

**GREGORIO DE LA PAZ AND GUADALUPE SANTIESTEBAN,
APPLICANTS AND APPELLANTS, VS. MACONDRAY & CO., INC.,
OPPOSITOR AND APPELLEE.**

G.R. No. 44072. October 28, 1938

Ponente: IMPERIAL, J.

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IMPERIAL, J.:

The applicants appealed from the judgment of the Court of First Instance of Rizal which decreed the registration of lots Nos. 1 to 8 of plan S. W. O. 13145, as amended by plan S. W. O. 13414, in favor of the oppositor, and in their favor that of lots Nos. 1 and 2 of plan Psu-58906 and the other parcel of land described in the plan S. W. O. 12153, without special pronouncement as to the costs.

In registration case No. 1123 of said court, G. L. R. O. Record No. 48399, the appellants applied, under Act No. 496, for the registration in their favor of eleven parcels of land situated in the municipality of Pasig, Province of Rizal. The registration of some portions was opposed by the Province of Rizal and by the Manila Railroad Company, but as the appellants abided by the oppositions and as the portions claimed by the oppositors were segregated from the plans, the latter eventually abandoned their intervention. As there was no longer any controversy, the court, after going over the evidence adduced by the appellants, ordered the registration of the lands in their favor. Before the decision thus rendered became final, the appellee appeared and asked for the setting aside thereof, for permission to file its written opposition, and for the reopening of the case. As grounds therefor it alleged that the eleven lots adjudicated to the appellants originally belonged to the spouses Baltazar Raymundo and Agapita San Juan; that the latter mortgaged the same to the appellee to secure the loan of five thousand pesos and the interest thereon at 12 per cent per annum which the appellee granted to them; that the mortgage deed executed for that purpose was registered in the register of deeds; that for failure of the debtors to pay their indebtedness after its maturity, the appellee brought foreclosure suit against them in the Court of First Instance of Rizal; that the latter were ordered to pay their indebtedness with interest, amounting to P5,389.51 plus interest and penalty at 20 per cent; that these amounts were thereafter reduced to P2,389.65 because of the partial execution of the judgment; that under a writ of execution subsequently issued, the sheriff sold the mortgaged properties at public auction, adjudicating the same to the appellee, as the highest bidder, for P1,100; and, finally, the court ordered the approval of the said sale. After hearing the parties, the court granted the petition, reversed its decision and allowed the appellee to file its opposition. After such filing, trial was held anew at which the parties presented the following stipulation of facts:

"1. That the spouses Baltazar Raymundo and Agapita San Juan were the exclusive owners of the lands described in the plans SWO-13145 and SWO-13414 (Exhibits A and A-1) the technical descriptions of which appear in the documents marked Exhibits A-2 and A-3, respectively.

"2. That on June 20, 1924, to secure the payment of the sum of P5,000 and any other sums plus interest at 12 per cent per annum and a penalty equivalent to 20 per cent of said sum, the said spouses Baltazar Raymundo and Agapita San Juan executed a deed of mortgage over the aforesaid lands in favor of Macondray & Co., Inc.,

a domestic corporation with its principal office in the City of Manila, which deed was acknowledged by Jose Agbulos, notary public, copy of which is attached to the record and marked Exhibit 1-Macondray, which deed was registered in the office of the register of deeds for Rizal on July 22, 1934.

"3. That on March 26, 1928, the spouses Baltazar Raymundo and Agapita San Juan executed a deed of sale of the same lands described in the plans SWO-13145 and SWO-13414 in favor of the spouses Ambrosio Santiesteban and Benita Lambengco for P5,200, which deed was acknowledged by Miguel Hernandez, notary public, and likewise registered in the office of the register of deeds for Rizal on May 18, 1928, Exhibit A-4.

"4. That from the said date, March 26, 1928, the execution of the deed of sale in favor of said spouses Ambrosio Santiesteban and Benita Lambengco, the latter entered upon the possession of said lands, reaping the fruits thereof from said date until November 28, 1932.

