

ROBERTO ESCAY, ET AL., PETITIONERS, VS. COURT OF APPEALS, ET AL., RESPONDENTS.

G.R. No. L-37504. December 18, 1974

Ponente: FERNANDEZ, J.

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FERNANDEZ, J.:

This Resolution is in support of Our minute Resolution of February 7, 1974 which denied "for lack of merit" petitioners' Petition for Review on Certiorari of the Decision of the Court of Appeals in CA-G.R. No. 35965-R, entitled Roberto Escay, et al., vs. Testate Estate of Jose G. Escay, Sr. et al., and of Our vote to deny their motion for reconsideration of said resolution.

Respondents have filed their Comment on the said motion for reconsideration and the petitioners have filed their Reply thereto. Afterwards, the parties filed their respective Memoranda.

I

THE FACTS

Very briefly, the pertinent facts are as follows:

Emilio and Jose Escay, now both deceased, were brothers. In his lifetime, Emilio mortgaged his properties now in question, to the Philippine National Bank. He died in 1924 before he could pay his obligation with the bank which had mounted. The bank then filed in 1930 a foreclosure suit against the estate of Emilio represented by the administrator, Atty. Eduardo Arboleda. Pending the said suit, on April 28, 1933, a contract hereafter referred to as original contract was entered among the Philippine National Bank, Jose Escay, Sr., and the administrator, Atty. Arboleda, under which Jose assumed the mortgage indebtedness of his deceased brother Emilio. This was agreed to by Magdalena Vda. de Escay, widow of Emilio, in her own behalf and as guardian ad litem of their children. When it was discovered that the original contract failed to state the transfer of the ownership of the properties in question to Jose Escay, Sr., in consideration of his assumption of the mortgage indebtedness of Emilio (subject to the right of repurchase of the heirs of Emilio within five (5) years after the mortgage indebtedness had been fully paid), a supplementary contract was entered into among the Philippine National Bank, the administrator, Atty. Arboleda and Jose Escay, Sr. This was approved by the probate court taking cognizance of the estate of the deceased Emilio Escay in its order of February 24, 1934.

In 1941, Magdalena Vda. de Escay, Roberto and the other children filed a complaint against Jose Escay, Sr. and Atty. Arboleda (administrator of the deceased Emilio), for the recovery of the ownership and possession of the properties in question. This case was provisionally dismissed after defendants have answered, upon motion of the parties on July 24, 1944.

II

NO ABUSE OF DISCRETION ON THE PART OF THE COURT OF APPEALS

The questions raised by the petitioners are basically factual and because the Court of Appeals did not commit a grave abuse of discretion in its findings of fact contained in its decision now challenged before Us by the petitioners, this Court correctly denied petitioners' petition "for lack of merit". It is for the same fundamental ground that I vote to deny the motion for reconsideration now pending before Us. As a matter of fact, it is my view that the decision of the Court of Appeals was correct.

The present opinion, being one which explains why We denied petitioners' petition "for lack of merit," and why We vote to deny their motion for reconsideration, will touch only on the principal points.

The issues in this case, particularly those reiterated in the Motion for Reconsideration, may be summarized as follows:

1. Validity of the original contract, the supplementary contract, and the Order approving the latter;
2. Acquisition of the properties by adverse possession;
3. Holding of the properties in trust (implied) for the heirs of Emilio Escay.

The issue of express trust was raised for the first time by petitioners in their reply to respondents' Comment to their Motion for Reconsideration. The additional issue of whether or not full payment of the obligation of the estate of Emilio Escay to the Philippine National Bank was made by Jose Escay, Sr. was raised in petitioners' brief.

(a) On The First Issue -

Petitioners contend:

- a) That the contract and the supplementary contract are not deeds of sale, because the petitioners, represented by their mother and guardian ad litem, merely intended under these contracts to transfer the possession, administration and supervision of these properties to respondents; it was never the intention of the petitioners as heirs of the testate estate of their father Emilio Escay to transfer the ownership of the properties in question to the respondents;
- b) That the original and supplementary contracts are fictitious and simulated for lack of consideration and an action to annul a non-existent contract does not prescribe;
- c) That the supplementary contract was null and void because it was approved by the Court without their knowledge and consent, considering that there was no written notice to them as required by Section 714 of the Code of Civil Procedure, hence, this supplementary contract and the order of the Court approving the same are null and void ab initio;
- d) That the order of the Court approving the supplementary contract was null and void because the Court had no power to approve the sale of properties of the testate estate of Emilio Escay for the purpose of paying the mortgage lien thereon under Sec. 718 of the Code of Civil Procedure, considering that such a sale would in effect be a foreclosure on the real property of the testate estate which is not within the power of the probate court to authorize; consequently, the supplementary contract could not have conferred ownership over the properties of the

petitioners in question in favor of the respondents; and

e) That the contract, Exhibit F (erroneously referred to by oversight as Exhibit H in the Decision of the Court of Appeals) and the supplementary contract, Exhibit were antichretic contracts and, therefore, by virtue of said contracts no ownership over the properties of the petitioners in question could have been transferred to the respondents (this issue was not raised in the motion for reconsideration but only in their brief, and according to the Court of Appeals was only raised for the first time on appeal).

We now hold, as the Court of Appeals has held that:

It is true that the original contract failed to provide for the transfer of the properties to Jose Escay, Sr., but, as the Court of Appeals held:

"Magdalena Vda. de Escay, as heir and as guardian ad litem of the heirs of Emilio Escay, gave her conformity to the deed of conveyance, Exhibit "H" in the document Exhibit "G" which had been reproduced above. She gave her consent to the contract executed by Atty. Arboleda, as administrator of the estate of Emilio Escay, in favor of Jose Escay and the bank 'en el cual los derechos de la testamentaria en los totes de terreno actualmental hipotecados al Banco Nacional Filipino, quedan transpasados al Sr. Jose Escay, obligandose este ultimo en asumir toda la obligacion de la testamentaria a favor del Banco Nacional Filipino.' She had, therefore, for herself, and as guardian ad litem of her children, given her consent to the transfer of the rights of the estate to the lots mortgaged to the bank in favor of Jose Escay. Unfortunately, the transfer or conveyance of these lots to Jose Escay was not provided for in the deed of conveyance, Exhibit "H". This oversight could have been due to the fact that the deed of conveyance was drawn by Atty. Recto of the bank, and his interest was only the protection and preservation of the rights of the bank, and had forgotten to provide for the consideration of the assumption of the obligation of the estate by Jose Escay. Jose Escay did not appear to be represented by counsel, and the absence of this consideration was discovered only when the contract was submitted to Atty. Hilado. Atty. Arboleda, as previously stated, took this matter with the widow and the bank, and the widow agreed to the execution of the supplementary contract." (Decision of Court of Appeals, pp. 10-11).

