45 Phil. 178

[G.R. No. 19843. October 03, 1923]

EL HOGAR FILIPINO, PETITIONER, VS. GERONIMO PAREDES, AS REGISTER OF DEEDS OF THE PROVINCE OF OCCIDENTAL NEGROS, RESPONDENT.

D E C I S I O N

STREET, J.:

This cause presents a single question of law, namely, whether the parties to a mortgage of real property may lawfully insert therein a clause giving to the mortgagee the power, upon default of the debtor, to foreclose the mortgage by an extrajudicial sale of the mortgaged property.

The facts necessary to a proper understanding of the case are briefly these: On September 26, 1919, Doña Aniceta Ardosa, of the City of Iloilo, executed a mortgage upon a rural estate located in the municipality of Manapla, Occidental Negros, and known as the *Hacienda de Bayabas y Agtongtong*, in favor of El Hogar Filipino, a mutual building and loan association of the City of Manila, to secure a loan of money in the manner customary in building and loan contracts. Among the clauses contained in this mortgage only two are material to be here noted, the tenth and fifteenth. In the first of these it is stipulated that upon maturity of the debt and default of the debtor in making the payment of the same, the manager for the time being of the association may proceed to make an extrajudicial sale of the property, before a notary public or auctioneer chosen by the directorate, after publication shall have been made once a week for three successive weeks in some paper of general circulation in the city, with irrevocable power in said manager, as agent (*mandatario*) of the debtor, to execute an appropriate deed in favor of the best bidder, at the end of thirty days from the date of the sale, during which period the debtor shall have the right to redeem the property. In the other clause it is stipulated that the association may take part in the bidding at any sale conducted under the power

above conferred and in case it becomes purchaser as the best bidder the manager of the association, as attorney in fact (*apoderado*) of the debtor, is authorized to execute the appropriate deed to it, under the same conditions as maintain in respect to other persons.

The debtor appears to have defaulted in the payment of the debt, and as a consequence of said default a non-judicial foreclosure was effected by the manager of the creditor association in all respects in conformity with the power conferred in the mortgage. At this sale the association itself became the purchaser as the highest and best bidder, and after the aforesaid period of thirty days had passed, without redemption having been effected, the manager of the association executed to it a deed of transfer in proper form.

It appears that the property constituting the *hacienda* in question is not registered under Act No. 496, but is duly inscribed in the property register of the Province of Iloilo. Accordingly, in order to complete the transfer of the property and give full effect to the foreclosure, the creditor association caused said deed, with the appropriate documents accrediting the sale aforementioned, to be presented to the register of deeds of the Province of Occidental Negros in order that said documents might be registered as contemplated in section 194 of the Administrative Code, as amended by Act No. 2837 of the Philippine Legislature. Registration of the instrument was, however, refused by the register of deeds on the ground that the stipulation contained in clause 10 of the mortgage, conferring a power of sale on the creditor association, was in his opinion void.

Upon this El Hogar Filipino, as mortgagee and purchaser in said sale, presented the present petition in this court asking that the writ of mandamus should issue to compel compliance on the part of the respondent register with the duty of registering the document in question. Upon the filing of this petition the respondent Geronimo Paredes was cited by this court to appear and demur or answer; and in response to this requirement the said respondent has interposed an answer admitting all the material facts stated in the petition but questioning the right of the petitioner to relief, upon the ground already suggested, that clause 10 of the mortgage is void. The cause being thus ready for determination by this court, upon the allegations of the complaint and the so-called answer of the then sole defendant, a motion was made by the attorneys

for the plaintiff, requesting leave to make Doña Aniceta Ardosa a party defendant, on the ground that, as owner of the property in question, she was interested in the subject-matter and therefore a proper party to the suit. This motion was granted, and after being duly served with notice Doña Aniceta Ardosa demurred generally on the ground that the facts alleged in the complaint do not constitute a cause of action. For purposes of the solution of the case as it stands before us, we shall treat the answer of Geronimo Paredes as a demurrer; as we may well do, for the reason that it raises only a question of law upon the facts stated in the complaint; and we take the situation to be in effect the same as if both of the present parties defendant had interposed a joint demurrer.

The question thus presented is one that, so far as we are aware, has not heretofore been considered by this court, in connection with a mortgage of real property; but it is clear that the power to which criticism is directed is entirely valid. This doctrine is supported not only by the Spanish jurisprudence but also by the practically unanimous voice of the courts of Great Britain and the United States. In a resolution adopted in 1901 for the information and guidance of registers in Spain, we find a declaration to the following effect:

> "Article 1859 of the same Code prohibits the creditor from appropriating to himself the things pledged or mortgaged, and from disposing of them; but this does not mean that a stipulation is prohibited whereby the creditor is authorized, in case of nonpayment within the term fixed by the parties, to sell the thing mortgaged at public auction, or to adjudicate the same to himself in case of failure of said sale, nor is there any reason whatever to prevent it; on the contrary, article 1872 expressly authorizes this procedure in connection with pledge, even if it may not have been expressly stipulated." (Resolution of the Gen eral Director of Registries of July 12, 1901; 92 Jur. Civ., 103.)

