THE LAW OF LIENS IN THE PHILIPPINE ISLANDS AS COMPARED WITH THAT PREVAILING IN THE UNITED STATES

By FELIPE YSMAEL, B. A., LL. B.

(*Awarded the Lawyers Cooperative Publishing Co. prize of United States Supreme Court Digest, Extra Annotated, 7 volumes, for the best thesis presented for graduation from the College of Law, University of the Philippines*)

CHAPTER I
INTRODUCTION

One needs but look about him to see that the "Law of Liens" in the Philippine Islands is—to the mind of a considerable number of persons—in the air. Suggestions for reforms in the law of liens and preferences is before the Philippine Congress. To clear this legal jungle or jumble I present this thesis declaring the present status of the law of liens in the Philippine Islands as compared with that prevailing in the United States—my goal being primarily directed to systematize into a well-ordered whole the formidable mass of lien-laws and decisions of our Legislature and Courts and those of Spain in so far as applicable to the Philippine Islands.

In preparing this thesis my aim was not to produce a philosophical discourse, but *A BOOK OF PRACTICE.*

CHAPTER II
DEFINITIONS AND DISTINCTIONS

GENERAL DEFINITION OF A LIEN.

A lien, *at common law*, has been well defined to be "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." (Hammonds *v.* Barclay, 2 East 227, 235, per *Grose, J.*:). The question always is, whether there be a right to retain the goods till a given demand shall be satisfied. (Gladstone *v.* Birley, 2 Mer. 404.) The right of lien has never been carried further than while the goods continue in possession of the party claiming it. (Sweet *v.* Pym, 1 East 4.) The requisites, therefore, are:

1. Possession by the creditor;
2. Title in the debtor;
3. A debt arising out of the specific property.

The right of retention (*derecho de retención*) recognized in the Spanish law is equivalent to the common law lien dependent upon possession.

Right of retention (*derecho de retención*) is defined to be "the right, arising independently of the agreement of the parties, by which the possessor and likewise the

creditor may refuse delivery to his debtor of a thing due, the latter, pending the satisfaction of what is due the creditor from the debtor." (2 Giorgi, Teoría de las Obligaciones, 419.) The principal function of the right of retention is that of an accessory. In other words, it serves as a security. (Q. Mucius Scaevola, Commentaries on the Civil Code, Vols. 8-9, p. 657.)

REQUISITES—

1. Possession by the creditor.

2. A debt arising out of the specific property for necessary and useful expenses incurred upon it.

3. Good faith on the part of the possessor.

If the possessor parts with the possession of the thing, the right of retention becomes impossible. It requires the actual possession of the thing. (Q. Mucius Scaevola, Commentaries on the Civil Code, Vols. 8-9, pp. 651-654.)

This right of retention is called a "privilege" under the Louisiana practice.

LIENS CONFER NO RIGHT OF PPROPERTY UPON THE HOLDER.

Liens dependent upon possession confer no right of property upon the holder. It is neither a *jus ad rem* nor a *jus in re*. It is neither a right of property in the thing, nor a right of action for the thing. IT IS SIMPLY A RIGHT OF RETAINER. (Jones on Liens, Sec. 10.)

A. *A Lien by Contract.*—A lien by contract exists only where it is expressly agreed that a party may retain the property as security for the work done or expense incurred in respect of it. There must be something more than a contract for the payment of the price. A lien by contract cannot, any more than an implied lien, exist without possession. (Jones on Liens, Sec. 5; 2 Giorgi, Teoría de las Obligaciones, 465.)

LIENS BY STATUTE.

By legislation many of the liens recognized by the common-law, and many of those asserted in equity, have been materially enlarged in their scope, or made more effectual by provisions for their enforcement. Modern legislation has created many new liens. Of the liens created, those known as "mechanics' liens" are the most familiar. So is an attorney's specific or charging lien. (Jones on Liens, Sec. 97.)

A familiar example of a statutory lien in the Philippine Islands is that awarded in favor of a common carrier for the collections of his transportation charges and expenses. (Articles 375 and 376 of the Code of Commerce.)

POSSESSION NOT REQUIRED TO SUPPORT STATUTORY LIENS.

The protection afforded at common law by possession is, in case of statutory liens, afforded by notice to the owner, or by attachment of the property within a limited time. A statutory lien without possession may by force of the statute have the same operation and efficiency that a common-law lien has with possession. (Jones on Liens, Sec. 104.)

NATURE OF A MARITIME LIEN.

The maritime privilege or lien is adopted from the Civil Law, and imports a tacit hypothecation of the subject of it. It is a *jus in re*, without actual possession or any right of possession. It accompanies the property into the hands of a *bona fide* purchaser. It can be executed and divested only by a proceeding *in rem*. This sort of proceeding against personal property is unknown to the common-law, and is peculiar to the process of courts of admiralty. (The Yankee Blade, 19 How. 82; Revilla, Commentaries on the Marine Mortgage Law of Spain, Aug. 31, 1893.)

LIEN DEFINED.

A lien, therefore, may be defined to be a right pertaining to a creditor over the *corpus* of the property of his debtor for the payment of a debt due the former from the latter. The lien fastens itself upon the goods, as a charge or incumbrance.

The extent and nature of the different liens will be fully discussed in the chapters which will follow.

MORTGAGE MORE THAN A LIEN.

A mortgage is something more than a lien; it is a transfer of property itself, as security for the debt. This must be admitted to be true at law, and it is equally true in equity, for in this respect equity follows the law. It does not consider the estate of the mortgage as defeated and reduced to a mere lien, but it treats it as a trust estate, and according to the intention of the parties, as a qualified estate and security. When the debt is discharged there is a resulting trust for the mortgagor. It is therefore only in a loose and general sense that it is sometimes called a lien, and then only by way of contract to an estate absolute and indefeasible. (Conard *v.* Atlantic Ins. Co., 1 Pet. (U. S.) 386, 441; 7 L. Ed. 189.)

DISTINCTION BETWEEN A "LIEN" AND A "GENERAL PREFERENCE."

Before entering into the discussion, it must be noted and kept in mind that in using the phrase general preference I refer to a preference created by a mere judgment, and not a preference with regard to specific property. A right of prior payment does not of itself constitute a lien. The distinction is an obvious one. A lien is said to be a qualified right, which in a given case may be exercised over the property of another. (Lickbarrow *v.* Mason, 6 East, 20.) It attaches to the subjects of property and follows them in their transmission to others. (Brent *v.* The Bank of Washington, 10 Peters, 611.)

A lien is an interest in property. A preference is not. A lien relates to specific property. A preference has nothing to do with property of any kind. A lien may exist against the property of a solvent debtor. A preference cannot exist or operate except where the debtor is unable to pay his debts in full; for question of preference cannot arise except where the debtor is insolvent and cannot pay his debts in full. This is so of necessity; for, if debtor A is simply able to pay his three creditors B, C, and D in full, how can the necessity exist for determining which of the three creditors shall be paid first or whether they shall be paid out of the proceeds of specific property?

If the property encumbered with a lien is sold it is sold subject to the lien; whereas, with respect to preferences, a creditor having an inferior credit who levies and sells does not sell subject to the superior preference. The property sold is sold absolutely free from the superior preference, the only right of the holder of the superior preference being to contest with the person making the sale the distribution of the proceeds; and if he does not exercise his preference by presenting and insisting on his right to be paid ahead of the inferior credit and, by reason of his failure to do so, the proceeds turned over to the person holding the inferior credit under which the sale was made, the superior preference becomes valueless and the creditor holding it loses all rights thereunder. This latter statement brings out the last difference between a lien and a preference to which I desire to call your attention. One of the things showing the wide separation between a lien and preference is this: I recall no case where a preference has been made effective, or any creditor has sought to make it effective, through a direct action by that creditor against another creditor. The uniform and universal practice has been for all the creditors to intervene in a proceeding before the sheriff having for its object the distribution of the proceeds of the sale of all the property of the insolvent debtor. No action is brought in the real sense of the term as no one is made a defendant with the possible exception of the sheriff himself. The creditors simply file their claims with the sheriff with a statement of the grounds on which they base their preference. The sheriff refers the matter to the Court of First Instance, which proceeds to hear the claims of the creditors and to decide the question of preference. A preferred creditor has no cause of action against any other creditor; there is no privity between the two. This situation has been recognized as existing in the Philippine Islands: and, as a result, the proceedings just referred to have always been taken. No independent action by one creditor against another has, so far as I recall, been brought in the Philippine Islands: and the strong probability is that no such action can be maintained. This indicates with striking clearness the difference between the lien and the preference. In case of a lien the lienor has a right of action against any person who takes the property upon which he has his lien. The taking of the property creates a juridical relation between the lienor and the taker which will support the appropriate action. As we have said, no such right of action exists in case of a preference. There the proceeding is in every respect and submit them with their alleged preferences to the determination of the proper authorities. (Mr. Justice Moreland in the case of Kuenzle & Streiff, Ltd., *v.* Juan Villanueva and Ed. A. Keller & Co., *v.* Juan Villanueva, 14 O. G. 2212.)

CHAPTER III
ATTACHMENT

American Idea of Attachment.

An Attachment on Process is a Lien.—The Circuit Court of Massachussets, speaking through Mr. Justice Story, said in ex parte Foster, 9 Fed. Case, p. 514, that "An

attachment does not come up to the exact definition, or meaning of a lien, either in the general sense of the common law, or in that of the maritime law, or in that of equity jurisprudence. Not in that of the common law, because the creditor is not in possession of the property; but it is in custodia legis, if personal property; if real property, it is not a fixed and vested charge, but it is a contingent, conditional charge, until the judgment and levy. Not in the sense of the maritime law, which does not recognize or enforce any claim as a lien, until it has become absolute, fixed, and vested. Not in that of equity jurisprudence, for there a lien is not a *jus in re* or a *jus ad rem;* that is, it is not a property in the thing itself, nor does it constitute a right of action for the thing. It is but a charge upon the thing, and then only when it has, in like manner, become absolute, fixed, and vested."

The question for determination was whether an attachment is a lien, in such sense as to be within that clause of the Bankrupt Law *which protects existing liens against the operation of the law.* If a lien, the attachment cannot be dissolved by an act of bankruptcy. Mr. Justice Story in the above entitled case concluded that it does not constitute a lien in any proper legal sense of the term; and therefore the attachment may be dissolved by an act of bankruptcy committed by the defendant after the levy of the writ. *The great weight of authority,* however, *throughout the United States* is opposed to the doctrine as laid down by Mr. Justice Story in ex parte Foster, 2 Story 131, Fed. Cas. 4960. To this effect see the opinion written by Mr. Justice Thompson of the Supreme Court of the United States in Haughton *v.* Eustis, 5 Law Reporter, 505.

Also Peck *v.* Jenness, 7 Howard Sup. Ct. 612;
Downer *v.* Brackett, 5 Law Reporter, 392; 21 Vermont, 599;
Rowell's Case, 6 Law Reporter, 300; 21 Vermont, 620;
Franklin Bank *v.* Batchelder, 23 Maine, 60;
Kittredge *v.* Warren, 14 New Hamp. 509;
Kittredge *v.* Emerson, 15 Ibid. 227;
Buffum *v.* Seaver, 16 Ibid. 160;
Davenport *v.* Tilton, 10 Metcalf, 320;
Vreeland *v.* Brown, 1 Zabriskie, 214;
Wells *v.* Brander, 10 Smedes & Marshall, 348;
Hill *v.* Hardin, 93 Ill., 77;
Burke *v.* Johnson, 37 Kan. 337, 15 Pac. 204, 1 A. S. R. 252;
Columbia Bank *v.* Jacobs, 10 Mich. 349, 81 Am. Dec. 792.

