

J. MCMICKING, SHERIFF OF THE CITY OF MANILA, PLAINTIFF AND APPELLEE, VS. T. KIMURA ET AL., DEFENDANTS AND APPELLANTS.*G.R. No. 4821. November 20, 1908*

Ponente: WILLARD, J.

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The plaintiff, who is sheriff of the city of Manila, on the 19th day of September, 1907, had in his hands P7,362.75, the net proceeds of the sale of certain personal property under an execution issued in the case of Walker vs. Kimura and Fukuchi, No. 5544, in the Court of First Instance of the city of Manila. He brought this action on the last-named date against the defendants herein, alleging that each one of them, except the defendants in the original action, claimed to be entitled to the fund, and he asked that they be compelled to interplead and that their rights be determined, basing his action upon section 120 of the Code of Civil Procedure. The case is similar to the case of Peterson vs. Newberry (6 Phil. Rep., 260).

From the evidence it appears that the defendant, Paterno, obtained a judgment against the debtors on the 15th day of June, 1907, and that such judgment was based upon rent due him for the use of the building where the business was carried on, and in which the property sold on execution was found at the time of such sale.

Five defendants, who were represented by Don Rafael Del-Pan, obtained judgments against the debtors on the 19th day of June, 1907, in the court of a justice of the peace of the city of Manila. Two other defendants, also represented by Don Rafael Del-Pan, obtained judgments in the same court against the debtors on the 20th of June, 1907. The indebtedness in all of these seven cases was based upon promissory notes and was created prior to the 7th day of June, 1907.

The defendant Walker, on the 7th day of June, 1907, in the action No. 5544 above-mentioned, obtained a writ of attachment under which the property of the defendants was seized by the sheriff, and the property so seized was the property afterwards sold and from which the fund in question was realized. Walker, however, did not obtain any judgment against the debtors until the 28th day of June, 1907. His claim was based also upon promissory notes.

On the first of May, 1907, the debtor, Fukuchi, made and executed to the defendant Ito the following document:

"This agreement made and entered into this 1st day of May, 1907, by and between Shintaro Fukuchi of the city of Manila, P. I., party of the first part, and Tzunetzu Ito of Yokohama, Empire of Japan, by his representative in the Philippine Islands, Enichi Kato, of Manila, party of the second part.

"Witnesseth: That—

"Whereas the party of the first part is indebted to said party of the second part in the sum of 15,000 yen, Japanese currency, receipt of the same is hereby duly acknowledged, and

"Whereas said party of the first part desires to secure the payment of said debt unto the said party of the second part absolutely and without reservation, and

"Whereas the said party of the first part is the sole and exclusive owner of that certain business known as the Bazar Japonese, situated at No. 18 Plaza del P. Moraga, district of Binondo, city of Manila, P. I., consisting of stock, furniture, fixtures, book accounts, and good will:

"Now, therefore, for and in consideration of the sum of one dollar, United States currency, in hand paid unto the party of the first part by the party of the second part, and for and in consideration of the foregoing premises, the said party of the first part does by these presents grant, bargain, sell and convey unto the said party of the second part, his executors, administrators, and assigns the above described property known at the Bazar Japonese, situated at No. 18, Plaza del P. Moraga, district of Binondo, Manila, P. I., and including the stock, furniture, fixtures, book accounts, and good will.

"To have and to hold unto the said party of the second part, his executors, administrators and assigns, said property and chattels hereinabove mentioned and said party of the first part hereby delivers the same to the said Enichi Kato under the following conditions:

"First. Said party of the second part shall maintain and conduct said business as it heretofore has been conducted and maintained by the party of the first part.

"Second, That any time prior to the repayment to the said party of the second part, or his representative, of said 15,000 yen, Japanese currency, it should be deemed advisable to dispose of the said business by public or private sale, the said party of the second part agrees to do so and to reimburse whatever amount may be due him from the said party of the first part from the proceeds of said sale, and to return to the said party of the first part any surplus remaining over and above the said indebtedness.

"In witness whereof, we have hereunto set our hands and seals, the party of the second part by means of his representative. Enichi Kato, at Manila, P. I., this 1st day of May, 1907.

