

**CONGREGACION DE LA MISION DE SAN VICENTE DE PAUL,
PLAINTIFF AND APPELLANT, VS. FRANCISCO REYES Y MIJARES AND
EL BANCO ESPAÑOL-FILIPINO, DEFENDANTS AND APPELLEES.**

G.R. No. 5508. August 14, 1911

Ponente: MORELAND, J.

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MORELAND, J.:

This is an appeal by the plaintiff from a judgment of the Court of First Instance of the city of Manila, the Hon. A. S. Crossfield presiding, foreclosing a second mortgage upon the property of the defendant Francisco Reyes y Mijares, subject, however, to the lien of a first mortgage held by the defendant bank, and declaring that there had not been paid on said first mortgage the sum of P96,781.75, as claimed by the plaintiff, and that said first mortgage had not been fully paid and satisfied.

This is an action by the plaintiff as the holder of an alleged second lien upon certain real and personal property to have declared fully satisfied and discharged the first lien held by defendant bank and to have plaintiff's lien foreclosed. The complaint contains two counts. In the first appear allegations showing the second mortgage to the plaintiff, the prior mortgage of the same property to the defendant bank to secure a specific debt, and alleging the subsequent payment of said debt in full. The second alleges the pledge of the personal property to the defendant bank to secure the same debt, the subsequent pledge thereof, or of such part thereof as might remain after the payment of the bank's lien, to the plaintiff, the payment to the defendant bank in full of the debt secured by said pledge, and that a portion of said personal property remained unexpended after the payment of the debt aforesaid. The complaint then asks for a foreclosure of the lien of the plaintiff and prays that the defendant bank render an account of all property remaining after the payment of its debt and of all moneys realized over and above the amount of the debt and interest, and that the same be delivered to the plaintiff for the purpose of said foreclosure.

The defendants answered denying that the debt of the defendant bank secured by the mortgage and lien had been paid and alleging that the greater part thereof remained unpaid.

The cause was submitted to the trial court for decision upon an agreed statement of facts and a judgment was rendered which decreed foreclosure in favor of the plaintiff, subjecting such foreclosure, however, to the first lien of the defendant bank upon the real and personal property described in the mortgage and pledge, upon which there still remained due and unpaid the sum of P75,427.88.

The attorney for the appellant states the facts and the case in his brief as follows:

"The facts involved in this contention are not disputed, but are all set forth in an express stipulation, certified as true by the parties litigant. It appears that on March 4, 1905, Francisco Reyes was indebted to the Banco Espanol-Filipino in the sum of P84,415.38; to the Hongkong & Shanghai Bank in the sum of P141,702; and to the plaintiff in the sum of P45,286. (Agreed statement Pars. I, II, and VII.) On that date the Banco Espanol-Filipino advanced Reyes the money to pay the Hongkong & Shanghai Bank, thus becoming his creditor in the sum total of P226,117.38. Reyes thereupon executed (Exhibit A) a first mortgage upon certain

specified real property, to secure the payment of said debt of P226,117.38 (agreed statement Par. III) and naught else. The indenture (Exhibit A) provides:

"15. Francisco Reyes y Mijares, in addition to the securities above stated as mortgaged and pledged, likewise charges with the complete payment of his obligation in favor of the Banco Espanol-Filipino, his other assets, present and future, particularly the balance to which he is this date entitled in and to the credits against the Government of Spain originally due him or acquired later, and the commission upon the collection of those entrusted to him, which said balance he obligates himself to pay into the hands of the said creditor bank when collected, if the obligation which is the subject of this indenture has not yet been completely satisfied and

"18. Francisco Reyes y Mijares obligates himself to give account to the creditor bank whenever the latter desires, of the condition of his business affairs, displaying to it the books, documents and other data which may be necessary for the investigation which it desires to make concerning the status and progress of his business affairs in which he grants to the creditor a direct participation and obligates himself to follow its directions.'

"Thereafter, on May 4, 1905, the bank made a further advance of P62,000 to Reyes, to secure which the latter executed a pledge (Exhibit B) of certain specified items of personal property, other than the items referred to in Exhibit A.

"Thereafter, on May 12, 1905, to secure the payment of the amount due to plaintiff, Reyes executed a second mortgage and pledge in favor of plaintiff (Exhibit C) upon the same real and personal property described and referred to in Exhibit A.

"All of the properties hereinabove referred to passed into the custody and control of the defendant bank. Portions of the same were disposed of from time to time and the proceeds were credited to the account of Reyes. This account, the sole and only account kept with Reyes by the bank, opened with a debit of the P226,117.38 which was secured by this mortgage.

