

MELLON BANK, N.A., PETITIONER, VS. HON. CELSO L. MAGSINO, IN HIS CAPACITY AS PRESIDING JUDGE OF BRANCH CLIX OF THE REGIONAL TRIAL COURT AT PASIG; MELCHOR JAVIER, JR., VICTORIA J...*G.R. No. 71479. October 18, 1990*

Ponente: FERNAN, C.J.

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The issue in the instant special civil action of certiorari is whether or not, by virtue of the principle of election of remedies, an action filed in California, U.S.A., to recover real property located therein and to constitute a constructive trust on said property precludes the filing in our jurisdiction of an action to recover the purchase price of said real property.

On May 27, 1977, Dolores Ventosa requested the transfer of \$1,000 from the First National Bank of Moundsville, West Virginia, U. S. A. to Victoria Javier in Manila through the Prudential Bank. Accordingly, the First National Bank requested the petitioner, Mellon Bank, to effect the transfer. Unfortunately, the wire sent by Mellon Bank to Manufacturers Hanover Bank, a correspondent of Prudential Bank, indicated the amount transferred as "US \$1,000,000.00" instead of US \$1,000.00. Hence, Manufacturers Hanover Bank transferred one million dollars less bank charges of \$6.30 to the Prudential Bank for the account of Victoria Javier.

On June 3, 1977, Javier opened a new dollar account (No. 343) in the Prudential Bank and deposited \$999,943.70. Immediately thereafter, Victoria Javier and her husband, Melchor Javier, Jr., made withdrawals from the account, deposited them in several banks only to withdraw them later in an apparent plan to conceal, "launder" and dissipate the erroneously sent amount.

On June 14, 1977, Javier withdrew \$475,000 from account No. 343 and converted it into eight cashier's checks made out to the following: (a) F.C. Hagedorn & Co., Inc., two checks for the total amount of P1,000,000; (b) Elnor Investment Co., Inc., two checks for P1,000,000; (c) Paramount Finance Corporation, two checks for P1,000,000; and (d) M. Javier, Jr., two checks for P496,000. The first six checks were delivered to Jose Marquez and Honorio Poblador, Jr.

It appears that Melchor Javier, Jr. had requested Jose Marquez, a realtor, to look for properties for sale in the United States. Marquez offered a 160-acre lot in the Mojave desert in California City which was owned by Honorio Poblador, Jr. Javier, without having seen the property, agreed to buy it for P3,236,800 (US \$437,405) although it was actually appraised at around \$38,500. Consequently, as Poblador's agent, Marquez executed in Makati a deed of absolute sale in favor of the Javiers and had the document notarized in Manila before an associate of Poblador. Marquez executed another deed of sale indicating receipt of the purchase price and sent the deed to the Kern County Registrar in California for registration.

Inasmuch as Poblador had requested that the purchase price should not be paid directly to him, the payment of

P3,000,000 was coursed through Elnor Investment Co., Inc., allegedly Poblador's personal holding company; Paramount Finance, allegedly headed by Poblador's brother, and F. C. Hagedorn, allegedly a stock brokerage with extensive dealings with Poblador. The payment was made through the aforementioned six cashier's checks while the balance of P236,000 was paid in cash by Javier who did not even ask for a receipt.

The two checks totalling P1,000,000 was delivered by Poblador to F. C. Hagedorn with specific instructions to purchase Atlas, SMC and Philex shares. The four checks for P2,000,000 with Elnor Investment and Paramount Finance as payees were delivered to the latter to purchase "bearer" notes.

Meanwhile, in July, 1977, Mellon Bank filed a complaint docketed as No. 148056 in the Superior Court of California, County of Kern, against Melchor Javier, Jane Doe Javier, Honorio Poblador, Jr., and Does I through V. In its first amended complaint to impose constructive trust dated July 14, 1977,[1] Mellon Bank alleged that it had mistakenly and inadvertently caused the transfer of the sum of \$999,000.00 to Jane Doe Javier; that it believes that the defendants had withdrawn said funds; that "the defendants and each of them have used a portion of said funds to purchase real property located in Kern County, California"; and that because of defendants' knowledge of Mellon Bank's mistake and inadvertence and their use of the funds to purchase the property, they and "each of them are involuntary or constructive trustees of the real property and of any profits therefrom, with a duty to convey the same to plaintiff forthwith." It prayed that the defendants and each of them be declared as holders of the property in trust for the plaintiff; that defendants be compelled to transfer legal title and possession of the property to the plaintiff; that defendants be made to pay the costs of the suit, and that other reliefs be granted them.