"5. That on August 20, 1930, Macondray & Co., Inc., filed the corresponding complaint to recover its mortgage credit against the spouses Baltazar Raymundo and Agapita San Juan, which complaint was docketed in the Court of First Instance of this province as civil case No. 4575, entitled, Macondray & Co., Inc., plaintiff, vs. Baltazar Raymundo and Agapita San Juan, defendants, copy of which complaint is attached to the record and marked as Exhibit 2-Macondray.

"6. That on January 30, 1931, and by a deed signed on January 23, 1931, by the spouses Baltazar Raymundo and Agapita San Juan in said civil case No. 4575, a decision was rendered therein ordering the aforesaid spouses Baltazar Raymundo and Agapita San Juan to pay to Macondray & Co., Inc., said mortgage credit, copy of which decision is attached hereto as Exhibit 3-Macondray.

"7. That as a result of the death of Benita Lambengco, wife of Ambrosio Santiesteban, on January 28, 1932, in the municipality of Pasig, Province of Rizal, there was instituted on February 4, 1932, the intestate of the deceased Benita Lambengco (civil No. 5041), wherein the widower Ambrosio Santiesteban was named administrator in May, 1932.

"8. That on January 29, 1932, after Macondray & Co., Inc., had asked, on June 11, 1931, for an order of execution of the said decision, said Macondray & Co., Inc., through its attorney, Jose Agbulos, filed a motion asking for the sale of the said lands described in the plans SWO-13145 and SWO-13414 to make good the sum of P2,389.65 plus interest thereon at 12 per cent from October 31, 1931, which motion was granted on February 16, 1932, and on February 23, 1932, there was issued an alias writ of execution whereby the deputy sheriff of Rizal, Valentin Teck, after the publication of the notices required by law, sold the said lands at public auction on April 16, 1932, adjudicating the same to the said plaintiff and judgment creditor Macondray & Co., Inc., which was the highest bidder for the sum of P1,100, as evidenced by the sale certificate issued by the said deputy sheriff, Valentin Teck, dated September 22, 1933, attached to the record and marked as Exhibit 4-Macondray, which sale was approved by the Court of First Instance of this province on October 9, 1933.

"9. That the aforesaid lands described in the plans above-mentioned formed a part of the inventoried properties in the intestate case of the deceased Benita Lambengco, civil No. 5041, and under the deed of partition duly approved by the court executed by the widower and the heirs of the said deceased, copy of which is hereto attached as Exhibit A-5, they were adjudicated to the surviving spouse, Ambrosio Santiesteban.

"10. That on November 29, 1932, Ambrosio Santiesteban executed a deed of sale of the same lands in favor of the spouses Gregorio de la Paz and Guadalupe Santiesteban, which deed was ratified before the justice of the peace and notary public of Pasig, Rizal, Hon. Simeon Garcia. and registered in the office of the register of deeds of Rizal on December 1, 1932, Exhibit A-6.

"11. That from this date, November 29, 1932, to the present, the spouses Gregorio de la Paz and Guadalupe Santiesteban have been in possession of the said lands, and they received and continue to receive the products thereof.

"12. That the possession of the applicants of the said lands, added to that of the spouses Ambrosio Santiesteban and Benita Lambengco and to that of the spouses Baltazar Raymundo and Agapita San Juan and their predecessor in interest, dates back to the Spanish regime, that is, over forty years back."

On February 27, 1935, the court, after the case was submitted, rendered the decision mentioned at the beginning.

- The appellants contend in their first assigned error that the foreclosure suit brought by the appellee against the spouses Baltazar Raymundo and Agapita San Juan, the mortgage debtors, as well as the decision rendered therein, neither affect nor prejudice them because Ambrosio Santiesteban and Benita Lambengco, who were the owners of the lands and who were their predecessors in interest at the time the suit was brought, were not included as defendants in the said case; and conclude with the statement that, as to them, the foreclosure suit was without effect and the court should have decreed the registration of all the lands in their favor, subject only to the mortgage lien in favor of the appellee.

