RECENT DECISIONS OF THE SUPREME COURT REVIEWED

PROHIBITION LIES TO RESTRAIN EXECUTION OF ORDERS PENDING DECISION OF APEAL.—Teodorico Uy Tioco vs. Hon Carlos Imperial, judge of the Court of First Instance of Manila, and Alejandro M. Panis. R. G. 29414—July 17, 1928. Prohibition proceedings in the Supreme Court. *Facts*: Before the final settlement of accounts in the proceedings for the settlement of the estate of the deceased Basilia Yangco, the respondent, Panis, presented a motion for the allowance of ₱15,000 as attorney's fees. The respondent judge, over the objection of the administrator of the estate, the petitioner herein, granted the motion. Jacinto Yangco, as guardian *ad litem* of the minor sons and only heirs of the deceased, presented a motion for reconsideration under section 113 of the Code of Civil Procedure, which was denied. He excepted and perfected an appeal which is now pending. The present proceedings are to restrain the judge from compelling the execution of the orders appealed from.

Held: Writ granted. "Whether these orders were valid and final need not here be determined, but they are appealable and we are not aware of any provision of law authorizing the lower court to enforce the immediate execution of such orders in probate proceedings after an appeal has been perfected. The interests of the appellee are supposed to be sufficiently protected by an adequate bond." (In banc, Ostrand, J.) *Briefed by P. M. Syquia.*

WHAT COUNTER-CLAIMS PERMISSIBLE ON APPEALS FROM JUSTICE OF THE PEACE.—Trinidad Rizal vs. Placido Odegimer, R. G. 28579—July 19, 1928.

Motion for Reconsideration. *Facts*: Plaintiff-appellant contends that the Court of First Instance erred in taking cognizance of the defendant's counterclaim presented for the first time on the appeal from a judgment of a justice of the peace. The facts upon which the claim was based did not materialize until after the appeal from the justice of the peace court had been perfected.

Held: "On appeals from judgments of the justice of the peace, the cases are tried *de novo* 'in accordance with the regular procedure of the courts of first instance 'as though the same had never been tried and had been originally there commenced' (Section 75 of the Code of civil procedure.) Under the regular procedure of the court, causes of action are within the jurisdiction of the court. Here the cause of action set forth in the counterclaim and of which the court took notice was not only within the jurisdiction of the court of first instance, but also within that of the justice of the peace. Under such circumstances, the provisions of section 75 may be applied and the regular proceedings followed; to hold otherwise would only lead to unnecessary litigation and multiplicity of suits."

Motion for reconsideration denied (In division, Ostrand, J.) *Briefed by P. M. Syquia.*

PLEADINGS—DEFAULT FOR FAILURE TO FURNISH PLAINTIFF COPY OF ANSWER; WHEN MUST IT BE SET ASIDE.—Donato Bañares vs. El Hon. Juez de Primera Instancia de Sorsogon, Sr. Tomas Flordeliza y Julian Gavito.

R. G. 29355—July 20, 1928. *Facts*: The petitioner in this case was declared in default in a case pending before the respondent judge for neglecting to furnish a copy of his answer to the plaintiff, the other respondent herein.

"..... the only cause for the declaration of default was the omission on the part of the petitioner to furnish a copy of the answer to the other respondent, Julian Gavito. It is undoubted that such an omission is sufficient for a Court to declare a defendant in default and to refuse to set it aside when the motion to that effect is not accompanied by an affidavit of merits and of proofs to show them, as held in the case last cited. (Gonzales vs. Francisco, 25 Ga. Of. 2705, October 20, 1928) But when the motion to set aside the default was made without loss of time and before the cause was set for trial on the merits and is accompanied by an affidavit of merits and by copies of the documentary proof that constitute prima facie a valid and just defense, such an omissioin is not sufficient to deprive a defendant of his rights, as in the present case, and the refusal to set aside the declaration of default constitutes an abuse of discretion, specially if the fact is taken into account that such an action does not prejudice the plaintiff in any way.

Mandamus granted. The lower court ordered to set aside default and to admit the answer of the defendant. (In banc, Villareal J.) (P. M. S.)

SUBROGATION OF DEBTOR—EFFECT.—The bank of the Philippine Islands vs. V. Concepcion e Hijos, Inc., and Venancio Concepcion, Henry W. Elser.

