FONSEKA *v.* PEIRIS *et al.*

D. C., Kalutara, 2,350.

Hypothecary action—Action by mortgagee against mortgagor of land and parties in possession.

The plaintiff, as mortgagee, sued the mortgagor on his bond, and joined in the same plaint the second, third and fourth defendants as parties in possession. The second defendant claimed under, and third and fourth defendants adversely to, the mortgagor.

Held, that such an action was maintainable, and that a mortgagee who seeks a decree rendering the mortgaged property specially bound and executable for the debt is entitled to sue a party in possession of the land and claiming to be the owner of it, even though he denies the right of the mortgagor to hypothecate it.

THE plaintiff on a mortgage bond dated 12th January, 1896, sued the first defendant as mortgagor, and the second third and fourth defendants were joined as parties to the

action for the reasons stated in paragraph 4 of the plaint, viz.:—

"The second defendant subsequent to the aforesaid mortgage is now in possession of the said portion of land, excluding a small portion on the north, to wit, the portions A and B, and the third and fourth defendants are now in the possession of the said small portion on the north marked A and B, claiming the same adversely to the first and second defendants, and they have thus rendered themselves liable to be sued in this action in order that the plaintiff may obtain a valid and effectual decree declaring the lands and premises mortgaged as aforesaid bound and executable for the plaintiff's debt."

The plaint prayed that the first defendant be ordered to pay plaintiff the debt with interest, and that the mortgaged land be declared especially bound and executable for the said debt.

The first defendant, the mortgagor, filed no answer.

The second defendant in his answer claimed title to the land by purchase at a Fiscal's sale on 28th June, 1900, but pleaded that he had no objection to the land being sold for realizing the money due on the bond, and that the sum realized in excess of plaintiff's claim should be paid to him.

The third and fourth defendants pleaded that the plaint disclosed no cause of action against them, and that they were improperly joined. They also specially denied that they were in possession of land belonging to the first or second defendant. For a further answer they claimed title to portions A and B by deed No. 13,596, dated 21st November, 1900.

At the trial, the issue of law was first discussed, viz., whether the action was maintainable against the third and fourth defendants.

The learned District Judge decided in the affirmative, and proceeded to try the following issue:—Was plaintiff-mortgagor entitled to the portions marked A, B, C and Z, excluding X and the portion coloured yellow as shown in plan filed?

The counsel for the third and fourth defendants declined to take part in the trial of this issue, and judgment was entered for plaintiff against all the defendants, and costs of the plaintiff and second defendant were ordered to be paid by the third and fourth defendants. The second defendant was declared entitled to the sum realized in excess of plaintiff's claim and costs.

The third and fourth defendants appealed.

De Mel, for appellants.—The plaintiff has misconceived his action. Even if the action is maintainable, we have been wrongly joined. This is a personal action against the mortgagor and an

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hypothecary action against the land. It is only possible to combine the personal and hypothecary actions when the mortgagor is in possession at the date of action. The plaint admits that the mortgagor is not in possession, and therefore the action fails. [Middleton, J.—What action should the plaintiff bring?] He could bring a personal action against the first defendant, or, what is more appropriate, proceed by the hypothecary action against the first and second defendants. The Civil Procedure Code requires the mortgagor or his legal representative to be always joined in the hypothecary action. [Middleton, J.—What is the cause of action against you?] None whatever. Assuming that the present action is proper, plaintiff has no cause of action against the third and fourth defendants. On the bond we are admittedly not liable. As regards the land mortgaged, plaintiff would have had a cause of action if we derived title through the mortgagor, and even then, only if title passed subsequent to the mortgage. But we claim adversely to the mortgagor. If any one has a cause of action against us, it is the second defendant. [Wendt, J.—Of what avail will the hypothecary decree be, if you dispute title and do not yield possession?] That question does not concern us. It may be that second defendant can bring an action *rei vindicatio* or sue us in ejectment. Perhaps the plaintiff can proceed against us, after obtaining an ordinary mortgage decree, to have the land sold under his writ. In a hypothecary action it is irregular to raise the question of title (*7 N. L. R. 10*); much less in an action on a bond.

