

**LEUNG BEN, PLAINTIFF, VS. P. J. O'BRIEN ; JAMES A. OSTRAND
AND GEO. R. HARVEY, JUDGES OF FIRST INSTANCE OF THE CITY OF
MANILA, DEFENDANTS.**

G.R. No. L-13602. April 06, 1918

Ponente: STREET, J.

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STREET, J.:

This is an application for a writ of certiorari, the purpose of which is to quash an attachment issued from the Court of First Instance of the City of Manila under circumstances hereinbelow stated.

Upon December 12, 1917, an action was instituted in the Court of First Instance of the city of Manila by P. J. O'Brien to recover of Leung Ben the sum of P15,000, alleged to have been lost by the plaintiff to the defendant in a series of gambling, banking, and percentage games conducted during the two or three months prior to the institution of the suit. In his verified-complaint the plaintiff asked for an attachment, under sections 424 and 412 (1) of the Code of Civil Procedure, against the property of the defendant, on the ground that the latter was about to depart from the Philippine Islands with intent to defraud his creditors. This attachment was issued; and acting under the authority thereof, the sheriff attached the sum of P15,000 which had been deposited by the defendant with the International Banking Corporation.

The defendant thereupon appeared by his attorney and moved the court to quash the attachment. Said motion having been dismissed in the Court of First Instance, the petitioner, Leung Ben, the defendant in that action, presented to this court, upon January 8, 1918, his petition for the writ of certiorari directed against P. J. O'Brien and the judges of the Court of First Instance of the city of Manila whose names are mentioned in the caption hereof. The prayer is that the Honorable James A. Ostrand, as the judge having cognizance of the action in said court (P. J. O'Brien vs. Leung Ben) be required to certify the record to this court for review and that the order of attachment which had been issued should be revoked and discharged, with costs. Upon the filing of said petition in this court the usual order was entered requiring the defendants to show cause why the writ should not issue. The response of the defendants, in the nature of a demurrer, was filed upon January 21, 1918; and the matter is now heard upon the pleadings thus presented.

The provision of law under which this attachment was issued requires that there should be a "cause of action arising upon contract, express or implied." The contention of the petitioner is that the statutory action to recover money lost at gaming is not such an action as is contemplated in this provision, and he therefore insists that the original complaint shows on its face that the remedy of attachment is not available in aid thereof; that the Court of First Instance acted in excess of its jurisdiction in granting the writ of attachment; that the petitioner has no plain, speedy, and adequate remedy by appeal or otherwise; and that consequently the writ of certiorari supplies the appropriate remedy for his relief.

The case presents the two following questions of law, either of which, if decided unfavorably to the petitioner, will be fatal to his application:

(1) Supposing that the Court of First Instance has granted an attachment for which there is no statutory authority; can this court entertain the present petition and grant the desired relief?

(2) Is the statutory obligation to restore money won at gaming an obligation arising from "contract, express or implied?"

We are of the opinion that the answer to the first question should be in the affirmative. Under section 514 of the Code of Civil Procedure the Supreme Court has original jurisdiction by the writ of certiorari over the proceedings of Courts of First Instance, "wherever said courts have exceeded their jurisdiction and there is no plain, speedy, and adequate remedy." In the same section, it is further declared that the proceedings in the Supreme Court in such cases shall be as prescribed for Courts of First Instance in sections 217-221, inclusive, of said Code. This has the effect of incorporating into the practice of the Supreme Court, so far as applicable, the provisions contained in those sections to the same extent as if they had been reproduced verbatim immediately after section 514. Turning to section 217, we find that, in defining the conditions under which certiorari can be maintained in a Court of First Instance, substantially the same language is used as is found in section 514 relative to the conditions under which the same remedy can be maintained in the Supreme Court, namely, when the inferior tribunal has exceeded its jurisdiction and there is no appeal, nor any plain, speedy, and adequate remedy. In using these expressions the author of the Code of Civil Procedure merely adopted the language which, in American jurisdictions at least, had long ago reached the stage of a stereotyped formula.

In section 220 of the same Code, we have a provision relative to the final proceedings in certiorari, and herein it is stated that the court shall determine whether the inferior tribunal has regularly pursued its authority and that if it finds that such inferior tribunal has not regularly pursued its authority, it shall give judgment, either affirming, annulling, or modifying the proceedings below, as the law requires. The expression, "has not regularly pursued its authority," as here, used, is suggestive, and we think it should be construed in connection with the other expressions "have exceeded their jurisdiction," as used in section 514, and "has exceeded the jurisdiction," as used in section 217. Taking the three together, it results in our opinion that any irregular exercise of judicial power by a Court of First Instance, in excess of its lawful jurisdiction, is remediable by the writ of certiorari, provided there is no other plain, speedy, and adequate remedy; and in order to make out a case for the granting of the writ it is not necessary that the court should have acted in the matter without any jurisdiction whatever. Indeed the repeated use of the expression "excess of jurisdiction" shows that the lawmaker contemplated the situation where a court, having jurisdiction, should irregularly transcend its authority as well as the situation where the court is totally devoid of lawful power.

