

**THE PHILIPPINE SUGAR ESTATES DEVELOPMENT CO., LTD., INC.,
PLAINTIFF AND APPELLEE, VS. JUAN M. POIZAT ET AL.,
DEFENDANTS. GABRIELA ANDREA DE COSTER, APPELLANT.**

G.R. No. 23352. December 31, 1925

Ponente: STATEMENT August 25, 1905, the appellant, with his consent, executed to and in favor of her husband, Juan M. Poizat, a general power of attorney, which, among other things, authorized him to do "in her name, place and stead, and making use of her rights and actions," the following things: "To loan or borrow any amount in cash or fungible things at the rate of interest, for the time, and under the conditions he may deem convenient, collecting or paying the principal or the interest, when they respectively should become due; executing and signing the corresponding public or private documents, and making these transactions with or without mortgage, pledge or personal securities." November 2, 1912, Juan M. Poizat applied for and obtained from the plaintiff a credit for the sum of 10,000 Pounds Sterling to be drawn on the "Banco Español del Rio de la Plata" in London not later than January, 1913. Later, to secure the payment of the loan, he executed a mortgage upon the real property of his wife, the material portions of which are as follows: "This indenture entered into in the City of Manila, P. I., by and between Juan M. Poizat, merchant, of legal age, married and residing in the City of Manila, in his own behalf and in his capacity also as attorney in fact of his wife Doña Gabriela Andrea de Coster by virtue of the authority vested in him by the power of attorney duly executed and acknowledged in this City of Manila, etc. "First. That in the name of Doña Gabriela Andrea de Coster, wife of Don Juan M. Poizat, there is registered on page 89 (back) of Book 3, temporary Binondo Section, property No. 685, inscription No. 3, Urban Property consisting of a house and six adjacent warehouses, all of strong material and constructed upon her own land, said property being Nos. 5, 3, and 1 of Calle Urbiztondo, and No. 13 of Calle Barraca in the District of Binondo in the City of Manila, etc. "Second. That the marriage of Don Juan M. Poizat and Doña Gabriela Andrea de Coster being subsisting and undissolved, and with the object of constructing a new building over the land hereinabove described, the aforesaid house with the; six warehouses thereon constructed were demolished and in their stead a building was erected, by permission of the Department of Engineering and Public Works of this City issued November 10, 1902, said building being of strong material which, together with the land, now forms only one piece of real estate, etc.; which property must be the subject of a new description [registration] in which it must appear that the land belongs in fee simple and in full ownership as paraphernal property to the said Doña Gabriela Andrea de Coster and the new building thereon constructed to the conjugal partnership of Don Juan M. Poizat and the said Doña Gabriela Andrea de Coster, etc. "Third. That the Philippine Sugar Estates Development Company, Ltd., having granted to Don Juan M. Poizat a credit of Ten Thousand Pounds Sterling with a mortgage upon the real property above described, etc. "(a) That the Philippine Sugar Estates Development Company, Ltd., hereby grants Don Juan M. Poizat a credit in the amount of Ten Thousand Pounds Sterling which the said Mr. Poizat may use within the entire month of January of the coming year, 1913, upon the bank established in the City of London, England, known as 'Banco Español del Rio de la Plata,' which shall be duly advised, so as to place upon the credit of Mr. Poizat the said amount of Ten Thousand Pounds Sterling, after executing the necessary receipt therefor. "(c) That Don Juan M. Poizat personally binds himself and also binds his principal Doña Gabriela Andrea de Coster to pay the Philippine Sugar Estates Development Company, Ltd., for the said amount of Ten Thousand Pounds Sterling at the yearly interest of 9 per cent which shall be paid at the end of each quarter, etc. "(d) Don Juan M. Poizat also binds himself personally and his principal Doña Gabriela Andrea de Coster to return to the Philippine Sugar Estates Development Company, Ltd., the amount of Ten Thousand Pounds Sterling within four years from the date that the said Mr. Poizat shall receive the aforesaid sum as evidenced by the receipt that he shall issue to the 'Banco Español del Rio de la Plata.' "(e) As security for the payment of the said credit, in the case Mr. Poizat should receive the money, together with its interest the said Mr. Poizat in the

dual capacity that he represents hereby constitutes a voluntary especial mortgage upon the Philippine Sugar Estates Development Company, Ltd., of the urban property above described, etc. "(f) Don Juan M. Poizat in the capacity above mentioned binds himself, should he receive the amount of the credit, and while he may not return the said amount of Ten Thousand Pounds Sterling to the Philippine Sugar Estates Development Company, Ltd., to insure against fire the mortgaged property in an amount not less than One Hundred Thousand Pesos, etc. "Fourth. Don Buenaventura Campa in the capacity that he holds hereby accepts this indenture in the form, manner, and condition executed by Don Juan M. Poizat by himself personally and in representation of his wife Doña Gabriela Andrea de Coster, in favor of the Philippine Sugar Estates Development Company, Ltd. "In witness whereof, we have signed these presents in Manila, this November 2, 1912. (Sgd.) "JUAN M. POIZAT "THE PHILIPPINE SUGAR ESTATES DEVELOPMENT COMPANY, LTD. "The President "BUENAVENTURA CAMPA "Signed in the presence of: (Sgd.) "MANUEL SAPSANO "JOSE SANTOS "UNITED STATES OF AMERICA "PHILIPPINE ISLANDS "CITY OF MANILA "In the City of Manila P. I., this November 2, 1912, before me Enrique Barrera y Caldes, a Notary Public for said city, personally appeared before me Don Juan M. Poizat and Don Buenaventura Campa, whom I know to be the persons who executed the foregoing document and acknowledged same before me as an act of their free will and deed; the first exhibited to me his certificate of registry No. 14237, issued in Manila, February 6, 1912, the second did not exhibit any cedula, being over sixty years old; this document bears No. 495, entered on page 80 of my Notarial registry. "Before me: (Sgd.) "Dr. ENRIQUE BARRERA Y CALDES " [NOTARIAL SEAL] "Notary Public "Up to the 31st of December, 1912" For failure to pay the loan, on November 12, 1923, the plaintiff brought an action against the defendants, to fore- close the mortgage. In this action, the summons was served upon the defendant Juan M. Poizat only, who employed the services of Antonio A. Sanz to represent the defendants. The attorneys filed a general appearance for all of them, and later an answer in the nature of a general denial. February 18, 1924, when the case was called for trial, Jose Galan y Blanco in open court admitted all of the allegations made in the complaint, and consented that judgment should be rendered as prayed for. Later, Juan M. Poizat personally, for himself and his codefendants, filed an exception to the judgment, and moved for a new trial, which was denied March 31, 1924. August 22, 1924, execution was issued directing the sale of the mortgaged property to satisfy the judgment. September 18, 1924, the property, which had an assessed value of P342,685, was sold to the plaintiff for the sum of P100,000. September 23, 1924, and for the first time, the appellant personally appeared by her present attorney, and objected to the confirmation of the sale, among other things, upon the following grounds: That the mortgage in question was illegally executed, and is null and void, because the agent of this defendant was not authorized to execute it. That there was no consideration. That the plaintiff, with full knowledge that J. M. Poizat was acting beyond the scope of his authority, filed this action to subject the property of this defendant to the payment of the debt which, as to appellant, was not a valid contract. That the judgment was rendered by confession when the plaintiff and J. M. Poizat knew that Poizat was not authorized to confess judgment, and that the proceeding was a constructive fraud. That at the time the action was filed and the judgment rendered, this defendant was absent from the Philippine Islands, and had no knowledge of the execution of the mortgage. That after the judgment of foreclosure became final and the order of the sale of the property was made, that this defendant for the first time learned that the mortgage contract was tainted with fraud, and that she first knew and learned of such things on the 11th of September, 1924. That J. M. Poizat was not authorized to bind her property to secure the payment of his personal debts. That the plaintiff knew that the agent of the defendant was not authorized to bind her or her property. That the mortgage was executed to secure a loan of 10,000 Pounds, which was not made to this defendant or for her benefit, but was made to him personally and for the personal use and benefit of J. M. Poizat. Among other things, the mortgage in question, marked Exhibit B, was introduced in evidence, and made a part of the record. All of such objections to the confirmation of the sale were overruled, from which Gabriela Andrea de Coster appealed and assigns the following errors: "I. The lower court erred in finding that Juan M. Poizat was, under the power of attorney which he had from Gabriela Andrea de Coster, authorized to mortgage her paraphernal property as security for a loan made to him personally by the Philippine Sugar Estates Development Co., Ltd.; "II. The lower court erred in not finding that under the power of attorney, Juan M. Poizat had no authority to make Gabriela Andrea de Coster jointly liable with him for a loan of 10,000 Pounds made by

