

**RAFAEL MOLINA SALVADOR, PLAINTIFF AND APPELLANT, VS.
ENRIQUE F. SOMES, DEFENDANT AND APPELLEE.**

G.R. No. 10105. March 31, 1915

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PER CURIAM:

This is an appeal from a judgment of the Court of First Instance of the city of Manila dismissing the complaint on the merits with costs.

With the expectation of later being able to set out fully the grounds of our decision we now, for the prompt dispatch of pending litigation, decide the case without opinion.

The judgment is affirmed, with costs against the appellant. So ordered.

Torres, Carson, and Trent, JJ.

CONCURRING

MORELAND, J.,

In the former case between the same parties (24 Phil. Rep., 49) plaintiff sought to change the nature of his cause of action on appeal and to recover on what he termed the theory of restitution. This attempt was frustrated and the cause was disposed of on the theory on which it had been tried and decided in the Court of First Instance. That action having been on a bond given by defendant to obtain a preliminary injunction against the plaintiff, and the right to recover against the defendant having, been denied in that action on the ground that he had not signed the bond or become responsible in any way thereon, plaintiff now seeks to recover against the same defendant on the theory under which it was presented to the Supreme Court in the previous action, that of restitution.

Strictly speaking, the question of restitution cannot arise in this case. Molina and Somes each had a judgment against De la Riva (Somes by subrogation) and the controversy between the two arose when it became necessary to determine whose judgment was entitled to preference with respect to the proceeds of the sale of certain specific property of the judgment debtor then in the hands of the sheriff by virtue of an execution levied under Molina's judgment. Somes was awarded judgment declaring that he was entitled to preference. Molina appealed and, at that time, or some time prior thereto, released the levy under his judgment and the property, which was the subject of the levy, was, so far as appears, returned to De la Riva. Thereupon, and during the pendency of the appeal from the judgment in his favor, Somes levied an execution on De la Riva's property issued on the judgment which he held against De la Riva and duly sold the same in accordance with law. The proceeds thereof, after deducting expenses and fees, were turned over to him by the sheriff in accordance with the provisions of the Code of Civil Procedure. Molina made no attempt to intervene in the proceedings to sell or to present to the sheriff a claim of preference with respect to the proceeds of the sale. He secured a reversal of the judgment from which he had taken an appeal; but, when he sought to levy on the property of De la Riva for the payment of his judgment, he

was confronted with the fact that that property had already been sold under *Somes'* judgment and the proceeds turned over to him. This action was commenced after plaintiff's defeat in the previous action (24 Phil. Rep., 49) to compel *Somes* to restore to *Molina* the property of *De la Riva* which had been seized and sold, or its equivalent.

I do not believe that the action will lie. Strictly speaking, as already intimated, it is very doubtful if the purpose of plaintiff's action is really restitution. At common law restitution was a remedy whose object was to restore to the appellant a specific thing or its equivalent of which he had been deprived by the enforcement of the judgment against him during the pendency of his appeal. In this action, the thing sought to be obtained by *Molina* was never his. It belonged always to *De la Riva*. Moreover, the injury sustained by *Molina*, if any, was not caused by the levy and sale under *Somes'* judgment. Instead of maintaining his levy *Molina* released it and returned the property to *De la Riva*, its owner. This act was purely voluntary. It was not sought for or asked by *Somes* nor was it ordered by the court. *Somes* never asked that *Molina* give up the property or even release his levy. He merely asked that he be paid his judgment out of the proceeds of the property before *Molina* was paid his. Neither *Somes* nor the court was responsible in any way for *Molina's* releasing the levy and giving up the property.

