

KUENZLE & STREIFF (LTD.), PLAINTIFF AND APPELLANT, VS. JUAN VILLANUEVA, DEFENDANT AND APPELLEE; AND ED. A. KELLER & CO., PLAINTIFF, VS. JUAN VILLANUEVA, DEFENDANT.

G. R. No. 10345. February 05, 1916

Ponente: CARSON, J.

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CARSON, J.:

On April 28, 1914, Kuenzle & Streiff (Ltd.) began an action against Juan Villanueva in the Court of First Instance of Manila and on April 29, 1914, procured the levy of an attachment by the sheriff upon a motor truck, the property of Villanueva, for the satisfaction of any judgment which might be recovered against him.

Sometime in the latter part of August, 1914, a money judgment was rendered in that action in favor of Kuenzle & Streiff and against Villanueva for P1,456 and interest thereon from the date of the institution of the action.

On May 22, 1914, after the date of the levy of the attachment but prior to the date of the judgment in that action, a judgment for P7,268 with interest and costs was rendered in favor of Ed. A. Keller & Co. (Ltd.) and against Villanueva, in another action in the same court.

Execution for the enforcement of Keller & Co.'s judgment issued forthwith, and was levied on the motor truck which had already been attached by Kuenzle & Streiff. The truck was sold at public auction on June 14, 1914, the net proceeds of the sale amounting to P189.88.

Both parties laid claim to the proceeds of the sale of the truck in the hands of the sheriff, who filed a motion praying the court to advise and direct him as to the disposition which he should make of the funds.

After hearing the parties, the court directed the sheriff to pay over the net proceeds of the sale of the truck to the judgment creditor, Ed. A. Keller & Co. From this order Kuenzle & Streiff appealed to this court, and the record is now before us on appellant's bill of exceptions.

The only question submitted for our consideration is whether the statutory preference in favor of a creditor who obtains a judgment on an unsecured debt, gives the judgment creditor a right to the proceeds of an execution sale of the property of the judgment debtor, superior to the right of another judgment creditor of the same debtor, whose judgment is of a later date, but who had procured the levy of an attachment on the property sold at execution sale prior to the date of the judgment in favor of the other claimant.

In other words, the question for consideration is whether an attachment levied on specific property gives to the attaching creditor a lien or a right to a preference in the nature of a lien, superior to the statutory right to a preference which is recognized in article 1924 of the Civil Code in favor of the owner of an after acquired judgment.

In a long and unbroken line of decisions, running through our reports from the first volume down to the last, we have uniformly and steadfastly sustained and recognized the statutory preferences created by the provisions of

title 17 of the Civil Code, save only in so far as they have been expressly or by necessary implication repealed or modified by Acts of the Commission or the Legislature.

In the course of these decisions we have had frequent occasion to consider the nature, force and effect of the preferences established in subsection 3 of article 1924 of the code in favor of "credits that without special privilege appear" in public instruments and final judgments. Construing these provisions we have carefully indicated that these preferences do not constitute a lien upon the property of the debtor in the ordinary sense of the word as used in English and American jurisprudence, the statutory right secured to the creditor being merely a right to a preference in the distribution of the funds of the estate of the judgment or record debtor, in those cases wherein by intervention or otherwise, he is a proper party to the distribution proceedings and duly asserts his rights as a preferred creditor. We have had occasion also to indicate that these statutory preferences in favor of record and judgment creditors attach to the proceeds of the sale of all or any part of the property of the debtor, both personal and real, which may be the subject of distribution proceedings—it always being understood, however, that by the express terms of the various provisions of chapter 3, of title 17 of the Civil Code, these preferences are subordinated to credits which, under the provisions of that chapter, enjoy special preferences with regard to specific personal or real property, and also to the different classes of credits mentioned in subsections 1 and 2 of art. 1924.

It is urged, nevertheless, that the issuance and levy of attachments and executions under the provisions of the new Code of Civil Procedure should be given the effect plainly contemplated by the American authors of that Code—that is to say, the effect of liens upon the specific property levied upon; and that these liens should be held to be superior to all or any of the statutory preferences recognized in title 17 of the Civil Code.

Upon full consideration of the provisions of the new Code of Civil Procedure by virtue of which levies of attachments are authorized, and of the circumstances under which that Code was enacted by a commission the majority of whose members were American lawyers, we are satisfied that it was the intention of the legislature to give an attaching creditor a lien or at least a right in the nature of a lien in the attached property; but we see no reason whatever for holding that this lien, or right in the nature of a lien, rises superior to any statutory preferences with which the property is affected at the time of its attachment.

There is no express provision of the statute to that effect; and we are not aware of anything in the nature of attachment proceedings as authorized in the Code of Civil Procedure which necessitates a holding that it was the intention of the legislator that the mere levy of an attachment should have the effect of destroying or dislodging the acquired rights of a creditor with a statutory preference for the purchase price of the property, or for the cost of repairs on the property, or the like. Nor can any sound reasons be advanced for holding the right of an attachment creditor superior to the statutory right of preference in favor of a judgment creditor who had obtained judgment against the debtor prior to the date of the levy of the attachment. In the absence of the most explicit language in the statute we should not and we will not read into the code provisions touching attachments an intent to emasculate or destroy these very salutary preferences; and such would be the effect of a holding that any unsecured creditor could oust or dislodge preferred creditors by the mere levy of an attachment upon the filing of his action against the debtor.

It is said that under the general doctrine recognized in the courts of the United States, the lien of an attachment gives the attaching creditor a right which is superior, with relation to the specific property attached, to the right of all other creditors whatsoever, except those who hold a prior recorded lien upon this property. And it is urged that since the statutory preferences recognized in subsection 3 of article 1924 give the judgment creditor no lien upon the property of the debtor, such preferences, even though they antedate the levy of the attachment, should not be permitted to defeat the right of the attachment creditor to enforce his lien on the specific property attached.

But, while we recognized, from the very nature of the proceedings authorizing the levy of attachments, that it necessarily follows that the levy of the attachment creates a lien upon the specific property attached, it does not necessarily follow that the above-mentioned American doctrine as to the effect of the lien thus created has also been imported into this jurisdiction.

That doctrine finds its justification in the jurisdictions in which it is recognized, in a system whereby creditors entitled to preferences are furnished with a method whereby rights of preferences may be converted into liens by their entry of record. In this jurisdiction however, no method is prescribed whereby a creditor with a right to a statutory preference can convert such right into a lien.

Under the old Spanish system of procedure there was no necessity therefor, since no door was left open whereby unsecured creditors could, at will, oust or dislodge preferred creditors of any right to a preference which had already affected the property of the debtor, provided the preferred creditor duly asserted his right to a preference. As we have said already, we do not believe that in enacting the new Code of Civil Procedure it was the intention of the legislator to emasculate and destroy the statutory preferences recognized and created in the Civil Code; and certain it is that there is nothing in the statute which has that effect, unless we import into this jurisdiction a general doctrine touching the effect of levies of attachment which has no justification or reason for being when considered with relation to the substantive laws in force in these Islands when the Code of Civil Procedure was enacted.

We are of opinion that while it is true that a judgment creditor has no lien on his debtor's property, which will permit him to follow the property into the hands of a purchaser for value and subject it to the payment of the judgment indebtedness; nevertheless, the property of the debtor is affected by the right of preference of his judgment creditor to such an extent that his right of preference in the distribution of the funds of the estate of his debtor should be and will be recognized, as of the date of the judgment, in any legal proceeding which has for its object the subjection of the property of the debtor to the payment of his debts or other lawful obligation. Attachments are invariably issued in the course of such proceedings, and attach rent creditors trust be held to have secured the levy of other attachment subject to the right of preferred creditors to assert their statutory right of preference in the proceeds of the sale of the attached property.

On the other hand, it is very clear that the code provisions whereby specific property is attached "for the satisfaction of any judgment which may be obtained against" the debtor, and limiting the amount of such property subject to attachment to an amount sufficient to satisfy such judgment, was intended not only to prevent the debtor from disposing of the property, but to prevent other creditors from acquiring liens or preferences in the nature of liens, after the date of the attachment, which might make it impossible for the attachment creditor to satisfy his judgment out of the property attached by him. Though an attaching creditor has no right by the mere levy of an attachment to dislodge other creditors who have already acquired rights of preference affecting the property, he is clearly entitled to have the property held, in custodia legis, pending his action and for the satisfaction of any judgment he may obtain, free of all after acquired liens and preferences. Otherwise prudent creditors would rarely assume the risk and expense of attachment proceedings.

It appears that many of the members of the bar have become convinced that in some of our former decisions, and especially in the cases of *Peterson vs. Newberry* (6 Phil., 260, 263), and *McMicking vs. Kimura* (12 Phil., 98), we have denied the existence in this jurisdiction of liens or preferences in the nature of a lien in favor of attaching creditors. Indeed, the trial judge in the case at bar, in declining to recognize the existence of a lien or a statutory preference in the nature of a lien in favor of the attaching creditor, said that "In the case of *McMicking vs. Kimura* (12 Phil., 98), the Supreme Court of these Islands held squarely that an attachment gives no special preference over a judgment though such judgment may be of a later date than the attachment, and that case is decisive of this

controversy."

But while some of the language used in the case of *McMicking vs. Kimura* (12 Phil., 98) appears to justify the comment of the trial judge, an examination of the facts in that case discloses that the real question submitted was whether an attaching creditor acquired a lien, or a preference in the nature of a lien superior to the statutory preference in favor of another judgment creditor whose debt was evidenced by a public document of earlier date than the levy of the attachment. The opinion discloses that the attaching creditor sued out his writ of attachment on the 7th of June, 1907, and obtained judgment on the 28th of June, 1907; while the date of the public instrument evidencing the debt of the record creditor was the 1st of May, 1907, and the date of his judgment sometime in the following month of June.

Expressly holding that the document evidencing the claim of the creditor, dated May 1, 1907, was a public document within the meaning of article 1924 of the Civil Code, we held that he had a right of preference in the distribution of the funds, of the debtor superior to those of the judgment creditor whose attachment and judgment bore dates subsequent to May 1, 1907. This ruling is in exact accord with the doctrine hereinbefore announced. It amounts to no more than a holding that the attaching creditor in levying his attachment on the 7th day of June, 1907 on the property of his debtor could not thereby destroy the preference with which the property was already affected in favor of the creditor whose indebtedness was recognized in a public instrument of an earlier date. Any language in the former opinion which tends to sustain a contention that the attaching creditor is not entitled by virtue of the levy of the attachment to a lien, or preference in the nature of a lien, superior to any statutory preference under article 1924 of the Code in favor of a judgment creditor whose judgment bears a date later than that of the levy of the attachment, was obiter dicta, not necessary to the disposition of the former case, and as such, of no binding force in the disposition of the present case.

No question as to the effect of the levy of an attachment arose in the case of *Peterson vs. Newberry* (supra). It is contended, however, that the language in which we held that the judgment creditor took nothing by virtue of a lien or preference in the nature of a lien, arising out of the levy of an execution on his judgment, is equally applicable in all cases of levies of attachments under the provisions, of the new Code of Civil Procedure. This contention, however, wholly overlooks the fact that execution levies are always subsequent to the date of the judgment while levies of attachment precede the entry of judgment. It will readily be seen that the right to a preference to which a judgment creditor is entitled, as of the date of his judgment, rises superior in all cases to his right arising under the levy of an execution thereon, which must necessarily be of a later date than the judgment. Speaking broadly therefore, we may, and did, in the *Peterson vs. Newberry* case, treat liens or preferences in the nature of liens which otherwise would arise out of the issuance and levy of judgment executions, as nonexistent and of no practical force or effect. But this cannot be said of liens or preferences in the nature of liens arising out of the levy of attachments which may long antedate the entry of final judgment.

