

ESTATE OF THE DECEASED GABINA LABITORIA. ENRIQUE M. PASNO, PETITIONER AND APPELLEE, VS. FORTUNATA RAVINA AND PONCIANO RAVINA, OPPOSITORS AND APPELLANTS. PHILIPPINE NATIONAL BANK...

G. R. No. 31581. February 03, 1930

Ponente: MALCOLM, J.

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MALCOLM, J.:

body { font-family: Verdana, Geneva, Arial, helvetica, sans-serif; font-size:80%; background-color:#FFFFFF; margin:0 2% 0 2%; text-align: justify; } h1 { font-family:times; } h2 { background-color:#cccccc; padding:10px 0 10px 0; font-weight: bold; text-align: center; } h3 { font-weight: bold; text-transform: uppercase; text-align: center; } div#footer { font-size:9px; } There are two appeals in this case. One appeal has been taken by the oppositors to the legalization of the will of Gabina Labitoria, and concerns the validity of that will. The other appeal has been taken by the Philippine National Bank and concerns the survivability of the right of sale of the mortgaged property under special power while the mortgaged property is in custodia legis. We will deal with these appeals separately.

I. Enrique M. Pasno, petitioner and appellee, vs. Fortunata Ravina and Ponciano Ravina, oppositors and appellants. Validity of Gabina Labitoria's will.

As the stenographic notes have not been written up and elevated to this court, any discussion of the evidence is rendered impossible. The single question to be decided, is whether the admitted fact that the will was executed on July 27, 1928, although stating that it was executed on February 6, 1926, invalidates the will. As said by the trial judge, the reason for the error was on account of the will being in great part a reproduction of another will of February 6, 1926, and inadvertently retaining this date.

Section 618, as amended, of the Code of Civil Procedure prescribes the requisites necessary to the execution of a valid will. The law does not require that the will shall be dated. Accordingly, a will without a date is valid. So likewise an erroneous date will not defeat a will. (Wright vs. Wright [1854], 5 Ind., 389; Peace vs. Edwards [1915], 170 1ST. C, 64; Ann. Cas. 1918-A, 778; L. R. A. 1916-E, 501 note.)

It results that the trial judge was right in admitting the will of Gabina Labitoria to probate.

II. Enrique M. Pasno, petitioner and appellee, vs. Philippine National Bank, appellant. Right of the mortgagee, the Philippine National Bank, to foreclose the mortgage in its favor executed by Gabina Labitoria during her lifetime now that the mortgaged property is in the hands of an administrator.

The facts are not in dispute. Gabina Labitoria during her lifetime mortgaged three parcels of land to the Philippine National Bank to secure an indebtedness of P1,600. It was stipulated in the mortgage, among other things, that the mortgagee "may remove, sell or dispose of the mortgaged property or any buildings, improvements or other property in, on or attached to it and belonging to the mortgagor in accordance with the provisions of Act No. 3135

or take other legal action that it may deem necessary." The mortgagor died, and a petition was presented in court for the probate of her last will and testament. During the pendency of these proceedings, a special administrator was appointed by the lower court who took possession of the estate of the deceased, including the three parcels of land mortgaged to the Philippine National Bank. The estate having failed to comply with the conditions of the mortgage, the Philippine National Bank, pursuant to the stipulations contained in the same, asked the sheriff of Tayabas to proceed with the sale of the parcels of land. When the attorney for the special administrator received notice of the proposed action, he filed a motion in court in which an order was asked requiring the sheriff to vacate the attachment over the mortgaged properties and to abstain from selling the same. The lower court granted the petition in an order of February 14, 1929, and later denied a motion for reconsideration presented on behalf of the Philippine National Bank.