The appellants rest their contention on the provisions of section 255 of the Code of Civil Procedure, the English text of which reads:

"SEC. 255. The complaint in an action for foreclosure of a real estate mortgage.—In an action for foreclosure of a real estate mortgage, or other incumbrance upon real estate, the complaint shall set forth the date and due execution of the mortgage, its assignments, if any, the names and residences of the mortgagor and mortgagee, a description of the mortgaged premises, a statement of the date of the note or other obligation secured by the mortgage, and the amount claimed to be unpaid thereon, and the names and residences of all persons having or claiming an interest in the premises subordinate in right to that of the holder of the mortgage, all of whom shall be made defendants in the action."

This and other sections regarding the foreclosure of a real estate mortgage do not state the legal effect resulting from the failure to include as defendants all those having an interest in the mortgaged premises subordinate to the mortgage sought to be foreclosed; on the other hand, it is clear from the language of section 255 that the purchaser of property previously mortgaged should be included as defendant because he has an interest subordinate to the mortgage lien, which is a real right subjecting the property wherever it may be found.

In the case of *Sun Life Assurance Company of Canada vs. Gonzalez Diez* (52 Phil., 271, 274 et seq.), this court held that a second mortgagee, while not an indispensable party in a foreclosure suit instituted by the first mortgagee, is, nevertheless, a necessary party and should be included in the case. In said case it was said:

"In the present appeal question is made as to the right of the first mortgage creditor to maintain this action. We are of the opinion, however, that the criticism directed against the appealed decision on this point is not well founded. A second mortgagee acquires only a mortgage lien upon what is called the equity of redemption vested in the mortgagor, and his rights are strictly subordinate to the superior lien of the first mortgagee. Having acquired this right the second mortgagee is a proper and in a sense even a necessary party to a foreclosure proceeding brought by the first mortgagee; for, in the closing words of section 255 of our Code of Civil Procedure, it is expressly provided that all persons having or claiming an interest in the mortgaged premises subordinate in right to that of the holder of the foreclosing mortgage creditor shall be made defendants in the foreclosure proceeding. Accordingly, if in the original foreclosure proceeding the attention of the court had been directed to the fact that a second mortgage had been executed in favor of Gonzalez Diez, it would have been peremptorily required that the second mortgagee should be made a party.

"But the second mortgagee was not an indispensable party to the proceeding to foreclose the first mortgage, because appropriate relief could be granted by the court to the first mortgagee, in the original foreclosure proceeding, without affecting the rights of the second mortgagee. But the failure on the part of the first mortgagee

to make the second mortgagee a defendant was that the decree entered in the original foreclosure proceeding did not have the effect of depriving the second mortgagee of his right of redemption. It is well recognized doctrine that a decree of foreclosure in a suit to which the holders of a second lien are not parties leaves the equity of redemption in favor of such lien holders unforeclosed and unaffected. (*Sioux City etc. R. Co. vs. Trust Co.*, 82 Fed., 124; 173 U. S., 99; 43 Law. ed., 628.)"

And in the case of *Government of the Philippine Islands vs. De las Cajigas* (55 Phil., 667, 670 et seq.), this court reiterated the same doctrine and further held that the failure to make a subordinate lienholder a party defendant in a mortgage foreclosure does not nullify the proceeding as among the actual parties thereto, but at most leaves the right of redemption unforeclosed as against such lienholder. In said case the court expressed itself thus:

"The first assignment of error raises the question whether the foreclosure proceeding was conducted against all of the indispensable parties, and particularly it is insisted that the heirs of Dolores G. Azaola de Cajigas should have been impleaded. It will be noted, however, that the property in question is covered by a Torrens title, and the mortgage was executed by the administrator, with the approval of the court, after the death of Dolores G. Azaola de Cajigas, the original owner. Under section 89 of the Land Registration Act (No. 496) real estate registered under the Torrens system passes upon the death of the owner to the executor or administrator of the deceased, whether such owner dies testate or intestate. There can be, therefore, no question as to the validity of the mortgage, and inasmuch as the legal title was vested in the administrator when the mortgage was executed, such administrator was the only indispensable party defendant in the foreclosure proceeding. The interest of the heirs of the original owner was derivative and contingent, and for the purposes of foreclosure they were represented by the administrator who was the true party in interest; and even supposing that the heirs might have been proper parties in interest within the meaning of section 255 of the Code of Civil Procedure, a valid foreclosure could be effected although they were not impleaded. As was pointed out in *Sun Life Assurance Co. of Canada vs. Gonzalez Diez* (52 Phil., 271), the effect of the failure to make a subordinate lien holder a party to a foreclosure proceeding is, not that the foreclosure is void as between the parties to the proceeding, but that the foreclosure is ineffective as against such subordinate lienholder, with the consequence that there remains in him an unforeclosed equity of redemption. The same reasoning holds with respect to Jose de las Cajigas in his character as transferee of the subordinate lien originally vested in Encarnacion Serra. The failure to implead him formally as a party, in lieu of the administrator of Encarnacion Serra, when the transfer was made known to the court, did not invalidate the foreclosure, but at most might have left in him a right of redemption, upon the existence of which right it is not necessary here to pass an opinion. While the subordinate lienholder is a proper party defendant in order to make a decree of foreclosure completely binding on all interests, he is not an absolutely indispensable party in the foreclosure proceeding."