It may be observed in this connection that the word "jurisdiction," as used in attachment cases, has reference not only to the authority of the court to entertain the principal action but also to its authority to issue the attachment, as dependent upon the existence of the statutory ground. (6 C. J., 89.) This distinction between jurisdiction over the main cause and jurisdiction to issue the attachment as an ancillary remedy incident to the principal litigation is of importance; as a court's jurisdiction over the main action may be complete, and yet it may lack authority to grant an attachment as ancillary to such action. This distinction between jurisdiction over the principal proceeding and jurisdiction over the ancillary has been recognized by this court in connection with actions involving the appointment of a receiver. Thus, in *Rocha & Co. vs. Crossfield and Figueras* (6 Phil. Rep., 355), a receiver had been appointed without legal justification. It was held that the order making the appointment was beyond the jurisdiction of the court; and though the court admittedly had jurisdiction of the main cause, the order was vacated by this court upon application for a writ of certiorari. (See *Blanco vs. Ambler*, 3 Phil. Rep., 358, *Blanco vs. Ambler and McMicking* 3 Phil. Rep., 735; *Yangco vs. Rohde*, 1 Phil. Rep., 404.)

By parity of reasoning it must follow that when a court issues a writ of attachment for which there is no statutory

authority, it is acting irregularly and in excess of its jurisdiction, in the sense necessary to justify the Supreme Court in granting relief by the writ of certiorari. In applying this proposition it is of course necessary to take account of the difference between a ground of attachment based on the nature of the action and a ground of attachment based on the acts or the condition of the defendant. Every complaint must show a cause of action of some sort; and when the statute declares" that the attachment may issue in an action arising upon contract, express or implied, it announces a criterion which may be determined from an inspection of the language of the complaint. The determination of this question is purely a matter of law. On the other hand, when the statute declares that an attachment may be issued when the defendant is about to depart from the Islands, a criterion is announced which is wholly foreign to the cause of action; and the determination of it may involve a disputed question of fact which must be decided by the court. In making this determination, the court obviously acts within its powers; and it would be idle to suppose that the writ of certiorari would be available to reverse the action of a Court of First Instance in determining the sufficiency of the proof on such a disputed point, and in granting or refusing the attachment accordingly.

We should not be understood, in anything that has been said, as intending to infringe the doctrine enunciated by this court in *Herrera vs. Barretto and Joaquin* (25 Phil. Rep., 245), when properly applied. It was there held that we would not, upon an application for a writ of certiorari, dissolve an interlocutory mandatory injunction that had been issued in a Court of First Instance as an incident in an action of mandamus. The issuance of an interlocutory injunction depends upon conditions essentially different from those involved in the issuance of an attachment. The injunction is designed primarily for the prevention of irreparable injury and the use of the remedy is in a great measure dependent upon the exercise of discretion. Generally speaking, it may be said" that the exercise of the injunctive power is inherent in judicial authority; and ordinarily it would be impossible to distinguish between the jurisdiction of the court in the main litigation and its jurisdiction to grant an interlocutory injunction, for the latter is involved in the former. That the writ of certiorari can not be used to reverse an order denying a motion for a preliminary injunction is of course not open to cavil. (*Somes vs. Crossfield and Molina*, 8 Phil. Rep., 284.)

But it will be said that the writ of certiorari is not available in this case, because the petitioner is protected by the attachment bond, and that he has a plain, speedy, and adequate remedy by appeal. This suggestion seems to be sufficiently answered in the case of *Rocha & Co. vs. Crossfield and Figueras* (6 Phil. Rep., 355), already referred to, and the earlier case there cited. The remedy by appeal is not sufficiently speedy to meet the exigencies of the case. An attachment is extremely violent, and its abuse may often result in the infliction of damage which could never be repaired by any pecuniary award at the final hearing. To postpone the granting of the writ in such a case until the final hearing and to compel the petitioner to bring the case here upon appeal merely in order to correct the action of the trial court in the matter of allowing the attachment would seem both unjust and unnecessary.

Passing to the problem propounded in the second question it may be observed that, upon general principles, recognized both in the civil and common law, money lost in gaming and voluntarily paid by the loser to the winner can not, in the absence of statute, be recovered in a civil action. But Act No. 1757 of the Philippine Commission, which defines and penalizes several forms of gambling, contains numerous provisions recognizing the right to recover money lost in gambling or in the playing of certain games (secs. 6, 7, 8, 9, 11). The original complaint in the action in the Court of First Instance is not clear as to the particular section of Act No. 1757 under which the action is brought, but it is alleged that the money was lost at gambling, banking, and percentage game in which the defendant was banker. It must therefore be assumed that the action is based upon the right of recovery given in section 7 of said Act, which declares that an action may be brought against the banker by any person losing money at a banking or percentage game.