It is clear that the intention in the original contract was to transfer the properties to Jose Escay, Sr. since this intention was confirmed in the written consent, Exhibit "G", executed by Magdalena Vda. de Escay. It is not true that Magdalena Vda. de Escay understood the original contract or her written conformity to mean only the transfer of possession and administration of the properties.

In the supplementary contract (Exh. I) the testate estate of Emilio Escay already clearly transferred all rights over the properties in question to Jose Escay, Sr. This transfer of properties was specified as follows:

"2-o x x x En realidad era la intencion de las partes que en consideraciones a sus asuncion de dichas obligacion el abintestato la cederia las propiedades hipotecadas el Banco Nacional Filipino, pero por discuido involuntario esta condicion se dejo de incluir en el contrato."

"3-o Que para subsanar el referido error en el otorgamiento de contrato tantas veces mencionado, el administrador judicial del abintestato del finado Emilio Escay por el presente CEDE y TRASPASA al Sr. Jose Escay, sus herederos, derechohabientes legales las parcelas de terreno, con sus mejoras, que se describen como sigue." (Record on Appeal, pp. 32-33).

This transfer of properties was in consideration of the assumption by the latter of the entire obligation of the said testate estate with the Philippine National Bank, subject only to the right of the heirs of said testate estate of Emilio Escay to repurchase the properties within five (5) years after Jose Escay, Sr. shall have fully paid the testate estate obligation with the Philippine National Bank, Bacolod Branch. This supplementary contract only set down in writing what was already agreed at the execution of the original contract and confirmed later by

Magdalena Vda. de Escay in Exhibit "G". The original contract and supplementary contract were therefore deeds of sale with assumption of obligation and by virtue of these contracts the ownership of the testate estate of Emilio Escay over the properties in question was transferred to Jose Escay, Sr.

There can be no question that the guardian ad litem and mother, Magdalena Vda. de Escay, as representative of the minor heirs, intended to transfer their rights over the properties in question, and so, they gave their conformity to the transfer of their rights over the properties of the testate estate of Emilio Escay already mortgaged to the Philippine National Bank, in favor of Jose Escay, Sr., provided that the latter shall assume all the obligations of the said testate estate in favor of the Philippine National Bank.

This original contract and the supplementary contract were executed by the judicial administrator of the testate estate of Emilio Escay after a series of conferences with the widow, Magdalena Vda. de Escay as guardian ad litem of her minor children and heirs of the testate estate of Emilio Escay, the Philippine National Bank represented by Atty. Recto, and Mr. Jose Escay, Sr. It must be noted that the decision to sell the properties in question to Jose Escay, Sr. was a concerted decision by all of these four persons. It should also be noted that prior to the execution of the original contract on April 28, 1933, the Philippine National Bank had already filed an action for foreclosure of the properties of the testate estate and these contracts were executed so that the properties of the testate estate would not be sold at public auction to strangers, in which instance the heirs would have very much less time to repurchase the properties than if the properties were to be sold to Jose Escay, Sr. who could give the heirs a longer period of time within which to repurchase the properties, as he did in fact give them a longer period, because he gave them five (5) years within which to repurchase the properties from and after the time that he shall have fully paid the bank the full amount of the obligation of the testate estate. This was the background of the execution of the original contract, the conformity of Magdalena Vda. de Escay as heir and guardian ad litem, and the supplementary contract.

Furthermore, it is a fact that in 1936, petitioner Roberto Escay, oldest son of Emilio Escay, executed a contract of lease, Exhibit 8, where he acknowledged Jose Escay, Sr. to be the owner of the properties in question, and his mother, Magdalena Vda. de Escay, also signed as witness thereto, showing that they knew that there was already a genuine sale of the properties to Jose Escay, Sr.

Consequently, the lower court and the Court of Appeals did not err in holding that the true intention of the parties expressed in the original contract and in the supplementary contract was for the testate estate of Emilio Escay to transfer its full ownership to the properties in question to Jose Escay, Sr. in consideration for his assumption of the obligation of the testate estate, subject only to the right to repurchase given to the heirs of Emilio Escay within five (5) years from and after Jose Escay, Sr. shall have fully paid the obligation of the testate estate with the Philippine National Bank. (Decision of the Court of Appeals, pp. 6-7, 11-13, 17, 18).

It is true that in order to be valid, this supplementary contract must be approved by the Court with prior written notice to the heirs. But the heirs of the testate estate of Emilio Escay approved this contract through their guardian ad litem, Magdalena Vda. de Escay, who was their mother. This approval and conformity to the said supplementary contract is embodied in the document dated May 13, 1933 and which has been marked as Exhibit "G". Actually the conformity was executed before the supplementary contract, but since the supplementary contract was executed only in view of the omission of the consideration in the original contract and the fact that the guardian ad litem, also as heir, had already expressed her conformity to the transfer of the properties after the execution of the original contract, this conformity to the original contract was therefore in effect also her conformity to the supplementary contract. In other words, under this document Exhibit "G", Magdalena Vda. de Escay, in her capacity as guardian ad litem of the minor heirs of the testate estate of Emilio Escay, also in effect gave her conformity to the supplementary contract as she was agreeable to the original contract authorized by and

entered into among the judicial administrator of the testate estate of Emilio Escay (Eduardo P. Arboleda), Jose Escay, Sr., and the Philippine National Bank on April 28, 1932.

Furthermore, as found out by the Court of Appeals:

"In any case, according to the records of Special Proceedings No. 3148, copy of the order approving the supplementary contract was sent by registered mail to Magdalena Vda. de Escay. No action was taken by Magdalena Vda. de Escay to set aside the order approving the supplementary contract. While the receipt of the notice by Atty. Arboleda on behalf of Magdalena Vda. de Escay, and the sending of the copy of the order approving the supplementary contract to Magdalena Vda. de Escay, might not be sufficient to satisfy the requirement of written notice to the heirs, her silence strongly supports the inference that the matter was really taken up by Atty. Arboleda and herself with Atty. Recto, and that she had consented to the execution of the supplementary contract." (Decision p. 12)

The minor heirs had given their consent to the supplementary contract through their guardian ad litem and therefore it was not null and void, and the Order approving it was valid.

The heirs through the guardian ad litem gave their conformity to the transfer of rights in favor of Jose Escay, Sr. in the document, Exhibit "G". Said the Court of Appeals:

"On May 13, 1933, Magdalena Vda. de Escay, in her own behalf and as guardian ad litem of her children, gave her conformity to the instrument of conveyance, Exhibit "H" as follows;

Por la presente hago constar que doy me conformided y estoy conforme al contrato otorgado por y entre el Sr. Jose Escay y el Banco Nacional Filipino de fecha 28 de Abril de 1933, en el cual los derechos de la testamentaria en los lotes de terreno actualmente hipotecados al Banco Nacional Filipino, quedan traspasados al Sr. Jose Escay, obligandose este ultimo en asumir toda la obligacion de la testamentaria a favor del Banco Nacional Filipino.