Some other cases have been cited in which it is said that this court has declined to recognize the doctrine announced with relation to the levy of attachments, but upon examination it appears either that our rulings in those cases were made with reference to the levy of attachments under the old Spanish Code of Civil Procedure, or that the comment contained in those opinions with reference to the nature and effect of the rights arising from the levies of attachments under the new Code of Civil Procedure had no controlling effect upon the disposition of the cases then under review. But, be this as it may, the question having been squarely submitted to us on this appeal, we are of opinion and so hold upon full consideration of the law as we understand it, that we should not be bound by anything in the former decisions which seems to set forth a doctrine in this regard contrary to that herein announced.

We conclude that the issuance and levy of an attachment on specific property, real or personal, gives to the

attaching creditor a lien, or a right to a preference in the nature of a lien with relation to such property, subject to all liens or statutory preferences by which such property is affected at the date of the levy, but superior to all liens and statutory preferences by which the property may be affected subsequent to the date of the levy.

Before finally disposing of this case it may not be amiss to indicate that we are not unaware of the arguments based on the grounds of convenience and expedience which may be advanced against the maintenance, with reference to the proceeds of the sale of attached property, of preferential rights of creditors whose claims of indebtedness are recognized in public documents of earlier date than that of the levy of the attachment. Much can be said, and has been said to the menace of fraud and sharp practice involved in the maintenance of this statutory preference when it is claimed by a creditor with reference to an indebtedness acknowledged in a notarial instrument, as those instruments are executed under existing law. But this court, with full knowledge of the force of these arguments has steadfastly maintained the view that notarial instruments are and must be held to be public instruments in the sense in which that term is used in subsection 3 of article 1924 of the Civil Code, and that ruling has long since become a fixed rule of property, which we are not at liberty to overthrow. If any change or modification of the rule appears to be required under existing conditions, such change or modification must have the sanction of legislative authority. (Peterson vs. Newberry, 6 Phil., 260; Pena vs. Mitchell, 9 Phil., 587; Macke and Macke vs. Rubert, 11 Phil., 480; Martinez vs. Holliday, Wise & Co., 1 Phil., 194; Quison vs. Salud, 12 Phil., 109.)

It is to be observed, however, that since the discussion first arose as to the apparent inexpedience of the treatment of notarial instruments as public documents, the legislature has, in fact, thrown a number of additional safeguards around the execution of notarial instruments, which obviate some of the principal objections against their recognition as public documents. And it is to be presumed that such other and further safeguards will be erected in the future as may be found necessary as a result of experience in the operation of the notarial law now in force.

What has been said necessitates the reversal of the judgment appealed from in this case, without costs in this instance, and the entry of an order directing that the net proceeds of the sale of the auto truck in the hands of the sheriff be turned over to the attaching creditor, the appellant in these proceedings, whose judgment claim is far in excess of the total amount of the funds available for distribution. So ordered.

Arellano, C. J., Torres, Trent, and Araullo, JJ., concur.

CONCURRING AND DISSENTING

MORELAND, J.:

I agree that the decision should be reversed. I cannot agree, however, to the discussion of the questions taken up and considered by the court in the majority opinion and decided. The whole subject of preference is covered and the field of attachments is fully occupied, when there is, in my opinion, nothing in the case which warrants it. The only question presented is this: Is an attaching creditor entitled to apply the proceeds of the sale of the property attached to the payment of the judgment obtained in the action in which the attachment was levied as against a mere judgment creditor of the same defendant whose judgment was obtained after the attachment was levied but before judgment in the action? To determine this question there was no necessity of discussing the whole law of preferred credits, or of attempting the impossible task of uniting or harmonizing it with the law of attachments; for, it is conceded by the court that, whether the attachment is considered a lien or a preference, it was to be preferred to a mere judgment subsequently obtained which had no relation to or connection with the property attached. There was no need, therefore, to attempt to exhaust the subject of preferences; and particularly there was

no reason for seriously emasculating, indeed, completely destroying, the essential character of the attachment as known, recognized and established by courts and jurists from the earliest times. This is clear not only from the fact already stated, viz., that the attachment was entitled to priority no matter whether it were considered a lien or a preference, but also from the fact that the court, after it had emasculated attachments in general, and this one in particular, held that it was still superior to the judgment of the defendant. Certainly, if it was superior after emasculation, it was before; and it is queer logic which leads one to destroy the essential and individual character of a right in order to demonstrate that it is superior to some other.

Moreover, there was no necessity for such a discussion as the opinion contains, with the uncertainty and confusion which will follow in several branches of the law, for another reason: If the court had simply followed the plain language of the Act relating to attachments that would have ended the matter at once. Its provisions are clear and the rights of the attaching creditor are set out so explicitly and plainly that to escape the obvious effects of the Act one must give it a construction and interpretation so strained and unnatural and so in violation of all precedent as to destroy the Act itself—and, as a result, to make a statute instead of apply a statute. A mere reading of the provisions of the law of attachments, as it is found in Act No. 190 of the Philippine Commission should end the controversy instantly. Its provisions are as clear as language can make them and are simplicity itself. Moreover, so far as securing to the attaching creditor his rights in the property attached is concerned, they are mandatory.

As I disagree with the act of the court in discussing unnecessary questions, so I dissent, in many instances, from the law as laid down in the discussion. The opinion of the court has, in my humble opinion, left both the law of attachments and preferred credits (preferences) in a confused and mutilated state. The language used at critical places is, to my mind and judgment, so inaccurate and the expressions so devoid of meaning, that it results that a decision which was intended to avoid confusion has, I am sorry to be obliged to believe, left it worse confounded. What I desire to do in this opinion is to offer such suggestions as may, in some small way, and in grasping the significance of the court's, opinion and to meet the situation which will necessarily be presented by what are, to me, the strange theories advanced and the unusual doctrines, enunciated therein.

I want, first of all, to point out what the court holds in this case and the train of argument by which it arrives at its conclusion. As I have said, I find no fault with the bare finding that the attachment must be upheld. With that I agree. That was a resolution of the question, and the sole question, before the court. But the court decides much more than that; and this, together with the style and character of the argument found in the opinion, is what I object to. Near the end of the opinion the court holds that an attachment lien is "subject to all * * * statutory preferences, by which such property is affected at the time of the levy * * *." This was clearly unnecessary to a decision of the question presented. The judgment in this, case was subsequent to the levy of the attachment and, therefore, the situation which would have arisen if it had been prior to the levy was not presented. But I would not object so seriously to the obiter dictum if it contained a correct statement of the law with which it deals. When, however, it is not only obiter but wrong also, I not only feel constrained to dissent but to register that dissent as well. Nothing is more objectionable than erroneous obiter dicta.

In order to thoroughly understand this declaration of the court we must know what "statutory preferences" are, so that it will be clear what "all" preferences include. Preferences, or, more correctly speaking, preferred credits, are of two kinds, those which refer to and are connected with specific property, and those which bear no relation to property of any kind. Those affecting specific property fall into two classes: those which arise by the acts of the parties and those which come into existence by operation of law. Belonging to the first class are the pledge and the mortgage and certain commercial contracts; and to the second those resulting from repair, preservation, housing, transportation, feeding, hotel accommodations, purchase price of seeds for seeding purposes, charges for

insurance of real estate, and the like. (Arts. 1921-1923, Civil Code.) Those credits which do not affect property of any kind are found defined in article 1924 and include, as provided by subdivision 3,—

"Credits which without special privilege appear—

"A. In a public instrument.

"B. In a final judgment should they (the credits) have been the object of litigation."

That subdivision terminates with the paragraph:

"These credits shall have preference among themselves according to the priority of dates of the instruments and of the judgments."

Articles 1928 and 1929 provide:

"ART. 1928. The residue of the estate of a debtor, after the credits which enjoy preference with regard to specified property, personal or real, have been paid, shall become part of the free property which he may possess for the payment of the other credits.

"Those which enjoy preference with regard to specific property, personal or real, and which have not been fully paid with the proceeds of such property, shall be paid with regard to the deficit in the order and place pertaining thereto, according to their respective characters.

"ART. 1929. Credits which have no preference with regard to specific property, and those which have preference for the amount not collected, or when the right of preference should have prescribed, shall be paid according to the following rules:

"1. In the order established in article 1924.

"2. Those preferred by dates, according to their order, and those which have a common date, pro rata.

"3. Common credits, referred to in article 1925, without consideration of their dates."

As is evident, the credit in the case at bar, being a judgment, falls within subdivision 3 of article 1924 above quoted; and it must be paid as provided in article 1929. By the provisions of this article as well as those of article 1924, subdivision 3, it is clear, as I have stated before, that neither a credit merged in a judgment nor a credit appearing in a public document bears the slightest relation to or produces the remotest effect on property of any kind.

It is clear, therefore, that, when the court declared it as a rule of law that an attachment lien is "subject to all * * * statutory preferences by which such property is affected at the date of the levy," it included in the word "all," among many others, judgments and credits appearing in public documents, neither of which "affect" property in any way whatsoever.

Now, it must be noted that the opinion of the court does not deal with credits, or preferences which affect specific property, found, as we have seen, in articles 1922 and 1926 of the Civil Code; but with those provided for in paragraph b of subdivision 3 of article 1924, namely, judgments. No attempt will be made, therefore, to discuss credits or preferences which affect specified property, but only those, such as judgments and credits appearing in public documents, which, under no conception and in no aspect, affect or touch property. I discuss credits appearing in public documents along with judgments as the error of the court is more clearly exposed by a discussion of its application to public documents than, perhaps, to judgments.

The question, therefore, presented by the declaration of the court that an attachment lien is subject to all

judgments and credits appearing in public documents which were in existence when the attachment was levied, is this: Does a mere credit, which has no effect whatever on property, which is neither a lien, charge, nor incumbrance thereon, which is merely an open, unsecured debt, in other words, a personal obligation pure and simple, but which has a date prior to that on which an attachment is made, take precedence over and destroy the attachment lien? Really, this is no question at all. While it is the one set up by the court for decision and discussed all through the opinion, it comes near to being utterly meaningless as a proposition of law, as we shall see more fully later. Nevertheless, it takes up and discusses this question, and, by arguments which I cannot understand, arrives at results that I can see, and, by seeing them, I know that they are bad. I cannot conceive how a thing which is not a lien on property and which does not affect it in any way can, legally speaking, be compared to a thing which is a lien and is a charge on property; and especially can I not understand how the two can come into competition concerning property. They do not belong to the same class of rights; and it is as impossible that they be competitors for legal rights in property itself as that the boa constrictor and the giraffe contest as to which has the right to browse. They are different rights, different legal animals, with almost no elements in common. If the serpent be granted the right to browse it has no qualities with which it can make that right effective; and, unless it is made over into a different animal at the time it is given the new rights, they will be worthless to it. So, if we give a public document or a judgment the qualities of a lien on specific property, those qualities will be useless, unless, at the time of the endowment of those rights, the judgment and the public document be made over into something they were not before.

In seeking to do what I regard as the impossible from a legal point of view, i, e., put the preferred credit on the same footing and give it the same qualities as an attachment and still preserve the identities of both, the court has:

1. Destroyed the vital element of the attachment, its lien on specific property, and has given the word a definition that it never before had in any country.
2. Destroyed the preferred credit, or, as it is called in the opinion of the court, the preference, by giving it an element foreign to its true nature, namely, making it a lien or charge on specific property to the extent of taking precedence over the attachment lien and removing it from its position in the Spanish bankruptcy law and making it applicable outside of bankruptcy proceedings.
3. Destroyed those provisions of the Civil Code and Mortgage Law which declare that a lien, charge or incumbrance on specific property arising from the voluntary act of the owner thereof shall produce no effect as to third persons dealing with the property unless notice of such lien, charge or incumbrance has previously been given to the world in the manner therein required. No notice of the existence of the preferred credit, which the court holds "affects" the debtor's property, need be given under the law governing preferred credits, as that law, being simply a part of the Bankruptcy Act, contains no provision as to notice; and the decision of the court offers nothing on that subject. In spite of the fact, however, that they receive no notice, the court lays down the doctrine that third persons deal with the debtor's property at their peril.
4. Destroyed the principle which informs all laws and rules relating to notice, namely, that which governs as to the place where and manner in which notice must be given of charges, liens or incumbrances. A promissory note the execution of which is acknowledged before a notary public and which, by such acknowledgment, becomes a public document, takes precedence over an attachment lien levied one hour after the execution of the note, although the note was executed in Bontoc and the attachment levied in Jolo a thousand miles away and in a different province. The same may be said of a judgment. A person levying an attachment in Jolo is charged with notice of a judgment obtained in Bontoc ten minutes prior to the levy.
5. Has discriminated between liens on property by holding that the lien of an attaching creditor is subordinated to

preferred credits without notice to the attaching creditor, while the lien of the pledge and the mortgage is not.