The only difference between the decided cases and the one at bar consists in that the former had to do with a second mortgagee, while in the case under consideration the one affected is a purchaser of the mortgaged real estate. We see no weighty reason for not applying the same principles to the case of a purchaser of real estate previously mortgaged. The fundamental reason behind the doctrines laid down has application to the case of a purchaser of real estate previously mortgaged. In the latter's case there exists the same fundamental reason that he has an interest in the mortgaged properties subordinate to the preferential right of the mortgagee. We, therefore, conclude that the failure to join the predecessors of the appellants as defendants in the foreclosure suit instituted by the appellee did not have the effect of nullifying the foreclosure proceeding, but kept alive the equitable right of redemption which the appellants had as purchasers of the mortgaged lands from their predecessors.

- The appellee relies upon the stipulation in the mortgage deed executed in its favor by the spouses Raymundo which prohibits the latter from alienating or encumbering the mortgaged lands without its written consent, and

contends that the sales made in favor of the spouses Ambrosio Santiesteban and Benita Lambengco and the appellants are null and void because its written consent had not been previously obtained, thus violating the said stipulation. The said stipulation reads: "The mortgagor, during the life of the mortgage, may not sell or in any way alienate the mortgaged properties, or encumber the same by a subsequent mortgage or lease them for more than one year without the written consent of the mortgagee."

This stipulation, styled pact de non alienando, sometimes found in mortgages executed in Louisiana and derived from the Spanish law, binds the mortgagor neither to sell nor encumber the mortgaged property to the prejudice of the mortgagee; does not nullify the sale in favor of a third person, but gives the mortgagee the right to proceed directly against the property, found in the purchaser's possession, in a proceeding against the mortgagor alone and without notice to the purchaser (41 C. JM sec. 741, p. 708).

In the case of *Avegno vs. Schmidt* (28 Law. ed., 976-978), the Supreme Court of the United States construed a like stipulation as follows:

"The effect of the stipulation in a mortgage called the pact de non alienando, by which the mortgagor agrees not to alienate or encumber the mortgaged premises to the prejudice of the mortgage, is well settled in Louisiana. In *Nathan vs. Lee* (2 Mart. [N. S.], 32), the effect was decided to be, that the mortgagee is not bound to pursue a third possessor, but may have the hypothecated property seized in via executina as if no change had taken place in its possessors, because any alienation or transfer made in violation of the pact de non alienando is ipso jure void as it relates to the creditor, and that this effect of the pact is not annulled by the provisions of the Civil Code in relation to mortgages, and the rules laid down for pursuing the action of mortgage.'

"In *Stanbrough vs. McCall* (4 La. Ann., 324), the court reviewed the cases on this subject, and held that where a mortgage contained the pact de non alienando, one who subsequently purchases the property from the mortgagor cannot claim to be in any better condition than his vendor, nor can he plead any exception which the latter could not, and that any alienation in violation of the pact is null as to the creditor.

"These cases, and those cited in the note, establish the rule that where a mortgage contains the pact de non alienando the mortgagee may enforce his mortgage by proceeding against the mortgagor alone notwithstanding the alienation of the property, and that all those claiming under the mortgagor, whether directly or remotely, will be bound, although not made parties."