Bacolod, Negros Occidental, 13 de Mayo de 1933," (Decision of the Court of Appeals, Exhibit "G", pp. 6-7).

Under this document, the widow gave her conformity to the supplementary contract which was drafted by Atty. Recto of the Philippine National Bank and there was no evidence that Atty. Recto had confederated with either Atty. Arboleda or the widow (Decision of the Court of Appeals, pp. 6 and 18). The lower court and Court of Appeals were correct in holding that the heirs gave their consent and conformity to this supplementary contract which was therefore a valid contract of transfer of absolute ownership of the properties in question of the testate estate of Emilio Escay to Jose Escay, Sr. This holding of the lower court and the Court of Appeals is solidly backed up by the following facts;

(a) The testimony of Atty. Eduardo P. Arboleda that he probably gave a copy of the Motion for the Approval of the "contrato suplementario", Exhibit "I", to Magdalena Vda. de Escay, since according to him he never did anything in connection with the transaction without prior notice, consent, approval and conformity of the guardian ad litem of the minor heirs, Magdalena Vda. de Escay.

"Atty. Arboleda, as previously stated, took up this matter with the widow and the bank, and the widow agreed to the execution of a supplementary contract. The supplementary contract was executed by Atty. Arboleda and submitted by Jose Escay to the Court for approval. Unfortunately again, the copy which was intended for Magdalena Vda. de Escay was received not by Magdalena, but by Atty. Arboleda. Atty. Arboleda testified that he must have given her the copy. It is understandable that Atty. Arboleda could not here definitely state that he had delivered the copy of the document to Magdalena in view of the fact that the incident happened about 30 years before he testified. In any case, according to the records of Special Proceedings No. 3148, copy of the order approving the supplementary contract was sent by registered mail to Magdalena Vda. de Escay. No action was

taken by Magdalena Vda. de Escay to set aside the order approving the supplementary contract. While the receipt of the notice by Atty. Arboleda on behalf of Magdalena Vda. de Escay, and the sending of the copy of the other approving the supplementary contract to Magdalena Vda. de Escay, might not be sufficient to satisfy the requirement of written notice to the heirs, her silence strongly supports the inference that the matter was really taken up by Atty. Recto, and that she had consented to the execution of the supplementary contract." (Decision of the Court of Appeals, pp. 11-12).

(b) A copy of the Order of the Court approving the "contrato suplementario" was sent to Magdalena Vda. de Escay by registered mail and she did not take any action whatsoever in order to set aside the said order. If it were really true that she did not have prior notice of the "contrato suplementario" and that she was not agreeable to the terms thereof because she was not willing to transfer the ownership of the properties in question to Jose Escay, Sr. under the "contrato suplementario", why is it that she did not do anything or take any action in order that the Court will set aside its order approving the said "contrato suplementario", Exhibit "I"? This is clear and convincing evidence that Magdalena Vda. de Escay knew, consented, approved and was in full conformity with, the terms and conditions set forth under the "contrato suplementario" and that the intention was really to transfer the properties of the estate of Emilio Escay to Jose Escay, Sr. in consideration of the assumption by the latter of all the obligations of the said estate with the Philippine National Bank.

The contract and "contrato suplementario" were not merely antichretic contracts. They were documents of sale which passed ownership over the properties in question to Jose Escay, Sr.

Petitioners argued (for the first time when they were already appealing) that under these contracts, Jose Escay, Sr. was only supposed to take possession and administration of the properties and by assuming the obligation of the testate estate of the Philippine National Bank, he became a creditor of the testate estate of Emilio Escay. As the Court of Appeals rightly ruled, under the contract and the "contrato suplementario", Jose Escay, Sr. did not become a creditor of the testate estate of Emilio Escay. He became a debtor of the Philippine National Bank. He was not charged with the duty of appropriating for himself the fruits of the properties in order to satisfy his credit in the testate estate of Emilio Escay but that his obligation was to assume and pay the obligation of the testate estate with the Philippine National Bank and within five (5) years from full payment of said obligation the estate may repurchase the properties from him. Clearly, therefore, Jose Escay, Sr. did not become the creditor of the testate estate of Emilio Escay after paying the obligation of said testate estate with the Philippine National Bank. He became the owner subject only to the right of repurchase by the heirs of the properties within five (5) years after full payment of the obligation with the Philippine National Bank.

Said the Court of Appeals:

"Moreover, the deed of conveyance, Exhibit "H", and the supplementary contract, Exhibit "I", are not antichretic contracts. It was a sale and transfer of property from the debtor to a buyer, who in consideration thereof, assumed the obligation of the debtor to the creditor. Jose Escay, Sr. did not become a creditor of the estate. He became the debtor of the Philippine National Bank. Neither did he become a creditor of the estate of Emilio Escay by virtue of the supplementary contract, Exhibit I. Jose Escay, Sr. became the owner of the properties, subject only to the right of estate or the heirs to repurchase the same within five years after Jose Escay, Sr. have completely paid the debts to the bank." (Decision, page 17).

The supplementary contract did not contravene Section 718 of the Code of Civil Procedure. Petitioners also argue that the order of the Court approving the "contrato suplementario" was null and void because it authorized the sale of the property of the testate estate in order to pay or satisfy the mortgage lien thereon which was not sanctioned by Sec. 718 of the Code of Civil Procedure. In effect, according to the petitioners, the probate court allowed the foreclosure of the properties of the testate estate in order to satisfy the mortgage lien thereon and the court had no

authority to do this under the aforecited provision of the Code of Civil Procedure.

The Court of Appeals was correct in disposing of this argument by holding that this section of the Code of Civil Procedure cannot impair the substantive right of the owners of the properties, who were the heirs of the testate estate, to sell what belonged to them. It held that since the sale of the properties was with prior notice, consent, conformity and approval of the heirs, their right to dispose of their properties cannot be curtailed by this procedural law. "A rule of procedure cannot prevail over the will of the owner insofar as the dispositions of his properties are concerned." (Decision of Court of Appeals, p. 16).

The original and supplementary contracts were supported by valuable consideration. Petitioners argue that the contract and the supplementary contract are null and void for lack of consideration; consequently, they are non-existent contracts because they are simulated and fictitious and the action to set them aside does not prescribe. Petitioners' premises are not well-founded. The contract and the supplementary contract were supported by valuable consideration, which was the assumption of the mortgage indebtedness with the Philippine National Bank, and in view thereof, Jose Escay, Sr. paid the following:

- (a) Outright payment upon the execution of contract of more than P4,000 representing arrearages of the testate estate of its amortizations with the Philippine National Bank;
- (b) Immediate delivery of 750 piculs to the bank at P6.30 per picul as partial payment of the estate obligations;
- (c) Subsequent yearly payments of 450 piculs beginning with the crop year 1933-34 until the obligations were fully liquidated;
- (d) Payment upon the execution of the contract of more than P1,128.00 to wipe out the testate estate obligations with the Pacific Commercial Company.