6. Classified incorrectly the credit created by the attachment. Although it be conceded, as the court finds and holds, that an attachment is not an attachment but a preferred credit, it should clearly be classified as a credit "which enjoys preference with regard to specific personal (or real) property" (Arts. 1921, 1923, 1926, 1927, Civil Code), and not a credit which has no relation to property of any kind, the classification established by the court. An attachment lien is as effective as if it were created by the voluntary act of the debtor and stands on as high equitable grounds as a mortgage lien. It should be classified, therefore, among credits which enjoy preference with respect to specific property, that is, with the pledge and the mortgage, and not with the judgment and public document which do not affect property in any way whatever.

7. Given precedence among preferred credits upon a principle not recognized by the Civil Code, namely, according to their dates instead of their nature. While it is true that certain credits take precedence in the order of their creation, that is, according to their effective dates, it is true only as between credits of the same class. Dates are of no consequence as between classes. While the date governs the preference as between members of the same class, the members of a given class take their position as compared with members of other classes not by virtue of their dates but by virtue of their nature. While judgments take preference among themselves according to their dates, an entirely different principle governs their position with respect to members of other classes. The preference given to him who repairs property, or who holds it in pledge or under a mortgage is superior to that given a judgment creditor, notwithstanding that his judgment was secured long before the repairs were made, the pledge taken or the mortgage given. An attachment lien is as strong as if it were created by the voluntary act of the debtor and stands on as high equitable grounds as a mortgage lien (*Peck vs. Jenness*, *infra*). In spite of this, however, the court says that the competition between the attachment and the judgment must be determined not by virtue of the nature of the attachment lien, as in the case of the pledge and the mortgage, but by virtue of their respective dates. Even admitting, as the court finds, that an attachment is a preferred credit, it must necessarily fall in that class of preferred credits which refers to specific property and not in that class, such as judgments and credits appearing in public documents, which do not refer to property at all.

Thus, although it be conceded that the attachment is a preferred credit and not a lien on specific property, the court is wrong in giving a judgment or a credit appearing in a public document precedence over it, no matter what the respective dates are, as precedence is determined not by their dates but by the nature of the credit.

8. Reversed the rule relating to implied repeals of statutes by the passage of later repugnant statutes; and has laid down the rule, in effect, that, in such cases, the prior statutes stand.

9. Confused beyond classification the law of attachments and the law relating to preferred credits.

I propose to point out, first, the nature of an attachment and its effect on the property attached; then to discuss the law of preferred credits and indicate the essential features of the preference as that term is used in the opinion of the court. I shall take up, third, the opinion itself and show how it destroys not only the attachment as such, but also the preference as such; and, in doing so, disregards or violates the law in other particulars, leaving the law on several subjects mutilated and confused. Finally, I shall call attention to the fact that certain parts of the opinion are inconsistent with and contradictory of other parts, and that certain statements and propositions are without meaning.

First as to the attachment:

An attachment creates a lien or a security on specific property and, although arising by operation of law, is as effective as if created by virtue of a voluntary act of the debtor and stands on as high equitable grounds as a

mortgage lien. The right acquired by an attachment of property is sufficient to justify the attaching creditor in filing a suit to clear the property from adverse claims or to preserve the lien of the attachment when necessary papers have been lost and cannot be supplied, or in applying for an injunction against the sale of the property under an execution issued on a subsequent judgment. (Schuster vs. Rader, 13 Colo., 329; Alley vs. Carrol, 6 Heisk. [Tenn.], 221; Francis vs. Lawrence, 48 N. J. Eq., 508; Smith vs. Bradstreet, 16 Pick. [Mass.], 264.) While it is sometimes said that a lien created by an attachment is inchoate, as it awaits the judgment and must fall with the suit, it is, nevertheless, a lien in real sense (Peck vs. Jenness, 7 How., 612, 622; Colby vs. Redden, 7 How., 626; Pratt vs. Law, 9 Cranch, 456, 496; Fidelity etc. Co. vs. Bucki, etc., Lumber Co., 189 U. S., 135, 139) and places the attaching creditor in the position of a purchaser and he will be protected as such. (Green vs. Van Buskirk, 7 Wall., 139, 146; Dooley vs. Pease, 180 U. S., 126, 128.) In Peck vs. Jenness, above, one of the questions for determination was whether a clause in a bankruptcy act providing "that nothing in this act contained shall be construed to annul, destroy, or impair, any liens," etc., would prevent a discharge in bankruptcy from destroying the lien of an attachment obtained against the property of the bankrupt prior to the bankruptcy proceedings. It accordingly became necessary to determine whether an attachment was a lien so as to bring it within the provisions of the clause partially quoted. In this connection the court said:

"As it is not alleged that the attachment in this case is subject to any imputation of inconsistency with the provisions of the second and fifth sections of the act, it will not be necessary to give them further attention. Taking the words of the proviso, disconnected with this exception, they are of the most general and expansive character; they are equivalent to a saving of all liens or securities, etc., from any construction of the act that shall in any wise annul, destroy, or impair them; and, furthermore, to test their validity, we are referred to the laws of the States respectively.

"At common law there can be no lien without possession. It is there denned, a right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied. (Hammond vs. Barclay, 2 East, 235.) In maritime law, liens exists independently of possession, either actual or constructive. In courts of equity, the term lien is used as synonymous with a charge or encumbrance upon a tiling, where there is neither jus in re, nor ad rem, nor possession of the thing. Hence a judgment which, by virtue of the statute of Westminster 2d (commonly called the Statute of Elegit), is a charge upon the lands of the debtor, is called in courts of equity in England, and in the courts of law of many of these States, a lien, and executions which bind the personal property of the debtor, after their delivery to the sheriff, are termed liens, both before and after the property is seized and taken into the custody of the law by its officer. In the case of Waller vs. Best (3 How., Ill), this court decided that in Kentucky the creditor obtains a lien upon the property of his debtor by the delivery of a fi. fa. to the sheriff, and this lien is as absolute before the levy as after; and that a creditor is not deprived of this lien by an act of bankruptcy on the part of the debtor, committed before the levy is made, but after the execution is in the hands of the sheriff; and 'it is unnecessary,' says the court, 'to remark upon the cases which have been decided in other States, or in England, because the question depends altogether upon the law of Kentucky.'

"It would be an arbitrary and fanciful exposition of the terms of this proviso to say that it saved common law liens, and no statute liens; liens after judgment, and not liens before judgment; of to assert that it is the policy of the Bankrupt Act to save the lien of a factor or bailee, while it annuls that of the judgment or execution creditor.

"It is clear, therefore, that whatever is a valid lien or security upon property, real or personal, by the laws of any State, is exempted by the express language of the act.

"Let us inquire, then, whether an attachment on mesne process is a valid lien or security on the property attached by the laws of New Hampshire, as expounded by her courts.

"This species of process is peculiar to the New England States. As early as the year 1650, while New

Hampshire was united to the Massachusetts colony, it was enacted, that 'henceforth goods attached upon any action shall not be released upon the appearance of the party or judgment, but shall stand engaged until the judgment or the execution granted on the same be discharged.' (Charters and Colony Laws, 50.) And a proviso was added in 1659, that, when execution was not taken out within one month after judgment, the attachment shall be released and void in law, and etc.

"The earliest provincial legislation of New Hampshire adopted the same system, which has been continued with some variations to the present day. In 1718, they describe the goods attached as 'security to satisfy the judgment' which the plaintiff might recover in the trial. (Provincial Laws N. H., 113.) In the statute of July, 1822, and of November sessions, 1842, ch. 2, the charge or incumbrance created by an attachment is denominated a lien.

"The mode of proceeding and practice, as at present established, under writs of attachment in the State of New Hampshire, is thus described by the Superior Court. of that State, in the case of Kittridge vs. Warren:

" 'In an attachment of personal estate, the sheriff, upon the service of the writ, takes the possession of the goods, and acquires thereby a special property in them, for the purpose of enforcing and protecting the attachment, and the rights, of all concerned in the attachment and in the goods. He is then accountable, both to the plaintiff and to the defendant, for the disposition of them. If the plaintiff obtains a judgment, they are seized and sold upon the execution. If he fails, they are returned to the debtor. Some person may become accountable for them, and they may thus go back into the hands of the debtor, and the attachment be dissolved; the sheriff having, by means of a receipt for them, the security of some third person, which is in that case to be made available to the creditor. But if the attachment is not dissolved, it fastens itself upon the goods, as a charge or incumbrance, like the attachment upon real estate, and the avails of them are first to be applied to the satisfaction of the judgment, when recovered. Subsequent attachment may be made upon them by the same sheriff, and where there are several attachments, the attaching creditors have a right to priority of satisfaction, so far as those goods are concerned, not by priority of judgment, but by that of the attachment. (Poole vs. Symonds, 1 N. H., 292, 294; Bissell vs. Huntington, 2 Ib., 142; Hackett vs. Pickering, 5 Ib., 24; Kittredge vs. Bellows, 7 Ib., 428; Clarke vs. Morse, 10 Ib., 238.)'

"The statute of *elegit* has never been adopted in this State and hence a judgment is not treated as a charge or lien on the lands of the defendant, and the reason would seem to be, because the plaintiff could select his security upon specific property by his attachment at the commencement of his suit and hold it for thirty days after judgment for the purpose of satisfaction. Hence their courts have denominated the charge or security thus obtained a lien. (See *Dunken vs. Fales*, 5 N. H., 538; *Kittredge vs. Bellows*, 7 Ib., 427; *Clarke vs. Morse*, 10 Ib., 238; *Burnam vs. Folsom*, 5 Ib., 568; *Kittredge vs. Warren*; *Kittredge vs. Emerson*, etc.)

"In Massachusetts, also the charge or incumbrance created by an attachment is denominated a lien. (See 9 Mass. Rep., 210; *Fettyplace vs. Dutch*, 13 Pick. [Mass.], 392; *Arnold vs. Brown*, 24 Pick., 95; *Kilborn vs. Lyman*, 6 Met. [Mass.], 299, etc.). In Connecticut, also, see *Carter vs. Champion* (8 Conn., 550).

"Having thus shown that an attachment on mesne process creates a charge on the property attached in favor of the plaintiff, which is, in the language of the statutes and courts of New Hampshire, called a security and a lien, it will be unnecessary to notice arguments which have been urged against them on the ground of their peculiarities or distinctive features. The mere accidents of the subject cannot alter its essence. It is a statute lien, and therefore as much protected by the general language of the proviso as a common law lien.

"II. Could this lien be defeated by the interposition of the plea of bankruptcy as a bar to a judgment in favor of the plaintiff?

"By the fourth section of the act, it is declared, that 'the certificate or discharge, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt which are provable under this act, and shall or may be pleaded as a full and complete bar to all

suits brought in any court of judicature whatever.' And it is contended, as the lien of the attachment was defeasible, and could only be rendered absolute and of practical benefit to the plaintiff by the recovery of a judgment for his demand, which is effectually barred by the plea, that therefore the action and the lien must fall together.