Is this a cause of action arising upon contract, "express or implied," as this term is used in section 412 of the Code

of Civil Procedure? To begin the discussion, the English version of the Code of Civil Procedure is controlling (sec. 15, Admin. Code, ed. of 1917). Furthermore, it is universally admitted to be proper in the interpretation of any statute, to consider its historical antecedents and its jurisprudential sources. The Code of Civil Procedure, as is well known, is an American contribution to Philippine legislation. It therefore speaks the language of the common-law and for the most part reflects its ideas. When the draftsman of this Code used the expression "contract, express or implied," he used a phrase that has been long current among writers on American and English law; and it is therefore appropriate to resort to that system of law to discover the meaning which the legislator intended to convey by those terms. We remark in passing that the expression "contrato tacito," used in the official translation of the Code of Civil Procedure as the Spanish equivalent of "implied contract," does not appear to render the full sense of the English expression.

The English contract law, so far as relates to simple contracts (i. e. contracts not evidenced by a sealed instrument or a judicial record), is planted upon two foundations, which are supplied by two very different conceptions of legal liability. These two conceptions are revealed in the ideas respectively underlying (1) the common-law debt and (2) the assumpsit promise. In the early and formative stages of the common-law the only simple contract of which the courts took account was the real contract or contract *re*, in which the contractual duty imposed by law arises upon the delivery of a chattel, as in the *mutuum*, *commodatum*, *depositum*, and the like; and the purely consensual agreements of the Roman Law found no congenial place in the early common law system.

In course of time the idea underlying the contract *re* was extended so as to include all cases where there was something of value passing from one person to another under such circumstance as to constitute a *justa causa debendi*. The obligation thereby created was a debt. The constitutive element in this obligation is found in the fact that the debtor has received something from the creditor, which he is bound by the obligation of law to return or pay for. From an early day this element was denominated the *quid pro quo*, an ungainly phrase coined by Mediaeval Latinity. The *quid pro quo* was primarily a material or physical object, and it constituted the recompense or equivalent acquired by the debtor. Upon the passage of the *quid pro quo* from one party to the other, the law imposed that real contractual duty peculiar to the debt. No one conversant with the early history of the English law would ever conceive of the debt as an obligation created by promise. It is the legal duty to pay or deliver a sum certain of money or an ascertainable quantity of ponderable or measurable chattels.

The ordinary debt, as already stated, originates in a contract in which a *quid pro quo* passes to the debtor at the time of the creation of the debt, but the term is equally applicable to duties imposed by custom, or statute, or by judgment of a court.

The existence of a debt supposes one person to have possession of a thing (*res*) which he owes and hence ought to turn over the owner. This obligation is the oldest conception of contract with which the common law is familiar; and notwithstanding the centuries that have rolled over Westminster Hall that conception remains as one of the fundamental bases of the common-law contract.

Near the end of the fifteenth century there was evolved in England a new conception of contractual liability, which embodied the idea of obligation resulting from promise and which found expression in the common law *assumpsit*, or parol promise supported by a consideration. The application of this novel conception had the effect of greatly extending the field of contractual liability and by this means rights of action came to be recognized which had been unknown before. The action of *assumpsit* which was the instrument for giving effect to this obligation was found to be a useful remedy; and presently this action came to be used for the enforcement of common-law debts. The result was to give to our contract law the superficial appearance of being based more or less exclusively upon the notion of the obligation of promise.

An idea is widely entertained to the effect that all simple contracts recognized in the common-law system are referable to a single category. They all have their roots, so many of us imagine, in one general notion of obligation; and of course the obligation of promise is supposed to supply this general notion, being considered a sort of menstruum in which all other forms of contractual obligation have been dissolved. This is a mistake. The idea of contractual duty embodied in the debt, which was the first conception of contract liability revealed in the common law, has remained, although it was destined to be in a measure obscured by the more modern conception of obligation resulting from promise.

What has been said is intended to exhibit the fact that the duty to pay or deliver a sum certain of money or an ascertainable quantity of ponderable or measurable chattels—which is indicated by the term debt—has ever been recognized, in the common-law system, as a true contract, regardless of the source of the duty or the manner in which it is created—whether derived from custom, statute or some consensual transaction depending upon the voluntary acts of the parties. The form of contract known as the "debt" is of most ancient lineage; and when reference is had to historical antecedents, the right of the debt to be classed as a contract cannot be questioned. Indeed when the new form of engagement consisting of the parol promise supported by a consideration first appeared, it was looked upon as an upstart and its right to be considered a true contract was questioned. It was long customary to refer to it exclusively as an *assumpsit*, agreement, undertaking, or parol promise, in fact anything but a contract. Only in time did the new form of engagement attain the dignity of being classed among true contracts.

The term "implied contract" takes us into the shadowy domain of those obligations the theoretical classification of which has engaged the attention of scholars from the time of Gaius until our own day and has been a source of as much difficulty to the civilian as to the common-law jurist. Here we are concerned with those acts which make one person debtor to another without there having intervened between them any true agreement tending to produce a legal bond (*vinculum juris*). Of late years some American and English legal writers have adopted the term quasi-contract as descriptive of these obligations or some of them; but the expression more commonly used is "implied contract."

