

THE ESTATE OF LUIS GAMBOA CARPIZO, DECEASED, PLAINTIFF AND APPELLEE, VS. ROBERTO FLORANZA, DEFENDANT AND APPELLANT.

G.R. No. 4069. December 05, 1908

Ponente: WILLARD, J.

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WILLARD, J.:

This case has been once before this court (Jaucian vs. Floranza, 9 Phil. Rep., 236), where a motion to dismiss the appeal was denied.

The commissioners appointed to hear claims against the estate of Luis Gamboa Carpizo in the judicial proceedings for the settlement of that estate allowed a claim in favor of Balbino Jaucian for P2,720. In their report made to the court on the 30th of July, 1906, they said that this claim was secured by a mortgage on real estate and expressed an opinion as to the preferential rights to which this creditor and another mortgage creditor would be entitled in the distribution of the proceeds of the sale. On the 27th of August, 1906, the administrator presented a petition to the court in which he referred to the report of the commissioners, stated that it appeared that some of the creditors were mortgage creditors, and asked that the court appoint a day for a hearing upon the question as to the preference which these creditors enjoyed. On the 22d of October, 1906, the court, apparently without hearing any of the parties interested, made an order directing the administrator to present a motion asking for an order directing the sale of the mortgaged property; that the mortgage debt be paid from the proceeds of the sale, and that what remained be distributed among the other creditors. This is one of the orders appealed from.

On the 23d of October, 1906, the administrator presented a petition in compliance with the order of the 22d of October asking that the real estate upon which it was said Balbino Jaucian had a mortgage be sold for the purpose of paying the mortgage debt. On the 12th of November, 1906, the court, without notice to any of the parties, and without hearing any of them, made an order directing that the property mentioned in the petition be sold for the purpose of paying the mortgage debt due to Balbino Jaucian. It provided that notice of the sale should be given in a certain way. This is the second order appealed from.

On the 14th of December, 1906, the administrator filed a report of the sale, stating that the property had been sold for P3,005, and asked that the sale be confirmed.

It does not appear from the record before us that this sale ever has been confirmed. On the contrary, it seems from certain findings subsequently made by the court that the land upon which the mortgaged house stood did not belong to the estate but belonged to the widow.

The creditor who has appealed says that the document evidencing the loan of Balbino Jaucian is not a mortgage. The appellant has not seen fit to have the document brought here and this assignment of error can not, therefore, be sustained.

The appellee insists that the question as to the preferential right of Jaucian was determined by the commissioners

in their report and that that report, not having been appealed from, such determination is final and conclusive. It is very apparent from the provisions of the code declaring what the powers of this commission are that it had no authority to make any ruling whatever in relation to preferential rights which some creditors might have over others. (See sec. 686 and following sections, and sec. 735, Code of Civil Procedure.)

It is claimed by the appellant that, under the provisions of section 708 of the Code of Civil Procedure, Jaucian waived his mortgage lien by presenting his claim before the commissioners. That section is as follows:

"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."

We do not find it necessary to decide this question, for the orders appealed from must be reversed on other grounds. The code states in its sections 714 to 721 various conditions under which the real estate of the deceased may be sold for the payment of debts. There is nothing in any one of these sections nor in any other section of the code which indicates that the Court of First Instance, in the exercise of its probate jurisdiction, has any power to order the sale of a specific piece of real estate for the purpose of paying a mortgage debt which is a lien thereon. It may be that the court would have authority to sell the property, subject to the mortgage lien, for the purpose of paying other debts of the estate, but there is nothing giving the court authority to sell it for the purpose of paying that specific debt.

Another fatal objection to the order of the 12th, of November, directing the sale, is that, the court entirely failed to comply with the provisions of section 722 of the Code; of Civil Procedure. That section requires the administrator to present a petition asking for the sale of the real estate. It also distinctly provides that, when such petition is made, the court shall appoint a time and place for hearing it and shall require notice of the petition and of the time and place of such hearing to be given in a newspaper of general circulation, and that the court may order such further notice given as it deems proper.

No attempt was made to comply with this provision of the law. No notice whatever was given to any of the persons interested of the application for license to sell. The orders appealed from, namely, that made on the 22d of October, 1906, and that made on the 12th of November, 1906, are reversed, and the case remanded for further proceedings in accordance with the law. No costs will be allowed to either party in this court. So ordered.

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

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