

**EL BANCO ESPAÑOL FILIPINO, PLAINTIFF AND APPELLEE, VS.
VICENTE PALANCA, ADMINISTRATOR OF THE ESTATE OF
ENGRACIO PALANCA TANQUINYENG, DEFENDANT AND APPELLANT.**

G.R. No. L-11390. March 26, 1918

Ponente: STREET, J.

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STREET, J.:

This action was instituted upon March 31, 1908, by "El Banco Español-Filipino" to foreclose a mortgage upon various parcels of real property situated in the city of Manila. The mortgage in question is dated June 16, 1906, and was executed by the original defendant herein, Engracio Palanca Tanquinyeng y Limquingco, as security for a debt owing by him to the bank. Upon March 31, 1906, the debt amounted to P218,294.10 and was drawing interest at the rate of 8 per centum per annum, payable at the end of each quarter. It appears that the parties to this mortgage at that time estimated the value of the property in question at P292,558, which was about P75,000 in excess of the indebtedness. After the execution of this instrument by the mortgagor, he returned to China, which appears to have been his native country; and he there died, upon January 29, 1910, without again returning to the Philippine Islands.

As the defendant was a nonresident at the time of the institution of the present action, it was necessary for the plaintiff in the foreclosure proceeding to give notice to the defendant by publication pursuant to section 399 of the Code of Civil Procedure. An order for publication was accordingly obtained from the court, and publication was made in due form in a newspaper of the city of Manila. At the same time that the order of the court was entered directing that publication should be made in a newspaper, the court further directed that the clerk of the court should deposit in the post office in a stamped envelope a copy of the summons and complaint directed to the defendant at his last place of residence, to wit, the city of Amoy, in the Empire of China. This order was made pursuant to the following provision contained in section 399 of the Code of Civil Procedure:

"In case of publication, where the residence of a nonresident or absent defendant is known, the judge must direct a copy of the summons and complaint to be forthwith, deposited by the clerk in the post-office, postage prepaid, directed to the person to be served, at his place of residence."

Whether the clerk complied with this order, does not affirmatively appear. There is, however, among the papers pertaining to this case, an affidavit, dated April 4, 1908, signed by Bernardo Chan y Garcia, an employee of the attorneys for the bank, showing that upon that date he had deposited in the Manila post-office a registered letter, addressed to Engracio Palanca Tanquinyeng, at Manila, containing copies of the complaint, the plaintiff's affidavit, the summons, and the order of the court directing publication as aforesaid. It appears from the postmaster's receipt that Bernardo probably used an envelope obtained from the clerk's office, as the receipt purports to show that the letter emanated from said office.

The cause proceeded in usual course in the Court of First Instance; and the defendant not having appeared, judgment was, upon July 2, 1908, taken against him by default. Upon July 3, 1908, a decision was rendered in

favor of the plaintiff. In this decision it was recited that publication had been properly made in a periodical, but nothing was said about notice having been given by mail. The court, upon this occasion, found that the indebtedness of the defendant amounted to P249,355.32, with interest from March 31, 1908. Accordingly it was ordered that the defendant should, on or before July 6, 1908, deliver said amount to the clerk of the court to be applied to the satisfaction of the judgment, and it was declared that in case of the failure of the defendant to satisfy the judgment within such period, the mortgage property located in the city of Manila should be exposed to public sale. The payment contemplated in said order was never made; and upon July 8, 1908, the court ordered the sale of the property. The sale took place upon July 30, 1908, and the property was bought in by the bank for the sum of P110,200. Upon August 7, 1908, this sale was confirmed by the court.

About seven years after the confirmation of this sale, or to be precise, upon June 25, 1915, a motion was made in this cause by Vicente Palanca, as administrator of the estate of the original defendant, Engracio Palanca Tanquinyeng y Limquingco, wherein the applicant requested the court to set aside the order of default of July 2, 1908, and the judgment rendered upon July 3, 1908, and to vacate all the proceedings subsequent thereto. The basis of this application, as set forth in the motion itself, was that the order of default and the judgment rendered thereon were void because the court had never acquired jurisdiction over the defendant or over the subject of the action.

At the hearing in the court below the application to vacate the judgment was denied, and from this action of the court Vicente Palanca, as administrator of the estate of the original defendant, has appealed. No other feature of the case is here under consideration than such as is related to the action of the court upon said motion.

The case presents several questions of importance, which will be discussed in what appears to be the sequence of most convenient development. In the first part of this opinion we shall, for the purpose of argument, assume that the clerk of the Court of First Instance did not obey the order of the court in the matter of mailing the papers which he was directed to send to the defendant in Amoy; and in this connection we shall consider, first, whether the court acquired the necessary jurisdiction to enable it to proceed with the foreclosure of the mortgage and, secondly, whether those proceedings were conducted in such manner as to constitute due process of law.

The word "jurisdiction," as applied to the faculty of exercising judicial power, is used in several different, though related, senses since it may have reference (1) to the authority of the court to entertain a particular kind of action or to administer a particular kind of relief, or it may refer to the power of the court over the parties, or (2) over the property which is the subject to the litigation.

The sovereign authority which organizes a court determines the nature and extent of its powers in general and thus fixes its competency or jurisdiction with reference to the actions which it may entertain and the relief it may grant.

Jurisdiction over the person is acquired by the voluntary appearance of a party in court and his submission to its authority, or it is acquired by the coercive power of legal process exerted over the person.

