

HERBERT S. WALKER AND W.J. ROHDE, PLAINTIFFS AND APPELLEES, VS. JOSE MCMICKING, DEFENDANT AND APPELLANT.

G.R. No. 5534. December 23, 1909

Ponente: JOHNSON, J.

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JOHNSON, J.:

On the 5th day of February, 1909, the plaintiff commenced an action in the Court of First Instance of the city of Manila to recover the possession of certain personal property mentioned in paragraph 1 of the complaint, or in default thereof the sum of P1,500, its value, and costs. The defendant filed a general denial.

After hearing the evidence adduced during the trial of the cause, the lower court rendered a judgment adjudging to Herbert S. Walker, the right to recover the articles mentioned in paragraph 1 of the complaint, of the defendant, or in default, the sum of P539, with interest at the rate of 5 per cent per annum, from February 6, 1909.

From this judgment the defendant appealed and made the following assignments of error:

- "1. The court erred in holding that the attachment of December 17, 1908, was null as to this defendant.
- "2. The court erred in holding that the sale of June 16, 1908, was rescinded in a way affecting this defendant.
- "3. The court erred in holding that the rescission does not involve a precedent condition to return the amounts paid on account of the purchase price.
- "4. The court erred in making an excessive valuation of the goods in question."

Under the first above assignment of error, the appellant contends that the lower court committed an error in holding that the attachment of the 17th of December, 1908, was null and void. The appellant relies upon Exhibit 1 (the writ of attachment) for the purpose of showing that said attachment was valid. Exhibit 1 was not made a part of the record in this court. We can not, therefore, examine it for the purpose of ascertaining just what its contents were. The lower court, in discussing the validity of said attachment and its effect upon the present action, said:

"The defendant is not sued in any official capacity, nor does he, in answer, or elsewhere, claim any such status. In fact his answer is only a general denial. He offers in evidence, however, a writ of attachment (Exhibit 1) issued by one of the judges of this court on December 16, 1908, on the back of which appears an indorsement to the effect that the sheriff of Manila delivered a copy of the writ and affidavit upon which the same was founded, to Arenas & Co. and that said sheriff attached certain articles therein mentioned, some of which appear to be similar to those in controversy, though the identity does not seem to be clearly established. The indorsement further recites that 'the goods are found deposited * * * in the possession of the same defendants according to a stipulation signed by both parties which is attached to this writ. The attached stipulation recites that all the goods attached 'shall remain in the possession of the same defendants, relieving the sheriff of all responsibility as regards the care and custody thereof.' Plaintiff Rohde further testifies (p. 13) that he never heard of the attachment until about the 29th of January, that he continued in possession from the time Arenas surrendered to him and that the latter was permitted to enter only for the purpose of preparing the articles for sale.

"Section 428 of the Code of Civil Procedure requires: 'The order of attachment shall be served by the officer of

the court by attaching, and safely keeping all the movable property of the defendant.'

"It will be seen from the recitals above quoted that the sheriff never claims to have taken into his 'keeping' the articles in controversy, but, on the contrary, left them with the attachment defendants, expressly relieving himself of all responsibility. This is clearly not a compliance with the statute and did not effect a valid attachment. A mere verbal declaration of seizure or service of writ is insufficient. (*Hollister vs. Goodale*, 21 Am. Dec, 674; *Jones vs. Howard*, 59 Am. St. Rep., 231; *Miles vs. Brown*, 38 N. Y. Supr. Ct., 400.) There must be actual assumption of control (4 Cyc, 484, 485.) This is not saying that a defendant may not be custodian; but the possession and responsibility must be the sheriff's and not the defendant's. If as stated in defendant's brief, such an arrangement is an everyday occurrence in attachment levies, here the vice of it can not too soon be declared."

The facts presented by a preponderance of the evidence seem to be as follows:

The plaintiff, Walker, was the owner of a Filipino carriage factory. The building in which the factory was operated and its contents were, on the 30th of June, 1908, sold to a partnership known as "Arenas & Co.," by plaintiff, Walker, whose ownership, at the time of the sale, was not disputed by any of the parties to this action. The contract was evidenced by a writing (Exhibit A), from which it appears that the said company was to pay for the said factory and its contents the sum of P3,200, P600 of which was paid at the time of the sale (June 30, 1908) and the balance was to be paid in three installments, due, respectively, P600 on the 15th of July, 1908, P1,000 due on the 15th of September, 1908, and P1,000 due on the 31st of December, 1908. The said company paid the installment due on the 15th of July, 1908, but failed to pay said installments due in September and December. Paragraph 4 of said contract (Exhibit A) contains the following provision:

"That, should the said firm of Arenas & Co. not pay me the amounts agreed to on the dates stated in the previous paragraph or within the thirty days following any of the said terms, the present sale shall be rescinded, and I, Herbert S. Walker, shall be entitled to take possession of the building as well as of the business and all the goods constituting the same."