R. G. 27701—July 21, 1928. *Facts*: The Concepcions executed a promissory note in favor of the Bank for ₱342,372.64, payable on demand, and as security, pledged 700 shares of the Philippine National Bank, and mortgaged 5,680 sq. m. of land on R. Hidalgo St. The Concepcions defaulted, and the Bank instituted the present foreclosure proceedings on February 3, 1922. Shortly afterwards, Elser entered into negotiations with both parties to take over the mortgaged property and to assume the mortgage debt. On May 5, 1922, Elser entered into an agreement with the Concepcions, in the form of a bilateral deed of sale, in which Elser, in consideration of the sale to him of the mortgaged property was subrogated in place of the Concepcions in all their rights and obligations to the Bank and the Concepcions were released of all liabilities for the mortgage debt. The Bank never consented to the subrogation, but petitioned the court to include Elser as defendant in the foreclosure proceedings, on the ground that the subrogation was a stipulation *pour autrui* on which the Bank could maintain its action.

C. W. Rosenstock intervened, first as guardian, and later as administrator and executor of Elser (who died on June 18, 1923), alleging that Elser was of unsound mind at the time he entered to the contract with the Concepcions, and that he was induced to enter into the contract by fraudulent representations.

After a lengthy trial, the lower court entered judgment, on January 22, 1928, absolving the Elser Estate from the complaint, and ordering the Concepcions to pay the Bank, ₱342,372.64, with interests, and costs, and providing for the sale of the mortgaged property in case of non-payment. The Bank and the Concepcions appealed.

Held: In order to constitute a valid stipulation *pour autrui*, it must be the purpose and intent of the stipulating parties to benefit the third person, and it is not sufficient that the third person may be incidentally benefited by the stipulation. "..... the stipulation is for the subrogation of the purchaser to the obligation of the original debtor; if such a stipulation is duly accepted by the creditor, it works a novation of the original agreement and releases the original debtor from further liability. Such subrogation is rarely for the benefit of the creditor, and that, in the present case, it was not believed to be of any advantage to the Bank is well shown by the fact that the parties were unable to obtain its written consent to the stipulations."

"But assuming that the stipulation is for the benefit of a third person, the plaintiff is nevertheless not in position to maintain its action against Elser. In order to be enforceable, such stipulations must be accepted by the third person and that has not been done here. The plaintiff asserts that it accepted the stipulation in part but that is not sufficient acceptance." "..... in order to create a binding agreement, the acceptance must be absolute, unconditional, and identical with the terms of the offer; ....."

The American doctrine that the purchaser of mortgaged property who assumes the payment of the mortgaged debt, may for that reason alone be sued for the debt by the creditor, "is not in harmony with the spirit of our legislation and has not been adopted in this country." (McCullough & Co., vs. Veloso et al. 46 Phil. 1.)

"From what has been said it follows that the plaintiff can have no cause of action against Elser, or rather against his estate."

"Assuming that Elser was of sound mind at the time of the execution of the contract——and that is a much debated question——the Concepcions, and not the plaintiff, might have maintained an action against the Elser Estate; but that action is now barred through the failure to present their claim in time to the Committee of Claims and Appraisal in the probate proceedings, and the plaintiff can, therefore, not successfully invoke article 1111 of the Civil Code....."

"Counsel for the appellee also argue that the Bank, having failed to present its claim to the Committee on Claims and Appraisal, it must be regarded as having elected to rely on its mortgage alone and therefore can have no personal judgment against the Elser Estate. That is good law."

Under section 708 of the Code of Civil Procedure the mortgagee has the election of one out of three courses.

"In this case the Bank did not abandon the security and took no steps of any sort before the committee, within the time limit provided for by sections 689 and 690 of the Code of Civil Procedure. The committee ceased

to function long ago, and the Bank has now nothing to rely on, except the mortgage. Intentionally or not it has brought itself within the third course provided for in section 708; it has no alternative."

".... The claim for the deficiency must be *presented* to the committee within the period fixed by sections 689 and 690 of the Code."... "When the contingent claim has become absolute, its amount may be ascertained and established in the manner indicated by sections 748 and 749. As will be readily seen, the Bank both could and should have presented its claim to the committee within the time prescribed by law. (In banc, Ostrand, J.) (P. M. S.)

Macondray & Co., and Fidelity and Surety Co., of the Philippine Islands vs. The Yangtaze Insurance Asan., Lt. and Jose Casimiro, as sheriff ex officio of the city of Manila.

R. G. 29604—July 21, 1928. *Facts*: The Yangtsze Co. filed an action against the petitioners herein for the recovery of ₱10,775.30 with interest and costs. Macondray & Co., by way of cross-complaint, prayed that the obligation be declared null and void for lack of consideration. The trial court entered judgment against Macondray and Co., as principal, and the Fidelity Co., as surety, for ₱7,737.03, with legal interest from December 9, 1922, and costs. The cross-complaint was dismissed. The defendants appealed. The appeal was heard, and decided against the defendants, by the Second Division of the of the Supreme Court. The defendants moved for a reconsideration and rehearing on the ground that the Second Division was without jurisdiction, inasmuch as the amount in controversy was in excess of ₱10,000. The motion was heard *in banc* and denied. The decision was subsequently certified to the lower court, and execution was, in due course, placed in the hands of the herein respondent sheriff. The present proceedings are to enjoin the execution of the alleged void judgment. The respondents demurred.

