1 Phil. 125

[G.R. No. 65. February 13, 1902]

THE UNITED STATES, COMPLAINANT AND APPELLANT, VS. JOSE REGALADO Y SANTA ANA, DEFENDANT AND APPELLEE.

D E C I S I O N

TORRES, J.:

For failure to pay the sum of 3,929 pesos and 60 cents, the amount specified in a promissory note executed by Don Jose Regalado y Santa Ana in favor of Messrs. Luchsinger & Co., the latter commenced an executive action in 1893. A preliminary attachment was ordered and was levied upon, among other properties, a warehouse with galvanized iron roof together with the land upon which it was located situated on the sea wall of the city of Iloilo. Nevertheless this attachment was not recorded in the register of property. When the decree of sale of the property was made in the executive action the order could not be carried out in spite of the fact that this land and warehouse had, by order of the court, been put in the possession of Don Juan Yncher as receiver or depositary, because the defendant had sold the attached property in 1900, as unincumbered for the sum of 15,000 pesos to his son, Don Pedro Regalado. Both the vendor and the purchaser of the property knew that it had been attached by an order made in the executive action which was still pending. This transfer was made without the consent of the plaintiff's creditors and without the authorization of the court or the knowledge of the receiver, and upon these grounds attorney Jose Ma, Gay, in the name of the creditors whose interests were supposed to be defrauded, filed a complaint against the defendant charging him with the crime of swindling (*estafa*).

The failure to record in the register of property the attachment levied upon the property belonging to the defendant, Don Jose Regalado y Santa Ana, is a defect so vital that it prevents us from holding that the crime of swindling has been committed by the disposal of the property in the sale made by the defendant to his son, Don Pedro Regalado. Such recordation is obligatory, not optional, and does not depend upon the discretion of the court or the will of the plaintiff in view of the imperative character of the rule laid down in article

1435 of the Code of Civil Procedure, which makes express reference to a preceding article, N6. 1391, which provides that the attachment of real property shall be effected only by a writ addressed to the registrar directing that the attachment be opportunely inscribed in the register of property in accordance with the prevailing provisions of the law.

It follows, therefore, that no incumbrance exists. As a matter of law there can be no levy upon real property—although it was otherwise before the enactment for these Islands of the Code of Civil Procedure which went into effect on the 12th of November, 1888—unless the attachment appears inscribed in the register of property in the manner provided by article 43 of the Mortgage Law. The mere issuance of the attachment made by virtue of a judicial order in an executive action or in proceedings for a preventive attachment, or in proceedings for the execution of a judgment, is not sufficient to affect any property with an incumbrance or subject it to the claim sued upon. For such purpose it is essential that the inscription be made.

For the reasons given it must be held that the fact that the defendant, Don Jose Regalado, conveyed the said warehouse together with the lot on which it stands, which were attached at the instance of Luchsinger & Co., does not constitute the crime of swindling, because in spite of the order of attachment there was no legal or effective incumbrance upon said real property for the reason that this attachment wag not inscribed in the register of property. This is an essential requisite, failing which the property can not be deemed incumbered and the defendant who sold the same to a third person can not be deemed included within the terms of article 537, paragraph 2 of the Penal Code.

Therefore, in our opinion the judgment appealed from should be affirmed with the costs *de oficio*. It is so ordered.

Arellano, C. J., Cooper, Willard, and *Ladd, JJ.,* concur.

Mapa, J., did not sit in this case.

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