

**NICOLAS ARBOTANTE, PLAINTIFF AND APPELLEE, VS. TAN BUNJUA ET AL., DEFENDANTS. JUAN CLIMACO, APPELLANT.**

*G.R. No. 4120. September 01, 1911*

Ponente: PER CURIAM: Without prejudice to the filing of a more extended opinion hereafter, let judgment be entered affirming the judgment of the court below in so far as it affects the defendant and appellant Diego Cabrera, and reversing said judgment; in so far as it affects the defendants Juan Climaco and Tan-Bun-Jua, as to whom the complaint filed in the court below will be dismissed without day; but without special condemnation of costs against any of the parties in either first or second instance. Arellano, C. J., Torres, Mapa, and Carson, JJ. DISSENTING; JOHNSON, J.

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**PER CURIAM:**

Without prejudice to the filing of a more extended opinion hereafter, let judgment be entered affirming the judgment of the court below in so far as it affects the defendant and appellant Diego Cabrera, and reversing said judgment in so far as it affects the defendants Juan Climaco and Tan-Bun-Jua, as to whom the complaint filed in the court below will be dismissed without day; but without special condemnation of costs against any of the parties in either first or second instance.

Arellano, C. J., Torres, Mapa, and Carson, JJ.

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**DISSENTING**

JOHNSON, J., with whom concur Moreland and Elliott, JJ.,

An appeal from a judgment of the Honorable Charles H. Burritt, judge of the Court of First Instance of the Province of Cebu.

Judgment should be affirmed.

This was an action against the defendants for the return of sixty-five logs, or their value, estimated at P1,250 and damages estimated at P225 and costs.

On the 9th of May, 1905, the plaintiff presented the following complaint:

"The plaintiff sets forth:

"1. That, in the month of March, 1905, the plaintiff was the owner of sixty-five logs or pieces of timber, deposited on the beach of the city of Cebu.

"2. That on the said date the defendant, Juan Climaco, was the governor and sheriff, duly elected, and qualified, of the Province of Cebu and is still, at the present time, such governor and sheriff.

"3. That in the same month of March, 1906 [1905], the defendant, Tan Bun Jua, was the plaintiff in a civil case then pending in the municipal court of Cebu, in which case one Manuel Chiong Tiqui was the defendant, and in the same month judgment was rendered in favor of the said plaintiff against the said Manuel Chiong Tiqui for a sum of more than P400.

"4. In the same month of March, 1905, the defendant, Juan Climaco, in his capacity of governor and sheriff of the Province of Cebu, sold the plaintiff's aforementioned logs to the defendant, Diego Cabrera.

"5. That said sale was held without the formalities required by law and at public auction in the office of the clerk of this court; that said sale was illegal and was effected at the petition and instigation of the defendant, Tan Bun Jua, under the pretext of complying with the writ of execution issued by the justice of the peace of the municipality of Cebu, in the case aforementioned.

"6. That said sale was null and illegal and the plaintiff has been injured thereby in the sum of P250.

"7. That the value of the said logs, sold as aforestated, was P1,250.

"8. That the defendant, Diego Cabrera, took possession of the said logs on the same date of the sale and up to the present time still retains possession of them and unlawfully refuses to deliver them to the plaintiff, who is their true owner.

"9. That, by reason of the illegal acts of the defendants before named, the plaintiff has suffered injury and damage in the amount of P225.

"10. That, therefore, the plaintiff asks that judgment be rendered against the defendants for the return of the sixty-five logs aforementioned, or, in case it be impossible to return them that the defendants be sentenced to pay the sum of P1,250 as an indemnity, the sum of P225 as losses and damages, and the costs of the trial; and for any further remedy that justice may require."

On the 19th of May, 1905, the plaintiff amended the foregoing complaint, as follows:

"The plaintiff sets forth:

"1. That he ratifies his previous complaint in all its parts, except the allegation that the said timbers are now in the possession of the defendant Diego Cabrera, and further alleges:

"That, on May 1, 1905, the defendant Diego Cabrera illegally sold and transferred the logs described in the complaint, to the defendant, the Chinaman Quina, who now has them and unlawfully refuses to deliver them to the plaintiff.

"Therefore, the plaintiff prays that judgment be rendered against the defendants for the return of the 65 logs aforementioned, or, in case it be impossible to return them, that the defendant be sentenced to pay the sum of P1,250 as an indemnity, the sum of P225 as losses and damages, and the costs of the trial; and for any further remedy that justice may require."

