1 Phil. 132

**[ G.R. No. 581. February 14, 1902 ]**

**IN THE MATTER OF THE APPLICATION OF A. W. PRAUTCH FOR A WRIT OF HABEAS CORPUS.**

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

**COOPER, J.:**

The petitioner, Arthur W. Prautch, makes application to this court for a writ of habeas corpus and a writ of *certiorari*, alleging in his petition that he is unlawfully held by the Sheriff of Manila by an order made by the Court of First Instance in a civil suit pending in that court, under article 412, Code of Civil Procedure (1901), which provides for the arrest of defendant in certain civil cases.

It is alleged in the application that the suit in the Court of First Instance is based upon a cause of action which arose between the plaintiff and defendant on the 20th day of August, 1900, and it is contended that the court did not have jurisdiction to make the order of arrest, because at the date of the making of the contract there was no law then in existence authorizing an arrest in civil cases, such provision having been enacted by the Code of Civil Procedure, which went into effect the 1st day of October, 1901. It is insisted that to sustain the proceedings would be giving the law a retroactive effect and that it would impair the obligation of the contract, and that a new remedy has been provided which changes the legal character and effect of the contract by taking aAvay a vested right acquired under an existing law, creating a new obligation, imposing a new duty, and attaching a new disability in respect to the transaction or consideration already passed.

We think that the principle invoked is inapplicable to this character of remedy. The right to imprison for debt h not a part of the contract. (Sturges vs. Crowninshield, 4 Wheat., 200; Odgen vs. Saunders, 12 Wheat., 230; U. S. vs. Quincy, 71 U.S., 409; Sutherland on Statutory Construction, 625.)

If the right to imprison for debt is not a part of the contract the converse of the proposition

is also true, that the right to exemption from imprisonment for a debt does not form a part of the contract. Such statutes are regarded us penal rather than remedial. They are enacted to pre vent fraud in the making of contracts, or to prevent the subsequent fraudulent conduct of parties with reference to their obligation, and are properly invoked as a punishment for dishonesty.

It does not appear from the application whether the affidavit upon which the arrest was based set forth the fraudulent acts as having been committed at a time before or after the Code of Civil Procedure went into effect, and consequently it is not necessary to consider whether the statute as to prior acts would in its nature be an *ex post facto* law, and as to what would be the"effect of a statute in such case.

There are other considerations equally conclusive against the right of petitioner to the writ. By the provisions of section 528 of the Code of Civil Procedure (1901), if it appears that the person alleged to be restrained of his liberty is in the custody of an officer under process issued by a court or magistrate or by virtue of a judgment or order of a court of record, and that the court or magistrate had jurisdiction to issue the process, render the judgment, or make the order, the writ shall not be allowed.

The Court of First Instance had jurisdiction both of the subject-matter and of the person; the remedy for arrest is provided by statute and the question as to the sufficiency of the grounds is for the determination of the court. That the affidavit for the arrest is based upon insufficient grounds or that the claim upon which the suit is based is without foundation in law are questions to be determined by the Court of First Instance, and should error be committed the defendant may appeal from the decision of the court.

It is true that an appeal can not be taken to an interlocutory order, but upon the rendition of a final judgment disposing of the action either party has the right to perfect the bill of exceptions for a review by the Supreme Court of all rulings, orders, and judgments made in the case to which the party has duly excepted at the time of the making of such ruling, order, or judgment. (Sec. 143, Code of Civil Procedure, 1901.)

That the defendant may suffer unjust imprisonment while waiting for a final judgment is a question to be addressed to the legislative power.

To prevent such result all reasonable safeguards have been placed around the remedy. The order of arrest is made by the judge; an affidavit is required to be made by the plaintiff, or some other person who knows the facts, that a sufficient cause of action exists, and that the

cause is one of those mentioned in section 412.

Before making the order the party applying for it must execute to the defendant an obligation in an amount to be fixed by the judge, and with sufficient surety to be approved by him, conditioned that the plaintiff will pay all costs which may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest if the same shall finally be adjudged to have been wrongful or without sufficient cause. And, finally, the defendant arrested may at any time before the trial of the action apply to the judge who made the order, or to the court in which the action is pending, upon reasonable notice, to vacate the order of arrest or to reduce the amount of bail.

