

**THE BANK OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE,
VS. GABRIELA ANDREA DE COSTER Y ROXAS ET AL., DEFENDANTS.
LA ORDEN DE DOMINICOS OR PP. PREDICADORES DE LA PROVINCIA
D...**

G.R. No. 23181. March 16, 1925

Ponente: STATEMENT March 10, 1924, the plaintiff filed a complaint in which it was alleged that it was a domestic banking corporation with its principal office and place of business in the City of Manila; that the defendant Gabriela Andrea de Coster y Roxas was the wife of the defendant Jean M. Poizat, both of whom were residents of the City of Manila; that the defendant J. M. Poizat & Co. was a duly registered partnership with its principal office and place of business in the City of Manila; that the defendant La Orden de Dominicos or PP. Predicadores de la Provincia del Santisimo Rosario was a religious corporation duly organized and existing under the laws of the Philippine Islands with its principal office and place of business in the City of Manila; that on December 29, 1921, for value, the defendant Gabriela Andrea de Coster y Roxas, having the consent and permission of her husband, and he acting as her agent, said defendants made to the plaintiff a certain promissory note for P292,000, payable one year after date, with interest of 9 per cent per annum, payable monthly, in which, among other things, it is provided that in the event of a suit or action, the defendants should pay the further sum of P10,000, as attorney's fees; that the note in question was a joint and several note; that to secure the payment thereof, the defendants Jean M. Poizat and J. M. Poizat & Co. executed a chattel mortgage to the plaintiff on the steamers Roger Poizat and Gabrielle Poizat, with the machinery and materials belonging to the Poizat Vegetable Oil Mills and certain merchandise; that at the same time and for the same purpose, the defendant Gabriela Andrea de Coster y Roxas, having the consent and permission of her husband, and he acting as her agent, they acknowledged and delivered to this plaintiff a mortgage on certain real property lying and being situated in the City of Manila, which is specifically described in the mortgage; that the real property was subject to a prior mortgage in favor of La Orden de Dominicos or PP. Predicadores de la Provincia del Santisimo Rosario, hence it is made a party defendant; that the note in question is long past due and owing. The plaintiff having brought action against the defendants on the note in the Court of First Instance of the City of Manila, civil case No. 25218; that in such case the court rendered judgment against the defendants Gabriela Andrea de Coster y Roxas, Jean M. Poizat and J. M. Poizat & Co. jointly and severally for P292,000, with interest at the rate of 9 per cent per annum from the 31st of August, 1923, P10,000 as attorney's fees, and P2,500 for and on account of insurance upon the steamer Gabrielle Poizat, with interest on that amount from February 9, 1924, at the rate of 9 per cent per annum, and costs; that the said defendants have not paid the judgment or any part thereof, and that the full amount of the debt secured by the mortgage on the property described in the complaint is now due and owing. Wherefore, plaintiff prays for an order of the court to direct the sheriff of the City of Manila to take immediate possession of the property described in the chattel mortgage and sell the same according to the Chattel Mortgage Law; that the property described in the real mortgage or so much thereof as may be required to pay the amount due the plaintiff be sold according to law; that out of such sales plaintiff shall be paid the amount due and owing it; and that such defendants be adjudged to pay any remaining deficiency. Copies of the chattel and real mortgage are attached to, and made a part of, the complaint and marked, respectively, Exhibits A and B. On April 24, 1924, the La Orden de Dominicos or PP. Predicadores de la Provincia del Santisimo Rosario appeared in the suit and filed the following plea: "The defendant corporation, La Orden de Dominicos or PP. Predicadores de la Provincia del Santisimo Rosario, for answer to the complaint, shows: "I. That the encumbrance above-mentioned, but not determined in paragraph V of the complaint, consisting of a first mortgage in favor of the aforesaid religious corporation on the property described in paragraph IV of the same complaint is P125,060 with interest of 10 per cent per annum; "II. That the mortgagors Jean M. Poizat and Gabriela Andrea de Coster y Roxas, have not paid the principal