(Sgd.) "S. FUKUCHI.

(Sgd.) "TZUNETZU ITO,

"By E. KATO.

"UNITED STATES OF AMERICA, PHILIPPINE ISLANDS,

"City of Manila,, ss:

"Personally appeared before me, Thos. D. Aitken, notary public, in and for the city of Manila, Mr. Shintaro Fukuchi and Mr. Enichi Kato, personally known to me to be the persons who executed the foregoing instrument. They acknowledged the same to be their voluntary act and deed, the latter acting for and in behalf of Tzunetzu Ito. They exhibit respectively cedula Nos. B 165017 and A 1386806 issued on the 30th day of April, 1907, at Manila, P. I., and the 13th day of March, 1907, at Cavite, P. I.

"In witness whereof, I have hereunto set my hand and affixed my official seal at Manila, P. I., this 1st day of May, 1907.

"[L. S.] (Sgd.) THOS. D. AITKEN, Notary Public.

"(My commission expires December 31, 1908.)"

The action of Kato, the agent of the defendant Ito, in making this document was expressly ratified by Ito in a public document executed on the 21st day of May, 1907.

The court below held that the defendant Paterno was entitled to be first paid out of the fund, because his debt grew out of rent for the property where the goods were found at the time of the sale. It further held that the defendant Walker was next entitled to be paid because at the time he obtained the attachment, on the 7th of June, none of the other defendants had secured an attachment against the, common debtor. It then ordered that the justice court

judgments should be paid in accordance with the dates, and held that the defendant Ito was to be paid after all the others had been paid. From this judgment Ito and the defendants holding judgments of the justice of the peace have appealed.

Manresa in his Commentaries on the Civil Code (Vol. 12, page 696), says:

"In the two preceding articles (1922 and 1923) we have dealt with the claims having a special preference, that is, those which are preferred credits with regard to specific personal or real property, and we are now to examine those known as simple preferences, under which denomination there are included all those which, having a preferential character, are limited to personal or real property of the debtor which it not subject to a specific preference,"

The claim of Paterno fails in the first class, as a claim with special preference, being covered by article 1922, paragraph 7, of the Civil Code. The goods from which the fund in question proceeded being upon the property in question and still belonging to the debtors, Paterno had a special preference in the distribution of such fund, his claim being for the rent of the property. (Pena vs. Mitchell, 9 Phil. Rep., 587; Macke vs. Rubert,[1] No. 4532, decided October 22, 1908.)

In giving him such preference, the court below did not err. It did err, however, in holding that Walker was also a creditor with a special preference by reason of his attachment. The only provision of the code, upon which the court could base such a holding, is article 1923, paragraph 4, which is as follows:

"ART. 1923. With regard to specific real property and rights therein 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."

It is seen, however, that this article does not relate to personal property, but to real estate. Moreover, it has been held by this court that, even in the case of real estate, such an attachment gives the attaching creditor no preference over other claims which existed at the time of his attachment. In the case of Martinez vs. Holliday, Wise & Co. (1 Phil. Rep., 194) the court said, at page 197—

"From the time when the Mortgage Law of 1861 was in consideration up to the present time there has been only one opinion concerning the effects of a provisional record of this class. It has always been said that it did not change the character of the debt; that it did not convert into a right to the thing itself the claim of the creditor; that it did not give him any preference over existing claims which were not so provisionally recorded—"

and at page 200—

"According to the express terms of this article, the record affects only subsequent claims. It does not affect a prior one. The relation between the claim in favor of which the record is made and any other claim of a prior date is not changed in any way by the record. If the claim of the appellee was prior to that of the appellants without the record of this attachment, it was so after it. The express terms of the article, and the nature itself of a record of this class, as we have seen, permit no other conclusion."

This case has been repeatedly followed by this court, (Olivares vs. Hoskyn, 2 Phil. Rep., 689; Peterson m Newberry, 6 Phil. Rep., 260; Fabian vs. Smith, Bell & Co., 8 Phil. Rep., 496; Boncan vs. Smith, Bell & Co., 9 Phil. Rep., 109; Casimiro vs. Fernandez, 9 Phil. Rep., 562.)