On the 10th of November, 1905, the defendant, Juan Climaco, filed the following answer:

"Juan Climaco, one of the defendants in the above-entitled case, in answer to the complaint filed therein, denies each and all of the allegations contained therein, and, as his special defense, alleges:

"That, as governor of the Province of Cebu, he is the chief executive officer of the courts of the justices of the peace of the said province, in accordance with Act No. 136, and, as such officer, duly officiated in the case in which Tan Bunjua is the plaintiff and Chiong Tiqui the defendant, in compliance with a writ of execution

addressed to him by the justice of the peace of the municipality of Cebu, which writ was and is authentic and legal, as shown by the attached copy thereof, marked Exhibit A; and that the proceedings carried out by the defendant Juan Climaco, as governor of Cebu, and by his authorized deputies, are legal and are within the said defendant's powers as such chief executive officer.

"Therefore, he respectfully prays the court to absolve him from the complaint, with the costs against the plaintiff."

Exhibit A, to which reference is made in the answer of the defendant, is as follows:

"EXHIBIT A,

"WRIT OP EXECUTION,

"To the governor of the Province of Cebu and  
his authorized deputies, greetings:

"We order that out of the personal property of the Chinaman Chiong Tiqui, a resident of Calle Felipe II of this municipality of Cebu, you collect the sum of P498, as debt and damages, with interest thereon from the date of this execution until the date of payment, at the rate of 6 per cent per annum; and the sum of P5.60, for the costs of the trial assessed in this justice of the peace court of the municipality of Cebu, on March 14, 1905, in the case against the Chinaman Tiqui for the payment of a debt and damages, interest and costs; and that you deliver the said sums to the Chinaman Tan Bunjua, the plaintiff with the exception of your legitimate fees for the execution, and, finally, that you make return to this court within the term provided by law of the execution of this writ, recording on the back hereof the proceedings had.

"But if there be not a sufficient amount of personal property to satisfy this execution and your legitimate fees, then we order you to levy upon the lands of the said defendant in order to obtain the sums aforementioned in the manner prescribed by law, and that you also make report of the execution of this order, within the period prescribed by law.

"Given under my hand and seal, this 25th day of March, 1905.

(Signed) "TRODIO GALICANO,  
"Auxiliary Justice of the Peace.

#### **"OFFICE OF THE DEPUTY TO THE GOVERNOR.**

"Cebu, March 30, 1905.

"I certify that on this date I have taken the necessary steps for the delivery of a copy of the writ on which the present proceedings are based, to the Chinaman Chiong Tiqui, the judgment debtor, for the purpose of requiring of him the payment of the sum of P503.60, the amount concerned in the said writ, and as the said Chiong Tiqui was not present in this city of Cebu, a copy of the writ mentioned was given to the man in charge of his domicile who was also notified that the personal property of the said judgment debtor, consisting of sixty-five logs, which were deposited in Calle McClenald of this municipality of Cebu, was thereby attached, the said logs having been levied upon on that same date.

(Signed) "JUAN CLIMACO,  
"Governor of Cebu,

"By P. E. DEL ROSARIO,  
"Deputy to the Governor.

**"APRIL 1, 1905.**

"Pursuant to the provisions of the existing Code of Civil Procedure, I have on this date published a notice of the sale at public auction of the personal property of the Chinaman Chiong Tiqui, consisting of sixty-five pieces of timber of various kinds and fixed the day and place therefor as the 10th of the present month of April, between the hours of 9 a. m. and 5 p. m. before the undersigned and in his office. Three notices have also been posted, during the period required by law, in three different places of this municipality of Cebu.

(Signed) "JUAN CLIMACO,  
"Governor of Cebu,  
"By P. E. DEL ROSARIO,  
"Deputy to the Governor.

"CEBU, April 10, 1905.

"In conformity with the announcement duly made in the notices published in accordance with the law and subscribed by the undersigned, relative to the sale of 65 pieces of timber belonging to the Chinaman Chiong Tiqui and attached by virtue of the writ on which the present proceedings are based, the public sale of the said 65 pieces of timber is declared open from the hour of 9 o'clock sharp of the above-mentioned date.

(Signed) "JUAN CLIMACO,  
"Governor of Cebu,

"By P. E. DEL ROSARIO,  
"Deputy to the Governor.

"Cebu, date ut supra.