"This conclusion would be undoubtedly correct, if we construe this section of the act by itself, and without regard to other provisions of the same act.

"But it is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by a reference to every other; and if possible, every clause and provision shall avail, and have the effect contemplated by the legislature. One portion of a statute should not be construed to annul or destroy what has been clearly granted by another. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together.

"The proviso to the second section of this act declares, 'that nothing in this act contained shall be construed to annul, destroy or impair,' any liens, etc. Here, then, is an absolute prohibition to the court to construe the general terms of the fourth section so as to defeat the lien saved by the second. It is clear, therefore, that the court, while it grants the defendant the benefit of his discharge, must do it in such a manner as not to impair the rights saved to the plaintiff. All liens, whether by mortgage or judgment, by common law or by statute, are for the purpose of obtaining satisfaction of some debt or claim; and the construction of the fourth section which would treat the bankrupt's certificate as an absolute discharge from all his debts, for every purpose, would be alike destructive of them all. The mortgagee, the factor, or the bottomry lender, is in no better condition than * * * attachment creditor. And an attempt to make a distinction between them, which would save the rights of one, and impair or destroy those of the other, would be judicial legislation,—*jus dare* not *jus dicere*. In order, therefore, to give full effect to all the provisions of the act, the bankrupt's certificate must be made to operate as a discharge of his person and future acquisitions, while, at the same time, the mortgagees or other lien creditors shall be permitted to have their satisfaction out of the property mortgaged or subject to lien. A legal right without a remedy would be an anomaly in the law."

The attachment law in the Philippine Islands is the same in nature and effect as in the United States. It is found in chapter 18 of the Code of Civil Procedure entitled "Attachment of defendant's property." It provides under what circumstances it may be issued, gives the procedure to be followed to obtain it, and state the effect thereof as follows:

"SEC. 436. Final disposition of property attached.—If judgment be recovered by the plaintiff, the officer of the court must cause the same to be satisfied, out of the property attached, if it be sufficient for that purpose, in the following manner:

"1. By paying to the plaintiff the proceeds of all sales of perishable or other property sold by him in pursuance of the order of the judge, or so much as shall be necessary to satisfy the judgment;

"2. If any balance remain due, and execution shall have been issued on the judgment, he shall sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands, or in that of the clerk of the court.

"3. By collecting from all persons having in their possession credits belonging to the defendant, or owing debts to the defendant at the time of the service upon them of the order of attachment of such credits or debts, the amount of such credits and debts as determined by the court in the action, and stated in the final judgment, and paying the proceeds of such collection over to the plaintiff.

"The officer shall make return in writing to the court of his proceedings under this section."

Under our statute it is clear that what the court said of an attachment lien in *Peck vs. Jenness* (supra), can and must be said of one here:

"The mortgagee, the factor, or the bottomry lender, is in no better condition than the * * * attachment creditor. An attempt to make a distinction between them, which would save the rights of one, and impair or destroy those of another, would be judicial legislation—*jus dare, not jus dicere*."

Having seen that the attachment creates a lien on specific property of the same quality and result as any other, mortgaged or otherwise, so far as saving the property to the attaching creditor is concerned, let us, for a moment, take up the preferred credit (preference). The nature of and the effect produced by a preference has already been defined and stated in two cases of this court. In the case of *Peterson vs. Newberry* (6 Phil., 260), the court said:

"The learned judge was of opinion that 'there is no law in the Philippine Islands * * * fixing the lien of judgments or execution 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 rights, 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 rights as a preferred creditor."

In the case of *Rubert & Guamis vs. Luengo & Martinez* (8 Phil., 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 cast 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."

Following these decisions, I stated in a concurring opinion in the case of *Molina vs. Somes* (31 Phil., 76):

"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."

At another place in the same case, speaking of a prior action between the same parties, it was said:

"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."

As will be seen from these decisions this court has laid down the proposition, and has never, until the decision in the present case was written, departed from it, that a preference of the character before us creates no interest in or lien upon property. It also appears that, under the law of the Philippine Islands, at no stage of the action does the plaintiff obtain or acquire an interest in or lien upon the property of the defendant, except by virtue of an attachment. Neither "by virtue of the filing of his complaint," says the court in *Peterson vs. Newberry* (supra) "the judgment, the issue of execution, or the levy thereunder," does the plaintiff acquire an interest in or lien upon the property of the defendant. If the judgment, or even a levy of execution, does not constitute a lien or charge on the debtor's property, on what ground does the court hold that the judgment, if obtained before the attachment is levied, is superior to and takes precedence over the attachment? And what can be the reason for declaring that attachments and judgments are on the same footing?

In considering the nature and effect of a preference, its position under the Spanish law must be continually kept in mind. Under the Civil Code it was nothing more than a part of the bankruptcy or insolvency law. It was simply the method adopted to determine and specify the order in which creditors should be paid on the final distribution of the proceeds resulting from the marshalling and sale of the bankrupt's assets. The provisions of the Civil Code affecting preferences are found in chapter second (arts. 1921-1925) and chapter third (arts. 1926-1929) of title 17. This title is headed thus: "Of the assembling of and preference among credits." There are three chapters in this title, two of which have been mentioned. The caption of the first is: "General provisions," These declare that (1) "a debtor, whose liabilities are greater than his assets, and who may have failed to meet his current obligations, must file a petition in bankruptcy (concurso) * * *"; (2) specify what his own and his property's status shall be after the declaration of bankruptcy; (3) what debts become due thereby; (4) when interest runs on credits; and (5) deal with compositions between the debtor and his creditors, etc. Chapter second is headed "Classification of credits;" and chapter third "Priority of payments." These three chapters, composing one title, constitute all the provisions of the Civil Code respecting bankruptcy and insolvency; and it is clear that the so called "preferences," dealt with in the last two chapters, constitute that part of the bankruptcy law which relates to the classification of credits and the order in which they must be paid on the final distribution of the bankrupt's estate. This being so, what effect can be given to the so-called preference outside of bankruptcy proceedings? And on what rational theory can it be compared to, or given precedence over, an attachment? Indeed, what possible effect can it produce on property? That the Philippine Commission, in enacting chapter 18 of Act No. 190, intended to pass an attachment law and not to amend a Bankruptcy Law already in existence by adding to the number of preferred credits, is perfectly clear. The same Commission in the very Act (No. 190) by which it introduced the attachment into the Philippine Islands expressly repealed all bankruptcy laws and expressly prohibited the institution of further bankruptcy proceedings in the Philippine Islands. Section 524 of Act 190 reads: "No new bankruptcy proceedings shall be instituted until a new bankruptcy law shall come into force in the Islands. All existing laws and orders relating to bankruptcy and proceedings therein are hereby repealed: Provided, That nothing in this section shall be deemed in any manner to affect pending litigation in bankruptcy proceedings." Section 523 of the same Act is as follows: "All proceedings in bankruptcy now pending in courts of the Philippine Islands shall

proceed to their regular termination in accordance with the procedure and law in force in the Islands on the thirteenth day of August, eighteen hundred and ninety-eight, notwithstanding anything in this code provided; but civil actions incident to bankruptcy proceedings shall be governed by the provisions of this code, and no challenge of the competency of a judge shall be entertained or allowed in such actions or proceedings."

These sections show beyond a doubt that the attachment was not intended to be an adjunct of the Bankruptcy Law; and that the Philippine Commission never dreamed that an attaching creditor would be obliged to give up the attached property, throw it into the hotchpotch, and share with the other creditors of the debtor, whether attaching creditors or not. Yet this is what the opinion of the court says he must do and is precisely what it made him to do in this very case. He happened to win in this case; but it was not because he had an attachment, but because he had a preference; not because he had the first attachment, but because he had a superior preference. That this is a frustration of the purpose of the Commission is evident. That it is violative of the essential nature of an attachment is clear. That it is, in effect, a repeal of the essential provisions of the law of attachment is beyond question.

Having pointed out the nature and effect of both the attachment and the preference, let us discuss the opinion of the court in the light of the knowledge so gained.

I desire to make certain quotations from the opinion on which the decision is based for the purpose of drawing conclusions therefrom which will form, in part at least, the foundation of the discussion. These quotations refer to the nature and effect of the preference as denned in the Civil Code and of the attachment under the Code of Civil Procedure. The court says:

"In the course of these decisions we have had frequent occasion to consider the nature, force, and effect of the preferences established in subsection 3 of article 1924 of the code in favor of 'credits that without special privilege appear' in public instrument and final judgments. Construing these provisions, we have carefully indicated that these preferences do not constitute a lien upon the property of the debtor in the ordinary sense of the word as used in English and American jurisprudence, the statutory right secured to the creditor being merely a right to a preference in the distribution of the funds of the estate of the judgment or record debtor, in those cases wherein by intervention or otherwise, he is a proper party to the distribution proceedings and duly asserts his rights as a preferred creditor."

Also:

"We are of opinion that while it is true that a judgment creditor has no lien on his debtor's property, which will permit him to follow the property into the hands of a purchaser for value and subject it to the payment of the judgment indebtedness; etc."

The following refer to the nature and effect of an attachment:

"Upon full consideration of the provisions of the new Code of Civil Procedure by virtue of which levies of attachments are authorized, and of the circumstances under which that code was enacted by commission, the majority of whose members were American lawyers; we are satisfied that it was the intention of the legislature to give an attaching creditor a lien or at least a right in the nature of a lien in the attached property.

"But, while we recognize, from the very nature of the proceedings authorizing the levy of attachments, that it necessarily follows that the levy of attachment creates a lien upon the specific property attached; etc.

"Any language in the former opinion which tends to sustain a contention that the attaching creditor is not entitled by virtue of the levy of the attachment to a lien, or preference in the nature of a lien. * * * was obiter dicta, not necessary to the disposition of the former case, and as such, of no binding force in the disposition of the present case."

From these statements, the court not only admits but affirmatively states:

1. That it was the intention of the Philippine Commission in enacting the law of attachments to give the attachment the same force and effect here that it has in the United States, namely, a lien on specific property which holds the property attached for the payment of the judgment in the action in which the attachment was levied.
2. That an attachment in the Philippine Islands creates a lien on specific property and holds it for the benefit of the attaching creditor.
3. That that class of credits to which the alleged preference in the case at bar belongs neither creates nor produces an interest in or lien upon the property of the debtor.

In spite, however, of the position seen by these quotations to have been taken by the court, we have this statement in the same opinion: "But we see no reason whatever for holding that this lien, or right in the nature of a lien, rises superior to any statutory preferences with which the property is affected at the time of its attachment." This statement may be regarded from two points of view: the one, that the attachment lien does not "rise superior" to the preference; and the other, that the property is "affected" by the preference (to the extent of being superior, in certain cases, to the attachment lien). It seems to me that these two statements are, in principle and effect, inconsistent with, if not actually contradictory to, the statements of the court quoted. Let us take first that part which declares: "But we see no reason whatever for holding that this lien, * * * rises superior to any statutory preference * * *." As we have seen, the opinion admits the intention of the Commission to introduce and establish here the attachment as known in the United States; and that the attachment, as so known, creates a lien on specific property. We have also seen that the opinion not only admits but expressly states that we have held in a long line of decisions that a preference, such as the subject-matter of this action, creates no lien on or interest in property. What is the natural if not the inevitable result of these admissions? If an attachment is a lien on specific property and a preference is not a lien on the same property the only conclusion possible is that the two, the attachment and the preference, i. e., the thing which is a lien and the thing which is not, are not in the same class of rights or interests; indeed, they are so far apart in nature and effect that it is quite impossible to compare them. They are utterly distinct; one failing in the essential qualities of the other. The attachment has all the elements necessary to hold the property attached. The preference has not a single quality which permits it to hold any property whatever, much, less the property attached. What meaning, then, can be given to the statement of the court, after admitting the intention of the Philippine Commission to introduce into the Philippine Islands the attachment as known in the United States, that it is a lien on specific property, and that the preference is a mere right to share in the proceeds of the sale of the debtor's "estate," and is, in no sense, a lien upon or an interest in specific property, what meaning can be given, I say, to the statement of the court that it "can see no reason whatever for holding that this lien * * * rises superior to" a preference? Did not the court see a reason for so holding when it stated over and over again in the same opinion that an attachment is a lien on specific property and that a preference is not? The very fact that it is a lien of necessity makes it superior, so far as the attached property is concerned, to something which is not,—so far superior indeed that the distance between them is, legally speaking immeasurable. If an attachment is a lien on specific property and a preference is not, as the court not only admits but affirmatively states certainly the attachment is "superior." It holds the property.