Jurisdiction over the property which is the subject of litigation may result either from a seizure of the property under legal process, whereby it is brought into the actual custody of the law, or it may result from the institution of legal proceedings wherein, under special provisions of law, the power of the court over the property is recognized and made effective. In the latter case the property, though at all times within the potential power of the court, may never be taken into actual custody at all. An illustration of the jurisdiction acquired by actual seizure is found in attachment proceedings, where the property is seized at the beginning of the action, or some subsequent stage of its progress, and held to abide the final event of the litigation. An illustration of what we term potential jurisdiction over the res, is found in the proceeding to register the title of land under our system for the registration of land. Here the court, without taking actual physical control over the property assumes, at the

instance of some person claiming to be owner, to exercise a jurisdiction in rem over the property and to adjudicate the title in favor of the petitioner against all the world.

In the terminology of American law the action to foreclose a mortgage is said to be a proceeding quasi in rem, by which is expressed, the idea that while it is not strictly speaking an action in rem yet it partakes of that nature and is substantially such. The expression "action in rem" is, in its narrow application, used only with reference to certain proceedings in courts of admiralty wherein the property alone is treated as responsible for the claim or obligation upon which the proceedings are based. The action quasi in rem differs from the true action in rem in the circumstance that in the former an individual is named as defendant, and the purpose of the proceeding is to subject his interest therein to the obligation or lien burdening the property. All proceedings having for their sole object the sale or other disposition of the property of the defendant, whether by attachment, foreclosure, or other form of remedy, are in a general way thus designated. The judgment entered in these proceedings is conclusive only between the parties.

In speaking of the proceeding to foreclose a mortgage the author of a well-known treatise, has said:

"Though nominally against persons, such suits are to vindicate liens; they proceed upon seizure; they treat property as primarily indebted; and, with the qualification above-mentioned, they are substantially property actions. In the civil law, they are styled hypothecary actions, and their sole object is the enforcement of the lien against the res; in the common law, they would be different if chancery did not treat the conditional conveyance as a mere hypothecation, and the creditor's right as an equitable lien; so, in both, the suit is a real action so far as it is against property, and seeks the judicial recognition of a property debt, and an order for the sale of the res." (Waples, Proceedings In Rem. sec. 607.)

It is true that in proceedings of this character, if the defendant for whom publication is made appears, the action becomes as to him a personal action and is conducted as such. This, however, does not affect the proposition that where the defendant fails to appear the action is quasi in rem; and it should therefore be considered with reference to the principles governing actions in rem.

There is an instructive analogy between the foreclosure proceeding and an action of attachment, concerning which the Supreme Court of the United States has used the following language:

"If the defendant appears, the cause becomes mainly a suit in personam, with the added incident, that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But, if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding in rem, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff." (Cooper vs. Reynolds, 10 Wall., 308.)

In an ordinary attachment proceeding, if the defendant is not personally served, the preliminary seizure is to be considered necessary in order to confer jurisdiction upon the court. In this case the lien on the property is acquired by the seizure; and the purpose of the proceedings is to subject the property to that lien. If a lien already exists, whether created by mortgage, contract, or statute, the preliminary seizure is not necessary; and the court proceeds to enforce such lien in the manner provided by law precisely as though the property had been seized upon attachment. (Roller vs. Holly, 176 U. S. (398, 405; 44 L. ed., 520.) It results that the mere circumstance that in an attachment the property may be seized at the inception of the proceedings, while in the foreclosure suit it is not taken into legal custody until the time comes for the sale, does not materially affect the fundamental principle involved in both cases, which is that the court is here exercising a jurisdiction over the property in a proceeding directed essentially in rem.

Passing now to a consideration of the jurisdiction of the Court of First Instance in a mortgage foreclosure, it is evident that the court derives its authority to entertain the action primarily from the statutes organizing the court. The jurisdiction of the court, in this most general sense, over the cause of action is obvious and requires no comment. Jurisdiction over the person of the defendant, if acquired at all in such an action, is obtained by the voluntary submission of the defendant or by the personal service of process upon him within the territory where the process is valid. If, however, the defendant is a nonresident and, remaining beyond the range of the personal process of the court," refuses to come in voluntarily, the court never acquires jurisdiction over the person at all. Here the property itself is in fact the sole thing which is impleaded and is the responsible object which is the subject of the exercise of judicial power. It follows that the jurisdiction of the court in such case is based exclusively on the power which, under the law, it possesses over the property; and any discussion relative to the jurisdiction of the court over the person of the defendant is entirely apart from the case. The jurisdiction of the court over the property, considered as the exclusive object of such an action, is evidently based upon the following conditions and considerations, namely: (1) that the property is located within the district; (2) that the purpose of the litigation is to subject the property by sale to an obligation fixed upon it by the mortgage; and (3) that the court at a proper stage of the proceedings takes the property into its custody, if necessary, and exposes it to sale for the purpose of satisfying the mortgage debt. An obvious corollary is that no other relief can be granted in this proceeding than such as can be enforced against the property.

We may then, from what has been stated, formulate the following propositions relative to the foreclosure proceeding against the property of a nonresident mortgagor who fails to come in and submit himself personally to the jurisdiction of the court: (I) That the jurisdiction of the court is derived from the power which it possesses over the property; (II) that jurisdiction over the person is not acquired and is nonessential; (III) that the relief granted by the court must be limited to such as can be enforced against the property itself.