"The total amount thus credited to this, account of Reyes was P297,418.27, made up as follows:

(a) From the proceeds of a portion of the securities covered by Exhibit A.....
P145,646.15

(b) From the proceeds of a portion of the securities covered by Exhibit B.....
15,098.12

(c) From the proceeds of properties not hypothecated in Exhibits A or B,
but subsequently pledged to the bank to secure a total of P25,627.25.....
P37,739.75

(d) An erroneous credit counterbalanced by an equal debit.....
2,152.50

(e) Amounts paid to the bank by Reyes from time to time obtained from
assets and credits other than those covered by Exhibits A or B
or the special pledges above referred to.....

96,781.75

297,418.27

"From time to time the bank cashed checks for Reyes and paid drafts and other obligations in favor of third persons. Sometimes these advances were secured by specific pledges of assets, other than those covered by the Exhibits A and B. For the most part, however, these moneys were paid to Reyes or to third persons for his account, without any security whatever. (A. S. Par. XI.)

"Upon this state of facts the plaintiff contends that the first mortgage (Exhibit A) is wholly paid and satisfied by the payment of the following sums, to wit:

(a) The proceeds of the mortgage securities expressly covered
by Exhibit A.....
P145,646.15

(b) The proceeds of the property not mortgaged to the bank
by Exhibits A and B but subsequently pledged at
least to the extent of the excess thereof over and
above the amount of the pledges..... P37,739.75

25,627.25 12,112.50

(c) The amounts paid to the bank by Reyes from other sources..... 96,781.75
254,540.40

"Wherefore plaintiff contends that the mortgaged properties referred to in Exhibit A which still remain undisposed of are released therefrom and the second mortgage thereon contained in Exhibit C, is now equivalent to a first mortgage thereon, to be foreclosed and satisfied without regard to any independent indebtedness of Reyes to the bank.

"The defendants' contention is twofold. In their answers they seek to maintain that the original mortgage (Exhibit A), legally secures any and all amounts which may be owing by Reyes to the bank, and that the entire indebtedness of Reyes to the bank is secured thereby. In their arguments, defendants contend that the amounts paid in by Reyes are now applicable to the satisfaction of any part of the latter's indebtedness, and as they choose to apply the same to the satisfaction of the unsecured advances, the mortgage debt, or a large part thereof, still remains unsatisfied.

"The opinion of the lower court is in favor of the plaintiff so far as concerns the proceeds of the mortgaged property and the excess obtained from the special pledges, but holds that the 96,781.75 paid into the bank from independent sources is not legally applicable to the satisfaction of the mortgage debt."

As is seen from appellant's own statement, the only question before us for determination is whether or not the sum of P96,781.75 should have been applied by the trial court to the payment of the debt, P226,117.38.

In taking the affirmative of this question counsel for the appellant asserts that said sum "must be" so "applied as the parties have expressly agreed" to do so. To the establishment of this proposition counsel, for the purpose of demonstrating the agreement referred to, divides the payments made by Reyes to the bank into three classes, saying:

"In the presentation of this point, the various payments made by Reyes are necessarily to be divided into three classes and each class considered separately.

"(a) The first class embraces the proceeds of that part of the mortgaged property which was converted into cash and paid into the bank. These proceeds amount to P145,646.15. Since the lower court has expressly ruled that the payment of this amount was a satisfaction pro tanto of the mortgage (Exhibit A) and the defendants are prosecuting no exception to this ruling, there is no need to justify the latter by argument and authority.

"(b) The second class embraces the excess proceeds of specially pledged property over the amounts secured by such pledges. By this is meant that after the execution of the mortgage (Exhibit A) the bank advanced various sums of money to Reyes from time to time and took as security therefor pledges of certain assets of Reyes which were not covered by the mortgage Exhibit A. The total amount thus advanced and secured by these

special pledges was P25,627.25. The property thus pledged Was subsequently disposed of and the proceeds, paid into the bank, amounted to P37,739.75. The excess proceeds of the pledges over the total amount of the advances was thus P12,112.50. This latter amount the lower court applies in pro tanto satisfaction of the mortgage, and for like reasons as before, it is wholly unnecessary to justify this ruling.

"(c) The third class embraces the unencumbered residue of Reyes' assets, neither mortgaged nor pledged unto the bank, but paid in from time to time to the aggregate total of P96,781.75. The plaintiff contends that this amount must be legally considered as paid in satisfaction pro tanto of the mortgage debt and appeals from the failure of the lower court so to do."