In a decision of October 21, 1902, the supreme court of Spain approved the same doctrine in these words:

> "Considering that the judgment appealed from does not violate articles 1859 and 1255 of the Civil Code, because the stipulation, by virtue of which the debtor gives the mortgagee the right to sell the thing mortgaged at public extrajudicial sale to make payment of the debt, does not imply an appropriation thereof, but is merely a derivative of the authority granted the contracting parties in the second of the two articles aforementioned, which authority is not against the law, since what it prohibits is only the acquisition by the creditor of the property mortgaged, merely by reason of the nonpayment of the debt, and the above stated stipulation simply authorizes him to sell it with the aforesaid conditions, which authorization is inherent in ownership, and is not against morals and public order, for what is authorized by the Code itself in article 1872 as to the pledgee, can never be held to be unjust with respect to the mortgagee when the debtor has expressly agreed upon such manner of making payment." (Decision of the supreme court of Spain of October 21, 1902; 94 Jur. Civ., 364. *See also* 94 Jur. Civ., 504; 96 Jur. Civ., 801.)

The same question has been considered in innumerable cases by the English and American tribunals, and the conclusion almost unanimously reached by those courts is that a stipulation in a mortgage conferring a power of sale upon the mortgagee is valid. The history of this doctrine, as abstracted from the pages of a well-known legal encyclopaedia is briefly this: The right to foreclose a mortgage of personalty by the exercise of a power of sale and without resorting to a bill in equity was sanctioned by Lord Hardwicke in 1742, and the power had been recognized even before that day. In the case of mortgages of realty the recognition of the validity of the power of sale encountered considerable opposition; and doubts as to its validity were not infrequently expressed far into the nineteenth century. In 1811, however, the power was recognized as being a good source of title, and in a few years the practice of inserting the provision had become general. Having once been recognized in England, the power of sale soon came to be an ordinary incident in the execution of a mortgage and was usually inserted as a matter of course; and so fully did the exercise of the power accord with considerations of public policy, that, by parliamentary enactment, the power of sale can now be exercised in England by the mortgagee although a provision therefor be omitted from the deed. In America also numerous early expressions are to be found which question the validity of the power of

sale or deny it altogether; but legislative and judicial opinion soon eradicated this notion almost entirely, and it is now settled in America as in England that, in the absence of a statutory requirement of judicial foreclosure, the exercise of the power of sale contained in a mortgage or deed of trust will vest a good title in the purchaser and cut off the equity of redemption. Such is the doctrine maintained in the Federal courts of the United States and the courts of every American State with the exception of one only. (27 Am. & Eng. Encyc. Law 2d ed., pp. 755, 756.)

The correctness of the foregoing statement is corroborated by the conclusions reached by other writers with reference to the same point. For instance, we find it stated in Ruling Case Law that the validity of the provision conferring a power of sale on the mortgagee is no longer open to doubt (19 R. C. L., 587); and the author of the monographic essay on Mortgages in the Cyclopaedia of Law and Procedure has this to say: "A power of sale in a mortgage or deed of trust, authorizing foreclosure by advertisement and sale without resort to the courts, is not contrary to public policy or the policy of the law; but on the contrary is perfectly legal and valid, except in a few states, where the statutes expressly forbid the exercise of such powers and require all foreclosures to be effected by judicial proceedings." (27 Cyc., 1449.)

In the extensive treatise on Mortgages written by Mr. Leonard A. Jones a full discussion of this and allied topics will be found, wherein the learned author points out that under the Roman Law a provision giving the mortgagee a power to sell extra judicially was recognized as valid, and the history of the doctrine is fully traced in all its aspects through the modern decisions of the English and American courts. (Jones, Mortgages, vol. 3, secs. 1765-1768.)

So far as appears from our reported decisions this court has never had occasion to consider the validity of the power of sale in relation with a mortgage of real property, but the court has not hesitated to sustain the same power when incorporated in a contract of pledge. This point was clearly involved in Peterson *vs*. Azada (8 Phil., 432), where certain jewelry had been pledged, with a stipulation to the effect that in case of non-payment of the debt the pledgee could sell the jewelry at the best price obtainable in the market and apply the proceeds to the payment, or in part payment, of the debt. The contingency thus contemplated occurred, and enough was not realized at the

sale to satisfy the entire debt. The creditor, therefore, brought an action to recover the balance due on the note, and the action was sustained. In discussing the power conferred upon the pledgee in that case, the court observed: "The will of the parties as expressed in a contract is the law, and the conditions stipulated with regard to the jewelry in this case are not in contravention of law, of morals, or of public order." (Peterson *vs*. Azada, 8 Phil., 432, 437.)