In the case of *New Orleans National Banking Association vs. Le Breton* (30 Law. ed., 821-824), the same Supreme Court of the United States said the following of a like clause:

"The illegalities alleged are: first, that the complainants and other mortgage creditors were not made parties to the proceeding and were not notified of the sale; * * *.

"Neither of these objections seems to be well founded. A holder of a first mortgage, duly executed before a notary, with pact de non alienando, is not bound to give notice to any person but the debtor in possession.

"These sections do not, it is true, speak of the pact de non alienando and its peculiar effect. This pact and its consequences were derived from the Spanish law and were not affected by the Code, and have been firmly established in the jurisprudence of Louisiana. (*Nathan vs. Lee*, 2 Mart. [La.], N. S., 32; *Donaldson vs. Maurin*, 1 La., 39, and other cases cited in *Hennen's Dig. arts. Executory Process*, III [6]; *Mortgage*, VI [c], 6; *Louque's Dig. ib.*) This rule not only applies to subsequent purchasers from the mortgagor, but to subsequent incumbrancers. (*Guesnard vs. Soulie*, 8 La. Ann., 53.) The mortgage of *Kennedy & Co.*, contained all the requisites required for this process. It was a first mortgage by agreement of all the parties, and contained the pact in question. The fact that the complainants and other creditors had a junior mortgage by virtue of the same instrument makes no

difference. They agreed to stand on the plane of second mortgagees, and must be bound by the conditions attaching to such a position. It has even been held by the Supreme Court of Louisiana that where two separate notes; drawn in favor of different individuals, were secured by the same mortgage, either mortgagee may sue to enforce his rights without a joinder of the other. (*Utz vs. Utz*, 34 La. Ann., 752.) Ana, in another case, it was held that where there are concurrent mortgagees, one of them may proceed by executory process to foreclose the mortgage without giving special notice to the others. (*Soniat vs. Miles*, 32 La. Ann., 164.) In such cases the other interested parties are entitled to their proper shares of the common proceeds. (*Carite vs. Trotot*, 105 U. S., 751, 755 [26: 1223, 1224].)"

In the case of *Citizens' Bank of Louisiana vs. Miller* (10 So. Rep., 779-782), the Supreme Court of Louisiana, construing the scope of said stipulation, said:

"The bank claims that a purchaser of property subject to a mortgage containing the pact de non alienando stands in the shoes of the original mortgage debtor, and cannot, any more than that debtor himself, claim reimbursement on account of improvements made on the property; in other words, that he is not, in the eye of the law, a third possessor, and is not, therefore, entitled to the protection of article 3407, Rev. Civil Code, which is the basis of interveners' claim, and which reads as follows: 'The deteriorations which proceed from the deed or neglect of the third possessor to the prejudice of the creditors who have a privilege or mortgage give rise against the former to an action of indemnification; but he can claim for his expenses or improvements only to the amount of the increased value which is the result of the improvements made.' The question raised is an interesting one, and we have considered it very closely. To the student of our Codes the effect given to the pact de non alienando is an anomaly, only explained by reference to its derivation in our law from the Spanish system. The pact is nothing else than the expression in the act of mortgage of a principle which, by the very terms of article 3397 of the Code, is, without any expression, implied in every mortgage, viz.: 'That the debtor cannot sell, engage, or mortgage the same property to other persons, to the prejudice of the mortgage which is already made to another creditor.' It is difficult to understand why the fact that this principle is expressed in the act should confer any different rights than would result from its conclusive implication, 'mere is no express provision in either our Civil Code or Code of Practice on the subject; and in the French Law, from which our system of mortgages is derived, this pact de non alienando is not recognized as conferring any particular right. Under the Spanish law, however, which long prevailed in this state, the holder of a mortgage containing this pact was allowed to disregard subsequent alienations, and to proceed directly against the original mortgagor, and have the property seized and sold without notice to actual third possessors, which was required in other cases. After the adoption of our Code of 1803 the question arose as to whether this effect of the pact was not destroyed; but the court held that 'the mode of proceeding under orders of seizure and sale is still regulated in a great measure by the Spanish laws which remain in force in this country,' and that the mortgagee's right under the pact de non alienando was not repealed. (*Nathan vs. Lee*, 2 Mart. [N. S.], 32.)