"The auction sale having been declared open before the undersigned, as determined in the above record, several bidders appeared, Diego Cabrera being the highest bidder, who, at five o'clock sharp in the afternoon, offered to buy the said logs for the sum of P415, and the said Diego Cabrera being the highest bidder, the undersigned adjudicated to him the sale of the said logs for the sum afore-mentioned and at the same time declared the public sale closed, at about 5 o'clock in the afternoon of the same day, the said purchaser signing this record with the undersigned.

(Signed) "JUAN CLIMACO,  
"Governor of Cebu,

"By P. E. DEL ROSARIO,  
"Deputy to the Governor.  
(Signed) "DIEGO CABRERA.

"Date ut supra.

"I hereby certify that) the sale of 65 pieces of timber owned by the Chinaman Chiong Tiqui having been adjudicated to Diego Cabrera, payment was demanded on this day of the latter of the sum of P415, which he bid for the said timbers; whereupon the said Diego Cabrera paid and delivered to me the said sum which I received from him to my entire satisfaction. In testimony whereof I sign these presents with the said Cabrera.

"JUAN CLIMACO,  
"Governor of Cebu.

"By P. E. DEL ROSARIO.  
(Signed) "DIEGO CABRERA.

"CEBU, April 10, 1905.

"I hereby certify that the undersigned officer, after receiving from the said Diego Cabrera the sum of P415, personally delivered to him on the beach of this city the aforementioned 65 pieces of timber purchased by the latter, and that, on this same date, after the delivery the said Diego Cabrera received the said logs, also to his satisfaction, and took charge of the same. In testimony whereof I sign these presents with the said Cabrera.

(Signed) "JUAN CLIMACO, Governor.

"By P. E. DEL ROSARIO, Deputy.

"CEBU, April 11, 1905.

"The plaintiff, Tan Bunjua, being present, the undersigned officer delivered to him the sum of P415, the product of the sale of the 65 pieces of timber sold at public auction, which sum was received by the said Tan Bunjua and to his satisfaction, he issuing to the undersigned his receipt therefor, which accompanies this record.

(Signed) "JUAN CLIMACO, Governor of Cebu,

"By P. E. DEL ROSARIO, Deputy.

"CEBU, April 11, 1905.

"I hereby certify that on this date I have issued a certificate of sale to Diego Cabrera, transferring to him the ownership and rights of the Chinaman Chiong Tiqui in the 65 pieces of timber which the said Cabrera purchased from the undersigned at public auction held on the 10th instant. "Cebu, P. I., April 11, 1905.

(Signed) "JUAN CLIMACO,

"Governor of Cebu,

"By P. E. del Rosario,

"Deputy to the Governor.

"I declare that I have received from Pantaleon E. del Rosario the sum of four hundred and fifteen pesos as payment of an account owing me by the Chinaman Chiong Tiqui, which is the subject of an execution issued on a judgment rendered by the justice of the peace of Cebu in a case filed against the said Chiong Tiqui. The said sum is the product realized from the attachment and sale at public auction of 65 pieces of timber.

"Cebu, April 11, 1905.

(Signed) "TAN BUNJUA.

"Amount: P415.

"I certify that this is a true and correct copy of the record of the proceedings carried out by me, the deputy, P. E. del Rosario, on the writ of execution issued by the justice of the peace of Cebu, the original of which was transmitted to the said officer.

"Cebu, November 11, 1905.

"JUAN CLIMACO,

"Governor of Cebu and Sheriff ex officio."

After hearing the evidence adduced during the trial of the cause, the lower court rendered a judgment in favor of

the plaintiff and against the defendants for the return of the sixty-five logs or the payment of the sum of P1,235, with interest at the rate of 6 per cent, from the 9th of May, 1905, and costs.

From this judgment of the lower court the defendants appealed and made the following assignments of error:

**"I.**

"The court erred in finding that the 65 pieces of timber which were attached and sold by the deceased Juan Climaco in his capacity of sheriff, belonged to the plaintiff, and not to Chiong Tiqui.

**"II.**

"The lower court also erred in finding that the sale made by the sheriff of the aforesaid 65 pieces of timber, was a private sale by the sheriff and not a judicial sale or one by judicial order.

**"III.**

"The lower court likewise erred in finding that the sale at public auction of the said pieces of timber was null and illegally made by the sheriff, Juan Climaco.

**"IV.**

"Finally, the lower court erred in finding the sheriff, Juan Climaco, liable for the sale made at public auction of the log's claimed, and in sentencing him to pay, jointly with his codefendants, to the plaintiff the sum stated in the judgment; and the said court also erred in denying the motion for a new hearing, presented by the said defendant sheriff."