the Philippine Sugar Estates Development Co., Ltd., to him; "III. The lower court erred in not finding that the Philippine Sugar Estates Development Co., Ltd., had knowledge and notice of the lack of authority of Juan M. Poizat to execute the mortgage deed Exhibit A of the plaintiff; "IV. The lower court erred in holding that Gabriela Andrea de Coster was duly summoned in this case; and in holding that Attorney Jose Galan y Blanco could lawfully represent her or could, without proof of express authority, confess judgment against Gabriela Andrea de Coster; "V. The court erred in holding that the judgment in this case has become final and res judicata; "VI. The court erred in approving the judicial sale made by the sheriff at an inadequate price; "VII. The lower court erred in not declaring these proceedings, the judgment and the sale null and void. JOHNS, J.: For the reasons stated in the decision of this court in the Bank of the Philippine Islands vs. De Coster (47 Phil., 594), the alleged service of the summons in the foreclosure suit upon the appellant was null and void. In fact, it was made on J. M. Poizat only, and there is no claim or pretense that any service of summons was ever made upon her. After service was made upon him, the attorneys in question entered their appearance for all of the defendants in the action, including the appellant upon whom no service was ever made, and filed an answer for them. Later, in open court, it was agreed that judgment should be entered for the plaintiff as prayed for in its complaint. The appellant contends that the appearance made by the attorneys for her was collusive and fraudulent, and that it was made without her authority, and there may be some truth in that contention. It is very apparent that the attorneys made no effort to protect or defend her legal rights, but under our view of the case, that question is not material to this decision. The storm center of this case is the legal force and effect of the real mortgage in question, by whom and for whom it was executed, and upon whom is it binding, and whether or not it is null and void as to the appellant. It is admitted that the appellant gave her husband, J. M. Poizat, the power of attorney in question, and that it is in writing and speaks for itself. If the mortgage was legally executed by her attorney in fact for her and in her name as her act and deed, it would be legal and binding upon her and her property. If not so executed, it is null and void. It appears upon the face of the instrument that J. M. Poizat, as the husband of the wife, was personally a party to the mortgage, and that he was the only person who signed the mortgage. It does not appear from his signature that he signed it for his wife or as her agent or attorney in fact, and there is nothing in his signature that would indicate that in the signing of it by him, he intended that his signature should bind his wife. It also appears from the acknowledgment of the instrument that he executed it as his personal act and deed only, and there is nothing to show that he acknowledged it as the agent or attorney in fact of his wife, or as her act and deed. The mortgage recites that it was entered into by and between Juan M. Poizat in his own behalf and as attorney in fact of his wife. That the record title of the mortgaged property is registered in the name of his wife, Doña Gabriela Andrea de Coster. That they were legally married, and that the marriage between them has never been dissolved. That with the object of constructing a new building on the land, the six warehouses thereon were demolished, and that a new building was erected. That the property is the subject of a new registration in which it must be made to appear that the land belongs in fee simple and in full ownership as the paraphernal property of the wife, and that the new building thereon is the property of the conjugal partnership. "That the Philippine Sugar Estates Development Company, Ltd., having granted to Don Juan M. Poizat a credit of 10,000 Pounds Sterling with the mortgage upon the real property above described," that the Development Company "hereby grants Don Juan M. Poizat a Credit in the amount of 10,000 Pounds Sterling which the said Mr. Poizat may use, etc." That should he personally or on behalf of his wife use the credit he acknowledges, that he and his principal are indebted to the Development Company in the sum of 10,000 Pounds Sterling which "they deem to have received as a loan from the said commercial entity." That he binds himself and his wife to pay that amount with a yearly interest of 9 per cent, payable quarterly. That as security for the payment of said credit in the case Mr. Poizat should receive the money at any time, with its interest, "the said Mr. Poizat in the dual capacity that he represents hereby constitutes a voluntary especial mortgage." That Don Juan M. Poizat "in the capacity above mentioned binds himself, should he receive the amount of the credit." It thus appears that at the time the power of attorney and the mortgage were executed, Don Juan M. Poizat and Gabriela Andrea de Coster were husband and wife, and that the real property upon which the mortgage was executed was her sole property before her marriage, and that it was her paraphernal property at the time the mortgage was executed, and that the new building constructed on the land was the property of the conjugal partnership. The instrument further recites that the Development Company "hereby grants Don Juan M. Poizat a credit in the amount of 10,000 Pounds Sterling which the said Mr. Poizat may use within the entire

month of January of the coming year, 1913." In other words, it appears upon the face of the mortgage that the loan was made to the husband with authority to use the money for his sole use and benefit. With or without a power of attorney, the signature of the husband would be necessary to make the instrument a valid mortgage upon the property of the wife, even though she personally signed the mortgage. It is contended that the instrument upon its face shows that its purpose and intent was to bind the wife. But it also shows upon its face that the credit was granted to Don Juan M. Poizat which he might use within the "entire month of January." Any authority which he had to bind his wife should be confined and limited to his power of attorney. Giving to it the very broadest construction, he would not have any authority to mortgage her property, unless the mortgage was executed for her "and in her name, place or stead," and as her act and deed. The mortgage in question was not so executed. It was signed by Don Juan M. Poizat in his own name, his own proper person, and by him only, and it was acknowledged by him in his personal capacity, and there is nothing in either the signature or acknowledgment which shows or tends to show that it was executed for or on behalf of his wife or "in her name, place or stead." It is contended that the instrument shows upon its face that it was intended to make the wife liable for his debt, and to mortgage her property to secure its payment, and that his personal signature should legally be construed as the joint or dual signature of both the husband and that of the wife as her agent. That is to say, construing the recitals in the mortgage and the instrument as a whole, his lone personal signature should be construed in a double capacity and binding equally and alike both upon the husband and the wife. No authority has been cited, and none will ever be found to sustain such a construction. As the husband of the wife, his signature was necessary to make the mortgage valid. In other words, to make it valid, it should have been signed by the husband in his own proper person and by him as attorney in fact for his wife, and it should have been executed by both husband and wife, and should have been so acknowledged. There is no principle of law by which a person can become liable on a real mortgage which she never executed either in person or by attorney in fact. It should be noted that this is a mortgage upon real property, the title to which cannot be divested except by sale on execution or the formalities of a will or deed. For such reasons, the law requires that a power of attorney to mortgage or sell real property should be executed with all of the formalities required in a deed. For the same reason that the personal signature of Poizat, standing alone, would not convey the title of his wife in her own real property, such a signature would not bind her as a mortgagor in real property, the title to which was in her name. We make this broad assertion that upon the facts shown in the record, no authority will ever be found to hold the wife liable on a mortgage of her real property which was executed in the form and manner in which the mortgage in question was executed. The real question involved is fully discussed in *Mechem on Agency*, volume 1, page 784, in which the author says: "It is to be observed that the question here is not how authority to execute sealed instruments is to be conferred, but how such an authority is to be executed. It is assumed that the agent was authorized to bind his principal, but the question is, has he done so." That is the question here. Upon that point, there is a full discussion in the following sections, and numerous authorities are cited: "SEC. 1093. Deed by agent must purport to be made and sealed in the name of the principal.—It is a general rule in the law of agency that in order to bind the principal by a deed executed by an agent, the deed must upon its face purport to be made, signed and sealed in the name of the principal. If, on the contrary, though the agent describes himself as 'agent,' or though he add the word 'agent' to his name, the words of grant, covenant and the like, purport upon the face of the instrument to be his, and the seal purports to be his seal, the deed will bind the agent if any one and not the principal. "SEC. 1101. Whose deed is a given deed—How question determined.—In determining whether a given deed is the deed of the principal, regard may be had, First, to the party named as grantor. Is the deed stated to be made by the principal or by some other person? Secondly, to the granting clause. Is the principal or the agent the person who purports to make the grant? Thirdly, to the covenants, if any. Are these the covenants of the principal? Fourthly, to the testimonium clause. Who is it who is to set his name and seal in testimony of the grant? Is it the principal or the agent? And Fifthly, to the signature and seal. Whose signature and seal are these? Are they those of the principal or of the agent? "If upon such an analysis the deed does not upon its face purport to be the deed of the principal, made, signed, sealed and delivered in his name and as his deed, it cannot take effect as such. "Sec. 1102. Not enough to make deed the principal's that the agent is described as such.—It is not enough merely that the agent was in fact authorized to make the deed, if he has not acted in the name of the principal. Nor is it ordinarily sufficient that he describes himself in the deed as acting by virtue of a power of attorney or otherwise, or for or in behalf, or as attorney, of the principal, or as a committee, or as trustee of a

