

S. W. O'BRIEN, A. S. CROSSFIELD, L. R. SWEET, FINDLAY MILLAR TIMBER CO., AND ASIATIC PETROLEUM CO. (P. I.), LTD., PETITIONERS, VS. HONORABLE SIMPLICIO DEL ROSARIO, JUDGE OF FIRS...

G.R. No. 26320. December 03, 1926

Ponente: JOHNS, J.

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JOHNS, J.:

The question presented involves the construction of Act No. 1956 known as the Insolvency Law, which is entitled as "An Act providing for the suspension of payments, the relief of insolvent debtors, the protection of creditors, and the punishment of fraudulent debtors."

Section 1 provides:

"This Act shall be known and may be cited as the Insolvency Law, and in accordance with its provisions every insolvent debtor may be permitted to suspend payments or be discharged from his debts and liabilities."

Under the head of "Voluntary Insolvency," among other things, section 18 of the Act provides:

"Upon the granting of said order all civil proceedings pending against the said insolvent shall be stayed. When a receiver is appointed, or an assignee chosen, as provided in this Act, the sheriff shall thereupon deliver to such receiver or assignee, as the case may be, all the property, assets, and belongings of the insolvent which have come into his possession."

Under the head of "Involuntary Insolvency," section 21 of the Act provides:

"Upon the filing of such creditors' petition, the court or a judge thereof shall issue an order requiring such debtor to show cause, at a time and place to be fixed by said court or judge, why he should not be adjudged an insolvent debtor; and at the same time, or thereafter, upon good cause shown therefor, said court or judge may make an order forbidding the payment of any debts, and the delivery of any property belonging to such debtor to him or to any other person for his use or benefit or the transfer of any property by him."

Section 24 provides:

"* * * Provided, That in the affidavit of the insolvent, touching his property and its disposition, he shall not be required to swear that he has not made any fraudulent preference or committed any other act in conflict with the provisions of this Act; but he may do so if he desires. Said order shall further direct the sheriff of the province or city where the insolvency petition is filed, or the receiver, if one has been theretofore appointed, to take possession of and safely keep, until the appointment of an assignee, all the deeds, vouchers, books of account, papers, notes, bills, bonds and securities of the debtor, and all his real and personal property, estate and effects, except such as may be by law exempt from execution. Said order shall further forbid the payment to the debtor of any debts due to him, and the delivery to the debtor, or to any person for him, of any property belonging to him, and the transfer of any property by him, and shall further appoint a time and place for a meeting of the creditors to choose an assignee of the estate * * *."

And that "upon the granting of said order, all civil proceedings pending against the said insolvent shall be stayed."

Section 32 of the Act provides:

"As soon as an assignee is elected or appointed and qualified, the clerk of the court shall, by an instrument under his hand and seal of the court, assign and convey to the assignee all the real and personal property, estate, and effects of the debtor with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in insolvency, and shall relate back to the acts upon which the adjudication was founded, and by operation of law shall vest the title to all such property, estate, and effects in the assignee, although the same is then attached on mesne process, as the property of the debtor. Such assignment shall operate to vest in the assignee all of the estate of the insolvent debtor not exempt by law from execution. It shall also dissolve any attachment levied within one month next preceding the commencement of the insolvency proceedings and vacate and set aside any judgment entered in any action commenced within thirty days immediately prior to the commencement of insolvency proceedings and shall vacate and set aside any execution issued thereon and shall vacate and set aside any judgment entered by default or consent of the debtor within thirty days immediately prior to the commencement of the insolvency proceedings."

Section 33 provides:

"The assignee shall have the right to recover all the estate, debts, and effects of said insolvent. If, at the time of the commencement of proceedings in insolvency, an action is pending in the name of the debtor, for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall be allowed and admitted to prosecute the action, in like manner and with like effect as if it had been originally commenced by him. If there are any rights of action in favor of the insolvent for damages, on any account, for which an action is not pending, the assignee shall have the right to prosecute the same with the same effect as the insolvent might have done himself if no proceedings in insolvency had been instituted. If any action or proceeding in which the insolvent is defendant is pending at the time of the adjudication, the assignee may defend the same in the same manner and with like effect as it might have been defended by the insolvent. Any suit prosecuted or defended by the assignee, a certified copy of the assignment made to him shall be conclusive evidence of his authority to sue or defend."

