

DOMICIANO TIZON, PLAINTIFF AND APPELLANT, VS. EMILIANO J, VALDEZ AND LUIS MORALES, SHERIFF OF THE PROVINCE OF TARLAC, DEFENDANTS AND APPELLEES.*G. R. No 24797, March 16, 1926*

Ponente: STREET, J.

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This action was instituted in the Court of First Instance of the Province of Tarlac by Domiciano Tizon against Emiliano J. Valdez and Luis Morales, the latter in the character of sheriff of Tarlac Province, for the purpose of obtaining a declaration to the effect that the plaintiff is the owner of certain chattels, consisting chiefly of a steam engine and boiler, described in the complaint, and to require the defendants to deliver the same to the plaintiff, with damages for the detention thereof and costs. The trial court having absolved the defendants from the complaint, the plaintiff appealed.

It appears that the personal property which is the subject of this action formerly belonged to one Leon Sibal, sr., by whom it was mortgaged, on September 14, 1920, to the defendant Valdez. On October 7, 1920, this mortgage was filed in the office of the register of the Province of Tarlac and was thereupon duly registered in the registry of chattel mortgages. On May 18, 1921, Sibal again mortgaged the same chattels to the plaintiff, Domiciano Tizon, whose mortgage was likewise duly registered in the chattel mortgage registry of Tarlac in June, 1921. No question is made with respect to the validity or good faith of either of these mortgages, but it should be stated that the mortgage to Valdez covered other property in addition to the engine and boiler in question and the debt secured in said mortgage is recited therein to be in the amount of P12,833.30, payable December 31, 1920, with interest from date of maturity at the rate of 12½ per centum per annum, with a stipulation for 25 per centum of principal and interest to be added in compensation for attorney's fee and expenses in case of the nonpayment of the debt at maturity.

When the stipulated date of payment arrived Sibal defaulted in the making of payment, and Valdez thereupon instituted a civil action (case No. 2301) to recover the indebtedness, in connection with which he sued out a writ of attachment and on June 24, 1921, caused the same to be levied upon the property which is the subject of this action. The property, however, was not retained by the attaching officer for the reason that Tizon gave a counter bond and lifted the attachment. The end of this civil action was that, on March 7, 1923, Valdez recovered of Sibal the sum of P19,026.24, with interest at 12½ per centum per annum on P15,187.12 from August 1, 1921. Upon this judgment Valdez caused an execution to be issued, which, on April 24, 1924, was levied upon the property now in question, being the same property included in Valdez's chattel mortgage.

Meanwhile Domiciano Tizon, proceeding under his own mortgage, had caused the sheriff to sell the same property in a foreclosure proceeding conducted in conformity with the provisions of the Chattel Mortgage Law (Act No. 1508, sec. 14). The sale in these proceedings was effected on June 28, 1923, Tizon becoming purchaser for the consideration of P1,000. As purchaser at his own foreclosure sale, Tizon assumed possession of the

property, and it was found in his possession when the sheriff levied upon it by virtue of the execution issued in the civil case No. 2301, above mentioned. At the time this levy was made, or soon thereafter, Tizon filed a claim with the sheriff, asserting that the property belonged to him and was not liable to be taken upon an execution directed against Sibal. The sheriff, however, under indemnity from Valdez, retained the property and sold it in due course at an execution sale, Valdez becoming purchaser at the price of P500. Pursuant to this sale Valdez now took possession, and Tizon presently instituted the present action for the purpose stated in the first paragraph of this opinion.

The facts of the case are not in dispute and the question presented is one of law purely. The trial court correctly observed that the relation between Valdez and Tizon is that of two rival mortgagees under first and second mortgages. In the appellant's brief attention is directed to the fact that contrary to the requirement of the Chattel Mortgage Law—Tizon's mortgage does not set forth the fact of the existence of the previous mortgage; and from this the conclusion seems to be drawn that Tizon's mortgage should not be denominated a second mortgage. But it is certainly not a first mortgage, and it is inferior to Valdez's mortgage because executed subsequent to the date when Valdez's mortgage was put of record. The violation of law by the mortgagor in failing to mention in the second mortgage the existence of the prior mortgage made him amenable to the penal provision contained in section 12 of the Chattel Mortgage Law but could not affect the priority of the earlier mortgage.

