

NATALIA FABIAN ET AL., PLAINTIFFS AND APPELLANTS, VS. SMITH, BELL & CO., DEFENDANTS AND APPELLEES.*G.R. No. 3667. September 05, 1907*

Ponente: WILLARD, J.

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On the 28th day of January, 1901, Emiliano Boncan was the owner of the real estate in question in this case, his title thereto being recorded in the registry of property. On that day he sold and conveyed the same by a public document to the plaintiffs. This deed was never recorded in the registry of property. The appellees, Smith, Bell & Co., having some years thereafter obtained a judgment against Emiliano Boncan, levied an execution issued on said judgment upon the real estate in question, which then stood upon the said record in the name of said Boncan. The plaintiffs thereupon brought this action to restrain the judgment creditors from selling the property under this execution. Judgment was entered in the court below in favor of the defendants, and the plaintiffs have appealed.

The question in the case is whether the levy of an execution against a judgment debtor upon real estate which stands in his name in the registry of property takes precedence or not of an unrecorded deed of the same property made by the judgment debtor prior to the levy in question.

This question, so far as the Spanish law in force prior to the present Code of Civil Procedure is concerned, has been considered by this court in a case relating to an attachment made under the same circumstances. By the provisions of that law an execution, such as was levied in the case at bar, stands upon the same footing as an attachment. Both are provisional records, one mentioned in article 42, paragraph 2, of the Mortgage Law, and the other in paragraph 3 of the same article. They are placed upon the same footing also by article 44, which is as follows:

"The creditor who obtains an entry in his favor in cases Nos. 2, 3, and 4 of article 42 shall have preference, only with regard to the property entered, over those who have another claim against the same debtor, contracted subsequently to said entry."

The case above referred to is the case of *Martinez vs. Holliday, Wise & Co.* (1 Phil. Rep., 194). In that case it was said (p. 197) :

"From the time when the Mortgage Law of 1861 was in consideration up to the present time there has been only one opinion concerning the effects of a provisional record of this class. It has always been said that it did not change the character of the debt; that it did not convert into a right to the thing itself the claim of the creditor; that it did not give him any preference over existing claims which were not so provisionally recorded."

This case was followed in that of *Olivares vs. Hoskyn & Co.* (2 Phil. Rep., 689), where the creditor had obtained judgment and levied an execution, the case, therefore, being similar to this case. It was also followed in the case of *Peterson vs. Newberry* (6 Phil. Rep., 260).

In accordance with the provisions of the Mortgage Law and the Civil Code, as they have thus been construed by this court, there can be no doubt that the claim of the appellants is superior to the claim of the appellees.

These provisions of the Spanish law have not been modified or repealed in this respect by the Code of Civil Procedure. The sections of that code relating to attachment provide that when real estate stands upon the records in the name of the defendant the attachment shall be made in a certain way, and when it stands in the name of a third person the attachment shall be made in a certain way; but nothing is said in any of these sections as to any priority secured by the attachment. The provision which is found in the statute law of a great many of the States of America, to the effect that an unrecorded deed shall be void as to subsequent attaching or judgment creditors, nowhere appears in this code. Article 1473 of the Civil Code, which gives preference to that one of two deeds which is first recorded, does not extend to attachments or executions.

The same is true of the sections of the code (Civil Procedure) relating to executions; it appearing, moreover, in section 463, that the purchaser under an execution sale "shall be substituted to and acquire all the right, interest, title, and claim of the judgment debtor thereto," which in this case would be nothing. The case of Peterson vs. Newberry, above cited, arose after the publication of the present Code of Civil Procedure.

Article 389 of the Mortgage Law is in part as follows:

"From the time this law goes into operation, no document or instrument which has not been recorded in the registry shall be admitted in the ordinary or special courts or tribunals, in the councils or ónices of the Government, by which interests subject to record are created, conveyed, acknowledged, modified, or extinguished, according to the same law, if the object of the presentation be to enforce, to the prejudice of third persons, the interests which should have been recorded."

This article does not aid the appellees, for they do not come within the meaning of the phrase "third persons" found therein. In the Commentaries of Galindo y Escosura upon the Mortgage Law, volume 2 (2d ed.), page 635, it is said:

"Therefore it is the general opinion that when a person, by virtue of a judgment for the recovery of a debt not supported by a mortgage, secures an attachment against property which turns out to have been previously sold, although the purchaser did not have the property registered in his name, the latter has the superior right, as the attachment does not confer a real right."

See also page 641 of the same volume.

The judgment of the court below is reversed, and the cause remanded with directions to enter judgment for the plaintiffs as prayed in the complaint. No costs will be allowed to either party in this court. So ordered.

Arellano, C. J., Torres, Johnson, and Tracey, JJ., concur.

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