Let us now take the statement in its second aspect, that presented by the assertion that it sees no reason for holding the attachment superior to the preference "with which the property is affected at the time of the attachment." Let us revert to that part of the opinion already quoted where the court said: "Construing these provisions, we have carefully indicated that these preferences do not constitute a lien upon the property of the debtor, * * *; for being merely a right to a preference in the distribution of the funds of the estate of the judgment or record debtor, in

those cases wherein by intervention or otherwise, he is a proper party to the distribution proceedings and duly asserts his rights as a preferred creditor;" and "these statutory preferences * * * attach to the proceeds of the sale" of the debtor's property. I have underscored certain words and sentences which show, as I have heretofore indicated, that, under the Spanish law, the preference was nothing more than one step in proceedings in bankruptcy; and that the provisions of the Civil Code relating to preferences are simply a part of the title dealing with bankruptcies (Title XVII). I do this that it may be observed that, tacitly at least, the court agrees with my contention in that regard. The point I wish to bring out here, however, is the contradiction between the admission that a preference is "not a lien on the debtor's property" and the refusal of the court to hold, in accordance with that admission, that the attachment is superior to the preference, giving as its reason that the property of the judgment debtor is "affected at the time of the attachment" by the preference. Under such circumstances may I not properly ask: Is it not inconsistent to hold that a preference is "not a lien on the debtor's property," and, at the same time, to declare that the preference "affects the property of the debtor" to such an extent as to make it superior to a subsisting lien thereon? If it is not a lien or a charge how can it "affect" the property to that or to any extent? And especially when it is merely, as the court says, the right to share in "the distribution of proceeds?" If it is not a lien or a charge how can it affect the property at all? And how can it be named in the same breath with an attachment which does "affect" the property?

These same inconsistencies, if I may be permitted so to call them, appear all through the opinion. Immediately following the statement "but we see no reason whatever for holding that this lien * * * rises superior to any statutory preferences with which the property may be affected * * *," appears this expression: "There is no express provision of the statute to that effect (that is that the attachment shall rise superior, etc.); and we are not aware of anything in the nature of attachment proceedings as authorized in the Code of Civil Procedure which necessitates a holding that it was the intention of the legislator that the mere levy of an attachment should have the effect of destroying or dislodging the acquired rights of a creditor with a statutory preference for the purchase price of the property, or for the cost of repairs on the property, or the like."

I observe here, in the first place, a rescission from the former position that an attachment creates a lien on specific property; and, in the second place, a shifting of the discussion from a general preference, i. e., one which does not affect property, to one never before referred to in the opinion as a basis or a reason for any conclusion, namely, a preference which relates to specific property. This so-called preference is not involved in this case, the preference here being based, as all admit, on a judgment which has its special place in the law of preference as defined by the Civil Code and has nothing in common with the so-called preferences which relate to specific property (credits which enjoy preference with regard to specified real or personal property). That branch of the law is not under consideration in this case. Nevertheless, taking this statement relative to the preference concerning specific property as a premise, the opinion, in the very next sentence, draws a conclusion concerning a general preference. The sentence is: "Nor can any sound reasons be advanced for holding the rights of an attachment creditor superior to the statutory right of preference in favor of a judgment creditor who had obtained judgment against the debtor prior to the date of the levy of the attachment." In other words, the opinion, comparing the attachment with the preference not affecting specific property, draws certain conclusions concerning preferences affecting specific property; then immediately gives the benefit of those conclusions to the general preference which, admittedly, does not affect specific property or any other property. It does not follow that, because an elephant can draw a ton load, a mouse can do the same thing,—that because a preference affecting specific property is equal to an attachment, a general preference, which affects no property, is also. Nor can I follow the reasoning involved in the sentences immediately following the one last quoted: "In the absence of the most explicit language in the statute we should not and we will not read into the code provisions touching attachments an intent to emasculate or destroy these very salutary preferences; and such would be the effect of a holding that any unsecured creditor

could oust or dislodge preferred creditors by the mere levy of an attachment upon the filing of his action against the debtor." I note how sedulously the opinion defends the "salutary preferences" and refuses to allow them to be "emasculated or destroyed;" and, at the same time, "emasculates and destroys" the essential nature of the attachment—an institution which the opinion a few lines before admitted was introduced here by American lawyers, with the clear intention of giving it the same effect as in the United States and of making it a lien on the property attached, which must, of necessity, give it precedence over something which creates no interest whatever in such property,—by holding that it is nothing more than an adjunct to the Spanish law of preferences created for the purpose of distributing equitably the estates of bankrupts,—something which the framers of the law, in my humble opinion, could not possibly have intended or even had in mind if the statement of the court that they intended to introduce the American law of attachments is correct. They could not have intended to introduce the law and destroy it at the same time.

But the sentence last quoted requires further attention. It contains an assumption which in my judgment is not only unwarranted but which continues the misconception of the true legal nature of the preference as well as the attachment. The sentence following the semicolon in the quotation states that "such would be the effect of holding that any unsecured creditor could oust or dislodge preferred creditors by the mere levy of an attachment." Before taking up the assumption to which I have referred, let me say that I cannot understand why the word "unsecured" was used. Is not the person holding the judgment in this case also an "unsecured" creditor, as are all persons entitled to general preferences under the Civil Code? If both creditors in this case are unsecured what beneficial result can follow a discussion of the rights of a secured creditor? And what conclusion can logically or legally be drawn unfavorable to plaintiff's attachment from the fact that the attaching creditor is unsecured? Whether he is secured or not has, as I view it, nothing to do with the legal effect of his attachment, as, also, it has nothing to do with the legal effect of the preference established by defendant's judgment. The use of this word introduces a new, and unnecessary, element into the case which, I am afraid, does not tend to clear thinking.

Recurring now to the assumption contained in the sentence quoted; it is found in the use of the words "oust or dislodge preferred creditors," referring to creditors having general preferences. Now, before a creditor can be "ousted" or "dislodged" by an attachment he must be in a position where the attachment will interfere with his rights. In other words, before a person can be "ousted" or "dislodged" he must occupy some place concerning or from which the ouster or dislodgment may take place. Logic requires us to ask what place or position does a creditor with a general preference occupy from which an attachment can dislodge or oust him? The answer to this question was given by the court in that portion of its opinion preceding the sentence under discussion, wherein it stated that the attachment creates a lien on the property attached while the preference creates no rights in property,—i. e., applying what was said to the present case the plaintiff, by his attachment, obtained a lien on the property attached, while the defendant's judgment gave him no interest whatever in the property attached. If the creditor with the preference has no interest in the property to be attached how can the attachment "oust" or "dislodge" him from that property? Having no standing or position with respect to that specific property, how could he be driven from it by the creditor attaching it? The sentence quoted contains an unwarranted and baseless assumption which consists in the holding that a creditor with a preference has an interest in specific property from which he may be "ousted or dislodged." This assumption is wholly gratuitous not only under the law but under the court's own statement in the earlier part of the opinion.

Having in mind what has gone before I cannot understand this statement in the opinion: "But, while we recognize, from the very nature of the proceedings authorizing the levy of attachments, that it necessarily follows that the levy of the attachment creates a lien upon the specific property attached; it does not necessarily follow that the above-mentioned American doctrine as to the effect of the lien thus created has also been imported into this jurisdiction." To say that "it necessarily follows that the levy of the attachment, creates a lien upon the specific

property attached" and then immediately declare that such lien produces no effect as such, is, it seems to me, to make two statements essentially inconsistent, in real and effective sense. Why go through the formality of declaring that the Philippine Commission imported the attachment into the Philippine Islands? If it amounts to nothing as an attachment, if its lien is worthless as a lien, why bring it over here, and why declare that it exists in the Philippine Islands? If it is true, as the statement suggests, that the lien does not have any effect as a lien but only as a preference, then the attachment was not introduced into the Philippine Islands by the Philippine Commission; for, the vital element of the attachment is absent—was left in the United States. Without the lien the attachment is nothing. It is a mere shell robbed of every thing which gives it value, of the very element which gave it identity as an attachment. As I have shown in another part of this opinion, an attachment cannot be an attachment and a preference at the same time. So a lien cannot be a lien and not a lien at the same moment. Nor can a lien be a preference. If it is one it cannot be the other. They have no elements in common. The court itself says: "In this jurisdiction however, no method is prescribed whereby a creditor with a right to a statutory preference can convert such right into a lien." The opinion, in another part, says: "As we have said already, we do not believe that in enacting the new Code of Civil Procedure it was the intention of the legislator to emasculate and destroy the statutory preferences recognized and created in the Civil Code." I believe that there is an unwarranted assumption in this statement. The assumption here is that if the law of attachment is permitted to have effect in this country, it will "emasculate and destroy the statutory preferences." In my judgment, this is not true. The law of attachment operates only with regard to property which might and probably would be, lost to the other creditors, or could be reached by them only with great difficulty and expense. An attachment can be obtained only in one of the following cases: (1) when the defendant is about to depart from the Philippine Islands with intent to defraud his creditors; (2) where he has embezzled or misapplied funds and the action is founded thereon; (3) where the action is to recover personal property unjustly detained and the property has been concealed, removed or disposed of by defendant to prevent its being found; (4) when the defendant is guilty of fraud in contracting the debt sued on; and (5) when he has removed or disposed of his property or is about to do so with intent to defraud his creditors. Does permission to a creditor to obtain an attachment under such circumstances "emasculate and destroy the statutory preferences?" As is clear from the cases in which they may be issued, attachments are properly granted only in a very limited class of cases. The number which can be issued under ordinary conditions is so small compared with the cases in which it cannot as to be almost negligible. Under such circumstances does the attachment "emasculate and destroy the statutory preferences?" Moreover, the creditor who obtains an attachment pays a full legal consideration for the privilege. The statute requires it. In the first place, he must make such investigations as will authorize him to make affidavit to the facts required under sections 412, 424, and 426 of the Code of Civil Procedure. Second, he must employ counsel to prepare his affidavits and pleadings and to bring his action. Third, he must give the statutory undertaking and subject himself to all the liabilities that it creates. Fourth, he must cause the levy to be made and the property safely kept and assume responsibility therefor. These things constitute the consideration which the statute declares is sufficient to entitle him to an attachment. If one gets no more than what one pays for, is he "emasculating and destroying" anything? If he does the things which statute demands, should he be required to stand on the same footing as creditors who have done none of them? And could it have been the intention of the Philippine Commission to put him on the same footing under such circumstances? According to the opinion of the court, the Commission must have so intended; for, if the lien which he gets by his attachment is of no value as such, then the consideration he paid for it, his efforts, his affidavits, his money and his obligation on his undertaking, all are lost and he is poorer than when he began. The law has cajoled him, has deceived him, has cheated him. I must, therefore, maintain that the assumption involved in the sentence last quoted, namely, that the law of attachments "emasculates and destroys the statutory preferences," is a gratuitous one.