Section 59 provides:

"When a creditor has a mortgage, or pledge of real or personal property of the debtor, or a lien thereon, for securing the payment of a debt owing to him from the debtor, or an attachment or execution on property of the debtor duly recorded and not dissolved under this Act, he shall be admitted as a creditor for the balance of the debt only, after deducting the value of such property, such value to be ascertained by agreement between him and the receiver, if any, and if no receiver, then upon such sum as the court or a judge thereof may decide to be fair and reasonable, before the election of an assigned, or by a sale thereof, to be made in such manner as the court or judge thereof shall direct; or the creditor may release or convey his claim to the receiver, if any, or if no receiver then to the sheriff, before the election of an assignee, or to the assignee if an assignee has been elected, upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the debtor's right of redemption thereon on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon, and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction * * *."

Among other things, section 60, upon which the defendants rely, provides:

"* * * That no valid lien existing in good faith thereunder shall be thereby affected. * * *"

Upon the question presented, it must be conceded that Act No. 1956 is very awkwardly worded and loosely written, and that there is an apparent conflict between the provisions of the Act as to "Voluntary insolvency" and "Involuntary insolvency". The question presented arises out of an "Involuntary insolvency."

It is elementary that in the construction of any statute, force and effect should be given to the intent of the law, and the purpose for which it was enacted.

Act No. 1956 is entitled "An Act providing for the suspension of payments, the relief of insolvent debtors, the protection of creditors. * * *" That was its purpose and intent, and in the case of an involuntary insolvency, section 32 of the Act provides that as soon as the assignee is elected, the clerk of the court shall convey to him all of the property, real, personal and mixed, of the insolvent, and that such assignment shall relate back to the commencement of the proceedings in insolvency, and shall relate back to the acts upon which the adjudication was founded, and by operation of law shall vest the title to all such property, estate, and effects in the assignee, although the same is then attached on mesne process, as the property of the debtor.

In the instant case, it appears that the mortgage to the bank covers all of the property of the insolvent debtors, who have made and are now in default in the foreclosure suit. In the very nature of things, the insolvents have no further interest in the foreclosure proceeding. It also appears that at the time the complaint in the foreclosure suit was filed, a receiver was appointed, and that he qualified and took actual possession of the property. Assuming that the bank has a valid mortgage for the amount of its claim, it follows that its lien would not be impaired or its interest in any way jeopardized by a reasonable delay for the appointment of an assignee by the creditors. If such delay is not granted," the bank can obtain a decree for the full amount of its claim and sell all of the property of the insolvents, and the unsecured creditors would be helpless, and would not receive a centavo on the whole amount of their claim.

Upon such a state of facts, if a foreclosure suit is not suspended pending the election of an assignee, the mortgagee and the insolvent, through fraud and collusion, as to the amount due on the mortgage, could wipe out all of the assets of an insolvent estate. For example: Suppose A executed a mortgage on all of his property to B, to secure a debt of P100,000, upon which A has paid P90,000 of the debt, and later B filed a suit to foreclose his mortgage in which he ignored the payments, and claims that there was P100,000 due and owing upon the mortgage. Pending the foreclosure suit, the creditors of A file a petition to have him declared an involuntary insolvent, A then, realizing that he has no further interest in the property covered by the mortgage, does not appear or make any defense in the foreclosure suit, and permits B to recover judgment against him for P100,000, and B has the mortgaged property sold to satisfy the judgment. By such a proceeding, all the assets of A would be wiped out, and the unsecured creditors would be left helpless. That was never the purpose and intent of the Insolvency Law, which, among other things, was enacted "for the suspension of payments and the protection of creditors." In the event of collusion between the mortgagee and the insolvent, such a proceeding would defeat the very purpose and intent of the Insolvency Law, and consummate a fraud upon the creditors whose interests the law was designed to protect.