The Supreme Court sustained the demurrer and denied the writ of prohibition. The rulings are given above. (In banc, Street, J.) (P. M. S.)

Court; Jurisdiction; Amount in Controversy; Interest.—Where the jurisdiction of a court is dependent upon the amount in controversy, the question whether the court has jurisdiction must be determined by the amount in controversy, the fact that the claim is subsequently increased by accretion to an amount beyond the statutory limit will not defeat the jurisdiction of the court.

Id.; Id.; Id.; Id.; Division of Supreme Court—Assuming that interest awarded in a Court of First Instance should be added to the controversy for jurisdictional purposes in a division of the Supreme Court, jurisdiction to award judgment for subsequent accretions of interest even though the total amount be in excess of ₱10,000.

Id.; Id.; Id.; Cost.—Under the statute defining the jurisdictional limit of a division of the Supreme Court in a civil action for a sum of money, costs should be excluded in determining the amount in controversy.

Id.; Id.; Id.; Division of Supreme Court; Rule 30 of Supreme Court.—In actions to enforce rights of undetermined monetary value, if the judgment of the Court of First Instance does not, on its face, that the amount in controversy is in excess of 10,000 pesos pursuant to Rule 30 of this Court.

Behn, Meyer & Co., H. Mij., vs. Carl Antholtz.

R. G. 29562—July 30, 1928. Mandamus Proceedings under section 499 of the Code of Civil Procedure.

The attorneys for the defendant received notice of the rendition of judgment in favor of the plaintiff on December 31, 1927. On January 26. 1928, they filed an exception and moved for a new trial. They were notified of the denial of the motion on February 14, 1928. On February 23, 1928, the bill of exceptions was filed in court. The disputed fact is whether or not defendant's exception and notice of appeal was filed on February 20, 1928 or on February 23, 1928. The lower court held the latter date to be the correct one, and refused to sign and certify the bill of exceptions. The present roceedings are to compel the judge to sign and certify the bill of exceptions.

The Supreme Court granted the writ of mandamus and made the rulings given above. (In banc, Malcolm, J.) (P. M. S.)

1. *Civil Procedure; Bill of Exceptions; Time of Presentation in Ordinary Actions.*—The rules announced in Layda vs. Legaspi, (1918) 39 Phil. 83, relating to the periods within which bills of exceptions must be presented, examined, and after consideration in connection with the cases of Luengo and Martinez vs. Herrero, (1910) 17 Phil. 29, and Pampolina and Visal vs. Suiza and Osuna, (1921) 42 Phil. 99, are adhered to, with the qualification, that if the aggrieved party files the bill of exceptions within ten days from the time of the notice denying the motion for a new trial, the presentation of the bill of exceptions for approval is tantamount to an announcement of an intention to appeal, and the requirements of the law are substantially fulfilled.

2. *Id.; Id.; Id.*—On February 14, 1928, the attorneys for the losing party in the trial court were notified of the order of the court denying the motion for a new trial. On February 23, 1928, the exception, notice of appeal, and bill of exceptions were filed in court. *Held,* that the bill of exceptions should have been received in the trial court for approval.

3. *Id.; Id.; Time of Presentation of Exception to the Denial of the Motion for a New Trial.*—The decision in Fisher vs. Ambler (1902) 1 Phil. 508 construing section 142 of the Code of Civil Procedure, examined and followed, sanction being given to the concurring opinion in said case of Mr. Justice Cooper.

4. *Id.; Id.; Id.*—Although the exception to the denial of the motion for a new trial was made at the same time that the bill of exceptions was presented for approval within a period of nine days, it is yet held that the exception was made within a reasonable time, thus not depriving the party appealing of the right to ask the Supreme Court to review the evidence adduced by the parties at the trial.

5. *Id.; Id.; Mandamus under Section 499 of the Code of Civil Procedure.*—Mandamus cannot be used to review the action of an inferior tribunal in any matter involving the examination of evidence and the decision of questions of fact since such duties are not ministerial in nature.

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THE DOCTRINE OF KUENZLE & STREIFF vs. VILLANUEVA

(41 Phil. 611)

By BIBIANO MEER[1]

FACTS OF THE CASE:—

Kuenzle & Streiff versus Villanueva is a case, the facts of which are as follows:

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

Sometime in August ,1914, the lower court rendered in that action a money judgement in favor of Kuenzle & Streiff and against Villanueva for ₱1456, plus interest thereon from the date of the institution of the action.