The moment that *De la Riva* received his property from the sheriff he had absolute control of it. He could sell it to whom he pleased. He could apply it to the payment of any debt he chose. He could have conveyed it to another and turned the money received therefrom over to *Somes* in payment of his judgment; or he could have turned the property over to *Somes* as payment or part payment of the judgment. There is no law which could have prevented any of these things from being done. Is any one of these things different in substance or effect from what actually happened? Does not the same legal condition exist in the case at bar? Did *De la Riva* commit a wrong in turning the property over to *Somes*? If *De la Riva* committed no wrong in permitting *Somes* to take the property, did *Somes* commit a wrong in taking it? There was a real legal relation between *De la Riva* and *Molina*, but there was none between *Molina* and *Somes*. If *De la Riva* cannot be held responsible to *Molina*, how can *Somes* be? What was legal for *De la Riva* to give was legal for *Somes* to accept. The turning of the property back to *De la Riva* by *Molina* terminated *Molina's* connection with it until he, at some subsequent time, should renew his levy or make some effort to obtain part of the proceeds of the sale. Indeed the release by *Molina* of his levy on *De la Riva's* property so completely destroyed the foundation on which the action in which his appeal was taken was based, that the appeal would have been dismissed on proper motion on the ground that there existed no controversy between the parties. I fail to see any basis of legal liability in favor of the plaintiff in this action. *Somes* committed no wrong against *Molina*. He took no property from *Molina* in which *Molina*, at the time, had the slightest interest. It was *De la Riva's* property, unincumbered and free. The suit pending between *Somes* and *Molina* at the time could not give *Molina* an interest in the property. Its only possible result would be to declare, as between *Somes* and *Molina*, who would be entitled to be paid first out of the proceeds of the sale of the property which was then in the process of being sold under *Molina's* execution. The court, in that action, could not declare that *Molina* had any interest in the property itself, although the specific property levied on might have been before the court at the time. Nor could it declare a preference over the general property of *De la Riva*. An action could not have been maintained for either purpose. An action cannot be maintained to declare a preference either in the general or specific property of a debtor. It must relate to the proceeds of the sale of specific property of the debtor which has been seized by one creditor to satisfy his debt and as to which another creditor is urging his rights of priority of payment. In other words, the action must relate to the distribution of the proceeds of property already in the hands of one creditor whose rights therein are disputed by another. Preference consists merely in the right to be paid first. The necessary prerequisites to an action to obtain preference are: first, the debtor's property shall not be sufficient to pay the claims of the rival creditors; second, the property shall have been sold or shall have been levied upon and be in the process of sale; third, a claim of preference in the distribution of the proceeds of that property shall have been made by one creditor and denied by another; and, fourth, the claim and denial must be

maintained. If one of these requisites is lacking, the action cannot be maintained. All of these elements existed at the time *Somes* began his action, but, from about the 3d day of August, 1907, forward, only one of these essentials was present, namely, that *De la Riva* did not have property sufficient to pay the judgments of both *Molina* and *Somes*. When the necessary conditions precedent to the maintenance of the action had ceased to exist, there was in law no real contest between them. There was no rival claim. The action would have been dismissed at any time on a showing of the facts as they were. The question left for the court was a moot one. Its resolution would have been useless. Its judgment would have been impossible of execution. It is idle for a court to decree preferential rights of parties in the proceeds of specific property when such proceeds have already ceased to exist as to them. It is nonsense to declare a preference in *Molina* in the proceeds resulting from the sale of specific property when he is making no claim with respect to such proceeds.

The principles which govern preference between creditors under the Civil Code must be kept in mind. Preference does not create an interest in property. It creates simply a right of one creditor to be paid the proceeds of the sale of property as against another creditor. It creates no lien on property and, therefore, gives no interest in property, specific or general, to the preferred creditor.

In the case of *Peterson vs. Newberry* (6 Phil. Rep., 260), this court said:

"The learned judge was of opinion that 'there is no law in the Philippine Islands * * * fixing the lien of judgments or executions until the levy,' but our attention has not been directed to any provision of law which provides that a levy under execution creates or fixes a lien, general or specific, in favor of a judgment creditor, nor does it appear that a creditor acquires a lien upon the property of the debtor by virtue of the filing of his complaint, the judgment, the issue of execution, or the levy thereunder, other than the mere right, as prescribed in article 1924 of the Civil Code, to a preference in the distribution of the funds of the estate of the judgment debtor in those cases wherein by intervention or otherwise the judgment creditor is a proper party to the distribution proceedings and duly asserts his right as a preferred creditor."