Again, section 60 specifically provides "That no valid lien existing in good faith thereunder shall be thereby affected. * * *" Assuming that the bank has a valid lien, and that a receiver was appointed in the foreclosure suit at the time the complaint was filed, that lien would not in any manner be "affected," or its interest jeopardized in those proceedings, through a reasonable delay for the appointment of an assignee by the creditors. If the bank does not have a valid lien for the full amount of its claim, and is permitted to obtain a decree by default for the full amount, and to sell the property to satisfy the decree, that would operate as a fraud upon the unsecured creditors. Through a reasonable delay in the foreclosure suit for the election of an assignee by the creditors, an assignee could then appear in the foreclosure suit and make any legal defence which he might have. During all of such

proceedings, any valid lien which the bank might have would be recognized and respected under the provisions of section 60.

As the title of the Act says, the Insolvency Law was designed to provide "for the suspension of payments," and the "protection of creditors," and under the law, the assignee appears for and represents the creditors, and he cannot make such appearance until after he is elected and qualified.

Section 32 provides that from the date of his appointment, "* * * such assignment shall relate back to the commencement of the proceedings in insolvency, and shall relate back to the acts upon which the adjudication was founded, and by operation of law shall vest the title to all such property, estate, and effects in the assignee, although the same is then attached on mesne process, as the property of the debtor. * * *"

Of what legal force and effect is that section, if pending the election of an assignee, all of the assets of the insolvent estate are wiped out by a decree in the foreclosure suit, as would be done in the instant case? If, as that section says, "such assignment shall relate back to the commencement of the proceedings in insolvency," and "by operation of law shall vest the title to all such property, estate and effects in the assignee," why should not his legal right to appear and defend in the foreclosure suit also relate back "to the commencement of the proceedings in insolvency," if for no other purpose, to prevent fraud and collusion between the insolvent debtor and the mortgagee in a foreclosure suit, and the wiping out of all the assets of the insolvent estate? If the assignee does not have that legal right, section 32 of the Act is a nullity.

This opinion is founded upon our construction of the Insolvency Law in which we do not wish to be understood as casting any reflections upon the justness of the amount of the bank's claim, but we do say that, upon the facts in this record, the assignee, when elected, ought to have the legal right to appear and defend in the foreclosure suit as of the date when the insolvency proceedings were filed, and as of the date when the title is vested in him as assignee. Otherwise, any title which is vested in him as assignee would be wiped out in the foreclosure suit before he had an opportunity to appear and defend. It will also be noted that the provisions of section 32 apply alike to a voluntary and an involuntary insolvent.

The prayer of the petitions is that a writ of prohibition be issued restraining the defendant Simplicio del Rosario from proceeding with the trial and decision in the foreclosure suit until authority is obtained from the insolvency court and an assignee in insolvency can be appointed and made a party defendant in the suit. In other words, that the lower court does not have jurisdiction to proceed in the foreclosure suit and render a decree until such time as an assignee is elected.

Legally speaking, upon the filing of the insolvency petition, Velasco & Company ceased to exist and was judicially dead, and it did not have or claim any further interest in the foreclosure suit. If in fact Velasco & Company had been an individual and had died pending the suit, it would be conceded that the lower court would not have jurisdiction to proceed with the trial and render a decree until such time as an administrator or an executor was appointed and substituted as a defendant. Upon legal principle, what is the difference? In the one case, you have a death through natural causes, and in the other, a legal death, as to the estate of the insolvent, through the filing of the insolvency petition. That is the true meaning and legal force and effect of section 32 when it says that upon the election of an assignee, his title to the estate relates back to the filing of the insolvency petition. That is to say, when a petition is filed by creditors to have a person declared an involuntary insolvent where, in the regular course of business, he is declared insolvent, and an assignee is elected, the title of the assignee to all of the estate and assets of the insolvent relates back and becomes vested in the assignee as of the date of the filing of the original petition by the creditors. In other words, as to his estate, the insolvent is then declared judicially dead as of the date of the filing of the petition. During that time the court might have

jurisdiction to render a personal judgment against such an insolvent in an action which was brought and pending when the insolvency petition was filed, but it would not have jurisdiction to render a decree for the sale of the assets of the insolvent to satisfy the judgment.