All the above authorities make it clear that *in the absence of an express provision in the bankruptcy act,* an attachment is not dissolved by the defendant's bankruptcy. *An attachment creates a lien or a security on specific property and, although arising by operation of law, is as effective as if created by virtue of a voluntary act of the debtor and stands on as high equitable grounds as a mortgage lien.* The right acquired by an attachment

of property is sufficient to justify the attaching creditor in filing a suit to clear the property from adverse claims or to preserve the lien of the attachment when necessary papers have been lost and cannot be supplied, or in applying for an injunction against the sale of the property under an execution issued on a subsequent judgment.

Schuster *v.* Rader, 13 Colo., 329;
Alley *v.* Carrol, 6 Heisk. (Tenn.), 221;
Francis *v.* Lawrence, 48 N. J. Eq., 508;
Smith *v.* Bradstreet, 16 Pkck. (Mass.), 264.

While it is sometimes said that a lien created by an attachment is inchoate, as it awaits the judgment and must fall with the suit, it is, nevertheless, a lien in real sense,

Peck *v.* Jenness, 7 How., 612, 622;
Colby *v.* Ledden, 7 How., 626;
Pratt *v.* Law, 9 Cranch, 456, 496;
Fidelity, etc. Co. *v.* Bucki, etc., Lumber Co., 189 U. S., 135, 139;

and places the attaching creditor in the position of a purchaser and he will be protected as such.

Green *v.* Van Buskirk, 7 Wall., 139, 146;
Dooley *v.* Pease, 180 U. S., 126, 128.

When an attachment is served, a lien on the property attached is created, which nothing subsequent can destroy but the dissolution of the attachment.

Goore *v.* Daniel, 1 McCord, 480;
Peck *v.* Webber, 7 Howard (Mi.), 658;
Smith *v.* Bradstreet, 16 Pick. 264;
People *v.* Cameron, 7 Illinois (2 Gilman), 468;
Vinson *v.* Huddleston, Cooke, 264;
Vanloan *v.* Kline, 10 Johnson, 129;
Desha *v.* Baker, 3 Arkansas, 509;
Freleson *v.* Green, 19 Ibid., 376;
Harrison *v.* Tracer, 29 Ibid., 85;
Richardson *v.* Aller, 46 Ibid., 43;
Davenport *v.* Lacon, 17 Conn. 278;
Woolfolk *v.* Ingram, 53 Alabama, 11;
McClellan *v.* Lipscomb, 56 Ibid., 255;
Grigg *v.* Banks, 59 Ibid., 311;
Schacklett and Glyde's Appeal, 14 Penn. State, 326;
Erskine *v.* Stanley, 12 Leigh, 406;
Moore *v.* Holt, 10 Grattan, 284;
Cary *v.* Gregg, 3 Stewart, 433;
Murray *v.* Gibson, 2 Louisiana Annual, 311;

Hervey *v.* Champion, 11 Hemphreys, 569;
Snell *v.* Allen, 1 Swan, 208;
Zeigenhagen *v.* Doe, 1 Indiana, 296;
Pierson *v.* Robb, 4 Ill. (3 Scammon), 139;
Martin *v.* Dryden, 6 Ill. (1 Gilman), 187;
Lyon *v.* Sanford, 5 Conn. 544;
Lackey *v.* Seibert, 23 Missouri, 85;
Hannahs *v.* Felt, 15 Iowa, 141;
Chandler *v.* Dyer, 37 Vermont, 345;
Ward *v.* McKenzie, 33 Texas, 297;
Emery *v.* Young, 7 Colorado, 107.

An attachment takes precedence of a junior execution.

Goore *v.* McDaniel, 1 McCord, 480;
Van Loan *v.* Kline, 10 Johnson, 129;
Lummis *v.* Boon, 2 Pennington, 734;
Pond *v.* Griffin, 1 Alabama, 678;
Beck *v.* Grady, 7 Louisiana Annual, 1;
Eddy *v.* Weaver, 37 Kansas, 540.

A purchaser of land under an attachment *will prevail* against a purchaser under a judgment obtained after the levy of the attachment, though the judgment in the attachment suit was subsequent to the other.

Baldwin *v.* Leftwich, 12 Alabama, 838;
American Ex. Bank *v.* Morris C. and B. Co., 6 Hill. (N. Y.), 362;
Martin *v.* Dryden, 6 Illinois, 1 Gilman, 187;
Oldham *v.* Scrivener, 3 B. Monroe, 597.

PHILIPPINE VIEW OF ATTACHMENT.—The attachment law in the Philippine Islands is the same in the nature and effect as in the United States.

On examining Chapters VII and XVIII of the Code of Civil Procedure, particularly Sections 150, 428, 435, 436, 437, 440, 461, 462, and Par. 2, of 464, the intention to create an effective lien in favor of the attachment creditor that shall be of practical value is apparent. Section 150 provides that such temporary injunction shall not operate to discharge or release bail nor extinguish "any lien which the party enjoined has acquired upon the property of the plaintiff by attachment or levy of execution." Section 428 says that the property "shall be held to await final judgment in execution." Whose judgment? Undoubtedly that of the attaching creditor. Section 435 provides that the proceeds shall "be deposited in court to abide the judgment in the action." Section 436 says that "If judgment be recovered by the plaintiff the officer of the court must cause the same to be satisfied out of the property attached, if it be sufficient for that purpose." Section 437 provides that plaintiff may proceed by execution "as in other cases" against other property if, after realizing

upon all the property attached, including the proceeds of any debts or credits collected, and applying the proceeds in extinguishment of the judgment, less the expenses of proceeding upon the judgment, any balance shall remain due. This section makes it the imperative duty of the attachment creditor to exhaust the attachment first, before recurring to any other property to satisfy his claim. The force of this section is such as to give other execution creditors a right to confine the attachment creditor to his own limits before allowing him to come in the general field, whenever he disregards his attachment and issues execution against other property before selling the property attached. Section 440 says that a release of the property attached shall take place upon defendant giving an undertaking. In this case who is the obligee but the attachment creditors? Section 461 speaking of the delivery of property to purchaser says, "Such sale conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied". Section 462, speaking of the certificate of sale, provides, "Such certificate conveys to the purchaser all the right which the debtor had in such property on the day that the execution or attachment was levied."

One cannot, in the teeth of the language of these sections, but clearly confirm the recognition by the legislature of a lien by attachment, absolutely barring all intervening claims until the proceeds of the property were in the hands of the plaintiff. The recognition of a superior or equal lien or preference created subsequently thereto will completely subvert the plain intent of these sections and the purpose of the legislature.

Prior to the decision of the case of Kuenzle & Streiff *v.* Juan Villanueva, Ed. A. Keller *v.* Juan Villanueva, 14 Off. Gaz. 2201, it was thought and so understood by the public, lawyers and even the Court of First Instance of Manila, that Chapter XVIII of the Code of Civil Procedure is a dead letter and attachments are worse than valueless.

Then came the above case which decided the question "whether an attachment levied on specific property gives to the attaching creditor a lien or a right to preference in the nature of a lien, superior to the statutory right to a preference which is recognized in Art. 1924 of the Civil Code in favor of the owner of an after acquired judgment.

Our Supreme Court, after reviewing many cases, speaking through Mr. Justice Carson, said:

> "On the other hand, it is very clear that the code provisions whereby specific property is attached 'for the satisfaction of any judgment which may be obtained against' the debtor, and limiting the amount of such property subject to attachment to an amount sufficient to justify such judgment, was intended not only to prevent the debtor from disposing of his property but to prevent other creditors from acquiring liens or preferences in the nature of liens, after the date of the attachment which might make it impossible for the

attachment creditor to satisfy his judgment out of the property attached by him. Though an attaching creditor has no right by the mere levy of an attachment to dislodge other creditors who have already acquired rights of preference affecting the property, he is clearly entitled to have the property held, in custodia legis, pending his action and for the satisfaction of any judgment he may obtain, free of all after-acquired liens and preferences. Otherwise prudent creditors would rarely assume the risk and expense of attachment proceedings. * * * We conclude that 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."

It was the intention of the Philippine Commission in enacting the law of attachments to give the attachment the same force and effect here that it has in the United States, namely, a lien on specific property which holds the property attached for the payment of the judgment in the action in which the attachment was levied; and to hold that an attachment is not a lien on the specific property attached is to destroy the accepted definition of attachment, is to change its nature beyond all recognition, is to alter the terminology of the law, is to defeat the intention of the legislature which enacted the law of attachments and is to use interpretation and construction not to administer the law but to destroy it altogether. To hold that the law of attachments in the Philippine Islands is simply a part of the system of concursos (bankruptcy), that relating to the distribution of the bankrupt's estate, now a misfit in several if not all of its aspects, is, in my judgment, judicial legislation. (Mr. Justice Moreland, in the case of Kuenzle & Streiff (Ltd.) *v.* Juan Villanueva, and Ed. A. Keller & Co. *v.* Juan Villanueva, *supra*.)

> "The mortgagee, the factor, or the bottomry lender, is in no better condition than the * * * attachment creditor. An attempt to make a distinction between them, which would save the rights of one, and impair or destroy those of another, would be judicial legislation—jus dare, not jus dicere. (Peck *v.* Jenness, 7 How. 612.)"

ATTACHMENT DISSOLVED BY INSOLVENCY.—Section 32 of our Insolvency Law (Act 1956) provides that "an assignment shall operate to dissolve any attachment levied within one month next preceding the commencement of the insolvency proceedings * * *"

JUDGMENT

JUDGMENT-LIENS VIEWED FROM AMERICAN STANDPOINT.—At common law, except for debts due the King, the lands of a debtor were not liable to the satisfaction of a judgment against him and consequently no lien thereon was created by the judg-

ment (Black on Judgments, Vol. 1, Sec. 397). The passage of the statute of Westminster 2d, 13 Edward I, c. 18, marks the beginning of the creation of judgment-lien. By that statute the judgment-creditor could sue out a writ commanding the sheriff to deliver to him all the chattels of the defendant (except oxen and beasts of the plough) and a moiety of his lands until the debt should be levied by a reasonable price or extent. This writ was denominated an elegit. The lands thus held in possession of the sheriff could not be foreclosed by a sale of the realty, but was limited to the reception of the rents and profits which land produced. So it is in fact a qualified or restricted lien. Judgment-lien then is a product of the statute, so that in the absence of express legislative enactment, judgments do not attach as liens to real estate in the modern sense of the term. Hence parties cannot by agreement convert a judgment into a chattel mortgage, or a bill of sale. (Lanning *v.* Carpenter, 48 N. Y. 408.)

The judgment-lien gives no property in debtor's land; it only gives the judgment-creditor a right to levy on the property of the debtor, that is, the right to make his lien effectual by a sale under execution, to the exclusion of adverse interests subsequent to the judgment. (Dail *v.* Freeman, 92 N. Car. 351.)