or the interest stipulated and agreed upon from the 16th of December, 1921, up to the present date; "III. The interest due up to the 30th of April of the present year 1924 amounts to a total sum of P27,925.34. "Wherefore, it is prayed that the credit above-mentioned be taken into account when the second mortgage is foreclosed." May 3, 1924, on motion of the plaintiff, for failure to appear or answer, the defendants Gabriela Andrea de Coster y Roxas and Jean M. Poizat and J. M. Poizat & Co. were declared in default. Without giving any notice to the defendants Jean M. Poizat, J. M. Poizat & Co. and Gabriela Andrea de Coster y Roxas, and after the introduction of evidence on the part of the plaintiff and the defendant Dominican Fathers, on June 24, 1924, the court rendered an opinion in substance and to the effect that the plaintiff should have judgment as prayed for in its complaint, and that the Dominican Fathers should have judgment for the amount of their claim, and that the property should be sold and the proceeds applied to satisfy the respective judgments. About August 26, through her attorney, the defendant Gabriela Andrea de Coster y Roxas filed a motion in which she recites that she is the legitimate wife of the defendant Jean M. Poizat; that she had been absent from the Philippine Islands and residing in the City of Paris from the year 1908 to April 30, 1924, when she returned to Manila; that at the time of the filing of the complaint and the issuance of the summons, she was absent from the Philippine Islands; that the summons was delivered by the sheriff of the City of Manila to her husband, and that through his malicious negligence, default was taken and judgment entered for the respective amounts; that she never had any knowledge of the actual facts until the latter part of July, 1924, when, through the local newspapers, she learned that a default judgment had been rendered against her on July 28, 1924; that when she first knew of that fact, she was unable to obtain the rendition of accounts, because her husband had left the Philippine Islands two days previous and gone to Hongkong; that she then went to Hongkong and learned that her husband had left there under a false name and had gone to the port of Singapore from whence he went to other places unknown to this defendant; that she then returned to Manila, and that in August, 1924, she came into possession of documents showing the illegality of the notes and mortgage in question; that she has a good and legal defense to the action, which involves the validity of the order of the Dominican Fathers in this, that their mortgage does not guarantee any loan made to this defendant; that it is a security only given for a credit of a third person; that the mortgage was executed without the marital consent of the wife; and that he did not have any authority to make her liable as surety on the debt of a third person; that as regards the notes to the plaintiff: First, it does not represent any money paid to the defendant by the bank; second, that it is exclusively the personal debt of the defendants Jean M. Poizat and J. M. Poizat & Co.; third, that it was executed by her husband, because the bank desired more security for the payment of her husband's debt to the bank; fourth, that it was executed by her husband in excess of the powers given to him under his power of attorney; fifth, that it was executed as the result of collusion between the bank and the defendant Jean M. Poizat, for the purpose of making this defendant liable for the obligation of a third person. That as to the mortgage: First, it was executed to secure a void obligation; second, it does not guarantee any loan made to this defendant; third, it was executed without the express marital consent which the law requires; fourth, it was executed through collusion. That if the judgment is not set aside, the defendant will suffer irreparable injury; that through surprise and negligence, for which she was not responsible, this defendant was prevented from defending herself in this action; that this is a case which comes under section 113 of the Code of Civil Procedure. She prays that the judgment be annulled and set aside and the case be reopened, and that she be permitted to file an answer, and that the case be tried on its merit, and that a final judgment be rendered, absolving her from all liability. The motion was based upon, and supported by, the affidavit of the defendant wife, to which was attached a large number of exhibits all of which tended to support the motion. After counter showings by the bank and the Dominican Fathers and the arguments of respective counsel, the motion to set aside and vacate the judgment was denied. A motion for a reconsideration was then made, and the motion of the defendants to file an answer and make a defense was again denied. The defendant Gabriela Andrea de Coster y Roxas appeals, assigning the following errors: "PART I "AS TO THE JURISDICTION "I. The lower court erred in holding that it had acquired jurisdiction on the defendant Gabriela Andrea de Coster y Roxas, "(1) There having been no personal service of the summons on her in the manner required by section 396 of the Code of Civil Procedure, she being absent from the Philippine Islands at the time of the filing of the complaint and of the issuance of the summons in this case, and a resident of Paris, France, where she had lived permanently and continuously for fifteen years prior thereto, and "(2) There having been no service by publication in the manner required by section 398 of the Code of Civil Procedure. "II. The lower court erred in

considering that in a case where the wife is the only necessary party, service of the summons on the husband, at a place which is not 'the usual place of residence' of the wife and where the wife has never lived or resided, is sufficient to give the court jurisdiction on the person and property of the wife and to render judgment by default against her. "III. The court erred in admitting and considering evidence, outside of the sheriff's return, of the fact that the husband of the defendant Gabriela Andrea de Coster y Roxas was her attorney in fact with power to appear for the defendant in court. "IV. The court erred in holding that the non-appearance of an agent of the defendant when service of the summons has been made on him not as the agent of the defendant but in other capacity, will entitle the plaintiff who has misstated the material jurisdictional facts of the complaint to a judgment by default against the principal. "V. The lower court erred in refusing to vacate a judgment by default against the defendant Gabriela Andrea de Coster y Roxas rendered on a defective summons, served in a manner not provided for by the law, and in a case where the complaint shows that plaintiff has no right of action. "PART II "AS TO THE MERITS OF THE DEFENSE "I. The lower court erred, with abuse of discretion, in holding that the negligence, if any, of J. M. Poizat in not appearing on behalf of the defendant Gabriela Andrea de Coster y Roxas, can be imputed to this defendant, without redress, and to the advantage of the plaintiff bank who in collusion with said J. M. Poizat caused the latter to contract beyond the scope of his powers as agent of this defendant the obligation which is the subject matter of this case. "II. The lower court erred in holding that the belief on the part of J. M. Poizat that there was no defense against the claim of the plaintiff on an obligation contracted by said J. M. Poizat apparently as agent of the defendant Gabriela Andrea de Coster y Roxas, but in truth beyond the scope of his authority, and with knowledge on the part of the plaintiff bank that he was so acting beyond his powers, was such an error as can be imputed to this defendant, and against which she can obtain no redress. "III. The lower court erred in not holding that a principal is not liable for an obligation contracted by his agent beyond his power even when both the creditor and the agent believed that the latter was acting within the scope of his powers. "IV. The lower court erred in holding that because the agent of the defendant Gabriela Andrea de Coster y Roxas had power to appear for her in court, his non-appearance could render this defendant liable to a judgment by default, when the record shows that there was no service of the summons in accordance with any of the forms of service provided by law. "V. The lower court erred in holding that J. M. Poizat was summoned as agent of his wife, the defendant Gabriela Andrea de Coster y Roxas, and was, in that capacity, notified of all the decisions rendered in this case, there being nothing in the record to support the truth of such finding. "VI. The lower court erred in holding that in contracting the obligations in favor of the plaintiff Bank of the Philippine Islands and of the defendant Orden de PP. Predicadores de la Provincia del Santisimo Rosario, the agent of the defendant Gabriela Andrea de Coster y Roxas acted within the scope of his powers. "VII. The lower court erred in not holding that the plaintiff Bank of the Philippine Islands and the defendant Orden de PP. Predicadores de la Provincia del Santisimo Rosario had knowledge of the fact that J. M. Poizat in contracting the respective obligations in their favor, pretending to act as agent of the defendant Gabriela Andrea de Coster y Roxas, was acting beyond the scope of his powers as such agent. "VIII. The lower court erred in making the following statement: " 'It is however alleged, by the petitioner, that these loans were obtained to pay debts, of strangers. Even so, this would not render the loan obtained by the attorney in fact null and void. The circumstance that the agent used the money, borrowed by him within the scope of his powers, to purposes for which he was not authorized by his principal, may entitle the latter to demand from him the corresponding liability for the damages suffered, but it cannot prejudice the creditor and cause the nullity of the loan. But, even admitting that the money borrowed was used by Poizat to pay debts which did not belong to his principal, even then, he would have acted within his powers, since his principal, together with the power to borrow money, had given her agent power to loan any amount of money, and the payment of the debts of a stranger would amount to a loan made by the agent on behalf of his principal to the person or entity whose debt was paid with the money obtained from the creditors.' "IX. The lower court erred in applying to this case the principle involved in the case of *Palanca vs. Smith, Bell & Co.*, 9 Phil., 131. "X. The court erred in supplying from its own imagination facts which did not take place, of which there is no evidence in the record, and which the parties never claimed to have existed, and then draw the conclusion that if under those hypothetical facts the transaction between J. M. Poizat and the Bank of the Philippine Islands might have been legal, then the transaction as it actually took place was also legal. "XI. The lower court erred in holding that, defendant has not alleged any of the grounds enumerated in section 113 of the Code of Civil Procedure. "XII. The lower court erred in holding that this