It must be admitted that when an administrator is appointed of the estate of a deceased person, the title of the administrator to the assets of the estate relates back to the date of the death of the deceased. That is the true meaning of section 32. If, in a foreclosure suit, where the defendant dies before the rendition of the decree, all proceedings must be stayed until an administrator of his estate is appointed and a substitution made, why does not the same legal principle apply to an insolvent estate where the title to the estate of the insolvent relates back and becomes vested in the assignee when elected as of the date of the filing of the insolvency petition?

Upon the undisputed facts, and in the interest of justice, the writ is granted as prayed for by the petitioners, with costs. So ordered.

Ostrand, Romualdez, and VillaReal, JJ., concur.

CONCURRING

MALCOLM, J.,

As my vote will be determinative of this important case, I desire to announce my position and to state my reasons therefor briefly. The purpose of the petition is to obtain a writ of prohibition ordering the suspension of the proceedings for the foreclosure of the mortgage until the permission of the insolvency court has been obtained and an assignee appointed and made a party in the suit. The pertinent sections of the Insolvency Law are mentioned and largely quoted in both the main opinion and the dissenting opinion. To my mind, a portion of section 60 not quoted is also important, viz.:

“* * * No creditor whose debt is provable under this Act shall be allowed, after the commencement of proceedings in insolvency, to prosecute to final judgment any action therefor against the debtor until the question of the debtor's discharge shall have been determined, and any such suit or proceeding shall, upon the application of the debtor or of any creditor, or the assignee, be stayed to await the determination of the court on the question of discharge: Provided, That if the amount due the creditor is in dispute, the suit, by leave of the court in insolvency, may proceed to judgment for the purpose of ascertaining the amount due, which amount, when adjudged, may be allowed in the insolvency proceedings, but execution shall be stayed as aforesaid.” Based on the Insolvency Law, my bent of mind is disclosed in my dissenting opinion in the case of *Chartered Bank of India, Australia and China vs. Imperial and National Bank* R. G. No. 17222,[1] and need not here be enlarged upon. Suffice it to say, the purpose of the Insolvency Law should be borne in mind and in my opinion will be largely defeated if the insolvency court shall not be permitted, to have full control of all proceedings not only after the adjudication of insolvency but following the institution of involuntary proceedings. For such reasons and others which are well stated in the majority opinion, I concur, and am of the opinion that the original decision was correct and that the writ should be granted.

[1] 48 Phil., 931

DISSENTING

STREET, J., with whom concur AVANCENA, C. J., JOHNSON, and VILLAMOR, JJ.,

This is an original petition whereby S. W. O'Brien and others, general creditors of Mariano Velasco & Co., against whom a petition of insolvency is now pending before the sixth branch of the Court of First Instance of Manila, seek to enjoin and prohibit the respondent Simplicio del Rosario, Judge of the first branch of said court, from hearing and determining a case now pending before him, in which the Bank of the Philippine Islands is plaintiff and Mariano Velasco & Co., and others, are defendants, the same being civil cause No. 29082 in said court. Upon the filing of the petition in this court a temporary order was granted restraining the respondent Judge from proceeding with the trial and decision of said civil cause until further order, and the respondents were required to answer the petition.

