

TEC BI & CO., PLAINTIFF AND APPELLEE, VS. THE CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA, DEFENDANT AND APPELLANT.

G. R. No. 9802. March 31, 1917

Ponente: CARSON, J.

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CARSON, J.:

The motion for a rehearing in this case must be denied.

In so far as the brief of counsel in support of this motion consists of a renewal of contentions advanced with much vehemence at the original hearing on appeal, we need only say that we adhere to the views already expressed in the opinion; and that we see no reason to change or modify our former rulings, which were adopted after due deliberation, and mature consideration of the arguments and citations of authority by counsel, and of the law applicable to the facts disclosed by the record.

As to the contentions of counsel based, in the language of his brief, on "certain obvious and insuperable objections to plaintiff's recovery which have been heretofore overlooked, due to what has developed to have been overconfidence in the points raised" in his printed brief, it might be sufficient to say that he is not entitled to demand a rehearing as of right, in order that he may be given an opportunity to present new arguments and to raise new contentions, which he failed or neglected to advance at the original hearing, notwithstanding the fact that he was given every opportunity for that purpose either in the course of his oral argument in open court, or in his printed brief filed with the record on appeal.

We have, nevertheless, given each of these contentions careful consideration, and it may be well to set forth very summarily the grounds upon which we rest our opinion that none of them furnishes a sufficient reason for setting aside the decision entered of record after the original hearing.

1. The contention that plaintiff should not have been permitted to maintain an original and independent action against the garnishee, may be disposed of very summarily by a reference to the case of *Roberts & Co. vs. Landecker* (9 Cal., 262), followed in *Carter vs. Los Angeles National Bank* (116 Cal., 370), which are based on statutory provisions substantially identical with those of our own Code.

The doctrine is thus announced in the syllabus of *Roberts & Co. vs. Landecker* (9 Cal., 262).

"1. ATTACHMENT PROCEEDINGS; STATUTORY AND SPECIAL.— It is well settled that the proceedings by attachment are statutory and special, and must be strictly pursued, and when a party relies upon his attachment-lien as a remedy, he must strictly follow the provisions of the Attachment Law.

"2. ID; LIABILITY OF GARNISHEE.—The provisions of the one hundred and twenty-eighth section were intended for the security of the plaintiff, and not to confer a privilege upon the garnishee, and the plaintiff may or may not, at his election, require the garnishee to appear and answer on oath, and his liability will not be affected by the failure of the plaintiff to take such a step.

"3. ID.; PROCEEDINGS AGAINST GARNISHEE.—A plaintiff who has sued out an attachment and given the necessary notice to a garnishee that the property in his hands is attached, and subsequently the garnishee fraudulently disposes of the property, has a right to waive his lien on the property, and bring suit for the value of the property, against the garnishee.

"4. STATUTORY RIGHTS AND REMEDIES.—If a statute gives a particular remedy in conferring a new right, then the particular remedy must be pursued; but under the Attachment Law a new right is created, but no practical remedy is prescribed."

The syllabus in the case of *Carter vs. Los Angeles National Bank* (116 Cal., 370-1) is as follows:

"ATTACHMENT; GARNISHMENT; ACTION BY JUDGMENT CREDITOR AGAINST GARNISHEE.—After execution unsatisfied against the judgment debtor, the judgment creditor may bring an action at law against a garnishee upon whom notice was served under an attachment issued in the action before judgment; and it is not necessary before bringing such action that the garnishee should be required to appear and answer, or that an order should be obtained authorizing the action against the garnishee; and no equitable circumstance need be shown to justify the suit, which is upon direct liability of the garnishee to the plaintiff in that suit provided for in section 544 of the Code of Civil Procedure."

Section 544 of the California Code of Civil Procedure is identical with section 432 of the Philippine Code of Civil Procedure, which, like most of the provisions of our Code touching attachment proceedings, was borrowed literally from the California Code; and we cannot agree with counsel that the provisions of section 436 of our Code furnish a "practical remedy" to enforce the right conferred in section 432 which differentiates the doctrine which should be applied in this jurisdiction from that set forth in the above cited opinions of the Supreme Court of California.