The claim of Walker, therefore, is a claim with a simple preference and stands in the same class as the claim of Ito, and the claims of those creditors who secured judgments in the justice court. Article 1924, paragraph 3, of the Civil Code, provides as follows:

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

* * * * *

"3. Credits which without a 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."

The claims of these creditors, therefore, take rank according to their dates, and the claim of Ito, appearing in a public document, must be paid before the claims of Walker and the other judgment creditors, because the document in which Ito's claim appears bears the date of 3faj 1, 1907, while the judgments were not secured until the following month. (See the cases above cited and in addition thereto: Gochuico vs. Ocampo, 7 Phil. Rep., 15; Soler vs. Alzoua, 8 Phil. Rep., 539; and Strong vs. Van Buskirk, 10 Phil. Rep., 190.)

That the document evidencing the claim of Ito's hereinbefore quoted is a public document within the meaning of article 1924 above cited, has been held by this court. (Gochuico vs. Ocampo, 7 Phil. Rep., 15; Soler vs. Alzoua, 8 Phil. Rep., 539; Hijos de I. de la Rama vs. Robles, 8 Phil. Rep., 712.)

In regard to the debt of Ito, certain facts appear which the appellee, Walker, claims destroy his, Ito's, rights. In the Walker case, No. 5544, Enichi Kato filed a complaint in intervention, claiming that he was the owner of the property seized upon the attachment in that case. As proof of his ownership, he presented a document dated May 2, 1907, which was in part as follows:

"Know all men by these presents, that I, Shintaro Fukuchi, * * * in consideration of the sum of 15,000 yen, Japanese currency, and the further consideration of the assumption of Enichi Kato * * * of an indebtedness due by the said party of the first part to Tzunetzu Ito, do by these presents grant, bargain, sell and convey unto the said party of the second part * * * all of that certain business, etc."

In the decision in the Walker case, the court there said that the intervener, Kato, testified that the agreement between himself and Fukuchi was that all he received from the property over the 15,000 yen, must be returned to the debtors. The court dismissed the claim of intervention, saying:

"It appears clear from the evidence that, if there was any transfer by the defendants to the intervening claimant that it was done for the purpose of defeating the creditors of the defendants, and from the intervener's own statement, he is not the owner but another person is the owner, and that the only possession he has was, the taking possession for the benefit of the creditor of the defendants."

It is apparent that this case was adjudicated upon the document of the 2d of May, 1907, under which Kato claimed to be the owner of the property, and it can be no bar to the presentation by I to of the document of May 1, 1907, for the purpose, not of showing that he is the owner of the property or has any lien thereon, but for the sole purpose of showing that he is a creditor of the debtors and is entitled, as such creditor, to share in the distribution of the fund. In other words, the fact that the document of May 1 did not constitute a lien upon the property because it was not filed in accordance with the Law of Chattel Mortgages, can not destroy its effect as a recognition of the

indebtedness. In the case of Olivares vs. Hoskyn, (2 Phil. Rep., 689) this court said (p. 690) :

"The first, third, and fourth assignments of error are based upon the proposition that the document of March 31, 1900, in favor of the plaintiff, was not a mortgage, because it had never been recorded, and that it should never have been received in evidence, the appellant citing as infringed articles 23 and 389 of the Mortgage Law and article 1875 of the Civil Code.

"For the purposes of this appeal, we may assume that this document did not constitute a mortgage. It, however, properly construed, did evidence, we think, a debt in favor of the plaintiff and against Don Eduardo for 6,000 pesos. * * * In view of these and other facts, we think that his intention by this instrument was to acknowledge a personal liability for 6,000 pesos and to secure it by a mortgage on the land.

"Neither of the parties had any recorded title to or interest in the land in question. Their respective rights, therefore, are not determined by articles 1923 and 1927 of the Civil Code, but by articles 1924 and 1929 of the same code. The debt of the plaintiff was evidenced by a public document dated March 31, 1900. The debt of the defendants was evidenced by final judgment dated February 15, 1901. By the terms of article 1924, paragraph 3, the plaintiff is entitled to a preference over the defendants."