Counsel then says that the express agreement referred to is found in paragraph 15 of the bank's mortgage and pledge, Exhibit A, in which, he asserts, "the parties stipulated that in addition to the securities therein constituted, the mortgagor obligated all of his property, present and future, to the payment of the mortgage debt, and agreed to pay its proceeds into the bank so long as that mortgage debt, was not wholly liquidated." The paragraph from which he draws this conclusion reads as follows:

"Don Francisco Reyes y Mijares, in addition to the properties above mentioned as mortgaged and pledged, also charges as security for the payment of said obligation in favor of the bank his other property; present and future, especially those debts which are now due him or which may hereafter become due him, and also the commission to which he is entitled or becomes entitled for the collection of claims against the Spanish Government which have been entrusted to him for collection, which said debts he obligates himself to turn over to the bank upon receiving them, if the debt which is the basis of this obligation has not been fully paid."

In answering this proposition of plaintiff's counsel, these points should be noted:

The provision just quoted, in so far as it seeks to mortgage or pledge the property mentioned therein, is wholly without force or effect. The property sought to be pledged is not described or identified. We do not know, from the terms of the clause or from any other source, that any of it really existed at the time of the execution of the clause. As a pledge or personally it is wholly ineffective, not only for indefiniteness but also for the reason that the property pledged, if any, was not delivered. As a mortgage of realty it is equally ineffective for the reason that, to be valid under the provisions of the Civil Code and the Mortgage Law, the mortgage must describe the property mortgaged so that it is clearly identified and identifiable. Sanchez Roman, in his work on the Civil Law (vol. 3, pp. 828, 829) correctly states the law as to mortgages. He says:

"A logical consequence of the plan of publicity of mortgages is the disappearance from our legal system of general mortgages, with the consequent repeal of all laws prescribing and authorizing them; and the stipulation of general mortgage which may hereafter be placed in contracts between private parties will signify nothing, as in fact it has signified nothing since the establishment of the mortgage office (contaduria de hipotecas). Even though limited to the property existing at the time, and not, as was usual, extending to the property which might thereafter be acquired, a general mortgage involves lack of publicity in the mortgage, because it can be called public just as soon as it is inscribed in the registro with a detailed statement of the estate affected and of the extent of the guarantee. A definite statement of the property mortgaged is an essential element of the publicity.

"Even aside from this consideration, which is conclusive in the plan adopted, general mortgages would not have gone unabandoned, since their very extension renders them invalid. Because of the very fact that they include all the present and future property of the debtor, he has to remain free to alienate it; and if he does alienate all of it, the guarantee disappears, without recourse against the purchaser, thus bringing about actual nullification of the right to the thing, because a mortgage that does not go with the estate, whoever may be its owner, does not deserve the name of mortgage."

This paragraph being entirely ineffective and valueless as a mortgage or pledge, the agreement to pay the

proceeds of any portion of the property or credits therein mentioned upon the mortgage debt would be equally ineffective and valueless, as such an agreement is purely subsidiary to the agreement of mortgage and pledge, and is wholly dependent upon it. The latter failing for illegality, or at least, invalidity, the dependent agreement falls with it. Moreover, even though we are wrong in our assertion that said paragraph 15 is wholly futile for the purpose for which it is relied upon by the plaintiff, nevertheless, the stipulation of facts prevents plaintiff from taking the position which counsel takes in this connection. Paragraph X of said stipulation reads:

"That from the 4th day of March, 1905, to the 31st day of December; 1907, the account of the defendant Reyes with the defendant bank has been credited from time to time, as shown by Exhibit D, hereunto attached, with various amounts aggregating the sum total of P297,418.27, derived from the following sources, to wit:

(a)

Amounts realized from time to time upon the securities given by instrument of March 4, 1905 (Exhibit A).....

P145,646.15

(b)

Amounts realized from time to time upon the securities given by instrument of May 4, 1905 (Exhibit B).....

P15,098.12

(c)

Amounts realized from time to time upon additional pledges of merchandise other than those enumerated in Exhibits A and B.....

NOTE. - This sum of P37,739.75, realized by the bank from special pledges of merchandise, resulted from advances made to Reyes upon such special pledges as follows:

37,739.75

April 13, 1905..... P2,960.00

April 29, 1905..... 9,800.32

May 13, 1905..... 2,483.34

May 27, 1905 1,999.91

June 10, 1905..... 695.04

July 17, 1905 1,490.00

July 20, 1905..... 6,198.64

25,627.25

(d)

Amounts erroneously credited to account of defendant Reyes and corrected by cross entries to his debit.....

2,152.50

(e)

Amounts paid to the bank from time to time by defendant Reyes,
realized by him from sources and credits other than those set out in Exhibits
A and B or subject of the special pledges referred
to in par. C above.....

96,781.75

NOTE. - This P96,781.75 includes the sum of P2,039.14 standing to Reyes' credit on the books of the bank on March 1, 1905, and deducted from his indebtedness of P226,117.38 on March 4, 1905, as shown by Exhibit D."