"After the Act of 1828, which repealed the Spanish laws and rules of proceeding, the question again arose, and it was contended 'that there is now no express law in Force to support any exception to the rules of proceeding established by the Code of Practice for hypothecary actions.' But the court said: 'Admitting this to be true, it is a universal principle, founded in reason and law, that effect must be given to all the parts of a written contract or agreement, and meaning to all its stipulations and phrases, unless such a construction leads to absurdity. It is also a general rule that owners of property must be presumed to know the titles and incumbrances under which they hold it. In applying these rules to the case under consideration, it is evident that the mortgagee intended some advantage to himself by the introduction of the clause "de non alienando", consented to on the part of the mortgagor, beyond what he would have had without such a pact or agreement, and that the only manner in which it can have the effect intended by the parties is to construe it into an authority to seize the property in the hands of

the third possessors, without preliminary proceedings, as in case of an ordinary hypothecation.' (Donaldson vs. Maurin, 1 La., 39.) This decision is the fountain head of our whole subsequent jurisprudence on this subject. We consider that it conclusively negatives the contention so ably urged by counsel of appellants. It distinctly holds that, after the repeal of the Spanish law formerly prevailing in this state, there remained in force no law giving any exceptional effect to the pact de non alienando, and that whatever effect it had was derived from that law which the parties made unto themselves by their contract. It interpreted the meaning and effect of that contract, and declared that its only effect was to authorize a direct seizure in the hands of third possessors, 'without preliminary proceedings, as in case of an ordinary hypothecation.' There are not wanting very clear reiterations of this principle in later cases. On this point the court in the case of Watson vs. Bondurant (30 La. Ann., 10) said: 'We understand the effect of the pact de non alienando to be this: Where a mortgage contains this stipulation, the sale by the mortgagor does not prevent the mortgagee from proceeding by executory process, and he need give no notice to the purchaser. * * * A little reflection will show that the pact de non alienando contains nothing that the law does not imply in every mortgage.' Again, in Ducros vs. Fortin (8 Rob. [La.], 167), the court said: 'We do not consider the clause 'de non alienando' as producing the effects supposed by the counsel. It does not absolutely prevent a sale of the property by the mortgagor. The latter may transfer the property subject to the right which such a clause gives the mortgagee of proceeding summarily against it, as if it still belonged to the mortgagor. The purchaser acquires a valid title which he can, in like manner transfer to others.' In Linn vs. Dee (31 La. Ann., 218), the right of the purchaser of property subject to a mortgage containing the pact, to recover for improvements, was expressly recognized. (See also Ducros vs. Fortin, 8 Rob. [La.], 165; Jamison vs. Barelli, 20 La. Ann., 453.) The correctness of this is conspicuously illustrated by the particular form given to the pact in the very mortgage on which the bank proceeds, and which is derived from section 24 of the charter, as follows: 'That all property mortgaged to said corporation for any purposes may be seized and sold at any time, according to law, in whosoever hands or possession the same may be, notwithstanding any alienation thereof, or change of possession, by succession or descent to heirs or legatees, by last will and testament or otherwise, in the same manner as if the same was in the possession of the original mortgagor.' This is the only pact of nonalienation contained in the charter or mortgage, and it has been held by this court to be the exact equivalent of the common pact de non alienando. (Gillaspie vs. Bank, 30 La. Ann., 1321; Bank vs. Freitag, 37 La. Ann., 271.) Now, this section simply expresses in plain language the precise sense and meaning which the jurisprudence above referred to had held to be implied in the pact de non alienando, conferring no exceptional right beyond that therein stated of proceeding directly against the property without notice to third possessors. The learned lawyers who framed this charter in 1835 were obviously doubtful whether, under the changed law, the interpretation given to the ordinary pact would be maintained, and preferred to give a clearer expression to their contracts. They have done so, and can claim nothing beyond what their contract gives them. This they have been allowed, and have actually proceeded, in this case, by executory process against the original mortgage, without notice to third possessors, in the very manner stipulated by their contract."