These are undoubtedly valuable considerations which represent much money at the time when the price of sugar per picul was only P6.30 (as compared to the present average price which ranges from P100 to P120 per picul). The payments made by Jose Escay, Sr. were certainly valuable consideration which supported the original contract and the supplementary contract now under consideration.

Petitioners also argue that assumption of the mortgage indebtedness of the testate estate of Emilio Escay by Jose Escay, Sr. was motivated by pure beneficence. This is not true because this assumption of obligation was in consideration of the transfer of the properties of the testate estate to Jose Escay, Sr. as intended in the original contract and as contained in the written conformity of the widow and in the supplementary contract (par. 5-0).

The obligation of the testate estate of Emilio Escay to the Philippine National Bank was fully paid by Jose Escay, Sr. The Court of Appeals has already made a finding of fact, which is binding upon Us, that full payment of the obligation to the Philippine National Bank had already been made (Decision of the Court of Appeals, p. 18). And on this premise of extinguishment of the said obligations, the Court of Appeals also found that:

"Jose Escay paid in full the obligation of the estate to the bank and mortgaged the properties to the Compania General de Tabacos." (Decision, p. 14).

Supporting this finding is the significant fact that the petitioners' complaint in this case filed in 1959 does not contain any express and categorical allegation that Jose Escay, Sr. had not paid in full the obligation of the estate of Emilio Escay to the Philippine National Bank. Furthermore, the petitioners themselves had averred as an allegation of fact in the complaint filed in 1941, Exhibit L, that:

"THIRD CAUSE OF ACTION"

1.-

That in view of the execution of the two documents copied and stated in the first cause of action, the defendant Jose Escay had the titles of ownership of the lots therein mentioned issued in his name by the Register of Deeds of this province; took possession of them thereof for his exclusive benefit, and in order to hasten the expiration of the five-year period stated in the "contrato suplementario", paid in full the mortgage indebtedness with Philippine National Bank." (Complainant in Civil Case No. 8829, CFI - Negros Occidental entitled "Magdalena Vda. de Escay, et al., vs. Jose Escay, Sr., et al., p. 10, Exhibit "L").

Petitioners have pointed out that the annotation of the encumbrance relating to the said obligation still appears on the titles covering the properties in question. But this is certainly of no significance for the reason that it is the standard and accepted practice in all banking transactions that no new mortgage for a bigger loan shall be granted by the same bank on the same collateral unless the prior mortgage debt shall have first been liquidated, although the bank and the borrower never take the trouble of having the annotation of the prior and liquidated mortgage debt on the title of the collateral cancelled before the next annotation of the subsequent mortgage debt is made on the title. One reason is to save on registration expenses. Thus, it happens as a matter of ordinary practice and procedure that annotations of extinguished mortgages are never cancelled on titles of collaterals, although the mortgage debts have already been paid.

This was exactly what happened in this case. And the fact that the obligation of the testate estate of Emilio Escay to the Philippine National Bank had been paid in full was the reason why Jose Escay, Sr. was able to use the same properties in question as collateral for his subsequent loan from the Compania General de Tabacos.

The five-year period for the repurchase of the properties in question by the heirs of the late Emilio Escay had expired long ago. As already stated in the foregoing discussion, it was averred as an allegation of fact in the petitioners' complaint filed in 1941 that Jose Escay, Sr. "in order to hasten the expiration of the five year period stated in the "contrato suplementario", paid in full the mortgage indebtedness with the Philippine National Bank."

Although full payment of the obligation was made before 1941, nevertheless in the absence of records (which have already been lost), even assuming that full payment was made only in 1941, there can be no doubt that the 5-year period for repurchase had expired long ago.

Petitioners contend that the repurchase price was not clearly stated because the value of the improvements was not specified. This may be so but this could easily have been fixed had the heirs of Emilio Escay made any offer to repurchase, which they never did. What should have been very clear to them was that their period to repurchase was five (5) years from full payment of the obligation of the testate estate to the Philippine National Bank. On the basis of this provision in the supplementary contract, Jose Escay, Sr. had acquired the full ownership of the properties in question from the testate estate of Emilio Escay.

(b) On the Second Issue -

Petitioners also argue that since the properties in question are registered lands under the Torrens system, the lower court and the Court of Appeals erred in holding that the respondents have acquired the properties by adverse possession or acquisitive prescription under Sec. 41, Act 190. Petitioners, however, have lost sight of the fact that as early as 1939, the titles over the properties in question were transferred to Jose Escay, Sr. who was therefore the registered owner thereof since that time. These are titled properties in the name of Jose Escay, Sr. since 1939 and, therefore, this matter of acquisitive prescription in his favor really need not be discussed except for the fact that this was raised as an alternative defense.

Speaking of Jose Escay, Sr., the Court of Appeals said that "He alone was possessing and enjoying the fruits of the properties and he introduced permanent improvements consisting of roads and fruit trees. This possession in the concept of owner was continuous, uninterrupted, public, open and adverse, and recognized particularly by plaintiff Roberto Escay and by his mother Magdalena Vda. de Escay." (Decision, p. 14). This possession by Jose Escay, Sr. in the character described by the Court of Appeals was acknowledged by the petitioners themselves when:

(a) In their complaint in 1941 in the case which was provisionally dismissed in 1944, the petitioners also admitted and acknowledged the adverse and exclusive possession by Jose Escay, Sr. and his successor in their allegations of fact; and

(b) In their complaint in this case filed in 1959, they also reiterated the allegation of fact in their complaint of 1941 that the properties in question have been under the adverse and exclusive possession of Jose Escay, Sr. and the respondents as his successors-in-interest in concept of an owner.

(c) On the Third Issue -

Petitioners contend that since the titles over the properties in question were transferred to the name of respondents' predecessor-in-interest, Jose Escay, Sr., by fraudulent means, an implied trust was created between the testate estate of Emilio Escay and Jose Escay, Sr. under which, by operation of law, Jose Escay, Sr. became a trustee of the properties in question in favor of the heirs of Emilio Escay as the cestui que trust; consequently, the respondents are duty bound to reconvey the properties in question to the petitioners whose right to recover the properties does not prescribe.