The cause has accordingly been submitted for decision here upon petition and answer; and, on August 21, 1926, an opinion, written by the author of this dissenting opinion, was promulgated by the court in which the relief sought was granted and the respondent Judge was required to return civil cause No. 29082 to the calendar and to suspend the proceedings therein long enough to permit the assignee, presently to be elected in the insolvency proceeding, to appear and make defense. Soon after the promulgation of said decision the attorneys for the respondents filed a motion for reconsideration; and, on October 8, 1926, said motion was granted by this court, with directions that the case be resubmitted to the court, as has now been done. The present decision is therefore a decision upon a motion to reconsider an opinion written by the undersigned. It is not improper to state that, when the case was first heard, there was not an entire agreement among the members of the court as to the propriety of the step taken, but the Justices who had doubts permitted themselves, in the interest of harmony, to sign with the others. Upon the reconsideration of the cause the lack of harmony above alluded to has become more pronounced; and the dissenting Justices now find it necessary to express their views in a formal dissent. Though the author of the present dissenting opinion was the original spokesman of the court, he has not been for that reason less disposed to correct the mistake which he believes was committed in the first decision. With these preliminary remarks we proceed to consider the questions of law and fact involved in the case.

It appears, then, that Mariano Velasco & Co. is a general collective partnership, duly organized under existing laws, and heretofore, as at present, engaged in mercantile business in the City of Manila. On March 8, 1919, said firm obtained an open credit with the Bank of the Philippine Islands in the amount of P350,000, and in order to assure the bank the payment of such indebtedness as might be incurred against this credit, with interest at eight per centum per annum, a mortgage was given by the debtor firm to the bank, upon various parcels of real property in the City of Manila. On November 23, 1921, a supplemental mortgage was executed by the debtor firm fixing the amount secured at P486,750.65, the indebtedness having in the meantime risen to said amount, and stipulating for the payment of interest at nine per centum per annum. On the same date, and for the purpose of securing the same indebtedness as was covered by the real estate mortgages already mentioned, a chattel mortgage was executed by Mariano Velasco & Co. to the bank, mortgaging to it four bonds of the Manila Electric Railroad and Light Corporation of the face value of \$1,000 each, together with more than a thousand shares in different industrial enterprises. On April 8, 1924, Jose Velasco, general manager of Mariano Velasco & Co., executed another document, personally pledging to the bank over one thousand shares in the China Banking Corporation and one hundred eighty shares in other industrial enterprises, all belonging to himself, for the purpose of guaranteeing to the bank the payment of all the indebtedness of Mariano Velasco & Co. On July 25, 1925, the same individual executed a ratificatory act confirming the contract next above-mentioned, in view of certain informalities in its execution. The indebtedness above referred to not having been liquidated, the Bank of the Philippine Islands, on December 7, 1925, instituted an action (case No. 29082) against Mariano Velasco & Co. and six partners therein, for the purpose of recovering its indebtedness, with stipulated attorneys' fees and costs, and to secure a foreclosure of the mortgage held by it. In the complaint in said action it was alleged that the

mortgaged properties were in danger of deterioration, and a receiver was accordingly asked for to take charge of said properties until foreclosure should be effected. Upon the filing of the complaint the court therefore made an order appointing as receiver Ramon Zaragoza, who duly qualified and assumed possession of the property subject to the mortgages.

Three of the partners in the defendant firm appear to be nonresidents, and as they are not represented by attorney in Manila, publication became necessary to affect them with notice in the civil action above referred to. The other defendants filed an answer in said cause on January 4, 1926, through their attorneys, Messrs. Crossfield and O'Brien. On February 26 judgment by default was taken against the nonresidents, and the cause was continued for trial until July 19.

The answer interposed in behalf of Mariano Velasco & Co. and two resident partners in the foreclosure case admits the validity of all the mortgages of which mention has been made and admits that Mariano Velasco & Co. is largely indebted to the plaintiff bank. They allege, however, that the stipulation for attorneys' fees is excessive, that plaintiff's claim is usurious, and that the plaintiff had collected money in behalf of the debtor that should be applied to its indebtedness to the bank, in amounts unknown to the defendants. They therefore deny that Mariano Velasco & Co. is indebted to the plaintiff in the amount claimed in the complaint. While it will thus be seen that the averments of the answer may be considered rather weak and inconclusive, they nevertheless traverse the allegations of the complaint with respect to the amount of the indebtedness and make an issue on this point.

