedic legal treatise, "if possession cannot be peaceably obtained the mortgagee must bring an action." (Trust Deeds and Power of Sale Mortgages, 28 Am. & Eng. Encyc. of Law, 2d ed., 783.) In the article on Chattel Mortgages, in Corpus Juris, we find the following statement of the law on the same point: "The only restriction on the mode by which the mortgagee shall secure possession of the mortgaged property after breach of condition is that he must act in an orderly manner and without creating a breach of the peace, subjecting himself to an action for trespass." (11 C. J., 560; see also 5 R. C. L., 462.)

The reason why the law does not allow the creditor to possess himself of the mortgaged property with violence and against the will of the debtor is to be found in the fact that the creditor's right of possession is conditioned upon the fact of default, and the existence of this fact may naturally be the subject of controversy. The debtor, for instance, may claim in good faith, and rightly or wrongly, that the debt is paid, or that for some other reason the alleged default is nonexistent. His possession in this situation is as fully entitled to protection as that of any other person, and in the language of article 446 of the Civil Code he must be respected therein. To allow the creditor to seize the property against the will of the debtor would make the former to a certain extent both judge and executioner in his own cause—a thing which is inadmissible in the absence of unequivocal agreement in the contract itself or express provision to that effect in the statute.

It will be observed that the law places the responsibility of conducting the sale upon "a public officer;" and it might be supposed that an officer, such as the sheriff, can seize the property where the creditor could not. This suggestion is, we think, without force, as it is manifest that the sheriff or other officer proceeding under the authority of the language already quoted from section 14 of the Chattel Mortgage Law, becomes pro hac vice the mere agent of the creditor. There is nothing in this provision which creates a specific duty on the part of the officer to seize the mortgaged property; and no intention on the part of the law-making body to impose such a duty can be implied. The conclusion is clear that for the recovery of possession, where the right is disputed, the creditor must proceed along the usual channels by action in court. Whether the sheriff, upon being indemnified by the creditor, could safely proceed to take the property from the debtor, is a point upon which we express no opinion.

In the brief of counsel attention is directed to the circumstance that in section 3 of Act No. 1508, the chattel mortgage is said to be a conditional sale; and an inference is drawn therefrom supposedly favorable to the contention of the petitioner. It is undeniable that the language there used supports the view that the mortgagee is the owner of the mortgaged property and therefore entitled to possession after condition broken, but that provision is in no wise concerned with the problem as to how possession may be acquired if the mortgagor refuses to yield it up. In this connection a few words of comment exhibiting the true import of that provision will not be out of place. The language referred to is as follows:

"SEC. 3. A chattel mortgage is a conditional sale of personal property as security for the payment of a debt, or the performance of some other obligation specified therein, the condition being that the sale shall be void upon the seller paying to the purchaser a sum of money or doing some other act named. If the condition is performed according to its terms the mortgage and sale immediately become void, and the mortgagee is thereby divested of his title."

The use of the term conditional sale in connection with the chattel mortgage is apt to be misleading to a person

unacquainted with the common-law history of the contract of mortgage; and it is unfortunate that such an expression should have been incorporated in a statute intended to operate in the Philippine Islands. As will be readily seen, the idea is totally foreign to the conception of the mortgage which is entertained by the civil law. What is worse it does not even reflect with fidelity the actual state of the American and English law on the same subject.

Rightly understood, in connection with the common-law history of the mortgage, the meaning of the section quoted may be exhibited in some such proposition as the following:

A chattel mortgage is a contract which purports to be, and in form is, a sale of personal property, intended as security for the payment of a debt, or the performance of some other obligation specified therein, upon the condition subsequent that such sale shall be void upon payment of the debt or performance of the specified obligation according to the terms of the contract.

Now, while the proposition which we have here formulated contains a true description of the external features of the chattel mortgage, it does not by any means embody a correct statement of its juridical effects. A visit to any recorder's office in a common-law State will supply abundant proof that chattel mortgages are commonly drawn in the form of a straight sale, to which a clause of defeasance is added, declaring that in case the debt is paid or other obligation performed the contract will be void. But the form of the contract is merely a heritage from the remote past, and does not by any means reveal the exact import of the transaction. Every person, however superficially versed in American and English law, knows that in equity the mortgage, however drawn, is to be treated as a mere security. The contract in fact merely imposes on the mortgaged property a subsidiary obligation by which it is bound for the debt or other principal obligation of the mortgagor. This is the equitable conception of the mortgage; and ever since the English Court of Chancery attained to supremacy in this department of jurisprudence, mortgages have been dealt with in this sense in every land where English law has taken root. The old formulas may, it is true, remain, but a new spirit has been breathed into them. And of course sooner or later the ancient forms are discarded. Look, for instance, at the form of a chattel mortgage given in section 5 of Act No. 1508, where it is said that the mortgagor "conveys and mortgages." This means "conveys by way of mortgage;" and the word "mortgages" alone would of course be equally effective. In fact we note that in the contract executed in the present case, it is merely said that EliaS Aboitiz "mortgages" the automobile to which the contract relates. In describing the chattel mortgage as a conditional sale we are merely rattling the bones of an antiquated skeleton from which all semblance of animate life has long since departed. The author of section 3 of the Chattel Mortgage Law was most unhappy in his effort to elucidate to civilian jurists the American conception of the contract of mortgage.

But whatever conclusion may be drawn in the premises with respect to the true nature of a chattel mortgage, the result must in this case be the same; for whether the mortgagee becomes the real owner of the mortgaged property—as some suppose—or acquires only certain rights therein, it is none the less clear that he has after default the right of possession; though it cannot be admitted that he may take the law into his own hands and wrest the property violently from the possession of the mortgagor. Neither can he do through the medium of a public officer that which he cannot directly do himself. The consequence is that in such case the creditor must either resort to a civil action to recover possession as a preliminary to a sale, or preferably he may bring an action to obtain a judicial foreclosure in conformity, so far as practicable, with the provisions of the Chattel Mortgage Law.

Only a few words will be added with reference to the question whether this court has jurisdiction to entertain the present proceeding. In this connection it is insisted by the attorneys for the respondent that the sheriff is an officer of the Court of First Instance and the petitioner should, so it is insisted, address himself to that court as the proper court to control the activities of the sheriff. While this criticism would be valid if the purpose were to control the

sheriff in the matter of carrying-into effect any judgment, order, or writ of a Court of First Instance, it is not applicable in a case like the present where the act to be done is defined by general law and has no relation to the office of sheriff as the executive officer of the Court of First Instance. As to such activities this court must be considered to have concurrent jurisdiction with the Court of First Instance under section 515 of the Code of Civil Procedure.

The demurrer must be sustained, and the writ prayed for will be denied. It is so ordered, with costs against the petitioner.

Mapa, C. J., Araullo, Avancena, and Villamor, JJ., concur.

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