On July 29, 1977, Mellon Bank also filed in the Court of First Instance of Rizal, Branch X, a complaint against the Javier spouses, Honorio Poblador, Jr., Domingo L. Jhocson, Jr., Jose Marquez, Roberto Gariño, Elnor Investment Co., Inc., F.C. Hagedorn & Co., Inc. and Paramount Finance Corporation. After its amendment, Rafael Caballero and Tri-Arc Investment & Management Company, Inc. were also named defendants.[2]

The amended and supplemental complaint alleged the facts set forth above and added that Roberto Gariño, chief accountant of Prudential Bank, and who was the reference of Mrs. Ventosa's dollar remittances to Victoria Javier, immediately informed the Javiers of the receipt of US \$1,000,000.00; that knowing the financial circumstances of Mrs. Ventosa and the fact that a mistake had been committed, the Javiers, with undue haste, took unlawful advantage of the mistake, withdrew the whole amount and transferred the same to a "343 dollar account"; that, aided and abetted by Poblador and Domingo L. Jhocson, the Javiers "compounded and completed the conversion" of the funds by withdrawing from the account dollars or pesos equivalent to US \$975,000; that by force of law, the Javiers had been constituted trustees of an implied trust for the benefit of Mellon Bank with a clear duty to return to said bank the moneys mistakenly paid to them; that, upon request of Mellon Bank and Manufacturers Hanover Bank, Prudential Bank informed the Javiers of the erroneous transmittal of one million dollars first orally and later by letter-demand; that conferences between the representatives of the Javiers, led by Jhocson and Poblador, in the latter's capacity as legal and financial counsel, and representatives of Mellon Bank, proved futile as the Javiers claimed that most of the moneys had been irretrievably spent; that the Javiers could only return the amount if the Mellon Bank should agree to make an absolute quitclaim and waiver of future rights against them, and that in a scheme to conceal and dissipate the funds, through the active participation of Jose Marquez, the Javiers bought the California property of Poblador.

It further alleged that trust fund moneys totalling P3,000,000.00 were made payable to Hagedorn, Paramount and Elnor; that Hagedorn, on instructions of Poblador, purchased shares of stock at a stock exchange for P1,000,000.00 but later, it hastily sold said shares at a loss of approximately P150,000.00 to the prejudice of the plaintiff; that proceeds of the sale were deposited by Hagedorn in the name of Poblador and/or the law office of

Poblador, Nazareno, Azada, Tomacruz and Paredes; that dividends declared on the shares were delivered by Hagedorn to Caballero after the complaint had been filed and thereafter, Caballero deposited the dividends in his personal account; that after receiving the P1,000,000.00 trust money, Paramount issued promissory notes upon maturity of which Paramount released the amount to unknown persons; that Elnor also invested P1,000,000.00 in Paramount for which the latter also issued promissory notes; that after the filing of the complaint, counsel for plaintiff requested Paramount not to release the amount after maturity; that in evident bad faith, Elnor transferred the non-negotiable Paramount promissory notes to Tri-Arc; that when the notes matured, Paramount delivered the proceeds of P1,000,000.00 to Tri-Arc; that Poblador knew or should have known that the attorney's fees he received from the Javiers came from the trust funds; and that despite formal demands even after the filing of the complaint, the defendants refused to return the trust funds which they continued concealing and dissipating.

It prayed that: (a) the Javiers, Poblador, Elnor, Jhocson and Gariño be ordered to account for and pay jointly and severally unto the plaintiff US\$999,000.00 plus increments, additions, fruits and interests earned by the funds from receipt thereof until fully paid; (b) the other defendants be ordered to account for and pay unto the plaintiff jointly and severally with the Javiers to the extent of the amounts which each of them may have received directly or indirectly from the US\$999,000.00 plus increments, additions, fruits and interests; (c) Marquez be held jointly and severally liable with Poblador for the amount received by the latter for the sale of the 160-acre lot in California City; and (d) defendants be likewise held liable jointly and severally for attorney's fees and litigation expenses plus exemplary damages.