But let us suppose it does "emasculate and destroy the statutory preferences." What of it? If, as between the

attachment and the preference, one is to give way, which should it be? All other things being equal, the preference should give way as the attachment is the last expression of the legislative will on the subject. The court arrives at the conclusion that the attachment should give way by a process of construction and, interpretation based neither on the law of attachments nor on the law of preferences, nor on both of them construed together, but on the theory that, at the time the Act relating to attachments was passed, there existed in the Philippine Islands the system of preferences, and it is not to be presumed or inferred or deduced that the Philippine Commission intended to "emasculate and destroy" that system. This is a strange theory. If it were followed no established system could, be overturned by the legislature except by express words, when, as is well known, laws are continually repealed and, therefore, whole systems falling, by implication. If a later law is inconsistent with and repugnant to a prior law, the prior law ceases to exist on the passage of the later. Of course, if they can stand together that is another matter. But the assumption on which the judgment of the court is based is that they cannot stand together as the later law "emasculates and destroys" the prior. They must, therefore, be inconsistent and repugnant and the rule relating to repugnant statutes must apply. The court holds, however, that, when a later law is repugnant to a prior law, the later must fall; and that for the very reason that it is repugnant to the prior. Now, it seems to me that, if the law of attachments is repugnant to the law of preferences, the later must fall as the law of attachments is the last expression of the legislative will. This, of course, is but an application to this case of the universal rule,—or was. until the opinion in this case was written. The court reverses this rule and does it, as I have said, not on any principle of law heretofore known, but simply and solely for the reason that the long established system of preferences ought not to be disturbed and, therefore, it must be assumed that no one intended to disturb it. Until the opinion of the court was written I did not suppose it possible to hold two statutes so repugnant to each other that they could not stand together without a consideration of the provisions of both acts with a view of determining whether they were in fact repugnant; and for the first time in my career at the bar and on the bench I am met with the principle that, when two statutes are repugnant to each other, the one last enacted must give way. The court has not shown, or even attempted to show, that the law of attachments is repugnant to the law of preferences. What particular provision of the law of attachments is repugnant to the law of preferences? Where is the conflict between them? The answer is that there is not the slightest conflict between them. The attachment is no more in conflict with the preference than is the chattel mortgage, by which the creditor assures the payment of his debt; than the pledge, by which the creditor takes the property of the debtor and holds it as security; than the mortgage on real estate, by which also the payment of the debt is secured. The attachment law cannot be repugnant to a law regulating preferred credits, as they do not operate in the same field or touch the same subject matter. It is a settled principle of law, as it is common sense, that statutes which do not deal with the same subject matter, that is, which do not occupy the same field, cannot be repugnant. Certainly the law of attachments, which permits a creditor, after proper proceedings, to seize the property of his debtor and hold it for the payment of his future judgment, cannot in any possible way or sense be repugnant to a law which deals exclusively with the order in which creditors shall be paid out of a fund produced by the marshalling and sale of the debtor's assets,—a proceeding taken for the payment of all of the debts of the debtor, not any particular debt. A very little consideration would have revealed the fact that no repugnancy really existed; and, that there was no reason, therefore, for destroying either the attachment or the preference.

But if they are repugnant, as the court claims, which law should give way? As: already stated, the invariable rule is that the statute last enacted shall prevail. This rule is completely overthrown by the opinion of the court in this case. It holds that the law of attachments, that is, the later law, must be modified so as to fit it in with the law of preferences; and, in pursuance of that holding, deprives the attachment of its vital elements as such and, lifting it from the field of attachments, places it among the preferred credits. This is done not only in violation of the principle above mentioned, but also in violation of the essential nature of the attachment as well as of the preference, which, by language itself, prevents them from being joined together. To consummate the union it was

necessary to destroy the essential provisions of the attachment law. The court, instead of repealing that law by express declaration, did so indirectly, but none the less effectively, by holding that that Act created not an attachment, but a preference; not a lien on specific property, but a preference that has no relation to property; not a charge on specific property which prevents it being sold or otherwise dealt with except subject to the lien, but a preference under which the property may be sold or otherwise dealt with free from all liens or charges, and in spite of which, is purchaser will take title free and clear of the preference; not a lien which, under the express and mandatory provisions of the statute, requires that the specific property attached be dedicated first of all to the payment of the judgment obtained in the action in which the attachment was levied, but a preference which can be paid out of the proceeds of the sale of any property which the debtor may have. By this decision the law of attachments becomes not an independent law operating in a field of its own by virtue of its own provisions, but, with sundry alterations, amendments and changes made by the court, an adjunct of the system of preferences.

I find it necessary to refer to still another misconception of the court which is involved in a statement of the opinion which seems, impliedly at least, to hold that attachment and preference are synonymous terms. It lies in that portion of the opinion where the court says that the attachment is "a lien or a right to a preference in the nature of a lien." If an attachment is a lien it cannot be a preference; for, the fact that it is a lien creates an interest in the property itself, something which the preference does not do. It must be noted and kept in mind that the opinion is speaking of, and the decision is dealing exclusively with, a general preference, one created by a mere judgment, and not a preference with regard to specified property; and it is the general preference only that I am discussing. As I have said so often, a general preference creates no interest whatever in property, as we have already seen, but simply a right to share, at a certain time as compared with other creditors, in the distribution of the proceeds derived from the sale of all of the debtor's assets, which, in law, are subject to be marshalled for that purpose. Where, then, are the points of likeness between a lien and a preference? A lien is an interest in property. A preference is not. A lien relates to specific property. A preference has nothing to do with property of any kind. A lien may exist against the property of a solvent debtor. A preference cannot exist or operate except where the debtor is unable to pay his debts in full; for question of preference cannot arise except where the debtor is insolvent and cannot pay his debts in full. This is so of necessity; for, if debtor A is amply able to pay his three creditors B, C, and D in full, how can the necessity exist for determining which of the three creditors shall be paid first or whether they shall be paid out of the proceeds of the specific property? If property encumbered with a lien is sold it is sold subject to the lien; whereas, with respect to preferences, a creditor having an inferior credit who levies and sells does not sell subject to the superior preference. The property sold is sold absolutely free from the superior preference, the only right of the holder of the superior preference being to contest with the person making the sale the distribution of the proceeds; and if he does not exercise his preference by presenting and insisting on his right to be paid ahead of the inferior credit and, by reason of his failure to do so, the proceeds are turned over to the person holding the inferior credit under which the sale was made, the superior preference becomes valueless and the creditor holding it loses all rights thereunder. This latter statement brings out the last difference between a lien and a preference to which I desire to call attention.^[1] The differences support the statement already made that the declaration in the opinion of the court that an attachment creates in favor of the attaching creditor "a lien or a right to a preference in the nature of a lien," involves a misconception of the nature and effect of both the attachment and the preference. A general preference, such as is the one relied on in this case, has not a single feature or element of a lien. It is, consequently, confusing to the jurisprudence of this country to call an attachment "a right to a preference in the nature of a lien," a statement utterly meaningless. This is particularly so when, at the same time, the attachment is subordinated to something that has not a semblance of a lien.

I have already discussed at length the misconception involved in the claim that a mere preference can "affect" property in any way. Nothing needs to be added to that discussion except, perhaps, to say that, it being true, as

admitted in the opinion of the court itself, that a preference consists simply of a right to share in a certain order in the proceeds of the sale of the debtor's property in general, not of specific property, it cannot have any force or effect until the property of the debtor is converted into money. Those provisions of the Civil Code dealing with preference of the kind involved in this case, simply provide the order in which creditors shall be paid out of the proceeds of the sale of the debtor's property. The right created by those provisions does not extend to anything else. The right is not effective prior to that time; nor is it a charge which exists against property from the moment the credit is created. The opinion of the court itself says that the right is "merely a right to a preference in the distribution of the funds of the estate of the judgment or record debtor;" and that such right is ineffective unless the creditor has "by intervention" become "a proper party to the distribution proceedings and duly asserts his rights as a preferred creditor." This court has uniformly held to this doctrine. (See cases cited on nature of preferences.) Such being the case, the right cannot exist in any effective way prior to the time of its presentation in the "distribution proceedings." It certainly cannot be a charge upon property or "affect" it prior to that time; and at that time the property has ceased to exist as to the creditor as property as it has been sold. Indeed, the very nature of the right, as it is defined by the court in its opinion, is itself a refutation of the claim that it is a "right of preference affecting the property." It should be continually kept in mind that the preference relates solely and exclusively to the order in which debts shall be paid, and that that order is effective only after all the debtor's property liable for the payment of his debts has been marshalled and converted into money. It is then and then only that the law of preference begins to apply. Never was the debtor's property anything but free and clear of the preference; he could sell it and give a good title and the purchaser takes it absolutely free from the preference; he could mortgage or pledge it; or he could give it away. He could do any or all of those things without violating in the slightest way the law of preferences or being subject to any of its provisions. In the face of this, how can it be maintained that a preference can "rise superior" to an attachment? And how is it possible to take the position that an attachment is nothing but a preference? And what must be said of the claim that preference and attachment are synonymous terms? Certainly if the debtor can sell, and the purchaser take, his property free from the preference, and this the court itself not only admits but states affirmatively, and no one has ever had the temerity to question it in this jurisdiction, how can it be seriously contended that it "affected" that property to such an extent as to be superior to the lien of an attachment and to take precedence over it? If the attaching creditor stands, by virtue of his attachment, in the position of a purchaser, and, as we have seen, the Supreme Court of the United States has so held, and, if the purchaser of the debtor's property takes it free of the preference, as this court and states, what is the character and quality of the logic by virtue of which the court concludes that the attaching creditor's lien is inferior and subordinate to the preference? If a purchaser takes the property free of the preference, and the attaching creditor occupies the position of a purchaser, why does not he also take the property free from the preference? He does, of course; and to hold the contrary is to confuse beyond possibility of clarification the law of attachments and preferences. As I have already stated, it is impossible even to compare, much less unite, the attachment and the preference. By the union the attachment is necessarily destroyed as an attachment. The law of attachments has no more relation to the law of preferred credits, or payments, and that is what the law of preferences is, than it has to the law of negligence; and to make it a part of the law of preferred credits is no more sensible or logical than to incorporate it into the law of negligence. As stated so often, preferences were devised simply as a necessary part of the Spanish law of bankruptcy by which it has provided, just as the new bankruptcy law now in force^[1] provides, the order in which the debts of the bankrupt must be paid; and, while this court has held, wrongly I think, that even though the Spanish bankruptcy law is repealed, that part of the law which provides the order in which the credits were to be paid survives, nevertheless this much may be said in perfect harmony with the decisions of this court (and that is entirely sufficient for the purposes of this discussion), namely: At the present time the law relating to preferred credits can have no application except in cases where the debtor is insolvent, that is, unable to pay his debts in full; for, as we have said before, if he has property enough to

pay all his debts in full, there can exist no possible reason for determining which credit shall be paid first or out of what particular property it shall be paid. On the other hand, the lien of the attachment, that is, the rights of the attaching creditor in the property attached is still a subsisting question and he can insist that it be given full force and effect even though the debtor has property enough to pay his debts in full including the debt due to the attaching creditor.

The declaration of the court in its opinion that an attachment creates a lien on the property attached, taken in connection with the facts of this case, presents another phase of the matter that shows conclusively that the preference under consideration here can have no effect on property and can in no sense come into competition with an attachment lien. Before third persons can be prejudiced or injuriously affected by a claim that certain property is charged or incumbered in favor of a given person, they must have been given notice thereof. Under the Civil Code persons cannot secretly agree to a charge or incumber property and, by virtue of that agreement, create a charge or incumbrance which will prejudice innocent persons dealing with the property sought to be charged or incumbered. Third persons are entitled to notice before they can be deprived of their rights. To this end the Civil Code provides; with regard to the pledge of personal property, article 1865: "A pledge shall not be effective against a third person, when evidence of its date does not appear in a public instrument." With regard to the mortgage, which, under the Civil Code, refers exclusively to real estate, the code provides, article 1875, as follows: "Besides the requisites mentioned in article 1857, it is indispensable, in order that the mortgage may be validly constituted, that the instrument in which it is created be entered in the registry of property." If these requirements are not complied with third persons may deal with the property sought to be pledged or mortgaged secure from the effects of the pledge or mortgage. Certain charges upon property may exist without appearing in a public document and without registration: such as antichresis, those arising from repairs, preservation and transportation of property, rents, hotel charges and the like. But in these cases, save that of antichresis, the charge arises by operation of law not by agreement of the parties; and the charge exists by virtue of the possession of the property by the creditor and disappears with the loss of possession. In these cases, therefore, persons dealing with the property are put upon their inquiry by virtue of the fact that the property is found in the hands of persons other than those with whom he is dealing.