It requires no argument to show that if the clause conferring a power of extra judicial sale is valid in a contract of pledge of personal property, it must also be valid in a mortgage of realty, for in essence the two species of contract are identical. Furthermore, it will not escape observation that in Peterson *vs*. Azada, *supra*, the stipulation contemplated a private sale by the pledgee in the market for the best price obtainable, and no publication or notice of any sort to the mortgagor was required.

In the light of the foregoing authorities it is evident that the power of sale conferred on the creditor in the mortgage now under consideration cannot be declared to be in contravention either of law, morals, or public policy.

That this view is in harmony with legal conceptions prevailing in this jurisdiction can be further seen from the circumstance that section 66 of the Land Registration Act (Act No. 496) fully recognizes the validity of a clause in a mortgage conferring a special power of sale on the mortgagee. It is true that that section deals only with land that has been registered under the Torrens system, but the provision reflects the commonly accepted professional view that such a clause is valid, regardless of the nature of the title. Certainly, it would be an astonishing conclusion if we were to hold here that a clause conferring special power of sale is invalid in a contract dealing with land not registered under the Torrens system, notwithstanding the fact that the same clause is valid when inserted in a contract relating to land so registered.

It is a matter of common knowledge that, owing to the difficulties and uncertainties attendant upon the realization of loans extended upon mortgages of real property in this country, intending borrowers are compelled in most cases to resort to the dangerous expedient of selling their land under a contract of sale with *pacto de retro*. When thus used, this form of agreement in most

cases operates, as everybody is aware, as a sort of self-executing mortgage, since the property consolidates unconditionally in the purchaser when the date of repurchase passes without redemption. Moreover, under the contract of sale with *pacto de retro*, the consolidation of the property may be accelerated by the failure of the seller to comply with some collateral stipulation, as for the payment of rent by the seller during the period allowed for repurchase (Vitug Dimatulac *vs*. Coronel, 40 Phil., 686) ; and the conclusion is irresistible that the mortgage containing a power of sale, to be exercised under reasonable restrictions, is in all respects a less objectionable form of security than the contract of sale with *pacto de retro*.

The most plausible argument advanced against the validity of the provision now in question proceeds on the assumption that the lawmaking body, in adopting our present Code of Civil Procedure, intended to make the method of judicial foreclosure, set forth in sections 254-261, inclusive, of said Code, the exclusive remedy for the foreclosure of mortgages upon real property; and in this connection attention is directed to certain decisions of this court in which foreclosure proceedings have been set aside for failure to pursue the statutory provisions or in which it has been declared that the parties cannot by agreement contravene the statutes and interfere with the lawful procedure of the courts. (Grimalt *vs*. Velazquez and Sy Quio, 36 Phil., 936; Raymundo *vs*. Sunico, 25 Phil., 365; Bank of the Philippine Islands *vs*. Yulo, 31 Phil., 476; Warner, Barnes & Co. *vs*. Jaucian, 13 Phil., 4; Yangco *vs*. Cruz Herrera and Wy Piaco, 11 Phil., 402.)

It is to be borne in mind, however, that the questions ventilated in those cases arose in the course of judicial foreclosures, and not in connection with extra judicial sales under a power such as is now before us. Of course, where the power of sale is not conferred at all, and recourse is had to the judicial remedy prescribed in the Code, the statutory provisions relating to that remedy must be followed. That proposition is in nowise inconsistent with the proposition here maintained that a valid extra judicial foreclosure may be effected pursuant to a special power. The judicial foreclosure and foreclosure under a special power of sale, where the power is conferred, must be considered alternative or cumulative remedies; and so they have been treated in jurisdictions where both methods of foreclosure are in use. (3 Jones, Mortgages, sec. 1773.)

Our attention has been called to section 185 of the Corporation Law (Act No. 1459) wherein it is declared that when a borrowing stockholder of a building and loan association shall be three months in arrears in the payment of his dues or stock or the interest or premium or instalments of premium on any loan, the whole loan, at the option of the board of directors, shall be due and payable and the board may proceed by action to enforce collection upon the securities held by the corporation. From the circumstance that the board of directors is authorized to proceed *by action* to enforce the collection of any of the obligations mentioned, it is argued that the remedy by action was intended to be exclusive, and that any special stipulation conferring a power of extrajudicial sale must be contrary to the policy of the law and therefore void. It is our opinion, however, that the statutory remedy *by action* conferred in the section cited is not exclusive; and the provision referred to constitutes no impediment to the making of an express stipulation of the character of that now under consideration.