Petitioners also argue that the original contract, Exhibit "F", and the supplementary contract, Exhibit "I", created in their favor an express trust because the true intention of the parties was that only the possession and administration of the properties of petitioners in question should be transferred to respondents' predecessor-in-interest Jose Escay, Sr., which properties he was supposed to hold in trust for the petitioners until such time as he shall have fully liquidated the obligations of the testate estate of Emilio Escay, and since an action based on an express trust does not prescribe the right of petitioners to recover the properties in question from the respondents does not prescribe and therefore the respondents can be ordered to reconvey the properties in question to petitioners.

As the Court of Appeals held, no fraud was proved (Decision, p. 18). On the other hand the evidence is clear that the original and supplementary contracts were the result of a series of negotiations by the testate estate of Emilio Escay through its Judicial Administrator and legal representative; its creditor, the Philippine National Bank; the heirs represented by their guardian ad litem, Magdalena Vda. de Escay and Jose Escay, Sr. As the Court of Appeals found, in these negotiations, in the series of conference Jose Escay, Sr. did not appear to have been represented by counsel. The contract and the "contrato suplementario" were both prepared for execution by the Judicial Administrator and by the lawyer of the bank, Atty. Recto. It is not fair to imply that the Philippine National Bank at that time was a party to a fraud. What interest would the Philippine National Bank have in fraudulently divesting the testate estate of Emilio Escay of its ownership of the properties in question? As the Court of Appeals observed, there is no evidence whatsoever that Atty. Recto or the Philippine National Bank contrived and confederated with the Judicial Administrator of the testate estate or the heirs through their guardian ad litem, Magdalena Vda. de Escay. Indeed, it is ridiculous to even imagine that the Philippine National Bank with no interest to serve except its own would lend itself as a party to a fraud in order to divest the testate estate of Emilio Escay of its rightful ownership over the properties in question. As a matter of fact, according to the Court of Appeals, it was perhaps because Atty. Recto had no interest to serve other than the interest of the Bank that he

overlooked to state in the original contract that the consideration for the assumption by Jose Escay, Sr. of the obligations of the testate estate with the Bank was the transfer of ownership of the properties of the estate to him. Since there was no fraud, there was no trust relation that arose.

Petitioners' original theory was implied or constructive trust. Petitioners now contend that the trust being a result of the agreement of the parties is after all an express trust.

Settled is the rule that a party may not change his theory on appeal. In the lower court petitioners relied on implied trust. In their brief in the Court of Appeals, the petitioners did not discuss at all their theory of implied trust in the lower court. In their motion for reconsideration of the decision of the Court of Appeals, however, petitioners again relied on their theory of implied trust. Before this Highest Tribunal, in their petition for review on certiorari of the decision of the Court of Appeals, petitioners relied again on their theory of implied trust. In their motion for reconsideration of the resolution of February 7, 1974, of this Highest Tribunal, they stuck to their theory of implied trust. And now, in their reply to respondents' comment on their motion for reconsideration of Our resolution of February 7, 1974, which denied for lack of merit the said petition for review, petitioners have raised this issue of express trust. And they now claim that an action based on express trust does not prescribe and the property held in trust cannot be acquired by adverse possession or acquisitive prescription.

In any case, an express trust concerning an immovable cannot be proved by parole evidence, and actions based on express trust also prescribe and the property held in trust may be acquired by adverse possession from the moment the trust is repudiated by the trustee. On this point, the Court of Appeals held in this case:

"And assuming an express trust, the trust had been repudiated by Jose Escay, Sr. when in 1941 he refused to transfer the property to the appellants, and appellants filed Civil Case No. 8829 in 1941 for the recovery of the properties." (Decision p. 19).

On the additional issue of extinctive prescription:

In the complaint filed by the petitioners in 1941 (Exhibit L), the following allegations of fact were averred:

1. That the obligation of the testate estate of Emilio Escay with Philippine National Bank had been fully paid by Jose Escay, Sr.
2. That Jose Escay, Sr. was already holding the properties in question by adverse and public possession for his exclusive benefit;
3. That the petitioners discovered the alleged fraud in 1941, and at that time Jose Escay, Sr. refused to return the properties in question.

The defense of extinctive prescription is available to the respondents on all three points above-stated, to defend themselves against the action for reconveyance brought by the petitioners.

On the first point, assuming that the 5-year period to repurchase the properties commenced only in 1941 (when the petitioners alleged in their complaint for reconveyance, Exhibit "L", against Jose Escay, Sr., that the obligations of the testate estate of Emilio Escay with the Philippine National Bank have been fully paid by Jose Escay, Sr.), since said five years had long since expired, any repurchase right of the petitioners arising therefrom has already been extinguished.

On the second point, assuming that Jose Escay, Sr. was not yet the registered owner of the properties since 1939, (although it is admitted by the parties that Jose Escay, Sr. became the registered owner of the properties in question in 1939) his open, public, adverse, and continuous possession of the properties for more than 25 years from the execution and approval of the supplementary contract to the filing of the complaint (Decision of the

Court of Appeals, p. 12), has by adverse possession and acquisitive prescription, already extinguished any right of the petitioners to ask for a reconveyance. (Under Sec. 40, Code of Civil Procedure, any action for reconveyance prescribes in ten (10) years.)

On the third point, assuming that there was fraud in the transfer of the properties, the lapse of time since the discovery of the alleged fraud in 1941 has extinguished any right on the part of the petitioners to seek the reconveyance of the properties. As the Court of Appeals correctly ruled:

"And assuming the existence of a trust relation, such trust was not an express one. If there was a trust, it arose from law, and therefore an implied trust. And implied trust prescribes in ten years. According to the appellants they discovered the fraud in 1941; the action to enforce an implied trust prescribed ten years thereafter. And assuming an express trust, the trust had been repudiated by Jose Escay, Sr. when in 1941 he refused to transfer the property to the appellants, and appellants filed Civil Case No. 8829 in 1941 for the recovery of the properties. This complaint, as stated above, was dismissed provisionally." (Decision of the Court of Appeals, pp. 18-19).

The prescriptibility of an action for reconveyance based on implied or constructive trust, is now a settled question in this jurisdiction. It prescribes in ten years. (*Bonaga vs. Soler, et al.*, G.R. No. L-15717, June 30, 1961; *J.M. Tuason & Co., Inc. vs. Magdangal*, G.R. No. L-15539, Jan. 30, 1962; special attention to footnote No. 1). *Alzona vs. Capunitan*, No. L-10228, Feb. 28, 1963; *Bueno vs. Reyes*, L-22587, April 28, 1969; 27 SCRA 1179.

Express trusts prescribe 10 years from the repudiation of the trust (*Manuel Diaz, et al. vs. Carmen Gorricho, et al.*, 54 O.G. p. 8429, Sec. 40, Code of Civil Procedure).

In conclusion, (a) all the findings of fact by the Court of Appeals were supported by the evidence, and (b) in any event, there was no grave abuse of discretion by the Court of Appeals in arriving at its findings.