It is, however, claimed by the appellee, Walker, that the document of May 2, being an absolute transfer of the property, extinguished the debt of 15,000 yen recognized in the document of May 1. In answer to this, it is to be observed in the first place that, by the very terms of the document of May 2, the debt was not extinguished but was kept alive and its payment was assumed by Kato. If we go outside of the terms of the contract and resort to the parol evidence offered in the Walker case, it is apparent that the document was not a sale of the property, but rather constituted a security for the payment of the debt, it being found in the Walker case that any balance remaining after the 15,000 yen were paid should be returned to the debtors.

Our conclusions are that the defendant Paterno is to be paid first, and after him the defendant Ito. The claim of Paterno amounts to at least P550 and interest from the 31st day of May, 1907. The claim of Ito when reduced to Philippine currency, will probably amount to P15,000. These two claims will, therefore, entirely absorb the fund of P7,362.75, and it is not necessary to decide the other questions presented in the briefs of the parties relating to the question of the priority of the judgments of the justice of the peace over the Walker judgment.

The judgment of the court below is reversed, and the case remanded with directions to receive evidence for the purpose of determining the value in Philippine currency of 15,000 yen, and then to enter judgment, without costs, ordering that, from the fund in the hands of the sheriff, he first pay in full the amount due upon the judgment of the defendant Paterno, and from what is left, so far as it will go, the amount due to the defendant Ito. No costs will be allowed to any one of the parties in this court So ordered.

Arellano, C. J., Mapa and Johnson, JJ., concur.

Torres, J., did not sit in this case.

CONCURRING

CARSON, J.,

I reluctantly concur, basing my concurrence on the ground that this court has heretofore held in the case of Oochuico vs. Ocampo (7 Phil. Rep., 15), that a document authenticated by a notary public is a public document in the sense in which that term is used in paragraph 3 of article 1924 of the Civil Code.

I do not doubt that the solemnities, more especially the protocolization, incident to the execution of a notarial

instrument in accordance with the provisions of the old notarial law, raised such an instrument to the dignity of a public document, as contemplated by the Spanish legislator when a preference was given to debts evidenced by a public document. (Par. 3, art. 1924, Civil Code.)

But were the question submitted to the court for the first time in this case, I would be inclined to hold that the Philippine Commission has made such sweeping changes in the notarial law, that notarial instruments as now executed are not public documents as contemplated in article 1924 of the Civil Code, which gives debts evidenced by public documents a preference over solemn and final judgments, and provides that where there are a number of debts evidenced by public documents, they are to be paid in the order of the date of their execution.

Practically all the solemnities prescribed by the former law for the execution of notarial instruments, including the entry of the instrument in a public record known as the notary's protocol, have been abolished; and we have substituted for these solemnities a mere unrecorded certificate by the notary that the parties to the instrument have acknowledged its execution before him. Such an instrument is in no proper sense a public document, for there is no public record of its execution or of its contents, which may be utterly unknown to any one except the party executing it; even to the notary himself, whose authentication relates only to the fact that the parties have acknowledged its execution before him, there being no obligation upon him to read the document or to acquaint himself with its contents.

I feel constrained, however, in view of the fact that rights of property may and probably have vested under the decision above cited, to concur in the decision of the majority based on the ruling in that case, in accordance with the well settled doctrine of stare decisis. But I have deemed it proper to write this separate opinion for the purpose of directing the attention of the lawmaker to the urgent need for appropriate legislation for the protection of business and private credit in these Islands, which to my mind is threatened with utter demoralization as a result of the suspension of the bankruptcy provisions of the Civil Code by the Philippine Commission "until a new bankruptcy law shall come into force," and the various decisions of this court (in which the writer has concurred) holding that the code provisions as to preferences are still in force, (Peterson vs. Newberry, 6 Phil. Rep., 260; Peña vs. Mitchell, 9 Phil. Rep., 587; Macke vs. Rubert,[1]1 No. 4532, decided October 22, 1908; Martinez vs. Holliday, Wise & Co., 1 Phil. Rep., 194.)

TRACEY, J., dissenting:

I dissent as to the preference of the claim of Ito.

[1] 11 Phil. Rep., 480.

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