The main contention of the appellant is directed to the supposed effect of the institution of a civil action by Valdez upon the mortgage debt, and the suing out of an attachment and execution by him against the property which was the subject of the mortgage, instead of his proceeding to foreclose his first mortgage under the provisions of the Chattel Mortgage Law. In this connection it is claimed for the appellant that the election of Valdez to proceed against the debtor in an ordinary civil action constituted a waiver of his rights under the mortgage, and it is said that by this waiver the rights of Tizon under the second mortgage became superior. This argument is based on the supposed inconsistency of the remedies by civil action and by extra-judicial foreclosure, and in particular it is contended that the attachment lien is incompatible with the lien of the mortgage. In support of this proposition reference is made to a line of decision from certain American courts holding that a mortgage creditor loses his lien by attaching the property which is subject to the mortgage. (*Dix vs. Smith* [Okla.], 50 L. R. A., 714.) But, as shown by the author of the annotation appended to that case in the volume cited, that doctrine rests upon strictly technical grounds and can only be maintained by adhering to two common-law rules neither of which prevails in this jurisdiction, namely, first, that after the default of the mortgagor in the payment of the debt the mortgagee has the legal title to the mortgaged property; and, secondly, that the equity of redemption which pertains to the mortgagor is not subject to be taken in execution at the instance of his creditor. Accordingly we find that it is only in those American jurisdictions where these antiquated ideas prevail that the courts have adopted the rule stated in *Dix vs. Smith*, *supra*. (5 R. C. L., 459; 11 C. J., 687, 688.)

But it is the settled doctrine of this court that a chattel mortgage, though written in the form of a conditional sale defeasible upon performance of a condition subsequent, is really no more than a mere security for a debt and creates only a lien in favor of the creditor. (*Bachrach Motor Co. vs. Summers*, 42 Phil., 3.) At the same time a writ of execution in this jurisdiction reaches both legal and equitable interests, with the result that the equity of redemption of the mortgagor will pass to the purchaser at an execution sale. The better rule, we think, and the rule which is certainly more in accord with other doctrines here prevailing is that announced by the Supreme Court of Ohio in *Green vs. Bass* (83 Ohio St., 378; Ann. Cas. [1912], 828). It was there declared that the owner of a senior mortgage does not, by recovering a judgment on the note which it secures and causing execution to be levied on the mortgaged chattels, waive the priority of his lien. And the authorities cited in the note to this case as printed in *Annotated Cases* show that this doctrine generally prevails in America.

But it is suggested that the suing out of an attachment by Valdez at the beginning of his civil action to recover upon the debt secured by his mortgage introduces a vital difference; and attention is directed to the fact that upon suing out an attachment under section 426 of the Code of Civil Procedure the creditor is required to make oath that he has no other sufficient security for the claim sought to be enforced by the action. The making of such affidavit shows an election on the part of the creditor, so it is contended, to waive the mortgage lien.

This argument in our opinion is not valid for two reasons, first, because the creditor is not required to state peremptorily under oath that he has no other security at all but only that he has no other sufficient security; and, secondly, because this court has held that the provision which prohibits the issuance of an attachment when there is other sufficient security has no application where the attachment is levied upon the property constituting the security in an action to recover the debt so secured. (*Pepperell vs. Taylor*, 5 Phil., 536.)

From whatever angle the matter be viewed we can discover no sound reason for holding that either the suing out of the attachment or the subsequent sale of the property under execution had the effect of destroying the prior mortgage lien, that is, as between the parties to this lawsuit. What Valdez may have obtained by purchasing at the execution sale, and whether he obtained anything at all, is a different question, and one that is really not necessary to be here decided. It is enough to say that the first mortgage in favor of Valdez continues to subsist unaffected by what happened as a result of the civil action. If anybody had been misled to his prejudice as a consequence of the course pursued by Valdez, this would have constituted a ground of estoppel; but nothing of the sort appears.

We have before us then the simple situation of a first mortgagee in possession attacked by the second mortgagee after foreclosure of the second mortgage; and a little reflection will show, we think, that the second mortgagee cannot prevail. After a first mortgage is executed there remains in the mortgagor a mere right of redemption, and only this right passes to the second mortgagee by virtue of the second mortgage. As between the first and second mortgagees, therefore, the second mortgagee has at most only the right to redeem, and even when the second mortgagee goes through the formality of an extra judicial foreclosure, the purchaser acquires no more than the right of redemption from the first mortgagee.