During the trial of the cause in the court below the plaintiff presented three witnesses. The first was the plaintiff himself; the second was Pantaleon E. del Rosario. The said Rosario is an attorney at law, and deputy sheriff of the Province of Cebu. The third witness was Quintan Chiong.

The plaintiff Nicolas Arbotante testified as follows:

"Direct examination.

"Q. What is your name? - A. Nicolas Arbotante.

"Q. How old are you? - A. Thirty-six.

"Q. What is your occupation? - A. I am a merchant.

"Q. Are you the plaintiff in this case? - A. Yes, sir.

"Q. Do you know the Chinaman, Manuel Cheong Tique? - A. Yes, sir.

"Q. Did you have any business relations with him in the year 1904? - A. Yes, sir.

"Q. What were they? - A. We had a verbal agreement by which he was to sell me one hundred and sixty pieces of lumber of various classes.

"Q. Was the agreement consummated? - A. Yes, sir.

"Q. When? - A. In the first days of August, 1904.

"Q. Did you receive the pieces of lumber? - A. Yes, sir; they were delivered to me in the sitio of Lutag of the city of Cebu.

"Q. Did you pay him? - A. Yes, sir.

"Q. Did you receive a receipt from him? - A. Yes, sir,

"Q. Examine the document marked for identification plaintiff's Exhibit A and state what it is. - A. This is the receipt to which I refer, showing the payment by me to the Chinaman Manuel Cheong Tique of the sum of sixteen hundred pesos for one hundred and sixty timbers."

Plaintiff's Exhibit A was admitted without objection,

"Q. Where are those timbers now? - A. Now, they are in the same sitio. The timbers remained in the same place where they were delivered to me at Lutag from the month of August, 1904, up until sometime in the month of April or May, 1905, when upon passing through the sitio of Lutag where the timbers were deposited I found several laborers at work on these timbers. Upon inquiring of them what they were doing and why they were working on those timbers, they informed me that they were taking the timbers away by order of Juan Quina. I asked them 'why they were taking my timbers away;' and they answered, 'because the Chinaman Juan Quina had bought them from Diego Cabrera.' I then called up the Chinaman Manuel Cheong Tique for an explanation, and Cheong Tique was ignorant of the matter and could give me no explanation. I then employed an attorney.

"Q. Where are those timbers now? - A. Part of the timbers have been carried away by the Chinaman Juan Quina.

"Q. How many? - A. Sixty-five pieces.

"Q. Did you have any contract or agreement with the Chinaman Quina at any time? - A. No, sir.

"Q. How many pieces of timber did you have deposited there? - A. I had 160 timbers deposited there marked C. Q.

"Q. Who paid the forestry tax? - A. Your servant here, myself.

"Q. Have you any receipts for those taxes? - A. Yes, sir.

"Q. Produce them to the court.

(Witness produces a letter with two sheets attached, which is marked by the stenographer for identification "Plaintiff's Exhibit B"; which exhibit was admitted in evidence. See Record, page 8.)

"Q. When was this verbal agreement made with Cheong Tique for the purchase of these timbers which you have just testified to? - A. In the month of May of the year 1904, in the city of Cebu.

"Q. According to that contract, who was to pay the forestry tax ? - A. The agreement with the Chinaman Cheong Tique was: When the timbers should arrive from Dapitan, Mindanao, I was to pay him at the rate of ten pesos per piece, deducting therefrom the amount of the forestry tax which it was my obligation to pay according to the contract, depositing an amount to secure the payment of the forestry tax; which was carried into effect. The contract was made in the month of May and the Chinaman Cheong Tique went to Dapitan with the lorchá Prudencia for the purpose of bringing the timbers to Cebu, returning with them in the first days of August when the contract was carried into effect.

"Q. When was the verbal agreement made? - A. In the month of May, 1904.

"Q. Do you know where those sixty-five pieces of timber were taken by Juan Quina? - A. I do not know.

"Q. According to the regular value of lumber in Cebu what are these sixty-five pieces worth each ? - A. I could sell them for nineteen pesos each.

"Q. Is that the value of each? - A. In my opinion they are worth nineteen pesos.

"Cross-examination.

"Q. The document, the order for the collection of the forestry tax is dated July 9, 1904; state whether or not that is the true date. - A. It was on the 9th of July that I paid the forestry tax as I had agreed.

"Q. Is it not a fact than on the 5th of January you made the deposit for the security of the forestry tax? - A. No, sir.