The demurrer of Doña Aniceta Ardosa is overruled and the answer of Geronimo Paredes which, as already stated, is in the nature of a demurrer, is declared insufficient and likewise overruled; and judgment will be entered for the issuance of the writ as prayed, requiring the respondent Geronimo Paredes, as register of deeds of the Province of Occidental Negros, to register the document, Exhibit B, in the manner prescribed by law, unless within five days after notification of this resolution the respondents shall interpose a sufficient answer to the petition.

So ordered, without special pronouncement as to costs.

Araullo, C.J.,
Johnson, Avanceña, Villamor, and *Romualdez, JJ.,* concur.

DISSENTING

MALCOLM, J.:

Philippine law does not sanction powers of sale in mortgages (Code of Civil

Procedure, sec. 254; Civil Code, art. 1872; Corporation Law, sec. 185; Banco Español Filipino *vs*. Donaldson Sim & Co. [1905], 5 Phil., 418; National Bank *vs*. Manila Oil Refining & By—Products Co. [1922], 43 Phil., 444). Conceding, however, that the statement just made is otherwise and that there exists a certain amount of discretion in the courts, yet powers of sale should be held void as against public policy. (Civil Code, art. 1255.) What with the *pacto de retro*, usurious contracts, and provisions like those found in the National Bank Charter authorizing private sales, the money lender is well fortified. Still another obstacle to more equal progress should not be interposed.

For the above reasons and others which are well stated in the opinion of Mr. Justice Johns, I reach the conclusion that the demurrer should be sustained and the petition dismissed.

DISSENTING

JOHNS, J.:

The question here involved is the legal force and effect of a "power of sale" under a mortgage executed to the plaintiff by Aniceta Ardosa, the material provisions of which are as follows:

> "Tenth. The borrower, Aniceta Ardosa, hereby confers a sufficient and irrevocable power of attorney in favor of the manager of the partnership, in order that he, in the event that the indebtedness, hereby acknowledged, falls due, on account of the failure on the part of the borrower to fulfill any of the obligations mentioned in clauses second, fourth, fifth, eleventh, twelfth, thirteenth, sixteenth, seventeenth and twenty-first of this deed, once the board of directors has resolved that said partnership has decided to exercise its right to consider the indebtedness of the borrower due, and once a notice has been published in a newspaper of general circulation of this city, once a week, during three consecutive weeks, may proceed to make an extrajudicial sale, before a notary public or auctioneer, whom the board of directors may designate,

of the real property, the subject of this mortgage, the manager of the partnership being hereby authorized, by irrevocable power of attorney, to execute, as agent of the borrower, the corresponding deed of sale in favor of the highest bidder at said auction sale; provided, however, that the deed of sale shall not be executed but after the expiration of the thirty days' time granted to run from the date of the auction sale; and provided that, in the event that the borrower should pay, within that period of thirty days, to be computed from the date of the sale, to the partnership, the total amount of her indebtedness, at such date, with interest due and expenses incurred by the sale, less the expenses for the cancellation of her shares, such public sale shall remain invalid, and the representative of the partnership shall execute the proper deed for the cancellation of the mortgage hereby made, the expenses for the execution of said deed of cancellafion being on account of the borrower.

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"Fifteenth. It is expressly agreed upon that the partnership shall be entitled to bid in any of the extrajudicial auctions for the sale of the mortgaged property, which might be held in accordance with the agreement entered
into on this date, and that in the event that the partnership's bid be higher than any other bid made by any other person, the manager of the partnership may
execute in favor of the partnership, as the agent for the borrower, the corresponding deed of sale, in the same form and under the same condition established in clause tenth of the deed."

It will be noted that clause 10 provides that if the indebtedness should fall due "on account of the failure on the part of the borrower to fulfill any of the obligations mentioned in clauses second, fourth, fifth, eleventh, twelfth, thirteenth, sixteenth, seventeenth and twenty-first," that the property may be advertised and sold in the manner provided in clause 10.

As pointed out by the majority opinion, for a breach of the conditions of the mortgage, and acting under the "power of sale," the plaintiff advertised the

property for sale and sold it to itself, claiming that it was the highest bidder. The sale was never confirmed by any court, and under the proceedings, the plaintiff now claims an absolute title to the property through a deed which it made to itself thirty days after the sale. The majority opinion points out that like proceedings for the sale of personal property are valid and sustained by the courts, and that, for such reasons, similar sales of real property should be sustained.