corporation, etc.; for these expressions are usually but *descriptio personae*, and if, in fact, he has acted in his own name and set his own hand and seal, the causes of action thereon accrue to and against him personally and not to or against the principal, despite these recitals. "Sec. 1103. Not principal's deed, where agent appears as grantor and signer.—Neither can the deed ordinarily be deemed to be the deed of the principal where the agent is the one who is named as the grantor or maker, and he is also the one who signs and seals it. * * * "Sec. 1108. * * * But however clearly the body of the deed may show an intent that it shall be the act of the principal, yet unless it is executed by his attorney for him, it is not his deed, but the deed of the attorney or of no one. The most usual and approved form of executing a deed by attorney is by his writing the name of the principal and adding 'by A B his attorney' or 'by his attorney A B.' * * * " That is good law. Applying it to the facts, under his power of attorney, Don Juan M. Poizat may have had authority to borrow money and mortgage the real property of his wife, but the law specifies how and in what manner it must be done, and the stubborn fact remains that, as to the transaction in question, that power was never exercised. The mortgage in question was executed by him and him only, and for such reason, it is not binding upon the wife, and as to her, it is null and void. It follows that the whole decree against her and her paraphernal property and the sale of that property to satisfy the mortgage are null and void, and that any title she may have had in or to her paraphernal property remains and is now vested in the wife as fully and as absolutely as if the mortgage had never been executed, the decree rendered or the property sold. As to Don Juan M. Poizat, the decree is valid and binding, and remains in full force and effect. It is an undisputed fact, which appears in the mortgage itself, that the land in question was the paraphernal property of the wife, but after the marriage, the old buildings on the property were torn down and a new building constructed and, in the absence of evidence to the contrary, it must be presumed that the new building is conjugal property of the husband and wife (Civil Code, art. 1404). As such, it is subject to the debts of the conjugal partnership for the payment or security of which the husband has the power to mortgage or otherwise encumber the property (Civil Code, art. 1413). It is very probable that this particular question was not fully presented to or considered by the lower court. The mortgage as to the paraphernal property of the wife is declared null and void *ab initio*, and as to her personally, the decree is declared null and void, and as to her paraphernal property, the sale is set aside and vacated, and held for naught, leaving it free and clear from the mortgage, decree and sale, and in the same condition as if the mortgage had never been executed, with costs in favor of the appellant. So ordered. Johnson, Malcolm, Ostrand, and Romualdez, JJ., concur. DISSENTING STREET, J., with whom concur Avanceña, C. J., Villamor, and Villa-Real, JJ.: In the year 1913 the plaintiff, the Philippine Sugar Estates Development Co., Ltd., Inc., let J. M. Poizat have nearly P100,000 of money on the supposed security of a mortgage on property belonging to his wife, Gabriela Andrea de Coster, executed by Poizat under a power of attorney from her. The plaintiff has now to learn that the security on which it relied is worthless and that it did not even so much as have Gabriela Andrea de Coster in court in the foreclosure proceeding. In the decision so holding the undersigned are unable to concur. To dispose first of the point as to the jurisdiction of the court over the person and property of Gabriela Andrea de Coster, it is only necessary to refer to the third paragraph from the end of the power of attorney (Exhibit A to the opposition of Gabriela Andrea de Coster) under which Poizat acted. To express, in a few words the substance of this paragraph in the part relevant to the present discussion, Poizat is given full authority to represent his wife in all judicial proceedings in Philippine courts, including, among other things, the making of appearances, submission of answers, receiving of service of process, and to take in her behalf any procedural steps and measures required by the law of procedure in order to make effective and bring to termination the matters in which he, as attorney in fact, may be concerned. If this power is not sufficient to authorize Poizat to accept service and employ a lawyer to appear in court for the principal, as was done in this case, it would seem to be useless for lawyers to exercise their ingenuity in the attempt to draft such authority. But the disastrous feature of the decision is found in the pronouncement that the mortgage on which the plaintiff's money was obtained is a nullity; and upon this point the court holds that Gabriela Andrea de Coster was not bound because the contract is signed "Juan M. Poizat," instead of "Gabriela Andrea de Coster, by Juan M. Poizat." But the document expressly recites in its preamble that it is executed by Juan M. Poizat, acting both in representation of himself and in the character of attorney in fact of his wife, Gabriela Andrea de Coster, in virtue of the authority conferred upon him in the power of attorney already mentioned. Furthermore, throughout the body of the document the idea is repeatedly expressed that J. M. Poizat obligates both himself and his wife. We submit that under the doctrine informing the Civil Code—which

should control in this jurisdiction—the mortgage instrument was lawfully executed and in a form sufficient to bind the principal as well as the agent. Certainly it would never occur to a civilian lawyer that the document in question is informally executed; and the circumstance that a learned Spanish notary (Don Enrique Barrera y Caldes) intervened in the execution of this instrument would alone suffice to show that it is done in conformity with approved Spanish models—a fact otherwise apparent. Even in the United States and Great Britain, where strict doctrines might be expected to prevail in such matters, owing to the technical rules involving the law of real property in those countries, ample authority is found to the effect that the principal will be bound by a contract signed by the agent only, when it appears from the face of the instrument that he is acting in the character of agent. (2 C. J., 672.) From the portentous way in which the opinion of the court refers to the question of the sufficiency of the signature to the mortgage as the "storm centre of the case," one would suppose that this question had been at least raised by the litigants and had been the subject of discussion in the lower court as well as in the briefs of the attorneys here. Nothing of the sort is true, for this capital point, on which the case is made principally to turn, has been jumped up exclusively in this court; and the voluminous briefs will be searched in vain for the slightest reference to the subject. In fact both parties appear to have assumed that the mortgage was executed with all proper formality. Apart from the fact that the question was not raised in the lower court, no assignment of error in this court calls in question the sufficiency of the mode of execution of the instrument. Under these circumstances this court should have confined itself to the matters put in issue by the litigants; and it should not have gone out of its way to take, up a point not discussed by the parties, and upon which in fact the losing party has never been heard. It is a good rule of practice—sometimes respected by us—that an appellate court will not permit an appellant to raise a point upon appeal which was not put in issue in the court below and upon which no assignment of error has been made. In our opinion the order appealed from should be affirmed. DECISION UPON PETITION FOR REHEARING February 15, 1926 JOHNS, J.: The plaintiff has filed a very able, vigorous and exhaustive petition for a rehearing, which we have given the careful consideration which the importance of the questions deserve. The first proposition advanced is that the mortgage in question is valid not only as to the buildings, but also as to the land on which they are constructed. The previous decision of this court is to the effect that, the buildings being conjugal property, the mortgage is valid as to the buildings, but that it is not valid as to the land, which is the paraphernal property of the wife. Plaintiff contends that the land is conjugal property under the provisions of article 1404 of the Civil Code. That article does not apply to the instant case. It does not appear that the buildings are of the nature therein specified. The commentator Manresa, cited in the motion for reconsideration, rightly distinguishes those buildings which, by reason of their importance, convert the land on which they are built into an accessory, from those which, on account of their small relative value, continue to remain as accessories to the land on which they are constructed, and for such reason partake of the land. "The word building is a generic term for all architectural work with roof built for the purpose of being used as man's dwelling, or for offices, clubs, theaters, etc. When the structure does not constitute a building, then the rule must be followed. The article cannot but be interpreted strictly. An inclosure for cattle or a 'tinada,' a stone barn, etc., follow the soil as accessories thereto." (9 Manresa, 626, 1919 ed.) It appears from the mortgage that the buildings in question to be constructed are warehouses, and as the circumstances and details do not appear in the record, such warehouses could not be construed as the class of buildings mentioned in article 1404. Hence, the facts are not sufficient to justify the court in holding that the exceptional provision applies to this case in the sense of considering the soil as an accessory to the building, contrary to the general rule contained in the Civil Code (arts. 358-364 and 1368). But conceding that article 1404 does apply, yet, under the provisions of that article, the owner of the land is entitled to an indemnity for its value. Since, according to the spirit of the law contained in article 349 of the Civil Code, no one can be deprived of his property without previous indemnity, and it not appearing in the instant case that such indemnity was ever paid, the land in question cannot now be considered as conjugal property. But it further appears that the mortgage upon which plaintiff relies contains the following recitals: "* * * which property must be the subject of a new registration wherein it must be stated that the lot forming a part thereof pertains to said Doña Gabriela Andrea de Coster in full ownership and fee simple as paraphernal property, and the building newly erected thereon to the conjugal partnership between Don Juan M. Poizat and his wife, the aforesaid Doña Gabriela Andrea de Coster * * *" (Italics ours.) The plaintiff, having taken and accepted the mortgage, is bound by those recitals. It further appears that this property is registered under the Torrens System, and that the title to the land is vested in the wife, and