It is important that the bearing of these propositions be clearly apprehended, for there are many expressions in the American reports from which it might be inferred that the court acquires personal jurisdiction over the person of the defendant by publication and notice; but such is not the case. In truth the proposition that jurisdiction over the person of a nonresident cannot be acquired by publication and notice was never clearly understood even in the American courts until after the decision had been rendered by the Supreme Court of the United States in the leading case of *Pennoyer vs. Neff* (95 U. S., 714; 24 L. ed., 565). In the light of that decision, and of other decisions which have subsequently been rendered in that and other courts, the proposition that jurisdiction over the person cannot be thus acquired by publication and notice is no longer open to question; and it is now fully established that a personal judgment upon constructive or substituted service against a nonresident who does not appear is wholly invalid. This doctrine applies to all kinds of constructive or substituted process, including service by publication and personal service outside of the jurisdiction in which the judgment is rendered; and the only exception seems to be found in the case where the nonresident defendant has expressly or impliedly consented to the mode of service. (Note to *Raher vs. Raher*, 35 L.R.A. [N.S.], 292; see also 50 L.R.A., 585; 35 L. R. A., [N.S.] 312.)

The idea upon which the decision in *Pennoyer vs. Neff* (supra) proceeds is that the process from the tribunals of one State cannot run into other States or countries and that due process of law requires that the defendant shall be brought under the power of the court by service of process within the State, or by his voluntary appearance, in order to authorize the court to pass upon the question of his personal liability. The doctrine established by the Supreme Court of the United States on this point, being based upon the constitutional conception of due process of law, is binding upon the courts of the Philippine Islands. Involved in this decision is the principle that in proceedings in rem or quasi in rem against a nonresident who is not served personally within the state, and who does not appear, the relief must be confined to the res, and the court cannot lawfully render a personal judgment

against him. (Dewey vs. Des Moines, 173 U.S., 193; 43 L. ed., 665; Heidritter vs. Elizabeth Oil Cloth Co., 112 U.S., 294; 28 L. ed., 729.) Therefore in an action to foreclose a mortgage against a nonresident, upon whom service has been effected exclusively by publication, no personal judgment for the deficiency can be entered. (Latta vs. Tutton, 122 Cal., 279; Blumberg vs. Birch, 99 Cal., 416.)

It is suggested in the brief of the appellant that the judgment entered in the court below offends against the principle just stated and that this judgment is void because the court in fact entered a personal judgment against the absent debtor for "the full amount of the indebtedness secured by the mortgage. We do not so interpret the judgment.

In a foreclosure proceeding against a nonresident owner it is necessary for the court, as in all cases of foreclosure, to ascertain the amount due, as prescribed in section 256 of the Code of Civil Procedure, and to make an order requiring the defendant to pay the money into court. This step is a necessary precursor of the order of sale. In the present case the judgment which was entered contains the following words:

"Because it is declared that the said defendant Engracio Palanca Tanquinyeng y Limquingco, is indebted in the amount of P249,355.32, plus the interest, to the 'Banco Español-Filipino' * * * therefore said defendant is ordered to deliver the above amount etc., etc."

This is not the language of a personal judgment. Instead it is clearly intended merely as a compliance with the requirement that the amount due shall be ascertained and that the defendant shall be required to pay it. As a further evidence of this it may be observed that according to the Code of Civil Procedure a personal judgment against the debtor for the deficiency is not to be rendered until after the property has been sold and the proceeds applied to the mortgage debt (sec. 260).

The conclusion upon this phase of the case is that whatever may be the effect in other respects of the failure of the clerk of the Court of First Instance to mail the proper papers to the defendant in Amoy, China, such irregularity could in no wise impair or defeat the jurisdiction of the court, for in our opinion that jurisdiction rests upon a basis much more secure than would be supplied by any form of notice that could be given to a resident of a foreign country.

Before leaving this branch of the case, we wish to observe that we are fully aware that many reported cases can be cited in which it is assumed that the question of the sufficiency of publication or notice in a case of this kind is a question affecting the jurisdiction of the court, and the court is sometimes said to acquire jurisdiction by virtue of the publication. This phraseology was undoubtedly originally adopted by the court because of the analogy between service by publication and personal service of process upon the defendant; and, as has already been suggested, prior to the decision of *Pennoyer vs. Neff* (supra) the difference between the legal effects of the two forms of service was obscure. It is accordingly not surprising that the modes of expression which had already been moulded into legal tradition before that case was decided have been brought down to the present day. But it is clear that the legal principle here involved is not effected by the peculiar language in which the courts have expounded their ideas.

We now proceed to a discussion of the question whether the supposed irregularity in the proceedings was of such gravity as to amount to a denial of that "due process of law" which was secured by the Act of Congress in force in these Islands at the time this mortgage was foreclosed. (Act of July 1, 1902, sec. 5.) In dealing with questions involving the application of the constitutional provisions relating to due process of law the Supreme Court of the United States has refrained from attempting to define with precision the meaning of that expression, the reason being that the idea expressed therein is applicable under so many diverse conditions as to make any attempt at precise definition hazardous and unprofitable. As applied to a judicial proceeding, however, it may be laid down

with certainty that the requirement of due process is satisfied if the following conditions are present, namely; (1) There must be a court or tribunal clothed with judicial power to hear and determine the matter before it; (2) jurisdiction must be lawfully acquired over the person of the defendant or over the property which is the subject of the proceeding; (3) the defendant must be given an opportunity to be heard; and (4) judgment must be rendered upon lawful hearing.