"A judgment is not a specific lien upon a specific real estate of the judgment-debtor, but a general lien upon all his real estate, subject to all prior liens, either legal or equitable, irrespective of the knowledge of the judgment-creditor as to the existence of such liens." (Rodgers *v.* Bonner, 45 N. Y. 379; Lanning *v.* Carpenter, 48 N. Y. 408; Dozier *v.* Lewis, 27 Miss. 679; Mansfield *v.* Gregory, 11 Neb. 297, 9. N. W. Rep. 87.)

It is often required by statutes that judgment shall be duly entered upon the docket before they can become liens upon the debtor's realty, at least as against subsequent purchasers in good faith, although the case of Gordon *v.* Rixey, 76 Va. 694 held the opposite.

WHAT IS NECESSARY TO JUDGMENT-LIENS.—In order that a judgment should create a lien upon the real property of the debtor, it is first of all necessary that it should be capable of collection by execution. A judgment which by its terms cannot be enforced against the property of a party cannot become a lien thereon. (In re Boyd, 4 Sawy. 262); (2) the judgment should have been rendered by a lawfully and validly constituted court; (3) there must be a valid and subsisting judgment; and (4) the judgment should be for a definite and certain sum of money.

Hamburger *v.* Easter, 57 Ga. 71;
Lirette *v.* Carrane, 27 La. Ann. 298;
Eames *v.* Germania Turn Verein, 74 Ill. 54.

Inasmuch as executors and administrators are not invested with the title to the lands of the decedent, it follows that judgment rendered against them in their representative character have no operation as liens upon realty belonging to the state. (Laidley *v.* Kline, 8 W. Va. 218; Woodyard *v.* Polsley, 14 W. Va. 211.)

TERRITORIAL RESTRICTION OF LIEN.—The judgment constitutes a lien only upon the real estate of the debtor lying within the territorial limit of the court pronouncing it. A judgment rendered in one state or country is not a lien upon land in another state or country. (Billan *v.* Herchlebrath, 23 Ind. 71.) In order to have that effect, it must be the basis of a suit or judgment in the second state or country, and then the lien will attach as an incident of the second judgment, not the first. (Black on Judgments, p. 512.)

LIENS BINDS REAL ESTATE.—Statutes usually provide that judgments shall be a lien on the "real estate" or "real property" of the defendant. Personal property is, therefore, excluded from the operation of the judgment.

IN THE PHILIPPINE ISLANDS

There is no such thing, in the Philippine Islands, as a lien by judgment. The only statutory reference to preference of claims arising from final judgment is found in Subsection 3 of Article 1924 of the Civil Code, which reads:

> "With regard to other real and personal property of the debtor, the following are entitled to preference:
>
> '3. Credits that without special privilege appear in a public instrument and final judgment.' "

Our Supreme Court in the case of Kuenzle & Streiff *v.* Villanueva, Ed. A. Keller *v.* Villanueva, 14 Official Gazette 2201, had occasion to construe said subsection. The following is a quotation:

> "Construing these provisions we have carefully indicated that these preferences do not constitute a lien upon the property of the debtor in the ordinary sense of the word as used in the English and American Jurisprudence, the statutory right secured to the creditor being merely a right to a preference in the distribution of the funds of the estate of the judgment or record debtor, in those cases wherein by intervention or otherwise, he is a proper party to the distribution proceedings and duly asserts his rights as a preferred creditor. We have had occasion also to indicate that these statutory preferences in favor of record and judgment creditors attach to the proceeds of the sale of all or any part of the property of the debtor, both real and personal, which may be the subject of distribution proceedings; it always being understood, however, that by the express terms of the various provisions of Chapter 3, of Title 17 of the Civil Code, these preferences are subordinated to credits which, under the provisions of that chapter, enjoy special preferences with regard to specific personal or real property, and also to the different classes of credits mentioned in subsections 1 and 2 of Art. 1924."

Under the Civil Code a public document, even when duly registered or protocoled, gives notice to the world only of the facts which it contains, i. e., its contents. If it does not speak of property, real or personal, and charge or incumber it, then no

notice is given to the world on that subject. But a judgment is not a public document. It cannot be recorded or protocoled. It is notice to no one and produces no effect whatever as to third persons under the law of the Philippine Islands. Third persons are entitled to notice before they can be deprived of their rights. It is the invariable rule of the Civil Code that a third person who deals with property cannot be prejudiced by any charge or incumbrance thereon of which he has no notice. (Mr. Justice Moreland in the case of Kuenzle & Streiff (Ltd.) *v.* Juan Villanueva; Ed. A. Keller & Co. *v.* Juan Villanueva, 14 Off. Gaz. 2215.)

RIGHT TO A PREFERENCE IN THE FUNDS INCLUDES REAL AS WELL AS PERSONAL PROPERTY.—As shown by the quotation, the right to a preference in the distribution of the funds secured to the creditor is extensive to personal property as distinguished from the American law, which makes the judgment extensive only to real estate, thereby excluding personal property from its operation.

DOES THE RIGHT OF PREFERENCE EXIST IN FAVOR OF THE JUDGMENT CREDITOR IN CASE OF APPEAL FROM HIS JUDGMENT?—Our Supreme Court, in the case of José McMicking *v.* Crisanto Lichauco, 12 Official Gazette 1296, held that the right of preference should be secured to the judgment creditor notwithstanding the appeal from his judgment; though of course the decree for the distribution of the funds should be so formulated that the amount to which the judgment creditor is entitled under his judgment will not be definitely turned over to him until and unless his judgment is affirmed on appeal; and the decree should further provide for the disposition of the amount thus retained, in the event that his judgment should be reversed in whole or in part.

The consensus of opinion among American courts sustains a similar principle and holds that the lien of a judgment is not necessarily destroyed by the perfecting of an appeal therefrom.

Black on Judgments, Vol. I, par. 473;
Thomson's Administrator *v.* Chapman's Administrator, 83 Va., 213;
Curtis *v.* Root, 28 Ill., 367;
Planters Bank *v.* Calvit, 3 Smedes and Marshall, Miss., 143;
Hardee *v.* Stovall, 1 Ga., 92;
Dewey *v.* Latson, 6 Cal. 130;
Moore *v.* Rittenhouse, 15 Ohio St., 310.

JUDGMENT VACATED BY INSOLVENCY.—Section 32 of our Insolvency Law (Act 1956) provides that "an assignment shall operate to vacate and set aside any judgment entered in any action commenced within thirty days prior to the commencement of insolvency proceedings, * * * and shall set aside and vacate any judgment entered by default or consent of the debtor within thirty days immediately prior to the commencement of the insolvency proceedings."

EXECUTION

WRIT OF EXECUTION DEFINED.—An execution is an order to the sheriff to attach and sell the property of the judgment debtor. (Osorio & Del Rosario *v.* Cortez and Manalo, 24 Phil. 661.)

UNDER THE AMERICAN LAW.

Nature and Effect of the Lien.—The lien of an execution does not of itself transfer title. It does not change the right of property, and vest it at once in the plaintiff in execution nor in the officer charged with the execution of the writ. The object of the lien is to make a judgment and execution effective by cutting off all transfers and assignments made after the inception of the lien. (Freeman on Executions, Sec. 195.) The object of the lien is to bind the property.

IN THE PHILIPPINE ISLANDS.—In the Philippine Islands there is no provision of law which provides that a levy under execution creates or fixes a lien, general or specific, in favor of a judgment creditor. While the American law, on the one side, recognizes such a lien by execution in favor of the judgment creditor, our law on the other side declares that the creditor acquires no lien upon the property of the debtor by virtue of the issue of execution other than a MERE RIGHT as prescribed in article 1924 of the Civil Code, of PREFERENCE which consists merely in RIGHT TO BE PAID FIRST, after the sheriff has marshaled the net proceeds of the sale. The necessary prerequisites to an action to obtain preference are:

First, the debtor's property shall not be sufficient to pay the claims of the rival creditors;

Second, the property shall have been sold or shall have been levied upon and be in the process of sale;

Third, a claim of preference in the distribution of the proceeds of that property shall have been made by one creditor and denied by another;

Fourth, the claim and denial must be maintained.

If one of these requisites is lacking the action cannot be maintained.

(Rafael Molina Salvador *v.* Enrique F. Somes, 14 Official Gazette, 149.)

Our Supreme Court, in the above entitled case, speaking through Mr. Justice Moreland, who delivered the concurring opinion, said:

"Preference does not create an interest in property. It creates simply a right of one creditor to be paid the proceeds of the sale of the property as against another creditor. It creates no lien on property and, therefore, general, to the preferred creditor. * * * The right of the plaintiff is not one in the corpus of the property. He got no lien or other right by his levy, for, after sale, any other creditor would have had the right to contest with him before the sheriff the application of the proceeds. His right was simply to have the proceeds applied in a certain way. IT WAS NOT A LIEN ON

> PROPERTY but a PREFERENCE IN APPLICATION. The law does not give the creditor who has a preference a right to take the property or sell it as against another creditor; it is one of the applications of proceeds after the sale—of payment of the debt."

RIGHT OF PREFERENCE COMMENCES AT THE LEVY.—The lien does not commence until the levy of the writ. The same result has been accomplished by declaring that the lien of a writ cannot be enforced as against bona fide purchasers and incumbrancers acquiring their title prior to the levy and without notice of the writ. (Freeman on Executions, Sec. 201.)

HOW MAY EXECUTION AND ITS RIGHT OF PREFERENCE BE AVOIDED.—An execution and its right of preference may be avoided by such conduct on the part of the plaintiff as shows any improper use of his writ, as where he takes out an execution with a view of binding defendant's property, but with no intent to make any immediate levy or sale; that is, when he intends to make an execution acquire the form of mere mortgage. In such case junior execution will outrank the one levied at plaintiff's instance.

Freeman on Executions, Sec. 205.

DURATION OF AN EXECUTION PREFERENCE.—Section 445 of the Code of Civil Procedure fixes the life of the writ of execution. Said section reads:

> "The execution may be made returnable, at any time, not less than ten nor more than sixty days after its receipt, by the governor, or his deputy, to the clerk of the Court rendering the judgment."

The attachment may be made at any time up to and including the very last day of the writ, but cannot be made thereafter, without the issuance of an alias writ. After the property has been attached legally within the lifetime of the writ, the property may be held by the sheriff, and sold thereafter. The sale by the sheriff under a valid attachment after the return day of the execution is valid, provided that the attachment was made during the lifetime of the writ.

Alagar *v.* Pio de Roda and Manalo, 29 Phil. 133. A levy made after the return day of the writ is not valid, and, therefore, after that time no execution preference will be recognized. The writ is functus officio. When the writ is legally dead, and can never be executed, the right of preference must also die with it, because the right of preference was conceded only that the writ might be more surely and effectually executed.

Freeman on Executions, Sec. 202.

EXECUTION DISSOLVED BY INSOLVENCY.—Section 32 of our Insolvency Law (Act 1956) provides that "an assignment shall operate to vacate and set aside any judgment entered in any action commenced within thirty days immediately prior to the commencement of insolvency proceedings and shall vacate and set aside any execution issued thereon * * *."