is not conjugal property, and that the wife is at least the owner of the land. In a supplemental plea filed January 21, 1926, petitioner cites and relies on the case of the National Bank vs. Quintos and Ansaldo (46 Phil., 370), in which article 1408 of the Civil Code was construed and applied. It must be conceded that this article applies only to those cases wherein there is a presumption that the debt contracted by the husband is for the common benefit of both spouses, but this presumption may be overcome by evidence to the contrary. "All debts and obligations contracted during the marriage by the husband, the legal representative of the partnership in the normal condition thereof, are deemed contracted by the partnership. The law presumes that they are contracted for the common benefit of both. However, this presumption may be overthrown by evidence to the contrary, as we shall see when we take up article 1413." (9 Manresa, 648.) For this reason, where, as in the instant case, it appears that the loan obtained by the husband was not only not obtained for the common benefit of the conjugal partnership, but was obtained to the damage of the wife, there is no such presumption, and that article does not apply. It is further contended that the mortgage was executed with all of the legal necessary formalities, and in accord with the established practice and custom in the Philippine Islands, citing blank forms given in section 127 of Act No. 496, from which plaintiff's counsel contends that it is not required that the attorney in fact, who executes a document in his own name and that of his principal, must show in his signature his double capacity by writing first his own signature and then the name of his principal, and say "by" and thereafter his own signature as attorney in fact. The Act should be construed with reference to section 81 of Act No. 136, which says: "After the enactment of a new system of registration of land titles, the notarial law of the Philippine Islands of February fifth, eighteen hundred and eighty-nine, its regulations of April eleventh, eighteen hundred and ninety, and the general instructions for drafting instruments subject to record in the Philippine Islands, of October third, eighteen hundred and eighty-nine, and the modifications thereof, by General Order Number Forty, issued from the office of the United States Military Governor, on September twenty-third, eighteen hundred and ninety-nine, and by General Order Number Twenty, issued from the office of the Military Governor on February third, nineteen hundred, shall be repealed and shall be of no effect after the date of such enactment, and thereafter appointments of notaries public and the performance of official duties by them shall be regulated by the subsequent provisions of this Act." The old Spanish notarial law and system of conveyances was repealed in the Philippines, and another and a different notarial law and system became the law of the land with the enactment of Act No. 496. One of the fundamental differences between the two systems consists in this. Under the Spanish system, the documents were executed in the form of minutes, wherein the notary was the one who spoke, and under Act No. 496, the notary is not the one who speaks, and there is no record kept of the minutes, and the intervention of a notary is limited to the acknowledgment only of the document. Under the Spanish system, to determine the capacity in which a person executed a document, it was sufficient to look at the text of the document, because its whole text was attended with the solemnity of the notary authorizing its execution. Under the present system, it is necessary to resort to the form in which the parties sign an instrument, because it is the signature rather than the text which bears the stamp of authenticity. Neither does section 127 of Act No. 496 bear the construction for which the plaintiff contends. It provides in legal effect that where one or more persons executed a conveyance, the instrument must be executed by all of the parties to the conveyance, and that if there are two or more persons, the instrument must not only be signed by all of the parties to the conveyance, but it must be acknowledged by all of them. That clearly appears from the certificate of acknowledgment in which it is recited: "* * * personally appeared....., known to me to be the same person (or persons) who executed the foregoing instrument, and acknowledged that the same is his (or their) free act and deed." The construction for which plaintiff contends would nullify the words "or persons" and the words "or their." The fact that those words are used in the manner in which they are used in section 127, must mean that where two or more persons give a deed or mortgage on real property, that all of them should not only sign the mortgage, but that all of them should acknowledge it as "their free act and deed." Again, in the instant case, the power of attorney was given by the wife to the husband, and the husband himself was a party to the mortgage, and the money was paid to him for and on his personal account, and his signature was necessary to bind any interest which he had in the land as the husband of the wife, and the signature of the wife in some form was necessary to bind her interest in the land. Here, you have the signature of the husband standing alone, and there is nothing upon the face of it which shows that in the signing of it, the husband ever intended to bind his wife. If Poizat had not been the husband of his wife, and if he himself was not a party to the instrument and

did not have any interest in the land mortgaged, another and a very different question would be presented, and his lone signature might then bind the property of the wife. With all due respect to the learned counsel, no law, either Spanish or American, has been cited or will ever be found which, upon the facts shown in the record, will construe the lone unqualified signature of the husband as the joint and dual signature of both the husband and the wife, so as to make it binding upon the paraphernal property of the wife. Although not cited in the petition during the discussion of this case in conference, attention was called to article 1717 of the Civil Code which provides as follows: "When an agent acts in his own name, the principal shall, have no right of action against the persons with whom the agent has contracted, or such persons against the principal. "In such case, the agent is directly liable to the person with whom he has contracted, as if the transaction were his own. Cases involving things belonging to the principal are excepted. "The provisions of this article shall be understood to be without prejudice to actions between principal and agent." In the instant case, this section should be construed with article 1713, which among other things provides that: "In order to compromise, alienate, mortgage, or to execute any other act of strict ownership, an express power is required." The mortgage in question was upon real property, and it was not a "simple contract," and where an agency is created by an express power, it must be executed with the formalities of an express power. Again, although the wife was a party to the body of the mortgage, Poizat himself had an interest in the real property, and was a party to the instrument, and his personal signature was necessary to the mortgage to bind his own personal interest, and the interest of the conjugal partnership. The power of attorney from the wife gave her husband the express power defined in article 1713, and that power should have been exercised, and the mortgage should have been executed "in the name, place, and stead of the wife." That was not done. The authorities cited in the petition for a rehearing and in the minority opinion are based upon, and refer to, the execution by the agent of a "simple contract," and for such reason are not in point. There is a very marked legal distinction between the authority of an agent to make a "simple contract," and his authority to convey or mortgage real property and the manner in which the power should be executed. It may be true that the decision of this court is based upon questions that are not as fully discussed in the appellant's brief, as they should have been, but the fact remains that they were pointed out, and attention was called to them in the argument in the brief, and that they are expressly covered by the assignments of error. Although ably presented, we are clearly of the opinion that the petition for a rehearing must be denied. So ordered. Johnson, Malcolm, Ostrand, and Romualdez, JJ., concur. DISSENTING AVANCEÑA, C. J., STREET, VILLAMOR, and VILLA-REAL, JJ.

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STATEMENT

August 25, 1905, the appellant, with his consent, executed to and in favor of her husband, Juan M. Poizat, a general power of attorney, which, among other things, authorized him to do "in her name, place and stead, and making use of her rights and actions," the following things:

"To loan or borrow any amount in cash or fungible things at the rate of interest, for the time, and under the conditions he may deem convenient, collecting or paying the principal or the interest, when they respectively should become due; executing and signing the corresponding public or private documents, and making these transactions with or without mortgage, pledge or personal securities."

November 2, 1912, Juan M. Poizat applied for and obtained from the plaintiff a credit for the sum of 10,000 Pounds Sterling to be drawn on the "Banco Español del Rio de la Plata" in London not later than January, 1913. Later, to secure the payment of the loan, he executed a mortgage upon the real property of his wife, the material portions of which are as follows:

"This indenture entered into in the City of Manila, P. I., by and between Juan M. Poizat, merchant, of legal age, married and residing in the City of Manila, in his own behalf and in his capacity also as attorney in fact of his wife Doña Gabriela Andrea de Coster by virtue of the authority vested in him by the power of attorney duly

executed and acknowledged in this City of Manila, etc.

"First. That in the name of Doña Gabriela Andrea de Coster, wife of Don Juan M. Poizat, there is registered on page 89 (back) of Book 3, temporary Binondo Section, property No. 685, inscription No. 3, Urban Property consisting of a house and six adjacent warehouses, all of strong material and constructed upon her own land, said property being Nos. 5, 3, and 1 of Calle Urbiztondo, and No. 13 of Calle Barraca in the District of Binondo in the City of Manila, etc.