For all these reasons, We voted to dismiss the petitioners' petition for certiorari, and We now deny their motion for reconsideration.

In view of the fact that Justice Barredo dissents, it should be stated that the original resolution of this Court of February 7, 1974 which denied "for lack of merit" the petitioner's petition for review, was the unanimous decision of this Division when Justice Zaldivar was still with the Court. With the present membership of this Division of five Justices, their unanimous vote is needed for the reconsideration of our Resolution of last February 7, 1974. Inasmuch as four of the members of this Division vote to deny the motion for reconsideration, with the dissent of Justice Barredo, Our denial of the motion for reconsideration stands.

Fernando, Chairman, Antonio, and Aquino, JJ., concur.

Barredo, J., dissents in a separate opinion.

DISSENTING OPINION

BARREDO, J.:

I dissent from the resolution denying petitioner's motion for reconsideration of the Court's resolution denying review of the decision of the Court of Appeals. After going over the whole record and reflecting further on all relevant aspects of this case, I am now convinced that the decision of the Court of Appeals under review is fatally deficient in factual and legal basis.

I know that findings of fact of the Court of Appeals are as a rule conclusive upon this Court. But in this case, my

considered view is that the basic conclusions of the appellate court are either not supported by its own premises or are indisputably belied by the records. More importantly, the legal conclusions contained in its decision are not in accord with law and jurisprudence.

The Court of Appeals has found that, contrary to the contention of petitioners, the haciendas in question were validly ceded by the Administrator of the Estate of Emilio Escay, Atty. Eduardo Arboleda, to Jose Escay, reserving to said estate the right to repurchase the same within five years, and that because no such repurchase was made within said period. Jose Escay acquired the said haciendas to the exclusion of petitioners. It further held that in any event, the action of petitioners to recover them has already prescribed, as also that the ownership of the haciendas has already been acquired by Jose Escay by *prescripcion adquisitiva*. It is my considered view, however, that all these conclusions are erroneous.

The Court of Appeals found the supposed *venta con pacto de retro* to be embodied in two documents, the so-called original contract of April 28, 1933 executed by the Philippine National Bank, Jose Escay and Atty. Arboleda, the administrator of the Estate, and the *Contrato Suplementario* executed by the same parties on February 3, 1934. On the other hand, petitioners contend that the real arrangement was for Jose Escay to assume the obligations of the Estate of Emilio Escay, retain possession (he was lessee) of the haciendas, manage the same and pay himself out of the net income thereof, after which they would be returned to the Estate. Consequently, the main issue here revolves around the true intent and purpose of said documents and their validity as transactions involving the estate of a deceased person represented by its administrator. The issue of whether or not the said documents embody and express the true intent and agreement of the parties, is factual, whereas the question of whether or not, being acts of an administrator disposing of rights belonging to the Estate of the heirs of Emilio Escay, they are valid, considering that it does not definitely appear that at the time they were approved by the probate court, the heirs had sufficient notice of the motion for such approval.

On the factual issue, the Court of Appeals upheld the theory of respondents already indicated that, as is stated in the "*Contrato*", the administrator had ceded the haciendas to Jose Escay in consideration of the latter's assuming the payment of the estate's indebtedness to the PNB and other specified creditors, reserving to said estate, however, the right to repurchase the same within five years from and after the full payment of the obligations to the PNB "*por el importe total de las cantidades que el ya ha pagado a cuenta de las obligaciones asumidas por el, las que pagare en adelante a cuenta dichas obligaciones, por contribucion territorial, por honorarios de su abogado en este asunto, mas los intereses sobre dichas cantidades a razon de 10% al ano, y el valor de la mejoras que el (Jose Escay) pusiere en el terreno.*" (See copy of *Contrato Suplementario*)

To my mind, this factual conclusion is wrong. For instance, there is absolutely nothing in the original contract of April 28, 1933 that even remotely suggests that any transfer of ownership of the haciendas was contemplated. Considering that such a transfer would have necessarily constituted a substantial novation of the mortgage contract with the PNB, involving as it did a change of debtors, it is not easily understandable why reference thereto does not appear even in the resolution of the PNB board of directors quoted in the contract in question. As the contract reads, it provides for nothing more than the assumption by Jose Escay of the obligation to pay for the indebtedness of the Estate of Emilio Escay to the bank, which is nothing strange since Jose was the lessee of the haciendas, and it was but normal that as a brother of Emilio, he should try to help his widow and children in their financial difficulties. After all, he could pay himself out of the income of the haciendas themselves, and that this was feasible is amply demonstrated by the admitted fact that Jose Escay was able to use the haciendas as collateral, with other properties, for comparatively bigger loans which he secured after transferring the same to his name.

It is significant that, according to the record on appeal, no notice was sent to the heirs of the motion for the

approval by the probate court of the said original contract. Besides, the record shows that said motion is actually dated April 25, 1933, three days before the contract itself, and copy thereof was received by the counsel for the bank on April 26, 1933, two days before the sale. The much-relied-upon conformity of Mrs. Magdalena Vda. de Escay bears the date of May 13, 1933, whereas the order of approval is dated May 15, 1933. Again, while the said conformity mentions a "traspaso", it is silent as to the alleged right of repurchase by the estate. While it is true, upon the other hand, that Atty. Arboleda's motion of April 25, 1933 did refer to a "transfer of whatever rights the estate may have over the properties mortgaged to the Philippine National Bank", the period of "repurchase" stated therein is "when they (the heirs) can afford to do so." The apparent inconsistencies of these details do not engender faith in the findings of the Court of Appeals.

The omission in the original contract of reference to the supposed "cession" with pacto de retro has been attributed by the intermediate court to a certain Mr. Recto of the PNB. But on the face of the document, this gentleman was not a party to the contract. It was a Mr. Juan who signed the same on behalf of the bank. And how are we to explain the similar omission in the supposed conformity of Mrs. Escay of any reference to a repurchase? Was Atty. Arboleda, like Mr. Recto, also careless in the preparation of the pertinent documents? Did Atty. Arboleda exercise that degree of diligence required for the protection of the interests of his wards, when he allowed Mrs. Escay to sign her conformity with nothing about repurchase being contained therein? Moreover, from April 28, 1933 to February 3, 1934, when the Contrato Suplementario was signed, is a period of more than nine months. It is difficult to believe that it took that much time for all the three parties, the bank, Jose Escay and Atty. Arboleda, to realize that the solemn covenant they had signed was far from being the agreement they had in mind.