CHAPTER IV

BANKER'S LIEN

EXISTENCE OF THE LIEN.—Under the American Law, a bank has a lien on all moneys, funds and securities of a depositor for the general balance of his account.

Commercial Bank of Albany *v.* Hughes, 17 Wend. (N. Y.) 94;
State Bank *v.* Armstrong, 4 Dev. (N. Car.) 519.

The Codes of California, Idaho, Montana, Oklahoma, North Dakota and South Dakota provide that a banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business.

California, Civil Code, 1906, sec. 3054;
Idaho, Rev. Code, 1908, sec. 3449;
Montana, Civil Code Ann., 1895, sec. 3937;
North Dakota, Rev. Code, 1905, sec. 6288;
Oklahoma, Compiled Laws, 1909, sec. 4144;
South Dakota, Rev. Civil Code, 1903, sec. 2155.

The banker's lien is a part of the law merchant.

In the Philippine Islands a banker's lien does not obtain for the following reasons:

(1) The right that a bank has to take its depositor's money to satisfy a debt he owes the bank is in effect, *the right of set-off*. (Gibronbury Banking Co. *v.* Wakerman Bank Co. 20, Ohio C. C. 591, 10 Ohio C. D. 754. The common law set-off is similar to our "Compensation" under Article 1195 of the Civil Code. Yap Unki *v.* Chua Jam Co., 14 Phil. 602.)

(2) "Compensation shall take place when two persons in their own right, are mutually creditors and debtors of each other." (Article 1195, Civil Code.)

(3) Under Article 1200, par. 1, of the Civil Code compensation shall not be proper when any of the debts arise from a deposit, or from the obligations of the depositary or borrower. In other words, one who has in his possession a thing as a deposit or a loan (commodatum), cannot withhold the delivery of such thing held in deposit or as a loan (commodatum) from the person from whom he received it, by reason of the fact that the lender or depositor owes him an equivalent amount.

(4) A bailee cannot retain the thing loaned under the pretext that the bailor owes him something, even if it should be by reason of expenses." (Art. 1195, Civil Code.)

The reason for not allowing compensation in such cases is because of the pressing necessity to uphold the distinguishing nature of the obligations created by the contracts of depositum and commodatum, in which there is the undeniable obligation to

return the same thing which has been delivered. If compensation should take place, the effects and condition of these contracts would be varied, which is the aim of the law to avoid.

19 Q. Mucius Scaevola, Commentaries on the Civil Code, 1022.

My next inquiry is directed to the adjudications of the Supreme Court of Louisiana in the matter of "compensation."

If a deposit of money is made, not sealed up in a package, but counted out and extended on the pass book (libro de Ingresos, as the term is used here in the Philippine Islands) in the form of an open account, and credited as cash to the depositor, and the face of the account shows that there was not a deposit of bills, or coin or packages to be restored identically, the deposit is at the risk of the depositary, and it cannot be regarded as a real deposit. Such deposit creates between the parties the relation of a debtor and creditor, and gives to the depositaries the right to use the money in the course of their business; *le domaine de la chose*, the power of using the money passes to the depositaries, and the obligation of returning, not the same, but a like amount is assumed by the depositaries; the ability of the depositaries to return a like amount depends upon their wealth, credit and the vicissitudes of business.

> Mathews, Finley & Co. *v.* Their Creditors—R. W. McKenzie, 10 Louisiana Annual Reports, 342.

While it is true that the relation of debtor and creditor is created between the depositor of money in a bank and the depositary (the Bank) as stated above, yet the Supreme Court of Louisiana, a country in which "civil law has withstood all attempts to supplant it," in the case of Hancock *v.* Citizens' Bank, 33 Louisiana Annual Reports 592, said:

> "Repeated adjudications in the jurisprudence of this State have placed beyond the domain of further controversy the principle that compensation does not take place in the confidential contracts arising from irregular deposits, such as the deposit of money with a banker, and the depositary is not authorized to apply the funds on deposit in his hands to the payment of the debts of the depositor, except there is a special mandate from him."

The provision in the by-laws of a corporation to the effect that "All notes discounted by the Bank, which are not taken up before the closing of the Bank, on the last day of grace, shall be charged to the account of the paties to the same, provided there are funds in the Bank to the credit of such person or persons" does not operate to give the right of compensation in the deposits alluded to in my discussion, for nothing is better settled than that by-laws of a corporation, in order to be valid must be consistent with the general law, and that they cannot have effect to interfere with

the rights and privileges of third parties or strangers, not members of the corporation, or be made binding on them, without their consent.

Potter on Corporations, Secs. 75-76;
Field on Corporations, Secs. 295-296;
Grant on Corporations, pp. 76 et seq.;
Angell and Ames, Secs. 333, 335.

The American law partly recognized what has just been said when it declares that "banks have no lien on a box containing securities deposited with them by a customer for safe-keeping, he keeping the key and having access to the box, and the bankers not having access to the contents of it."

Jones on Liens, Sec. 254.

This is what is called under the laws of Louisiana as special or real deposits of money. Checks cannot be drawn against the money so deposited.

Mathews, Finley & Co. *v.* Their Creditors—R. W. McKenzie, 10 Louisiana Annual Reports, 342; Article 1769 of the Spanish Civil Code.

Act 2612 a recent enactment of the Philippine Legislature, creating the Philippine National Bank is silent upon the question of a banker's lien. Therefore, if the bank wants to acquire a lien, it must properly constitute a pledge, as section 40 of said act intimates, or else get the consent of the depositor to allow that compensation should take place.

SAVINGS BANK

DEFINITION.—Any banking corporation, the principal business of which is the receiving of funds on time deposits, and their investment, together with that of its capital, in bonds, or in loans secured by bonds, bullion, or real estate mortgages, as hereinafter provided, or in any combination of the aforementioned forms of investment, shall be known as a savings and mortgage bank for the purpose of this Act. Sec. 103, Act 1459.)

The Supreme Court of the United States, in the case of Huntington *v.* National Savings Bank, 6 Otto 388, expressed its opinion, on the nature of a savings bank, as follows:

> "It is not a commercial partnership: nor is it an artificial being, the members of which have property interests in it; nor is it strictly eleemosynary. Its purpose is rather to furnish a safe depositary for the money of those members of the community disposed to intrust their property to its keeping. It is somewhat of the nature of such corporations as church wardens for the conservation of the goods of a parish, the college of surgeons for the promotion of medical science, or the society of antiquaries for the advancement of the study of antiquities. Its purpose is a public advancement, without any interest in its members."

DEPOSITOR'S LIEN.—In some States of the American Union, upon the failure of a savings bank, depositors are considered as general creditors; while on others they are not to be paid until after all other debts for management, etc., are discharged. As such banks are only agencies for receiving and investing the money of depositors, one depositor cannot ordinarily bring an action to recover the full amount, and if the deposits are scaled the adjustment will be deemed proper. Attempts are often made to hold a deposit as special and entitled to a preference, but a deposit, although special, is not always entitled to a preference, and generally a special depositor fares no better than others. (5 Cyc. 611-612.)

In the case of Newark Savings Institution Case, 11 Stew 552, the court in discussing the nature of a savings bank used the following language:

> "That the design of the legislature in granting the charter was to promote industry and frugality, and preserve and husband the fruits of honest toil; that it contemplated no benefit to the managers, but looked only to the security and advantage of the depositors; that the trust thus created was a general or public trust, that no depositor had, under the charter or in equity, any right to any particular security in the hands of the institution for his deposit any more than any other depositor, and that all the assets, after deducting necessary expenses, were held as a common fund for the security of all the depositors."

In Coite *v.* Society for Savings, 32 Conn. 173, it was said:

> "If a savings institution, carefully and honestly managed, should meet with loss by the depreciation of its securities, can it justly and equitably be held that a depositor who has borrowed the trust funds to the amount of his deposit has thus secured himself against the loss? It is clear that the borrower in such case must, in equity, be held to be bound to pay his debt, and take his dividend of his deposit and its accretions."

In Stockton *v.* Mechanics Bank, 32 New Jersey, Equity Reports, 168, it was held that the debts of a savings bank, for loans and incidental expenses, are entitled to a preference over the claims of the depositors. They are the expenses of executing the trust.

More on Banks and Bankings, in Section 618, says:

> "A by-law authorizing a savings deposit to be withdrawn after giving due notice, without regard to the condition of the investment at the time, indicates that the depositor has no trust in the investment."

As will be seen from all the above authorities, in the United States, a depositor has no particular security in the hands of the institution for his deposit any more than any other depositor; depositors are not to be paid until after all other debts for management, etc., are discharged.

In the Philippine Islands, a contrary rule obtains. Thus section 107 of the Corporation Law provides:

> "The capital stock and assets of every savings and mortgage bank can constitute the security of depositors, and depositors have the priority of right over all others to such assets. The directors of a savings and mortgage bank shall not create any debt or liability against the corporation for any purpose whatever other than for deposits made with it and the reasonable and necessary current and running expenses of the corporation."

Section 112 of said Corporation Law is of the following words:

> "Whenever there is a call by depositors for repayment of their deposits and the call so made equals or exceeds the moneys actually available in the bank and disposable for the purpose of paying deposits, the savings and mortgage bank shall not make any new loans or investment of the funds of depositors or of the earning of such funds until the call of the depositors has been satisfied."

In other words, a depositor in a savings bank has a lien on the capital stock and assets of such savings institution for the repayment of his deposit.

CHAPTER V

SUCCESSION DEBTS

CREDITOR'S LIEN ON PROPERTY OF DECEASED.—Under the Spanish law, upon the death of a person, the sole and exclusive heir became the owner of the property and was charged with the obligations of the deceased at the moment of his death, upon precisely the same terms and conditions as the property was held and as the obligations had been incurred by the deceased prior to his death, save only that when he accepted the inheritance, "with benefit of an inventory" he was not held liable for the debts and obligations of the deceased beyond the value of the property which came into his hands (Suiliong & Co. *v.* Chio-Taysan, 12 Phil. Rep. 13). This is shown by articles 657, 660 and 661 of the Civil Code which provide:

> "The righs to the succession of another are transmitted from the moment of his death.
>
> "An heir is a person succeeding under an universal title; and a legatee, one succeeding under a special title.
>
> "Heirs succeed the deceased by the mere fact of his death, in all his rights and obligations."

The property of the deceased, both real and personal, became the property of the heir by the mere fact of death of his predecessor in interest, and he could deal with it in precisely the same way in which the deceased could have dealt with it, subject only to the limitations which by law or by contract were imposed upon the deceased himself. He could alienate or mortgage it with the same freedom as could the de-

ceased in his lifetime; the unsecured debts and other personal obligations of the heir for which he was held personally responsible in precisely the same manner as the deceased, save only, as has been said before, where he availed himself of the privilege of taking the estate "with the benefit of an inventory," in which the case of his liability was limited to the value of the estate which came into his hands, though in other respects its character as a personal liability remained unchanged. Thus death created no new lien in favor of creditors upon the property of the deceased, which was not in existence at the time of his death; personal debts and obligations of the heir, to whom the creditor was compelled to look for payment, with no new right in or to the property of the deceased, in the hands of the heir, which he did not have in or to such property in the hands of the deceased.

