

**AQUILINO F. PANDO, ADMINISTRATOR OF THE ESTATE OF THE
DECEASED ADOLFO F. PANDO, PLAINTIFF AND APPELLEE, VS.
CARMEN KETTE AND GEORGE C. SELLNER, DEFENDANTS AND
APPELLANTS.**

G.R. No. 32124. March 27, 1930

Ponente: VILLAMOR, J.

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VILLAMOR, J.:

body { font-family: Verdana, Geneva, Arial, helvetica, sans-serif; font-size:80%; background-color:#FFFFFF; margin:0 2% 0 2%; text-align: justify; } h1 { font-family:times; } h2 { background-color:#cccccc; padding:10px 0 10px 0; font-weight: bold; text-align: center; } h3 { font-weight: bold; text-transform: uppercase; text-align: center; } div#footer { font-size:9px; } This is a foreclosure of mortgage. Judgment having been rendered in favor of the plaintiff, he prayed and obtained from the court below the proper writ of execution. In pursuance thereof the sheriff, on January 30, 1929, posted notices of the sale of the land described in said writ in three public places, to wit, upon the land itself, at the market, and on the municipal building of Pasay, and the sale took place on February 19th following. On the same day, that is, January 30, 1929, notice of the sale was sent to the newspaper La Opinion for publication, and the editor certified that he published it once a week for three consecutive weeks, more particularly on the 2nd, 9th, and 15th of February, 1929.

The provincial sheriff applied to the court for approval of the sale, to which the defendants objected on the ground that the publication required by law for the public auction sale of real property had not been made, thereby clearly violating section 454 of the Code of Civil Procedure, providing for the publication of the notice of sale in a newspaper. Having heard both the sheriff's motion and the defendants' objection, the court below decreed:

"Considering the motion of the plaintiff herein filed through counsel, praying that the public auction sale of the property under execution herein carried out by the sheriff of this province on February 19, 1929, in favor of said plaintiff, and considering also the two written oppositions thereto filed by counsel for defendant Carmen Kette; and

"Whereas it appears that said sale was duly and lawfully conducted, and that no irregularity sufficient to warrant disapproval of said motion has been committed.

"The sale in question is hereby approved. So ordered."

The defendants appealed from this order, and in their brief assign nine errors, not one of which has sufficient merit to justify the reversal of the order appealed from.

The principal ground for this appeal is that the notice of sale was insufficient.

Section 454 of the Code of Civil Procedure provides: "Sec. 454. Advertisement of Property to be Sold on Execution.—Before the sale of property on execution, notice thereof must be given, as follows:

1. * * * * * 2. * * * * *

"3. In cases of real property, by posting a similar notice particularly describing the property, for twenty days in three public places of the municipality or city where the property is situated, and also where the property is to be sold, and publishing a copy thereof once a week, for the same period, in some newspaper published or having general circulation in the province, if there be one. If there are newspapers published in the province in both the Spanish and English languages, then a like publication for a like period shall be made in one newspaper published in the Spanish language, and in one published in the English language: Provided however, That such publication in a newspaper will not be required when the assessed valuation of the property does not exceed four hundred pesos;

"4. * * * * *

This provision is taken almost literally from section 692 of the California Code, which reads:

"692. Notice of sale under execution, how given.—Before the sale of the property on execution, notice thereof must be given, as follows:

"1. * * * * *

"2. * * * * *

"3. In case of real property: by posting a similar notice, particularly describing the property for twenty days, in three public places of the township or city where the property is situated, and also where the property is to be sold, and publishing a copy thereof once a week for the same period, in some newspaper published in the county, if there be one."

This section of the California Code has several times been construed by the Supreme Court of that state. In *Northern C. I. Trust vs. Cadman* (101 Cal., 200, 204; 35 Pac. Rep., 557), it was held: "These sections (692 and 693) enjoin upon the sheriff both the duty and the responsibility of posting and publishing the notices of sale as prescribed, which injunction necessarily implies the duty and responsibility of selecting the places where the notices are to be posted, and the newspapers in which they are to be published, since they are not specified. He is required to post the notices in three public places in the township, etc., and to publish them in some newspaper in the county once a week, under a heavy penalty, besides his responsibility for all damages."

In *Frink vs. Roe* (70 Cal., 296), it was held: "A failure to give the proper notice of a sale of real estate under an execution does not invalidate the sale."

In *Smith vs. Randall* (6 Cal., 47), it was stated: "If the sheriff, before a sale of real estate under execution, neglects to give the proper notice, the statute gives an adequate remedy against the officer. There is not sufficient cause to set aside or avoid the sale."