defendant-appellant has no meritorious defense against the Dominican Order and the Bank of the Philippine Islands. "XIII. The lower court erred in taking into consideration Exhibit A appearing at pages 156-165 of the bill of exceptions. "XIV. The lower court erred in denying the motion filed by this defendant-appellant. "XV. The lower court has acted throughout these proceedings with a clear abuse of discretion." JOHNS, J.

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STATEMENT

March 10, 1924, the plaintiff filed a complaint in which it was alleged that it was a domestic banking corporation with its principal office and place of business in the City of Manila; that the defendant Gabriela Andrea de Coster y Roxas was the wife of the defendant Jean M. Poizat, both of whom were residents of the City of Manila; that the defendant J. M. Poizat & Co. was a duly registered partnership with its principal office and place of business in the City of Manila; that the defendant La Orden de Dominicos or PP. Predicadores de la Provincia del Santisimo Rosario was a religious corporation duly organized and existing under the laws of the Philippine Islands with its principal office and place of business in the City of Manila; that on December 29, 1921, for value, the defendant Gabriela Andrea de Coster y Roxas, having the consent and permission of her husband, and he acting as her agent, said defendants made to the plaintiff a certain promissory note for P292,000, payable one year after date, with interest of 9 per cent per annum, payable monthly, in which, among other things, it is provided that in the event of a suit or action, the defendants should pay the further sum of P10,000, as attorney's fees; that the note in question was a joint and several note; that to secure the payment thereof, the defendants Jean M. Poizat and J. M. Poizat & Co. executed a chattel mortgage to the plaintiff on the steamers Roger Poizat and Gabrielle Poizat, with the machinery and materials belonging to the Poizat Vegetable Oil Mills and certain merchandise; that at the same time and for the same purpose, the defendant Gabriela Andrea de Coster y Roxas, having the consent and permission of her husband, and he acting as her agent, they acknowledged and delivered to this plaintiff a mortgage on certain real property lying and being situated in the City of Manila, which is specifically described in the mortgage; that the real property was subject to a prior mortgage in favor of La Orden de Dominicos or PP. Predicadores de la Provincia del Santisimo Rosario, hence it is made a party defendant; that the note in question is long past due and owing. The plaintiff having brought action against the defendants on the note in the Court of First Instance of the City of Manila, civil case No. 25218; that in such case the court rendered judgment against the defendants Gabriela Andrea de Coster y Roxas, Jean M. Poizat and J. M. Poizat & Co. jointly and severally for P292,000, with interest at the rate of 9 per cent per annum from the 31st of August, 1923, P10,000 as attorney's fees, and P2,500 for and on account of insurance upon the steamer Gabrielle Poizat, with interest on that amount from February 9, 1924, at the rate of 9 per cent per annum, and costs; that the said defendants have not paid the judgment or any part thereof, and that the full amount of the debt secured by the mortgage on the property described in the complaint is now due and owing. Wherefore, plaintiff prays for an order of the court to direct the sheriff of the City of Manila to take immediate possession of the property described in the chattel mortgage and sell the same according to the Chattel Mortgage Law; that the property described in the real mortgage or so much thereof as may be required to pay the amount due the plaintiff be sold according to law; that out of such sales plaintiff shall be paid the amount due and owing it; and that such defendants be adjudged to pay any remaining deficiency.

Copies of the chattel and real mortgage are attached to, and made a part of, the complaint and marked, respectively, Exhibits A and B.