Passing at once to the requisite that the defendant shall have an opportunity to be heard, we observe that in a foreclosure case some notification of the proceedings to the nonresident owner, prescribing the time within which appearance must be made, is everywhere recognized as essential. To answer this necessity the statutes generally provide for publication, and usually in addition thereto, for the mailing of notice to the defendant, if his residence is known. Though commonly called constructive, or substituted service, such notification does not constitute a service of process in any true sense. It is merely a means provided by law whereby the owner may be admonished that his property is the subject of judicial proceedings and that it is incumbent upon him to take such steps as he sees fit to protect it. In speaking of notice of this character a distinguished master of constitutional law has used the following language:

"* * * if the owners are named in the proceedings, and personal notice is provided for, it is rather from tenderness to their interests, and in order to make sure that the opportunity for a hearing shall not be lost to them, than from any necessity that the case shall assume that form." (Cooley on Taxation [2d. ed.], 527, quoted in Leigh vs. Green, 193 U.S., 79, 80.)

It will be observed that this mode of notification does not involve any absolute assurance that the absent owner shall thereby receive actual notice. The periodical containing the publication may never in fact come to his hands, and the chances that he should discover the notice may often be very slight. Even where notice is sent by mail the probability of his receiving it, though much increased, is dependent upon the correctness of the address to which it is forwarded as well as upon the regularity and security of the mail service. It will be noted, furthermore, that the provision of our law relative to the mailing of notice does not absolutely require the mailing of notice unconditionally and in every event, but only in the case where the defendant's residence is known. In the light of all these facts, it is evident that actual notice to the defendant in cases of this kind is not, under the law, to be considered absolutely necessary.

The idea upon which the law proceeds in recognizing the efficacy of a means of notification which may fall short of actual notice is apparently this: Property is always assumed to be in the possession of its owner, in person or by agent; and he may be safely held, under certain conditions, to be affected with knowledge that proceedings have been instituted for its condemnation and sale.

"It is the duty of the owner of real estate, who is a nonresident, to take measures that in some way he shall be represented when his property is called into requisition, and if he fails to do this, and fails to get notice by the ordinary publications which have usually been required in such cases, it is his misfortune, and he must abide the consequences." (6 R.C.L., sec. 445 [p. 450]).

It has been well said by an American court:

"If property of a nonresident cannot be reached by legal process upon constructive notice, then our statutes were passed in vain, and are mere empty legislative declarations, without either force, or meaning; for if the person is not within the jurisdiction of the court, no personal judgment can be rendered, and if the judgment cannot operate upon the property, then no effective judgment at all can be rendered, so that the result would be that the courts would be powerless to assist a citizen against a nonresident. Such a result would be a deplorable one." (Quarl vs. Abbett, 102 Ind., 233; 52 Am. Rep., 662, 667.)

It is, of course, universally recognized that the statutory provisions relative to publication or other form of notice against a nonresident owner should be complied with; and in respect to the publication of notice in the newspaper it may be stated that strict compliance with the requirements of the law has been held to be essential. In *Guaranty Trust etc. Co. vs. Green Cove etc., Railroad Co.* (139 U. S., 137, 138), it was held that where newspaper publication was made for 19 weeks, when the statute required 20, the publication was insufficient.

With respect to the provisions of our own statute, relative to the sending of notice by mail, the requirement is that the judge shall direct that the notice be deposited in the mail by the clerk of the court, and it is not in terms declared that the notice must be deposited in the mail. We consider this to be of some significance; and it seems to us that, having due regard to the principles upon which the giving of such notice is required, the absent owner of the mortgaged property must, so far as the due process of law is concerned, take the risk incident to the possible failure of the clerk to perform his duty, somewhat as he takes the risk that the mail clerk or the mail carrier might possibly lose or destroy the parcel or envelope containing the notice before it should reach its destination and be delivered to him; This idea seems to be strengthened by the consideration that in placing upon the clerk the duty of sending notice by mail, the performance of that act is put effectually beyond the control of the plaintiff in the litigation. At any rate it is obvious that so much of section 399 of the Code of Civil Procedure as relates to the sending of notice by mail was complied with when the court made the order. The question as to what may be the consequences of the failure of the record to show the proof of compliance with that requirement will be discussed by us further on.

The observations which have just been made lead to the conclusion that the failure of the clerk to mail the notice, if in fact he did so fail in his duty, is not such an irregularity as amounts to a denial of due process of law; and hence in our opinion that irregularity, if proved, would not avoid the judgment in this case. Notice was given by publication in a newspaper and this is the only form of notice which the law unconditionally requires. This in our opinion is all that was absolutely necessary to sustain the proceedings.