In *Shores vs. Scott River Water Company* (17 Cal., 626), it was stated: "This is an appeal from an order refusing to set aside a sale made under a judgment of foreclosure. Various objections are urged to the validity of the sale, none of which, we think, are well taken. There is nothing in the point that the sale was made upon insufficient notice. The statute provides an adequate remedy in such cases by an action against the officer; and in *Smith vs. Randall* (6 Cal., 47) it was held that this provision was exclusive in its terms, and that the party aggrieved was entitled to no other remedy."

The provision of our Code of Civil Procedure having been adopted from section 692 of the California Code, it must be understood that our law was promulgated with the construction placed upon it by the State of California. (*U. S. vs. De Guzman*, 30 Phil., 416; *Cerezo vs. Atlantic, Gulf & Pacific Co.*, 33 Phil., 425; *Tamayo vs. Gsell*, 35 Phil., 953.)

We have not overlooked the fact that this court has held in *Campomanes vs. Bartolome and Germann & Co.* (38

Phil., 808) y that "if the sheriff sells property seized under execution without notice or at a time or place other than that designated in the notice, and in doing so acts under inducement or promise of indemnity by the judgment creditor, the sheriff and such judgment creditor are joint tort feors, and are liable in solidum for all damages caused by their wrongful act;" and in *Borja vs. Addison* (44 Phil., 895), that if a sheriff sells land without the notice prescribed by the Code of Civil Procedure, induced thereto by the judgment creditor or his agent, and the purchases at the sale is the judgment creditor, the sale is void and no title passes. It was likewise held in *Iturralde vs. Velazquez and Babasa* (41 Phil., 886), that under the facts stated in the opinion, for the reason that the proper notice was not given and because the price received by the sheriff was insufficient, the sale was invalid and should have been annulled. And in this same case, the court cited with approval volume 10 R. C. L., 1294, as follows:

"As a general rule the title acquired at the sale is not affected by the want of notice, except where a contrary rule is established by statute, at least if the purchaser has bought innocently, and no collusion appears. And it is not incumbent on the purchaser to see that the sheriff has properly advertised the sale. Any person injured by the officer's neglect of duty may hold him to such damages as have accrued therefrom. As between him and the execution defendant he may be regarded as a trespasser ab initio. In some instances a failure to give notice may be ground for setting aside the sale in a direct proceeding between the parties, particularly under other circumstances of hardship or irregularity."

But it must be observed, however, that the facts in the instant case differ from those of the three cases of *Campomanes*, *Borja*, and *Iturralde* above cited. As has been stated, the sheriff posted the notice of the sale in three public places on January 30, 1929, which was also published in *La Opinion* once a week for three consecutive weeks, that is, on the 2nd, 9th, and 15th of February of that year. The sale took place on the 19th of February of said year. It does not appear in the record that in conducting the sale the sheriff was induced by the judgment creditor.

In view of these facts it is evident that the notice of sale was posted in three public places for a period of twenty days prior to the sale, as required by law. That the notice was published in *La Opinion* three times during the same period of twenty days, once a week, is likewise evident, bearing in mind that from the 30th of January to the 19th of February, 1929, comprises a period of three weeks, though the number of days from the 2nd to the 15th is less than the number of days included in said three weeks. It must be noted that where a newspaper is published in the province, or is in general circulation therein, the law only requires the notice of sale be published in said paper three times, once a week during the period of twenty days. The question is, When do these twenty days begin?

As far as we are aware, in this jurisdiction ever since the Code of Civil Procedure was promulgated, judicial officers have computed the duration of the notices of public auction sales published in newspapers from the time said notices were posted at the places prescribed by law, on the ground, no doubt, that considering the local conditions, especially of those who live in remote provinces, the posting of notices in such places is the most effective way of advertising the proposed public auction of real property.

In the case in question, we see no reason for not following such an interpretation. From the posting of the notice in three public places until the day of the sale, twenty days have elapsed. The notice was published in the *La Opinion* once a week during the three consecutive weeks included in the twenty days.

Wherefore, we are of opinion and so hold, that the requirements of the law regarding the notice of the sale in question have been substantially complied with, and the order appealed from being in accordance with the law, it must be, as it is hereby, affirmed, with costs against the appellants. So ordered.

Johnson, Malcolm, Ostrand and Villa-Real, JJ., concur.

DISSENTING

Johns, J., with whom concurs Romualdez, J.:

This is a typical case of judicial legislation, and the majority opinion is not sustained by either Spanish or American decisions.

The question involved is the construction of section 454 of the Code of Civil Procedure as it relates to section 455, and as they both relate to section 257.