On April 24, 1924, the La Orden de Dominicos or PP. Predicadores de la Provincia del Santisimo Rosario appeared in the suit and filed the following plea:

"The defendant corporation, La Orden de Dominicos or PP. Predicadores de la Provincia del Santisimo Rosario, for answer to the complaint, shows:

"I. That the encumbrance above-mentioned, but not determined in paragraph V of the complaint, consisting of a first mortgage in favor of the aforesaid religious corporation on the property described in paragraph IV of the same complaint is P125,060 with interest of 10 per cent per annum;

"II. That the mortgagors Jean M. Poizat and Gabriela Andrea de Coster y Roxas, have not paid the principal or the interest stipulated and agreed upon from the 16th of December, 1921, up to the present date;

"III. The interest due up to the 30th of April of the present year 1924 amounts to a total sum of P27,925.34.

"Wherefore, it is prayed that the credit above-mentioned be taken into account when the second mortgage is foreclosed."

May 3, 1924, on motion of the plaintiff, for failure to appear or answer, the defendants Gabriela Andrea de Coster y Roxas and Jean M. Poizat and J. M. Poizat & Co. were declared in default.

Without giving any notice to the defendants Jean M. Poizat, J. M. Poizat & Co. and Gabriela Andrea de Coster y Roxas, and after the introduction of evidence on the part of the plaintiff and the defendant Dominican Fathers, on June 24, 1924, the court rendered an opinion in substance and to the effect that the plaintiff should have judgment as prayed for in its complaint, and that the Dominican Fathers should have judgment for the amount of their claim, and that the property should be sold and the proceeds applied to satisfy the respective judgments.

About August 26, through her attorney, the defendant Gabriela Andrea de Coster y Roxas filed a motion in which she recites that she is the legitimate wife of the defendant Jean M. Poizat; that she had been absent from the Philippine Islands and residing in the City of Paris from the year 1908 to April 30, 1924, when she returned to Manila; that at the time of the filing of the complaint and the issuance of the summons, she was absent from the Philippine Islands; that the summons was delivered by the sheriff of the City of Manila to her husband, and that through his malicious negligence, default was taken and judgment entered for the respective amounts; that she never had any knowledge of the actual facts until the latter part of July, 1924, when, through the local newspapers, she learned that a default judgment had been rendered against her on July 28, 1924; that when she first knew of that fact, she was unable to obtain the rendition of accounts, because her husband had left the Philippine Islands two days previous and gone to Hongkong; that she then went to Hongkong and learned that her husband had left there under a false name and had gone to the port of Singapore from whence he went to other places unknown to this defendant; that she then returned to Manila, and that in August, 1924, she came into possession of documents showing the illegality of the notes and mortgage in question; that she has a good and legal defense to the action, which involves the validity of the order of the Dominican Fathers in this, that their mortgage does not guarantee any loan made to this defendant; that it is a security only given for a credit of a third person; that the mortgage was executed without the marital consent of the wife; and that he did not have any authority to make her liable as surety on the debt of a third person; that as regards the notes to the plaintiff: First, it does not represent any money paid to the defendant by the bank; second, that it is exclusively the personal debt of the defendants Jean M. Poizat and J. M. Poizat & Co.; third, that it was executed by her husband, because the bank desired more security for the payment of her husband's debt to the bank; fourth, that it was executed by her husband in excess of the powers given to him under his power of attorney; fifth, that it was executed as the result of collusion between the bank and the defendant Jean M. Poizat, for the purpose of making this defendant liable for the obligation of a third person. That as to the mortgage: First, it was executed to secure a void obligation; second, it does not guarantee any loan made to this defendant; third, it was executed without the express marital consent which the law requires; fourth, it was executed through collusion. That if the judgment is not set aside, the

defendant will suffer irreparable injury; that through surprise and negligence, for which she was not responsible, this defendant was prevented from defending herself in this action; that this is a case which comes under section 113 of the Code of Civil Procedure. She prays that the judgment be annulled and set aside and the case be reopened, and that she be permitted to file an answer, and that the case be tried on its merit, and that a final judgment be rendered, absolving her from all liability.

The motion was based upon, and supported by, the affidavit of the defendant wife, to which was attached a large number of exhibits all of which tended to support the motion.

After counter showings by the bank and the Dominican Fathers and the arguments of respective counsel, the motion to set aside and vacate the judgment was denied. A motion for a reconsideration was then made, and the motion of the defendants to file an answer and make a defense was again denied. The defendant Gabriela Andrea de Coster y Roxas appeals, assigning the following errors:

"PART I

"AS TO THE JURISDICTION

"I. The lower court erred in holding that it had acquired jurisdiction on the defendant Gabriela Andrea de Coster y Roxas,

"(1) There having been no personal service of the summons on her in the manner required by section 396 of the Code of Civil Procedure, she being absent from the Philippine Islands at the time of the filing of the complaint and of the issuance of the summons in this case, and a resident of Paris, France, where she had lived permanently and continuously for fifteen years prior thereto, and

"(2) There having been no service by publication in the manner required by section 398 of the Code of Civil Procedure.

"II. The lower court erred in considering that in a case where the wife is the only necessary party, service of the summons on the husband, at a place which is not 'the usual place of residence' of the wife and where the wife has never lived or resided, is sufficient to give the court jurisdiction on the person and property of the wife and to render judgment by default against her.

"III. The court erred in admitting and considering evidence, outside of the sheriff's return, of the fact that the husband of the defendant Gabriela Andrea de Coster y Roxas was her attorney in fact with power to appear for the defendant in court.

"IV. The court erred in holding that the non-appearance of an agent of the defendant when service of the summons has been made on him not as the agent of the defendant but in other capacity, will entitle the plaintiff who has misstated the material jurisdictional facts of the complaint to a judgment by default against the principal.