It will be observed that in considering the effect of this irregularity, it makes a difference whether it be viewed as a question involving jurisdiction or as a question involving due process of law. In the matter of jurisdiction there can be no distinction between the much and the little. The court either has jurisdiction or it has not; and if the requirement as to the mailing of notice should be considered as a step antecedent to the acquiring of jurisdiction, there could be no escape from the conclusion that the failure to take that step was fatal to the validity of the judgment. In the application of the idea of due process of law, on the other hand, it is clearly unnecessary to be so rigorous. The jurisdiction being once established, all that due process of law thereafter requires is an opportunity for the defendant to be heard; and as publication was duly made in the newspaper, it would seem highly unreasonable to hold that the failure to mail the notice was fatal. We think that in applying the requirement of due process of law, it is permissible to reflect upon the purposes of the provision which is supposed to have been violated and the principle underlying the exercise of judicial power in these proceedings. Judged in the light of these conceptions, we think that the provision of the Act of Congress declaring that no person shall be deprived of his property without due process of law has not been infringed.

In the progress of this discussion we have stated the two conclusions; (1) that the failure of the clerk to send the notice to the defendant by mail did not destroy the jurisdiction of the court and (2) that such irregularity did not infringe the requirement of due process of law. As a consequence of these conclusions the irregularity in question is in some measure shorn of its potency. It is still necessary, however, to consider its effects considered as a simple irregularity of procedure; and it would be idle to pretend that even in this aspect the irregularity is not grave enough. From this point of view, however, it is obvious that any motion to vacate the judgment on the ground of the irregularity in question must fail unless "it shows that the defendant was prejudiced by that

irregularity. The least, therefore, that can be required of the proponent of such a motion is to show that he had a good defense against the action to foreclose the mortgage. Nothing of the kind is, however, shown either in the motion or in the affidavit which accompanies the motion.

An application to open or vacate a judgment because of an irregularity or defect in the proceedings is usually required to be supported by an affidavit showing the grounds on which the relief is sought, and in addition to this showing also a meritorious defense to the action. It is held that a general statement that a party has a good defense to the action is insufficient. The necessary facts must be averred. Of course if a judgment is void upon its face a showing of the existence of a meritorious defense is not necessary. (10 R.C.L., 718.)

The lapse of time is also a circumstance deeply affecting this aspect of the case. In this connection we quote the following passage from an encyclopaedic treatise now in course of publication:

"Where, however, the judgment is not void on its face, and may therefore be enforced if permitted to stand on the record, courts in many instances refuse to exercise their quasi equitable powers to vacate a judgment after the lapse of the term at which it was entered, except in clear cases, to promote the ends of justice, and where it appears that the party making the application is himself without fault and has acted in good faith and with ordinary diligence. Laches on the part of the applicant, if unexplained, is deemed sufficient ground for refusing the relief to which he might otherwise be entitled. Something is due to the finality of judgments, and acquiescence or unnecessary delay is fatal to motions of this character, since courts are always reluctant to interfere with judgments, and especially where they have been executed or satisfied. The moving party has the burden of showing diligence, and unless it is shown affirmatively the court will not ordinarily exercise its discretion in his favor." (15 R.C.L., 694, 695.)

It is stated in the affidavit that the defendant, Engracio Palanca Tanquinyeng y Limquingco, died January 29, 1910. The mortgage under which the property was sold was executed far back in 1906; and the proceedings in the foreclosure were closed by the order of court confirming the sale dated August 7, 1908. It passes the rational bounds of human credulity to suppose that a man who had placed a mortgage upon property worth nearly P300,000 and had then gone away from the scene of his life activities to end his days in the city of Amoy, China, should have long remained in ignorance of the fact that the mortgage had been foreclosed and the property sold, even supposing that he had no knowledge of those proceedings while they were being conducted. It is more in keeping with the ordinary course of things that he should have acquired information as to what was transpiring in his affairs at Manila; and upon the basis of this rational assumption we are authorized, in the absence of proof to the contrary, to presume that he did have, or soon acquired, information as to the sale of his property.

The Code of Civil Procedure, indeed, expressly declares that there is a presumption that things have happened according to the ordinary habits of life (sec. 334 [26]) ; and we cannot conceive of a situation more appropriate than this for applying the presumption thus defined by the lawgiver. In support of this presumption, as applied to the present case, it is permissible to consider the probability that the defendant may have received actual notice of these proceedings from the unofficial notice addressed to him in Manila which was mailed by an employee of the bank's attorneys. Adopting almost the exact words used by the Supreme Court of the United States in *Grannis vs. Ordean* (234 U. S., 385; 58 L. ed., 1363), we may say that in view of the well-known skill of postal officials and employees in making proper delivery of letters defectively addressed, we think the presumption is clear and strong that this notice reached the defendant, there being no proof that it was ever returned by the postal officials as undelivered. And if it was delivered in Manila, instead of being forwarded to Amoy, China, there is a probability that the recipient was a person sufficiently interested in his affairs to send it or communicate its contents to him.

Of course if the jurisdiction of the court or the sufficiency of the process of law depended upon the mailing of the notice by the clerk, the reflections in which we are now indulging would be idle and frivolous; but the considerations mentioned are introduced in order to show the propriety of applying to this situation the legal presumption to which allusion has been made. Upon that presumption, supported by the circumstances of this case, we do not hesitate to found the conclusion that the defendant voluntarily abandoned all thought of saving his property from the obligation which he had placed upon it; that knowledge of the proceedings should be imputed to him; and that he acquiesced in the consequences of those proceedings after they had been accomplished. Under these circumstances it is clear that the merit of this motion is, as we have already stated, adversely affected in a high degree by the delay in asking for relief. Nor is it an adequate reply to say that the proponent of this motion is an administrator who only qualified a few months before this motion was made. No disability on the part of the defendant himself existed from the time when the foreclosure was effected until his death; and we believe that the delay in the appointment of the administrator and institution of this action is a circumstance which is imputable to the parties in interest whoever they may have been. Of course if the minor heirs had instituted an action in their own right to recover the property, it would have been different.