It will be noted that all of the proceedings here were personally conducted by the plaintiff, and that, as a result, the property was sold by the plaintiff to the plaintiff as the highest bidder, and the deed which divests Aniceta Ardosa of her title to the real property was made by the plaintiff to the plaintiff.

There is a marked legal distinction between the sale of personal property, both public and private, and the sale of real property. In ordinary business dealings the title to personal property is passed by delivery, and there is no writing of any kind between the parties. That is true in daily commercial transactions involving large amounts of money, and in the ordinary course of business no person holds a record title to personal property. Conveyances to real property are made by written instruments duly signed, witnessed and acknowledged. As a general rule the holder of the record title is the owner of the real property. Personal property is movable from one place or country to another, and real property is immovable. Conveyances of real property are made through the forms and solemnities of law, and, in the ordinary course of business, title to personal property passes by delivery and without any writing.

We admit that a large majority of the courts have sustained the validity of a "power of sale," but are not so much concerned with the validity of a "power of sale" in general as we are with the particular "power of sale" in question. In other words, where the "power of sale" provides for a reasonable notice of sale and a reasonable time for redemption, we agree that it is valid and should be sustained.

Our criticism here is directed to the specific power, which is conferred and the manner in which it was exercised, rather than to a "power of sale" under

proper and reasonable restrictions.

The authorities cited in the majority opinion are largely founded upon a "power of sale" under a trust deed, as distinguished from a mortgage, or they are in states and countries where the record title passes by the mortgage itself subject only to the right of redemption.

There is an important legal distinction between a "power of sale" under a trust deed and q. "power of sale" under a mortgage, which is clearly defined by the authorities. Upon that question Words and Phrases, vol. 8, p. 7126, says:

> "The chief practical difference between a deed of trust with power of sale and a plain mortgage is that the deed of trust may be foreclosed according to its terms by the trustee without authority of court, whereas a simple mortgage can be foreclosed only under decree of court. (Axman *vs*. Smith, 57 S. W., 105, 106; 156 Mo., 286; Cornell *vs*. Conine-Eaton Lumber Co., 47 Pac, 912, 914; 9 Colo. App., 225.)
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> " 'Deed of trust' is not synonymous with 'mortgage,' even when used in reference to security for debt. A deed of trust has no feature in common with a mortgage, except that it was executed to secure an indebtedness. In a mortgage there is a right, after condition broken, to foreclose on the part of the mortgagee, and a right of redemption on the part of the mortgagor. These two rights are reciprocal. When the one cannot be enforced, the existence of the other is denied; and, when either is wanting, the instrument, whatever its resemblance in other respects, is not a mortgage. (Southern Building & Loan Ass'n. *vs*. McCants, 25 South., 8, 10; 120 Ala., 616 [quoting Koch *vs*. Briggs, 14 Cal., 257; 71 Am. Dec., 651].)
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> "There is a manifest and well-settled distinction between an unconditional deed of trust and a mortgage or deed of trust in the nature of a mortgage. The former is an absolute and indefeasible conveyance of the subject-matter thereof, for the purpose expressed, whereas the latter is conditional and defeasible. A mortgage is the conveyance of an estate or pledge of property as security for the payment of money or the performance of some other act, and conditioned to become void upon such payment or performance. A deed of trust in the nature of

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> mortgage is a conveyance in trust by way of security, subject to a condition of defeasance, or redeemable at any time before the sale of the property. A deed conveying land to a trustee as mere collateral security for the payment of a debt, with the condition that it shall become void on the payment of the debt when due, and with power to the trustee to sell the land and pay the debt in case of default on the part of the debtor, is a deed of trust in the nature of a mortgage. By an absolute deed of trust the grantor parts absolutely with the title, which rests in the grantee unconditionally for the purpose of the trust. The latter is a conveyance to a trustee for the purpose of raising a fund to pay debts, while the former is a conveyance in trust for the purpose of securing a debt, subject to a condition of defeasance. (Hoffman *vs*. Mackall, 5 Ohio St., 124, 130 [citing Woodruff *vs*. Robb, 19 Ohio, 212, 216; 1 Hill. Mortg., 359].)"

In a trust deed the record title to the property passes through the trust deed from the grantor to the trustee, and a conveyance by the trustee passes the record title. In a mortgage the record title remains in the mortgagor, and the title remains in the mortgagor and cannot be divested without the formalities of a sale. A trustee is some third person selected and agreed upon by the parties upon account of his integrity, business reputation and financial standing, and a person who is deemed fair and impartial, and whose legal duty is alike to protect the mutual interests of both parties, and who is selected for that reason.

When property is sold under a trust deed, all of the proceedings for the sale are in the name of the trustee, and when a conveyance is made to the purchaser it is made by the trustee.