"Q. You say you are a merchant. Have you an office in the city of Cebu? - A. Yes, sir; I am consignee for various interisland boats.

"Q. Where is your office in Cebu? - A. In the house of Diego Contino.

"Q. On what street? - A. Plaza Rizal, No. 7.

"Q. Is your office a long distance from the place where the timbers were deposited in the sitio of Lutag? - A. It is about three or four minutes' walk between the two places.

"Q. When you bought this lumber and placed it there, did you not place a man in charge of it to look after it? - A. I did not place any one in charge of it for the reason that from time to time I was able to look after it outside of the time I was employed in my office, in the afternoons and mornings.

"Q. Where were you on the 30th of March, 1905? - A. In Cebu.

"Q. Were you in your office at that time? - A. Yes, sir.

"Q. Where were you in the month of April, 1905? - A. Here in Cebu.

"Q. Is it not a fact that you knew that the provincial governor of Cebu in his capacity of sheriff had levied an attachment through his deputies upon the timbers in question? - A. I was given no notice of it.

"Q. Do you not know that it is a fact that you were advised and that the sheriff by his deputies had posted a notice in the very place where the lumber was situated, in the following words: Woods seized under attachment? - A. No, sir.

"Q. Were you also in Cebu on the 10th of April, 1905? - A. Yes, sir.

"Q. Is it not a fact that on this day you knew that the sheriff of Cebu was selling these sixty-five pieces of timber at public auction? - A. No, sir; it is not a fact.

"Q. When did you first learn that these timbers had been sold by the governor? - A. It was in the month of May when I passed by there, I found them sawing the timbers - May, 1905.

"Q. You have just stated that you were the consignee of several interisland boats; is it not a fact that the lorch Prudencia was consigned to you? - A. No, sir; the lorch Prudencia, no.

"Re-direct examination.

"Q. Who was the owner of the lot where these timbers were deposited? - A. On the land belonging to the house of Diego Contino.

"Q. Were there any other timbers deposited there besides these in question? - A. Yes, sir; there were a great many more timbers on the same lot.

"Re-cross examination.

"Q. You stated a little while ago that the lumber was marked C and Q. What did those marks signify? - A. These are the letters placed upon all goods of every de- scription which the Chinaman Chiong Tique transmits

to the city of Cebu and consigned to me. In effect the letters C. [and] Q. are a commercial mark which in trade means Chiong Tique.

"Q. Is it not a fact that, aside from the timbers which were placed upon the shore here at Cebu and marked with the letters C. Q., the other timbers belonging to you there did not have any such mark? - A. The timbers were piled up in two piles with a long way between them, and the timbers on either side of this way were so marked."

Pantaleon E. del Rosario was called by the plaintiff and testified as follows:

"Q. Please state your name. - A. Pantaleon E. del Rosario.

"Q. What is your occupation? - A. Attorney at law and deputy sheriff of the Province of Cebu.

"Q. Are you the deputy sheriff who sold the timber in question? - A. Yes, sir.

"Q. Where were these timbers deposited? - A. In the same place where they were attached.

"Q. Do you mean to say that they were in the same place described by the witness Arbotante? - A. They were situated in the same place as that described by the last witness; with the exception that there were other timbers there that were not marked C.

Q. and those that were seized by me under the writ of attachment bore an additional mark of 'Sheriff.' I placed the mark of 'Sheriff' upon them with Chinese red paint.

"Q. Where was the public auction held? - A. It was celebrated in the office of the deputy sheriff of the provincial governor in the office of the court in the absence of the property.

"Q. Did you bring the timbers to the government house? - A. No, sir; it was impossible to bring the timbers. They were very large timbers; so large that they could not be moved without the aid of machinery."

Quintin Cheong was called for the plaintiff and testified as follows:

"Q. What is your name? - A, Quintin Cheong.

"Q. Where do you live? - A. In Cebu.

"Q. How old are you? - A. Thirty-six.

"Q. What is your occupation? - A. I am a merchant.

"Q. What business were you engaged in in the year 1904? - A. I was at the head of a soap establishment; a soap factory.

"Q. Do you know Nicolas Arbotante, the plaintiff in this case? - A. Yes, sir; I know him.

"Q. Do you know the Chinaman, Manuel Cheong Tique? - A. Yes, sir; I know him.

"Q. Did you have any business relations with this Chinaman in the year 1904? - A. He was a partner in business with me.

"Q. In a soap factory? - A. Yes, sir.