(Suiliong & Co. *v.* Chio-Taysan, *supra.*)

Our Supreme Court, through Mr. Justice Carson, in the said case of Suiliong & Co. *v.* Chio-Taysan, has declared that the provisions of articles 660 and 661 of the Civil Code have been abrogated.

Such was the status of succession debts obtaining under our Civil Code. The Code of Civil Procedure (Act 190), however, wrought some radical changes in this field of the law. Personal obligations, which were such before the death of the deceased, are no longer considered as such but partake of the nature of a real right, that is a right in rem—in the thing itself. The property of the deceased may be subjected to the payment of such debts or obligations wherever it be found. Thus section 597 expressly provides that, in those cases where settlement of an intestate estate may be made without legal proceedings, either by a family council, as known under the Spanish law, or by an agreement in writing executed by all the heirs, the real estate of the deceased remains charged with liability to creditors of the deceased for two years after the settlement, "notwithstanding any transfers thereof that may have been made"; and prior to the date of such settlement, the real estate at least was charged in like manner with the debts of the deceased. (Suiliong & Co. *v.* Chio-Taysan, *supra.*) Sections 727 and 729 of the Code of Civil Procedure read as follows:

> "The personal estate of a deceased person shall be first chargeable with the payment of debts and expenses; and if the personal estate is not sufficient for that purpose, the whole of the real estate, or so much thereof as is necessary, may be sold for that purpose by the executor or administrator shall have the right to the possession of the real as well as personal estate of the deceased, so long as is necessary for that purpose."
>
> "The estate, real or personal, given by will to the devisees, or legatees, shall be liable for the amount of the debts, expenses of administration, and family expenses, in proportion to the amount of the several devises or legacies, except that specific devises or legacies may be exempted if it appears to the court necessary to carry into effect the intention of the testator, and if there is sufficient other estate."

As will have been seen from a reading of these two sections, the machinery used to obtain the recovery of claims against the deceased, is not by proceeding directed against the heir, but by proceedings looking directly to the subjection of the property of the deceased to the payment of such claims. To conclude I quote what Mr. Justice Carson declared in said case, which is as follows:" * * * and the new code having provided a remedy whereby the property of the deceased may always be subjected to the payment of his debts in whatever hands it may be found, the right of a creditor to a lien upon the property of the deceased, for the payment of the debts of the deceased, created by the mere fact of his death, may be said to be recognized and created by the provisions of the new code."

In the United States, as shown by the following authorities, a creditor has a lien upon the property of the deceased, for the payment of the debts of the deceased, created by the mere fact of his death.

In Leavens *v.* Butter, 8 Poter's Reports (Ala.) 380, it was said by the court:

> "The payment of the debts will claim precedence of the legacies, and the court will not, in general, order legacies to be paid, where it appears that the assets will be required to pay debts.
>
> "It was one time a much mooted question whether an executor could retain a sufficiency of the assets to satisfy a contingent debt, but it is now well settled that the legatee will be entitled to it, on giving security to refund, should the debt become absolute; or he may have it paid into court for its better security."

In Sibley et al. *v.* Simonton (20 Federal Reporter 784) the court used the following language:

> "It is well settled that the claims of a deceased person must be satisfied before a devisee can derive any benefit from the bounty of the devisor."

Again, in Ferguson *v.* Ferguson (51 Georgia 349) it was held that:

> "Outstanding debts have priority over claims for legacy."

Again, in the Succession of Mrs. T. Bachemin (19 Louisiana Annual Reports 488) the court said:

> "The heirs can only claim the residue after deducting the amount of the succession liabilities."

And lastly, 40 Cyc. 405, 597-598 says:

> "So far as assets may have reached his hand in due course every executor or administrator is bound to administer the estate committed to him according to law, by paying the debts, claims, and charges upon it, in their legal order of preference, before settling legacies or gifts, or making any distribution to the heirs. * * * The right of a legatee or distributee to his legacy or distributive share is suspended until all debts and liabilities of the decedents estate have been satisfied, although every legacy or devise may be thereby

defeated or until the suspension is removed by the assent of the personal representative, where he is satisfied that the estate is solvent, or by the lapse of time for the settlement of the estate."

However, a case more directly in point than any of the above cited, is that of Alexander *v.* Alexander, 26 Nebraska Reports, 73—which was an action to compel partition—wherein the court had occasion to construe the following provisions of the procedural law of Nebraska which read as follows:

"Sec. 289. After the payment of the debts, funeral charges, and the expenses of administration, and after the allowances made for the expense of the family of the deceased, and for the support of the children under seven years of age, and after the assignment to the widow of her dower, and of her share in the personal estate or when sufficient assets shall be reserved in the hands of the executor for the above purposes, the county court shall, by a decree for that purpose, assign the residue of the estate, if any, to such other persons as are by law entitled to the same."

"Sec. 291. Among other things provides: * * *, but no heir, devisee or legatee, shall be entitled to a decree for his share until payments of the debts and allowances and expenses mentioned in the preceding section have been made or provided for, unless he shall give a bond, * * * to secure * * * the payments of such debts and expenses.

The Supreme Court of Nebraska in the above entitled case held: "There being no claim that all debts, allowances, and expenses against the estate have been paid or provided for, or that the plaintiffs had given bonds to secure the payment of the same, they, therefore, cannot maintain an action of partition or for distribution."

CHAPTER VI
UNPAID SELLER

AN UNPAID SELLER'S LIEN.

Definition of Unpaid Seller.—A seller of goods is deemed to be unpaid-seller—(a) when the whole of the price has not been paid or tendered. (b) * * * (Sec. 54, Uniform Sales Act of New York, 1911).

Lien of Seller on Goods Sold.—Under the American law, unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for possession of goods (Sec. 42, Uniform Sales Act of New York, 1911). Accordingly, the seller always has a lien upon the goods for their price, so long as they remain in his possession and the purchaser neglects to pay the price, unless the terms of the bargain indicate a contrary agreement.,

Carlisle *v.* Kinney, 66 Barb. (N. Y.) 363;
Cornwall *v.* Haight, 8 Barb. (N. Y.) 327, reod., 21 N. Y. 462;
Wanamaker *v.* Yerkes, 70 Pa. St. 443;
Meyers *v.* McAllister, 94 Minn. 510, 103 N. W. 564.

"A lien for the price is incident to the contract of sale, when there is no stipulation therein to the contrary; because a man is not required to part with his goods until he is paid for them." (Arnold *v.* Delans, 4 Cush. (Mass.) 33, 39; 50 Am. Dec. 754.)

"Where goods are sold and nothing is said as to the time of the delivery, or the time of payment, and everything the seller has to do with them is complete, the property rests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, the seller is liable to deliver them whenever they are demanded upon payment of the price; but the buyer has no right to have possession of the goods till he pays the price. * * * If the seller has dispatched the goods to the buyer, and insolvency occurs, he has a right in virtue of his original ownership to stop them in transitu. Why? Because the property is vested in the buyer, so as to subject him to the risk of any accident, but he has not an indefeasible right to the possession, and his insolvency, without payment of the price, defeats that right. And if this be the case after he has dispatched the goods, and whilst they are in transitu, a fortiori, is it when he has never parted with the goods, and when no transitus has begun. The buyer, or those who stand in his place, may still obtain the right of possession if they will pay or tender the price, or they may still act upon their right of property if anything unwarrantable is done to that right. (Bloxam *v.* Sanders, 4 B. & C. 941)."

Our law on this subject is Articles 1466 and 1467 of the Civil Code, which read as follows:

> "The vendor shall not be bound to deliver the thing sold, if the vendee should not have paid the price, or if a time for the payment has not been fixed in the contract."
>
> "Neither shall the vendor be obliged to deliver the thing sold when a delay on time for payment may have been agreed upon, and it should be discovered after the sale that the vendee is insolvent to such a degree that the vendor is in imminent danger of losing the price."

The provisions of the said article 1466 contain a rule and an exception: the rule is that the thing shall not be delivered, unless the price be paid; and the exception is that the thing must be delivered, though the price be not first paid, if a time for such payment has been fixed in the contract. The delivery of the thing sold does not depend on the payment of the price, in this case of exception contained in Article 1466 of the Civil Code. (Florendo *v.* Foz, 20 Phil. Rep. 393.)

"If this period was fixed, the vendor, notwithstanding that such period has not terminated, nor consequently, that he has not collected the price, is obliged to deliver the thing sold." (10 Manresa, Commentaries on the Civil Code, 130.)

It will thus be readily seen that the Spanish law is similar to the American law with regard to the retention of the thing sold until the purchase price has been paid. In a cash sale, the normal guaranty of the seller lies in the lien over the thing sold, that is, the right of retention, as long as the price is not paid (Art. 1466), and the rescis-

sion of the contract when the vendee should not appear to receive the thing sold at the fixed time for its delivery, or having appeared he should not have offered the price at the same time (Art. 1505). However, when there is a time fixed for payment, the intrinsic guaranty of retention of the thing sold, that is to say, the lien over the thing sold, cannot coexist with the assumption of risk by the vendor and delivery of the thing, which is a consequence of fixing the time for payment; and extrinsic guaranty must be sought elsewhere in the realm of suretyship, pledge, or mortgage. (23 Q. Mucius Scaevola, Commentaries on the Civil Code 482.) Article 340 of the Code of Commerce strengthens this view. Said article reads as follows:

> "During the time the articles sold are in the possession of the vendor, even though they be in the capacity of deposit, the latter shall have preference to the same over any other creditor to obtain the payment of the price with the interest arising from the delay."

Once the vendor parts with the possession of the thing, he cannot later claim the right to the possession of the property sold because the purchase price remains unpaid. (Rubert & Guamis *v.* Luengo & Martinez, 8 Phil. 559.) Article 1467 of the Civil Code deals with the insolvency of the buyer. It says that even though a fixed time for payment should have been stipulated, if before the delivery of the thing sold, the vendor should have discovered that the vendee is insolvent to such a degree that the vendor is in imminent danger of losing the price, the latter may withhold the delivery of the thing. (10 Manresa, Commentaries on the Civil Code, 139; Jones on Liens, Sec. 811.) A person is insolvent who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not. (Williston on Sales, Sec. 522.)

Part Payment Will Not Divest Seller of His Lien.—Where the vendee pays a part of the price, for goods sold for cash or on credit, such payment does not divest the vendor of his lien so long as he retains possession. (Buckley *v.* Furniss, 17 Wend. (N. Y.) 504; Williams *v.* Moore, 5 N. H. 235.) However, payment in full for a severed portion of the goods divests the seller of his lien in respect of that portion of the goods which has been actually paid for. The sale may be apportionable, although in one sense the contract is an entire contract. (Jones on Liens, Sec. 80, citing many cases.)

For What May the Vendor Claim a Lien.—The vendor can only claim a lien for the price, and not for keeping the thing sold, because "no person has by law a right to add to his lien upon a chattel a charge for keeping it till the debt is paid; that is, in truth, a charge for keeping it for his own benefit."

Sommes *v.* British Empire Shipping Co., 8 H. L. Cases, 338, 445.

Seller's Lien Depends on His Retaining Possession.—Both under the American and the Spanish law, the seller loses his lien if the goods come into the possession of the buyer.