Another action in the same court was begun by Ed. A. Keller & Co. (Ltd.) against the same defendant, Juan Villanueva, in which the court rendered a money judgment in favor of the plaintiff for ₱7,268 with interest and costs. This judgment was rendered on May 22, 1914, after the date of the levy of attachment but prior to the date of the judgment in favor of Kuenzle & Streiff.

Execution for the enforcement of the judgment was issued and levied on the motor truck which had already been attached by Kuenzle & Streiff. On June 14, 1914, the truck was sold at public auction, the net proceeds of the sale amounting to ₱189.88.

Inasmuch as both parties laid claim to the proceeds of the auction sale, the sheriff, by motion, prayed the trial court to advise and direct him as to the disposition which he should make of the funds. After hearing the interested parties, the court ordered the payment of the funds to Ed. A. Keller & Co. From this order, Kuenzle & Streiff appealed to the Supreme Court.

The only question squarely put before the Supreme Court for decision is, in the language of the court, as follows:

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1 LL.B. (U. P.), member of the Philippine Bar.

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

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

DOCTRINE:—

The court in reversing the decision of the lower court laid down the following doctrine:

"The issuance and levy of an attachment on specific property, real or personal, gives to the attaching creditor a lien, or a right to a preference in the nature of a lien with relation to such property, subject to all liens or statutory preferences by which such property is affected at the date of the levy but superior to all liens and statutory preferences by which the property may be affected subsequent to the date of the levy."

CRITICISM OF THE DOCTRINE.—

Scope of the Criticism.—

It is admitted that the court did well and did administer justice in holding that the decision of the lower court should be reversed. As will be noted, however, the court did not content itself with deciding the case as it should and as it did, but went further to the extent of laying down a doctrine which is highly objectionable for the strange theories advanced therein and the inconsistent arguments made in expounding and supporting the same. As I have already stated, the doctrine, as laid down, struck at the very foundation of the law upon which the decision itself was based and even confused provisions and principles of law, heretofore clear and properly construed.

The laws of attachments and preferred credits in the Philippine Islands are simple and clear, and the objectionable doctrine

would not have come to be registered in the court's records if the court had simply applied the law applicable to the case and stopped after applying the same. In the language of Justice Moreland, the only question presented in the case is this: "Is an attaching creditor entitled to apply the proceeds of the sale of the property attached to the payment of the judgment obtained in the action in which the attachment was levied as against a mere judgment creditor of the same defendant whose judgment was obtained after the attachment was levied but before judgment in the action?" In deciding this question, the court ought to have merely pointed out the fact that the levy of attachment was prior to the judgment and hence the attachment should be upheld. It was unnecessary for the court to state the law applicable to a purely different situation as when the judgment precedes the levy of attachment, and much more so, when the law so stated is in fact not the law, but a court-made law. As Justice Moreland, in his dissenting opinion, has very well said, "But I would not object so seriously to the *obiter dictum* if it contained a correct statement of the law with which it deals. When, however, it is not only *obiter* but wrong also, I not only feel constrained to dissent but to register that dissent as well. Nothing is more objectionable than erroneous *obiter dicta*."

With a view to ward off clients, practitioners of the law, and the members of the judiciary from insisting on a blind observance of what, in my humble opinion, is an unusual doctrine, and in order to convince and remind the court of the necessity of an immediate correction of its mistake, should an occasion arise for it, for the benefit of those whose rights might be affected thereby, and ultimately, so that justice might be done to the law itself, I have decided to write this paper and to show, beyond peradventure of a doubt, that the doctrine enunciated by the Supreme Court in the case of Kuenzle & Streiff vs. Villanueva has:

1. Confused the law of attachments and the law of preferred credits in the Philippine Islands.
   A. Destroyed the very nature, purpose, and effect of the attachment, its lien on specific property.
   B. Changed the nature of the preferred credit by making it a lien on specific property to the extent of taking precedence over the attachment lien and by making it applicable outside of bankruptcy proceedings.
2. Destroyed the provisions of articles 1865 and 1875 of the Civil Code which declare that no lien, charge or incumbrance on specific property arising from the

voluntary act of the owner thereof shall affect third persons dealing with the property, unless due notice of such lien, charge or incumbrance has previously been given to the world in the manner therein required.

3. Destroyed the principle governing the place where and the manner in which notice must be given of liens, charges or incumbrances.
4. Has taken away the lien of an attaching creditor from its place among the liens created by pledge and mortgage, by making it subordinate to preferred credits without notice to the attaching creditor, while that of pledge and mortgage is not.
5. Established a principle, not recognized by the Civil Code, that preferred credits, irrespective of their nature or class, shall have preference over one another according to their dates.
6. In effect, laid down a new rule of statutory construction that there shall be no implied repeals of statutes by the passage of later repugnant statutes.