It has been the frequent action of trial courts to order the property sold under an execution issued by a person whose rights in the application of the proceeds were admittedly inferior to those of another, the essential character of the preferential rights being that of application of proceeds rather than interest in or lien on the property itself.

In the case of *Rubert & Guamis vs. Luengo & Martinez* (8 Phil. Rep., 554), the court said:

"It is important to determine the exact nature of the right declared by this article 1922, paragraph 1. We do not think that it gives any lien to the creditor upon the property itself. It simply provides that, when the proceeds of the property are distributed, the preferred creditor shall be paid first. Not having any lien upon the property, the plaintiffs in this case had no right to the possession of these films. They had no right to prevent a seizure of the films upon an attachment or execution issued at the suit of another creditor, but they did have a right to secure from the proceeds of the sale made under such seizure the payment of their claim before the claims of other creditors were paid. It is apparent that in this case, and in other cases, there must necessarily be a sale of the property before the rights of the creditors can be adjusted. In this case it was necessary that the films be sold before it could be determined how much of the proceeds *Luengo & Martinez* were entitled to receive after the plaintiffs had been paid. If the films sold for less than the claim of the plaintiffs, the plaintiffs would be entitled to all the proceeds; if for more, *Luengo & Martinez* would be entitled to the surplus after the plaintiffs were paid."

The right of plaintiff is not one in the corpus of the property. He got no lien or other right by his levy, for, after sale, any other creditor would have had the right to contest with him before the sheriff the application of the proceeds. His right was simply to have the proceeds applied in a certain way. It was not a lien on property but a preference in application. The law does not give the creditor who has a preference a right to take the property or sell it as against another creditor. It is not a question of who takes or sells; it is one of the application of the

proceeds after the sale—of payment of the debt.

So that the taking and the sale by the sheriff under *Somes'* execution, even admitting that *Somes'* rights were inferior to those of *Molina*, so far as the law of preference goes, were not wrongful acts as to *Molina*. No one was injured when the sheriff sold under *Somes'* execution and collected the proceeds. *Molina's* remedy, and his only remedy, even if he himself had sold, was to fight out with *Somes* the application of the proceeds obtained by the sale. The rights which the plaintiff asserts in this case must be based, if they have basis at all, not on his levy, whether maintained or not, on an interest in property, but on the application of the proceeds by the sheriff after sale.

Was the application of the proceeds legally made by the sheriff ? There can be no doubt about that. Nobody denies his right or duty to apply them as he did. *Molina* did not object or protest in any way. That being the case, did *Somes* incur responsibility to *Molina* by reason of such application? Compliance with the law discharges obligations and responsibilities; it does not create them. The sheriff obeyed the law in distributing the proceeds. There was no contest before him as to whom the money should be paid. *Molina* failed to take the steps necessary to protect his judgment. There was only one claimant to the proceeds before the sheriff and he was the one whose execution the sheriff was collecting. The sheriff, then, committed no wrong in delivering the proceeds of the sale of *De la Riva's* property to *Somes*. All things else being equal, what one man has a right to give another has a right to receive. The sheriff having the clear right to apply the proceeds to the payment of *Somes'* execution, the very execution under which those proceeds were obtained, did not *Somes* have an equal right to receive them, and in receiving them did he lay himself open to attack by *Molina* ?

