# Notarial enforcement of pledges. Is Article 1872 of the Civil Code mandatory? In what sense?

## Supreme Court Judgment no. 1992/2025 of 22 December (ECLI:ES:TS:2025:6067)

Although in the context of repealed law, the Supreme Court 'shields' Article 1872 of the Civil Code and does not allow direct awards to the enforcing creditor, unless they entail the extinguishment of the entire debt.

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We analyse a civil liability claim against a notary who had authenticated an award of pledged property under the terms, in principle, of Article 1872 of the Civil Code (CC). The Supreme Court reaffirms the notary's liability. The Madrid Provincial Court *reasoned that the procedure under Article 1872 CC is merely optional, but if chosen and if the creditor awards himself the auctioned property, an acknowledgement letter for receipt of payment of the entire debt must be provided.* Therefore, it took the view that the defendant had not exercised due care in authenticating the deed of 13 May 2010 and in, as if supplementing Article 1872 CC, allowing it to be recorded that in the event that the shares were awarded to the creditor for the initial appraised value (€200,000), the creditor could still claim the rest of the debt.

It should be noted that, pursuant to Article 1872 CC, "[t]he creditor whose claim has not been satisfied in a timely manner may proceed before a notary to dispose of the pledged

property. This disposal shall be carried out by public auction, summoning, as appropriate, the pledgor and the pledgee. If the pledged property is not sold at the first auction, a second auction may be held with the same formalities; and if this also fails, the creditor may take ownership of the pledged property. In this case, the creditor is required to provide an acknowledgement letter for receipt of payment of the entire debt".

*Article 1872 of the Civil Code is not meant to be mandatory, but rather to prevent unjust enrichment of the creditor*

It should be noted that, at the time, the rules on notarial auctions in the 2015 Non-Contentious (In re) Proceedings Act (LJV) did not apply, nor, of course, did the new regulations on judicial auctions introduced by Act 1/2025. The issue was important because the previously-in-force Article 647(2) of the Civil Procedure Act (LEC) only allowed the creditor to take part in the auction if there were other bidders, and the appellant notary considers that this rule cannot be an obstacle to the appeal because the aim is to prevent the award of the property at a derisory price in the absence of bidders, and, at the same time, Article 651 of the same previously-in-force law allows the creditor to award the himself the property in the event of an auction without bidders for 30% of the appraised value or for the amount owed to him for any reason, that is, without the need to issue an acknowledgement letter for receipt of payment of the entire debt.

The reasoning of the Supreme Court is not transparent. Throughout its discourse, there is a radical uncertainty as to whether, *once the auction and enforcement have been expressly requested in accordance with Article 1872 CC,* it is "no longer possible to deviate from it", or whether "certain agreements" (but it does not say which ones) are admissible within Article 1872 CC, or whether the legal procedure is mandatory in all notarial enforcements of pledges that are not subject to special rules, without prejudice to the creditor's right to seek judicial enforcement. The various formulations of the idea by the Supreme Court do not clarify the issue, which is fundamental, nor do the references to previous case law, which are inconclusive on this point.

If the first option is valid, the problem is purely formalistic. It will suffice, and the parties would do well, to agree on *another* enforcement procedure and not refer in any way to Article 1872 CC; for example, by adopting the new regulation on notarial auctions, agreeing that the enforcing creditor may bid in any auction on the same terms as it would do judicially in accordance with Article 647(2) of the current Civil Procedure Law ("The enforcing creditor may take part in the auction, even if there are no other bidders, without having to deposit any amount. He must do so in accordance with the terms of Articles 650 and 670 if he intends to award himself the property. Once the auction is over, he may not improve on the final price offered by the highest bidder. If there have been no bids, he may not request the award of the property either"). The enforcing creditor bids with his claim using a benchmark figure of the appraised value, for example, between 50% and 30% (Art. 650 LEC) of the valuation given

to the property in the deed of sale; lastly, he acquires it through an out-of-court sale and does not give an acknowledgement letter for receipt of full payment, because the difference remains unpaid. The Supreme Court suggests that, at the time when this rule did not apply, the creditor could only attend the auction if there were other bidders, and it seems to suggest then - but does not say so - that any private agreement for notarial enforcement could not overcome this barrier.

However, it is clear that today this barrier can be overcome, and it is sufficient for the parties to agree on a notarial enforcement procedure that replicates the provisions of the current Articles 647 et seq. LEC, because it cannot be consistently argued that what is valid in judicial enforcement is not valid in notarial enforcement. At least, if it is agreed upon. And how could it not be possible to award under a *pactum marcianum* if this procedure is admissible throughout the scheme of security?

It is also absurd that an agreement of this kind cannot be carried out in the territory of national civil law and yet is valid in Catalonia, Article 569-20.3 of the Civil Code of Catalonia ("Pledgees and pledgors may agree that either of them or a third party may sell the pledged property. This agreement, which must be formalised in a public instrument, must contain the criteria for the sale and the deadline by which it must be completed, which may not exceed six months, and must be reliably notified to the known holders of rights in rem over the property, so that, if they are interested, they may pay the debt and place themselves, by way of subrogation, in the pledgees' position"). It would then suffice for the parties to agree to submit to Catalan law or, at least, to the Catalan procedure of Article 569-20, which is governed by the *lex fori* of the notary authenticating the enforcement. This is because Article 1872 CC is not a substantive rule of the *lex rei sitae*, but a procedural rule that follows the place of the forum of enforcement.

In the lawsuit, the appellant argues with the Supreme Court as to whether he actually bid in the third (?) auction. The Supreme Court holds that there was no bid offered by the enforcing creditor, and it is most likely that the Supreme Court is correct. However, it is also unclear whether the Supreme Court understands whether or not he could have bid and retained the award only for part of the appraised value.

Consequently, the past is no longer important, but rather how to proceed from now on. Practitioners cannot simply refer to the procedure in Article 1872 CC, as is currently the case, without agreeing on any clause. And the clause agreed upon must comply, for greater certainty, with the provisions of the new judicial enforcement procedure. It will be necessary to agree on an appraised value, which is not required in Article 1872 CC, because otherwise the award would be similar to a 'forfeiture proviso' *(pactum commissorium)*, which the Civil Code neutralised with the drastic imposition of extinguishment of the debt in its entirety.