It is, however, argued that the defendant has suffered prejudice by reason of the fact that the bank became the purchaser of the property at the foreclosure sale for a price greatly below that which had been agreed upon in the mortgage as the upset price of the property. In this connection, it appears that in article nine of the mortgage which was the subject of this foreclosure, as amended by the notarial document of July 19, 1906, the parties to this mortgage made a stipulation to the effect that the value therein placed upon the mortgaged properties should serve as a basis of sale in case the debt should remain unpaid and the bank should proceed to a foreclosure. The upset price stated in that stipulation for all the parcels involved in this foreclosure was P286,000. It is said in behalf of the appellant that when the bank bought in the property for the sum of P110,200 it violated that stipulation.

It has been held by this court that a clause in a mortgage providing for a tipo, or upset price, does not prevent a foreclosure, nor affect the validity of a sale made in the foreclosure proceedings. (*Yangco vs. Cruz Herrera and Wy Piaco* 11 Phil. Rep., 402; *Banco-Español Filipino vs. Donaldson, Sim & Co.*, 5 Phil. Rep., 418.) In both the cases here cited the property was purchased at the foreclosure sale, not by the creditor or mortgagee, but by a third party. Whether the same rule should be applied in a case where the mortgagee himself becomes the purchaser has apparently not been decided by this court in any reported decision, and this question need not here be considered, since it is evident that if any liability was incurred by the bank by purchasing for a price below that fixed in the stipulation, its liability was a personal liability derived from the contract of mortgage; and as we have already demonstrated such a liability could not be the subject of adjudication in an action where the court had no jurisdiction over the person of the defendant. If the plaintiff bank became liable to account for the difference between the upset price and the price at which it bought in the property, that liability remains unaffected by the disposition which the court made of this case; and the fact that the bank may have violated such an obligation can in no wise affect the validity of the judgment entered in the Court of First Instance.

In connection with the entire failure of the motion to show either a meritorious defense to the action or that the defendant had suffered any prejudice of which the law can take notice, we may be permitted to add that in our opinion a motion of this kind, which proposes to unsettle judicial proceedings long ago closed, can not be considered with favor, unless based upon grounds which appeal to the conscience of the court. Public policy requires that judicial proceedings be upheld. The maxim here applicable is *non quita movere*. As was once said by Judge Brewer, afterwards a member of the Supreme Court of the United States:

"Public policy requires that judicial proceedings be upheld, and that titles obtained in those proceedings be safe from the ruthless hand of collateral attack. If technical defects are adjudged potent to destroy such titles, a judicial

sale will never realize the value of the property, for no prudent man will risk his money in bidding for and buying that title which he has reason to fear may years thereafter be swept away through some occult and not readily discoverable defect." (Martin vs. Pond, 30 Fed., 15.)

In the case where that language was used an attempt was made to annul certain foreclosure proceedings on the ground that the affidavit upon which the order of publication was based erroneously stated that the absent party was a resident of a certain town in the State of Kansas, when he was in fact residing in another State. It was held that this mistake did not affect the validity of the proceedings.

In the preceding discussion we have assumed that the clerk failed to send the notice by post as required by the order of the court. We now proceed, to consider whether this is a proper assumption; and the proposition which we propose to establish is that there is a legal presumption that the clerk performed his duty as the ministerial officer of the court, which presumption is not overcome by any other facts appearing in the cause.

In subsection 14 of section 334 of the Code of Civil Procedure it is declared that there is a presumption "that official duty has been regularly performed;" and in subsection 18 it is declared that there is a presumption "that the ordinary course of business has been followed." These presumptions are of course in no sense novelties, as they express ideas which have always been recognized. *Omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*. There is therefore clearly a legal presumption that the clerk performed his duty about mailing this notice; and we think that strong considerations of policy require that this presumption should be allowed to operate with full force under the circumstances of this case. A party to an action has no control over the clerk of the court; and has no right to meddle unduly with the business of the clerk in the performance of his duties. Having no control over this officer, the litigant must depend upon the court to see that the duties imposed on the clerk are performed.

Other considerations no less potent contribute to strengthen the conclusion just stated. There is no principle of law better settled than that after jurisdiction has once been acquired, every act of a court of general jurisdiction shall be presumed to have been rightly done. This rule is applied to every judgment or decree rendered in the various stages of the proceedings from their initiation to their completion (*Voorhees vs. United States Bank*, 10 Pet., 314; 35 U. S., 449); and if the record is silent with respect to any fact which must have been established before the court could have rightly acted, it will be presumed that such fact was properly brought to its knowledge. (*The Lessee of Grignon vs. Astor*, 2 How., 319; 11 L. ed., 283.)

"In making the order of sale [of the real state of a decedent] the court are presumed to have adjudged every question necessary to justify such order or decree, viz: The death of the owners; that the petitioners were his administrators; that the personal estate was insufficient to pay the debts of the deceased; that the private acts of Assembly, as to the manner of sale, were within the constitutional power of the Legislature, and that all the provisions of the law as to notices which are directory to the administrators have been complied with. * * * The court is not bound to enter upon the record the evidence on which any fact was decided." (*Florentine vs. Barton*, 2 Wall., 210; 17 L. ed., 785.) Especially does all this apply after long lapse of time.