By this paragraph of the stipulation of facts it is clear that the sum of P96,781.75 was received by Reyes "from sources and credits other than those set out in Exhibits A and B or subject to the special pledges referred to in paragraph C above." But paragraph 15 to which plaintiff's counsel refers as giving a right to plaintiff to require that said sum of P96,781.75 be applied on the mortgage debt, said paragraph, asserts plaintiff's counsel, covering all of the other property of Reyes beyond that described in the other paragraphs of said exhibit and making its proceeds applicable to the payment of the mortgage debt, is a paragraph of Exhibit A; and for that reason the property therein described is excluded as the source of said sum of P96,781.75 by express stipulation of subdivision (c) of Paragraph X of the stipulation of facts, which agrees, as we have seen, that said sum came "from sources and credits other than those set out in Exhibits A and B." If we exclude this stipulation of fact from consideration we are left without facts to sustain plaintiff's contention. There would be then in the whole case not a word of evidence as to the origin and source of said sum of P96,781.75. Its origin or source being unknown, there is no means of determining the express agreement of the parties as to its application, their express agreements relating only to sums whose sources are fully known and plainly set forth.

Finally, we can not overlook the fact that said sum of P96,781.75 is referred to by plaintiff's counsel in his brief as having been derived from "independent sources," as is seen from the quotation from his brief, above (p. 9).

These facts and observations entirely dispose of appellant's first proposition, that there was an express agreement between the parties to Exhibit A that the P96,781.75 should be applied to the payment of the debt to the defendant bank.

The second proposition presented by the appellant to which we direct our attention is:

"That in any event the payments made by the mortgage debtor to the mortgage creditor are legally applicable to the satisfaction of the mortgage debt."

He then proceeds to discuss the law governing the application of payment, asserting that the proper rule to be applied to this case "is that furnished by article 1174 of the Civil Code, which makes these payments applicable to the more onerous of the two debts. As between the mortgage debt and the unsecured advances there can be no doubt that the former was the more onerous. By virtue of the mortgage debt, all of Reyes' real estate and a large portion of his personal property was in the control of the bank; he was obliged to lay open his business affairs, his books, accounts and other documents to the bank; he was obliged to allow the bank to intervene in his business affairs and to implicitly obey the bank's directions therein; he was obliged to turn over his entire income to the bank; he was the obligee of a score of covenants all set forth in the instrument of mortgage. By virtue of the unsecured advances, on the other hand, Reyes was a simple debtor for the amount thereof. It imports nothing that

Reyes, in his present insolvent indifference, at the dictates of the bank, may voice a preference for the payment of one debtor or the other. The rule of law makes the payment applicable, not to the debt chosen by the debtor, but to that which is the more onerous in fact." Counsel's discussion of this point goes, as it necessarily must, upon the assumption that said sum of P96,781.75 was in fact a payment and not a deposit. That assumption is based on two grounds: One. That there was an express agreement that all money from the source whence came said sum should be turned over to the bank as payments. The other. That said sum is found credited to Reyes in the only account kept by the bank between it and Reyes, and that such credit is an application of said sum to the payment of the debt which, having once been made, can not be recalled. The first ground, as we have already seen, is untenable. There was no such express agreement. The second ground we will discuss along with the proposition whether or not said sum was really a payment at all.

We have already twice said that there was no express agreement that the proceeds of all of Reyes' property other than that specifically described in Exhibit A should be applied in payment of the bank's debt. Not only is this so, but we may go farther and say that it was not even agreed that all the rents and incomes of the property specifically described in Exhibit A should be so applied. It should be remembered that Reyes was to continue in business. The bank distinctly recognized that. Paragraph 18 of Exhibit A, translated, provides:

"18. Don Francisco Reyes y Mijares hereby agrees to render an account to the bank whenever deemed necessary by the latter of all of his business transactions, and to permit the bank to examine the books, documents and other papers which may be necessary in connection with any investigation which the bank may desire to make as to the condition of the business, in which said matters the debtor hereby secures to his creditor a direct intervention, and hereby promises to follow its instructions and suggestions."

It is obvious that Reyes could not run a business without using money to do so. If he were obliged to pay upon said mortgage debt every dollar which came to him, from whatever source, the provision permitting him to continue in business would be farcical. A business can not be run if the money received in the course thereof must instantly be withdrawn and paid to the discharge of obligations wholly apart from the business itself. In the meantime he must have something for the support and maintenance of his family. To meet this situation, in part, paragraph 13 was inserted in Exhibit A. Translated it reads as follows:

"13. The total amount of the proceeds of the securities given for the payment of this obligation shall be deposited by Don Francisco Reyes y Mijares in the vaults of the bank, the same to be applied to the payment of this obligation. The debtor likewise agrees to do the same with the proceeds of the rents and dividends accruing to his real estate, securities, credits and shares as they are received by him, reserving to himself, however, only such portions as the parties by mutual agreement may determine to be necessary to meet the expenses of his commercial business and those of his family."