Molina voluntarily abandoned his levy on the property of *De la Riva*. *Somes* took advantage of this and procured a levy of his own, and the sheriff sold and turned the proceeds over to *Somes*. *Molina* made no objection to the levy or sale and none to the act of the sheriff in turning the proceeds over to *Somes* to apply on his execution. He saw all of these things taking place and stood passive. Did he not, thereby, lose his right of preference over *Somes*? The contention of the plaintiff would undoubtedly be, in reply, that although he did not actually go to the sheriff at the time of the levy or sale or while the sheriff still held the proceeds in his hands, and assert his claim to preference in the distribution of the funds, nevertheless, so far as *Somes* is concerned, he, *Molina*, at all times asserted his right of preference just as effectually; that, at the very time of the levy, sale and distribution, there was pending in court an action begun by *Somes* against him for the very purpose of determining the question of preference; that, in that action, *Somes* was asserting his right of preference in the very property so sold and that he was denying such right; that that right was the whole subject-matter of the litigation. To this there is an obvious answer. In the first place, the declaration by the Supreme Court of the preference of *Molina's* claims over *Somes'* (15 Phil. Rep., 133)[1] was based on the finding, a fact undisputed at the time, that the property concerning which the rival claims were being made was then in the hands of the sheriff under *Molina's* levy awaiting the resolution of the appeal. The court in that case said: "Said executions were placed in the hands of the sheriff of the city of Manila and the sheriff of the Province of Albay, and all of the property of the defendant *De la Riva* was levied upon under said executions, which levies still remain in force, the property not having been sold pursuant thereto." That fact, coupled with the further fact that the property of *De la Riva* was not sufficient to pay the claims of both, furnished the fundamental basis of the action. If there was property enough to pay both, then the fight over preference was vain. A litigation to determine a preference when there is no specific property or proceeds in the hands of the sheriff upon which that preference is to operate, is almost equally vain. In fact, until the sheriff has actually sold the property and has marshalled the net proceeds of the sale, it is at least uncertain, in many cases, whether a declaration of preference will be necessary. As we said in the case of *Rubert & Guamis vs. Luengo & Martinez* (8 Phil. Rep., 554):

"It is apparent that in this case, and in other cases, there must necessarily be a sale of the property before the rights of the creditors can be adjusted. In this case it was necessary that the films be sold before it could be determined how much of the proceeds Luengo & Martinez were entitled to receive after the plaintiffs had been paid. If the films sold for less than the claim of the plaintiffs, the plaintiffs would be entitled to all the proceeds; if for more, Luengo & Martinez would be entitled to the surplus after the plaintiffs were paid."

Strictly speaking, the action is premature if brought before the sale, as the only time when it can be determined absolutely whether the preference is necessary is after the sale is made. The property may bring enough to pay all debts. Practically, however, it is many times so clear, even before the sale, that the property in question will not yield sufficient money on sale to satisfy the contending creditors, that an action for a declaration of preference will be entertained before the sale takes place. But in such case the fact that the property, when sold, will not be sufficient to satisfy the contending creditors must be clearly and explicitly alleged in the complaint and proved on the trial. Failing in such allegation, the complaint is insufficient. Failing in that proof, the plaintiff cannot succeed. Moreover, it must appear that the property in question is in process of being sold when the action is commenced. That is to say, the property must have been seized by the sheriff at the instance of one of the creditors and must be in the process of sale under such seizure. Unless one of the creditors is engaged in the act of satisfying his claim at the expense of the other creditors, the action of which we are speaking cannot be maintained. An action will not be entertained to declare a preference over the general property of the debtor or over property concerning which creditors are not disputing. The property must be specific property which has been seized and is actually being disposed of. Furthermore, there must be an actual present dispute between creditors as to who shall take preference in the distribution of the proceeds. The right of preference is one which can be made effective only by being asserted and maintained. If the right claimed is not asserted and maintained, it is lost. In the case at bar the plaintiff levied on the property of De la Riva. After the levy *Somes* asserted a right of preference over *Molina* in the distribution of the proceeds of the sale as against the plaintiff. Thereafter *Molina* released the levy, leaving the property in possession of the debtor, *De la Riva*, as free as before the levy. This was in effect an abandonment, at least at that moment, of any claim of preference, if one had ever been asserted. Let us repeat that, unless the property has actually been seized by one creditor and a right of preference in application of the proceeds of the sale thereof has been asserted by another, an action to obtain a declaration of preference will not lie. The claim of preference necessarily assumes the existence and presence of two persons. If the property has not been seized by one creditor it is open to seizure by another. If there are not two parties at least, the question of preference cannot, of course, arise. Therefore, when *Molina* abandoned his levy and consequently the possession of the property, indicating thereby that, at that moment, he did not intend to press his claim further as to that specific property, the right of preference, if one had been asserted by or against him, could not be a subject of dispute until some subsequent and timely act of his revived his claim. After that act his claim of preference could not exist because he had ceased to contest. He did not maintain. As a necessary result, when *Somes* thereafter levied on the property and took it from the possession of *De la Riva*, there was no one disputing his right to the proceeds thereof. *Molina* could have made his claim; but he did not. No subsequent act of his renewed or revived his abandoned claim. He sat quiet while the sheriff levied, sold and distributed, and made no claim.