THE LAWS WITH REFERENCE TO ATTACHMENTS AND PREFERRED CREDITS, CONFUSED.

To hold, as the court did, that in the case under consideration, the attachment should prevail over the judgment, could not but be in conformity with law, and no dissenting voice would have been raised had the court contented itself with deciding the case as it well did. But the court went further. It discussed at length the subject of preferences, and attempted to harmonize it with the law of attachments, a thing which cannot be done without destroying either or both laws. Such efforts were entirely uncalled for, inasmuch as the question presented before the court was only whether or not an attaching creditor is entitled to apply the proceeds of the sale of the property attached to the payment of the judgment obtained in the action in which the attachment was levied as against a mere judgment creditor of the same defendant whose judgment was obtained after the attachment was levied but before judgment in the action. The court itself has admitted that an attachment whether it is considered a lien or a preference should prevail over the preference recognized in article 1924 of the Civil Code in favor of the owner of an after-acquired judgment. If the court has so admitted, why then did it go on to the extent of declaring an attachment lien as "subject to *all* * * * statutory preferences by which

such property is affected at the date of the levy * * * ?," Such a statement is far from the truth. Evidently, the court in stating "subject to *all* * * * statutory preferences * * *," committed an error in using the word "all" and overlooked the fact that statutory preferences, according to the Civil Code, are not only of one kind, nor do all they affect specific property as does the attachment.

Preferred credits are of two kinds: (1) those that affect specific property (see Arts. 1922, 1923, 1926, and 1927 of the Civil Code,) and (2) those that do not refer to any kind of property (see subdivision 3, Art. 1924 C.C.) Those belonging to the first class are also of two kinds: (a) those created by the voluntary act of the parties, namely, pledge, mortgage, and certain commercial contracts, and (b) those created by operation of law, namely, those resulting from construction, repair, preservation, transportation, board and lodging, purchase price of seeds for seeding purposes, charges for insurance of real estate, and the like. The credits belonging to class No. 2 of the general classification, i. e., those which do not affect any kind of property include "Credits which without a special privilege appear—

A. In a public instrument.

B. In a final judgment, should they (the credits) have been the object of litigation. (Subdiv. 3, Art. 1924 C. C.)

It can, therefore, be readily seen that when the court stated, as a rule of law, that an attachment lien is "subject to *all* * * * statutory preferences by which such property is affected at the date of the levy," it made us to understand that an attachment lien is subject to credits which without a special privilege are evidenced by a public instrument or by a final judgment should they have been the subject of litigation. Now, how can the attachment lien be classified or compared with the preferred credit not affecting any kind of property, and, worse, how can it be possible that an attachment lien which refers to specific property be made subject to a credit which does not affect any kind of property whatsoever? As Justice Moreland, dissenting from the majority opinion, has well stated, "I cannot conceive how a thing which is *not* a lien on property and which does not affect it in any way can, legally speaking, be compared to a thing which *is* a lien and *is* a charge on property; and especially can I not understand how the two can come into competition concerning property. They do not belong to the same class of rights; and it is as impossible that they be competitors for legal rights in property itself as that the boa constrictor and the giraffe contest as

to which has the right to browse. They are different rights, different legal animals, with almost no elements in common. If the serpent be granted the right to browse, it has no qualities with which it can make that right effective; and unless it is made over into a different animal at the time it is given the new rights, they will be worthless to it. So, if we give a public document or a judgment the qualities of a lien on specific property, those qualities will be useless unless, at the time of the endowment of those rights, the judgment and the public document be made over into something they were not before."

Evidently, the court has erroneously classified the attachment lien with the preferred credits established by subsection 3 of article 1924, by declaring that they should take precedence over one another according to their dates, when the law provides that only those of the same nature or class shall so take precedence over one another.

A. THE VERY NATURE, PURPOSE, AND EFFECT OF THE ATTACHMENT, ITS LIEN ON SPECIFIC PROPERTY, DESTROYED

Before taking up this point, a knowledge of the nature, purpose, and effect of the attachment is essential.

1. *Definition.*—Attachment is "a writ issued at the institution or during the progress of an action commanding the sheriff or other proper officer to attach the property, rights, credits or effects of the defendant to satisfy the demands of the plaintiff." (6 C. J. 28.)

2. *Purpose.*—

"The word 'attachment' as ordinarily understood in American law has reference to a writ the object of which is to hold property to abide the order of the court for the payment of a judgment in the event the debt shall be established." (Wilder vs. Inter-Island Steam Navigation Co., 211 U. S. 239, 245.)

According to the case of Beardsley vs. Beecher, 47 Conn., 408, 414, "the original design of this writ was to secure the appearance of one who had disregarded the original summons by taking possession of his property as a pledge. (3 Black, Com. 280.) By an extension of this principle in the New England States, property attached remains in the custody of the law after an appearance and until final judgment."