It may be stated, then, as the invariable rule of the Civil Code, that a third person who deals with property cannot be prejudiced by any charge or incumbrance thereon of which he has no notice. Now, the court has held in this case as follows: "We conclude that the issuance and levy of an attachment on specific property, real or personal, gives to the attaching creditor a lien * * * with relation to such property, subject to all statutory preferences by which the property is affected at the date of the levy * * *." As we have already pointed out, "all statutory preferences" include credits appearing in public documents, whether promissory notes executed before a notary public, and judgments. By this holding the court declares that a third person, an attaching creditor for example, may be prejudiced by something of which he had no notice at the time he obtained his attachment. A judgment is not a public document. It can not be recorded or protocolled. It is notice to no one and produces no effect whatever as to third persons under the law of the Philippine Islands. Nevertheless, the court holds that third persons, like attaching creditors, take their liens subject to a prior judgment, although that judgment may have been obtained in Ilocos Norte and the property attached is real estate located in Manila. The place where the judgment is obtained as well as the place where the property is located and the debtor resides is of no consequence whatever. Notice to the innocent party in the manner specified by law is entirely without significance to the court in the determination of his rights as against a judgment creditor.

Let us look at this same question from another point of view. According to the opinion of the court all public documents, of whatever character, take precedence over an attaching creditor provided that their dates are prior to that of the attachment. The attachment lien, says the court, is "subject to all statutory preferences by which the

property is affected at the date of the levy." As we have already pointed out, "statutory preferences" include all credits appearing in public documents whether promissory notes executed before a notary public or any other public instruments, even though it does not charge or incumber or even refer to the property of the debtor executing the instrument. Any agreement to pay money may become a public document. All that is necessary is that its execution be acknowledged before a notary public. As I have said a mere promissory note may be executed before a notary public and thereupon become a public document which, under the decision of the court referred to, will take precedence over an attachment lien acquired the day after. The court, in its decision in this case, has failed entirely to distinguish between these two classes of public documents, those which, while they recognize or create obligations, do not affect the property of the debtor in the slightest degree; and those which by their terms do affect his property. The failure to make this most obvious distinction has led the court to declare that both classes produce the same effect on the debtor's property and that, therefore, an attachment lien is subject to every public document, of whatever class, and every judgment in existence at the time the lien is created. That is to say, that a promissory note executed before a notary public on June 1, will charge and incumber the maker's property to such an extent that it will take precedence over an attachment lien procured on June 2; and that, when the attaching creditor sells the property attached, he must pay the promissory note before he can apply any of the proceeds to the payment of his judgment. If the note happens to be an amount sufficient to require that all the proceeds be dedicated to its payment, then, of course, the attaching creditor has had his trouble and expense for nothing. I admit that I cannot reach such a result by any species of reasoning. Nevertheless that is what the court holds; and it holds even more: it declares, as we have seen, that even a judgment, which, of course, is not a public document at all as nobody executed it, and which the court admits in the quotation made from the opinion, is not a lien or charge on the judgment debtor's property, takes precedence over an attachment lien acquired subsequent to the judgment. To hold that public documents of the class mentioned and judgments affect property, nay, to hold that they not only affect property but will do so to the extent of defeating third persons innocently acquiring an interest in the property itself, presents a condition which I am wholly unable to grasp. To hold that a promissory note executed before a notary public produces the same effect on property as an incumbrance or charge offers new possibilities in the realm of jurisprudence.

Apart from the nature of the public document itself, such as a promissory note acknowledged before a notary public, which on its face does not purport to affect the property of the maker in any possible way, and which, therefore, ought not to be held to affect his property to the remotest extent under any system of law, we have presented by that portion of the court's opinion above quoted the question of notice already considered in one aspect. If a third person dealing with property cannot be prejudiced by a previous charge or incumbrance on the property without having had legal notice thereof, how can it be said that a public document which on its face does not purport to be a charge or incumbrance, which does not describe, or mention, or even refer to property, but simply creates a personal obligation, gives notice to such third person that the property with which he is dealing is affected by a prior charge or incumbrance? Under the Civil Code a public document, even when duly registered or protocolled, gives notice to the world only of the facts which it contains, i. e., its contents. If it does speak of property, real or personal, and charge or incumber it, then no notice is given to the world on that subject. A public document cannot give notice of anything it does not contain; and, if its purpose was simply to recognize or create an unsecured debt, it does not give notice to anyone that the creditor claims or the debtor creates a charge or incumbrance on his property or any portion thereof. As a necessary consequence the debtor may dispose of his property as he pleases and all persons dealing with him are protected. It may be sold or mortgaged or pledged or attached and the seller, the mortgagee, the pledgee, and the attaching creditor will be absolutely unaffected by such a public document.

The court, however, holds that a public document which merely creates or recognizes and agrees to pay a debt, a

mere personal obligation, without attempting in the remotest way to secure that debt by charging or incumbering the debtor's property, produces the same effect on his property, so far as third persons are concerned, as if it expressly and in terms created a charge or incumbrance thereon as security for the payment of the obligations recognized or created. Thus, without notice, indeed, without even a writing of any kind in the remotest way referring to a charge or incumbrance, the rights of the innocent are subordinated or destroyed by virtue of a notice which was never given and a document that never existed.

Finally, let me repeat that the only question raised in this case is whether defendant's judgment is superior to plaintiff's attachment. The court admits and states affirmatively that the Supreme Court has held always and consistently that a judgment does not create a lien or affect in any way the judgment debtor's property. Nevertheless, in the very next breath, it proceeds to hold that it does affect the debtor's property. It attempts to explain this contradiction by putting the judgment under the enchanted influence of the "preference." A judgment which all admit produces of itself no effect, even of the remotest kind, on the judgment debtor's property is given by the court the magic name of "preference" and lo! its whole nature is changed. It is instantly invested with new virtues and powers, and does affect the judgment debtor's property. It does bind it and tie it and hold it fast, even to the extent of defeating the rights acquired by an innocent third person who has no knowledge, legal or otherwise, of its existence and who deals with the property alleged to be so affected in the best of good faith. So mighty is the power of this mystic and awesome word that a person in Jolo is charged with knowledge of a judgment obtained in Bontoc, a thousand miles away, the very instant it comes into existence. The court holds that a man in Jolo attaching property at precisely 12 o'clock m. will levy his attachment subject to a judgment obtained in Bontoc at 11.59 a. m. of the same day. Likewise, so wonderful is the power of the word, says the court, the execution of a public document in Bontoc is known instantly to an attaching creditor in Jolo; and he will be bound by its provisions the instant it is executed, although he was a thousand miles away and acted in perfect good faith in levying his attachment. When the word preference is spoken no stretch of land or sea is great enough to hide men from its sound. That word breathed in a whisper in the deepest valleys of the Mountain Province will be instantly heard, says the court, in the last islet of the Sulu Archipelago. But this is not all. This marvelous thing called a preference, according to the interpretation of the court, has still a stranger power: when it speaks the word "horse" all men must hear, not the word "horse," but the word "cow." When it speaks of an instrument which, by its express terms, creates exclusively a personal obligation, a naked agreement to pay money and not to charge or encumber property, all men must hear and take notice of not that instrument, but an instrument which expressly charges and incumbers property. Could there be greater magic? To make a thing what it is not, to contradict and overrule nature, to confound speech itself, what can be more wonderful?

That no court ought to do the things pointed out goes without saying. No necessity is so great as to require a court to destroy definitions long established in the law, to change the nature of legal entities which have existed for generations and are known to all men, to wipe out legal terminology established by long usage, or to frustrate the purposes of legislatures by interpretation and construction which so transcend their extreme limits as to amount to legislation. To hold that an attachment is not a lien on the specific property attached is to destroy the accepted definition of attachment, is to change its nature beyond all recognition, is to alter the terminology of the law, is to defeat the intention of the legislature which enacted the law of attachments and is to use interpretation and construction not to administer the law; but to destroy it altogether. To hold that the law of attachments in the Philippine Islands is simply a part of the Spanish system of concursos (bankruptcy), that relating to the distribution of the bankrupt's estate, now a misfit in several if not all of its aspects, is, in my judgment, judicial legislation. "The mortgagee, the factor, or the bottomry lender, is in no better condition than the * * * attachment creditor. An attempt to make a distinction between them, which would save the rights of one, and impair or destroy those of another, would be judicial legislation—*jus dare*, not *jus dicere*." (Peck vs. Jenness, above.)[1]

[1] One of things showing the wide separation between a lien and a preference is this: I recall no case where a preference has been made effective, or any creditor has sought to make it effective, through a direct action by that creditor against another creditor. The uniform and universal practice has been for all the creditors to intervene in a proceeding before the sheriff having for its object the distribution of the proceeds of the sale of all the property of the insolvent debtor. No action is brought in the real sense of the term as no one is made a defendant with the possible exception of the sheriff himself. The creditors simply file their claims with the sheriff with a statement of the grounds on which they base their preference. The sheriff refers the matter to the Court of First Instance which proceeds to hear the claims of the creditors and to decide the question of preference. A preferred creditor has no cause of action against any other creditor; there is no privity between the two. This situation has been recognized as existing in the Philippine Islands; and, as a result, the proceedings just referred to have always been taken. No independent action by one creditor against another has, so far as I recall, been brought in the Philippine Islands; and the strong probability is that no such action can be maintained.

This indicates with striking clearness the difference between the lien and the preference. In case of a lien the lienor has a right of action against any person who takes the property upon which he has his lien. The taking of the property creates a juridical relation between the lienor and the taker which will support the appropriate action. As we have said, no such right of action exists in case of a preference. There the proceeding is in every respect one in bankruptcy where the creditors file their claims and submit them with their alleged preferences to the determination of the proper authorities.

[1] There is a grave question whether the new bankruptcy law passed in 1909 does not repeal the provisions of the Civil Code relating to preference, they being a part of the old Spanish bankruptcy law. As we have already seen section 524 of the Code of Civil Procedure, by express terms, repealed all bankruptcy acts in force at that time and provided that no further proceedings relating to bankruptcy should be instituted in the Philippine Islands until a new bankruptcy law should come into effect. In 1909 the Philippine Legislature passed Act No. 1956 which is known as the Insolvency Law. Chapter 6, sections 48 to 50, inclusive, of that Act is devoted to the "classification and preference of creditors." Section 83 of that Act provides: "All Acts and parts of Acts inconsistent with the provisions of this Act are hereby repealed."

The only justification which this court had for continuing to apply the classification and preference of credits of the old bankruptcy law, as set out in the Civil Code, after the express repeal of "all existing laws and orders relating to bankruptcy" by the Code of Civil Procedure, was the fact that the repealing Act provided in place thereof no classification and preference of credits and certain decisions of the supreme court of Spain which had applied that same classification in cases of *tercerias* and other judicial proceedings in which various creditors intervened in proceedings for the distribution of the proceeds of the insolvent debtor's estate.