2. As to the contention of counsel based on the theory that, at all events, plaintiff's right of recovery in this action should be limited to the worthless equity of redemption of his judgment debtor in the tobacco in the hands of the defendant, it is sufficient to call attention to our former ruling that article 1865 of the Civil Code providing that a "pledge shall not be effective against a third person, when evidence of its date does not appear in a public instrument" is a "rule of substantive law, prescribing a condition without which the execution of a pledge contract cannot affect third persons adversely."

3. As to the contention that plaintiff should have been required to have execution issued and returned unsatisfied, in whole or in part, before the court below could entertain this action, it is to be observed, not only that this contention wholly fails to take into account the ruling in our former opinion, just referred to, holding that the pledge of the tobacco to the defendant bank was wholly ineffective in so far as the rights of third persons were concerned; and that such an objection, even if well founded, should have been advanced in the trial court, and cannot be raised for the first time on appeal, and still less upon a motion for a rehearing after decision has been rendered in the appellate court.

4. We come now to consider the contentions of counsel based on the alleged "repeal of articles 1922 and 1924 of the Civil Code upon which the judgment is based," by the enactment of the Bankruptcy Act (No. 1956). With reference to this contention counsel says:

"We apologize to the court for not having raised this point in our original brief because it seems to us conclusive against the judgment. Our only excuse for not having done so before is that this Honorable Court has continued to apply these articles of the Civil Code since their repeal and we presume has been fully justified in so doing because no member of the bar, as far as we know, interested in defeating these provisions of the old bankruptcy law, has ever awakened at the right moment to the fact that we have a new bankruptcy act in full force and effect."

It is true, as said by counsel, that in a long line of decisions filed before and since the enactment of the Bankruptcy Act on May 20, 1909, this court has steadfastly and uniformly construed, applied, and recognized as in full force and effect, in this jurisdiction, the various provisions of articles 1922 and 1924 of the Spanish Civil Code touching statutory preferences where such preferences have been asserted, as in the case at bar, in judicial proceedings other than formal bankruptcy proceedings; and we have said, furthermore, on more than one occasion, that the doctrine announced in these decisions constitutes a rule of property not subject to change except by legislative enactment. (Cf. Discussion and citation of cases in *Alzua and Arnalot vs. Johnson*, 21 Phil., 308.) But counsel contends that all these statutory preferences were swept away by necessary implication as a result of the enactment of the Insolvency Law (Act No. 1956). We cannot give our assent to this contention.

It seems to be based on the general provisions of Chapter VI of the Bankruptcy Act, which do not provide for the recognition of any of these "statutory preferences," other than those included in the list of preferred claims set forth in sections 49 and 50, although the order in which "preferred claims" shall be paid from the proceeds of the sale of the property of the insolvent which, comes into the hands of the assignee, is expressly set forth in these sections, which provide furthermore that "all other creditors shall be paid pro rata."

But this argument for repeal, by implication, of the provisions of the Spanish code touching "statutory preferences," not mentioned in Chapter VI of the Act, takes no account of the provisions of section 59 of the Bankruptcy Act, by virtue of which a right to any of these statutory preferences may be set up and maintained, if duly asserted in the manner and form therein prescribed. This section is as follows:

"When a creditor has a mortgage, or pledge of real or personal property of the debtor, or a lien thereon, for securing the payment of a debt owing to him from the debtor, or an attachment or execution on property of the debtor duly recorded and not dissolved under this Act, he shall be admitted as a creditor for the balance of the debt, only, after deducting the value of such property, such value to be ascertained by agreement between him and the receiver, if any, and if no receiver, then upon such sum as the court or a judge thereof may decide to be fair and reasonable, before the election of an assignee, or by a sale thereof, to be made in such manner as the court or judge thereof shall direct; or the creditor may release or convey his claim to the receiver, if any, or if no receiver then to the sheriff, before the election of an assignee, or to the assignee if an assignee has been elected, upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the debtor's right of redemption thereon on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon, and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not sold or released, and delivered up, or its value fixed, the creditor shall not be allowed to prove any part of his debt, but the assignee shall deliver to the creditor all such property upon which the creditor holds a mortgage, pledge, or lien, or upon which he has an attachment or execution."

