Present: De Sampayo J.

1917.

WIJESEKERA *v.* RAWAL.

26—C. R. Chilaw, 15,704.

Mortgage—Can mortgagee sell other property before selling mortgaged property?

Even where a decree on a mortgage merely declares the property bound and executable, and does not specially direct the mortgaged property to be sold in default of payment of the debt, the creditor should first realize the mortgage, and can resort to the other property only for any deficiency, unless the debtor consents otherwise.

THE facts are set out in the judgment.

Asserappa, for plaintiff, appellant.

Sansoni, for defendant, respondent.

Cur. adv. vult.

February 28, 1917. DE SAMPAYO J.—

This appeal raises an important and, so far as I know, new point in the law of mortgage. The original plaintiff, who sued on a mortgage bond, assigned the decree to the appellant, who has been substituted as plaintiff on the record. On the application of the appellant a writ of execution was issued to the Fiscal, but the appellant subsequently moved that the Fiscal be directed to sell property other than the specially mortgaged property. This motion was opposed by the second defendant, who had granted the mortgage, and the Commissioner disallowed it.

It is contended on behalf of the appellant that he is entitled to sell the property of the judgment-debtor in any order he may choose. This no doubt is so in the case of an ordinary decree. It is also true

that, where several properties are mortgaged, the mortgagee may well sell these properties in any order he pleases. (*Wickremesinghe v. Punchi Nona.*[1]) But has he a similar right to sell unmortgaged property before exhausting the mortgaged property? No local decision on this question has been cited to me, nor can I find any. The argument on behalf of the appellant is that, as the decree for the realization of a mortgage includes also a decree for money, the ordinary incidents of a decree for money arise. It seems to me, however, that there is a broad distinction between the two cases in regard to the mode of execution, and that the question must be decided upon other considerations. There would have been no difficulty if the decree in this case had followed the form which has been generally adopted since the enactment of the Civil Procedure Code, for then the decree would have directed that in default of payment of the debt the mortgaged property should be sold and the proceeds applied in and towards the payment of the amount of the debt, and in the event of such proceeds not being sufficient for the payment in full of such amount, the judgment-debtor should pay the deficiency, with interest, until realization. If a mortgage decree is in that form, I think that the mortgaged property must first be realized, unless, perhaps, there is some good reason to the contrary, such as lawful claims of third parties, in which case, no doubt, the Court will give further directions. But the decree in this case is in the well-known form of decree whereby the mortgaged property is declared specially bound and executable, and contains no particular directions as to its sale. This, I may say, is the proper form of mortgage decree under the Roman-Dutch law, which, subject to certain modifications irrelevant to the present case, is still applicable here, and *Mohotte v. Dissanayake*,[2] so far from considering that form of mortgage decree to be no longer applicable, held that an order for sale in terms of section 201 of the Civil Procedure Code was a substantial compliance with it. The question, therefore, is whether it is open to the mortgagee, in the first instance, to seize and sell other property than the property mortgaged, and by the decree declared specially bound and executable. *Voet 20, 1, 15* discusses the case of a creditor who has a special mortgage of some property, and also a general mortgage of the other property of the debtor, and says that the creditor cannot, without first realizing the special mortgage, resort to the other property as against creditors, to whom the latter property has been subsequently bound by special mortgage. But he adds: "Plainly, if the other creditors do not oppose, this liberty of first following up the goods generally mortgaged is not to be denied to the creditor, however much the debtor may object and desire that the goods specially mortgaged be sold." (*Berwick's translation, 2nd ed., p. 292.*) This, however, appears to be limited to a case where there is both a special and a general mortgage, and comes

[1] *(1912) 2 C. A. C. 43.*

[2] *(1910) 13 N. L. R. 70.*

1917.

DE SAMPAYO J.

Wijesekera v. Rawal

within the principle that, where there are several things mortgaged, the creditor is entitled to proceed first against any one of them in his discretion. *Code 8, 28, 9*, which deals with the case of a special mortgage without reference to any other mortgage, runs thus: "*Quæ specialiter vobis obligata sunt, debitoribus detrectantibus solutionem, bona fide debetis et solemniter vendere. Ita enim apparebit, an ex pretio pignoris debito satisfieri possit. Quodsi quid deerit, non prohibemini cetera etiam bona jure conventionis consequi.*" The law so laid down seems to me to provide generally that the mortgaged property should first be discussed before resorting to the other property of the debtor. The rule of practice in Holland appears to have been in accordance with this view. *Nathan, vol. 4, art. 2238*, citing *Van der Linden's Judicial Practice, 3, 6, 11, and 12*, says: "If the judgment-debtor has no money wherewith to pay, he may satisfy the judgment by pointing out goods, movable or immovable, wherewith the writ may be satisfied, provided that on a cursory inspection the same shall appear sufficient for the purpose. Where, however, a judgment declares as executable goods specially hypothecated to secure the creditor's claim, the sheriff must first of all take such goods in execution without requiring the debtor to point out disposable goods, and he may proceed to sell the goods so hypothecated." Nathan here deals with the practice in South Africa at the present day. *Van Zyl's Judicial Practice 207* is to the same effect, for it is there said: "By the Roman law animals and movables had first to be exhausted before any recourse could be had to the sale of landed property. It is the same with us when the plaintiff has no hypothec or pledge. But when property has been specially mortgaged, that property must first be sold in execution before any other can be taken, and only for the deficiency can other property be taken." From all this the interesting fact emerges that the form of mortgage decree, generally adopted since the Civil Procedure Code, has introduced nothing new, but has substantially reproduced the Roman-Dutch procedure. In this state of authorities it must, I think, be held, in the absence of any local decision or rule of practice to the contrary, that, even where the decree on a mortgage merely declares the property bound and executable, and does not specially direct the mortgaged property to be sold in default of payment of the debt, the creditor should first realize the mortgage, and can resort to the other property only for any deficiency, unless, of course, the debtor consents otherwise.

For these reasons the appeal is dismissed, with costs.

Appeal dismissed.