Dornhorst, K.C. (*Schneider and Batuwantudawe* with him), for plaintiff, respondent.—The present action is quite proper. Under the old law two actions were competent: personal action against the mortgagor for the debt and the *actio quasi Serviana*, commonly called the hypothecary action, to have the land sold (*Voet, 20, 4, 3*). Chapter XLVI. of the Code altered that procedure, and the mortgagee must now join all parties in possession with the mortgagor (*4 N. L. R. 42*). If my learned friend's contention be upheld, when a mortgagor is sued he has only to put a stranger in possession, and the mortgagee cannot reach him. Of course the mortgagee can sue third parties in possession claiming under, or adverse to, the mortgagor by a real action like this, as was held in a Full Court case reported in *3 S. C. C. 99*. Though Justice Clarence differs, he is careful to say that he agrees that a real action is competent to the mortgagee against any party in possession. This principle was adopted in a case reported in *8 S. C. C. 121*. This is an *actio quasi Serviana*, whereby creditors follow up the pledges and hypothecs bound to them, expressly, tacitly, or by law, when

satisfaction is not made to them by the debtor or by those who are in possession of the subjects mortgaged (*Voet 20, 4, 1*). This action may be prosecuted not only against the debtor himself and against a person who has mortgaged his own property on behalf of a debtor, but also against any third party in possession, whether he be a *bonâ fide* or *malâ fide* possessor (*Voet, 20, 4, 2*). If the third and fourth defendants were not joined, of what avail would our decree be? All necessary parties must be joined (*7 N. L. R. 10*). These defendants are all joined in order to obtain a valid and effectual decree declaring the land mortgaged bound and executable.

De Mel, in reply.—The authorities cited are not relevant. They might have been relevant if, first, the appellants claimed title through the mortgagor; secondly, if plaintiff had already a mortgage decree; thirdly, if this was only an hypothecary action; and lastly, if mortgagor was in possession. Our claim is not merely *bonâ fide*. It is expressly averred in the plaint that we are in actual possession, and that we claim by a title adverse to the mortgagor. In an incidental action like this, questions of title cannot be decided. [Wendt, J.—How can the plaintiff reach you?] He must proceed by an hypothecary action against the first and second defendants. Till he obtains such a decree, he has no cause of action against us (*8 S. C. C. 121*). Or, the second defendant can sue us in ejectment as in the case reported in *3 S. C. C. 99*. The passages quoted from *Voet* for the respondent refer clearly to the right of a creditor to pursue the debtor, or any one to whom he has transferred by any kind of alienation, whether *bonâ or malâ fide* (*Voet, 20, 4, 2*). [Wendt, J.—Section 640 of Code altered that procedure.] Yes, to this extent. Before the Code—when the mortgagor was out of possession—two remedies were open to the creditor, the personal remedy against the mortgagor for the debt, or the hypothecary action against the party in possession. Section 640 requires that in the latter case the mortgagor should be joined. Under the old law the plaintiff could bring an hypothecary action against the second defendant. Now he cannot maintain the hypothecary action against the second defendant without joining the first defendant (*4 N. L. R. 42*). But it is only when the mortgagor is in possession that both the personal and hypothecary actions can be brought simultaneously and joined in one libel (*Voet, 20, 4, 3*). Here the mortgagor is admittedly not in possession. Therefore, granting that we are a necessary party, the action fails. So that the second defendant can also take objection to the form of action. But it is to his interest not to do so, for it will save him the necessity of bringing a fresh action to vindicate title between him or the appellants.

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20th July, 1904. WENDT, J.—

We think this appeal should be dismissed. The only question argued is, as to whether the plaintiff had a right to join the appellants as parties to the action, they being alleged in the plaint to be in possession of a portion of the mortgaged land adversely to the mortgagor.

The authorities to which we have been referred by the respondent's counsel have satisfied us that a mortgagee, who seeks a decree rendering the mortgaged property especially bound and executable for the debt, is entitled to sue a party in possession of the land and claiming to be the owner of it, even although he denies the right of the mortgagor to hypothecate it. That of course is a right which the plaintiff must establish in order to secure his decree.

It struck us that perhaps the appellants might be in a position to ask, on terms, for the indulgence of a new trial, but it would seem that they are not in that position. They filed no list of witnesses against the trial, and apparently they have no evidence to support their claim to the land.

MIDDLETON, J.—I agree.