The Court of Appeals agreed with respondents that the Contrato Suplementario merely put in black and white the true intent and agreement of the parties. But in arriving at such a conclusion, it overlooked a number of relevant circumstances, namely: (1) whereas in connection with the original agreement there is absolutely no showing that the heirs of Emilio Escay were served notice of the motion for its approval (not even Mrs. Escay), an attempt was made to prove that a copy of the motion to approve the second document was furnished Mrs. Escay, with the result, however, that even the Court of Appeals itself had to concede there was no basis for a definite finding that such service was in fact made, for the simple reason that Atty. Arboleda to whom the notice for Mrs. Escay was addressed could not swear that he transmitted the same to her. He did not give any reason for his belief that he must have given it to her. At this point, it might be mentioned that the eldest heir of Emilio, Roberto Escay might have been of age already in 1934, since he was already eleven years old when the petition for administration was filed in 1924, and so, notice to Mrs. Escay would have been insufficient anyway. (2) Seemingly, the Court of Appeals relied on the alleged conformity signed by Mrs. Escay. But this was given on May 13, 1933 long before the "Contrato." Moreover, there is nothing in it about repurchase. In any event, why was not a new conformity required of her? Indeed, the court order of February 23, 1943 approving the Contrato does not speak of a conformity of Mrs. Escay but of absence of any opposition either from her or the administrator. But how could any opposition be filed by her, when she was not notified? (3) The Court of Appeals reasoned out that the silence of Mrs. Escay "supports the inference that the matter (of the contrato) was really taken up by Atty. Arboleda and herself with Atty. Recto and that she had consented to the execution (thereof)". For the appellate court to so hold in the face of its own observation that "the receipt of the notice by Atty. Arboleda on behalf of Magdalena Vda. De Escay and the sending of the copy approving the supplementary contract to Magdalena Vda. de Escay, might not be sufficient to satisfy the requirement of written notice to the heirs" (presumably as required by Section 718 of the Code of Civil Procedure then obtaining for the validity of a probate court's order of the nature here in question) is an incomprehensible self-contradiction that demonstrates how erroneously the Court of Appeals viewed the situation of the parties and the evidence before it.

But assuming for a moment, without conceding, that the above erroneous factual conclusions of the Court of Appeals could have some basis, I still cannot accept the legal conclusion that the transaction in question is a *venta con pacto de retro*. To begin with, I do not believe it can be disputed that to part with the haciendas even momentarily was farthest from the mind of Mrs. Escay. Indeed, she has been insisting that what she actually agreed to was for Jose Escay to assume the estate's obligations to the bank with the right to retain the haciendas in his possession (he was then lessee) in order to pay himself out of the proceeds thereof. Indeed, there would have been hardly any advantage to the heirs to have allowed Jose Escay to acquire their haciendas at the price of their total obligations then, even with the supposed right to repurchase them, for under such arrangement, they would have had practically no chance to recover them, since the very properties from which they would derive any income would be taken away from them and transferred to their uncle. So, if ever Mrs. Escay had agreed to a *venta con pacto de retro*, it must have been because she considered the same to be in truth nothing more than a mere guarantee for the payment, with the income of the haciendas, by her and her children to Jose Escay of whatever he was supposed to pay the bank on their account. I reiterate it is inconceivable that she could have agreed to what respondents are claiming to have been the contract, for the simple reason that it would have deprived her and the other heirs of the only means to pay Jose. It would have been worse than an outright sale, since the price was very low and, on the other hand, the right of repurchase stipulated was anyway futile and ineffective, considering that their only source of income was being taken away from them. On the other hand, for Jose to retain the property with all its income without accounting to the heirs of his brother only because he has assumed all their obligations, would have been an unconscionable arrangement, considering that the total obligations of the estate have not been shown to be beyond its market value. At least, I feel that such an onerous condition could not have been imposed by a brother trying to help his sister-in-law and her children by his brother. In round figures, the total indebtedness assumed by Jose was not more than P35,000, and the haciendas were assessed at about P14,000, with a loan value of P28,000. In other words, the circumstances surrounding the transaction in question tend to show that the transfer or cession of the haciendas to Jose Escay was for the sole purpose of serving as security.

There is another factor which makes the said transaction one of equitable mortgage. In the *Contrato Suplementario*, it is expressly stipulated that during the period of repurchase, the land taxes of the haciendas would be paid by Jose but chargeable to the account of the heirs. Under Article 1602 of the Civil Code, this circumstance indicates that the conveyance is an equitable mortgage. (*Dalandan et al. vs. Julio et al.*, 10 SCRA 400.) In any event, it is gravely doubtful if Mrs. Escay sufficiently understood the transaction to be a sale. Now, under Article 1603 of the Civil Code, in case of doubt, "a contract purporting to be a sale with right to repurchase shall be construed as an equitable mortgage." Like Article 1602, this provision may be given retroactive effect so as to apply to transactions entered into before the effectivity of the New Civil Code. (*V Tolentino*, Civil Code, p. 138, citing *Casabar vs. Sino Cruz*, G.R. No. L-6882, December 29, 1954. See also *Santos vs. Duata*, 14 SCRA 1041.) In fact, because of the disfavor that *ventas con pacto retro* have suffered under the express provisions of the New Civil Code which have put into codal form the prevailing jurisprudential attitude, the decisions holding that the conclusions of the Court of Appeals on the intent of contracts of sale with right of repurchase in *Morales vs. Ventanilla*, 84 Phil. 459 and *Calaguas vs. Lim*, 83 Phil. 796, no longer hold.

In connection with the provisions of the New Civil Code regarding sales with right of repurchase, in Padilla's Civil Code, Vol. V, 1974 ed. pp. 470-471, We read:

"It must be admitted that there are some cases where the parties really intend a sale with right to repurchase. Although such cases are rare, still the freedom of contract must be maintained and respected. Therefore, the contract under consideration is preserved, but with adequate safeguards and restrictions. (Report of the Code Commission, p. 64).

"One of the gravest problems that must be solved is that raised by the contract of sale with right of repurchase or pacto de retro. The evils arising from this contract have festered like a sore on the body politic. (Report of the Code Commission, p. 61).

"It is a matter of common knowledge that in practically all of the so-called contracts of sale with right of repurchase, and the real intention of the parties is that the pretended purchase-price is money loaned, and in order to secure the payment of the loan a contract purporting to be a sale with pacto de retro is drawn up. It is thus that the provisions contained in articles 1859 and 1958 of the present Civil Code which respectively prohibit the creditor from appropriating the things given in pledge or mortgage and ordering that said things be sold or alienated when the principal obligation becomes due, are circumvented.

"Furthermore it is well-known that the practice in these so-called contracts of sale with pacto de retro is to draw up another contract purporting to be a lease of the property to the supposed vendor, who pays in money or in crops a so-called rent. It is, however, no secret to anyone that this simulated rent is in truth and in fact interest on the money loaned. In many instances, the interest is usurious. Thus, the usury law is also circumvented.