Among other things, section 454 says:

"Before the sale of property on execution, notice thereof must be given, as follows:

* * * * *

"3. In cases of real property, by posting a similar notice particularly describing the property, for twenty days in three public places of the municipality or city where the property is situated, and also where the property is to be sold, and publishing a copy thereof once a week, for the same period, in some newspaper published or having general circulation in the province, if there be one. If there are newspapers published in the province in both the Spanish and English languages, then a like publication for a like period shall be made in one newspaper published in Spanish language, and in one published in the English language: Provided however, That such publication in a newspaper will not be required when the assessed valuation of the property does not exceed four hundred pesos."

* * * * *

That is to say, in cases of the sale of real property, the law specifically provides that notices of the sale describing the property must be posted, for twenty days in three public places, previous to the sale, and the "publishing a copy thereof once a week, for the same period, in some newspaper published or having general circulation in the province." In the instant case, it is conceded that the notice of the sale was posted in three public places twenty days prior to the sale, but there is no claim or pretense that the notice, which was published in the La Opinion, was ever published twenty days before the sale. In fact it is conceded that the first publication in the newspaper was made on the 2d of February, 1929, the second on the 9th, and the third on the 15th, and that the sale was made by the sheriff on the 19th day of February, 1929. That is to say, the first publication in the newspaper was on the 2d of February, 1929, and the sale was made on the 19th day of February, 1929, or seventeen days after the first publication in the newspaper.

It appears from the record that the execution on which the property was sold was based upon a judgment for the foreclosure of a mortgage on the real property which was advertised for sale.

Among other things, section 257 of the Code of Civil Procedure, under " Sale of the Mortgaged Property," provides:

"* * * He sale, when confirmed by decree of the court, shall operate to divest the rights of all the parties to the action and to vest their rights in the purchaser. Should the court decline to confirm the sale, for good cause shown, and should set it aside, it shall order a resale in accordance with law."

It is conceded that the defendant made prompt and timely objections to the confirmation of the sale in which, among other things, he specified and pointed out that the first notice of sale published in the newspaper was on the 2d of February, 1929, and that the sale was made on the 19th day of February, 1929, or seventeen days after the first publication in the newspaper, all of which appears upon the face of the record and from the return of the

sheriff, and is not disputed, and it is from the order of the court refusing to set aside and vacate the sale, that this appeal was taken, and in numerous decisions this court has held that an appeal will lie in such cases. Hence, it must be conceded that the defendant has the legal right to appeal to this court from the decision of the lower court in refusing to vacate the sale. Hence, the question is squarely presented as to whether or not a sale should be confirmed by the lower court when it appears from the record that the sale was made seventeen days after the first publication in the newspaper. It must be conceded that under section 257, when the sale is confirmed, the judgment debtor is divested of all of his right, title, and interest in the property, and that any time prior to its confirmation, the judgment debtor has the legal right, for good cause shown, to object to the confirmation of the sale, and in the instant case timely objections, for good cause shown, were made prior to the confirmation of the sale.

Section 455 of the Code of Civil Procedure provides:

"Penalty if Officer Sells Without Notice.—An officer selling without the notice prescribed by the last section, shall forfeit five hundred pesos to any party injured thereby, in addition to his actual damages, both to be recovered in a single proper action; and a person willfully taking down or defacing the notice posted, if done before the sale or the satisfaction of the judgment (if the judgment be satisfied before sale), shall forfeit five hundred pesos to any person injured by reason thereof, to be recovered in any proper action."

And it is conceded that section 454 above quoted is an exact copy of the Code of California, from which it was taken, and that is true also of section 455, except as to the amount which the officer shall forfeit "without the notice prescribed by the last section." It is for such reason that the majority opinion cites and relies upon the California decisions, from which it quotes, but in the final analysis neither of those decisions are in point, for the simple reason that they do not deal with or decide the legal right to object to the confirmation of the sale "for good cause shown." Neither does it appear in any of the cases cited that timely objections were made prior to the confirmation of the sale, which is a very important underlying, fundamental fact overlooked in the majority opinion. The very fact that the Legislature enacted section 455 penalizing the officer for making the sale "without the notice prescribed by the last section" is conclusive that the Legislature intended to prohibit the sale of real property in a case like this, without the giving of a twenty days' notice of the sale "in some newspaper published or having general circulation in the province," which is a statutory provision, and in section 454 it specifically says:

"Before the sale of property on execution, notice thereof must be given, as follows."

No stronger language than that could have been used by the Legislature, and it should be construed as mandatory, and when so construed, the sale in question should be vacated and set aside.

Corpus Juris, vol. 23, p. 638, says:

"The general rule is that statutory provisions requiring publication must be strictly pursued, and even slight deviations therefrom have been held to invalidate the notice and render the sale at least voidable, unless there is a statutory provision to the contrary."