Upon examination of these obligations, from the view point of the common-law jurisprudence, it will be found that they fall readily into two divisions, according as they bear an analogy to the common-law debt or to the common-law *assumpsit*. To exhibit the scope of these different classes of obligations is here impracticable. It is only necessary in this connection to observe that the most conspicuous division is that which comprises duties in the nature of debt. The characteristic feature of these obligations is that upon certain states of fact the law imposes an obligation to pay a sum certain of money; and it is characteristic of this obligation that the money in respect to which the duty is raised is conceived as being the equivalent of something taken or detained under circumstances giving rise to the duty to return or compensate therefor. The proposition that no one shall be allowed to enrich himself unduly at the expense of another embodies the general principle here lying at the basis of obligation. The right to recover money improperly paid (*repetition de lo indebido*) is also recognized as belonging to this class of duties.

It will be observed that according to the Civil Code (article 1089) obligations are supposed to be derived either from (1) the law, (2) contracts and quasi-contracts, (3) illicit acts and omissions, or (4) acts in which some sort of blame or negligence is present. This enumeration of the sources of obligations supposes that the quasi-contractual obligation and the obligation imposed by law are of different types. The learned Italian jurist, Jorge Giorgi, criticises this assumption and says that the classification embodied in the code is theoretically erroneous. His conclusion is that one or the other of these categories should have been suppressed and merged in the other. (Giorgi, *Teoria de Uts Obligaciones*, Spanish ed., vol. 5 arts. 5, 7, 9.) The validity of this criticism is, we think,

self-evident; and it is of interest to note that the common law makes no distinction between the two sources of liability. The obligations which in the Code are indicated as quasi-contracts, as well as those arising ex lege, are in the common law system merged into the category of obligations imposed by law, and all are denominated implied contracts.

Many refinements, more or less illusory, have been attempted by various writers in distinguishing different sorts of implied contracts, as, for example, the contract implied as of fact and the contract implied as of law (or constructive contract). No explanation of these distinctions will be here attempted. Suffice it to say that the term "contract, express or implied" is used by common-law jurists to include all purely personal obligations other than those which have their source in delict, or tort. As to these it may be said that, generally speaking, the law does not impose a contractual duty upon a wrongdoer to compensate for injury done. It is true that in certain situations where a wrongdoer unjustly acquires something at the expense of another, the law imposes on him a duty to surrender his unjust acquisitions, and the injured party may here elect to sue upon this contractual duty instead of suing upon the tort; but even here the distinction between the two liabilities, in contract and in tort, is never lost to sight; and it is always recognized that the liability arising out of the tort is delictual and not of a contractual or quasi-contractual nature.

In the case now under consideration the duty of the defendant to refund the money which he won from the plaintiff at gaming is a duty imposed by statute. It therefore arises ex lege. Furthermore, it is a duty to return a certain sum which had passed from the plaintiff to the defendant. By all the criteria which the common law supplies, this is a duty in the nature of debt and is properly classified as an implied contract. It is well-settled by the English authorities that money lost in gambling or by lottery, if recoverable at all, can be recovered by the loser in an action of indebitatus assumpsit for money had and received. (*Clarke vs. Johnson*, Lofft, 759; *Mason vs. Waite*, 17 Mass., 560; *Burnham vs. Fisher*, 25 Vt., 514.) This means that in the common law the duty to return money won in this way is an implied contract, or quasi-contract.

It is no argument to say in reply to this that the obligation here recognized is called an implied contract merely because the remedy commonly used in suing upon ordinary contracts can be here used, or that the law adopted the fiction of a promise in order to bring the obligation within the scope of the action of assumpsit. Such statements fail to express the true import of the phenomenon. Before the remedy was the idea; and the use of the remedy could not have been approved if it had not been for historical antecedents which made the recognition of this remedy at once logical and proper. Furthermore, it should not be forgotten that the question is not how this duty came to be recognized in the common law as a contractual duty but what sort of obligation did the author of the Code of Civil Procedure intend to describe when he used the term implied contract in section 412.

In what has been said we have assumed that the obligation which is at the foundation of the original action in the court below is not a quasi-contract, when judged by the principles of the civil law. A few observations will show that this assumption is not by any means free from doubt. The obligation in question certainly does not fall under the definition of either of the two quasi-contracts which are made the subject of special treatment in the Civil Code, for it does not arise from a licit act as contemplated in article 1887 and the money was not paid under error as contemplated in article 1895. The obligation is clearly a creation of the positive law—a circumstance which brings it within the purview of article 1090, in relation with article 1089; and it is also derived from an illicit act, namely, the playing of a prohibited game. It is thus seen that the provisions of the Civil Code which might be consulted with a view to the correct theoretical classification of this obligation are unsatisfactory and confusing.

The two obligations treated in the chapter devoted to quasi-contracts in the Civil Code are: (1) The obligation incident to the officious management of the affairs of other persons (*gestion de negocios ajenos*) and (2) the recovery of what has been improperly paid (*cobro de lo indebido*). That the authors of the Civil Code selected

these two obligations for special treatment does not signify an intention to deny the possibility of the existence of other quasi-contractual obligations. As is well said by the commentator Manresa.