"V. The lower court erred in refusing to vacate a judgment by default against the defendant Gabriela Andrea de Coster y Roxas rendered on a defective summons, served in a manner not provided for by the law, and in a case where the complaint shows that plaintiff has no right of action.

"PART II

"AS TO THE MERITS OF THE DEFENSE

"I. The lower court erred, with abuse of discretion, in holding that the negligence, if any, of J. M. Poizat in not appearing on behalf of the defendant Gabriela Andrea de Coster y Roxas, can be imputed to this defendant, without redress, and to the advantage of the plaintiff bank who in collusion with said J. M. Poizat caused the

latter to contract beyond the scope of his powers as agent of this defendant the obligation which is the subject matter of this case.

"II. The lower court erred in holding that the belief on the part of J. M. Poizat that there was no defense against the claim of the plaintiff on an obligation contracted by said J. M. Poizat apparently as agent of the defendant Gabriela Andrea de Coster y Roxas, but in truth beyond the scope of his authority, and with knowledge on the part of the plaintiff bank that he was so acting beyond his powers, was such an error as can be imputed to this defendant, and against which she can obtain no redress.

"III. The lower court erred in not holding that a principal is not liable for an obligation contracted by his agent beyond his power even when both the creditor and the agent believed that the latter was acting within the scope of his powers.

"IV. The lower court erred in holding that because the agent of the defendant Gabriela Andrea de Coster y Roxas had power to appear for her in court, his non-appearance could render this defendant liable to a judgment by default, when the record shows that there was no service of the summons in accordance with any of the forms of service provided by law.

"V. The lower court erred in holding that J. M. Poizat was summoned as agent of his wife, the defendant Gabriela Andrea de Coster y Roxas, and was, in that capacity, notified of all the decisions rendered in this case, there being nothing in the record to support the truth of such finding.

"VI. The lower court erred in holding that in contracting the obligations in favor of the plaintiff Bank of the Philippine Islands and of the defendant Orden de PP. Predicadores de la Provincia del Santisimo Rosario, the agent of the defendant Gabriela Andrea de Coster y Roxas acted within the scope of his powers.

"VII. The lower court erred in not holding that the plaintiff Bank of the Philippine Islands and the defendant Orden de PP. Predicadores de la Provincia del Santisimo Rosario had knowledge of the fact that J. M. Poizat in contracting the respective obligations in their favor, pretending to act as agent of the defendant Gabriela Andrea de Coster y Roxas, was acting beyond the scope of his powers as such agent.

"VIII. The lower court erred in making the following statement:

" 'It is however alleged, by the petitioner, that these loans were obtained to pay debts, of strangers. Even so, this would not render the loan obtained by the attorney in fact null and void. The circumstance that the agent used the money, borrowed by him within the scope of his powers, to purposes for which he was not authorized by his principal, may entitle the latter to demand from him the corresponding liability for the damages suffered, but it cannot prejudice the creditor and cause the nullity of the loan. But, even admitting that the money borrowed was used by Poizat to pay debts which did not belong to his principal, even then, he would have acted within his powers, since his principal, together with the power to borrow money, had given her agent power to loan any amount of money, and the payment of the debts of a stranger would amount to a loan made by the agent on behalf of his principal to the person or entity whose debt was paid with the money obtained from the creditors.'

"IX. The lower court erred in applying to this case the principle involved in the case of Palanca vs. Smith, Bell & Co., 9 Phil., 131.

"X. The court erred in supplying from its own imagination facts which did not take place, of which there is no evidence in the record, and which the parties never claimed to have existed, and then draw the conclusion that if under those hypothetical facts the transaction between J. M. Poizat and the Bank of the Philippine Islands might have been legal, then the transaction as it actually took place was also legal.

"XI. The lower court erred in holding that, defendant has not alleged any of the grounds enumerated in section

113 of the Code of Civil Procedure.

"XII. The lower court erred in holding that this defendant-appellant has no meritorious defense against the Dominican Order and the Bank of the Philippine Islands.

"XIII. The lower court erred in taking into consideration Exhibit A appearing at pages 156-165 of the bill of exceptions.

"XIV. The lower court erred in denying the motion filed by this defendant-appellant.

"XV. The lower court has acted throughout these proceedings with a clear abuse of discretion."

JOHNS, J.:

We will decide the case of the bank first.

The petition of the appellant states under oath:

"II. That this defendant has been absent from the Philippine Islands and residing in the City of Paris, France, since the year 1908 (1909), up to April 30, 1924, on which date she arrived in this City of Manila, Philippine Islands.

"III. That at the time when the complaint in this case was filed and the summons issued, she was still absent from the Philippine Islands and had no knowledge either of the filing of this action or of the facts which led to it."

Under oath the plaintiff, through its acting president, says:

"I-II. That it admits the allegations contained in paragraphs I and II of the aforesaid motion.

"III. That it admits the first part of this paragraph, to wit: That at the time that the complaint in the above entitled case was filed, the defendant Gabriela Andrea de Coster y Roxas was absent from the Philippine Islands."

Paragraph 6 of section 396 of the Code of Civil Procedure provides:

"In all other cases, to the defendant personally, or by leaving a copy at his usual place of residence, in the hands of some person resident therein of sufficient discretion to receive the same. But service upon a corporation, as provided in subsections one and two, may be made by leaving the copy at the office of the proper officer thereof if such officer cannot be found."