"Q. In the year 1904, did you hear any conversation between the Chinaman Manuel Cheong Tique and the plaintiff, Nicolas Arbotante, about some timbers? - A. Yes, sir; I did.

"Q. When? - A. In the month of May; I do not remember the date.

"Q. What was said by them in that conversation at that time? - A. They talked about lumber.

"Q. State all that was said, to the best of your recollection. - A. I heard Nicolas Arbotante say that he wanted to buy lumber.

"Q. Do you know whether or not Nicolas Arbotante bought any lumber from the Chinaman Manuel Cheong Tique in the year 1904? - A. Yes, sir; I know that he did.

"Q. Where were the timbers deposited? - A. In the sitio of Lutag.

"Q. Do you know how much lumber; how many timbers? - A. There were one hundred and sixty pieces."

During the trial the plaintiff offered in evidence the record in case No. 305 of the Court of First Instance of Cebu, in which Manuel Cheong Tique was plaintiff and Tan Bunjua and Juan Climaco were defendants. Said record was admitted without objection.

From said record (No. 305) it appears that on the 15th of April, 1905, the plaintiff, Manuel Cheong Tique, who had been the defendant in the action upon which the execution in question was issued (the case of Tan Bunjua vs. Manuel Cheong Tique), commenced an action against Tan Bunjua and Juan Climaco for the purpose of having the judgment in the case of Tan Bunjua vs. Manuel Cheong Tique declared null and void, for the reason that he, Manuel Cheong Tique, had not been duly notified of the existence of said action and that said judgment was rendered against him without a hearing. The plaintiff, Manuel Cheong Tique also prayed that said sentence and execution be declared null and void. In this action (case No. 305) the defendant, Juan Climaco, made no appearance.

After hearing the evidence adduced during the trial, in cause No. 305 the lower court rendered a judgment decreeing that the sentence dictated by the justice of the peace, in the case of Tan Banjua vs. Manuel Cheong Tique was null and void and that the execution issued thereon, on the 25th of March, 1905, was also null and void; and the court issued an order restraining the sheriff, Juan Climaco, and his deputies, from executing the said execution.

It was stipulated by the plaintiff and the defendants that Exhibit A, attached to the answer of the defendant, Juan Climaco, correctly stated the facts relating to the execution and sale of the logs in question, as well as the return of the sheriff made in relation to the said sale.

From the evidence adduced during the trial of the cause the following facts were fully proven and are not disputed:

First. That the auxiliary justice of the peace of the municipality of Cebu, on the 14th of March, 1905, in an action then pending between. Tan Bunjua, plaintiff, vs. Manuel Cheong Tique, defendant, rendered a judgment in favor of the plaintiff for the sum of P498 with costs.

Second. That on the 25th of March, 1905, an execution was issued upon said judgment and was placed in the hands of the sheriff of said province, who, upon the 30th of March, levied upon the sixty-five logs which he found deposited in McClermand Street in the city of Cebu, which logs were sold at public auction in the office of the sheriff upon the 10th of April, 1905.

Third. That the sixty-five logs in question belonged to and were owned by Nicolas Arbotante.

Fourth, That the said Nicolas Arbotante who owned the said sixty-five logs, had no notice whatever of either the pendency of the action between Tan Bunjua and Manuel Cheong Tique, nor of the attachment or sale of the said sixty-five logs by the said sheriff, which sale took place in the office of the sheriff upon the 10th of April, 1905.

Fifth. That the judgment of the justice of the peace rendered in the cause of Tan Bunjua vs. Manuel Cheong Tique

was declared null and void by the judge of the Court of First Instance of the Province of Cebu in an action (No. 305) commenced for that purpose on the 15th of April, 1905, which action (No. 305) was entitled Manuel Cheong Tique vs. Tan Bunjua and Juan Climaco, sheriff. The basis of this action was the fact that the defendant, Manuel Cheong Tique, had not been given a hearing in the cause of Tan Bunjua vs. Manuel Cheong Tique. Said action (305) was based upon the provisions of section 113 of the Code of Procedure in Civil Actions. Said section 113 provides:

"Sec. 113. Relief from effect of judgments and orders. - Upon such terms as may be just the court may relieve a party or his legal representative from a judgment, order, or other proceedings taken against him through mistake, inadvertence, surprise, or excusable neglect: Provided, That application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken."

The judgment in question was rendered by the justice of the peace upon the 14th of March, 1905. The action (305) declaring null such judgment, was commenced on the 15th of April, 1905.