Particular attention is called to the last clause, giving Reyes the right to the rents and income of the property, real and personal, to assist in the conduct of his business and the maintenance of his family and himself, as far as such rents and incomes were sufficient for that purpose. Take this fact in connection with another. It is obvious that Reyes could not continue in business without banking facilities. He must have a bank in which to make deposits and upon which to draw checks and upon which drafts could be drawn. What more natural than to use the bank that had already befriended him? From these facts we can readily see that not every peso delivered to the bank by Reyes was necessarily to be applied to the payment of the mortgage debt, even though said peso came by way of rents and income from the property actually included by specific description in Exhibit A. Moreover, Reyes had a large amount of property not included in the bank's mortgage and pledge. This property was entirely unencumbered and was free to be used by him in his business conducted after the execution of the mortgage and pledge to the bank. It is the admitted evidence in the case that he actually did use substantially all of said property in that way. As a result, such property, converted into cash or used as security, was delivered to the bank to that

end. Witness to this fact not only said P96,781.75 but also Exhibit B and numerous succeeding pledges. Here again we see moneys delivered to the bank which were not necessarily to be applied to the payment of the debt secured by the mortgage and pledge of the bank. Desiring to continue his business, Reyes was confronted with a stern necessity. He must have money to run that business and he must have a bank in which to put it. If every dollar which he could muster and deposit in the bank had to be applied to the payment of an old obligation by the very fact of that deposit, his business was in a sorry plight. The stipulation between him and the bank that he should continue such business would, under such conditions, lose all significance. It is thus clear that it is at least possible that there was some money delivered at different times to the bank which, strictly speaking, was not intended to be used in reduction of said original debt. It is, as we have seen, conceded that said sum of P96,781.75 is composed of such moneys.

At this point, however, we are met with the contention of plaintiff strongly and insistently urged by its counsel, that Reyes and the bank can not be held to have had any other intention with respect to said sum of P96,781.75 than to apply it to the payment of said original debt, because it was actually so applied on the books of the bank. Meeting this contention it should be noticed:

- That, as we have seen, there was, prior to the delivery of said sum to the bank, no express agreement that it was to be applied to said original debt.
- That it nowhere appears that there was any implied agreement to do so. Plaintiff does not assert any such implied agreement. Counsel rests his contention upon (a) an express agreement to apply, (b) application by operation of law, and (c) the fact of actual application on the books of the bank.
- That at the time of the delivery of said sum to the bank, the original debt was not yet due.

Take this fact in connection with the fact already discussed, that Reyes was to continue in business, that, as a necessary result, he had to have banking facilities, that he must make deposits and draw checks, and that it would be impossible to continue his business if all the money dedicated by him to its continuance had to be paid upon the old obligation, and it is evident that it could not be assumed, presumed or implied that moneys so delivered to the bank were intended by Reyes to be applied on the old obligation. It is certain that the bank, without the consent of Reyes, had no right whatever so to apply them, for the reason that the debt was not yet due and the only agreement between the parties as to the application of money of Reyes delivered by him to the bank related solely and exclusively to the proceeds of the sale of the property specifically described in the mortgage and pledge, of which said sum of P96,781.75 was concededly no part. Reyes was under no legal obligation to pay any part of the indebtedness secured by the mortgage and pledge to the bank until June 4, 1905 (clause 10, Exhibit A), unless he sold some of the property described therein. In such case the proceeds of the sale must be applied to the payment of the debt. But the bank had absolutely no right, before the debt was due, to apply to its payment moneys deposited by Reyes which had been obtained from other sources. There was no agreement to which Reyes was a party that he should apply all of his assets to the payment of the said debt, especially before it was due. He was not obliged to pay any portion of it before it was due. Under the agreement the bank could not oblige Reyes before the debt was due to dispose of any of the property described in the mortgage and pledge of the bank, nor could it do so itself. He had the right to dispose of any of said property before the debt was due and apply the proceeds; but he was not obliged to do so. The bank could foreclose only "in the event that the debt stated, with the interest thereon, had not been paid at the time and to the amount hereinafter to be fixed." While this clause relates to real estate only, the agreement was the same relative to the personal property. (See par. 12, Exhibit A.) By what process of reasoning, then, can the conclusion be justified that said sum of P96,781.75 was applied to the payment of the debt by operation of law, particularly when we have in mind the fact that said debt was not yet due?