"It is high time these transgressions of the law were stopped. It is believed by the Commission that the plan submitted for the solution of the problem will meet with the approval of an enlightened public opinion, and in general, of everyone moved by a sense of justice." (Report of the Code Commission, p. 63.)

Of course, I am aware that this discussion of mine differs from the theory of antichresis or trust pursued by petitioners, but it is my conviction that the Court is not precluded from deciding a case according to how it believes the law should be applied regardless of the respective theories of the parties, as long as the facts on which the decision is based are those tried by the trial court and found by the Court of Appeals. I hold that the Court is not bound by the legal theories set by the parties, for were that the rule, cases would be decided not according to law and justice but according to how the lawyers of the parties feel or believe they should be resolved.

But let Us assume again, that Mrs. Escay had agreed to a sale with right of repurchase as found by the Court of Appeals. Still, in the state of the record of this case, I am not convinced that the contracts in question are valid. I notice that throughout the decisions of the trial court and the Court of Appeals, Mrs. Escay was referred to as Guardian-ad-litem of the heirs of Emilio, but nowhere in the record does any appointment of her as such appear. Personally, I have my doubts as to whether or not she could act as such, considering that in the settlement of the estate of a deceased person, every heir has a potential conflict of interest with all the other heirs. Besides, Mrs. Escay had been replaced as administratrix precisely because she failed to properly attend to her duties as such. Such being the case, how could she properly protect the interests of her children which may even conflict with her own?

More importantly, in view of the nature of the transaction submitted to the approval of the probate court, involving as it does the disposition of properties of her wards, I do not believe that her being their guardian ad litem, assuming she had an appointment as such, was sufficient to enable her to act in their behalf. I submit that under the circumstances, the conformity on the part of the heirs had to be given by the duly appointed guardian over their properties. Accordingly, the conformity relied upon by respondents does not bind the other heirs of Emilio Escay.

Assuming again, without conceding, that the transaction is a pacto de retro sale, in my opinion, petitioners have not yet lost their right to repurchase the lands in question. Under the theory of respondents, Jose Escay consolidated ownership in himself of the lands in question for failure of the heirs of Emilio to exercise their right of repurchase. I cannot see at all the circumstances surrounding such consolidation. For one thing, there is no proof at all found by the Court of Appeals as to when it actually took place. There is an indication that on April 4,

1939, the title of Emilio Escay was cancelled in favor of Jose Escay, but under what circumstances, there is nothing in the record to show. In this connection, it must be noted that under the pretense of respondents, the period of repurchase is five (5) years from the payment of all obligations.[1] And if we go by the theory that the complaint filed by the heirs in 1941 admitted payment by Jose of the account with the bank, hence, in the absence of other proof, it may be conceded that such payment took place in 1941, it is hardly explainable how the consolidation could have been made in 1939. Please note that April 4, 1939 was hardly five (5) years from February 3, 1934, when the contract was signed, and there is no pretense that the payment was made anywhere within three months after the date of the "Contrato Suplementario."

As may be seen, the facts found by the Court of Appeals do not appear to be clear enough and sufficiently consistent to convince the conscience that justice is being done to the heirs of Emilio Escay. In cases of this nature where the rights of innocent minors are involved, courts must be extremely careful and should require nothing less than clear and convincing evidence.

What is more, the finding of the Court of Appeals that the mortgage by Emilio Escay in favor of the bank has been cancelled is belied completely by the fact that nowhere is the numerous memoranda annotated at the back of the corresponding titles is such cancellation shown. And the theory further pursued by the appellate court that the bank would not have executed a cancellation, if the indebtedness had not been paid, is baseless because there is precisely no proof of such cancellation. Moreover, the explanation that Jose Escay must have secured a mortgage for a bigger amount without cancelling the previous one only goes to show that he used the contract to his advantage and to the prejudice of his sister-in-law and his nephews.

What is most disturbing is that, to my mind, whatever transaction may have been entered into between Atty. Arboleda and Jose Escay, it could not have been a pacto de retro to sale. Either it was a mere antichresis contract or at the most an equitable mortgage. Or to imagine a third legally possible alternative, it was a promise to sell the lands to Jose Escay if the obligations to the bank were not paid in five years. Under any of these hypothesis, the heirs have not lost completely their rights over the land. As I have discussed above, under settled jurisprudence and the provisions of the Civil Code, there is more than enough basis for Us to hold that the agreement in question is an equitable mortgage.

And assuming it was a pacto de retro sale, there is no showing at all that proper accounting was made by Jose Escay to enable the heirs to make the repurchase. Precisely, the weakness of the sale theory is that there was no price definitely fixed, but rather a price determinable only, if at all, in the future, after an accounting of all the payment made by Jose Escay for which they were liable. There is absolutely no evidence that Jose even informed the petitioners of the consolidation he had made.

The concern of the law regarding the rights of the vendor a retro is clearly evidenced by Article 1607 of the New Civil Code requiring a judicial order, to be issued only after due hearing, before the Register of Deeds can record a consolidation of the vendee-a-retro's title. I am not saying that in this particular case, this procedure should have been followed, but I maintain that pursuant to the Supreme Court's ruling in *Basco vs. Puzon*, 69 Phil. 706, "If the parties agree that the redemption price would be fixed after an accounting to be made by the buyer a retro, then failure of such buyer to render said accounting should excuse the seller a retro from effecting the repurchase within the time stipulated. Equity demands that the seller a retro be given an additional time within which to repurchase after a correct accounting has been made either by the buyer a retro or by the court." This ruling is squarely applicable to the case at bar. And since no accounting has been shown by respondents, the consolidation relied upon by them was premature.

I will not tarry long on the issue of prescription because the transaction being an equitable mortgage, Jose Escay

could not, in the fashion of a pactum commissorium have validly appropriated the haciendas to himself unceremoniously as he appears to have done. And since there is no showing as to when the invalid consolidation took place, there is no basis for prescription. There could not be any prescripcion adquisitiva in this case because as far as petitioners were concerned their right to repurchase had not yet expired or even began. And under the theory of equitable mortgage, there is no reason to discuss prescription in this case.

I vote to grant petitioners' motion for reconsideration and to give due course to the petition which, to my mind, shows sufficient ground for Us to reverse the decision of the Court of Appeals and to allow petitioners either to repurchase the haciendas in line with the above discussion or to require respondents to foreclose the equitable mortgage in their favor, annulling for these purposes the title in favor of Jose Escay sustained by the courts below.

[1] As previously observed, in the motion of Atty. Arboleda of April 25, 1933, the period specified for the repurchase is "when they (the heirs) can afford to do so", meaning indefinitely, albeit under Article 1606, the same cannot be more than ten years. (*Alojado vs. Lim Siongco*, 51 Phil. 339.)

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