"The number of the quasi-contracts may be indefinite as may be the number of lawful facts, the generations of the said obligations; but the Code, just as we shall see further on, in the impracticableness of enumerating or including them all in a methodical and orderly classification, has concerned itself with two only—namely, the management of the affairs of other persons and the recovery of things improperly paid—without attempting by this to exclude the others." (Manresa, 2d ed., vol. 12, p. 549.)

It would indeed have been surprising if the authors of the Code, in the light of the jurisprudence of more than a thousand years, should have arbitrarily assumed to limit the quasi-contracts to two obligations. The author from whom we have just quoted further observes that the two obligations in question were selected for special treatment in the Code not only because they were the most conspicuous of the quasi-contracts, but because they had not been the subject of consideration in other parts of the Code. (Opus citat., p. 550.)

It is well recognized among civilian jurists that the quasi-contractual obligations cover a wide range. The Italian jurist, Jorge Giorgi, to whom we have already referred, considers under this head, among other obligations, the following: payments made upon a future consideration which is not realized, or upon an existing consideration which fails; payments wrongfully made upon a consideration which is contrary to law, or opposed to public policy; and payments made upon a vicious consideration or obtained by illicit means (Giorgi, *Teoria de las Obligaciones*, vol. 5, art. 130.)

In permitting the recovery of money lost at play, Act No. 1757 has introduced modifications in the application of articles 1798, 1801, and 1305 of the Civil Code. The first two of these articles relate to gambling contracts, while article 1305 treats of the nullity of contracts proceeding from a vicious or illicit consideration. Taking all these provisions together, it must be apparent that the obligation to return money lost at play has a decided affinity to contractual obligations; and we believe that it could, without violence to the doctrines of the civil law, be held that such obligations is an innominate quasi-contract. It is, however, unnecessary to place the decision on this ground.

From what has been said it follows that in our opinion the cause of action stated in the complaint in the court below is based on a contract, express or implied, and is therefore of such nature that the court had authority to issue the writ of attachment. The application for the writ of certiorari must therefore be denied and the proceedings dismissed. So ordered.

Arellano, C. J., Torres, Johnson, and Carson, JJ., concur.

Fisher, J., with whom concurs Avanceña, J.

CONCURRING OPINION

MALCOLM, J., concurring:

As I finished reading the learned and interesting decision of the majority, the impression which remained was that the court was enticed by the nice and unusual points presented to make a hard case out of an easy one, and unfortunately to do violence to the principles of certiorari. The simple questions are: Did the Court of First Instance of the city of Manila exceed its jurisdiction in granting an attachment against the property of the defendant, now plaintiff? Has this defendant, now become the plaintiff, any other plain, speedy, and adequate remedy? The answers are found in the decision of this court, in *Herrera vs. Barretto and Joaquin* ([1913], 25 Phil., 245), from which I quote the following:

"It has been repeatedly held by this court that a writ of certiorari will not be issued unless it clearly appears that the court to which it is to be directed acted without or in excess of jurisdiction. It will not be issued to cure errors in the proceedings or to correct erroneous conclusions of law or of fact. If the court has jurisdiction of the subject matter and of the person, decisions upon all questions pertaining to the cause are decisions within its jurisdiction and, however irregular or erroneous they may be, cannot be corrected by certiorari. The Code of Civil Procedure giving Courts of First Instance general jurisdiction in actions for mandamus, it goes without saying that the Court of First Instance had jurisdiction in the present case to resolve every question arising in such an action and to decide every question presented to it which pertained to the cause. It has already been held by this court that, while it is a power to be exercised only in extreme cases, a Court of First Instance has power to issue a mandatory injunction to stand until the final determination of the action in which it is issued. While the issuance of the mandatory injunction in this particular case may have been irregular and erroneous, a question concerning which we express no opinion, nevertheless its issuance was within the jurisdiction of the court and its action is not reviewable on certiorari. It is not sufficient to say that it was issued wrong fully and without sufficient grounds and in the absence of the other party. The question is, Did the court act with jurisdiction?

"It has been urged that the court exceeded its jurisdiction in requiring the municipal president to issue the license, for the reason that he was not the proper person to issue it and that, if he was the proper person, he had the right to exercise a discretion as to whom the license should be issued. We do not believe that either of these questions goes to the jurisdiction of the court to act. One of the fundamental questions in a mandamus against a public officer is whether or not that officer has the right to exercise discretion in the performance of the act which the plaintiff asks him to perform. It is one of the essential determinations of the cause. To claim that the resolution of that question may deprive the court of jurisdiction is to assert a novel proposition. It is equivalent to the contention that a court has jurisdiction if he decides right but no jurisdiction if he decides wrong. It may be stated generally that it is never necessary to decide the fundamental questions of a cause to determine whether the court has jurisdiction. The question of jurisdiction is preliminary and never touches the merits of the case. The determination of the fundamental questions of a cause are merely the exercise of a jurisdiction already conceded. In the case at bar no one denies the power, authority, or jurisdiction of the Court of First Instance to take cognizance of an action for mandamus and to decide every question which arises in that cause and pertains thereto. The contention that the decision of one of those questions, if wrong, destroys jurisdiction involves an evident contradiction.