No more can it be concluded that such application was made with the consent of Reyes.

Let us notice the conditions existing at the time the various sums constituting the total of said P96,781.75 were delivered to the bank by Reyes.

We have already seen the necessity of Reyes having banking facilities, with the right to deposit and check, as a prerequisite to the conduct of his business. We have also seen the impossibility of conducting his business if every deposit in bank was to be applied, perforce, to the payment of the original mortgage debt. It has also been made evident that such application could not have been within the intention of the parties as it would have been entirely at variance with their intentions and purposes when they inserted in the mortgage and pledge paragraph 18, already quoted. That instrument must be interpreted as a whole and, if possible, effect given to every part. While a term in a contract may be, in effect, abrogated by the subsequent acts of the parties showing an intention so to do, to accomplish such result such acts must be so inconsistent with the abrogated term as to make such a result necessary. The mutual acts of parties are always presumed to be in fulfillment of their express agreements, and not in violation thereof, unless the contrary clearly and necessarily appears.

From these observations alone it might be safely assumed that the mere fact of crediting the said sum on Reyes' account on the books of the bank and the consequent apparent reduction of his general indebtedness (of all kinds) to the bank, did not show an intention that said sum should be withdrawn from the uses of his business and dedicated to the payment of a different obligation.

But reliance is not placed wholly on those observations. There are other facts and circumstances, even stronger, which show that the parties could not have intended such result.

First. During the time that the sums constituting said sum of P96,781.75 were being deposited in the bank, Reyes had drawn checks on the bank and the bank had honored drafts and obligations of Reyes to an amount exceeding P160,000. In other words, during said time Reyes had drawn money from the bank so much faster than he had deposited it that he had not only consumed the said sum of P96,781.75, but had overdrawn his current account more than P50,000. This was the situation on May 4th. On that date, probably on the demand of the bank that he make good the overdraft, Reyes executed another pledge to the bank (Exhibit B), the main features of which were: (a) Reyes acknowledged that the bank had granted him an amplification amounting to P62,426.21 of the credit given him by the said banking establishment on March 4th last (Exhibit B); (b) to secure this sum Reyes pledged to the bank personal property described in said instrument; (c) it was agreed that in case the property pledged should not realize a sum sufficient to pay the amount pledged, the property mortgaged and pledged by the instrument of March 4 (Exhibit A) should be held liable to respond for the deficiency, and that the propepty pledged by the present instrument should likewise respond for any deficiency arising under the instrument of March 4; (d) the time fixed by the instrument for the payment of said sum was one month, thereby bringing the indebtedness under both pledges due at the same time, June 4, 1905. The transactions between Reyes and the bank leading up to the result just noted are significant. From the very beginning deposits were made by Reyes and checks drawn by him against them as a matter of course, as would naturally be expected from the fact that Reyes was continuing his business and the necessities, already noted, which such continuance laid upon him. During all the month of March and until toward the middle of April, the deposits were slightly in excess of the withdrawals. On April 13, two checks were drawn upon the bank by Reye one of P464.15 and another of P9,975.90. On the same day he seems to have been required .to give security by way of pledge in the sum of P2,960. On April 24 Reyes drew on the bank for nearly P30,000, and on the 26th and 29th other withdrawals were made. On May 2 and 3 checks were drawn amounting to nearly P40,000. On the 4th of May, as we have seen, the pledge to secure P62,426.21 was required and given. These facts seem to indicate that Reyes and the bank treated the checking account as a thing quite different from the pledge account of P226,117.38. While it is true that the bank permitted

Reyes to overdraw his checking account to the extent of more than P130,000, this was undoubtedly done under the belief, clearly well founded, that the pledges which the bank held on the property of Reyes could be continued and extended to secure the payment of said overdraft.