Our Civil Code, in its Title XV of Book IV which deals with pledge, mortgage and antichresis, contains no provision referring to an agreement not to alienate or encumber mortgaged real property without the consent of the mortgagee. In connection with mortgages constituted under the existing Mortgage Law, section 107, No. 4, thereof, expressly provides that the mortgaged property may be encumbered by a subsequent mortgage notwithstanding any prohibition which may have been stipulated in the first mortgage. The controversies on the validity of the agreement not to alienate a mortgaged property without the written consent of the mortgagee were governed generally by the rules of the Civil Code regarding contracts and particularly by article 1255 to the effect that the contracting parties may establish agreements, clauses, and conditions which they may deem advisable, provided they are not contrary to law, morals, or public order. Of this tenor was the decision of the Direccion del Registro of all the cases submitted to it, until by resolution of June 9, 1914, it held that the agreement whereby the

debtor binds himself not to enter into any contract with respect to a part of the mortgaged property which is registerable in the registry of deeds, while the creditor has not been fully paid, goes against the principle of freedom of contract underlying the civil legislation, and particularly against the provision of section 107, No. 4 of the Mortgage Law, which authorizes in all cases the execution of second or subsequent mortgages. Morell, in his commentaries on the Mortgage Law (volume 3, pp. 648-650, Biblioteca Juridica XXI), expounds the process of interpretation given to this agreement as follows:

"Agreement not to alienate the mortgaged property.—Other Agreements.—Law 67, title 5, Partida 5, expressly declared the validity of the agreement not to alienate the mortgaged property, and based thereon, the resolution of May 3, 1884, before the Code, held that there being no provisions in the Mortgage Law expressly repealing said law of the Partida, the said agreement could not be deemed to be null and void although it may seem contrary to the spirit and tendency of the Mortgage Law.

"Upon the publication of the Civil Code, the provision of the Partidas disappeared, leaving only, on the one hand, its article 1255 aforecited, and, on the other, that spirit and tendency of the Mortgage Law and No. 4 of article 107.

"On November 29, 1907, the Direccion laid down the following doctrine:

"It is a juridical doctrine, provided in article 1255 of the Civil Code, that the contracting parties may establish agreements, clauses, and conditions which they may deem advisable, provided they are not contrary to law, morals, or public order. Valid and legal, therefore, is the agreement that the debtor may not enter into any contract of lease of the mortgaged property which is registerable in character, or where there is an advance delivery of more than the amount of an annuity, because, this purely temporary limitation is not prohibited by any law and it is not contrary to any public order or to morals, and it does not have the extent and scope characteristic of an agreement not to alienate, wherefore, even supposing that this were actually prohibited, it could not be compared to an agreement not to lease for a determinate period, which is the one in question.

"In this resolution, the Direccion neither affirms nor denies. The resolution of August 27, 1912, holds valid the agreement limiting the power to alienate, whereby the debtor is authorized to make the alienation, but only in the case where the amount thereof is to be applied to a part of the principal, notifying the creditor thereof and the latter receiving the price at the time of the sale.

"In another resolution of June 30, 1913, it is held that a certain agreement that the debtor may not sell or lease, mentioned in the registration of the mortgage, and where there is no question of the validity or nullity of such prohibitions, should be understood as without consequence with respect to third persons, being limited to its literal sense and to the language used, either, because the condition should not be extended to cases and things not expressly stipulated, or because the property should be deemed free in principle. Here likewise there is no denial or affirmance of the validity or nullity of these agreements with respect to a third person.

"The resolution of November 12 of the same year 1913, applies No. 4 of article 107, to the agreement whereby if subsequent to the first mortgage there should be constituted other mortgages or real liens upon the same property, the creditors should be subject to the result of the extra judicial sale and the said subsequent mortgages and liens should be extinguished if the price for the payment thereof is not readied. The Direccion is of the opinion that the same reasons underlying article 107 are applicable to agreements which, without directly prohibiting subsequent mortgages, pervert the scope of those which might be constituted on the same property, by reducing or making illusory the rights of second or subsequent mortgagees.