"Second. That the marriage of Don Juan M. Poizat and Doña Gabriela Andrea de Coster being subsisting and undissolved, and with the object of constructing a new building over the land hereinabove described, the aforesaid house with the; six warehouses thereon constructed were demolished and in their stead a building was erected, by permission of the Department of Engineering and Public Works of this City issued November 10, 1902, said building being of strong material which, together with the land, now forms only one piece of real estate, etc.; which property must be the subject of a new description [registration] in which it must appear that the land belongs in fee simple and in full ownership as paraphernal property to the said Doña Gabriela Andrea de Coster and the new building thereon constructed to the conjugal partnership of Don Juan M. Poizat and the said Doña Gabriela Andrea de Coster, etc.

"Third. That the Philippine Sugar Estates Development Company, Ltd., having granted to Don Juan M. Poizat a credit of Ten Thousand Pounds Sterling with a mortgage upon the real property above described, etc.

"(a) That the Philippine Sugar Estates Development Company, Ltd., hereby grants Don Juan M. Poizat a credit in the amount of Ten Thousand Pounds Sterling which the said Mr. Poizat may use within the entire month of January of the coming year, 1913, upon the bank established in the City of London, England, known as 'Banco Español del Rio de la Plata,' which shall be duly advised, so as to place upon the credit of Mr. Poizat the said amount of Ten Thousand Pounds Sterling, after executing the necessary receipt therefor.

"(c) That Don Juan M. Poizat personally binds himself and also binds his principal Doña Gabriela Andrea de Coster to pay the Philippine Sugar Estates Development Company, Ltd., for the said amount of Ten Thousand Pounds Sterling at the yearly interest of 9 per cent which shall be paid at the end of each quarter, etc.

"(d) Don Juan M. Poizat also binds himself personally and his principal Doña Gabriela Andrea de Coster to return to the Philippine Sugar Estates Development Company, Ltd., the amount of Ten Thousand Pounds Sterling within four years from the date that the said Mr. Poizat shall receive the aforesaid sum as evidenced by the receipt that he shall issue to the 'Banco Español del Rio de la Plata.'

"(e) As security for the payment of the said credit, in the case Mr. Poizat should receive the money, together with its interest the said Mr. Poizat in the dual capacity that he represents hereby constitutes a voluntary especial mortgage upon the Philippine Sugar Estates Development Company, Ltd., of the urban property above described, etc.

"(f) Don Juan M. Poizat in the capacity above mentioned binds himself, should he receive the amount of the credit, and while he may not return the said amount of Ten Thousand Pounds Sterling to the Philippine Sugar Estates Development Company, Ltd., to insure against fire the mortgaged property in an amount not less than One Hundred Thousand Pesos, etc.

"Fourth. Don Buenaventura Campa in the capacity that he holds hereby accepts this indenture in the form, manner, and condition executed by Don Juan M. Poizat by himself personally and in representation of his wife Doña Gabriela Andrea de Coster, in favor of the Philippine Sugar Estates Development Company, Ltd.

"In witness whereof, we have signed these presents in Manila, this November 2, 1912.

(Sgd.)

"JUAN M. POIZAT

"THE PHILIPPINE SUGAR ESTATES
DEVELOPMENT COMPANY, LTD.

"The President

"BUENAVENTURA CAMPA

"Signed in the presence of:

(Sgd.)

"MANUEL SAPSANO

"JOSE SANTOS

"UNITED STATES OF AMERICA

"PHILIPPINE ISLANDS

"CITY OF MANILA

"In the City of Manila P. I., this November 2, 1912, before me Enrique Barrera y Caldes, a Notary Public for said city, personally appeared before me Don Juan M. Poizat and Don Buenaventura Campa, whom I know to be the persons who executed the foregoing document and acknowledged same before me as an act of their free will and deed; the first exhibited to me his certificate of registry No. 14237, issued in Manila, February 6, 1912, the second did not exhibit any cedula, being over sixty years old; this document bears No. 495, entered on page 80 of my Notarial registry.

"Before me:

(Sgd.) "Dr. ENRIQUE BARRERA Y CALDES

" [NOTARIAL SEAL]

"Notary Public

"Up to the 31st of December, 1912"

For failure to pay the loan, on November 12, 1923, the plaintiff brought an action against the defendants, to fore-close the mortgage. In this action, the summons was served upon the defendant Juan M. Poizat only, who employed the services of Antonio A. Sanz to represent the defendants. The attorneys filed a general appearance for all of them, and later an answer in the nature of a general denial.

February 18, 1924, when the case was called for trial, Jose Galan y Blanco in open court admitted all of the allegations made in the complaint, and consented that judgment should be rendered as prayed for. Later, Juan M. Poizat personally, for himself and his codefendants, filed an exception to the judgment, and moved for a new trial, which was denied March 31, 1924.

August 22, 1924, execution was issued directing the sale of the mortgaged property to satisfy the judgment.

September 18, 1924, the property, which had an assessed value of P342,685, was sold to the plaintiff for the sum of P100,000.

September 23, 1924, and for the first time, the appellant personally appeared by her present attorney, and objected to the confirmation of the sale, among other things, upon the following grounds: That the mortgage in question was illegally executed, and is null and void, because the agent of this defendant was not authorized to execute it. That there was no consideration. That the plaintiff, with full knowledge that J. M. Poizat was acting beyond the scope of his authority, filed this action to subject the property of this defendant to the payment of the debt which, as to appellant, was not a valid contract. That the judgment was rendered by confession when the plaintiff and J. M. Poizat knew that Poizat was not authorized to confess judgment, and that the proceeding was a constructive fraud. That at the time the action was filed and the judgment rendered, this defendant was absent from the Philippine Islands, and had no knowledge of the execution of the mortgage. That after the judgment of foreclosure became final and the order of the sale of the property was made, that this defendant for the first time learned that the mortgage contract was tainted with fraud, and that she first knew and learned of such things on the 11th of September, 1924. That J. M. Poizat was not authorized to bind her property to secure the payment of his personal debts. That the plaintiff knew that the agent of the defendant was not authorized to bind her or her property. That the mortgage was executed to secure a loan of 10,000 Pounds, which was not made to this defendant or for her benefit, but was made to him personally and for the personal use and benefit of J. M. Poizat.

Among other things, the mortgage in question, marked Exhibit B, was introduced in evidence, and made a part of the record.

All of such objections to the confirmation of the sale were overruled, from which Gabriela Andrea de Coster appealed and assigns the following errors:

"I. The lower court erred in finding that Juan M. Poizat was, under the power of attorney which he had from Gabriela Andrea de Coster, authorized to mortgage her paraphernal property as security for a loan made to him personally by the Philippine Sugar Estates Development Co., Ltd.;

"II. The lower court erred in not finding that under the power of attorney, Juan M. Poizat had no authority to make Gabriela Andrea de Coster jointly liable with him for a loan of 10,000 Pounds made by the Philippine Sugar Estates Development Co., Ltd., to him;

"III. The lower court erred in not finding that the Philippine Sugar Estates Development Co., Ltd., had knowledge and notice of the lack of authority of Juan M. Poizat to execute the mortgage deed Exhibit A of the plaintiff;

"IV. The lower court erred in holding that Gabriela Andrea de Coster was duly summoned in this case; and in holding that Attorney Jose Galan y Blanco could lawfully represent her or could, without proof of express authority, confess judgment against Gabriela Andrea de Coster;

"V. The court erred in holding that the judgment in this case has become final and res judicata;

"VI. The court erred in approving the judicial sale made by the sheriff at an inadequate price;

"VII. The lower court erred in not declaring these proceedings, the judgment and the sale null and void.

JOHNS, J.:

For the reasons stated in the decision of this court in the Bank of the Philippine Islands vs. De Coster (47 Phil., 594), the alleged service of the summons in the foreclosure suit upon the appellant was null and void. In fact, it was made on J. M. Poizat only, and there is no claim or pretense that any service of summons was ever made upon her. After service was made upon him, the attorneys in question entered their appearance for all of the defendants in the action, including the appellant upon whom no service was ever made, and filed an answer for them. Later, in open court, it was agreed that judgment should be entered for the plaintiff as prayed for in its

complaint.

The appellant contends that the appearance made by the attorneys for her was collusive and fraudulent, and that it was made without her authority, and there may be some truth in that contention. It is very apparent that the attorneys made no effort to protect or defend her legal rights, but under our view of the case, that question is not material to this decision.

The storm center of this case is the legal force and effect of the real mortgage in question, by whom and for whom it was executed, and upon whom is it binding, and whether or not it is null and void as to the appellant.

It is admitted that the appellant gave her husband, J. M. Poizat, the power of attorney in question, and that it is in writing and speaks for itself. If the mortgage was legally executed by her attorney in fact for her and in her name as her act and deed, it would be legal and binding upon her and her property. If not so executed, it is null and void.