Second. In the pledge of May 4 (Exhibit B), given eight days before the execution of the plaintiff's mortgage, it is stated that the sum secured by the pledge was to be credited to Reyes' "account current with the bank." This phrase, under the circumstances, and particularly in view of the fact that checks were immediately drawn against it, clearly imports a check and deposit account. To give one a credit in a "current account" with a bank is to give him a checking credit. No other meaning is possible. That money was delivered to the bank and that checks were drawn against it is unquestioned. That this was repeated almost daily, and frequently many times a day, month after month, for more than two years, is admitted. If this does not make a check and deposit account, nothing can. The method of bookkeeping is not decisive. It does not change the essential nature of the transaction. What the parties actually did and what they understood they were doing is the important thing. The intention of the parties governs. It was clearly not the intention of Reyes, in delivering money to be checked against, that it should go in satisfaction of the original debt. If it were so applied, it could not be checked against, as it legally ceased to exist as soon as applied to such payment. It borders on the absurd to say that one would deposit money to create a checking account with the intention that said account should be instantly destroyed by the application of the sum deposited to the satisfaction of another obligation. Under such circumstances no check account could possibly be created till the obligation was fully paid. But this would defeat the very object of the deposit. The purpose and intention of Reyes and the bank were to provide means and facilities by which Reyes could continue his business. To do this he must have resources, banking facilities, must make deposits and draw checks. But if, by the application of his deposits instantly to the payment of an outside obligation, it was impossible to create a check account, what would he draw against? He could not draw against the original debt, as that was a debt and not a credit. He could not draw against the deposit, as that had been destroyed by its application to the debt. There is nothing which a check can be drawn against except a checking account. That can be created only by actual deposit of money or by a credit extended by the bank. The account in the present case was created by a combination of both methods. Reyes made deposits and the bank gave him a checking credit by permitting him to overdraw. Certainly Reyes could not ask for more generous treatment; nor could anyone who occupied his shoes then or thereafter. He could not have had the hardihood to ask the bank to credit all his deposits on the secured debt, thereby releasing pro tanto the property mortgaged and pledged to secure that debt, and still permit him to have the same checking credit which he would have had if the deposits had not been so applied. Such a method would speedily have transformed the secured debt of the bank into an unsecured one of precisely the same amount. To illustrate: The secured debt was, in round numbers, P226,000. Let us suppose that, during the first week after securing the debt, Reyes had deposited in cash P100,000, and during the second week P126,000, also in cash, said sums being from sources entirely independent of the property mortgaged and pledged to secure the debt. Let us suppose, as plaintiff contends they were, that these two sums had been credited on the secured debt. The debt would have been fully paid and the mortgage and pledge given to secure it fully discharged. Suppose, further, that during said two weeks Reyes had drawn checks for P226,000 in the aggregate, which the bank had honored. What would have been the result? By this method, the bank's secured debt, in two short weeks, would have been changed into one entirely unsecured. This is exactly what the plaintiff claims actually happened in the case at bar, substituting the real amounts for the partly fictitious ones given in the illustration. Under this theory the bank would be the worse off the more deposits it received, and Reyes the "better off the more he overdrew. Every check would be an overdraft.

Moreover, that the delivery of said sum of P96,781.75 was not intended as a payment but, rather, as a deposit, is shown by the struggle which Reyes made to maintain a checking account in the bank. We have already referred to

this. He was almost continuously hard up. He was always struggling to get money to pay his current expenses. To meet these he pledged and mortgaged and overdrew, In spite of it all his head was almost continually under water. Under such conditions is it reasonable to say that, after all that struggle and worry, he obtained money to deposit only to have it used to some other purpose? On the other hand, is it a fair interpretation of the situation to conclude that, after all its endeavor to keep Reyes from overdrawing, the bank, nevertheless, not only permitted the very thing it sought to avoid, namely, the overdrafts, but also perpetrated the absurdity of voluntarily exchanging a debt perfectly secured for such overdrafts, entirely unsecured? Is it reasonable to conclude that it was the intention of the bank thus to throw away the very security which it had been at so much pains to secure? Whatever the form in which the books were kept, the parties acted and dealt precisely as if Reyes had not only a secured debt account but also a current account for checking and general banking purposes. The sum in dispute here was deposited and wholly drawn out by Reyes, by general banking operations, before June 4, 1905, the date on which the mortgage and pledges of the bank, Exhibits A and B, matured. The debt of P226,117.38 not having been due when the P96,781.75 was deposited and withdrawn, and there having been no express agreement for its application to the payment of said debt, said sum could not have been so applied without the consent of Reyes, express or implied. We do not believe that such consent is shown merely by the method of bookkeeping pursued by the bank, particularly in view of the incessant struggle and endeavor put forth by Reyes to create a check account. We do not think such intention is sufficiently shown on the part of the bank, in view of the strikingly pernicious effect that such application would have had upon the interests of the bank itself, namely, the exchange of a debt perfectly secured for one not secured, with no consideration whatever for such exchange.

Again, there was no necessity which called for the application of said sum as a payment on the original debt. It was secured by property worth more than P400,000, according to the value put upon it by the parties themselves. This was, so far as appears, sufficient security. There existed, therefore, no particular or pressing reason why the bank should desire payments upon the debt so secured, especially before it was due. This becomes more apparent when we recall, again, the extremely pressing need of Reyes for money for current uses and the very injurious results to the bank which would result from such application.