The said company having failed to pay the second and third installments due respectively in September and December, as above indicated, the plaintiff Walker, early in the month of January, 1909, by virtue of the said provision of the contract, rescinded said sale and took possession of said factory with its contents. The factory was located upon land belonging to the plaintiff Rohde. The said company had failed for some months to pay the rent for the land. The plaintiff Rohde claimed that by virtue of the provisions of paragraph 7 of article 1922 of the Civil Code that he had a preferred claim against the said factory and its contents for the payment of the rent. The plaintiff Rohde, acting for himself and for the plaintiff Walker, took possession of said factory and its contents, on or about the first of January, 1909. Mr. Rohde testified that at the time he took possession of said factory, representing himself and the said Walker, there was no one in possession of said property except the said Arenas & Co., and that Arenas & Co. turned said property over to him without any objection whatever, in fact, that the delivery was made by mutual consent and agreement.

It appears, however, that on or about the 16th of December, 1908, the defendant, acting as sheriff of the city of Manila, levied an attachment upon the said factory and its contents, by virtue of a judgment theretofore rendered against the said Arenas & Co. The record does not disclose fully just what was done in effecting said attachment. It appears, however, by an indorsement upon said alleged writ of attachment, or perhaps by a stipulation between the parties (to the attachment), that the goods attached "shall remain in the possession of the same defendants, relieving the sheriff of all responsibility as regards the care and custody thereof."

The plaintiff Rohde testified that he had never heard of said attachment until about the 29th of January, 1909; that he continued in possession from the time (about January 1) that Arenas & Co. surrendered possession to him, and

that Arenas & Co. was only permitted to enter the premises thereafter for the purpose of preparing the contents of said factory for sale.

The evident theory of the defendant and appellant is that the attachment had the effect of defeating the right of the plaintiffs in said factory and its contents. It appears in the record, that in some way the defendant obtained possession of the articles mentioned in paragraph 1 of the complaint, and that some time early in the month of February, 1909, they were sold for the sum of P191, and a few cents. It is not suggested in the record that the defendant, McMicking, is sued as sheriff. The defendant does not pretend that what he did was done as sheriff. The plaintiff does not attempt to recover of the defendant as sheriff. The pretension of the plaintiff is that the defendant, Jose McMicking, took possession of certain personal property, and retains the possession of the same, which belongs to them. Even admitting that the defendant did, by virtue of an attachment, as sheriff, pretend to take possession of the property in question, the plaintiffs contend that the attachment was void for the reason that the defendant, as sheriff, did not comply with the law in levying the said attachment.

The lower court, basing his conclusions upon the provisions of section 428 of the Code of Procedure in Civil Actions, held that the attachment was null for the reason that the defendant did not comply with said section. Section 428 provides that-

"The order of attachment shall be served by the officer of the court by attaching and safely keeping all the movable property of the defendant in the Philippine Islands, or so much thereof as may be sufficient to satisfy the plaintiff's demands, unless the defendant gives security by obligation to the plaintiff, with sufficient surety, to be approved by the judge who granted the order of attachment, in an amount sufficient to satisfy such demands besides costs, * * *. The property so attached shall be held to await final judgment in execution, unless released as provided in this section or section four hundred and forty."

It will be noted, even admitting that the defendant is here sued as sheriff, and that his responsibility in this action is as sheriff, that he did not comply with said section 428, in making said attachment. He did not attach and safely keep the movable property attached. A verbal declaration of seizure or service of a writ of attachment is not sufficient. There must be an actual taking of possession and placing the attached property under the control of the officer or someone representing him. (Hollister vs. Goodale, 8 Conn., 332, 21 Am. Dec, 674; Jones vs. Howard, 99 Ga., 451, 59 Am. St. Rep., 231.)

We believe that under said section 428 to constitute a valid levy of an attachment, the officer levying it must take actual possession of the property attached as far as under the circumstances is practicable. He must put himself in position to, and must assert and, in fact, enforce a dominion over the property adverse to and exclusive of the attachment debtor, and such property must be in his substantial presence and possession. (Corniff vs. Cook, 95 Ga., 61, 51 Am. St. Rep., 55, 61.) Of course, this does not mean that the attaching officer may not, under an arrangement satisfactory to himself, put anyone in possession of the property for the purpose of guarding it, but he can not in this way relieve himself from liability to the parties interested in said attachment.

