

MARIANO G. VELOSO, PLAINTIFF AND APPELLANT, VS. JOSH HEREDIA, AS ADMINISTRATOR OF THE ESTATE OF GENARO HEREDIA, DECEASED, DEFENDANT AND APPELLEE.

G.R. No. 9087. January 27, 1916

Ponente: JOHNSON, J.

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JOHNSON, J.:

The purpose of the present action was to foreclose a certain mortgage, executed and delivered by the said Genaro Heredia to the plaintiff on the 20th of July, 1908, for the sum of P4,200 together with 8 per cent interest annually.

Some time before the commencement of the present action Genaro Heredia died and the defendant herein was duly appointed as the administrator of the estate.

The defendant answered and alleged that the plaintiff had presented a claim for the amount due on said mortgage to the commission appointed to consider claims against the estate of Genaro Heredia, which claim had been allowed by the said commission.

Upon the issue thus presented the cause was submitted for trial. After hearing the evidence the Honorable A. S. Crossfield, judge, reached the conclusion that "when the plaintiff filed his claim secured by the mortgage, as herein before set forth, with the committee appointed to hear claims for the full amount thereof, he indicated to all persons interested in the estate that he abandoned the mortgage and he cannot now, after the mortgage property has been taken into the mass of the estate of the deceased, require its subjection to the payment of the mortgage debt when his mortgage debt has already been allowed against the estate and is subject to participate in the distribution thereof, even though the plaintiff may now believe that the estate is insolvent and cannot pay all of its legal debts," and under said facts relieved the defendant from all responsibility under the complaint.

From that judgment the plaintiff appealed to this court and presented the following assignments of error:

"1. The lower court erred in presuming, from the mere fact of appellant's, having previously presented his claim before the commissioners of appraisal, that he suggested to the other persons interested in the property that he would waive the mortgage.

"2. The lower court likewise erred in concluding that the appellant lost his right to bring an action for foreclosure of the mortgage after his claim had been allowed by said commissioners."

The proof was not brought to this court. We are governed therefore by the finding of facts made by the lower court.

The lower court, after hearing the evidence, made the following finding of facts:

"From the evidence presented at the trial I find that in July, 1908, the deceased, Genaro Heredia, was indebted to the plaintiff in the sum of P4,200 and executed a document admitting the indebtedness, and in the same document mortgaged property described in the complaint to secure the payment of the indebtedness, and the

mortgage was inscribed in the registry of property of the city of Manila on the 4th day of August, 1908.

"The defendant paid the interest upon the mortgage up to and including the month of June, 1911.

"That the executor under the will of the deceased proceeded to and took possession of the property described in the complaint as mortgaged to the plaintiff, and stated in the inventory that it was subject to the mortgage or subject to a pacto de retro, and later on after commissioners had been appointed to hear claims against the estate, the plaintiff filed his claim against the estate of the deceased and proved it by the document before referred to, as acknowledging the indebtedness by the deceased and his mortgage of the property described to secure the payment thereof, and the claim was allowed by the commissioners appointed to hear claims.

"There is no question but that the sum of P4,200 is due from the estate of the deceased to the plaintiff, with interest thereon at 8 per cent per annum beginning with the 1st day of July, 1911, and that a mortgage was given upon property described in the complaint to secure the payment of the indebtedness, but whether the mortgage can now be foreclosed is a question raised by the pleadings and upon which counsel for the parties differ."

Considering the facts, in relation with the assignments of error above quoted, we have but one question presented and that is a question of law. The question presented is, whether or not the holder of a mortgage against the estate of a deceased person may present his claim to the commissioners appointed to consider claims against the estate and thereafter bring an action to foreclose the same mortgage, in an action of foreclosure.

Section 708 of the Code of Procedure in Civil Actions provides that:

"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 * * *."

We have heretofore considered the provisions of said section in an action exactly analogous to the present one. In the case of *Osorio vs. San Agustin* (25 Phil. Rep., 404), we said, in discussing the question presented here, that:

"It is clear by the provisions of said quoted section that a person holding a mortgage against the estate of the deceased person may abandon such security and prosecute his claim before the committee and share in the distribution of the general assets of the estate."

Said section provides also that he may also, at his own election, foreclose the mortgage and realize upon the security. But the law does not permit that he may have both remedies. If he elects one he must renounce the other. If he fails in one, he fails utterly. He is not permitted, under said section, to annoy those interested in the estate of deceased persons, by two actions for exactly the same purpose.

For the foregoing reasons, in our opinion the judgment of the lower court should be and is hereby affirmed, with costs. So ordered.

Arellano, C. J., Torres, Moreland, Trent, and Araullo, JJ., concur.

Carson, J., see concurring opinion

CONCURRING OPINION

CARSON, J.:

I concur, but in doing so I refer expressly to my concurring opinion in the case of Osorio vs. San Agustin (25 Phil. Rep., 404).

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