In the case of *Rubert & Guamis vs. Luengo & Martinez* (8 Phil., 554, 556), this court in referring to the procedure for invoking the preference under paragraph 1 of article 1922 of the Civil Code said:

"The question is, When and how is that preference to be secured? It is apparent that the provisions of Title XVII of book IV of the Civil Code, including articles 1911 to 1929, are intended to apply to cases of bankruptcy and to the settlement and liquidation of the estates of deceased persons, but these are not the only cases to which the provisions of this title are applicable. Following the decisions of the supreme court of Spain, this court has held that these articles are applicable to what was called in the Spanish law of civil procedure *terceria de mejor derecho*. In the case of *Olivares vs. Hoskyn & Co.* (2 Phil., 689) it is said (p. 691):

" 'Had the conflicting claims of these parties been presented in a proceeding in bankruptcy, there is no question, but that the above result would have been reached. It is said, however, that article 1924 is applicable

only to such cases and to the settlement of the estates of deceased persons, and can not be applied to a suit like this between two persons as to their rights of preference in the distribution of the proceeds of the sale of a specific piece of real estate. There is nothing in the Spanish law of civil procedure, under which this proceeding was commenced, to indicate that the intervention by a creditor could not be made, whether he had any lien on the property in question or not. A general creditor, who claimed that in the distribution of any of the property of the common debtor he had a better right than the plaintiff in the executive action, could intervene therein. And the supreme court of Spain, in allowing such intervention, has applied, for the purposes of determining the priorities, the provisions of article 1924 and the provisions of the Partidas, which were substantially the same. (Judgment of October 6, 1886, and judgment of January 4, 1894.)

" 'In the case of Martinez vs. Holliday, Wise & Co. (1 Phil., 194), we adopted the rule thus laid down and applied the provisions of article 1924 in a case which can not be distinguished from this one.

" 'The same principle was applied in the case of Peterson vs. Newberry et al. (6 Phil., 260).' "

In the case of Peterson vs. Newberry (6 Phil., 260, 262), the court said:

"It has been said that the provisions of this article were wholly repealed by the enactment of the Code of Civil Procedure, and it would appear that 'so far as this article is applicable to cases of bankruptcy and estates of deceased persons it has been rendered obsolete as to the former by section 524, which repeals bankruptcy laws, and repealed as to the latter by section 735, which sets forth the order of payment in the settlement of such estates,' but we are of opinion that its provisions are not limited to such cases and that it remains in full force and effect when by intervention or otherwise a judgment creditor is a proper party to distribution proceedings of the funds or estates of his judgment debtor and duly asserts his right as a preferred creditor. (Martinez vs. Holliday, Wise & Co., 1 Phil., 194; Olivares vs. Hoskyn & Co., 2 Phil., 689.)

"The learned judge was of opinion that 'there is no law in the Philippine Islands * * * fixing the lien of judgments or execution 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.

"We are not unaware of the difficulties which arise under the existing condition of the law, and we can not deny that the rule laid down herein may at times work hardship upon debtor and creditor alike because of the repeal of the bankruptcy provisions of the Spanish law, but until and unless a new bankruptcy law is enacted it is our duty to apply the provisions of existing law as we find them."

From these decisions and from the constant practice in a great number of other cases, some of which are enumerated in the case of Alzua and Arnalot vs. Johnson (21 Phil., 308, 356), it is clear that the preference provided in articles 1922 to 1926 of the Civil Code can only be invoked if at all in certain actions brought about by the insolvency of the common debtor resulting in the concurrence of at least two creditors such as in tercerias, interpleading of creditors. The reason why the preference of credits cannot be invoked in a direct action by one creditor against another is that neither is indebted to the other and there is no privity or contractual relation between them. (Matteson, etc. Co. vs. Conley, 144 Cal., 483; Herrlich vs. Kaufmann, 99 Cal., 271.)

The new bankruptcy law (Act No. 1956) provides its own classification and preference of credits and it is a grave

question whether it does not repeal articles 1922 to 1926 of the Civil Code as well as all other provisions of the old bankruptcy law contained in that Code.

It would seem that the new bankruptcy law removes the only justification which this court had for applying the old bankruptcy law in the cases cited. The same reasons which induced the court to apply the provisions of the Civil Code in *terceria* proceedings after they were expressly repealed by the Code of Civil Procedure would seem to require it to apply the new classification and preference of credits provided for in the new Insolvency Act. The old bankruptcy act is just as separate and distinct from the rest of the Civil Code as the new bankruptcy act from the rest of the laws of the Commission. If there is any reason for applying the provisions of the old bankruptcy act to proceedings other than bankruptcy cases that reason must apply with much greater force to the provisions of the new bankruptcy act. It would seem that the repealing clause of the new bankruptcy act repeals every provision of the old bankruptcy law. The provisions of the two acts would seem to be in direct conflict and therefore cannot coexist under any theory of construction.

[1] The following letter, written by a firm of lawyers of the city of Manila with a view to obtaining legislation on the subject covered by the decision of the court in this case, illustrates the practical difficulties met by attorneys in their daily practice brought about in my judgment, very largely by the decisions of the courts on the question of preference:

"Under the existing laws the concealment of assets, the preference of the claims of friendly persons and the general defrauding of creditors can be accomplished with ease. And even when a diligent creditor, after much labor and expense, has succeeded in unearthing assets of his debtor, he frequently sees the entire product of his efforts paid over to some other creditor, less enterprising than himself or more friendly to the creditor [debtor] and who has therefore remained quiescent, but who is nevertheless favored with a preference by the laws now in force.

"Such a state of the law is highly detrimental to the merchants of the Philippines in their dealings with resident customers, and the effect is even worse in foreign commerce. The local merchants would find it far easier to secure credit abroad, if the Philippine laws were modernized, and were designed to aid, instead of to hinder, the collections of accounts.

"There are various branches of the law on this general subject which are defective and out of accord with the spirit of the times. These branches include, among other matters:

"(1) Priorities, preferences and liens;

"(2) Grounds for attachment, and proceedings therein;

"(3) Proceedings in aid of execution, to force disclosure of assets by the debtor, and the application of such assets to the payment of debts.

"The glaring defects in the present law on the first of these branches, that is, priorities, preferences and liens, have been impressed on us anew by several of our recent cases. This has moved us to ask you to work with us to secure the legislations to improve these conditions. For this reason we are submitting to you, and to a number of others, including commercial associations, business men and attorneys, this discussion of the existing condition of the law, together with a draft of a bill, which, in our opinion, should be enacted by the legislature, and which would have beneficial results.

"If you to whom this matter is submitted, will write us your ideas on the subject, together with any changes which you may recommend in the proposed bill, we will be pleased to forward to the legislature for their consideration the entire discussion and correspondence.

"The law on the subject now in force is contained in articles 1921 to 1925 of the Spanish Civil Code, forming a chapter entitled "Classification of credits," and in articles 1926 to 1929, forming a chapter entitled "Priority of payment Of credits." These chapters were originally designed to apply to the distribution to creditors of the estates of deceased persons and of bankrupts, in which cases the entire assets of the debtor are in the possession of the court for distribution, and all of the creditors are before the court to present their claims. These chapters, even if they were based on the proper and just principles of distribution, in accordance with the modern spirit of enterprise (and they are decidedly not based on such principles) are ill-adapted, as a matter of court procedure, to practical application in the case of a levy of execution or attachment issued to enforce the payment of a single, individual claim in an ordinary lawsuit.

"But, as a matter of fact, these chapters have been superseded and are no longer in force in bankruptcy and probate cases, for which they were originally designed and are applied only in the case of an ordinary execution or attachment. For the purpose of enforcing them in such cases to which they are so ill-adapted, the statutes have not provided any form of proceeding. As the cases arise, the courts, yielding to the needs of the situation, have been and are still devising a sort of makeshift, patchwork procedure, in an endeavor to carry out the requirement of the said chapters.

"The entire chapters are objectionable and should be repealed. Certain articles and paragraphs, however, stand out as more harmful than the rest. These are as follows:

"ART. 1922. With regard to specified personal property of the debtor, the following are preferred:

" '1. Credits for the construction, repair, preservation, or for the amount of the sale of personal property which may be in the possession of the debtor to the extent of the value of the same.

" '7. Credits for rents and leases for one year with regard to the personal property of the lessee existing on the estate leased and on the fruits thereof.

" 'ART. 1923. With regard to determined real property and property rights of the debtor, the following are preferred:

" '4 Credits, of which a cautionary notice has been made in the registry of property by virtue of a judicial mandate, by reason of attachments, sequestrations, or execution of judgments, with regard to the property entered therein and only with regard to subsequent credits.

" 'ART. 1924. With regard to the other personal and real property of the debtor, the following credits are preferred:

" '3. Credits which without special privilege appear—

" '(a) In a public instrument.

" '(b) In a final judgment should they have been the object of litigation.

" 'These credits shall have preference among themselves according to the priority of dates of the instruments and of the judgments.

" 'To explain the effect of the article quoted, we will suppose that a wholesale merchant of Manila has an account against a local retailer in the sum of P5,090. The retailer has a good stock of goods on hand in a well-furnished store, and the entire lot and building appear in the registry to belong to the retailer, and no mortgage has been recorded on either the real or personal property. The creditor receives reliable information that the retailer has begun to dispose of his assets with intent to defraud his creditors. A few days delay will let

everything disappear, and no creditor can collect anything. The vigilant wholesale merchant employs an attorney, files suit on his claim, gives the necessary bond, and attaches all the property of the debtor. After a few weeks the creditor recovers judgment and causes the sale of the attached property of execution. But there are many persons who may now make their appearance and be ahead of him in the distribution of the money realized. The attaching creditor may never have heard of them or their claims until after the goods were attached, and there may have been no way of ascertaining the existence of such claims until the claimants gave notice to the sheriff after the levy of the attachment. The claims may have been fraudulently devised and stored away to rescue the debtor from just such an emergency. Or the claimants may have been merely lax and indifferent, waiting for someone else to 'dig up' the debtor's assets for his benefit. The claimant need not even to have begun a suit on his claim, unless his priority is based on the last paragraph quoted above, i. e., article 1924, par. 3 (a).

"According to the decisions of the Supreme Court, the above-quoted articles of the Civil Code require the payment of the following claims before the wholesale merchant can receive a centavo from the proceeds of his attachment and execution:

"(1) The unpaid vendor of the goods attached. (McMicking vs. Tremoya, 14 Phil., 252.) According to a recent decision of the Court of First Instance of Manila, the attaching creditor, i. e., the wholesale merchant in this case, will be liable to the vendor for the full contract price of the goods, and not merely for the amount received at the sheriff's sale.

"(2) An unrecorded deed transferring the real estate. (Faban vs. Smith, Bell & Co., 8 Phil., 496; Ariston vs. Cea, 13 Phil., 109.)

"(3) An unregistered chattel mortgage. (McMicking vs. Kimura, 12 Phil., 98.)

"(4) A judgment rendered in another case, prior to the judgment on the wholesale merchant's claim, but after the levy of the attachment. (McMicking vs. Kimura, 12 Phil., 98; Peterson vs. Newberry, 6 Phil., 260.)

"(5) Any judgment from Manila or from any province prior in date, although the judgment creditor may have taken no steps to enforce it, until the wholesale merchant discovered the debtor's assets, and even if the suit therein was filed after the attachment by our plaintiff. (McMicking vs. Kimura, 12 Phil., 98; Peterson vs. Newberry, 6 Phil., 260.)

"(6) Any claim evidenced by an instrument of any sort executed before a notary public before the levy of the attachment. It makes no difference that this instrument has not been recorded or registered or filed in any public office. (Martinez vs. Holliday, Wise & Co., 1 Phil., 194; Olivares vs. Hoskyn & Co., 2 Phil., 689; Gochuico vs. Ocampo, 7 Phil., 15; McMicking vs. Kimura, 12 Phil., 98; McMicking vs. Martinez and Go Juna, 15 Phil., 204.)

"(7) And if the debtor had been a tenant instead of the owner of the real estate occupied by him, the landlord would have had priority for his unpaid rent. (McMicking vs. Kimura, 12 Phil., 98.)

"The Supreme Court, itself, has criticised the existing state of the law (Peterson vs. Newberry, 6 Phil., 260), but was unable to do anything except enforce the law as enacted by the legislative authorities.

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