The mortgage makes special reference to Act No. 3135. That Act is one to regulate the sale of property under special powers inserted in or annexed to real-estate mortgages. It fails to make provision regarding the sale of mortgaged property which is in custodies legis. Under these circumstances, it would be logical to suppose that the general provisions of Philippine law would govern this latter contingency. It is a familiar rule that statutes in *pari materia* are to be read together. The legislative body which enacted Act No. 3135 must be presumed to have been acquainted with the provisions of such a well known law as the Code of Civil Procedure and to have passed Act No. 3135 with reference thereto.

The appellant practically concedes that the law applicable to the case is section 708 of the Code of Civil Procedure. The cited section reads: "A creditor holding a claim against the deceased, secured by mortgage or other collateral security, may abandon the security and prosecute his claim before the committee, and share in the general distribution of the assets of the estate; or he may foreclose his mortgage or realize upon his security, by ordinary action in court, making the executor or administrator a party defendant;; and if there is a judgment for a deficiency, after the sale of the mortgaged premises, or the property pledged, in the foreclosure or other proceeding to realize upon the security, he may prove his deficiency judgment before the committee against the estate of the deceased; or he may rely upon his mortgage or other security alone, and foreclose the same at any time, within the period of the statute of limitations, and in that event he shall not be admitted as a creditor, and shall receive no share in the distribution of the other assets of the estate; but nothing herein contained shall prohibit the executor or administrator from redeeming the property mortgaged or pledged, by paying the debt for which it is held as security, under the direction of the court, if the court shall adjudge it to be for the best interest of the estate that such redemption shall be made." In this connection, it is to be noted that the law provides two remedies (*Osorio vs. San Agustin* [1913], 25 Phil., 404). The creditor here is not taking advantage of the first remedy for the mortgage security has not been abandoned. Rather is the second remedy invoked but until now unsuccessfully since the mortgagee has not begun an ordinary action in court to foreclose the mortgage making the special administrator a party defendant.

The power of sale given in a mortgage is a power coupled with an interest which survives the death of the grantor. One case, that of *Carter vs. Slocomb* ([1898], 122 N. C., 475), has gone so far as to hold that a sale after the death of the mortgagor is valid without notice to the heirs of the mortgagor. However that may be, conceding that the power of sale is not revoked by the death of the mortgagor, nevertheless in view of the silence of Act No. 3135 and in view of what is found in section 708 of the Code of Civil Procedure, it would be preferable to reach the conclusion that the mortgagee with a power of sale should be made to foreclose the mortgage in conformity with the procedure pointed out in section 708 of the Code of Civil Procedure. That would safeguard the interests of the estate by putting the estate on notice while it would not jeopardize any rights of the mortgagee. The only result is to suspend temporarily the power to sell so as not to interfere with the orderly administration of the estate of a decedent. A contrary holding would be inconsistent with the portion of our law governing' the settlement of

estates of deceased persons.

It results that the trial judge committed no error in sustaining the petition of the administrator of the estate of the deceased Gabina Labitoria and in denying the motion of the Philippine National Bank.

Agreeable to the foregoing pronouncements, the judgment and orders appealed from will be affirmed, with one-half of the costs of this instance against the oppositors and appellants Portunata Ravina and Ponciano Ravina, and the other half of the costs of this instance against the Philippine National Bank.

Johnson, Johns, Romualdez and Villa-Real, JJ., concur.

CONCURRING AND DISSENTING

Street, Villamor and Ostrand, JJ.,:

We concur in so much of the opinion of the court in this case as is concerned with the probate of the will of Gabina Labitoria, but are unable to concur in the second part of the decision wherein it is held that, after the death of the mortgagor, the mortgage can only be foreclosed in an ordinary action in court even though it may contain a clause expressly conferring upon the mortgagee the power to sell the property extrajudicially. It is our opinion that, under such a power, the sale may be proceeded with under the provisions of Act No. 3135, which is expressly referred to in the mortgage now under consideration.