Before the day fixed for the trial of the foreclosure case various creditors of Mariano Velasco & Co. filed a petition in bankruptcy (case No. 29995) in the sixth branch of the Court of First Instance of Manila, alleging that said firm was insolvent, and asking that it be adjudicated a bankrupt, as well as the various individuals named in the petition as general partners in the firm. This insolvency proceeding is still pending, and a receiver has been appointed to take possession of the properties of said alleged insolvents pending the contemplated election of an assignee in insolvency.

On the date set for the trial of the foreclosure case in the first branch of the Court of First Instance of Manila, Messrs. Crossfield and O'Brien appeared and informed said court that they had filed a petition in bankruptcy against Mariano Velasco & Co., and that they could no longer represent the defendants for whom they had previously appeared in the foreclosure case. At the same time they raised a question as to the jurisdiction of the court to proceed with the trial of the case. His Honor, Judge Del Rosario, thereupon continued the cause until July 30, 1926, and caused notice of the continuance to be given to the defendants in said cause.

On July 26, 1926, Crossfield and O'Brien, on behalf of themselves and other creditors of Mariano Velasco & Co., submitted a petition to Judge Del Rosario in the foreclosure case, informing the court of the status of the insolvency proceeding and asking that the foreclosure proceeding be suspended until the permission of the court of bankruptcy should be obtained and until an assignee should be appointed in the bankruptcy proceeding, who might be made a party in the foreclosure proceeding. This request was denied, and, on July 30, 1926, as we have already seen, the respondent Judge allowed the plaintiff to submit the cause for decision upon proof presented in its behalf and in the absence of representation on the part of the defendants.

For the petitioners the proposition is advanced that after the beginning of the bankruptcy proceeding (case No. 29995 in the sixth branch of the Court of First Instance of Manila), the foreclosure proceeding pending in the first branch should have been stayed as a matter of course, and that the last mentioned court has no jurisdiction to entertain said proceeding further, or at least not until the court of insolvency shall give its permission for the other court to proceed with the foreclosure. This contention is based upon a provision in section 24 of the Insolvency Law (Act No. 1956) to the effect that upon the granting of the preliminary order declaring the debtor to be

insolvent all civil proceedings pending against said insolvent shall be stayed, as well as upon the more extended statement in section 60 of the same Act to the effect that no creditor whose debt is provable under the Insolvency Law shall be allowed, after the commencement of proceedings in insolvency, to prosecute to final judgment any action therefor against the debtor until the question of the debtor's discharge shall be determined, and any such suit or proceeding shall, upon the application of the debtor or any creditor, or the assignee, be stayed to await the determination of the court on the question of discharge, provided that if the amount due the creditor is in dispute, the suit, by leave of the court in insolvency, may proceed to judgment for the purpose of ascertaining the amount due, which amount, when adjudged, may be allowed in the insolvency proceedings, but execution shall be stayed as aforesaid.