Robert & Guamis *v.* Luengo & Martinez, 8 Phil. 559;
Holland's Assignee *v.* Cincinnati Co., 97 Ky. 454, 40 S. Q. 972;
Thompson *v.* Conover, 32 N. J. L. 466.

And it is not revived if the goods are redelivered to the seller for a special purpose, as for packing. (Valpy *v.* Gibson, 4 C. B. 837.) But the wrongful taking of the goods by the buyer without the assent of the seller does not destroy the lien. (Bush *v.* Bender, 113 Pa. St. 94, 4 Atl. 213.)

A glance at paragraph 1 of article 1922 of the Civil Code will probably lead one to believe that there is a lien in favor of the vendor for the unpaid price even after the goods have left his possession. It is therefore important to determine the exact nature of the right declared by said article 1922, paragraph 1. That paragraph is as follows:

> "With regard to specified personal property of the debtor, the following are preferred:
>
> " '1. Credits for the construction, repair, preservation, or for the amount of the sale of personal property which may be in the possession of the debtor to the extent of the value of the same.' "

Our Supreme Court, in the case of Rubert & Guamis *v.* Luengo & Martinez, 8 Phil. 558, has declared that said paragraph "does not give any lien to the creditor upon the property itself. It simply provides that when the proceeds of the property are distributed, the preferred creditor shall be paid first. Not having any lien upon the property, the vendor has no right to the possession of the property. The vendor has no right to prevent a seizure of the goods upon an attachment or execution issued at the suit of another creditor, but he has a right to secure from the proceeds of the sale made under such seizure the payment of his claim before the claims of other creditors are paid. The following are the requisites for the application of said paragraph 1 of article 1922 of the Civil Code:

1. There must necessarily be a sale of the property before the right of the creditors can be adjusted (Rubert & Guamis *v.* Luengo & Martinez, 8 Phil. Rep. 559; Torres *v.* Genato, 7 Phil. Rep. 206.)

2. Property over which the preference is asserted must be in the possession of the debtor. (McMicking *v.* Tremoya, 14 Phil. Rep. 259.)

3. The claim to which a preference is given must be a claim for specific personal property found in the possession of the debtor. The mere fact that the vendee owed the vendor a sum of money for goods sold and delivered, would not justify the said vendor in entering the store of the vendee and

claiming any of the goods which were there found which they had sold. They must prove that the particular goods were not only sold to the debtor, but that the price of the particular goods selected had not been paid, before they were entitled to the right of preference as provided in said article of the Civil Code. (McMicking *v.* Tremoya, 14 Phil. Rep. 259.)

4. Vendor must identify property in order to establish preference. Thus, where two vendors have shown that certain goods, the proceeds of which are in the hands of the sheriff, were the particular goods sold by them separately and that these particular goods have not been paid for, but are unable to show what particular goods were sold by each, they will not be entitled to a preference. The right of preference depends upon the ability to identify the property. This is a condition precedent to a legal right. (McMicking *v.* Co Piaco, 24 Phil. Rep. 445.)

Property Will Not Pass under Conditional Sale.—Under a conditional sale, the title to the property does not pass though the same be delivered.

Bachrach *v.* Peterson, 7 Phil. 371;

Kuenzle & Streiff *v.* Watson & Co., 13 Phil. 26.

The vendor, in trying to recover back the property sold, does not assert such right by virtue of a lien, but by virtue of the title to the property which he expressly reserved to himself.

Harkness *v.* Russell, 118 U. S. 663, 30 L. Ed. 285, 7 Sup. Ct. 51;

Frick *v.* Hilliard, 95 N. Car. 117; Dec. Sup. Ct. of Spain, February 16, 1894.

But if the vendor retains for himself the title to the property and a lien is in some form reserved to him, though this may be a valid contract between the parties, it does not protect the property from seizure by creditors of the purchaser, or from passing a sale made by him.

Heryford *v.* Davis, 102 U. S. 235, 26 L. Ed. 160, 2 Ky. L. 95.

The unstability of things movable, says Q. Mucius Scaevola, in his Commentaries on the Civil Code, Vol. 23, page 482, which exerts a great influence in the juridical field, and which determines the very fundamental principle that possession is equivalent to title, does not permit of preferences of a real nature over those things, though they may be simulated and hidden under apparent forms of legal virtuality, but of undoubtedly juridical perversity; for, should such forms prevail, the rights of third persons acting in good faith would be left unprotected, which, if they are protected by law with regard to rescissory actions (Art. 1295, paragraph 2), they are not and cannot be protected from reivindicatory actions because the right of the person claiming the ownership is, to a certain degree absolute and divisible with third persons; wherefore the reivindicatory action might be converted as a licit means of depriving a man of his property for the fraudulent convenience of the supposed purchaser and vendor.

STOPPAGE IN TRANSITU

STOPPAGE IN TRANSITU DEFINED.

> "The doctrine of stoppage in transitu is that a vendor may stop the goods which he has sold to and which have become the property of the purchaser at any time before they have got into his possession, if he has become insolvent." (Fraser *v.* Witt, L. R. 7 Eg. 64.)

The fundamental doctrine supporting the right is the doctrine of failure of consideration. It is the injustice of allowing the buyer to have property when he has not paid and, owing to his insolvency, cannot pay the price which was to be given in return for the goods. (Williston on Sales, Sec. 518.)

EXISTENCE OF THE RIGHT UNDER THE SPANISH LAW.

The Spanish law does not recognize the doctrine of stoppage in transitu. If the insolvency of the buyer should be known before the sale is perfected, that is, before the vendor and vendee should agree upon the thing which is the object of the contract and upon the price, the vendor would not contract, or would not consent to sell on credit; however, if the insolvency of the buyer should be discovered, because delivery to the carrier is tantamount to the consignee, then article 1467 of the Civil Code would not be applicable. Paragraph 1 of Article 1129 of the Civil Code is the controlling article (10 Manresa 140). Said paragraph 1 of Article 1129 is of the following tenor:

> "The debtor shall lose all right to profit by the period—
>
> 1. If, after contracting the obligation, it should appear that he is insolvent, unless he gives security for the debt."

The remedy given to the vendor in such case is to have the debt, which was otherwise to be paid in a fixed time, demandable at once, aside from the right also given to him to ask an attachment. (19 Q. Mucius Scaevola, Commentaries on the Civil Code, 706.)

My argument negativing the recognition of this right of stoppage in transitu is strengthened by Article 368 of the Code of Commerce which reads as follows:

> "The carrier must deliver to the consignee without any delay or difficulty the merchandise received by him, by reason of the mere fact of being designated in the bill of lading to receive it; and should said carrier not do so he shall be liable for the damages which may arise therefrom."

The Supreme Court of Spain established, in an opinion of October 5, 1876, that the carrier has no personality to investigate the title with which the consignee receives the merchandise transported.

A remedy is given by law in article 360 of the Code of Commerce, by which "the vendor, that is, the shipper, may, without changing the place where the delivery is to be made, change the consignment of the goods delivered to the carrier, and the latter shall comply with his orders, provided that at the time of making the change of the

consignee the bill of lading subscribed by the carrier be returned to him, if one were issued, exchanging it for another containing the novation." As apparent from the reading of the said article,

(1) the ship must not yet have left the port of loading, and

(2) the bill of lading must be capable of being returned to the captain for exchange, for if it should have been sent by another steamer which has already left, then this article is not applicable.

The intimation of this article is that after the goods are placed on board the ship, the shipper cannot take them back from the ship unless it can be done without causing any delay to the ship, and if any delay is caused then the payment of demurrage will precede the taking of the goods; but he may change the name of the consignee, without changing the place where the delivery is made. The shipper, that is, the vendor, may conveniently protect himself by naming himself as consignee of the bill of lading. In such a case the property in the goods will not pass and the seller is entitled to receive the goods from the carrier at their destination as owner, not by virtue of the peculiar doctrine of stoppage in transitu.

Under the Louisiana practice, carriers are nothing more than agents of the shipper for the transmission of the goods to the vendee. Therefore, the transitus of goods is not at an end when they are in the hands of an agent for transmission to the vendee; the vendor may retake them, although they may have been attached by a creditor of the vendee.

(Marshall & James *v.* Fall & Co. and Fall & Wilson—Schaffer, Roberts & Co., 9 Louisiana Annual Reports 92.)

It must, however, be noted that the Louisiana Court in deciding this case based its decision on common law authorities such as Kent's Commentaries, Smith's Mercantile Law, and Cross on Liens. No civil law writer on the subject was cited.

Before closing my argument it would not be useless to say that France in Article 578 of the Code of Commerce expressly recognizes the right of the seller to stop goods while in transit and not delivered to the purchaser's warehouse or the warehouse of this commission agent. The goods cannot be stopped if before arrival they have been sold on the faith of invoices, bills of lading, or shipping receipts. The right exists only in case of the buyer's bankruptcy.

I, therefore, urgently recommend legislation in this field of the law with a view to guard the interests of merchants and commerce in general.

CHAPTER VII
INNKEEPER

INNKEEPER DEFINED.

"A common innkeeper is a person who generally makes it his business to entertain travelers and passengers, and provide lodging and necessaries for them and their horses and attendants. (4 Words and Phrases, 3627.) The term includes a "hotel"

in a city which receives transient persons as guests. (Taylor *v.* Monnot, 11 N. Y. Super. Ct. (4 Duer) 116). A boarding-house keeper is not an innkeeper, and is not subject to the responsibility or entitled to the privileges of a common innkeeper (Redg. Carr., Sec. 545.) One who merely keeps a restaurant where meals are furnished is not an innkeeper (People *v.* Jones (N. Y.) 54 Barb. 311, 316). A sleeping car company is not an innkeeper (Welding *v.* Wagner (N. Y.) 1 City Ct. R. 66). One who rents out the upper rooms of a building to lodgers whom he does not supply with meals, and rents the basement of the building to another person, who keeps an independent restaurant therein is not an innkeeper. (Cochrane *v.* Schryver (N. Y.) 12 Daily, 174).

BOARDING HOUSE DISTINGUISHED.

In a boarding house the guest is under an express contract at a certain rate for a certain length of time; but in an inn there is no express engagement. The guest being on his way, is entertained from day to day, according to his business on an implied contract. (Foster *v.* State, 84 Ala. 451; Pullman Palace Co. *v.* Lowe, 28 Neb. 239.)

AN INNKEEPER'S PARTICULAR LIEN.

Under the American law an innkeeper has a particular lien for the reason that he is under an obligation to serve the public. The innkeeper, in return for the obligation imposed upon him to entertain any guest who may come to his house, and the liability incurred for the safekeeping of his goods, is invested with a lien upon the property of his guest. (Jones on Liens, Sec. 498.)

Under the Spanish law, if such lien exists at all, it must be found in paragraph 5, Article 1922, of the Civil Code, which provides that, with relation to particular property of the debtor, preference shall be given to

> "Expenses of boarding with regard to the personal property of the debtor existing in the inn."