It appears upon the face of the instrument that J. M. Poizat, as the husband of the wife, was personally a party to the mortgage, and that he was the only person who signed the mortgage. It does not appear from his signature that he signed it for his wife or as her agent or attorney in fact, and there is nothing in his signature that would indicate that in the signing of it by him, he intended that his signature should bind his wife. It also appears from the acknowledgment of the instrument that he executed it as his personal act and deed only, and there is nothing to show that he acknowledged it as the agent or attorney in fact of his wife, or as her act and deed.

The mortgage recites that it was entered into by and between Juan M. Poizat in his own behalf and as attorney in fact of his wife. That the record title of the mortgaged property is registered in the name of his wife, Doña Gabriela Andrea de Coster. That they were legally married, and that the marriage between them has never been dissolved. That with the object of constructing a new building on the land, the six warehouses thereon were demolished, and that a new building was erected. That the property is the subject of a new registration in which it must be made to appear that the land belongs in fee simple and in full ownership as the paraphernal property of the wife, and that the new building thereon is the property of the conjugal partnership. "That the Philippine Sugar Estates Development Company, Ltd., having granted to Don Juan M. Poizat a credit of 10,000 Pounds Sterling with the mortgage upon the real property above described," that the Development Company "hereby grants Don Juan M. Poizat a Credit in the amount of 10,000 Pounds Sterling which the said Mr. Poizat may use, etc." That should he personally or on behalf of his wife use the credit he acknowledges, that he and his principal are indebted to the Development Company in the sum of 10,000 Pounds Sterling which "they deem to have received as a loan from the said commercial entity." That he binds himself and his wife to pay that amount with a yearly interest of 9 per cent, payable quarterly. That as security for the payment of said credit in the case Mr. Poizat should receive the money at any time, with its interest, "the said Mr. Poizat in the dual capacity that he represents hereby constitutes a voluntary especial mortgage." That Don Juan M. Poizat "in the capacity above mentioned binds himself, should he receive the amount of the credit."

It thus appears that at the time the power of attorney and the mortgage were executed, Don Juan M. Poizat and Gabriela Andrea de Coster were husband and wife, and that the real property upon which the mortgage was executed was her sole property before her marriage, and that it was her paraphernal property at the time the mortgage was executed, and that the new building constructed on the land was the property of the conjugal partnership.

The instrument further recites that the Development Company "hereby grants Don Juan M. Poizat a credit in the amount of 10,000 Pounds Sterling which the said Mr. Poizat may use within the entire month of January of the coming year, 1913." In other words, it appears upon the face of the mortgage that the loan was made to the husband with authority to use the money for his sole use and benefit. With or without a power of attorney, the

signature of the husband would be necessary to make the instrument a valid mortgage upon the property of the wife, even though she personally signed the mortgage.

It is contended that the instrument upon its face shows that its purpose and intent was to bind the wife. But it also shows upon its face that the credit was granted to Don Juan M. Poizat which he might use within the "entire month of January."

Any authority which he had to bind his wife should be confined and limited to his power of attorney.

Giving to it the very broadest construction, he would not have any authority to mortgage her property, unless the mortgage was executed for her "and in her name, place or stead," and as her act and deed. The mortgage in question was not so executed. It was signed by Don Juan M. Poizat in his own name, his own proper person, and by him only, and it was acknowledged by him in his personal capacity, and there is nothing in either the signature or acknowledgment which shows or tends to show that it was executed for or on behalf of his wife or "in her name, place or stead."

It is contended that the instrument shows upon its face that it was intended to make the wife liable for his debt, and to mortgage her property to secure its payment, and that his personal signature should legally be construed as the joint or dual signature of both the husband and that of the wife as her agent. That is to say, construing the recitals in the mortgage and the instrument as a whole, his lone personal signature should be construed in a double capacity and binding equally and alike both upon the husband and the wife. No authority has been cited, and none will ever be found to sustain such a construction.

As the husband of the wife, his signature was necessary to make the mortgage valid. In other words, to make it valid, it should have been signed by the husband in his own proper person and by him as attorney in fact for his wife, and it should have been executed by both husband and wife, and should have been so acknowledged.

There is no principle of law by which a person can become liable on a real mortgage which she never executed either in person or by attorney in fact. It should be noted that this is a mortgage upon real property, the title to which cannot be divested except by sale on execution or the formalities of a will or deed. For such reasons, the law requires that a power of attorney to mortgage or sell real property should be executed with all of the formalities required in a deed. For the same reason that the personal signature of Poizat, standing alone, would not convey the title of his wife in her own real property, such a signature would not bind her as a mortgagor in real property, the title to which was in her name.

We make this broad assertion that upon the facts shown in the record, no authority will ever be found to hold the wife liable on a mortgage of her real property which was executed in the form and manner in which the mortgage in question was executed.

The real question involved is fully discussed in Mechem on Agency, volume 1, page 784, in which the author says:

"It is to be observed that the question here is not how authority to execute sealed instruments is to be conferred, but how such an authority is to be executed. It is assumed that the agent was authorized to bind his principal, but the question is, has he done so."

That is the question here,

Upon that point, there is a full discussion in the following sections, and numerous authorities are cited:

"SEC. 1093. Deed by agent must purport to be made and sealed in the name of the principal.—It is a general rule in the law of agency that in order to bind the principal by a deed executed by an agent, the deed must upon

its face purport to be made, signed and sealed in the name of the principal. If, on the contrary, though the agent describes himself as 'agent,' or though he add the word 'agent' to his name, the words of grant, covenant and the like, purport upon the face of the instrument to be his, and the seal purports to be his seal, the deed will bind the agent if any one and not the principal.

"SEC. 1101. Whose deed is a given deed—How question determined.—In determining whether a given deed is the deed of the principal, regard may be had, First, to the party named as grantor. Is the deed stated to be made by the principal or by some other person? Secondly, to the granting clause. Is the principal or the agent the person who purports to make the grant? Thirdly, to the covenants, if any. Are these the covenants of the principal? Fourthly, to the testimonium clause. Who is it who is to set his name and seal in testimony of the grant? Is it the principal or the agent? And Fifthly, to the signature and seal. Whose signature and seal are these? Are they those of the principal or of the agent?

"If upon such an analysis the deed does not upon its face purport to be the deed of the principal, made, signed, sealed and delivered in his name and as his deed, it cannot take effect as such.

"Sec. 1102. Not enough to make deed the principal's that the agent is described as such.—It is not enough merely that the agent was in fact authorized to make the deed, if he has not acted in the name of the principal. Nor is it ordinarily sufficient that he describes himself in the deed as acting by virtue of a power of attorney or otherwise, or for or in behalf, or as attorney, of the principal, or as a committee, or as trustee of a corporation, etc.; for these expressions are usually but *descriptio personae*, and if, in fact, he has acted in his own name and set his own hand and seal, the causes of action thereon accrue to and against him personally and not to or against the principal, despite these recitals.

"Sec. 1103. Not principal's deed, where agent appears as grantor and signer.—Neither can the deed ordinarily be deemed to be the deed of the principal where the agent is the one who is named as the grantor or maker, and he is also the one who signs and seals it. * * *

"Sec. 1108. * * * But however clearly the body of the deed may show an intent that it shall be the act of the principal, yet unless it is executed by his attorney for him, it is not his deed, but the deed of the attorney or of no one. The most usual and approved form of executing a deed by attorney is by his writing the name of the principal and adding 'by A B his attorney' or 'by his attorney A B.' * * *"

That is good law. Applying it to the facts, under his power of attorney, Don Juan M. Poizat may have had authority to borrow money and mortgage the real property of his wife, but the law specifies how and in what manner it must be done, and the stubborn fact remains that, as to the transaction in question, that power was never exercised. The mortgage in question was executed by him and him only, and for such reason, it is not binding upon the wife, and as to her, it is null and void.

It follows that the whole decree against her and her paraphernal property and the sale of that property to satisfy the mortgage are null and void, and that any title she may have had in or to her paraphernal property remains and is now vested in the wife as fully and as absolutely as if the mortgage had never been executed, the decree rendered or the property sold. As to Don Juan M. Poizat, the decree is valid and binding, and remains in full force and effect.

It is an undisputed fact, which appears in the mortgage itself, that the land in question was the paraphernal property of the wife, but after the marriage, the old buildings on the property were torn down and a new building constructed and, in the absence of evidence to the contrary, it must be presumed that the new building is conjugal property of the husband and wife (Civil Code, art. 1404). As such, it is subject to the debts of the conjugal partnership for the payment or security of which the husband has the power to mortgage or otherwise encumber the property (Civil Code, art. 1413).

