

PHILIPPINE NATIONAL BANK, PLAINTIFF AND APPELLEE, VS. TAN ONG SZE, VIUDA DE TAN TOCO, DEFENDANT AND APPELLANT.*G.R. No. 30831. September 02, 1929*

Ponente: JOHNS, J.

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The defendant at all the times alleged was the owner of two parcels of land in the City and Province of Iloilo, known as lots Nos. 279 and 572, of the Iloilo cadastral survey, evidenced by certificate of title No. 329. September 14, 1916, in Amoy, China, she executed before the United States Vice Consul at that place a power of attorney, known in the record as Exhibit K, in which she made and constituted Tan Bunco as her attorney-in-fact, the material provisions of which are as follows:

"Know all men by these presents,

"That I, Tan Ong Sze (Chinese characters) widow of late Tan Tek Co (Chinese characters) of Ng Chung Village in the Tong An District, Chuancho, Prefecture, who died in H, T. 2d year 8th month 3d day (6th September, 1910) have made ordained, constituted and appointed, and by these presents do make, ordain, constitute and appoint Tan Bunco (Chinese characters) to be my lawful attorney of the shop Hock Bee (Chinese characters) at Iloilo, Philippine Islands, * * * and also for me and in my name to sign, seal and execute, and as my act and deed, deliver, any lease, any other deed for the conveying and real or personal property or other matter or thing wherein I am or may be personally interested or concerned. And I do hereby further authorize and empower my said attorney to substitute and appoint any other attorney or attorneys under him, for the purpose aforesaid and the same again and pleasure to revoke (and generally for me and in my name to do, perform and execute all and every other lawful and reasonable acts and things whatsoever as fully and affectually as I the said Tan Ong Sze (————) might or could do if personally present. And I do hereby ratify and confirm all and whatsoever my said attorneys or attorney or his or their substitute or substitutes, or any of them, shall lawfully do, or cause to be done, in or about the premises, by virtue of these presents * * *."

It is apparent that a clerical error was made in the preparation of the instrument or an error was made in its translation, and in so far as it is material to this opinion, it should read:

" (1) * * * and also for me and in my name to sign, seal and execute, and as my act and deed, deliver any lease, any other deed for conveying any real or personal property or other matter or thing wherein I am or may be personally interested or concerned;

(2) * * * and also for me and in my name to sign, seal and execute, and as my act and deed, deliver any lease, any other deed for the conveying of any real or personal property or other matter or thing wherein I am or may be personally interested or concerned"

It is very apparent that the words "for the conveying and real or personal property" should read "for the conveying of real or personal property." That is to say, the defendant executed a power of attorney to Tan Bunco in which she vested him with the power "for me and in my name to sign, seal and execute, and as my act and deed, deliver any lease, any other deed for conveying any real or personal property" or "any other deed for the conveying of any

real or personal property."

Plaintiff's complaint is founded upon the promissory note, known in the record as Exhibit B, which purports to have been executed in Iloilo on May 23, 1922, by her attorney-in-fact under and by virtue of the power of attorney above described, and the mortgage which purports to have been executed to plaintiff to secure the payment of the note, known in the record as Exhibit E.

The question is thus squarely presented whether or not under his power, the attorney-in-fact had the authority to execute the promissory note or to execute the mortgage on real property to secure its payment. It will be noted that the language used in the power of attorney is confined and limited to the authority "to sign, seal and execute, and as my act and deed, deliver any lease, any other deed for conveying any real or personal property," or "to sign, seal and execute, as my act and deed, deliver any lease, any other deed for the conveying of any real or personal property." Hence, does this power carry with it and imply the authority of the attorney-in-fact to borrow money and to execute the promissory note of the defendant and mortgage her real property to secure its payment?

In an exhaustive opinion the lower court held that the power to convey real property carried with it the power to mortgage, and that the defendant was liable on both the note and the mortgage.

Cyclopedia of Law and Procedure, vol. 31, p. 1390, says:

"(II) TO MORTGAGE OR PLEDGE. Authority to mortgage the property of a principal is rarely to be inferred. It is not to be implied from general authority to manage, or even to sell, the principal's property."

Under which, in the notes, decisions are cited from the Supreme Courts of California, Florida, Kansas, Missouri, South Carolina, and Texas, and it is said:

"The power to sell and convey lands as a general rule carries no implied power to charge the principal with the responsibilities and liabilities of a mortgagor." (Citing decisions from the Supreme Courts of Kansas, Michigan, Minnesota, North Dakota, Wisconsin, and a large number of English authorities.)

And on page 1395, it is said:

"(IV) TO LEND OR BORROW MONEY. Power to lend or borrow money, like most other special powers of an agent, is not to be inferred without clear evidence of such a grant."

And on page 1396, it is said:

"* * * And when authority is conferred, whether expressly or impliedly, it must be exercised within the limits prescribed, and burdens assumed by the agent but not authorized by the principal cannot bind the latter. * * *. No authority to borrow money is to be implied from a power to lend, nor merely from a power to act for the principal in his business generally or in other specific matters."