Sixth. In the action (305) the court not only declared that the judgment of the justice of the peace in the case of Tan Bunjua vs. Manuel Cheong Tique was null and void, but also declared that the execution issued thereon was null and void.

From the foregoing facts we have the following conclusions :

That the defendant herein, Juan Climaco, as sheriff of the Province of Cebu, by virtue of authority of a writ of execution which was declared to be null and void, issued upon a judgment of the justice of the peace, which has also been declared null and void, levied upon property of the plaintiff, Nicolas Arbotante, and sold the same without his (Arbotante's) having had any notice whatever of said execution and sale.

With reference to the first above assignment of error, the plaintiff proved beyond any peradventure of doubt that the said sixty-five logs belonged to him. The defendant presented no proof whatever even tending to show that the logs were not the property of the plaintiff.

Under the second assignment of error, the appellant attempts to show that by reason of the fact that he levied upon the logs in question and sold them under an execution issued by the justice of the peace, that he was acting in a judicial capacity. This contention can not be admitted, but even if it were admitted, even then it would not be authority for the sheriff to sell the property of a third person. The execution commanded the sheriff to attach sufficient personal property belonging to the defendant, Manuel Cheong Tique, to satisfy said judgment. The execution afforded the defendant (the sheriff) no authority whatever to attach the property of another person, and when he attached the property of a third person, he violated the provisions of his order (the execution). The execution only afforded him protection when he complied with its terms, to wit, to levy upon the property of the persons mentioned therein.

With reference to the third assignment of error, the defendant and appellant contends that his acts in levying upon and selling the logs in question were legal and valid. This contention certainly can not be maintained. The plaintiff herein, the owner of the logs in question, had had no hearing whatever with reference to the said sale. He had no notice of the execution and sale. He was deprived of his property without due process of law.

Under the fourth assignment of error, the defendant and appellant (the sheriff) contends that inasmuch as the execution was levied upon the logs in question, and the same were sold by him in good faith, he should be relieved from all responsibility; in other words, the effect of the contention of the defendant and appellant (the sheriff) is that under a writ of execution issued by the court he may levy upon the property of any person whatsoever, and sell the same, without incurring any responsibility, so long as he acts in good faith. The lack of

good faith is a fact difficult to prove. The execution was issued to the sheriff and he was directed to levy upon the property of Manuel Cheong Tique. He did not obey that order. Instead of levying upon the property of Manuel Cheong Tique, he levied upon and sold the property of Nicolas Arbotante. To sustain the good faith which he claims he exercised in said execution and sale he made no effort to show that he had made the slightest inquiry of the people living in and about the place where the logs were deposited, for the purpose of ascertaining who the real owner of the logs was. Certainly a sheriff in the execution of a writ of execution can claim no protection under said writ of execution, unless he can show that he obeyed its orders. In the present case he makes no pretense of having obeyed the writ of execution.

An execution is an order to the sheriff to attach and sell the property of the judgment debtor. If he sells the property of another he is not obeying the order of the court.

The officer has no authority to attach the property of any person except that of the defendant (judgment debtor). If he does so the writ affords him no justification, for the act is not in obedience to its mandate. (Rhodes vs. Patterson, 3 Cal, 469; Van Pelt vs. Littler, 14 Cal., 194; Sanderson vs. Baker, 3 Wils., 309; State vs. Moore, 19 Mo., 369; Harris vs. Hanson, 11 Maine, 241; People vs. Schuyler, 4 N. Y., 173; State vs. Talom, 69 N. C, 35.)

If the sheriff takes the property of a third person he is entitled to no indulgence. The sheriff having misapplied his process, whether by mistake or design, will make no difference. He stands in the position of every trespasser and is liable to an action in the instant the trespass is committed. The circumstance that the property was in the possession of the execution debtor at the date of the judgment, amounts to nothing except proof of fraud. (Boulware vs. Craddock, 30 Cal, 190; Vose vs. Stickney, 8 Minn., 51; Dodge vs. Chandler, 9 Minn., 87; Rankin vs. Ekel, 64 Cal., 446.)

The owner whose property has been taken under a writ of attachment, to which he was not a party, has his choice of remedies. He may sue in trespass or for the recovery of the property. (Yarborough vs. Harper, 32 Miss., 112; Gimble vs. Acklex, 12 Iowa, 27.)