Not only was there no preference being asserted to the proceeds of that specific property, but, still more, at the time of the decision of this court in the case above cited (*Somes vs. Molina*, 15 Phil. Rep., 133) the property no longer belonged to the debtor, *De la Riva*. It had been seized and sold by *Somes* without protest by *Molina* and its proceeds had gone from the hands of the sheriff and had been dissipated. True, it was *Somes* who caused the property to be sold and took the proceeds. But it was without objection or protest from *Molina*. The pendency of the action could not be held to be an objection or protest on the part of *Molina*.

In the second place, at the time the action was begun by *Somes*, *Molina* held the property under his executions.

Somes was the protestant. He objected to Molina holding the property and opposed his taking the proceeds after a sale should be made. Somes was the objector and insistent claimant and was the plaintiff in the action. Molina was passive. He was simply holding fast at the time. Now, Somes being the objector, the mover, the positive and insistent claimant, and the plaintiff in the action to enforce his claims, how would be construed, normally, the act of Molina releasing his levies on the property, abandoning his possession thereof and turning it back to De la Riva? Was this not an abandonment of the levy and the rights which he had acquired thereunder? Was it not, for the moment at least, an abandonment of his right of preference, which right cannot be effectively asserted so long as the property concerning which it is claimed is in possession of and under the control of the debtor? The very essence of the right is that the property of the debtor shall have been seized by one of the creditors. So long as the debtor has undisputed possession the claim of preference cannot be made. There can, at such time, be no basis for it. What can be said, then, of the voluntary return of the property by Molina to the debtor? The instant that was done the claim of preference, if any, kept alive, if it was, by the pendency of the action, was abandoned; and that action would have been dismissed on proper motion, as the purpose for which it had been begun had disappeared. This is particularly so after the sale of the property and the distribution of the proceeds. When two acts of an individual are inconsistent with each other, the last act will prevail, as it is the last expression of his will and purpose. If Molina's defense of Somes' action can be said to be an assertion of his right of preference over Somes, then his subsequent act of abandonment and return of the property to De la Riva must be held to prevail over it. One cannot hold fast and let loose at the same time.

It is true that the question in this case is one of preference under article 1213 of the Civil Code; but I do not believe that the preference under that article is, compared with article 1924, such as to require, so far as this case is concerned, different treatment. Articles 1210, 1211, 1212 and 1213 read as follows:

"ART. 1210. Subrogation shall be presumed:

"1. When a creditor pays another preferred creditor.

"2. When a third person, who is not interested in the obligation, pays with the express or implied approval of the debtor.

"3. When the person who is interested in the fulfillment of the obligation pays, without prejudice to the effects of the confusion with regard to the share pertaining to him.

"ART. 1211. A debtor may make the subrogation without the consent of the creditor when, in order to pay the debt, he may have borrowed money in a public instrument, stating his purpose and setting forth in the receipt the origin of the sum paid.