Upon such application the judge or court shall grant an immediate hearing, after notice to the parties, and upon hearing make such orders as appear to be just as to continuing the order of arrest or vacating same or reducing the amount of bail required. (Secs. 413, 414, 415, 423, Code of Civil Procedure, 1901.) Without considering the question of the practice of joining in the same petition an application for both *habeas corpus* and, *certiorari*, it is clear that a writ of *certiorari* can not be granted in such a case as is presented here. Under the provisions of the Code in *certiorari* proceedings, it is necessary that it should appear both that the inferior court has exceeded its jurisdiction and that there is no appeal from such court. (Code of Civil Procedure, 1901, sec. 217.)

The application for writ of *habeas corpus* and *certiorari* is denied, and costs taxed against petitioner.

*Arellano, C. J., Torres,* and *Mapa, JJ.,* concur.

*Ladd, J.,* did not sit in this case.

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*CONCURRING*

**WILLARD, J.:**

I concur with the opinion of the majority in the denial of the petition, but my opinion is based upon the following reasons: The affidavit upon which was issued the order of arrest contains this clause, “that the said Arthur W. Prautch has concealed or disposed of all the money appropriated and not paid by him as aforesaid, and has removed and disposed of all

his property and of all the property of the house of Prautch, Scholes & Co. aforementioned with intent to defraud his cceditors."

It does not appear whether this act took place before or after the 1st of October, 1901, when the prevailing Code of Procedure went into effect. If it took place after this date it could not be seriously contended that the law did not authorize the arrest. Supposing that on the date on which the debt was contracted the debtor might have had the right to defraud his creditors by means of such transfers, to contend that such a privilege continues attached to the debt in such a manner that the law can not take it away would be to contend that an individual could have a vested right to defraud his creditors.

It was the duty of the petitioner to show that the court had committed error, and therefore the burden was upon him to prove that the act in question took place before the 1st of October. Not having done so he can not raise the question of whether or not the arrest can be ordered for a cause arising prior to said date, and we do not decide that question.

It remains to be considered whether the alleged defects in the affidavit, pointed out by the petitioner, affect the competency of the court in such a manner as to make null and void the order made by virtue of the same, or whether said order was merely voidable and the error which has been committed in making the same was one of those which can be remedied by means of an appeal.

The Supreme Court of the United States has said:

> "It may be confessed that it is not always very easy to determine what matters go to the jurisdiction of a court so as to make its action when erroneous a nullity. But the general rule is, that when the court has jurisdiction by law of the offense charged and of the party who is so charged, its judgments are not nullities." (*Ex parte* Bigelow, 113 U. S., 328.)
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> In this case we have an action pending in which the court below has jurisdiction. We have a law which authorizes the arrest when the cause of action has accrued after the 1st of October. We have a defendant who committed an act after the said date which warrants his arrest. Under these circumstances the court has the right to order his arrest. According to the text of the Code the court "has jurisdiction to issue the writ or make the order."(Art. 528.)

The jurisdiction of the court does not proceed from the filing of the affidavit but rather from the existence of the facts above set forth. Considering the existence of facts which may confer jurisdiction the question of whether those facts are presented in such a manner in the affidavit as to invoke the exercise of this jurisdiction is one which the court has the same right to determine as it would have in the decision of any other questions which might arise in a matter within its cognizance. In the exercise of this power it may issue an erroneous order, but such an order is not absolutely void; unless it is remedied during the same action by means of an appeal or otherwise, it will have the effect of a valid order.

The Court of First Instance should not give a judgment upon a complaint on a promissory note which does not state a cause of action, but if it does so its judgment is valid unless it is reversed by means of appeal.

We can not defer to any decision of the supreme court of California which sustains a contrary doctrine. Article 528, already cited, establishes the law of these Islands, and we must submit to that. To accept the other rule would be to convert the writ of *habeas corpus* into a writ of error, a thing which is in no wise permissible. It would make it possible for any defendant by means of such writ to interpose an appeal to this court in all those cases in which an order of arrest should be issued and would oblige us to review the errors of law which are alleged to have been committed by the court in investigating the sufficiency of the affidavit, and this is, in our opinion, the very practice which article 528 seeks to avoid.

Errors of this kind can be remedied by an appeal from the judgment. (Art. 143.) If the order was erroneous the plaintiff must answer upon his bond to the defendant for the damages and injuries which the latter suffers. (Art. 415.) That this right of appeal is not by reason of the delay in securing it an adequate remedy is a matter which should be submitted to the legislature and not to the courts,

The release prayed for should be denied, with the costs taxed against the petitioner.

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