"Jurisdiction is the authority to hear and determine a cause—the right to act in a case. Since it is the power to hear and determine, it does not depend either upon the regularity of the exercise of that power or upon the rightfulness of the decisions made. Jurisdiction should therefore be distinguished from the exercise of jurisdiction. The authority to decide a cause at all, and not the decision rendered therein, is what makes up jurisdiction. Where there is jurisdiction of the person and subject matter, as we have said before, the decision of all other questions arising in the case is but an exercise of that jurisdiction."

Then follows an elaborate citation and discussion of American authorities, including a decision of the United States Supreme Court and of the applicable Philippine cases. The decision continues:

"The reasons given in these cases last cited for the allowance of the writ of prohibition are applicable only to the class of cases with which the decisions deal and do not in any way militate against the general proposition herein asserted. Those which relate to election contests are based upon the principle that those proceedings are special in their nature and must be strictly followed, a material departure from the statute resulting in a loss, or in an excess, of jurisdiction. The cases relating to receivers are based, in a measure, upon the same principle, the appointment of a receiver being governed by the statute; and in part upon the theory that the appointment of a receiver in an improper case is in substance a bankruptcy proceeding, the taking of which is expressly prohibited by law. The

case relative to the allowance of alimony pendente lite when the answer denies the marriage is more difficult to distinguish. The reasons in support of the doctrine laid down in that case are given in the opinion in full and they seem to place the particular case to which they refer in a class by itself.

"It is not a light thing that the lawmakers have abolished writs of error and with them certiorari and prohibition, in so far as they were methods by which the mere errors of an inferior court could be corrected. As instruments to that end they no longer exist. Their place is now taken by the appeal. So long as the inferior court retains jurisdiction its errors can be corrected only by that method. The office of the writ of certiorari has been reduced to the correction of defects of jurisdiction solely and cannot legally be used for any other purpose. It is truly an extraordinary remedy and, in this jurisdiction, its use is restricted to truly extraordinary cases—cases in which the action of the inferior court is wholly void; where any further steps in the case would result in a waste of time and money and would produce no result whatever; where the parties, or their privies, would be utterly deceived; where a final judgment or decree would be nought but a snare and a delusion, deciding nothing, protecting nobody, a judicial pretension, a recorded falsehood, a standing menace. It is only to avoid such results as these that a writ of certiorari is issuable; and even here an appeal will lie if the aggrieved party prefers to prosecute it.

"A full and thorough examination of all the decided cases in this court touching the question of certiorari and prohibition fully supports the proposition already stated that, where a Court of First Instance has jurisdiction of the subject matter and of the person, its decision of any question pertaining to the cause, however erroneous, cannot be reviewed by certiorari, but must be corrected by appeal."

I see no reason to override the decision in *Herrera vs. Barretto and Joaquin* (supra). Accordingly, I can do no better than to make the language of Justice Moreland my own. Applying these principles, it is self-evident that this court should not entertain the present petition and should not grant the desired relief.

DISSENTING OPINION

FISHER, J., dissenting:

I am in full accord with the view that the remedy of certiorari may be invoked in such cases as this, but I am constrained to dissent from the opinion of the majority as regards the meaning of the term "implied contract."

Section 412 of the Code of Civil Procedure, in connection with section 424, authorizes the preliminary attachment of the property of the defendant: "(1) In an action for the recovery of money or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the Philippine Islands, with intent to defraud his creditors; (2) * * *; (3) * * *; (4) * * *; (5) When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors."

It is evident that the terms of paragraph five of the article cited are much broader than those of the first paragraph. The fifth paragraph * is not limited to actions arising from contract, but is by its terms applicable to actions brought for the purpose of enforcing extra-contractual rights as well as contractual rights. The limitation upon cases falling under paragraph five is to be found, not in the character of the obligation for the enforcement for which the action is brought, but in the terms of article 426, which requires that the affidavit show that "the amount due the plaintiff * * * is as much as the sum for which the order is granted."

That is to say, when an application is made for a preliminary attachment upon the ground that the plaintiff is about to dispose of his property with intent to defraud his creditors—thus bringing the case within the terms of paragraph five of the section—it is not necessary to show that the obligation in suit is contractual in its origin, but it is

sufficient to show that the breach of the obligation, as shown by the facts stated in the complaint and affidavit, imposes upon the defendant the obligation to pay a specific and definite sum. For example, if it is alleged in the complaint that the defendant by his negligence, has caused the destruction by fire of a building belonging to plaintiff, and that such building was worth a certain sum of money, these facts would show a definite basis upon which to authorize the granting of the writ. But if it were averred that the defendant has published a libel concerning the plaintiff, to the injury of his feelings and reputation, there is no definite basis upon which to grant an attachment, because the amount of the damage suffered, being necessarily uncertain and indeterminate, cannot be ascertained definitely until the trial has been completed.