And in the notes, it is said:

"* * * That authority to borrow money, conferred on an agent, must be created by express terms or necessarily implied from the nature of the agency, for authority to borrow money is one of the most dangerous powers a principal can confer upon an agent.

"Thus such power is not to be implied from the power to manage the principal's business, even though with authority to buy goods on credit (Hayness vs. Carpenter, 86 Mo. App., 30; Bickford vs. Menier, 107 N. Y., 490; 14 N. E., 438 (reversing 36 Hun., 446); Weekes vs. A. F. Shapleigh Hardware Co., 23; Tex. Civ. App., 577; 57 S. W., 67; Spooner vs. Thompson, 48 Vt., 259), or from authority to draw checks to make payments for property bought by the agent (Mordhurst vs. Boies, 24 Iowa, 99)."

Ruling Case Law, vol. 21, p. 885, says:

"An instrument empowering an attorney, among other things, 'to buy and sell real estate, and in my name to receive and execute all necessary contracts and conveyances therefor,' does not authorize such attorney to sell and convey lands to which, as the record shows, the principal had acquired title before execution of the power. * * * The attorney may not mortgage the property; nor has he authority to execute an option."

The case of *Hawxhurst vs. Rathgeb* (51 Pacific, 846), decided by the Supreme Court of California, is square in point. The syllabus laid down this rule:

"2. The language, in a power of attorney, 'to sell, transfer, and release two certain mortgages * * *; to indorse and transfer the notes secured by said mortgages; to sell and transfer my claims for said notes and mortgages

* * *; and to receive payment * * * and give acquittances therefor—confers the power to sell and transfer the title to the securities absolutely, or to collect them, but does not confer power to pledge them.

"3. The act of an attorney in fact in pledging securities, when his authority only gave him power to sell or collect, is void."

And the opinion says:

"The effect of this language was to confer a power to sell and transfer the title to the securities absolutely, or, if not so sold, to collect them from the estate of Kunz. There is nothing in the language which by any proper construction purports to confer a power to pledge or hypothecate the securities for any purpose, or to borrow money thereon. The words 'sell and transfer' as there used, are of no broader signification than the words 'sell and convey' used with reference to a conveyance of real estate; and the latter, employed as the operative words in a power to convey land, do not carry authority to mortgage or otherwise dispose of the property"

The case of *Minnesota Stoneware Co. vs. McCrossen*, 110 Wisconsin, 316; 84 American State Reports, p. 927, in the syllabus says:

"A POWER OF ATTORNEY TO SELL AND CONVEY real estate does not include a power to mortgage.

"POWER OF ATTORNEY—INTERPRETATION.—A written instrument, not ambiguous either in its literal sense or in the application of its language to the subject or purpose thereof, must be taken to mean what it says."

In that case the language used in the power was this:

" 'In my name, place and stead to sell and convey any real estate and personal property which I may now own or may hereafter acquire in the States of Wisconsin and Washington.' "

Construing which, the court, on page 928 of the opinion says:

"The power of attorney was a mere power to sell and convey, importing authority to sell out and out for cash and not power to mortgage. That is elementary: *Jones on Mortgages*, sec. 129; *Devlin on Deeds*, sec. 363a; *Morris vs. Watson*, 15 Minn., 212; *Colesbury vs. Dart*, 61 Ga., 620; *Wood vs. Goodridge*, 6 Cush., 117; 52 Am. Dec, 771; *Hoyt vs. Jaques*, 129 Mass., 286; *Perry on Trusts*, sec. 768. No departure from such general rule, worthy of consideration, we venture to say, can be found."

And in the case of *Campbell vs. Foster Home Association*, 26 L. R. A., p. 117; 163 Pa., 609, the Supreme Court of that State says:

"1. A power to mortgage land is not included in a power of attorney to sell and convey, uncoupled with any interest in the land or the fund."

And on page 122, among other authorities, the opinion quotes with approval the decision of Justice Cooley, in *Jeffrey vs. Hursh* (49 Mich., 31), in which it is said:

" 'J. M. Hursh had power to sell the land, but not to mortgage it. The power is not to be extended by construction. The principal determines for himself what authority he will confer upon his agent, and there can be no implication from his authorizing a sale of his lands that he intends that his agent may at discretion charge him with the responsibilities and duties of a mortgagor.' "

In fact the authorities are overwhelming that the power to sell and convey does not carry with it or imply the power to borrow money or to execute a mortgage on real property.

The lower court in its opinion holds that, legally speaking, a mortgage is a conveyance and that the power to convey carries with it the power to mortgage. That theory is not sustained by any authority. By its express terms and provisions the instrument itself, upon which plaintiff relies, provides for the foreclosure of the mortgage, and the whole purpose and tenor of plaintiff's complaint is to foreclose the mortgage. If in truth and in fact it was a conveyance of the legal title to the property, there would be no reason why the plaintiff should apply to the court to foreclose it as a mortgage.