It has been suggested that under our former rulings, these "statutory preferences" cannot be treated as liens affecting the property of the debtor, as that word is used in the above cited section of the Bankruptcy Act. But while it is true that we have held in a number of decisions, that these "statutory preferences" of the Civil Code are not liens in the strict and limited sense of that word as used in Anglo-American jurisprudence, and while we have taken considerable pains to distinguish the nature and effect of these "statutory preferences" (sometimes called "civil law liens" by American law writers), from that of "liens," as that word is used in the strict technical parlance of the American and English authorities; nevertheless, there can be no question that when a right to one of these "statutory preferences" has actually been asserted, in the course of judicial proceedings which have for their object the distribution of funds derived from the sale of all or any part of the assets of the debtor, by a proper party to such proceedings, as intervenor or otherwise; the consequences flowing therefrom are closely assimilated to, and substantially identical with those arising as a result of the assertion in the course of such proceedings, of a

recorded "lien" upon the assets of the debtor with a view to its enforcement therein. We are of opinion, therefore, that the word "liens" as used in section 59 of the Insolvency Law should be held to include "statutory preferences" such as those now under consideration if and when they are duly asserted in the course of bankruptcy proceedings.

We are not unaware of the fact that this construction of the language of the statute may give rise to some practical difficulties in the administration of insolvency proceedings; but we do not apprehend that these difficulties will prove to be any less surmountable than similar practical difficulties with which our courts have been confronted, in applying and construing the terms of many other statutes enacted in recent years, wherein the general provisions and the terminology in which they are expressed have been borrowed directly from American or English precedents, in the enactment of which the legislator had in mind provisions of substantive law radically different from those of the Spanish substantive law still in force in these Islands.

The right to a preference in the case at bar being founded upon the failure of a debtor to pay the purchase price of goods sold to him by the plaintiff; it may be well to add that the right of the, vendor of merchandise, bought on credit by an insolvent, "so long as the actual delivery thereof has not been made" to have such goods placed at his disposal, in the manner and form prescribed in subsection 8, section 48 of the Insolvency Law, is manifestly an additional and cumulative remedy allowed a vendor of merchandise, the purchase price of which has not been paid, and is in no wise in conflict with the right of such a vendor to assert the preference secured to him in article 1922 of the Code of Civil Procedure [Civil Code], in any case wherein delivery has actually been made.

As we said in the case of *Smith, Bell & Co. vs. Estate of Maronilla* (R. G. No. 8769), decided February 5, 1916^[1] (wherein we ruled adversely upon a similar contention as to the repeal by implication of the provisions of articles 1922 and 1924 of the Civil Code as a result of the enactment of the provisions of the new Code of Civil Procedure touching the distribution of the estates of deceased persons), we would be loathe to believe that it was the intention of the legislator to destroy all these valuable privileges, without substituting anything in their stead; and we decline to sustain such a contention in the absence of clear and explicit language in the statute which, either in express terms or by necessary implication, leads to such conclusion.

Strong and compelling reasons of public policy, in this jurisdiction as elsewhere, have resulted in the enactment of legislation providing special security in one form or another, for credits for construction, repair and preservation of personal property; transportation charges; seeds and other agricultural advances; rents; credits evidenced in solemn judgments; and the like. The security in such cases, furnished under statutory authority in the United States, in the form of liens on the property of the debtor, was not affected, nor intended to be affected by the enactment of the American prototypes of the provisions of our Insolvency Law and our Code of Civil Procedure; and we are satisfied that it was not the intention of the legislature to destroy, without providing a substitute therefor, the security in the form of "statutory preferences" furnished in our Civil Code in like cases, and that the language of these statutes does not sustain such a contention.

Torres, Trent, and Araullo, JJ., concur.

Moreland, J., dissents.

[1] Page 557, ante.

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