In due course, the defendants filed their answers and hearing of the case ensued. In his testimony, Jose Marquez stated that Prudential Bank and Trust Company checks Nos. 2530 and 2531 in the respective amounts of P100,000 and P900,000 payable to F. C. Hagedorn were delivered to him by Melchor Javier, Jr. as partial consideration for the sale of Poblador's property in California. After receiving the checks, Hagedorn purchased shares of Atlas Mining, Philex, Marcopper and San Miguel Corporation for Account No. 3000, which, according to Fred Hagedorn, belonged to the law office of Poblador.[3]

F. C. Hagedorn & Co., Inc. then sold the shares for P874,490.75 as evidenced by HSBC check No. 339736 for P400,000 and HSBC check No. 339737 for P474,490.75 payable to "cash". Mellon Bank traced these checks to Account 2825-1 of the Philippine Veterans Bank in the name of Cipriano Azada, Poblador's law partner and counsel to the Javiers.[4]

An employee of the Philippine Veterans Bank thereafter introduced the specimen signature cards for Account No. 2825-1 thereby confirming Azada's ownership of the account. Defendants objected to this testimony on the grounds of Azada's absence, the confidentiality of the bank account, and the best evidence rule. The court overruled the objection. Another employee of the Philippine Veterans Bank then presented the ledger card for Account No. 2825-1, a check deposit slip and a daily report of returned items. The defendants objected but they were again overruled by the court.

Mellon Bank then subpoenaed Erlinda Baylosis of the Philippine Veterans Bank to show that Azada deposited HSBC checks No. 339736 and 339737 amounting to P874,490.75 in his personal current account with said bank. It also subpoenaed Pilologo Red, Jr. of Hongkong & Shanghai Banking Corporation to prove that said amount was returned by Azada to Hagedorn.

The testimonies of these witnesses were objected to by the defense on the grounds of *res inter alios acta*, immateriality, irrelevancy and confidentiality. To resolve the matter, the court ordered the parties to submit memoranda. The defendants' objections were also discussed at the hearing on July 13, 1982. For the first time, Poblador's counsel raised the matter of "election of remedies." [5]

At the July 20, 1982 hearing, the lower court, then presided by Judge Eficio Acosta, conditionally allowed the testimonies of Baylosis and Red. Baylosis affirmed that Azada deposited checks Nos. 339736 and 339737 in the total amount of P874,490.75 in his personal account with the Philippine Veterans Bank but almost simultaneously, Azada issued his PVB check for the same amount in favor of Hagedorn. Consequently, Azada's check initially bounced. For his part, Red testified that Azada's check for P874,490.75 was received by the Hongkong & Shanghai Banking Corporation and credited to the account of Hagedorn.

The defendants then moved to strike off the testimonies of Baylosis and Red from the record. Defendant Paramount Finance Corporation, which is not a party to the California case, thereafter filed its memorandum raising the matter of "election of remedies". It averred that inasmuch as the Mellon Bank had filed in California an action to impose constructive trust on the California property and to recover the same, Mellon Bank can no longer try to regain the purchase price of the same property through Civil Case No. 26899. The other defendants adopted Paramount's stand.

After Mellon Bank filed its reply to the memorandum of Paramount, on September 10, 1982, Judge Acosta issued a resolution ordering that the testimonies of Baylosis and Red and the documents they testified on, which were conditionally allowed, be stricken from the records.[6] Judge Acosta explained:

"After a judicious evaluation of the arguments of the parties the Court is of the view that in cases where money held in trust was diverted by the trustee, under the 'rule of trust pursuit' the beneficiary 'may elect whether to accept the trust estate in its new form or hold the trustee responsible for it in its original condition' (Lathrop vs. Hampton, 31 Cal. 17; Zodos vs. Marefalos, 48 Idaho 291; Bahle vs. Hasselbrach, 64 NW Eq. 334, 51 Sections 508-76 Am Jur. 2d p. 475), and that 'an election to pursue one remedy waives and bars pursuit of any inconsistent remedy' (76 Am Jur 2d S253). The instant complaint among others is for the recovery of the purchase price of the Kern property as held in trust for the plaintiff while in the California case the plaintiff maintains that the Kern property is held in trust for the plaintiff, which positions are inconsistent with each other. Neither can the plaintiff now abandon his complaint for the recovery of the Kern property and pursue his complaint for the recovery of the purchase price of said property for 'if he has first sought to follow the res, the plaintiff cannot thereafter hold the trustee personally responsible' and 'when once there has been an election to do one of two things, you cannot retract it and do the other thing. The election once made is finally made.' (Fowler vs. Bowvery Savings Bank 113 N.Y. 450, 21 N.E. 172, 4 LRA 145, 10 Am. S.R. 479. 2 Silv. 280, 23 Abb. N. Cos. 133065 C. J. p. 980 Note 32).

