

**TAN DE JUA, PLAINTIFF AND APPELLANT, VS. J. M. PO PAOCO ET AL.,
DEFENDANTS AND APPELLEES.***G. R. No. 31588. January 31, 1930*

Ponente: STREET, J.

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On September 20, 1922, the plaintiff, Tan De Jua, resident of the municipality of Iloilo, lent the sum of P10,000 to J. G. Tan Jongco, of Sibalom de Iloilo, in the Province of Antique, and as security for this loan Tan De Jua took a mortgage, to mature a year later, on property belonging to Tan Jongco. In April, 1923, the plaintiff increased the loan by P5,000, thus making the mortgage debt P15,000. Both these instruments were duly registered in the office of the register of deeds of the Province of Antique, where the mortgaged property was situated.

Some time prior to the date when the mortgage, as thus amplified, fell due, the defendant, J. M. Po Paoco, obtained a judgment, in the Court of First Instance of Iloilo, for a sum of money 'against Tan Jongco, and although the latter appealed the case to the Supreme Court, Po Paoco obtained from the Court of First Instance an order for the execution of the sentence pending the appeal. Pursuant to this order an execution was issued in favor of Po Paoco against Tan Jongco, and the execution was levied upon the property already mortgaged by Tan Jongco to Tan De Jua. After the execution was thus levied, Tan De Jua intervened as a third party, asserting his rights under his two mortgages. In response to this intervention Po Paoco gave bond to indemnify the sheriff, with Alejandro Montelibano, Mariano de la Rama Tan Bungco, and Enrique Salvani as sureties. Under the protection of this bond the provincial sheriff, Pascual Magbanua, proceeded to sell the property which had been levied upon, and at the sale J. M. Po Paoco and Alejandro Montelibano became the purchasers.

Thereupon Tan De Jua instituted the present action on September 17, 1923, or three days before the maturity of the mortgage debt, for the purpose of recovering the amount of his debt and an attorney's fee, with interest, from Po Paoco, Tan Jongco, Salvani, De la Rama, Montelibano, and Magbanua (the latter as sheriff). The theory underlying the action is that, by levying upon the mortgaged property and selling it over the protest of the plaintiff, the defendants have cooperated, in the respective characters stated, in the destruction of plaintiff's security, whereby, it is supposed, the defendants have become jointly and severally liable to the plaintiff for the full amount of the debt and the attorney's fee stipulated in the mortgage.

It appears that the judgment which Po Paoco had recovered against Tan Jongco in the Court of First Instance of Iloilo was reversed upon appeal in the Supreme Court, [1] with the consequence that the rights acquired by Po Paoco as a result of purchasing the mortgaged property at his own execution sale were no longer asserted, and the property appears in fact to have remained, where it had previously been, in the possession of Tan Jongco.

Upon the foregoing facts it is quite evident that this damage suit is not well founded, and the trial court committed no error in absolving the defendants from the complaint. An execution creditor who levies his execution upon property which the judgment debtor has mortgaged to another can sell at most only the equity of redemption belonging to the mortgagor. The execution sale does not affect the right of the mortgagee under the

earlier mortgage. The proper remedy of the mortgagee in this case is to bring an action against the mortgagor to foreclose the mortgage; and the remedy which he here seeks to assert is misconceived. He can recover no damages against any of these defendants, for the reason that the proceedings under the execution did not impair the plaintiff's legal rights in the least. The situation is analogous to that where a second mortgage is created upon property which the owner has already mortgaged to another person. In such case, as is well recognized, the foreclosure of the second mortgage does not impair the lien of the mortgagee under the first mortgage. In the case before us some of the property mortgaged to the plaintiff was personal, but this does not alter the situation. If the plaintiff's mortgage, in the character of a chattel mortgage, was registered as a chattel mortgage, the rights of the plaintiff in the mortgaged property were superior to any that could be acquired by the creditor as purchaser at the execution sale. Here the plaintiff's position is made even stronger by the circumstance that the judgment under which the execution sale was made was reversed in the end in the Supreme Court, as a result of which any title acquired by Po Paoco and his associate by purchase at the execution sale was destroyed.

It being understood, therefore, that the judgment in this case is without prejudice to the plaintiff's right to proceed to the foreclosure of his mortgages and the enforcement of his claim against Tan Jongco, the appealed decision is affirmed. So ordered, with costs against the appellant.

Johnson, Malcolm, Villamor, Ostrand, Johns, Romualdez and Villa-Real, JJ., concur.

[1] G. R. No. 20915, promulgated November 14, 1923, not reported.

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