The decisions of English and American courts are almost unanimous to the effect that a power of sale contained in a mortgage is a power coupled with an interest and is not revoked by the mortgagor's death. In the title Mortgages, in 41 C. J., p. 927, decisions from Great Britain and nearly twenty American States are cited to this proposition; and the contrary rule, adopted in one or two American States, is so opposed to the current of authority as to be entitled to no weight.

The opinion of the court refers to section 708 of the Code of Civil Procedure as determining the proposition that, after the death of the mortgagor, foreclosure can be effected only by an ordinary action in court; but if this section be attentively examined, it will be seen that the bringing of an action to foreclose is necessary only when the mortgagee wishes to obtain a judgment over for the deficiency remaining unpaid after foreclosure is effected. In fact this section gives to the mortgagee three distinct alternatives, which are, first, to waive his security and prove his credit as an ordinary debt against the estate of the deceased; secondly, to foreclose the mortgage by ordinary action in court and recover any deficiency against the estate in administration; and, thirdly, to foreclose without action at any time within the period allowed by the statute of limitations.

The third mode of procedure is indicated in that part of section 708 which is expressed in these words:

"Or he may rely upon his mortgage or other security alone, and foreclose the same at any time, within the period of the statute of limitations, and in that event he shall not be admitted as a creditor, and shall receive no share in the distribution of the other assets of the estate."

The alternative here contemplated is, evidently, a foreclosure under power of sale contained in the mortgage. It must be so, since there are no other modes of foreclosure known to the law than by ordinary action and foreclosure under power, and the procedure by action is covered in that part of section 708 which immediately precedes the words which we have quoted above. It will be noted that the result of adopting the last mode of foreclosure is that the creditor waives his right to recover any deficiency from the estate.

In addition to what is said above, we submit that the policy of the court in requiring foreclosure by action in case of the death of a mortgagor, where a power of sale is inserted in the mortgage, will prove highly prejudicial to the estates of deceased mortgagors. Nowadays nearly every mortgage executed in this country contains a stipulation for the payment of attorney's fees and expenses of foreclosure, usually in an amount not less than 20 or 25 per cent of the mortgage debt. This means, in practical effect, that the creditor can recover, for attorney's fees and expenses, whatever the court will allow as reasonable, within the stipulated limit. On the other hand, if an extrajudicial foreclosure is effected under the power of sale, the expenses of foreclosure are limited to the cost of advertising and other actual expenses of the sale, not including the attorney's fee.

Again, if foreclosure is effected extrajudicially, under the power, in conformity with the provisions of Act No. 3135, the mortgagor or his representative has a full year, from the date, of the sale, within which to redeem the property, this being the same period of time that is allowed to judgment debtors for redeeming after sale under execution. On the other hand, the provisions of the Code of Civil Procedure relative to the foreclosure of mortgages by action allows no fixed period for redemption after sale; and although, in the closing words of section 708 of the Code of Civil Procedure the court is authorized to permit the administrator to redeem mortgaged property, this evidently refers to redemption to be effected before the foreclosure becomes final.

When account is further taken of the fact that a creditor who elects to foreclose by extrajudicial sale waives all right to recover against the estate of the deceased debtor for any deficiency remaining unpaid after the sale, it will be readily seen, that the decision in this case will impose a burden upon the estates of deceased persons who have mortgaged real property for the security of debts, without any compensatory advantage.

We permit ourselves to make one more suggestion, which is that the courts ought to be friendly to the provisions of law relating to mortgages, and they should not, by strict interpretation, deprive the mortgagee of any right fairly deducible from the contract. In this country the contract of sale with pacto de retro, as used in lieu of the mortgage, has an almost uncontrollable vogue, undoubtedly due to the defects of our laws relating to mortgages, and the slender reliance that can be placed upon them. And as long as the attitude of the Legislature and the courts remains unfriendly to the mortgage, to that extent the day is postponed when borrowers, upon the security of real property, can be freed from the dangers incident to the contract of sale with pacto de retro.

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