"Finally, in the resolution of June 9, 1914, it is held that while article 1255 of the Civil Code authorizes the

contracting parties to establish agreements, clauses and conditions which they may deem advisable, provided that they are not contrary to the general provisions of law, the agreement whereby the debtor binds himself not to enter into any contract regarding a part of the mortgaged property which is registerable in the registry of deeds while the creditor has not been fully paid, runs counter to the principle of freedom of contract underlying the civil legislation, particularly the provision of article 107, No. 4 of the Mortgage Law, which authorizes in all cases the execution of second and subsequent mortgages, it being, therefore, unregistrable.

"The Direccion has at last decided to hold the illegality of the agreement of nonalienation of the mortgaged property by the debtor. We applaud its doctrine for the reason that the question is doubtful."

We have not found any decision of the Supreme Court of Spain in support or in affirmance of the last resolution of the Direccion del Registro holding that the agreement not to enter into any contract covering the mortgaged property which is registerable in the registry of deeds, while the mortgagee has not been fully paid, is contrary to the freedom of contract. Neither have we found any decision of the same Supreme Court holding the nullity of a stipulation which prohibits the mortgagor from selling the mortgaged property without the creditor's consent, because the same is contrary to the freedom of contract, to morals or to the public interest. However, we do not hesitate to accept the view above set forth to the effect that an agreement of such nature, while it does not nullify the subsequent sale made by the mortgagor, nevertheless operates to authorize the mortgagee to bring the foreclosure suit against the mortgagor without the necessity of either notifying the purchaser or including him as defendant. And this holding is in harmony with the doctrine enunciated by this court in the cases of *Sun Life Assurance Company of Canada vs. Gonzalez Diez* and *Government of the Philippine Islands vs. De las Cajigas* supra, to the effect that in such case the purchaser of the mortgaged property does not lose his equitable right of redemption.

Applying this view which we have adopted to the case under consideration, it results that the eight lots which are the subject matter of this appeal may be registered in the name of the appellee, subject, however, to the appellants' equitable right of redemption, which right should be exercised within the period of three months from the date this decision becomes final.

- After the appealed decision was rendered, the appellants filed a motion for new trial alleging that they have discovered new evidence which would result in the reversal of the decision rendered against them. The new evidence is made to consist in a sworn statement of Baltazar Raymundo wherein he asserted that he had already fully paid his indebtedness to the appellee, with the exception of about P600; that the payments were made through Jose Perez; that as a result of the payments the appellee returned to him the documents which he had delivered, and that the balance remaining of his indebtedness was secured by the mortgage of other properties which had been pledged to El Hogar Filipino. The motion was denied by the court. In their second assignment of error the appellants contend that the court erred in denying their motion for new trial. We hold that the error assigned was not committed because even admitting the offered evidence and considering it as newly discovered, which is not the case, it would not have influenced the result of the case in view of clear and convincing evidence that the indebtedness of the spouses Raymundo, as fixed by the court, has not been paid, hence, the mortgage continues to be valid and binding.

- In the third and last assignment of error the appellants argue that the court should not have reopened the case nor set aside the decision rendered on December 11, 1933, nor should it have permitted the appellee to file its written opposition. What is stated in the first and second paragraphs of this decision shows that this assignment of error is without merit. Considering the facts stipulated by the parties, which form the bases of the appealed decision and of our holdings, the reopening of the case was inevitable and justice required that the appellee be given an opportunity to file its opposition and to be heard.

For all the foregoing considerations, we modify the appealed decision in the sense that lots Nos. 1 to 8 of plan SWO-13145, amended by the plan SWO-13414, be registered in favor of the appellee, but subject to the equitable right of redemption of the applicants-appellants, which right should be exercised by them within three months from the date this decision becomes final, paying to the appellee the sum of P2,389.65 plus interest thereon at 12 per cent per annum from October 31, 1931. Upon the payment of this sum the appellee shall execute a deed of conveyance of all the eight lots in favor of the appellants and the registrar of deeds of the Province of Rizal shall proceed to the registration thereof and to the other steps required by the Land Registration Law, without special pronouncement as to the costs in this instance. So ordered.

Avanceña, C. J., Villa-Real, Abad Santos, Diaz, Laurel, and Concepcion, JJ., concur.

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