These provisions are certainly clear and the language broad enough to include a foreclosure action. But upon taking said provisions in connection with others in the same Law, it is quite apparent that the draftsman of these provisions had principally in mind actions of a purely personal character against the debtor; and at any rate other provisions show an intention on the part of the legislature to except actions to foreclose a lien from the operation of those provisions. Thus in section 60, immediately preceding the provision last above mentioned, there is a proviso to the effect that no valid lien existing in good faith shall be affected. This means of course that the obligation created by a valid mortgage shall not be impaired. But there are still other provisions of the Insolvency Law showing that the lawmaker had no intention to inhibit the prosecution of a foreclosure suit. Under section 29 of said Law, no creditor or claimant holding a mortgage, pledge, or lien, of any kind whatever, as security for the payment of his claim, or having an attachment or execution on property of the debtor duly recorded and not dissolved under the Insolvency Act, is permitted to vote at the election of the assignee unless he shall first have the value of his security appraised and the amount deducted from his claim, in which case he may vote at the election of assignee, in representation of so much of his credit as is unsecured; or, if he chooses to surrender his security to the insolvent estate, he may vote in such election in representation of his entire claim. Again, under section 59, a creditor having a mortgage or pledge of real or personal property of the debtor, or a lien thereon, for securing the payment of his credit, or an attachment or execution on the property of the debtor duly recorded and not dissolved under the Insolvency Law, is not admitted as a general creditor except for the balance of the debt after deducting the appraised value of the property constituting his security. Moreover, under the same section, if the secured creditor elects to rely upon his security without participating in the assets of the insolvent, the assignee is required to deliver to the creditor all the property subject to the creditor's mortgage, pledge, or lien, or upon which he has an attachment or execution. These provisions appear to be absolutely inconsistent with the idea of requiring the court in which a foreclosure suit is pending to suspend the foreclosure proceedings upon the commencement of insolvency proceedings against the mortgagor. It follows that the provisions contained in sections 29 and 60 requiring actions against the insolvent to be stayed (subject to the last proviso of section 60) cannot be given full latitude, but must be read in the light of the special provisions relative to mortgages and other liens. This means of course that the mortgage foreclosure proceeding is excepted in so far as the creditor means to proceed to subject the mortgaged property to the payment of his debt. Of course the court entertaining the foreclosure proceeding could not be permitted to give personal judgment against the insolvent debtor for the balance due after the proceeds of the mortgaged property are applied, the remedy being necessarily limited to a declaration of the amount of indebtedness and the sale of the property in case said indebtedness should not be paid within the period of ninety days allowed in foreclosure proceedings.

The question above discussed was under consideration in this court sometime ago in the case of *Chartered Bank of India, Australia and China vs. Imperial and National Bank*, R. G. No. 17222.[1] It there appeared that prior to December 8, 1920, Umberto de Poli had been a licensed public warehouseman in the City of Manila, and that he had also been engaged for sometime as a merchant in buying and selling the products of the country. In the course

of his transactions in said capacity, he had become indebted in the amount of nearly P4,000,000 to various banks and to other creditors in this city. Upon the date mentioned one of these creditors, to wit, the Philippine National Bank, instituted an action of replevin against the said U. de Poli in the Court of First Instance of the City of Manila to recover possession of certain merchandise and effects, to the value of over P600,000, which were alleged to have been pledged by him to the said Bank as security for his indebtedness to it. The writ of replevin having been issued, the sheriff proceeded to take possession of certain merchandise and effects found in his bodegas, of the class and quality of the goods described in the pledge, and which the Bank claimed to be those pledged to it. After this seizure had been effected, and while the property was still in the custody of the sheriff, without having been delivered under the writ of replevin to the Philippine National Bank, other creditors of the said U. de Poli, to wit, the Chartered Bank of India, Australia and China, the Hongkong and Shanghai Banking Corporation, and W. S. Stevenson & Co., Ltd., filed a petition in insolvency against him, alleging that, being a merchant, he had generally defaulted in the payment of his current obligations for a period of thirty days prior to the presentation of said petition—an act of insolvency under section 20 of the Insolvency Law. Upon the presentation of this petition U. de Poli appeared in court and, admitting the allegations of the petition, waived his right to the preliminary hearing on the question of his insolvency. The Court of First Instance accordingly issued its order, declaring U. de Poli an involuntary bankrupt and directing the sheriff of the City of Manila, pursuant to section 24 of Act No. 1956, to take possession of all property belonging to the insolvent and safely to keep the same until the appointment of an assignee. Up to this point the action of replevin and the insolvency proceeding had been prosecuted in different branches of the Court of First Instance of the City of Manila, but by consent the action of replevin was transferred to the fourth branch of said court, presided over by his Honor, Judge C. A. Imperial, before whom the proceeding in insolvency was pending. This having been accomplished, the petitioning creditors in the insolvency action moved the court to stay proceedings in the action of replevin. This motion was denied by Judge Imperial, and directions were given to the sheriff to make delivery of the replevined property to the Philippine National Bank, unless the petitioning creditors should within twenty-four hours exercise the right, conferred by section 267 of the Code of Civil Procedure, of giving a counter bond in double the amount of the property. Contemporaneously with the taking of action upon the motion aforesaid, his Honor also overruled a similar motion, made by McLeod & Co., Inc., which house, though not a party to the petition of insolvency, was a creditor of the insolvent. The petitioning creditors thereupon filed in the Supreme Court a petition for writs of certiorari and prohibition to annul the order of the lower court directing the sheriff to deliver the property, the subject of the action of replevin, to the plaintiff in that action, and to require his Honor, Judge Imperial, to refrain from proceeding with the replevin proceedings until further orders. In an elaborate opinion written by Mr. Justice Araullo, this court refused to grant the relief sought, with the result that the action of replevin was prosecuted to finality in the court below.