Applegate vs. Lexington and Carter County Mining Co. (117 U.S., 255) contains an instructive discussion in a case analogous to that which is now before us. It there appeared that in order to foreclose a mortgage in the State of Kentucky against a nonresident debtor it was necessary that publication should be made in a newspaper for a specified period of time, also that the order requiring the defendant to appear should be posted at the front door of the court house and be published on some Sunday, immediately after divine service, in such church as the court should direct. In a certain action judgment had been entered against a nonresident, after publication in pursuance of these provisions. Many years later the validity of the proceedings was called in question in another action. It

was proved from the files of an ancient periodical that publication had been made in its columns as required by law; but no proof was offered to show the publication of the order at the church, or the posting of it at the front door of the court-house. It was insisted by one of the parties that the judgment of the court was void for lack of jurisdiction. But the Supreme Court of the United States said."

"The court which made the decree * * * was a court of general jurisdiction. Therefore every presumption not inconsistent with the record is to be indulged in favor of its jurisdiction. * * * It is to be presumed that the court before making its decree took care to see that its order for constructive service, on which its right to make the decree depended, had been obeyed."

It is true that in this case the former judgment was the subject of collateral, or indirect attack, while in the case at bar the motion to vacate the judgment is a direct proceeding for relief against it. The same general presumption, however, is indulged in favor of the judgment of a court of general jurisdiction, whether it is the subject of direct or indirect attack, the only difference being that in case of indirect attack the judgment is conclusively presumed to be valid unless the record affirmatively shows it to be void, while in case of direct attack the presumption in favor of its validity may in certain cases be overcome by proof extrinsic to the record.

The presumption that the clerk performed his duty and that the court made its decree with knowledge that the requirements of law had been complied with appear to be amply sufficient to support the conclusion that the notice was sent by the clerk as required by the order. It is true that there ought to be found among the papers on file in this cause an affidavit, as required by section 400 of the Code of Civil Procedure, showing that the order was in fact so sent by the clerk; and no such affidavit appears. The record is therefore silent where it ought to speak. But the very purpose of the law in recognizing these presumptions is to enable the court to sustain a prior judgment in the face of such an omission. If we were to hold that the judgment in this case is void because the proper affidavit is not present in the file of papers which we call the record, the result would be that in the future every title in the Islands resting upon a judgment like that now before us would depend, for its continued security, upon the presence of such affidavit among the papers and would be liable at any moment to be destroyed by the disappearance of that piece of paper. We think that no court, with a proper regard for the security of judicial proceedings and for the interests which have by law been confided to the courts, would incline to favor such a conclusion. In our opinion the proper course in a case of this kind is to hold that the legal presumption that the clerk performed his duty still maintains notwithstanding the absence from the record of the proper proof of that fact.

In this connection it is important to bear in mind that under the practice prevailing in the Philippine Islands the word "record" is used in a loose and broad sense, as indicating the collective mass of papers which contain the history of all the successive steps taken in a case and which are finally deposited in the archives of the clerk's office as a memorial of the litigation. It is a matter of general information that no judgment roll, or book of final record, is commonly kept in our courts for the purpose of recording the pleadings and principal proceedings in actions which have been terminated; and in particular, no such record is kept in the Court of First Instance of the city of Manila. There is, indeed, a section of the Code of Civil Procedure which directs that such a book of final record shall be kept; but this provision has, as a matter of common knowledge, been generally ignored. The result is that in the present case we do not have the assistance of the recitals of such a record to enable us to pass upon the validity of this judgment and as already stated the question must be determined by examining the papers contained in the entire file.

But it is insisted by counsel for this motion that the affidavit of Bernardo Chan y Garcia showing that upon April 4, 1908, he sent a notification through the mail addressed to the defendant at Manila, Philippine Islands, should be accepted as affirmative proof that the clerk of the court failed in his duty and that, instead of himself sending the

requisite notice through the mail, he relied upon Bernardo to send it for him. We do not think that this is by any means a necessary inference. Of course if it had affirmatively appeared that the clerk himself had attempted to comply with this order and had directed the notification to Manila when he should have directed it to Amoy, this would be conclusive that he had failed to comply with the exact terms of the order; but such is not this case. That the clerk of the attorneys for the plaintiff erroneously sent a notification to the defendant at a mistaken address affords in our opinion very slight basis for supposing that the clerk may not have sent notice to the right address.

There is undoubtedly good authority to support the position that when the record states the evidence or makes an averment with reference to a jurisdictional fact, it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as stated. If, to give an illustration, it appears from the return of the officer that the summons was served at a particular place or in a particular manner, it will not be presumed that service was also made at another place or in a different manner; or if it appears that service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also (*Galpin vs. Page*, 18 Wall., 350, 366; *Settlemyer vs. Sullivan*, 97 U. S., 444, 449). While we believe that these propositions are entirely correct as applied to the case where the person making the return is the officer who is by law required to make the return, we do not think that it is properly applicable where, as in the present case, the affidavit was made by a person who, so far as the provisions of law are concerned, was a mere intermeddler.