But it appears that the legislature, although it has seen fit to authorize a preliminary attachment in aid of actions of all kinds when the defendant is concealing his property with intent to defraud his creditors, has provided that when the ground of attachment is that the defendant is about to depart from the country with intent to defraud his creditors, the writ will issue only when the action in aid of which it is sought arises from a contract "express or implied." If an attachment were permitted upon facts bringing the application within the first paragraph of the section in support of actions of any kind, whether the obligation sued upon is contractual or not, then paragraph five would by construction be made absolutely identical with paragraph one, and this would be in effect equivalent to the complete elimination of the last two lines of the first paragraph. It is a rule of statutory construction that effect should be given to all parts of the statute, if possible. I can see no reason why the legislature should have limited cases falling within the first paragraph to actions arising from contract and have refrained from imposing this limitation with respect to cases falling within the terms of the fifth paragraph, but this should have no effect upon us in applying the law. Whether there be a good reason for it or not the distinction exists.

Had the phrase "express or implied" not been used to qualify "contract," there would be no doubt whatever with regard to the meaning of the word. In the Spanish civil law contracts are always consensual, and it would be impossible to define as a contract the juridical relation existing between a person who has lost money at gaming and the winner of such money, simply because the law imposes upon the winner the obligation of making restitution. An obligation of this kind, far from being consensual in its origin, arises against the will of the debtor. To call such a relation a contract is, from the standpoint of the civil law, a contradiction in terms.

But it is said that as the phrase "express or implied" has been used to qualify the word "contract," and these words are found in a statute which "speaks the language of the common law," this implies the introduction into our law of the concept of the "implied contract" of the English common law, a concept which embraces a certain class of obligations originating ex lege, which have been arbitrarily classified" as contracts, so that they might be enforced by one of the formal actions of the common law which legal tradition and practice has reserved for the enforcement of contract. I cannot concur in this reasoning, I believe that when a technical juridical term of substantive law is used in the adjective law of these Islands, we should seek its meaning in our own substantive law rather than in the law of America or of England. The Code of Civil Procedure was not enacted to establish rules of substantive law, but upon the assumption of the existence of these rules.

In the case of *Cayce vs. Curtis* (Dallam's Decisions, Texas Reports, 403), it appears that the legislature, at a time when that State still retained to a large extent the Spanish substantive civil law, enacted a statute in which the word "bond" is used. In litigation involving the construction of that statute, one of the parties contended that the word "bond" should be given the technical meaning which it had in the English Common Law. The court rejected this contention, saying—

"On the first point it is urged by counsel for the appellant that the word 'bond,' used in the statute, being a common law term, we must refer to the common law for its legal signification; and that by that law no instrument

is a bond which is not under seal. The truth of the proposition that sealing is an absolute requisite to the validity of a bond at common law is readily admitted; but the applicability of that rule to the case under consideration is not perceived. This bond was taken at a time when the common law afforded no rule of decision or practice in this country, and consequently that law cannot be legitimately resorted to, even for the purpose for which it is invoked by the counsel for the appellant, unless it be shown that the civil law (which under certain modifications was at that time the law of the land) had no term of similar import; for we regard it as a correct rule of construction, that where technical terms are used in a statute, they are to be referred for their signification to terms of similar import in the system of laws which prevails in the country where the statute is passed, and not to another system which is entirely foreign to the whole system of municipal regulations by which that country is governed. (Martin's Reports, vol. 3, 185; 7 Martin [N. S.], 162.)"

Consequently, I believe that in the interpretation of the phrase "contract, express or implied," we should apply the rules of our own substantive law. The phrase in itself offers no difficulty. The concept of the contract, under the Civil Code, as a legal relation of exclusively consensual origin, offers no difficulty. Nor is any difficulty encountered in the grammatical sense of the words "express" and "implied." "Express," according to the New International Dictionary is "that which is directly and distinctly stated; expressed, not merely implied or left to inference." Therefore, a contract entered into by means of letters, in which the offer and the acceptance have been manifested by appropriate words, would be an "express contract." The word "imply," according to the same dictionary, is "to involve in substance or essence, or by fair inference, or by construction of law, when not expressly stated in words or signs; to contain by implication; to include virtually."

Therefore, if I enter a tailor shop and order a suit of clothes, although nothing is said regarding payment, it is an inference, both logical and legal, from my act that it is my intention to pay the reasonable value of the garments. The contract is implied, but it is none the less purely consensual. An implied contract, therefore, is that in which the consent of the parties is implied.

Manresa, commenting upon article 1262 of the Civil Code, says:

"The essence of consent is the agreement of the parties concerning that which is to constitute the contract * * *. The forms of this agreement may vary according to whether it is expressed verbally or in writing, by words or by acts. Leaving the other differences for consideration hereafter, we will only refer now to those which exist between express consent and implied consent * * *. It is unquestionable that implied consent manifested by acts or conduct, produces a contract * * *."

If it were necessary to have recourse to the English common law for the purpose of ascertaining the meaning of the phrase under consideration, we could find many decisions which gave it the same meaning as that for which I contend.

"An implied contract is where one party receives benefits from another party, under such circumstances that the law presumes a promise on the part of the party benefited to pay a reasonable price for the same." (Jones vs. Tucker [Del.], 84 Atlantic, 1012.)