Our Supreme Court, in the case of Peña *v.* Mitchell, 9 Phil. Rep. 594, generally said that the provisions contained in Title XVII (Book IV) of the Civil Code, devoted exclusively to "la concurrencia y prelación de créditos (the concurrence and preference of credits)" are intended merely to provide rules for the ascertainment of the right of priority in payment of various classes of credits when the property of the debtor is in course of distribution in a judicial proceeding, and the creditor duly asserts his rights as a preferred creditor. We do not think that these rules for the classification of credits create, or were intended to create, a lien in favor of the creditor upon the property of the debtor, which attaches to such property and gives to the creditor a special interest therein, other than the mere right of preference in the distribution of the proceeds of the sale of such property in the course of judicial proceedings wherein the creditor is a proper party and duly asserts his right to a preference."

But notwithstanding this general interpretation put by our Honorable Supreme Court, I believe that there is a lien in favor of the innkeeper with regard to property existing in his inn belonging to the debtor, basing my conclusions on the following reasons:

(1) At common law, a lien in its proper legal sense imports that one is in possession of the property of another, and that he detains it as security for some demand which he has in respect to it. (Gladstone *v.* Birley, 2 Mer. 404.) A lien, says Mr. Jones in his work on Liens, sec. 20— implies:

> First, possession by the creditor;
> Second, title in the debtor;

Third, a debt arising out of the specific property. As long as these three requisities are existing, there is no doubt but that there exists a lien. This lien is understood to be effective only while the goods continue in possession of the party claiming same. (Sweet *v.* Pym, 1 East 4.)

(2) The common law theory is not the only reason. I found still further support in Article 1780 of the Civil Code, which reads:

> "The bailee may retain the thing bailed until the full payment of what is due him by reason of the depositum."

(3) Under the Civil Code persons cannot secretly agree to a charge or incumber property and, by virtue of that agreement, create a charge or incumbrance which will prejudice innocent persons dealing with the property sought to be charged or incumbered. Third persons are entitled to notice before they can be deprived of their rights. To this end the Civil Code provides, with regard to the pledge of personal property, article 1865:

> "A pledge shall not be effective against a third person, when evidence of its date does not appear in a public instrument."

With regard to the mortgage, which, under the Civil Code, refers exclusively to real estate, the Code provides, article 1875, as follows:

> "Besides the requisites mentioned in article 1857, it is indispensable, in order that the mortgage may be validly constituted, that the instrument in in which it is created be entered in the registry of property."

If these requirements are not complied with third persons may deal with the property sought to be pledged or mortgaged secure from the effects of the pledge or mortgage. Certain charges upon property may exist without appearing in a public document and without registration: such as antichresis, those arising from repair, preservation and transportation of property, rents, hotel charges and the like. But in these cases, save that of antichresis, the charge arises by operation of law and not by agreement of the parties; and the charge exists by virtue of the possession of the property by the creditor and disappears with the loss of possession. In these cases, therefore, persons dealing with the property are put upon their inquiry by virtue

of the fact that the property is found in the hands of persons other than those with whom he is dealing.

> Mr. Justice Moreland, in the case of Kuenzle & Streiff (Ltd.), *v.* Juan Villanueva, and Ed. A. Keller & Co. *v.* Juan Villanueva, 14 Official Gazette 2215.

However, if the person claiming the lien departs with the possession of the goods, the lien is lost, and only a personal action ensues (11 Manresa 709), and it is then and not until then, I believe that the interpretation given by the Supreme Court in the said case of Peña *v.* Mitchell, 9 Phil. Rep. 594, will be said to be applicable, inasmuch as the lien was lost with the departure of possession.

LIEN LIMITED TO CREDITS RESULTING FROM BOARD AND LODGING.

The lien created in favor of an innkeeper on the goods of his guest can only attach when the credits are due as a result of board and lodging, and not those which may be due the innkeeper from the guest in any other capacity, as, for example, a loan made to the guest aside from board and lodging. (12 Manresa 698-699.) The goods must have been received by the innkeeper in his capacity as such innkeeper.

> Binns *v.* Pigot, 9 Car. & P. 208
> Orchard *v.* Rachstraw, 9 C. B. 698;
> Fox *v.* McGregor, 11 Barb. (N. Y.) 41;
> Ingallsbee v. Wood, 33 N. Y. 577, 88 Am. Dec. 409;
> Miller *v.* Marston, 35 Maine 153, 56 Am. Dec. 694;
> Walker *v.* Kennedy, 20 Pa. Co. Ct. 433, 7 Pa., Dist. 516).

PART THAT OWNERSHIP OF GOODS PLACED IN THE INN BY THE GUEST PLAYS IN DETERMINING THE LIEN.

A noteworthy difference is found between the American and the Civil Law on this point. Under the American law, there is no distinction between the goods of a guest and those of a third person brought by a guest, and in good faith received by the innkeeper as the property of the guest.

> Woodworth *v.* Morse, 18 La. Ann. 156;
> Peet *v.* McGraw, 25 Wend, (N. Y.) 653;
> Waugh *v.* Denham, 16 Irish C. E. 405.
> Covington *v.* Newberger, 99 N. Car. 523, 9 S. E. 205;
> McGhee *v.* Edwards, 87 Tenn. 506, 11 S. W. 316, 3 L. R. A. 654.

Therefore, if a guest departs leaving his horse, and after many months it appears that the guest had stolen the horse, and the owner demands possession, the innkeeper may retain him for his charges in keeping him. If upon a sale by virtue of a lien, the

proceeds are insufficient to pay the innkeeper's charges, no action will lie against the owner for the balance, inasmuch as there is no personal obligation on the part of the owner to pay the charges for keeping the horse.

> Black *v.* Brennan, 5 Dana (Ky).) 310;
> Jones on Liens, sec. 499.

Unless there is something to excite suspicion, the innkeeper is not bound to inquire into the title of property brought by his guest. The Civil Law, on the contrary, although admitting that "Possession is, in itself, prima facie evidence of ownership," however, holds that such a presumption which is only a disputable one, cannot prejudice the right of a third party, that is, the real owner. Therefore, if it should be proven that the things retained belong to a third person, the preference established in Art. 1922, par. 5, will cease, and an intervention will properly be entertained. No charges due from the wrongful owner can be exacted from the rightful owner. (12 Manresa 699.).

WHEN LIEN NOT APPLICABLE.

A decision laid down by the Supreme Court of Spain dating December 30, 1896, held—that this lien does not attach when the stay of the guest was gratuitous. The same holding may be said to apply under the American law.

MAY THE LIEN BE MADE EXTENSIVE TO PROPERTY EXEMPT FROM EXECUTION.

Property of a guest which would otherwise be exempt from execution under the Statute is not exempt from an innkeeper's lien by reason of such fact. In Swan *v* Bournes, 47 Iowa 501, 29 Am. Rep. 492, that lien attaches to the coat of guest, notwithstanding his claim that it is a part of his ordinary wearing apparel, and is exempt from execution. The following quotation is a further recital of said case:

> "An innkeeper's lien exists by common law, and we see nothing in the statute exempting certain property from execution to indicate an intention to abrogate the common law in this respect. The statute exempts only from general execution. It was never designed to prevent persons from giving a lien upon whatever property they see fit. When a lien is given it may of course be enforced. Had the plaintiff given a chattel mortgage upon his coat to secure his hotel bill, no one would doubt the right of the defendant to foreclose it, notwithstanding the coat might have been part of the plaintiff's wearing apparel. When the plaintiff became defendant's guest at his hotel he gave the defendant a lien upon his coat as effectually as if he had given him a mortgage upon it. The law implied that from the act of becoming the defendant's guest and taking his coat with him. The rule is too well established to require support from authorities."

If such holding is the fate of the provision in the American statutes regarding "exemption of property from execution," sec. 452 of our Code of Civil Procedure

relating to "property exempt from execution", having been copied verbatim from the American law, may be said to have met the same fate, so that the proposition that, in the Philippine Islands, property of a guest is not exempt from an innkeeper's lien by reason of the fact that it is property which would be exempt under sec. 452 of the Code of Civil Procedure, may be unhesitatingly advanced.

AGAINST WHOSE PROPERTY IS LIEN ENFORCED IN CASE HUSBAND AND WIFE BOARD AT AN INN.

The husband is presumptively liable for the charges due a hotel-keeper where he and his wife board at a hotel. It may, however, be shown that the hotel-keeper gave credit to the wife rather than to the husband so as to justify the detention of her property for their bill. (Birney *v.* Wheaton, 2 How. Pr. (N. Y.) (N. S.) (519). Where board is furnished to the spouses under a contract with the husband, no lien attaches upon the paraphernal property brought by the wife to the hotel; for no lien can exist against a guest who does not become liable to the keeper of the house. (McIlvane *v.* Hilton, 7 Hun. (N. Y.) 594; Chichering-Chase Bros. Co. *v.* White, 127 Wis. 83, 106 N. W. 797.).

LIEN ON INFANT'S BAGGAGE.

On the theories that the entertainment is necessary and that the innkeeper is legally bound to receive and entertain an infant as well as an adult applicant, a lien on the baggage of an infant guest for the recovery of the price of the entertainment is established in favor of the hotel-keeper.

(Watson *v.* Cross, 2 Duv. (Ky.) 147;
Read *v.* Amidon, 41 Vt. 15, 98 Am. Dec. 560.)

AGISTOR

AGISTOR DEFINED.

An agistor is one who takes the cattle of another man on to his own ground, to be paid for a consideration, to be paid by the owner.

(Skinner *v.* Caughley, 64 Minn. 375, 67 N. W. 203;
Bass *v.* Pierce, 16 Barb. (N. Y.) 595).

AGISTOR'S LIEN.

The common law authorities are well-nigh uniform to the effect that an agistor of animals has no lien on them for their keeping, except by special agreement with the owner. (At present, however, nearly all the states have statutes recognizing the right of agistors to a lien on horses and other animals for their keep. (2 Cyc. 515, 517.).

Article 3191 of the Civil Code of Louisiana provides, "that he who having in his possession the property of another, whether in deposit or loan, or otherwise, has been obliged to incur any expense for its preservation, acquires a privilege on this

property." In the case of Andrews *v.* Crandell, 16 Louisiana Annual Reports, 208, the plaintiff, in her third opposition, claimed a privilege on the horses and mules seized and sold by the Sheriff. Her demand was for their board; and the only question raised was whether she being a livery stable keeper, the privilege attaches. The Supreme Court of Louisiana, in the aforementioned case, expressed its opinion as follows:

> "Under articles 3191, 3192 and 3193 of the Civil Code, a party is entitled to recover the expenses incurred for the preservation of property, which he has in his possession, "whether in deposit, loan or otherwise;" and he has a right of pledge, by which he may, until reimbursed, retain the property. As a necessary consequence, the last mentioned article gives him a preference upon the proceeds of the sale. Keeping and feeding horses must be classed among the expenses incurred for their preservation."

The case of Hyams *v.* Smith, 6 Louisiana Annual Reports, 302, is to the same effect.

Our Civil Code in article 453 declares that, "necessary expenses are refunded to every possessor; but only those in good faith may retain the thing until they paid."

Following the construction placed by the Supreme Court of Louisiana upon article 3191 of its Civil Code which is similar to our article 453, I hold that an agistor's lien obtains in the Philippine Islands.

A further reason for upholding the existence of an agistor's lien in the Philippine Islands is found in article 1780 of the Civil Code by which "the bailee may retain the thing bailed until the full payment of what is due him by reason of the deposit."