The return of the sheriff as to the service is as follows:

"On this date I have served a copy of the within summons, and of the complaint attached, upon Jean M. Poizat, personally, and the copies corresponding to J. M. Poizat & Co., a company duly organized under the laws of the Philippine Islands, by delivering said copies to its President Mr. Jean M. Poizat, personally, and the copies corresponding to Gabriela Andrea de Coster y Roxas, by leaving the same in the place of her usual residence in the City of Manila and in the hands of her husband, Mr. J. M. Poizat, a person residing therein and of sufficient discretion to receive it, personally.

"Done at Manila, P. I., this 13th day of March, 1924.

"RICARDO SUMMERS

"Sheriff of Manila

"By GREGORIO GARCIA"

"I hereby certify that on this date I have delivered a copy of this summons and of the complaint corresponding to the 'La Orden de Dominicos or PP. Predicadores de la Provincia del Santisimo Rosario,' through Father Pedro Pratt, Procurador General of said Orden de Dominicos or PP. Predicadores de la Provincia del Santisimo Rosario, personally.

"Manila, P. I., April 1, 1924.

"RICARDO SUMMERS

"Sheriff of Manila

"By SIMEON D. SERDEÑA"

It will be noted that the service of summons and complaint was made on this defendant on the 13th day of March, 1924, and that it is a stipulated fact that since the year 1908 and up to April 30, 1924, she was "residing in the City of Paris, France." Even so, it is contended that the service was valid by reason of the fact that it was made at the usual place of residence and abode of the defendant husband, and that legally the residence of the wife is that of the husband. That contention is in direct conflict with the admission of the plaintiff that since the year 1908 and up to April 30, 1924, the wife was residing in the City of Paris. The residence of the wife in the City of Paris covered a period of sixteen years.

It may be that where in the ordinary course of business the wife is absent from the residence of the husband on a pleasure trip or for business reasons or to visit friends or relatives that, in the nature of such things, the residence of the wife would continue and remain to be that of the husband. That is not this case. For sixteen years the residence of the husband was in the City of Manila, and the residence of the wife was in the City of Paris.

Upon the admitted facts, we are clearly of the opinion that the residence of the husband was not the usual place of residence of the wife. Giving full force and effect to the legal presumption that the usual place of residence of the wife is that of her husband, that presumption is overcome by the admitted fact that the wife was "residing in the City of Paris, France, since the year 1908 up to April 30, 1924."

Without placing a limitation upon the length of time sufficient to overcome the legal presumption, suffice it to say that sixteen years is amply sufficient.

It follows that the substituted service attempted to be made under the provisions of section 396 of the Code of Civil Procedure is null and void, and that by such service the court never acquired jurisdiction of the person of the defendant wife. In that event the plaintiff contends that under his power of attorney, the husband was the general agent of the wife with authority to accept service of process for her and in her name, and that by reason of the fact that the husband was duly served and that he failed or neglected to appear or answer, his actions and conduct were binding on the defendant wife. Be that as it may, there is nothing in the record tending to show that the husband accepted service of any process for or on account of his wife or as her agent, or that he was acting for or representing her in his failure and neglect to appear or answer.

The first appearance in court of the defendant wife was made when she filed the motion of August 26, 1924, in which she prays in legal effect that the judgment against her be annulled and set aside and the case reopened, and that she be permitted to file an answer and to have the case tried on its merits. That was a general appearance as

distinguished from a special appearance. When she filed that motion asking to be relieved from the legal force and effect of the judgment, she submitted herself to the jurisdiction of the court. If, in the first instance, she had made a special appearance to question only the jurisdiction of the court, and had not appeared for any other or different purpose, another and a different question would have been presented. Having made a general appearance for one purpose, she is now in court for all purposes.

It is an elementary rule of law that as a condition precedent, to entitle a party to relief from a judgment "taken against him through his mistake, inadvertence, surprise or excusable neglect," that, among other things, he must show to the court that he has a meritorious defense. Based upon that legal principle the bank contends that no such a showing has been made by the defendant wife. That involves the legal construction of the power of attorney which, it is admitted, the wife gave to her husband on August 25, 1903, which, among other things material to this opinion, recites that she gave to him:

"Such full and ample power as required or necessary, to the end that he may perform on my behalf, and in my name and availing himself of all my rights and actions, the following acts:

"5. Loan or borrow any sums of money or fungible things at the rate of interest and for the time and under the conditions which he might deem convenient, collecting or paying the capital or the interest on their respective due dates; executing and signing the corresponding public or private documents related thereto, and making all these transactions with or without mortgages, pledges or personal guaranty.

"6. Enter into any kind of contracts whether civil or mercantile, giving due form thereof either by private documents or public deeds with all clauses and requisites provided by law for their validity and effect, having due regard to the nature of each contract.

"7. Draw, endorse, accept, issue and negotiate any drafts, bills of exchange, letters of credit, letters of payment, bills, vales, promissory notes and all kinds of documents representative of value; paying or collecting the value thereof on their respective due dates, or protesting them for non-acceptance or non-payment, utilizing in this case the rights granted by the Code of Commerce now in force, in order to collect the value thereof, interests, expenses and damages against whomsoever should be liable therefor.

"8. Institute before the competent courts the corresponding action in justification of the possession which I have or might have over any real estate, filing the necessary pleadings, evidencing them by means of documentary or oral testimony admissible by law; accepting notices and summons, and instituting all necessary proceedings for the termination thereof and the consequent inscription of said action in the corresponding office of the Register of Deeds, in the same manner in which I might do if personally present and acting.