By the weight of authority, it is settled that "under the present statutes, in most jurisdictions, the chief purpose served by the remedy is to secure a contingent lien on defendant's property until plaintiff can, by appropriate proceedings, obtain a judg-

ment and have such property applied to its satisfaction." (Alder vs. Roth, 5 Fed. 895, 2 McCrary 447; In re Bellows, 3 F. Cas. No. 1, 278, 3 Story 428; Myers vs. Mott, 29 Cal. 539.)

3. *Nature and Effect.*—

An attachment creates a lien or a security on the property attached. Such a lien, although arising by operation of law, is no less effective than that created by the voluntary act of the debtor. By attachment, the attaching creditor is entitled to clear the property of adverse claims, to preserve the attachment lien when necessary papers have been lost and cannot be supplied, and to apply for an injunction against the sale of the property under an execution issued on a subsequent judgment. (Schuster vs. Rader, 13 Colo., 329; Alley vs. Carrol, 6 Heisk (Tenn.) 221; Francis vs. Lawrence, 48 N. J. Eq., 508; Smith vs. Bradstreet, 16 Pick (Mass.) 264.)

An attachment, although inchoate, is a lien in a real sense, (Colby vs. Ledden, 7 How., 626; Pratt vs. Law, 9 Cranch 456, 496; Fidelity etc. Co. vs. Bucki, etc., Lumber Co., 189 U. S. 135. 139) and the protection which the law gives to a purchaser is also given to an attaching creditor. (Green vs. Van Buskirk, 7 Wall., 139, 146; Dooley vs. Pease, 180 U. S. 126, 128.)

In the leading case of Peck vs. Jenness, 7 How. 612, 622, the court, speaking of the nature and effect of the attachment lien. said:

> "At common law there can be no lien without possession. It is there defined, a right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied. (Hammond vs. Barclay, 2 East 235.) In maritime law, liens exist independently of possession, either actual or constructive. In courts of equity, the term *lien* is used as synonymous with a charge or incumbrance upon a thing, where there is neither *jus in re*, nor *ad rem*, nor possession of the thing. Hence a judgment which, by virtue of the statute of Westminster 2d (commonly called the Statute of Elegit), is a charge upon the lands of the debtor, is called in courts of equity in England, and in the courts of law of many of these States, a *lien*, and executions which bind the personal property of the debtor, after their delivery to the sheriff, are termed *liens*, both before and after the property is seized and taken into the custody of the law by its officer. In the case of Waller vs. Best (3 How. 111), this court decided that in

Kentucky the creditor obtains a lien upon the property of his debtor by the delivery of a *fi. fa.* to the sheriff, and this lien is as absolute before the levy as after; and that a creditor is not deprived of this lien by an act of bankruptcy on the part of the debtor, committed before the levy is made but after the execution is in the hands of the sheriff."

In holding that an attachment on mesne process is a valid *lien* or *security* on the property attached, the same court, in the same case, said:

"This species of process is peculiar to the New England States. As early as the year 1650, while New Hampshire was united to the Massachusetts colony, it was enacted that 'henceforth goods attached upon any action shall not be released upon the appearance of the party or judgment, but shall stand engaged until the judgment or the execution granted on the same be discharged.' (Charters and Colony Laws, 50.)

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

The court further stated:

"The *mortgagee*, the factor, or the bottomry lender, *is in no better condition* than * * * *attachment creditor*. And an attempt to make a distinction between them, which would save the rights of one, and impair or destroy those of the other, would be judicial legislation."

The Philippine law on the subject also declares that an attachment creates a *lien* or *security* on specific property. Section 424 of the Code of Civil Procedure provides:

"A plaintiff may, at the commencement of his action or at any time afterwards, have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered unless the defendant gives security to pay such judgment, * * *."

Section 426, C. C. P. also provides:

"A Judge or justice of the peace shall grant an order of attachment when it is made to appear to the judge or

justice of the peace * * * that there is no other sufficient *security* for the claim sought to be enforced by the action, * * *."

With regard to the effect of attaching personalty, Sec. 428 C. C. P. provides:

"* * *. The property so attached shall be held to await final judgment in execution, unless released as provided in this section or in section four hundred and forty."