It is true that English courts have extended the concept of the term "contract" to include certain obligations arising ex lege without consent, express or implied. True contracts created by implied consent are designated in the English common law as "contracts implied in fact," while the so-called "contracts" in which the consent is a fiction of law are called "contracts implied by law." But it is evident that the latter are not real contracts. They have been called "contracts" arbitrarily by the courts of England, and those of the United States in which the English common law is in force, in order that certain actions arising ex lege may be enforced by the action of assumpsit. In the rigid formulism of the English common law the substantive right had to be accommodated to the

form of action. As is stated in the monograph on the action of assumpsit in Ruling Case Law (volume 2, p. 743)—

"In theory it was an action to recover for the nonperformance of simple contracts, and the formula and proceedings were constructed and carried on accordingly. * * * From the reign of Elizabeth this action has been extended to almost every case where an obligation arises from natural reason, * * * and it is now maintained in many cases which its principles do not comprehend and where fictions and intendments are resorted to, to fit the actual cause of action to the theory of the remedy. It is thus sanctioned where there has been no * * * real contract, but where some duty is deemed sufficient to justify the court in imputing a promise to perform it, and hence in bending the transaction to the form of action."

In the ancient English common law procedure the form of the action was regarded as being much more important than the substantive right to be enforced. If no form of action was found into which the facts would fit, so much the worse for the facts! To avoid the injustices to which this condition of affairs gave rise, the judges invented those fictions which permitted them to preserve the appearance of conservatism and change the law without expressly admitting that they were doing so. The indispensable averment, without which the action of assumpsit would not lie, was that the defendant promised to pay plaintiff the amount demanded. (*Sector vs. Holmes*, 17 Va., 566.) In true contracts, whether express or implied, this promise in fact exists. In obligations arising *ex lege* there is no such promise, and therefore the action of assumpsit could not be maintained, although by reason of its relative simplicity it was one of the most favored forms of action. In order to permit the litigant to make use of this form of action for the enforcement of certain classes of obligations arising *ex lege*, the judges invented the fiction of the promise of the defendant to pay the amount of the obligation, and as this fictitious promise gives the appearance of consensuality to the legal relations of the parties, the name of implied contract is given to that class of extra-contractual obligations enforceable by the action of assumpsit.

Now, it is not to be supposed that it was the intention of the Legislature in making use in the first paragraph of article 412 of the phrase "contract, express or implied" to corrupt the logical simplicity of our concept of obligations by importing into our law the antiquated fictions of the mediaeval English common law. If one of the concepts of the term "implied contract" in the English common law, namely, that in which consent is presumed from the conduct of the debtor, harmonizes with the concept of the contract in our law, why should we reject that meaning and hold that the Legislature intended to use this phrase in the foreign and illogical sense of a "contract" arising without consent? This is a civil law country. Why should we be compelled to study the fictions of the ancient English common law, in order to be informed as to the meaning of the word "contract" in the law of the Philippine Islands? Much more reasonable to my mind was the conclusion of the Texas court, under similar circumstances, to the effect that "Where technical terms are used in a statute they are to be referred for their signification to terms of similar import in the system of laws which prevails in the country where the statute is passed." (*Cayce vs. Curtis*, *supra*.)

My conclusion is that the phrase "contract, express or implied" should be interpreted in the grammatical sense of the words and limited to true contracts, consensual obligations arising from consent, whether expressed in words, writing or signs, or presumed from conduct. As it is evident that the defendant in the present case never promised, expressly or by implication, to return the money won from him in the gambling game in question, his obligation to restore the amount so won, imposed by the law, is not contractual, but purely extra-contractual, and therefore the action brought not being one arising upon "contract, express or implied," the plaintiff is not entitled to a preliminary attachment upon the averment that the defendant is about to depart from the Philippine Islands with intent to defraud his creditors, no averment being made in the complaint or in the affidavit that the defendant has removed or disposed of his property, or is about to depart with intent to defraud his creditors, so as to bring the case within the terms of the fifth paragraph of section 412.

I am unable to agree with the contention of the applicant (brief, p. 39) here that the phrase in question should be interpreted in such a way as to include all obligations, whether arising from consent or ex lege, because that is equivalent to eliminating all distinction between the first and the fifth paragraphs by practically striking out the first two lines of paragraph one. The Legislature has deliberately established this distinction, and while we may be unable to see any reason why it should have been made, it is our duty to apply and interpret the law, and we are not authorized under the guise of interpretation to virtually repeal part of the statute.

Nor can it be said that the relations between the parties litigant constitute a quasi contract. In the first place, quasi contracts are "lawful and purely voluntary acts by which the authors thereof become obligated in favor of a third person * * *." (Civil Code, article 1887.) The act which gave rise to the obligation ex lege relied upon by the plaintiff in the court below is illicit—an unlawful gambling game. In the second place, the first paragraph of section 412 of the Code of Civil Procedure does not authorize an attachment in actions arising out of quasi contracts, but only in actions arising out of contracts, express or implied.

I am therefore of the opinion that the court below was without jurisdiction to issue the writ of attachment, and that the writ should be declared null and void.

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