It must be conceded that, under the law of the Philippine Islands, after the execution of the real mortgage, the record title continues to remain in the mortgagor and does not become vested in the mortgagee. It must also be conceded that the instrument in question in the instant case is a real mortgage as distinguished from a trust deed, and that there is no claim or pretense that it is a trust deed.

Among other things, clause 10 provides that, when the original debt becomes due for any one of the specified conditions, and that fact is so declared by the board of directors, the property may be sold at an extrajudicial sale by the publishing of a notice in a newspaper of general circulation in the City of Manila for three consecutive weeks, and, through an irrevocable power of attorney, the mortgagee is made and appointed the manager of the plaintiff as agent to make the sale, and execute a deed to the purchaser thirty days after the sale.

Clause 15 provides that the plaintiff may bid at such sale, and in the event it is the highest bidder, its manager, as agent for the mortgagor, may make the deed of sale to itself as provided for in clause 10.

In other words, the mortgagor gives the mortgagee an irrevocable power of attorney to sell the property to itself by the publishing of a notice of sale for three weeks in the City of Manila, and within thirty days after the sale, the mortgagee, as agent of the mortgagor, may make a deed to itself of the property. Under such provisions, it will be noted that the property may be advertised and sold without notice of any kind to the mortgagor, either real or constructive, except the notice to be published in a newspaper in the City of Manila, and that thirty days after the sale, the mortgagee may make a deed to itself of the property.

We vigorously contend that, under the conditions existing in the Philippine Islands, such provisions are both unfair, unjust and unconscionable, and ought never to be sanctioned or approved by any court.

Vol. 3, sec. 1771, Jones on Mortgages, says:

> "*Trustee the agent of both parties*.—The trustee in a deed of trust is the agent of both parties, and he should perform his duties with the strictest impartiality, and look to the interest of both parties; inasmuch as the trustee acts for both parties, and the law requires of him the utmost good faith and the strictest impartiality, he should have no personal interest to subserve, and the beneficiaries should not be relatives or friends whom he might feel called upon to accommodate. Certainly no one interested in the debt secured, and no one who

> is a near relative of the beneficiary, should be a trustee."

With all due respect to the majority opinion, no case is cited, and none will ever be found, either Spanish, English or American, where any reputable court has ever sustained the validity of such provisions under the conditions existing here.

As the majority opinion says, the instant case is one of first impression in this court. Hence, it should be decided on the peculiar local conditions existing in the Philippine Islands, and this court ought not to be bound by decisions of other courts, which are not founded upon the same or similar conditions.

Many States have enacted laws against the validity of a "power of sale" under a mortgage, and others have enacted laws regulating the sale, and defining the terms and conditions upon which it should be made.

Cyc., vol. 27, p. 1450, says:

> "In several of the states the right to exercise a power of sale contained in a mortgage or deed of trust has been taken away by statutes requiring judicial proceedings for foreclosure in all cases, or much restricted; and in others, laws have been passed regulating the exercise of such powers in respect to the notice to be given, the time and place of sale, and other particulars, which statutes must of course be fully complied with in order to effect a valid foreclosure."

In many of the States, which uphold the "power of sale" under a mortgage, it will be found that by such a mortgage, the record title to the land passes *ipso facto* from the mortgagor to the mortgagee, subject only to the right of redemption.

Under the mortgage in the instant case, the record title could not pass to the mortgagee without the formalities of a sale.

The Philippine Islands is a country exclusively of islands, of which there

are about three thousand. They are inhabited by people of different habits and modes of living, and who use and speak many different dialects and languages, and many of whom can only speak or write in their own dialect or language, and who know nothing of either Spanish or English.

The records of this court show, and it is a matter of common knowledge, that a very large percentage of all written instruments in the Philippine Islands are made and signed by "thumb prints" by persons who cannot read or write in any language. In many of such cases, the makers of such instruments do not know or understand what they are signing. Many of them at one time have owned valuable lands and property rights, which, through their ignorance and the cunning and design of the money lender, have been lost by the signing of instruments known as *pacto de retro*.

In the interest of justice, this court has many times been called upon to relieve innocent and ignorant people from the Shylock methods by which they were induced to sign a *pacto de retro*, and lost their title to valuable lands.

Even in that kind of an instrument, the time is specified in which the property may be redeemed, ranging from one to many years. With a "power of sale" under a mortgage, with the provisions in the instant case, a mortgagor may own land in one island and live at a long distance in another, and, through some neglect or default, his land could be sold and a conveyance made and his title lost forever without his knowledge.

In the instant case the land is situated in the *sitios* of Agtongtong and Bayabas, *barrio* of Tortosa, municipality of Manapla, Province of Occidental Negros, and the mortgagor resided in lloilo, and after three weeks' notice in a newspaper published in Manila, the land was sold in Manila.