The last question of importance which we propose to consider is whether a motion in the cause is admissible as a proceeding to obtain relief in such a case as this. If the motion prevails the judgment of July 2, 1908, and all subsequent proceedings will be set aside, and the litigation will be renewed, proceeding again from the date mentioned as if the progress of the action had not been interrupted. The proponent of the motion does not ask the favor of being permitted to interpose a defense. His purpose is merely to annul the effective judgment of the court, to the end that the litigation may again resume its regular course.

There is only one section of the Code of Civil Procedure which expressly recognizes the authority of a Court of First Instance to set aside a final judgment and permit a renewal of the litigation in the same cause. This is as follows:

"Sec. 113. Upon such term as may be just the court may relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; Provided, That application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken."

An additional remedy by petition to the Supreme Court is supplied by section 513 of the same Code. The first paragraph of this section, in so far as pertinent to this discussion, provides as follows:

"When a judgment is rendered by a Court of First Instance upon default, and a party thereto is unjustly deprived of a hearing by fraud, accident, mistake or excusable negligence, and the Court of First Instance which rendered the judgment has finally adjourned so that no adequate remedy exists in that court, the party so deprived of a hearing may present his petition to the Supreme Court within sixty days after he first learns of the rendition of such judgment, and not thereafter, setting forth the facts and praying to have judgment set aside. * * * "

It is evident that the proceeding contemplated in this section is intended to supplement the remedy provided by section 113; and we believe the conclusion irresistible that there is no other means recognized by law whereby a defeated party can, by a proceeding in the same cause, procure a judgment to be set aside, with a view to the renewal of the litigation.

The Code of Civil Procedure purports to be a complete system of practice in civil causes, and it contains provisions describing with much fulness the various steps to be taken in the conduct of such proceedings. To this end it defines with precision the method of beginning, conducting, and concluding the civil action of whatever species; and by section 795 of the same Code it is declared that the procedure in all civil action shall be in accordance with the provisions of this Code. We are therefore of the opinion that the remedies prescribed in sections 113 and 513 are exclusive of all others, so far as relates to the opening and continuation of a litigation which has been once concluded.

The motion in the present case does not conform to the requirements of either of these provisions; and the consequence is that in our opinion the action of the Court of First Instance in dismissing the motion was proper.

If the question were admittedly one relating merely to an irregularity of procedure, we cannot suppose that this proceeding would have taken the form of a motion in the cause, since it is clear that, if based on such an error, the motion came too late for relief in the Court of First Instance. But as we have already seen, the motion attacks the judgment of the court as void for want of jurisdiction over the defendant. The idea underlying the motion therefore is that inasmuch as the judgment is a nullity it can be attacked in any way and at any time. If the judgment were in fact void upon its face, that is, if it were shown to be a nullity by virtue of its own recitals, there might possibly be something in this. Where a judgment or judicial order is void in this sense it may be said to be a lawless thing, which can be treated as an outlaw and slain at sight, or ignored wherever and whenever it exhibits its head.

But the judgment in question is not void in any such sense. It is entirely regular in form, and the alleged defect is one which is not apparent upon its face. It follows that even if the judgment could be shown to be void for want of jurisdiction, or for lack of due process of law, the party aggrieved thereby is bound to resort to some appropriate proceeding to obtain relief. Under accepted principles of law and practice, long recognized in American courts, a proper remedy in such case, after the time for appeal or review has passed, is for the aggrieved party to bring an action to enjoin the judgment, if not already carried into effect; or if the property has already been disposed of he may institute suit to recover it. In every situation of this character an appropriate remedy is at hand; and if property has been taken without due process, the law concedes due process to recover it. We accordingly hold that, assuming the judgment to have been void as alleged by the proponent of this motion, the proper remedy was by an original proceeding and not by motion in the cause. As we have already seen our Code of Civil Procedure defines the conditions under which relief against a judgment may be obtained by motion; and we think it would only be productive of confusion for this court to recognize such a proceeding as proper under conditions different from those defined by law. Upon the point of procedure here involved, we refer to the case of *People vs. Harrison* (84 Cal., 607) wherein it was held that a motion will not lie to vacate a judgment after the lapse of the time limited by statute if the judgment is not void on its face; and in all cases, after the lapse of such time, when an attempt is made to vacate the judgment by a proceeding in court for that purpose an action regularly brought is preferable, and should be required. It will be noted that section 113 of the Code of Civil Procedure was taken verbatim from the California Code (sec. 473).

The conclusions stated in this opinion indicate that the judgment appealed from is without error, and the same is accordingly affirmed, with costs. So ordered.

Arellano, C. J., Torres, Carson, and Avanceña, JJ., concur.

DISSENTING OPINION

MALCOLM, J., dissenting:

I dissent. It will not take me long to state my reasons. An immutable attribute—the fundamental idea—of due process of law is that no man shall be condemned in his person or property without notice and an opportunity of being heard in his defense. Protection of the parties demands a strict and an exact compliance with this constitutional provision in our organic law and of the statutory provisions in amplification. Literally hundreds of precedents could be cited in support of these axiomatic principles. Where as in the instant case the defendant received no notice and had no opportunity to be heard, certainly we cannot say that there is due process of law. Resultantly, "A judgment which is void upon its face, and which requires only an inspection of the judgment roll to demonstrate its want of vitality is a dead limb upon the judicial tree, which should be lopped off, if the power so to do exists. It can bear no fruit to the plaintiff, but is a constant menace to the defendant." (Mills vs. Dickson, 6 Rich. [S. C], 487.)

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