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[G.R. No. 1178. November 17, 1903]

CARMEN OLIVARES Y TELLO, PLAINTIFF AND APPELLEE, VS. HOSKYN & CO. ET AL., DEFENDANTS AND APPELLANTS.

D E C I S I O N

WILLARD, J.:

Don Eduardo Olivares on March 30, 1897, was the recorded owner of the real estate in question. On January 31, 1900, he transferred it to one Fleming, who, on March 8, 1900, reconveyed it to Olivares, reserving a mortgage Hen thereon for 6,500 pesos. This deed was recorded on October 22,1900. Qn March 31,1900, Olivares executed to the plaintiff a public instrument, which the court below held to be a mortgage on the property in favor of the plaintiff for 6,000 pesos. This instrument was never recorded. On November 22,1900, the defendants commenced an executive action against Eduardo Olivares to recover 2,958.52 pesos, the amount due on a promissory note. In this action the real estate in question was seized, but the writ of execution was never recorded in the office of the register of property. The defendants having, on February 15, 1901, obtained a judgment of remate, were proceeding to the sale of he property when the plaintiff presented a complaint in intervention, claiming a better right than the defendants to the proceeds of the sale. The court below so held and postponed the payment of the defendants' debt to that of the plaintiff. The defendants excepted to the judgment and have brought the case here for review.

The first, third, and fourth assignments of error are based upon the proposition that the document of March 31, 1900, in favor of the plaintiff, was not a mortgage, because it had never been recorded and that it should never have been received in evidence, the appellant citing as infringed articles 23 and 389 of the Mortgage Law and article 1875 of the Civil Code.

For the purposes of this appeal, we may assume that this document did not constitute a

mortgage. It, however, properly construed, did evidence, we think, a debt in favor of the plaintiff and against Don Eduardo for 6,000 pesos. It is somewhat contradictory in its terms, but it recites that he had received from the plaintiff 6,000 pesos to manage or handle; that he had invested it in this building, and that he had executed a private document in which he declared that the property belonged to the plaintiff. He then creates this mortgage to secure the rights stated in the former obligation. It is added that this estate shall respond for the payment of this mortgage and interest thereon, and it creates an additional mortgage of 600 pesos as security for costs.

He had received this money to administer. He had taken the title to the property in his own hands and had created an incumbrance thereon of 6,500 pesos, which was prior to the claim of the plaintiff. According to the findings of the court, which in this respect are contrary to the recitals of the instrument, the money of the plaintiff was used only to aid in the construction of buildings on the lot which was bought with his own money, he thereby apparently becoming a debtor for the amount so used. In view of these and other facts, we think that his intention by this instrument was to acknowledge a personal liability for 6,000 pesos and to secure it by a mortgage on the land.

Neither of the parties had any recorded title to or interest in the land in question. Their respective rights, therefore, are not determined by articles 1923 and 1927 of the Civil Code, but by articles 1924 and 1929 of the same Code. The debt of the plaintiff was evidenced by a public document dated March 31, 1900. The debt of the defendants was evidenced by final judgment dated February 15,1901. By the terms of article 1924, paragraph 3, the plaintiff is entitled to a preference over the defendants.

Had the conflicting claims of these parties been presented in a proceeding in bankruptcy, there is no question but that the above result would have been reached. It is said, however, that article 1924 is applicable only to such cases and to the settlement of the estates of deceased persons, and can not be applied to a suit like this between two persons as to their rights of preference in the distribution of the proceeds of the sale of a specific piece of real estate. There is nothing in the Spanish law of civil procedure, under which this proceeding was commenced, to indicate that the intervention by a creditor could not be made, whether he had any lien on the property in question or not. A general creditor who claimed that in the distribution of any of the property of the common debtor he had a better right than the plaintiff in the executive action could intervene therein. And the supreme court of Spain, in allowing such intervention, has applied, for the purpose of determining the priorities, the provisions of article 1924 and the provisions of the *Partidas*, which were substantially the

same. (Judgment of October 6, 1886, and judgment of January 4,1894.)

In the case of Martinez *vs.* Holliday, Wise & Co. (1 Off. Gaz., 526)[1] we adopted the rule thus laid down and applied the provisions of article 1924 in a case which can not be distinguished from this one.

We have said that the levy in question was not provisionally inscribed in the registry of property. We construe the findings of the court as so stating. If, however, that construction is wrong the result would be the same. (Martinez *vs.* Holliday, Wise & Co., *supra*.)

The decision states that this intervention was one of ownership. In the same decision, however, it considered it is an intervention of preference in payment. The second assignment of error can not, therefore, be sustained, as the judge below' did not receive the document of March 31, 1900, to prove ownership, but only to prove such preference. The judgment of the court below is affirmed with the costs of this instance against the appellant, and, upon the expiration of forty days, reckoned from the date of this decision, judgment shall be rendered accordingly and the case is returned to the court below for execution.

Arellano, C. J., Torres, Cooper, Mapa, and *McDonough,JJ.,* concur.

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

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[1] 1 Phil. Rep., 194.

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