Of what value is it to a person in a distant island, who does not take a newspaper, or who cannot read or write, to have a notice of the sale of his or her property published in a newspaper in the City of Manila?

It is a matter of common knowledge that there are about 11,000,000 people in the Philippine Islands, and that only about 1 per cent of them take or read a newspaper of any kind published in any language. Yet, by the majority opinion,

these people, living in distant islands, can be divested of valuable lands and property rights, through a notice of sale published in a newspaper in the City of Manila, which they will never see and never read, and of which they never will have any knowledge.

In the final analysis, whatever injustice there may be in a *pacto de retro*, it will be found that the "power of sale," under the provisions of the real mortgage in question, is far more drastic, summary and unconscionable than a *pacto de retro*.

The majority opinion says:

> "* * * and the conclusion is irresistible that the mortgage containing a power of sale, to be exercised under reasonable restrictions, is in all respects a less objectionable form of security than the contract of sale with *pacto de retro*."

That is true. But the trouble is that the restrictions in the "power of sale" in the instant case are not reasonable. If they were, we would not be writing this dissenting opinion.

The "power of sale" in question gives the money lender an unfair and unconscionable advantage over ignorant and illiterate persons, who do not know that they have signed an instrument with a "power of sale," who do not realize its legal force and effect, or what kind of an instrument they have signed, until after they have lost valuable lands, and it is too late to obtain any relief.

It is contended that a power of sate is a matter of private contract between the parties, and that the mortgagor has a legal right to make a private contract, and that he is legally bound by its terms and provisions. Legally speaking, that is true where the parties know and understand what they are signing, and the legal force and effect of the contract. The law carries with it and implies that the parties are on equal footing, know and understand what they are doing. But, here, you are dealing with a class of people many of whom cannot read or write, who are ignorant and illiterate of legal forms and

technicalities, who speak many different languages, and who do not know anything about the distinction between a trust deed and a mortgage, and, yet, they have and own valuable property rights.

Again, the instrument in question nowhere provides for a confirmation of the sale by the court, and under its terms, the period of redemption from the sale is limited to thirty days. Under the conditions existing here, that provision is unfair and unreasonable. It is not only possible, but it is probable, that under the "power of sale" in a mortgage, valuable lands could be advertised and sold and the title divested, without any notice to, and without the knowledge of, the mortgagor.

In section 465 of the Code of Civil Procedure, the Legislature has wisely provided that in a judicial sale "The judgment debtor, or redemptioner, may redeem the property from the purchaser, at any time within twelve months after the sale, on paying the purchaser the amount of his purchase, with one per cent per month interest thereon in addition, up to the time of redemption * * *."

But in the instant case, the power of redemption is limited to thirty days. That is to say, the Legislature has enacted a law that one year is reasonable time for redemption, and under the "power of sale" in question, the period of one month is fixed as a reasonable time.

In "*Advertisement of Property to be Sold on Execution*," section 454 of the same Code provides that:

> "3. In cases of real property, by posting a similar notice particularly describing the property, for twenty days in three public places of the municipality or city where the property is situated, and also where the property is to be sold, and publishing a copy thereof once a week, for the same period, in some newspaper published or having general circulation in the province, if there be one. If there are newspapers published in the province in both the Spanish and English languages, then a like publication for a like period shall be made in one newspaper published in the Spanish language, and in one published
> in the English language: *Provided however,* That such publication in a newspaper will not be required when the assessed valuation of the property does

not exceed four hundred pesos."

Although the Legislature has provided for the posting of notices "in three public places" of the municipality or city where the property is situated, and also where the property is to be sold" and the publication of the notice of sale in both Spanish and English, under the "power of sale" in question the only notice required is the publication of a notice in a newspaper in the City of Manila. Compare the notice and formalities required in a judicial sale with the notice of sale to be given under the "power of sale" in question.

Clause 10 recites that, as a condition precedent, the board of directors shall pass a resolution declaring the indebtedness due. That is a matter largely in the discretion of the directors. Here, again, it is not provided that the borrower shall receive any notice of such action by the board of directors.

If, as Cyc. says in the above quotation, many States in the United States have found it necessary to enact laws against the validity of a "power of sale" under a mortgage, and others have enacted laws regulating the sale and defining how it should be made, how much more forcible is the argument against the validity of the "power of sale" in question within the Philippine Islands where, as here, the proceedings are so summary and drastic?

It is a matter of common knowledge in the United States, founded upon the same basis as here, that more than one hundred per cent of the people read the newspaper, and the whole country is threaded with railroads, telephone and telegraph lines, and the people have and use a common language, and the mail carries letters and newspapers in four days from one side of the continent to the other, and the whole United States is composed of one contiguous body of land.