WAIVER AND EXTINGUISHMENT.

An agistor cannot be deprived of his lien upon live stock except by his voluntary relinquishment of the lien, or by such conduct as estops him from asserting it. A voluntary parting with possession of the animal is an abandonment of the lien, which may be surrendered by agreement; but as the lien must be regarded as something of value, such agreement, in order to be obligatory, must be based on legal consideration. (2 Cyc. 319-320.).

WAREHOUSEMAN

WAREHOUSEMAN'S LIEN.

Warehouseman and Warehouse, Defined.—Warehouseman means a person lawfully engaged in the business of storing goods for profit. (Sec. 58, Act 2137, known as the Warehouse Receipts Act.).

Warehouse is a place where goods are received in store for profit (40 Cyc. 400).

> Right to lien under the American law and the Law in the Philippine Islands.

At common law warehousemen had a specific, not a general, lien on property stored with them for their proper charges in connection with the special bailment, and the consequent right to retain possession of it until the charges were paid. (40 Cyc. 454). This lien is regulated in nineteen states of the Union and the District of Columbia by the Uniform Warehouse Receipts Act (40 Cyc. 400, note 1).

In the Philippine Islands, a right to retain similar to that recognized under the American law is recognized in Act 2137 of the Philippine Legislature, known as the Warehouse Receipts law, said act being of American origin. Section 27 of said act provides:

> "Subject to the provisions of section thirty which reads—If a negotiable receipt is issued for goods, the warehouseman shall have no lien thereon, except for charges for storage of those goods subsequent to the date of the receipt, unless the receipt expressly enumerates other charges for which a lien is claimed—a warehouseman shall have a lien on goods deposited or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods; also for all lawful claims for money advanced, interest, insurance, transporation, labor, weighing, coopering, and other charges and expenses in relation to such goods; also for all reasonable charges and expenses for notice, and advertisements of sale, and for sale of the goods where default has been made in satisfying the warehouseman's lien."

Section 31 of said act further provides:

> "A warehouseman having a lien valid against the person demanding the goods may refuse to deliver the goods to him until the lien is satisfied."

Does the Lien Attach to Mortgaged Property Deposited with Warehouseman.—Under the American law a warehouseman is not entitled to retain mortgaged property to enforce his lien for charges where it was stored in violation of the provisions of the mortgage without the mortgagee's consent; and the rule applies, although the goods remained in the mortgagor's possession, storage being necessary for their preservation, and the mortgagee was informed of the storage afterward; no promise can be implied from his silence. (40 Cyc. 458.)

Our Warehouse Receipts Act is silent upon this question, and on the other hand it may be implied from its general provision that such a lien attaches notwithstanding anterior encumbrances affecting the goods. But it must not be forgotten, however, that our Warehouse Receipts Act is drawn in large part from American precedents, so that it is necessary for its proper construction to draw from recognized principles in that jurisprudence. Judging from general principles regarding priority of liens, it would be a most unsound principle to sustain that the warehouseman's lien, if existing at all, should have preference over that of the mortgagee acquiring his interest prior to the storage. This would suggest a happy medium between the recogni-

tion of the absolute rights of the mortgagee and those of the warehouseman. In other words, the warehouseman's lien will re recognized to its full extent as in ordinary cases except only in so far as it prejudices the prior rights acquired by the mortgagee.

This unhappy clashing of the recognized rights of the mortgagee and the real interest of the warehouseman attaching on the goods by virtue of the storage is most lamentable, but, fortunately, in actual practice it will be found that it is of seldom occurrence, for the law in its perfect foresight and prevision has imposed a grave criminal responsibility upon the owner of goods who with fraudulent intent should cause such a situation to arise. (Sec. 55, Act 2137.)

OBLIGATION OF WAREHOUSEMAN TO DELIVER.

A warehouseman, in the absence of some lawful excuse provided by this Act, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with

(*a*) An offer to satisfy the warehouseman's lien;

(*b*) An offer to surrender the receipt if negotiable, with such indorsements as would be necessary for the negotiation of the receipt; and

(*c*) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman.

In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal. (Sec. 8, Act 2137.)

AGAINST WHAT PROPERTY THE LIEN MAY BE ENFORCED.

Subject to the provisions of section thirty, a warehouseman's lien may be enforced—

(*a*) Against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which the lien is asserted, and

(*b*) Against all goods belonging to others which have been deposited at any time by the person who is liable as debtor for the claims in regard to which the lien is asserted if such person had been so intrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value would have been valid. (Sec. 28, Act 2137.)

WAREHOUSEMAN'S LIEN DOES NOT PRECLUDE OTHER REMEDIES.

Whether a warehouseman has or has not a lien upon the goods, he is entitled to all remedies allowed by law to a creditor against his debtor, for the collection from the depositor of all charges and advances which the depositor has expressly or impliedly contracted with the warehouseman to pay. (Sec. 32, Act 2137.)

SATISFACTION OF LIEN BY SALE.

A warehouseman's lien for a claim which has become due may be satisfied as follows:

The warehouseman shall give a written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice shall contain—

(*a*) An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice and the date or dates when it became due,

(*b*) A brief description of the goods against which the lien exists,

(*c*) A demand that the amount of the claim as stated in the notice, and of such further claim as shall accrue, shall be paid on or before a day mentioned, not less than ten days from the delivery of the notice if it is personally delivered, or from the time when the notice should reach its destination, according to the due course of post, if the notice is sent by mail, and

(*d*) A statement that unless the claim is paid within the time specified the goods will be advertised for sale and sold by auction at a specified time and place.

In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the warehouseman for which he has a lien on the goods. The sale shall be had in the place where the lien was acquired, or, if such place is manifestly unsuitable for the purpose, at the nearest suitable place. After the time for the payment of the claim specified in the notice to the depositor has elapsed, an advertisement of the sale, describing the goods to be sold, and stating the name of the owner or person on whose account the goods are held, and the time and place of the sale, shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale, in not less than six conspicuous places therein.

From the proceeds of such sale the warehouseman shall satisfy his lien, including the reasonable charges of notice, advertisement, and sale. The balance, if any, of such proceeds shall be held by the warehouseman, and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the goods.

At any time before the goods are so sold any person claiming a right of property or possession therein may pay the warehouseman the amount necessary to satisfy his lien and to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment. The

warehouseman shall deliver the goods to the person making such payment if he is a person entitled, under the provisions of this Act, to the possession of the goods on payment of charges thereon. Otherwise the warehouseman shall retain possession of the goods according to the terms of the original contract of deposit. (Sec. 33, Act. 2137.)

HOW THE LIEN MAY BE LOST.

A warehouseman loses his lien upon goods—

(*a*) By surrendering possession thereof, or

(*b*) By refusing to deliver the goods when a demand is made with which he is bound to comply under the provisions of this Act. (Sec. 29, Act 2137.)

CHAPTER VIII

RENT

LANDLORDS' LIENS FOR RENT.

Both under the American law and the Civil Law, the right of taking and retaining the effects of the lessee found in the leased premises for the payment of rent is a right to be exercised only through the ministry of justice. The right which the lessor had upon default of payment of rent to enter the leased premises, vi et armis, and take hold of whatever property is distrainable thus taking the law into his own hands is a thing of the past. Such right was recognized under the Common law. Such measure, however, has become unpopular in the United States; mesne process o attainment has taken the place of so-called Distress of the Common Law. (Jones on Liens, sec. 540.) In the United States, at present, in twenty-one states of the Union, a lien is given to landlords by statute.

IN THE PHILIPPINE ISLANDS.

A landlord's lien over the effects of the lessee found in the premises for rents due is not recognized in the Philippine Islands. A claim may be made that by virtue of article 1922, paragraph 7, of the Civil Code, the lessor has a lien upon the property in the premises for the amount due him. That article is as follows:

> "Art. 1922. With regard to specified personal property of the debtor, the following are preferred:
>
> " '7. Credits for rents and leases for one year with regard to the personal property of the lessee existing on the thing leased and on the fruits thereof."

But the construction of this article was before our Supreme Court in the case of Peña *v.* Mitchell (9 Phil. Rep., 595), and it was there said:

> "We do not think," said the Supreme Court speaking of Title XVII (Book IV) of the Civil Code, which is devoted exclusively to the "concurrence

and preference of credits," "that these rules for the classification of credits create, or were intended to create, a lien in favor of the creditor upon the property of the debtor, which attaches to such property and gives to the creditor a special interest therein, other than the mere right of preference in the distribution of the proceeds of the sale of such property in the course of judicial proceedings wherein the creditor is a property party and duly asserts his right to a preference."

Again our Supreme Court, in the case of McMicking *v.* Kimura, 12 Phil. 98, declared:

> "The claim of Paterno falls in the first class, as a claim with special preference, being covered by article 1922, par. 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. (Peña *v.* Mitchell, 9 Phil. Rep., 587; Macke *v.* Rubert, 11 Phil. Rep., 480."

Said right of preference is "a consequence of the life of the building." (Bonell's Commentaries on paragraph 7 of Article 1922 of the Civil Code; 12 Manresa 702.) Mr. Troplong says that there is a TACIT PLEDGE in numerous transactions. The CONTRACT OF LEASE is given as an example. The fruits of the crop and the furniture and instruments of husbandry in the rented house or farm are a tacit pledge, INHERENT IN THE CONTRACT OF LEASE and give the lessor the right to be paid by preference from the proceeds of these things. He adds—THE THINGS IN QUESTION ARE CONTAINED IN THE LEASED PREMISES; THE LESSOR, THEREFORE, DETAINS THEM IN SOME SORT IN DETAINING AND POSSESSING THE PREMISES WHICH CONTAINS THEM.

The denomination of a tacit pledge to designate the right of preference referred is hardly a correct one. The law permits parties to enter into contractual relations with one another, but it does not contract for them. The law therefore does not itself pledge the property of the debtor to the creditor. It only submits it to the power of the latter, in certain cases and for certain purposes.

MEANS ADOPTED TO PROTECT LESSOR.

It is competent for the landlord and tenant to create a lien upon the tenant's property by contract, so as to insure the payment of the rents.

Our Supreme Court, speaking through its Chief Justice, in the case of Meyers *v.* Thein, 15 Phil. Rep. 310, said:

> "The registration of a chattel mortgage, executed in accordance with Act No. 1508, is not in violation of the right of possession, supposed to have been acquired ex lege by the lessor over the furniture existing upon the leased premises, because no such right of possession is granted by law to the lessor

over the personal property of the lessee upon the estate leased; it is subject only to the payment of rent for one year, A CONDITION WHICH MAY BECOME VAIN AND ILLUSORY BY A TRANSACTION LIKE THE ONE IN QUESTION, to wit, when the lessee executed a mortgage upon such personal property in favor of a third person, in the same manner as he could have previously performed these or other acts of disposal in respect thereto inasmuch as his right to dispose of the same was not then, and is not now limited by reason of their being in a leased building; against this contingency the lessor should take proper precautions in order to ensure the payment of rent by MEANS OF AN EXPRESS LIEN THEREON, since the personality is merely affected by a tacit lien under the circumstance presumed by the law, to wit, that it belongs to the lessor and continues upon the premises and is liableonly for the rent for one year."

(To be continued)