

44 Phil. 243

[ G. R. No. 19898. December 23, 1922 ]

**FRANK B. INGERSOLL, AS ASSIGNEE "IN THE MATTER OF THE INSOLVENCY OF CAMPOS RUEDA & CO., S. EN C," PETITIONER, VS. HONORABLE PEDRO CONCEPCION, AS JUDGE OF THE COURT OF FIRST INSTANCE OF MANILA, AND JOSE CAUWENBERGH, RESPONDENTS.**

## **D E C I S I O N**

### STATEMENT

This is an original petition for a writ of prohibition in which it is alleged that Frank B. Ingersoll is the duly elected, qualified and acting assignee "In the matter of the Involuntary Insolvency of Campos Rueda & Co., S. en C.;" that he was elected on October 5, 1922; that his election was approved on October 7; and that he qualified a few days later; that the Honorable Pedro Concepcion is the duly appointed, qualified and acting Judge of the Court of First Instance, and that Jose Cauwenbergh is temporarily residing in the City of Manila and is the plaintiff in a certain cause in the Court of First Instance entitled "Jose Cauwenbergh vs. Campos Rueda & Co., S. en C. and Philippine National Bank," which is an action to foreclose a real estate mortgage in which the Bank was made a party defendant, for the reason that it holds a second mortgage on some of the property.

That the foreclosure was commenced on June 29, 1922, when a summons was duly issued and served on Jose Campos Rueda as manager of Campos Rueda & Co., S. en C.

On December 29, 1921, a petition of involuntary insolvency was filed against Campos Rueda & Co., S. en C, which was denied in the Court of First Instance. An appeal was taken to this court which reversed<sup>[1]</sup> the decision of the lower court, and remanded the case to the Court of

First Instance about September 15, 1922, upon which date the Court of First Instance entered an order declaring Campos Rueda & Co., S. en C, insolvent as of December 29,

1921, the date of the filing of the original petition; that on October 24, 1922, Jose Cauwenbergh, the plaintiff in the foreclosure suit, filed a motion in the cause in which the insolvency proceedings were then pending, stating that on August 30, 1922, the court declared in default the insolvent for failure to appear and answer the complaint; that on September 9, 1922, it entered an order suspending the trial of the case to give an opportunity to the assignee, who might be named in the insolvency proceedings, to appear and present any objections he might have to the foreclosure; that on September 14, 1922, the order was served on Frank B. Ingersoll as assignee; that, notwithstanding the fact that more than thirty days had elapsed, the assignee has not entered his appearance or made any answer to the complaint; and prays that he be declared in default and the plaintiff allowed to present his proofs.

Upon the receipt of a copy of that motion, the assignee made a special appearance reciting the fact that Campos Rueda & Co., S. en C, was declared insolvent on December 29, 1921; that no legal service was ever made upon the insolvent company; and that the action was instituted more than six months after the company has become insolvent. Wherefore, it prayed that an order be issued in substance and to the effect that the court was without jurisdiction and to annul and set aside the pretended service of summons in the foreclosure suit. On November 4, 1922, this motion came on for hearing and was overruled. As grounds of the petition here, it is then alleged that, unless restrained, the respondent Judge will continue to exceed his jurisdiction and render a judgment in accordance with the prayer of Jose Cauwenbergh, and that his court has no jurisdiction of the premises or the subject-matter of the foreclosure suit, and prays for a preliminary injunction against the Judge Pedro Concepcion, and that he be prohibited from taking any further proceedings in the foreclosure suit and for costs and general relief. To this petition the respondents filed a demurrer upon the ground, first, that the petitioner, as assignee of the insolvent estate, has no legal capacity to bring this action; second, that the petition does not state facts sufficient to warrant the issuance of a writ of prohibition.

Johns, J.:

It will be noted that the original petition to declare Campos Rueda & Co., S. en C, an involuntary insolvent was filed on December 29, 1921; that later the petition was denied, from which an appeal was taken to this court; that on August 28, 1922, the decision of the lower court was reversed and the cause remanded to the Court of First Instance which, on September 15, 1922, entered a judgment on the mandate in substance and to the effect that Campos Rueda & Co., S. en C, was insolvent as of the date of December 29, 1921, which

was the date upon which the original petition was filed.

June 29, 1922, Jose Cauwenbergh commenced his suit to foreclose a real mortgage on the property of the insolvent, and personal service of summons was made upon Jose Campos Rueda as its manager. At that time the company had not been declared insolvent, and no assignee had been elected, and for such reason service of summons was made on Jose Campos Rueda as manager. At that time there was no assignee or any other person upon whom service of summons could be made.

In September, 1922, on the mandate of this court, the company was declared insolvent as of December 29, 1921, the date when the original petition was filed in the Court of First Instance. The petitioner now claims that the force and effect of that decision is to legally declare the company insolvent from and after that date.

Assuming that the plaintiff has a valid mortgage lien, he would have a legal right to foreclose his mortgage, even though the company had legally been declared insolvent at the time his foreclosure was commenced.

Section 60 of the Insolvency Law specifically provides for the foreclosure of such liens, and contemplates that upon a proper showing, the leave to foreclose would be granted by the insolvency court, and that such application is a matter of form and not of substance. The foreclosure of a mortgage is a proceeding *in rem* and is founded upon a written instrument to secure an existing debt evidenced by a writing, all of which is duly acknowledged and made a matter of record, and in such cases about the only question involved is whether there has been a breach of the conditions and as to the amount which is due and owing.

At the time that Jose Cauwenbergh commenced his action to foreclose the company had not been declared insolvent, and no assignee had been elected, and the property of the insolvent had not passed to, or come within, the jurisdiction of the court. Again, no decree of foreclosure has been rendered and the trial court directed that the assignee should be made a party, and that he should make any defense that he had to the foreclosure. As between Cauwenbergh and the creditors of the insolvent, whom the assignee represents, the only question involved is the validity of the mortgage, and whether there is any breach and as to the amount which is due and owing, all of which questions can now be litigated under proper pleadings. In what has been said, we have assumed that the plaintiff had a valid mortgage lien which would not in any manner be affected by the insolvency proceedings; that it was executed more than thirty days previous to the filing of the original petition; and

that no creditor was defrauded in the execution of the mortgage.

We hold, under the facts shown, that at the time Cauwenbergh filed his complaint to foreclose his mortgage, the court acquired jurisdiction of the subject-matter of the suit and of the person of that company, Campos Rueda & Co., S. en C, with the right to hear and determine the cause.

The petition for the writ of prohibition is denied. In the interest of justice the assignee will be allowed ten days in which to appear in the foreclosure suit and make any defense which he may have to the merits. Neither party to recover costs. The temporary restraining order is dissolved. So ordered.

*Araullo, C. J., Street, Malcolm, Avanceña, Villamor, Ostrand, and Romualdez, JJ., concur.*

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<sup>[1]</sup>Involuntary Insolvency of Campos Rueda & Co. vs. Pacific Commercial Co., p. 916 *post*.

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