Make a contrast between that and the geographical conditions in the Philippine Islands, and the length of time it requires for a letter to go from one island to another, and the many different dialects and languages spoken, and the percentage of people who read the newspaper.

This court is not dealing with conditions that exist in the United States, or in Great Britain, or in Spain, but it is dealing with the economic and physical

conditions that exist in the Philippine Islands.

In legal effect, the majority opinion sustains the “power of sale” in the mortgage in question, because it would facilitate the loaning of money in the Philippine Islands. We concede that, because it gives the money lender an undue and superior advantage over the borrower, and authorizes him, through drastic and summary methods, to divest the mortgagor of his title and obtain possession of his property. Such an argument is one of the strongest reasons why the legality of such a “power of sale” should not be sustained in the Philippine Islands.

Section 185 of the Corporation Law, under the heading of Building and Loan Corporations, says:

> “Whenever a borrowing stockholder shall be three months in arrears in the payment of his dues on stock or the interest or premium or installments of premium on any loan, the whole loan, at the option of the board of directors, shall become due and payable and the board may proceed by action to enforce collection upon the securities held by the corporation.”

Hence, we have this situation, the plaintiff is a corporation organized under a law which points out the method which it shall pursue under the statute against a person who is delinquent in his payments, and it might well be contended that its powers and duties are confined and limited to its corporate powers denned in the legislative act by which it is created.

Again, as was done in this case, it enables the mortgagee to purchase and acquire the land at its own price. With the land in another and distant island and the property sold without any notice, except the one published in a newspaper, no one but the mortgagee would have any knowledge of the sale, of the character or the value of the land. Hence, the mortgagee, as the only bidder, would acquire the land, as the plaintiff did here, for about thirty-five per cent of its actual value.

But the majority opinion says that the proceedings were founded upon a contract between the parties, and for such reason they are valid and

enforceable. That would be true if both parties dealt at arm's length, knew and realized what they were doing and the legal force and effect of the contract.

The harshness of such a proceeding is forcibly illustrated in the instant case. The original mortgage was executed on the 3d day of October, 1919, was for P10,800, and the property was advertised and sold in October, 1922, without any actual notice to the mortgagor, and it was bid in by the plaintiff for P12,445.18.

It is a matter of common knowledge that such loans are made upon about one-third of the appraised value of the land. Hence, we have this situation. Property, lying in the Province of Occidental Negros, was advertised for sale only in a newspaper in Manila and was sold by the plaintiff to the plaintiff, and a deed was made by the plaintiff to the plaintiff, all without the knowledge of the mortgagor, and the plaintiff was the only interested person who knew about the sale, and the lands, which were appraised at over P30,000, were sold for P12,445.18.

In the case of National Bank *vs*. Manila Oil Refining & By-Products Co. (43 Phil., 444), it was held by this court that a "judgment note" was void as against public policy. In that case the parties specifically contracted that upon certain conditions the holder of the note should have judgment against the maker of the note. Upon legal principle, that case is in conflict with the majority opinion. Upon the question of the right of the parties to make a contract ousting the jurisdiction of the courts, 7 R. C. L., p. 1046, says.

> "*Ouster of jurisdiction by act of parties*.—Both in England and the United States, it has been decided in a great number of cases, and conceded in an equally large number of other cases, to be settled law that the jurisdiction of the courts cannot be ousted by the private agreements of individuals made in advance; that private persons are incompetent to make any such binding contracts; and that all such contracts are illegal and void as against public policy. * * * Courts are created by virtue of the constitution, and inhere in our body politic as a necessary part of our system of government, and it is not competent for any one, by contract or otherwise, to deprive himself of their

> protection. The right to appeal to the courts for the redress of wrongs is one of those rights which are in their nature under our constitution inalienable and cannot be thrown off or bartered away."

Assuming that under proper restrictions a "power of sale" is valid, equity and good conscience require that a "power of sale" should be fair and reasonable, and that one, which is unconscionable, is null and void as against public policy. Applying that test here, you have this situation. Aniceta Ardosa was a resident of Iloilo and owned valuable lands in Occidental Negros upon which she obtained a loan from the plaintiff for P10,800, and for three years complied with the provisions of the mortgage. Founded upon a resolution of the board of directors of the plaintiff, of which it is not claimed that she ever had any notice, the principal debt was declared due and owing, the property was advertised for a sale for a period of three weeks in this City of Manila, and sold to the plaintiff for P12,445.18. Thirty days after the sale, a deed for the land was made from the plaintiff to the plaintiff.

In the opinion of the
writer, such a proceeding is unconscionable, and, when applied to the local and economic conditions existing in the Philippine Islands, is void as against public policy, and never ought to be sanctioned by any court.

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