The remedy of the plaintiff in this case must therefore be limited to the right to redeem by paying off the debt secured by the first mortgage. But the action is not directed to this end, and in the controversy over the title the purchaser at the foreclosure sale under the second mortgage must fail. Valdez, as first mortgagee, even supposing that he acquired nothing by his purchase at his own execution sale, is yet entitled to possession for the purpose at least of foreclosing his first mortgage (*Bachrach Motor Co. vs. Summers*, 42 Phil., 3), the lien of which, as we have already demonstrated, still subsists; and since Valdez is entitled to possession Tizon cannot maintain an action to recover the property.

For the reasons stated the judgment appealed from must be affirmed, and it is so ordered, with costs against the appellant.

Avanceña, C. J., Malcolm, Villamor, Ostrand, Romualdez, and Villa-Real, JJ., concur.

DISSENTING

JOHNS, J.,

The facts are well and clearly stated in the majority opinion from which it appears that on September 14, 1920, Sibal, sr., executed a chattel mortgage on the property in question to Valdez, which was duly filed October 7, 1920. May 18, 1921, Sibal executed another chattel mortgage on the same property to the plaintiff, which was

duly filed and registered in June, 1921. Both mortgages were executed in good faith and for valuable consideration.

Upon default in payment, Valdez brought an action against Sibal to recover the amount of his debt, and in which he made an affidavit and procured a writ of attachment, and June 24, 1921, caused the attachment to be levied upon the property, which is the subject of this action. Valdez recovered judgment for the full amount of his claim, issued an execution, which on April 24, 1924, was levied upon the identical property, which is specifically described in his chattel mortgage, pending which Tizon, the plaintiff, caused the sheriff to seize and sell the property under the provisions of his chattel mortgage, in conformity with the provisions of the Chattel Mortgage Law, and that sale was made on June 28, 1923, at which Tizon became the purchaser. After the purchase, Tizon took actual possession of the property. Later, the property was again seized by the sheriff upon the execution issued upon the judgment in favor of Valdez against Sibal. Tizon claiming the property, Valdez indemnified the sheriff, and in due course sold it under execution, at which sale Valdez became the purchaser, and took possession of the property.

It will thus be noted that this is not a dispute between Valdez and Sibal, or between Tizon and Sibal. It is a dispute between Valdez, who held the first mortgage, and Tizon, who held the second mortgage. At this point, it will be noted that Tizon sold the property under his chattel mortgage, and that he had a legal right to sell it, and that he became the purchaser of it at his sale. That Valdez did not sell the property under his chattel mortgage. That for some unknown reason, he brought an action on his original debt in which he made an affidavit for, and procured, an attachment to be issued and levied on the identical property covered by his chattel mortgage.

The majority opinion holds that Valdez has two liens on the same property, one being an attachment, and the other a chattel mortgage lien. That might be true as between Valdez and Sibal, but it cannot be true as between Valdez and Tizon. When Valdez made his affidavit for an attachment, in legal effect, he said: My debt is not secured by any lien. It was necessary for him to do that to procure the attachment. Having made that affidavit and procured the attachment of the property upon which he had a chattel mortgage lien, he ought to be legally estopped to now claim or assert that he did not have a chattel mortgage lien.

In the authority cited in the majority opinion, there was no attachment, and the property was seized for the first time on execution. That is a very different case. Again, the property in dispute is personal property, from which, after a sale, there is no redemption; another important item that is overlooked in the majority opinion. In the notes to the case of *Dix vs. Smith* (50 L. R. A., 714), there is an extended discussion of the legal question here involved, and a number of authorities are cited. In the case of *Stein vs. McAuley and McAuley* (147 Iowa, 630), cited in volume 5, *Ruling Case Law*, p. 459, the opinion says:

"III. We do not think there was a waiver of the mortgage lien, especially in view of the fact that the attachment was dismissed and never went to trial. Had there been a sale of the property under execution growing out of the attachment proceedings, we would have a very different proposition. * * *"

In the instant case, there was a sale of the property under an execution growing out of the attachment proceeding. It should be borne in mind that the property involved in this case is personal property, for which there is no legal right of redemption from a sale when made, and that this is not an action between a mortgagor and a mortgagee.

Upon such a state of facts, the majority opinion does not cite the decision of any court which sustains the legal principles which it lays down. Under it, at the time the property was sold by Tizon on his chattel mortgage, Valdez had two liens on the same property, one under his chattel mortgage, and the other by his attachment, which was secured by his affidavit to the effect that he "did not have a chattel mortgage lien. That is not good law.

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