The authorities cited in the opinion of the lower court are not in point, and that is specially true of 47 California, 242,[1] in which the syllabus says:

"CONSTRUCTION OF POWER OF ATTORNEY.—A power of attorney in which the principal authorizes the agent to make contracts, to settle outstanding debts, and generally to do all things that concern his interest in any way, real and personal, to use the principal's name to release others, to bind the principal as he may deem proper and expedient, and making the agent his general attorney and agent, and ratifying and confirming whatever the attorney may do by virtue of the power, authorizes the attorney to execute a lease of the principal's real estate for a term exceeding one year, and to execute any instrument affecting the real estate of the principal, unless, it may be, a conveyance of it."

It will be noted that this case was decided in January, 1874.

Note the marked distinction between the powers conferred in that case and in this. Yet it was there held that the agent did not have the power to convey. That case was decided in January, 1874.

The lower court also cites 46 California, 603,[1] from a reading of which it will be found that the real question involved in that case was the priority of mortgages which involved the construction of section 1215 of the Code which defines the terms of the conveyance:

"As embracing every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or incumbered, or by which the title to any property may be affected, except wills."

It did not involve the construction of a power of attorney, and neither of those cases are even mentioned in the decision of that court above quoted, which was rendered January 5, 1898.

The case of *Golinsky vs. Allison* (46 Pacific, 295), also decided by the Supreme Court of California on October 7, 1896, is square in point, The syllabus says:

"1. A power of attorney to an agent authorizing him to 'superintend' property of his principals, and to 'preserve, manage, sell, and dispose of the same, and to 'manage, work, sell, and dispose of other property, did not confer authority on the agent to execute a promissory note in the name of his principals, or to mortgage their property to secure the same, though the note was given in settlement of an antecedent debt contracted by the agent in the management of the property."

And in the opinion, it is said:

"A power of attorney, like any other instrument, is to be construed according to the natural import of its language ; and the authority which the principal has conferred upon his agent is not to be extended by implication beyond the natural and ordinary significance of the terms in which that authority has been given. The attorney has only such authority as the principal has chosen to confer upon him, and one dealing with him must ascertain at his own risk whether his acts will bind the principal. By the above letter of attorney given by Allison and Sackett to Barron, he had authority to 'superintend' the property of his principals, and to 'preserve, manage, sell, and dispose of the same, and also to locate mill sites, mining claims, and water rights, and 'to manage, work, sell, and dispose of them'. A power to sell and convey real estate does not authorize the attorney to mortgage it. (Jeffrey vs. Hursh, 49 Mich., 31; 12 N. W., 898; Wood vs. Goodridge, 6 Cush., 117; Brown vs. Rouse, 93 Cal., 237; 28 Pac, 1044.) For an exhaustive discussion of the subject, see Campbell vs. Association (163 Pa. St., 609; 30 Atl., 222, 224). 'The power is not to be extended by construction. The principal determines for himself what authority he will confer upon his agent, and there can be no implication, from his authorizing a sale of his lands, that he intends that his agent may, at discretion, charge him with the responsibilities and duties of a mortgagor'"

No authority of any court has been cited and none will ever be found holding that a power "to sign, seal and execute, and as my act and deed, deliver, any lease, any other deed for conveying any real or personal property" or "to sign, seal and execute, and as my act and deed, deliver, any lease, any other deed for the conveying of any real or personal property," or any similar language, standing alone and within itself, carries with it or implies the power to borrow money or to execute a real mortgage to secure the payment of a debt.

The trial court also found that by her actions and conduct, the defendant had ratified and approved the acts of her agent in the execution of both the note and the mortgage. Upon that point, we have read and reread the record, and there is no legal evidence to sustain that finding. In fact there is nothing in the record which show³ or tends to show that the defendant ever knew of the execution or the existence of the note or the mortgage, or that she ever had any knowledge of the transaction in question.

With all due respect to the exhaustive opinion of the lower court, we are clearly of the opinion that it is fundamentally wrong, and that there is no legal principle upon which it can be sustained, from which it follows that the judgment of the lower court must be reversed. It is true that on the former appeal and in the interest of justice, this, case was remanded to the lower court, with leave to the plaintiff to introduce the power of attorney in question and any other evidence which it might have to sustain its cause of action and that there should be an end to litigation. Be that as it may, the amount involved is now about one-half million pesos, and it is apparent that the Bank acted in good faith.

The judgment of the lower court is reversed and the complaint is dismissed, but for such reasons and in the interest of justice, such dismissal is without prejudice to any legal rights or remedies, of any kind or nature, which the plaintiff may have against the defendant, with costs in favor of the appellant. So ordered.

Avanceña, C. J., Johnson, Street, Villamor, Romualdez, and Villa-Real, JJ., concur.

[1] Jones vs. Marks and Harrington.

[1]Odd Fellows' Saving's Bank vs. Banton.

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