(a) MODE OF PROCEEDING AND PRACTICE.—

Under the American Law.—

Particularly in the State of New Hampshire, in an attachment of personal property, the sheriff, upon service of the writ, takes possession of the goods and becomes accountable, both to the plaintiff and to the defendant, for the disposition of them. If the plaintiff wins the case, the goods are sold upon the execution and the proceeds of the sale are turned over to him. If he loses the case, the goods are returned to the defendant debtor. In other words, if the attachment is dissolved the goods are returned to the debtor, but, if not, they shall be subject to the lien or incumbrance of the attachment and shall be applied to the satisfaction of the judgment, when recovered. In case of several attachments, these shall take precedence over one another, so far as the goods attached are concerned, not by priority of judgment, but by that of attachment. (Poole vs. Symonds, 1 N. H. 292, 294; Bissell vs. Huntington, 2 Ib., 142; Hackett vs. Pickering, 5 Ib, 24; Kittredge vs. Bellows, 7 Ib., 428; Clarke vs. Morse 10 Ib., 238.)

Under the Philippine Law.—

Practically the same mode of proceedings is provided for by the Philippine Code of Civil Procedure. In an attachment of personal estate, the order of attachment is 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 demands of the plaintiff. If the plaintiff wins the case, the goods attached are sold and the proceeds of the sale are applied to the satisfaction of his judgment. If the defendant wins the case, the property attached or the proceeds of the sale thereof are delivered to him and the order of attachment is thereby discharged. (See Chapter XVIII, C. C. P.)

HOW THE DOCTRINE DESTROYED THE LAW OF ATTACHMENTS

In proving that the doctrine, under consideration, has destroyed the nature, purpose, and effect of the attachment, I shall avail myself of the very statements and arguments made by the court. The court, in its opinion, stated:

> "Upon full consideration of the provisions of the new Code of Civil Procedure by virtue of which levies of attachments are authorized, and of the circumstances under which that Code was enacted by a commission the majority of whose members were American lawyers, we are satisfied that it was the intention of the Legislature to give an attaching creditor a lien or at least a right in the nature of a lien in the attached property.
>
> "But, while we recognize from the very nature of the proceedings authorizing the levy of attachments, that it necessarily follows that the levy of attachment creates a lien upon the specific property attached; etc.
>
> "Any language in the former opinion which tends to sustain a contention that the attaching creditor is not entitled by virtue of the levy of the attachment to a lien, or preference in the nature of a lien. * * * was *obiter dicta*, not necessary to the disposition of the former cause, and as such, of no binding force in the disposition of the present case."

By these statements, the court has evidently admitted that an attachment creates a lien on the specific property attached, and that, in enacting the law of attachment, the Legislature intended to give it the same force and effect that it has in the United States, namely, a lien on specific property. However, disregarding what it has already admitted, the court turned around and said:

> "* * *; but we see no reason whatever for holding that this lien, or right in the nature of a lien, rises superior to any statutory preferences with which the property is affected at the time of its attachment."

We have already learned that the attachment, as known in the United States and in this jurisdiction, creates a lien on specific property, and holds the property attached for the payment of the judgment in the action in which the attachment was levied. As will be seen hereinbelow, the court has admitted and has held in a long line of decisions that a preference does not create any lien or interest in property. Now, if an attachment creates a lien on the specific property attached and the preference creates

no lien or interest in property, I cannot see by what processes of reasoning the court came to the conclusion that the attachment lien does not rise superior to any of the statutory preferences with which the property is affected at the time of its attachment. If, as the court has held in the case of Peterson vs. Newberry, (6 Phil. Rep., 260) a judgment creditor does not acquire a lien upon the property of the debtor by virtue of the *filing of the complaint*, nor by *judgment*, nor by the *issue of execution*, nor by the *levy thereunder*, but merely acquires a *right* to a *preference* in the *distribution* of the funds of the estate of the judgment debtor and only when he is a proper party to the distribution proceedings, how can it be said, with legal precision and without contravening express provisions of the law, that an attachment cannot rise superior to a judgment simply because this judgment happened to precede the levy of attachment? What reason can there be advanced to sustain a statement that they can compete concerning the property attached? The attachment has all the qualities to hold the property attached in favor of the attaching creditor, while the preference fails in all those qualities to hold the property in favor of the judgment creditor.

As I have already stated, the court did well in deciding that the attachment in the case, the doctrine of which is now under consideration, should be upheld. Considering, however, that decision, in the light of its statement that "* * * we see no reason whatever for holding that this lien, or right in the nature of a lien, rises superior to any statutory preferences with which the property is affected at the time of its attachment," which statement was embodied in the doctrine laid down in the case, the court has also held either that (1) an attachment was a preference and only took precedence over the judgment simply because it was a superior preference, or that (2) a judgment or a preference was a lien, in that if it precedes the levy of attachment, it should prevail over the attachment, notwithstanding the fact that the contest between the two was over specific property, the property attached. Either of these two holdings would be an absurdity in law. To accept the first holding and to consider it as a rule of law would be to frustrate the wise and evident intention of the Philippine Commission to enact for the Philippine Islands a law of attachments which the court itself has in plain terms admitted. In fact, the Philippine Commission could not intend otherwise. It intended to and did enact a law of attachments, distinct, separate, and different from all other laws. It could not have intended, as the court, in effect, intimated, to make the attachment a mere adjunct of the Bankruptcy Law, for

the elementary rules of statutory construction forbid interpreting against express provisions of a statute. The Philippine Commission itself has provided in the Code of Civil Procedure, where the law of attachment is embodied that all bankruptcy laws were thereby repealed and that no further bankruptcy proceedings should be instituted until a new bankruptcy law should come into force. Section 524 of Act 190 provides:

> "No new bankruptcy proceedings shall be instituted until a new bankruptcy law shall come into force in the Islands. All existing laws and orders relating to bankruptcy and proceedings therein are hereby repealed; Provided, that nothing in this section shall be deemed in any manner to affect pending litigation in bankruptcy proceedings."

Section 623 of the same Act reads:

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

Furthermore, I cannot find any reason why the court, after admitting that an attachment, according to the laws of the Philippine Islands, creates a lien on the property attached, did say that "* * *, it does not necessarily follow that the above-mentioned American doctrine as to the effect of the lien thus created has also been imported into this jurisdiction." What is the use of importing the American law of attachments, if the essential element of that law, its lien on specific property, is not also imported with it? Even in America, the attachment without the lien is no attachment. The lien is the very crown of the attachment, and the Philippine Commission, would not have authorized the levy of attachments if the liens created by them are worthless as liens. In truth, what is the use of calling something a lien, when it is not a lien or does not have the effects of a lien?

Moreover, could it be the intention of the Philippine Commission, in enacting the attachment law of this country, to subject an attaching creditor to the pains and responsibility of procuring a levy of attachment only to be considered before the eye

of the law as in no better condition than a mere owner of a preference not affecting any kind of property whatsoever? Of course not, otherwise, in the words of Mr. Justice Moreland, "if the lien which he (the attaching creditor) gets by his attachment is of no value as such, then the consideration he paid for it, his efforts, his affidavits, his money and his obligation on his undertaking, all are lost and he is poorer than when he began. The law has cajoled him, has deceived him, has cheated him."

The court further stated:

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

But is it because that in this country there is no system whereby preferences may be converted into liens that the court is deemed authorized to declare that when a preference not affecting property antedates the levy of attachment it should prevail over the attachment? If the law is deficient why not ask the Legislature to fill up the deficiency? And why assume the power of the Legislature by placing the attachment lien in the same plan with the preference not affecting any kind of property?

Evidently, when the court finally concluded that an attachment is "* * *, *subject to all* * * * *statutory preferences* by which such property is affected at the *date* of the *levy*, * * *," it destroyed the law of attachments in the Philippine Islands; in other words, it destroyed the very nature, purpose, and effect of the attachment, its lien on specific property.

B. THE NATURE OF THE PREFERRED CREDIT CHANGED

Before taking up this point, a knowledge of the classification, nature, and effect of the preferred credits or preferences, is essential.

1. CLASSIFICATION.—

Article 1921 C. C. provides::

> "Credits shall be classified for their graduation and payment in the order and manner specified in this chapter."

Art. 1922 C. C. reads:

> "With respect to determinate personal property of the debtor, the following are preferred:

1. Credits for the construction, repair, preservation or purchase price of personal property in the possession of the debtor, to the extent of the value of the same;

2. Credits secured by a pledge in the possession of the creditor, with respect to the thing pledged and to the extent of its value;

3. Credits guaranteed by the deposit of goods or securities in a public or commercial establishment, with respect to the security and to the extent of the value of the same;

4. Credits for the transportation of goods and expenditures for the carriage and preservation thereof, with respect to such goods, until their delivery, and for thirty days thereafter;

5. Credits for board and lodging with respect to any personal property of the debtor in the inn;

6. Credits for seed and expenses of cultivation and harvesting, advanced to the debtor, with respect to the fruits of the crops which they were used to produce;

7. Credits for one year's rent with respect to the personal property of the lessee on the estate leased and the fruits produced by such estate.

If the personal property, with respect to which the preference is allowed, has been removed, the creditor may claim it from the person who has the same, within the term of thirty days counted from the time it was so removed."

Art. 1923 reads:

"With respect to determinate real property and real rights of the debtor, the following are preferred:

1. Credits in favor of the State, with respect to the property of tax payers for the last annual assessments, due and unpaid, of the taxes to which the same is subject;

2. The credits of insurers, with respect to the property insured, for the insurance premium for two years, and should the insurance be mutual, for the last two assessments levied;

3. Mortgage and refection credits entered and recorded in the Registry of Deeds, with respect to the property mortgaged, or which has been the subject-matter of the refection;