"9. Represent me in all cases before the municipal courts, justice of the peace courts, courts of first instance, supreme court and all other courts of regular or any other special jurisdiction, appearing before them in any civil or criminal proceedings, instituting and filing criminal and ordinary civil actions, claims in intestate and testamentary proceedings, insolvencies and other actions provided by law; filing complaints, answers, counterclaims, cross complaints, criminal complaints and such other pleadings as might be necessary; filing demurrers, taking and offering judicial admissions, documentary, expert, oral evidence, and others provided by law, objecting to and opposing whatever contrary actions are taken, offered and presented; accepting notices, citations and summons and acknowledging their receipt to the proper judicial officials.

"10. For to the end stated above and the incidents related thereto, I confer on him ample and complete power, binding myself in the most solemn manner as required by law to recognize as existing and valid all that he might do by virtue hereof."

It is admitted that on December 29, 1921, the defendant husband signed the name of the defendant wife to the

promissory note in question, and that to secure the payment of the note, upon the same date and as attorney in fact for his wife, the husband signed the real mortgage in question in favor of the bank, and that the mortgage was duly executed.

Based upon such admissions, the bank vigorously contends that the defendant wife has not shown a meritorious defense. In fact that it appears from her own showing that she does not have a legal defense. It must be admitted that upon the face of the instruments, that fact appears to be true. To meet that contention, the defendant wife points out, first, that the note in question is a joint and several note, and, second, that it appears from the evidence, which she submitted, that she is nothing more than an accommodation maker of the note. She also submits evidence which tends to show:

"First. That prior to July 25, 1921, Jean M. Poizat was personally indebted to the Bank of the Philippine Islands in the sum of P290,050.02 (Exhibit H, page 66, bill of exceptions);

"Second. That on July 25, 1921, the personal indebtedness of Jean M. Poizat was converted into six promissory notes aggregating the sum of P308,458.58 of which P16,180 were paid, leaving an outstanding balance of P292,278.58 (Exhibits D, E, F, G, H and I, pages 75-80, bill of exceptions);

"Third. That on December 29, 1921, the above promissory notes were cancelled and substituted by a joint and several note signed by Jean M. Poizat in his personal capacity and as agent of Gabriela Andrea de Coster y Roxas and as member of the firm J. M. Poizat & Co."

In other words, that under the power of attorney, the husband had no authority for and on behalf of the wife to execute a joint and several note or to make her liable as an accommodation maker. That the debt in question was a preexisting debt of her husband and of the firm of J. M. Poizat & Co., to which she was not a party, and for which she was under no legal obligation to pay. That she never borrowed any money from the bank, and that previous to the signing of the note, she never had any dealings with the bank and was not indebted to the bank in any amount. That the old, original debts of her husband and J. M. Poizat & Co. to the bank, to which she was not a party, were all taken up and merged in the new note of December 29, 1921, in question, and that at the time the note was signed, she did not borrow any money, and that no money was loaned by the bank to the makers of the note.

Assuming such facts to be true, it would be a valid defense by the defendant wife to the payment of the note. There is no claim or pretense that the bank was misled or deceived. If it had made an actual loan of P292,000 at the time the note was executed, another and a different question would be presented. In the ordinary course of its business, the bank knew that not a dollar was loaned or borrowed on the strength of the note. It was given at the urgent and pressing demand of the bank to obtain security for the six different notes which it held against J. M. Poizat & Co. and Jean M. Poizat of date July 25, 1921, aggregating about P292,000, and at the time it was given, those notes were taken up and merged in the note of December 29, 1921, now in question. Upon the record before us, there is no evidence that the defendant wife was a party to the notes of July 25, 1921, or that she was under any legal liability to pay them.

The note and mortgage in question show upon their face that at the time they were executed, the husband was attorney in fact for the defendant wife, and the bank knew or should have known the nature and extent of his authority and the limitations upon his power.

You will search the terms and provisions of the power of attorney in vain to find any authority for the husband to make his wife liable as a surety for the payment of the preexisting debt of a third person.

Paragraph 5 of the power of attorney above quoted authorizes the husband for and in the name of his wife to "loan or borrow any sums of money or fungible things, etc." This should be construed to mean that the husband had

power only to loan his wife's money and to borrow money for or on account of his wife as her agent and attorney in fact. That does not carry with it or imply that he had the legal right to make his wife liable as a surety for the preexisting debt of a third person.

Paragraph 6 authorizes him to "enter into any kind of contracts whether civil or mercantile, giving due form thereof either by private documents or public deeds, etc."

Paragraph 7 authorizes him to "draw, endorse, accept, issue and negotiate any drafts, bills of exchange, letters of credit, letters of payment, bills, vales, promissory notes, etc."

The foregoing are the clauses in the power of attorney upon which the bank relies for the authority of the husband to execute promissory notes for and on behalf of his wife and as her agent.

It will be noted that there is no provision in either of them which authorizes or empowers him to sign anything or to do anything which would make his wife liable as a surety for a preexisting debt.

It is fundamental rule of construction that where in an instrument powers and duties are specified and defined, that all of such powers and duties are limited and confined to those which are specified and defined, and that all other powers and duties are excluded.

Paragraph 8 of the power of attorney authorizes the husband to institute, prosecute and defend all actions or proceedings in a court of justice, including "accepting notices and summons."

There is nothing in the record tending to show that the husband accepted the service of any notice or summons in the action on behalf of the bank, and even so, if he had, it would not be a defense to open up and vacate a judgment under section 113 of the Code of Civil Procedure. The same thing is true as to paragraph 9 of the power of attorney.

The fact that an agent failed and neglected to perform his duties and to represent the interests of his principal is not a bar to the principal obtaining legal relief for the negligence of her agent, provided that the application for such a relief is duly and properly made under the provisions of section 113.