We are of the opinion, and so hold, that the attachment was not properly made in accordance with the provisions of the Code of Procedure in Civil Actions. There is no pretension, however, in the record, on the part of the defendant, that he attached said property and held the same by virtue of such attachment. Even though this defense had been made by the defendant, which is only made by his attorney, it would be an admission of the principal facts alleged by the plaintiffs in their complaint-to wit, that he had taken possession of personal property belonging to them. The defense made by the defendant is new matter, to which no reference whatever was made in the pleadings, and it is, therefore, upon the whole, inadmissible. Facts not alleged in the pleadings but offered as evidence, which admit the facts alleged, but tend to confess and avoid the facts alleged, are not admissible in evidence. (Bliss on Code Pleadings, 3d ed., 427, and cases cited.) For example: A sues B on a promissory note,

setting up the necessary facts in his petition. B answered by a general denial. B's real defense is prescription. B will not be permitted to prove 'prescription for the reasons that (a) he denied the existence of the debt, and (b) by his evidence tending to show that the said debt is prescribed, he thereby admits the existence of the debt, which is a confession of his liability. In other words, the defense of prescription is a confession and an avoidance of the obligation.

Under the second assignment of error the appellant contends that the original sale of said factory and its contents had not been rescinded by the plaintiffs herein in a manner which in any way affected the defendant. The fourth clause of the contract of sale (Exhibit A) quoted above, gave the vendor of said factory and contents the right to rescind the sale for a failure to pay any of the subsequent installments. The plaintiffs testified during the trial that the second installment had not been paid, in accordance with the terms of the contract and that he, therefore, rescinded the contract of sale, to which rescission, the said company (the purchaser) acceded and delivered to the plaintiff Walker the said carriage factory and its contents. No allegation is made by the defendant that either the contract or the rescission of the contract was corruptly made, or for the purpose of defrauding any of the creditors. Exhibit A was the contract between the said company and the plaintiff Walker. It constituted that law covering the rights of the respective parties to it. (Arts. 1254 and 1255, Civil Code.) The plaintiff Walker did all that was necessary for him to do to rescind said contract.

Under the third assignment of error, the appellant insists that the contract could not be rescinded by Walker without returning to Arenas & Co. the amount of money which Arenas & Co. had paid on said contract, and cites several provisions of the Civil Code in support of his contention, especially article 1295. Arenas & Co. are not parties to this action. Arenas & Co. have made no claim for the return of the money which they paid on said contract. If they have a right to a return of the money which they paid on said contract upon a rescission by Walker, a question which we do not now decide, they are the only ones which can insist upon it. No such claim is here made. It is not a right which the defendant in this action can insist upon. This question is not involved in the present action for the reason that Arenas & Co. make no such claim. They are not parties to this action.

Under the fourth assignment of error, the defendant insists or contends that the value allowed by the lower court for the property in question was excessive. Upon an examination of the evidence brought to this court, relating to the value of the property in question, we are of the opinion, and so hold, that the lower court committed no error in fixing the value of said property at the sum of P539.00. The price obtained for property under a forced sale is not a fair criterion for the purpose of ascertaining the true value of such property.

We have discussed at length the assignments of error made by the appellant, but in our opinion the whole case may be stated briefly as follows:

First. The defendant attached certain property under a writ of execution issued by one of the courts of the city of Manila, which attachment was levied upon the property in question. This attachment, however, was rendered invalid and of no effect for the reason that the defendant did not maintain his control over the same, either personally or by his representatives. The attachment became invalid the moment the sheriff lost either his actual or constructive-control over the property.

Second. The plaintiffs herein, innocently and in good faith and under a right, acquired possession of the property in question.

Third. That subsequent to the acquisition of the possession by the plaintiffs, the defendant, in some way which does not appear of record, acquired possession of the property in question, and admits that he subsequently sold it.

Fourth. The plaintiffs allege that the defendant is in possession of property belonging to them, and prays that

the same may be returned or its value. The defendant denies (general denial) that he has the possession of the property. The evidence clearly shows that the defendant did take possession of property which was rightfully in possession of the plaintiffs. He is therefore liable, either to return said property or its value.

For all of the foregoing reasons, we are of the opinion and so hold that the judgment of the lower court should be affirmed, with costs.

So ordered.

Arellano, C. J., Torres, Mapa, Carson, Moreland, and Elliott, JJ., concur.

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