In the case of Forsythe vs. Ellis (4 J. J. Marshall (Ky.), 298) the chief justice, speaking for the court, said:

"The reason why the sheriff is responsible to the owner is a very comprehensive one and applies to all persons who take the property of others without any authority. An execution against the goods of A gives no authority to the sheriff to take the goods of B. So long as the officer confines his acts to the authority of the process he is irresponsible, but all acts which are not justified by the writ are, of course, without authority of law. The inevitable consequence, therefore, of the principle that no man shall touch the property of another without the permission of the owner or the sanction of the law, is that no plea of exemption or station, however exalted or consecrated, can exonerate a trespasser. This principle is conservative of property. Without its integrity and universality, private rights would be insecure and the law would be unequal and tyrannical. The sovereign power of the State, with its 'eminent domain' can not take from the humblest citizen a particle of his property for public use, without allowing him a just compensation.

"If an execution against one man would excuse the sheriff for taking and selling the property of another, every citizen would be at his mercy and none could call his estate his own. As the execution gives the sheriff no authority, he has none, and therefore his sale neither devises nor confers any rights. The owner of the property, therefore, sold by the sheriff without authority, may recover from the sheriff its value in an action of trespass."

Mr. Harlow, in his work on the liability of sheriffs, at section 562, says:

"An officer is liable to the owner of personal property for the seizure and sale thereof under an execution against a third party, and he is not relieved from liability by professing to sell only the 'right, title and interest' of the defendant."

In the case of Boulware vs. Craddock (30 Cal., 190) the court said:

"If the sheriff, by virtue of an execution, seizes the property of a person other than the judgment debtor, whether by mistake or design, it is not necessary for the owner of the property thus seized to make a demand on the sheriff before commencing suit."

The defense is made for the defendant here (he does not make it for himself) that under section 451 of the Code of Procedure in Civil Actions, he is not liable, even though he levies upon and sells the property of a third person, unless such third person should give him notice in writing and lay claim to the property which is being sold. We can not agree that said section 451 is subject to any such interpretation. We do not believe that section 451 was intended to protect a sheriff from all responsibility whatever where he sells the property of a third person under a writ of execution, where such third person fails to give him notice that the property being sold belongs to him. If that is the correct interpretation of said section 451, then we contend that that provision of said section is absolutely void under the provisions of the Philippine Bill, which provides that persons shall not be deprived of their property without due process of law. It being admitted in the present case that the property belonged to Nicolas Arbotante and that it was sold without his knowledge or consent, or without the slightest notice that the same was being levied upon and sold, we hold, that to justify the sheriff in said sale and to relieve him from all responsibility whatever, would constitute one of the most flagrant cases of depriving a man of his property without due process of law which could possibly come to the attention of the court.

The defendant and appellant makes no claim that section 451 of the Code of Procedure in Civil Actions relieves him of all responsibility. The defense is made for him.

Section 451 is taken from section 689 of the California Code. So far as we have been able to discover the supreme court of California has not interpreted said section (689). In the case of Black vs. Clasby (97 Cal., 482) the supreme court of California referred to said section (689) but refused to discuss the effect of the same, for the reason that the action in that case arose prior to the time of the enactment of said provision. In that case, as they had done in many others, the supreme court of California said:

"When the sheriff, under a writ of attachment, or of execution against one person, seizes the goods of another, which at the time of the seizure are in the custody either of the owner, or of a person other than the defendant in the writ, he is a trespasser ab initio and no previous demand is necessary to authorize the recovery therefor."

In the case of Lammon vs. Feusier (111 U. S., 17) Mr. Justice Gray, speaking for the Supreme Court of the United States said:

"The marshall (the officer corresponding to the sheriff), in serving a writ of attachment on mesne process, which directs him to take the property of a particular person, acts officially. His official duty is to take the property of that person, and of that person only; and to take only such property of his as is subject to be attached, and not property exempt by law from attachment. A neglect to take the attachable property of that person, and a taking, upon the writ, of the property of another person or of property exempt from attachment, are equally breaches of his official duty. The taking of the attachable property of the person named in the writ is rightful; the taking of the property of another person is wrongful \* \* \*."

"A person other than the defendant named in the writ, whose property is wrongfully taken, may, indeed, sue the marshall, like any other wrongdoer, in an action of trespass, to recover damages for the wrongful taking; and neither the official character of the marshall, nor the writ of attachment, affords him any defense to such action. (Day vs. Gallup, 2 Wall., 97; Buck vs. Colbatch, 3 Wall., 334.)"

For all of the foregoing reasons, basing our judgment upon the facts and the law, we are of the opinion and so

hold that the judgment of the lower court should be affirmed with costs.

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