It is very apparent from the face of the instrument that the whole purpose and intent of the power of attorney was to empower and authorize the husband to look after and protect the interests of the wife and for her and in her name to transact any and all of her business. But nowhere does it provide or authorize him to make her liable as a surety for the payment of the preexisting debt of a third person.

Hence, it follows that the husband was not authorized or empowered to sign the note in question for and on behalf of the wife as her act and deed, and that as to her the note is void for want of power of her husband to execute it.

The same thing is true as to the real mortgage to the bank. It was given to secure the note in question and was not given for any other purpose. The real property described in the mortgage to the bank was and is the property of the wife. The note being void as to her, it follows that as to her the real mortgage to the bank is also void for want of power to execute it.

It appears that before the motion in question was filed, there were certain negotiations between the bank and the attorney for the wife with a view of a compromise or settlement of the bank's claim against her, and that during such negotiations, there was some evidence or admissions on the part of her attorney that she was liable for the bank's claim. It now contends that as a result of such negotiations and admissions, the wife is estopped to deny her liability. But it also appears that during such negotiations, both the wife and her attorney did not have any knowledge of the actual facts, and that she was then ignorant of the defense upon which she now relies. Be that as it may, such negotiations were more or less in the nature of a compromise which was rejected by the bank, and it

appears that in any event both the wife and her attorney did not have any knowledge of the facts upon which they now rely as a defense.

There is no claim or pretense that the debt in question was contracted for or on account of the "usual daily expenses of the family, incurred by the wife or by her order, with the tacit consent of the husband," as provided for in article 1362 of the Civil Code. Neither is there any evidence tending to show that the wife was legally liable for any portion of the original debt evidenced by the note in question.

This decision as to the bank on this motion is based on the assumption that the facts are true as set forth and alleged in the petition to set aside and vacate the judgment as to the wife, but we are not making any finding as to the actual truth of such facts. That remains for the defendant wife to prove such alleged facts when the case is tried on its merits.

It follows that the opinion of the lower court in refusing to set aside and vacate the judgment of the plaintiff bank against the defendant wife is reversed, and that judgment is vacated and set aside, and as to the bank the case is remanded to the lower court, with leave for the wife to file an answer to plaintiff's cause of action, and to have the case tried on its merits and for any further proceedings not inconsistent with this opinion.

As to the judgment in favor of the Dominican Fathers, it appears that their plea above quoted in the statement of facts was filed on April 24, 1924. In that plea they say that they have a first mortgage on the property described in paragraph IV of the complaint for P125,000 with interest at 10 per cent per annum. That the mortgagors Jean M. Poizat and Gabriela Andrea de Coster y Roxas have not paid the principal or the stipulated interest from December 16, 1921, to date, which up to the 30th day of April, 1924, amounts to P27,925.34. Wherefore, it is prayed that the credit above-mentioned be taken into account when the second mortgage is foreclosed.

No other plea of any kind, nature or description was filed by it. The record shows that a copy of this alleged plea was served upon the attorneys for the plaintiff bank. There is nothing in the record which shows or tends to show that a copy of it was ever served on either one of the defendants. Neither is there any evidence that either of the defendants ever appeared in the original action. In fact, judgment was rendered against them by default.

Under such a state of facts, the judgment in favor of the Dominican Fathers cannot be sustained. In the first place, the plea above quoted filed on April 24, 1924, would not be sufficient to sustain a judgment. It does not even ask for a judgment or the foreclosure of its mortgage. In the second place, no copy of the plea was ever served upon either of the defendants, who were the real parties in interest, and against whom a judgment was rendered for the full amount of the note and the foreclosure of the mortgage. Such a proceeding cannot be sustained on any legal principle.

Unless waived, a defendant has a legal right to service of process, to his day in court and to be heard in his defense.

From what has been said, it follows that, if the transaction between the Dominican Fathers and Jean M. Poizat as attorney in fact for his wife was an original one and the P125,000 was actually loaned at the time the note and mortgage were executed and the money was in good faith delivered to the husband as the agent and attorney in fact of the wife, it would then be a valid exercise of the power given to the husband, regardless of the question as to what he may have done with the money.

Paragraph 5 of the power of attorney specifically authorizes him to borrow money for and on account of his wife and in her name, "and making all these transactions with or without mortgages, pledges or personal guaranty."

It follows that the judgment of the lower court in favor of La Orden de Dominicos or PP. Predicadores de la

Provincia del Santisimo Rosario is reversed, without prejudice to its right to either file an original suit to foreclose its mortgage or to file a good and sufficient plea as intervenor in the instant suit, setting forth the facts upon which it relies for a judgment on its note and the foreclosure of its mortgage, copies of which should be served upon the defendants.

Neither party to recover costs. So ordered.

Ostrand and Romualdez, JJ., concur.

Johnson and Malcolm, JJ., concur in the result.

CONCURRING AND DISSENTING

VILLAMOR, J.:

I concur in the result reached by the court in ordering the remanding of the case for further proceedings, for in my opinion, the defendant-appellant, against whom a judgment by default was rendered, has the right, under section 113 of the Code of Civil Procedure, to have said judgment set aside and to be given an opportunity to appear, having alleged facts which, if proven, would constitute a good defense, but I dissent from the opinion of the majority in so far as it attempts to decide certain features of the case raised by the defendant-appellant, without waiting for the outcome of the new trial wherein the other parties must naturally have the same opportunity to present their defenses against the facts alleged by the appellant. In my opinion, the merits of the question should not now be discussed without giving the trial court an opportunity to pass upon the allegations and evidence of the parties litigant.

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