It is very probable that this particular question was not fully presented to or considered by the lower court.

The mortgage as to the paraphernal property of the wife is declared null and void ab initio, and as to her personally, the decree is declared null and void, and as to her paraphernal property, the sale is set aside and vacated, and held for naught, leaving it free and clear from the mortgage, decree and sale, and in the same condition as if the mortgage had never been executed, with costs in favor of the appellant. So ordered.

Johnson, Malcolm, Ostrand, and Romualdez, JJ., concur.

DISSENTING

STREET, J., with whom concur Avanceña, C. J., Villamor, and Villa-Real, JJ.:

In the year 1913 the plaintiff, the Philippine Sugar Estates Development Co., Ltd., Inc., let J. M. Poizat have nearly P100,000 of money on the supposed security of a mortgage on property belonging to his wife, Gabriela Andrea de Coster, executed by Poizat under a power of attorney from her. The plaintiff has now to learn that the security on which it relied is worthless and that it did not even so much as have Gabriela Andrea de Coster in court in the foreclosure proceeding. In the decision so holding the undersigned are unable to concur.

To dispose first of the point as to the jurisdiction of the court over the person and property of Gabriela Andrea de Coster, it is only necessary to refer to the third paragraph from the end of the power of attorney (Exhibit A to the opposition of Gabriela Andrea de Coster) under which Poizat acted. To express, in a few words the substance of this paragraph in the part relevant to the present discussion, Poizat is given full authority to represent his wife in all judicial proceedings in Philippine courts, including, among other things, the making of appearances, submission of answers, receiving of service of process, and to take in her behalf any procedural steps and measures required by the law of procedure in order to make effective and bring to termination the matters in which he, as attorney in fact, may be concerned. If this power is not sufficient to authorize Poizat to accept service and employ a lawyer to appear in court for the principal, as was done in this case, it would seem to be useless for lawyers to exercise their ingenuity in the attempt to draft such authority.

But the disastrous feature of the decision is found in the pronouncement that the mortgage on which the plaintiff's money was obtained is a nullity; and upon this point the court holds that Gabriela Andrea de Coster was not bound because the contract is signed "Juan M. Poizat," instead of "Gabriela Andrea de Coster, by Juan M. Poizat." But the document expressly recites in its preamble that it is executed by Juan M. Poizat, acting both in representation of himself and in the character of attorney in fact of his wife, Gabriela Andrea de Coster, in virtue of the authority conferred upon him in the power of attorney already mentioned. Furthermore, throughout the body of the document the idea is repeatedly expressed that J. M. Poizat obligates both himself and his wife. We submit that under the doctrine informing the Civil Code—which should control in this jurisdiction—the mortgage instrument was lawfully executed and in a form sufficient to bind the principal as well as the agent. Certainly it would never occur to a civilian lawyer that the document in question is informally executed; and the circumstance that a learned Spanish notary (Don Enrique Barrera y Caldes) intervened in the execution of this instrument would alone suffice to show that it is done in conformity with approved Spanish models—a fact otherwise apparent.

Even in the United States and Great Britain, where strict doctrines might be expected to prevail in such matters, owing to the technical rules involving the law of real property in those countries, ample authority is found to the effect that the principal will be bound by a contract signed by the agent only, when it appears from the face of the

instrument that he is acting in the character of agent. (2 C. J., 672.)

From the portentous way in which the opinion of the court refers to the question of the sufficiency of the signature to the mortgage as the "storm centre of the case," one would suppose that this question had been at least raised by the litigants and had been the subject of discussion in the lower court as well as in the briefs of the attorneys here. Nothing of the sort is true, for this capital point, on which the case is made principally to turn, has been jumped up exclusively in this court; and the voluminous briefs will be searched in vain for the slightest reference to the subject. In fact both parties appear to have assumed that the mortgage was executed with all proper formality. Apart from the fact that the question was not raised in the lower court, no assignment of error in this court calls in question the sufficiency of the mode of execution of the instrument. Under these circumstances this court should have confined itself to the matters put in issue by the litigants; and it should not have gone out of its way to take, up a point not discussed by the parties, and upon which in fact the losing party has never been heard. It is a good rule of practice—sometimes respected by us—that an appellate court will not permit an appellant to raise a point upon appeal which was not put in issue in the court below and upon which no assignment of error has been made. In our opinion the order appealed from should be affirmed.

DECISION UPON PETITION FOR REHEARING

February 15, 1926

JOHNS, J.:

The plaintiff has filed a very able, vigorous and exhaustive petition for a rehearing, which we have given the careful consideration which the importance of the questions deserve.

The first proposition advanced is that the mortgage in question is valid not only as to the buildings, but also as to the land on which they are constructed. The previous decision of this court is to the effect that, the buildings being conjugal property, the mortgage is valid as to the buildings, but that it is not valid as to the land, which is the paraphernal property of the wife.

Plaintiff contends that the land is conjugal property under the provisions of article 1404 of the Civil Code. That article does not apply to the instant case. It does not appear that the buildings are of the nature therein specified. The commentator Manresa, cited in the motion for reconsideration, rightly distinguishes those buildings which, by reason of their importance, convert the land on which they are built into an accessory, from those which, on account of their small relative value, continue to remain as accessories to the land on which they are constructed, and for such reason partake of the land.

"The word building is a generic term for all architectural work with roof built for the purpose of being used as man's dwelling, or for offices, clubs, theaters, etc. When the structure does not constitute a building, then the rule must be followed. The article cannot but be interpreted strictly. An inclosure for cattle or a 'tinada,' a stone barn, etc., follow the soil as accessories thereto." (9 Manresa, 626, 1919 ed.)

It appears from the mortgage that the buildings in question to be constructed are warehouses, and as the circumstances and details do not appear in the record, such warehouses could not be construed as the class of buildings mentioned in article 1404. Hence, the facts are not sufficient to justify the court in holding that the exceptional provision applies to this case in the sense of considering the soil as an accessory to the building, contrary to the general rule contained in the Civil Code (arts. 358-364 and 1368). But conceding that article 1404

does apply, yet, under the provisions of that article, the owner of the land is entitled to an indemnity for its value. Since, according to the spirit of the law contained in article 349 of the Civil Code, no one can be deprived of his property without previous indemnity, and it not appearing in the instant case that such indemnity was ever paid, the land in question cannot now be considered as conjugal property. But it further appears that the mortgage upon which plaintiff relies contains the following recitals:

"* * * which property must be the subject of a new registration wherein it must be stated that the lot forming a part thereof pertains to said Doña Gabriela Andrea de Coster in full ownership and fee simple as paraphernal property, and the building newly erected thereon to the conjugal partnership between Don Juan M. Poizat and his wife, the aforesaid Doña Gabriela Andrea de Coster * * *" (Italics ours.)

The plaintiff, having taken and accepted the mortgage, is bound by those recitals. It further appears that this property is registered under the Torrens System, and that the title to the land is vested in the wife, and is not conjugal property, and that the wife is at least the owner of the land.

In a supplemental plea filed January 21, 1926, petitioner cites and relies on the case of the National Bank vs. Quintos and Ansaldo (46 Phil., 370), in which article 1408 of the Civil Code was construed and applied. It must be conceded that this article applies only to those cases wherein there is a presumption that the debt contracted by the husband is for the common benefit of both spouses, but this presumption may be overcome by evidence to the contrary.

"All debts and obligations contracted during the marriage by the husband, the legal representative of the partnership in the normal condition thereof, are deemed contracted by the partnership. The law presumes that they are contracted for the common benefit of both. However, this presumption may be overthrown by evidence to the contrary, as we shall see when we take up article 1413." (9 Manresa, 648.)

For this reason, where, as in the instant case, it appears that the loan obtained by the husband was not only not obtained for the common benefit of the conjugal partnership, but was obtained to the damage of the wife, there is no such presumption, and that article does not apply. It is further contended that the mortgage was executed with all of the legal necessary formalities, and in accord with the established practice and custom in the Philippine Islands, citing blank forms given in section 127 of Act No. 496, from which plaintiff's counsel contends that it is not required that the attorney in fact, who executes a document in his own name and that of his principal, must show in his signature his double capacity by writing first his own signature and then the name of his principal, and say "by" and thereafter his own signature as attorney in fact.