In most cases the account itself distinguishes between the money delivered to the bank by Reyes for checking purposes and for payment purposes, referring by the latter phrase to money obtained from the sale of some of the mortgaged or pledged property. In the one case it always refers to the money as a deposit, "ingreso", and in the others it is generally entered thus: "Recibido del mismo para amortizar su credito, importe de 78 acciones de la Electricista." Or: "Recibidas para amortizar s. credito medte. entrega del mismo del P. No. 421 de Minas de Carb6n de Batan." Or "Recibido para amortizar s. credito medte. entrega al mismo del P. 413 de San Nicolas Iron". Or "Su ingreso para amortizar s. credito mediante entrega al mismo del P. No. 417 de la Vda. de M. Soler". Or "Su ingreso para amortizar s. credito por cobro P. de Pons & Co."

The only question we are asked to decide being whether or not the said sum of P96,781.75 ought to have been applied as a payment on the original debt instead of being regarded as a deposit in a check account, we are not called upon to determine the amount actually due on said debt except to affirm the finding made by the trial court. Nevertheless' in closing, we desire to refer to, a subject which touches the question of the amount due indirectly. We have already said that, so far as the personality described in the mortgage and pledge of defendant bank is Concerned, the plaintiff took absolutely nothing by its second mortgage and pledge (Exhibit C). The pledge was wholly without virtue or effect as to the property itself. That this is so is due, among other things, to the fact that there was no delivery by the pledgor to the pledgee of the property sought to be pledged. (Civil Code, art. 1863.) Property held in lawful pledge by one can not legally be pledged to another while the first pledge subsists. (Civil Code, art. 1866; Manresa, in his discussion of that article, vol. 12.) Moreover, the defendant bank had the right to extend the pledge created by Exhibit A until every other obligation which Reyes contracted with said bank

subsequently thereto and which was due before the complete liquidation of the first debt should be fully satisfied. (Art. 1866, Civil Code; Manresa, in his discussion of this article, vol. 12.) Plaintiff's Exhibit C, its alleged second mortgage and pledge, must, therefore, be construed as nothing more than a mortgage on the real estate covered by the first mortgage. It does not touch, by way of lien, any of the personal property involved in this suit. It is, in law, simply a mortgage on the real estate described therein. This, taken in connection with the other effect above set forth, that all of the personal property described in the bank's first pledge (Exhibit A) could be held by said bank under said pledge for the payment not only of the mortgage-pledge debt but also of any other debt contracted by Reyes and due before the mortgage-pledge debt was fully paid, may carry some important consequences in determining how much is due, when taken in connection with the facts now to be stated. It should be noted that, from the terms of Exhibit A, primarily, the real estate is charged with the payment of a specified portion of the mortgage-pledge debt, namely, P88,000; and the personal property with P138,117.38. While it is provided in Exhibit A that the real estate shall respond for the deficiency should the personal property not produce P138,117.38, and, vice versa, the personal property shall respond should the real estate not produce P88,000, nevertheless, that can not be required until all of the property dedicated to its particular purpose has been actually put thereto. In other words, the real estate can not be used to pay any part of the P138,117.38 until all of the personal property has been used toward paying that sum. Nor can any portion of the personal property be used to pay any part of the P88,000 until all of the real estate has been applied to such payment. It appears from Exhibit E that by far the greater part of the real estate yet remains unsold and has been in no way applied to the reduction of the P88,000. There has been received from the proceeds of the real estate (and from the income, the amount of which we do not know) only the sum of P19,070.23. It is manifest, therefore, that no part of the personal property or the income therefrom, if any, could have been applied to relieve the real estate from its share of the burden of the debt during the time included within the scope of this action. On the other hand, a considerable part of the charge imposed upon the personal property still remains unpaid, a portion of said property still remaining in the hands of the bank unsold and unused for the reduction of said debt. There has been realized from the personal property the sum of P126,575.92. Its share of the burden was P138,117.38. With interest added, there would remain a considerable balance due from the personal property.

These facts are important for the reason that inasmuch as plaintiff's Exhibit C touches by way of lien nothing but the real estate, it is evident that its mortgage is effective as a lien only to the extent, at the very utmost, to which the real estate has been relieved of its burden of P88,000.

We are of the opinion that, from every point of view, regarding the case from the standpoint of its separate elements and as a whole, it is clear that the intention of the parties, Reyes and the bank, was that the said sum of P96,781.75 should be considered as a deposit instead of a payment, and we so hold. No prejudice to the plaintiff having been shown as a result of the carrying out of such intention, there is no need of further discussion.

The judgment of the court below is affirmed, without special finding as to costs. So ordered.

Torres, Johnson, Carson, and Trent, JJ., concur.

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