Citing decisions from the Supreme Court of the United States and Federal Courts, and the States of California, Delaware, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Montgomery, Nebraska, New Jersey, New York, Ohio, Philadelphia, Rhode Island, South Carolina, South Dakota, Washington, and Wisconsin, all of which sustain the text above quoted.

In the case of *Early vs. Doe*, 14 Law. ed., U. S. Supreme Court, p. 1079, that court said:

"It appears that the notice for sale of the property in dispute was inserted in the *National Intelligencer* twelve

times in successive weeks, the first insertion being on Saturday, the 26th of August, and the last on the 15th of November, the day of sale. Including the 26th of August as one of the days of the notice, and the 15th of November necessarily as another, we find that the notice was given only for eighty-two days. The language of the statute regulating the notice to be given, is in these words: 'That public notice of the time and place of the sale of all real property for taxes due the corporation of the City of Washington, shall be given hereafter, by advertisement, inserted in some newspaper published in said city, once in each week. for at least twelve successive weeks.' Now, the first week following the date of the advertisement expired with the next Friday, the 10th of November, and if the computation is carried out, it will be found that the twelfth week expired on the 17th of November. But the sale was made two days before, on the 15th of November, the last insertion of the notice being on the day of sale."

And it was there held that under such a notice the sale was void.

The case of the United States vs. Sinclair (209 Federal Reporter, 612), is square in point. The syllabus says: "Under Rev. Civ. St. Tex. 1911, art. 3757, which requires a sale of land under execution order of sale or other process to be advertised for 20 days in a newspaper published in the county where the land is situated, the failure to so advertise the land renders the sale void."

And the court said:

"We do not decide whether or not the homestead of Sinclair was exempt from distraint, the decision of that question being unnecessary, because we conclude that the fact that the sale was not advertised in a weekly newspaper published in the county for 20 days made the sale void."

In the case of M'Donough vs. Gravier's Curator, vol. 9, Louisiana Reports, p. 531, that court laid down the rule that "In forced alienations of property, all the formalities required by law, must be strictly fulfilled to give validity to the sale," and in the opinion, it is said:

"It also appeared in evidence that the advertisement of this property was first published in English in the Louisiana Advertiser the 16th, and in French on the 24th March, 1830. It was also published in the New-Orleans Argus in English the 18th, and in French on the 19th of March, 1830. The sale took place the 15th April, according to the sheriff's return, and on the 19th, according to his deed made to the plaintiff, which is itself dated the 30th April, 1830. The advertisement states that the sale is to be made on the 19th April, 1830. The law provides that sales of immovables, slaves and steam-boats can be made only thirty days after the first notice has been given Code of Practice, article 670.

"Advertisements for the sale of property in the City of New Orleans, must be inserted three times in two newspapers in the English and French languages. Code of Practice, 689."

In that case the court held that the sale was void.

In Nugent vs. McCaffrey, vol. 33, Louisiana Annual Reports, p. 271, that court again said:

"The advertisement of the sheriff for the sale of such a claim, should be during thirty days, as for the sale of immovables."

Such are a few of the authorities cited in the notes to Corpus Juris sustaining the text above quoted, all of which are without dissent, the reason for which is very apparent.

The law of this case is well stated in Taylor vs. Reid (103 111., 349), in which the syllabus says:

* * * * *

"2. Same; of notice under statute; as to the first and last days of publication.—The provision of the statute relating to sales under powers in mortgages and deeds of trust, requiring at least thirty days' previous notice of

a sale to be given, whether so specified in the power or not, and that such notice shall be given !by publication, once in each week for four successive weeks, in some newspaper, etc., does not require that the last publication shall be at least thirty days before the sale, but it is sufficient that the first publication shall be at least thirty days before the sale, and the publication shall be continuous as nearly as possible, in weekly newspapers, for thirty days prior to the sale."

Upon the facts admitted in this case, no decision of California or any other court is cited in the majority opinion denying the right of the judgment debtor to make timely objections to the confirmation of the sale for want of a published notice and to have the objections sustained. Where the sale was made, as in this case, seventeen days after the first published notice in the newspaper, how and upon what legal principle can it be said that the sale was made twenty days after the first published notice, as required by the express provision of section 454 of the Code of Civil Procedure? The legal effect of the majority opinion is to nullify section 257 of the Code of Civil Procedure above quoted, which has been sustained by numerous decisions of this court signed by every one of its members, and to sustain such a sale, over the vigorous and timely objections of the judgment debtor made prior to its confirmation, and hold that the published notice in question of seventeen days only is a compliance with the law, regardless of the express provisions of the statute, is a clear case of judicial legislation, and for such reasons we dissent.

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