In *Ingersoll vs. Concepcion and Cauwenbergh* (44 Phil., 243), this court refused to grant a writ of prohibition to restrain a Court of First Instance from entertaining a proceeding to foreclose a mortgage given by a party against whom a petition in insolvency had been filed prior to the institution of the foreclosure proceeding. In that case, as here, the alleged insolvent had not, at the time of the commencement of the action, been as yet adjudicated bankrupt.

The conclusion is that this court will not prohibit a Court of First Instance in which a mortgage foreclosure is pending from proceeding with the trial of such cause, for the mere reason that proceedings have been instituted to declare the mortgagor a bankrupt. In the case before us the provisional declaration of insolvency in the insolvency proceeding had not as yet been made when the time appointed for the trial of the foreclosure suit in the court of the respondent Judge arrived; and the defendant in that case (the alleged insolvent) was under no disability whatever to make defense. More than this any of the creditors of the alleged insolvent would without a doubt have

been admitted to appear and make defense if they had elected to intervene for that purpose. We cannot agree with the proposition contained in the opinion of the court to the effect that, "Legally speaking, upon the filing of the insolvency petition, Velasco & Co. ceased to exist and was judicially dead."

In this connection it should be remembered that there is a difference with respect to the making of the provisional declaration (adjudication) of insolvency between cases of voluntary insolvency and cases of involuntary insolvency. In case of voluntary insolvency, under section 18 of the Insolvency Law (Act No. 1956), the order of court declaring the petitioner insolvent follows at once and as a matter of course upon the filing of the petition. With respect to the involuntary insolvency the rule is different. In this case section 22 of the same Law requires that the alleged insolvent shall be served with notice of the filing of the petition as in civil actions; and under section 24 the adjudication of insolvency cannot be made until default is entered against the insolvent, or until a trial is had, if the application is opposed. It will be noted that under both sections 18 and 24 the judicial declaration of insolvency is the critical fact which operates to stay proceedings in civil proceedings pending against the insolvent; and if, in the case before us, such declaration had been made, it would no doubt have been the duty of the respondent Judge to have suspended the proceedings until the appointment and appearance of an assignee. The case of *Paguia vs. Del Rosario and Viuda de M. F. Cardenas* (46 Phil., 59), may be taken as authority for the proposition that, after the declaration of insolvency has been made, the assignee is a necessary party to foreclosure proceedings against the insolvent. But we have never heretofore held that a Court of First Instance entertaining a foreclosure proceedings is deprived of jurisdiction to proceed by the mere fact of the institution of an involuntary insolvency proceeding against the mortgagor. Until the adjudication of insolvency has been made, that court, it seems to us, necessarily has authority to proceed with the foreclosure, subject of course to the rules that maintain in ordinary actions with respect to the proper representation of parties and subject of course to the ordinary right of appeal against errors committed in matters of procedure. The question which we have to decide in this proceeding is not whether the respondent Judge erred in refusing the request to suspend proceedings, but whether he had jurisdiction to proceed to trial. If any error has been committed in the case before us,—a point which need not be here decided,—such error did not proceed from a lack of jurisdiction on the part of the court; nor did it involve any act in excess of jurisdiction, but consisted merely in the improper exercise of judicial authority. In any event the writ of prohibition is not, in the opinion of the undersigned, an appropriate remedy.

For the reasons stated we are of the opinion that the petition should be dismissed. Writ granted.

[1] 48 Phil., 931.

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