The Act should be construed with reference to section 81 of Act No. 136, which says:

"After the enactment of a new system of registration of land titles, the notarial law of the Philippine Islands of February fifth, eighteen hundred and eighty-nine, its regulations of April eleventh, eighteen hundred and ninety, and the general instructions for drafting instruments subject to record in the Philippine Islands, of October third, eighteen hundred and eighty-nine, and the modifications thereof, by General Order Number Forty, issued from the office of the United States Military Governor, on September twenty-third, eighteen hundred and ninety-nine, and by General Order Number Twenty, issued from the office of the Military Governor on February third, nineteen hundred, shall be repealed and shall be of no effect after the date of such enactment, and thereafter appointments of notaries public and the performance of official duties by them shall be regulated by the subsequent provisions of this Act."

The old Spanish notarial law and system of conveyances was repealed in the Philippines, and another and a different notarial law and system became the law of the land with the enactment of Act No. 496. One of the fundamental differences between the two systems consists in this. Under the Spanish system, the documents were executed in the form of minutes, wherein the notary was the one who spoke, and under Act No. 496, the notary is

not the one who speaks, and there is no record kept of the minutes, and the intervention of a notary is limited to the acknowledgment only of the document. Under the Spanish system, to determine the capacity in which a person executed a document, it was sufficient to look at the text of the document, because its whole text was attended with the solemnity of the notary authorizing its execution. Under the present system, it is necessary to resort to the form in which the parties sign an instrument, because it is the signature rather than the text which bears the stamp of authenticity.

Neither does section 127 of Act No. 496 bear the construction for which the plaintiff contends. It provides in legal effect that where one or more persons executed a conveyance, the instrument must be executed by all of the parties to the conveyance, and that if there are two or more persons, the instrument must not only be signed by all of the parties to the conveyance, but it must be acknowledged by all of them. That clearly appears from the certificate of acknowledgment in which it is recited:

"* * * personally appeared.....,

known to me to be the same person (or persons) who executed the foregoing instrument, and acknowledged that the same is his (or their) free act and deed."

The construction for which plaintiff contends would nullify the words "or persons" and the words "or their." The fact that those words are used in the manner in which they are used in section 127, must mean that where two or more persons give a deed or mortgage on real property, that all of them should not only sign the mortgage, but that all of them should acknowledge it as "their free act and deed."

Again, in the instant case, the power of attorney was given by the wife to the husband, and the husband himself was a party to the mortgage, and the money was paid to him for and on his personal account, and his signature was necessary to bind any interest which he had in the land as the husband of the wife, and the signature of the wife in some form was necessary to bind her interest in the land. Here, you have the signature of the husband standing alone, and there is nothing upon the face of it which shows that in the signing of it, the husband ever intended to bind his wife. If Poizat had not been the husband of his wife, and if he himself was not a party to the instrument and did not have any interest in the land mortgaged, another and a very different question would be presented, and his lone signature might then bind the property of the wife.

With all due respect to the learned counsel, no law, either Spanish or American, has been cited or will ever be found which, upon the facts shown in the record, will construe the lone unqualified signature of the husband as the joint and dual signature of both the husband and the wife, so as to make it binding upon the paraphernal property of the wife.

Although not cited in the petition during the discussion of this case in conference, attention was called to article 1717 of the Civil Code which provides as follows:

"When an agent acts in his own name, the principal shall, have no right of action against the persons with whom the agent has contracted, or such persons against the principal.

"In such case, the agent is directly liable to the person with whom he has contracted, as if the transaction were his own. Cases involving things belonging to the principal are excepted.

"The provisions of this article shall be understood to be without prejudice to actions between principal and agent."

In the instant case, this section should be construed with article 1713, which among other things provides that:

"In order to compromise, alienate, mortgage, or to execute any other act of strict ownership, an express power

is required."

The mortgage in question was upon real property, and it was not a "simple contract," and where an agency is created by an express power, it must be executed with the formalities of an express power.

Again, although the wife was a party to the body of the mortgage, Poizat himself had an interest in the real property, and was a party to the instrument, and his personal signature was necessary to the mortgage to bind his own personal interest, and the interest of the conjugal partnership. The power of attorney from the wife gave her husband the express power defined in article 1713, and that power should have been exercised, and the mortgage should have been executed "in the name, place, and stead of the wife." That was not done.

The authorities cited in the petition for a rehearing and in the minority opinion are based upon, and refer to, the execution by the agent of a "simple contract," and for such reason are not in point. There is a very marked legal distinction between the authority of an agent to make a "simple contract," and his authority to convey or mortgage real property and the manner in which the power should be executed.

It may be true that the decision of this court is based upon questions that are not as fully discussed in the appellant's brief, as they should have been, but the fact remains that they were pointed out, and attention was called to them in the argument in the brief, and that they are expressly covered by the assignments of error.

Although ably presented, we are clearly of the opinion that the petition for a rehearing must be denied. So ordered.

Johnson, Malcolm, Ostrand, and Romualdez, JJ., concur.

DISSENTING

AVANCEÑA, C. J., STREET, VILLAMOR, and VILLA-REAL, JJ.:

We insist in our dissenting opinion and reference is hereby made to what we briefly said in our separate opinion. We wish, however, to emphasize our point of view on the merits of the case with regard to appellant's liability.

The theory of the majority is contained in the following paragraph of its decision upon the motion for reconsideration:

"* * * if Poizat had not been the husband of his wife, and if he himself was not a party to the instrument and did not have any interest in the land mortgaged, another and a very different question would be presented, and his lone signature might then bind the property of the wife."

It follows from this that the power given by the appellant to her husband Juan M. Poizat is held sufficient to mortgage the land in question, that the contract entered into by him with the plaintiff, mortgaging this land, is within the scope of this power, and that the contract thus signed by Poizat might be sufficient to bind the appellant. But it is said that it is not, by reason of the fact that Poizat was also a party to the contract and has an interest in the property mortgaged. We do not see the importance of this fact. If Poizat were not a party to the contract and had no interest in the property mortgaged, the document would, as it stands,—signed by him alone,—be sufficient to bind the appellant, not by what his signature says, since it says nothing, but because the document shows that he was acting on behalf of the appellant. This being the case, we see no reason why the document should not have full effect merely because it states that Poizat was acting on his behalf and that of the appellant. The most that can be said is that it was necessary that Poizat should have signed twice, but again we do not see the

necessity of this duplicity. The signature serves only to authenticate the document,—and for this purpose one is enough,—and not to express the nature and extent of the obligation, which must be determined by the document itself.

But whether this be the effect of the majority opinion, or that it is necessary, in order to bind the appellant, that Poizat should have signed the document twice, the first time on his own behalf, and the second on that of the appellant, or should have signed it only once, stating that he did so in his own behalf and that of the appellant, with all due respect to the majority, we believe that the decision rendered is erroneous.

The doctrine laid down by the majority is openly repugnant to the spiritualistic conception which informs article 1278 of the Civil Code, according to which contracts shall be binding whatever may be the form in which they may have been entered into, provided that the essential requisites for their validity are present.

In some contracts, a public document is required as a special form for convenience of evidence (art. 1280, Civil Code), but not as an essential requisite for its validity, but only for its efficaciousness (art. 1279, Civil Code). In very few cases does the Civil Code require a certain form for special reasons, as a requisite to the validity of the contract as for instance in the donation, in which a public document is required (art. 633, Civil Code), and in the mortgage, which must be registered (art. 1875, Civil Code). But except in these cases, and even in these cases, once the required special form is complied with, the question as to form in the former, or the question as to other formalities in the latter, falls under the broad rule established in article 1278, and loses all its influence on the effects of the contract, it being enough that the contract be proven. In this connection, we are not unmindful of the amendments introduced by the Code of Civil Procedure to the Civil Code as to the form of contracts for their efficaciousness, but nevertheless we believe that the rule provided by article 1278 of the Civil Code subsists.

In the instant case, the power given by the appellant to Poizat, as well as the mortgage executed by the latter in his own behalf and that of the appellant with the plaintiff was executed in the form required by the law, that is, in a public document registered in the registry of property. Under such circumstances, it is not proper to destroy the effects of these contracts and ignore the rights and obligations which the parties thereby desired to acquire and assume, merely by reason of a formality which no law requires, and does not seem to answer any purpose. The theory of agency, according to the Civil Code, is based on representation and its characteristic is the subrogation of the agent in the place of his principal whom he substitutes, in matters constituting the subject-matter of the agency. Thus, once it is stated in the document that the agent acts by virtue of the agency, he absorbs the personality of the principal, and by a legal fiction, he appears as the principal himself, and whatever he does within the agency is considered as done by the principal.

At any rate, even supposing that Poizat acted in his own name in executing the contract with the plaintiff, as he acted within the limits of the agency or power granted him by the appellant and the contract relates to things belonging to her, the plaintiff has an action against the appellant under article 1717 of the Civil Code.

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