"ART. 1212. Subrogation transfers to the party subrogated the credit, with the corresponding rights, either against the debtor or against third persons, be they sureties or holders of mortgages.

"ART. 1213. A creditor to whom a partial payment has been made may exercise his right with regard to the balance, with preference to the person subrogated in his place by virtue of the partial payment of the said credit."

There can be no claim in this action that the judgment held by Somes had preference over those held by Molina, or that the judgments held by Molina had any preference over that held by Somes, by virtue of anything inherent in the judgments themselves. This is necessarily so because, in the case of *Somes vs. Molina* (15 Phil. Rep., 133), this court held "that there exists no preference among the judgments in actions Nos. 3402, 3829 and 4766 referred to in this action. They all stand on an equal footing." The preference of Molina over Somes exists, as intimated, not by virtue of article 1924 but, rather, by virtue of article 1213 of the Civil Code above quoted. While, as we have said, there is no preference under article 1924 and the following articles, nevertheless, the preference

provided for in article 1213 is sufficiently like the preference provided for in article 1924 as, under the theory of judgments and the credits which they exemplify laid down in the Civil Code, to make them the same for the purposes of this action. *Somes*, having been subrogated to the rights of *Molina* in judgment No. 3402, was entitled to exercise all of the rights which *Molina* could have exercised if he had continued to hold the judgment uncollected, except that *Somes* could not take from *Molina* any of the property of *De la Riva* then in the sheriff's hands by virtue of the levies under *Molina*'s judgments. After they had been fully satisfied, then *Somes* was entitled to any surplus which might remain for the payment of the judgment which he held in cause No. 3402. It must be noted that the case above cited (15 Phil. Rep., 133) proceeded in this court and was decided by it on the theory that all of the property of *De la Riva* had been levied upon by *Molina* and was then in his hands or the hands of the sheriff for the purposes of sale and the application of the proceeds thereof to the payment of his judgments. In that property *Somes* could have no interest until the payment of *Molina*'s two judgments in full. This was so by virtue of the fact that the payment by *Somes* of judgment No. 3402 was but a part payment of the debt of P130,000 which *De la Riva* owed to *Molina*. This being a partial payment of the debt, *Molina* was entitled to collect the balance of that debt out of the property of *De la Riva*, which he then held under executions, before *Somes* could take any portion of it for the payment of his claim against *De la Riva* arising out of his payment of the judgment in cause No. 3402, notwithstanding the fact that, by such payment, he became subrogated to the rights which *Molina* had therein. (Article 1213 of the Civil Code above quoted.) The right of *Molina* over *Somes* was simply a right to be paid first out of specific property, not a right to be paid first out of the general property of the judgment debtor. If the judgment debtor had paid *Somes*' judgment out of his general assets *Molina* would have been helpless to prevent it. In the same way, if *Somes* collected his judgment out of property of *De la Riva* which was in his possession and under his control at the time, with no attempt on the part of *Molina* to interfere or intervene, the latter is without remedy after the termination of the proceedings on execution and the payment of the fund to *Somes*.

I am of the opinion, therefore, that *Molina*, having failed to present his claim to the sheriff, or having neglected to take some other appropriate proceeding to establish, as against *Somes*, his right to be preferred in the distribution of the proceeds of the sale of *De la Riva*'s property, and having permitted distribution without objection, protest or intervention, lost his right of preference and is not entitled to assert it in this action. As I have already stated, at the time the judgment was granted by the Supreme Court in favor of *Molina* against *Somes* as to their rights under their respective judgments, it was assumed by the court that *Molina* had maintained his levy on *De la Riva*'s property and that the real question in litigation was the right of *Molina* to share ahead of *Somes* in the distribution of the proceeds of the sale of that property. It is very doubtful if the court would have permitted the action to go forward if it had appeared that no property had been seized and held under levy and that none was before the court. The question presented by the pleadings would probably have been academic.

For these reasons I am of the opinion that the action cannot be maintained and that the complaint must be dismissed on the merits.

[1] *Somes vs. Molina*.

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