"The fact that the California case has been stayed pending determination of the instant case only means that should this case be dismissed, the California case can proceed to its final determination.

"Furthermore, when the plaintiff filed the California case for the transfer of legal title and possession of the Kern property to the plaintiff it in effect ratified the transaction for 'by taking the proceeds or product of a wrongful transfer of trust property or funds, the beneficiary ratifies the transaction' (Board of Commissioner vs. Strawn [CA6 Ohio] 157 F. 49, 76 Am Jur 2d Section 253). Consequently the purchase price of the California property received by defendant Poblador from Javier is no longer the proper subject matter of litigation and the movement and disposition of the purchase price is therefore within the scope of the absolutely confidential nature of bank deposits as provided by Sec. 2, R. A. 1405 as amended by PD No. 1792."

Mellon Bank moved for reconsideration, alleging that said order prevented the presentation of evidence on the purchase price of the California property; that the California case cannot be considered a waiver of the pursuit of the purchase price as even if said case was filed fifteen days prior to the filing of the original complaint in this case, except for the Javiers, no other defendants raised in their answers the affirmative defense of the filing of the California case; that after the amendment of the complaint, none of the defendants raised the matter of "election of

remedies" in their answers; that realizing this procedural error, Paramount sought the amendment of its answer to reflect the "defense" of election of remedies"; that, disregarding its previous orders allowing evidence and testimonies on Account No. 2825-1, the court made a turnabout and ruled that the testimonies on said account were irrelevant and confidential under Republic Act No. 1405; that Philippine law and jurisprudence does not require the election of remedies for they favor availment of all remedies; that even United States jurisprudence frowns upon election of remedies if it will lead to an inequitable result; that, as held by this Court in *Radiowealth vs. Javier*[7], there can be no binding election of remedies before the decision on the merits is had; that until Mellon Bank gets full recovery of the trust moneys, any contention of election of remedy is premature, and that, the purchase price being the subject of litigation, inquiring into its movement, including its deposit in banks, is allowed under Republic Act No. 1405.

Defendants filed their respective comments and oppositions to the motion for reconsideration. In its reply, the Mellon Bank presented proof to the effect that in the California case, defendants filed motions to strike out the cross-complaint of Mellon Bank, for summary judgment and to stay or dismiss the action on the ground of inconvenient forum but the first two motions and the motion to dismiss were denied "without prejudice to renew upon determination of the Philippine action". The motion to stay proceedings was "granted until determination of the Philippine action." [8]

On October 28, 1983, the lower court, through Judge Acosta, denied the motion for reconsideration and ordered the continuation of the hearing (Rollo, p. 182). The plaintiff filed a motion for the reconsideration of both the September 10, 1982 and October 28, 1983 orders. After the parties had filed comments, opposition and reply, the court, through Judge Celso L. Magsino, denied Mellon Bank's second motion for reconsideration on the ground that it was "proscribed by the 1983 Interim Rules of Court" in an order dated July 9, 1985. [9]

The court ruled that the determination of the relevancy of the testimonies of Baylosis and Red was "premised directly and principally" on whether or not Mellon Bank could still recover the purchase price of the California property notwithstanding the filing of the case in California to recover title and possession of the said property. After quoting the resolution of September 10, 1982, the Court ruled that it was a "final order or a definitive judgment with respect to the claim of plaintiff for the recovery" of the purchase price of the California property. It stated:

"The adjudication in the Order of September 10, 1982 and the Order of October 28, 1983, which has the effect of declaring that plaintiff has no cause of action against the defendants for the recovery of the proceeds of the sale of Kern property in the amount of Three Million Three Hundred Fifty Thousand Pesos (P3,500,000.00 [sic]) for having filed a complaint for the recovery of the Kern property in the Superior Court of California, County of Kern, is a final and definitive disposition of the claim of the plaintiff to recover in the instant action the proceeds of sale of said property against the defendants. The issue of "election of remedy" by the plaintiff was lengthily and thoroughly discussed and argued by the parties before the rendition of the resolution of September 10, 1982, and in the motion for reconsideration and oppositions thereto before its resolution in the Order of October 28, 1983. Such issue is a substantive one as it refers to the existence of plaintiff's cause of action to recover the proceeds of the sale of the Kern property in this action, and that issue was presented to the Court as if a motion to dismiss or a preliminary hearing of an affirmative defense on the ground that plaintiff has no cause of action, and was resolved against plaintiff in the Order of September 10, 1982, after a full hearing of all the parties. Said Order of September 10, 1982 has the effect of putting an end to the controversy between the parties as to the right of plaintiff to claim or recover the proceeds of the sale of the Kern property from the defendants. It is therefore an adjudication upon the merits. [10]

Hence, Mellon Bank filed the instant petition for certiorari claiming that the resolution of September 10, 1982 and the orders of October 28, 1983 and July 9, 1985 are void for being unlawful and oppressive exercises of legal

authority, subversive of the fair administration of justice, and in excess of jurisdiction. The petition is founded on its allegations that: (a) the resolution of September 10, 1982 is interlocutory as it does not dispose of Civil Case No. 26899 completely; (b) the evidence stricken from the records is relevant on the basis of the allegations of the amended and supplemental complaint, and (c) the doctrine of election of remedies, which has long been declared obsolete in the United States, is not applicable in this case.

With the exception of the Javiers, all the respondents filed their respective comments on the petition. Having failed to file said comment, the Javiers' counsel of record, Azada, Tomacruz & Cacanindin,[11] was required to show cause why disciplinary action should not be taken against it. And, having also failed to show cause, it was fined P300.

In his motion for reconsideration of the resolution imposing said fine, Cipriano Azada alleged that in Civil Case No. 26899, the Javiers were indeed represented by the law firm of Poblador, Azada, Tomacruz & Cacanindin but he was never the lawyer of the Javiers' in his personal capacity; that after the death of Honorio Poblador, Jr., he had withdrawn from the partnership; that he is the counsel of the Administratrix of the Estate of Honorio Poblador, Jr. for which he had filed a comment, and that should the Court still require him to file comment for the Javiers despite the lack of client-lawyer relationship, he would adopt the comment he had filed for the said Administratrix.[12]

In its effort to locate the Javiers so that their side could be heard, we required the petitioner to furnish us with the Javiers' address as well as the name and address of their counsel.[13] In compliance therewith, counsel for petitioner manifested that the Javiers had two known addresses in San Juan, Metro Manila and in Sampaloc, Manila; that since their conviction in Crim. Case No. CCC-VII-2369-P.C. of the Pasig Regional Trial Court, the Javiers had gone into hiding and warrants for their arrest still remain unserved;[14] that the Javiers' counsel of record in Civil Case No. 26899 is Atty. Cipriano Azada; that the same counsel appeared for the Javiers in Criminal Case No. 39851 of the Pasig Regional Trial Court which is a tax evasion case filed by the Republic of the Philippines, and that during the hearings of the civil and tax evasion cases against the Javiers, Atty. Cipriano Azada, Jr. represented them.[15]

Inasmuch as copies of the resolution requiring comment on the petition and the petition itself addressed to Melchor Javier were returned with the notations "moved" and "deceased", the Court required that said copies be sent to Mrs. Javier herself and that petitioner should inform the Court of the veracity of Javier's death.[16] A copy of the resolution addressed to Mrs. Javier was returned also with the notation "deceased." [17]

Counsel for petitioner accordingly informed the Court that he learned that the Javiers had fled the country and that he had no way of verifying whether Melchor Javier had indeed died.[18]

In view of these circumstances, the Javiers' comment on the petition shall be dispensed with as the Court deems the pleadings filed by the parties sufficient bases for resolving this case. The Javiers shall be served copies of this decision in accordance with Section 6, Rule 13 of the Rules of Court by delivering said copies to the clerk of court of the lower court, with proof of failure of both personal service and service by mail.

We hold that the lower court gravely abused its discretion in ruling that the resolution of September 10, 1982 is a "final and definitive disposition" of petitioner's claim for the purchase price of the Kern property. The resolution is interlocutory and means no more than what it states in its dispositive portion - the testimonies of Baylosis and Red and the documents they testified on, should be stricken from the record.

That the resolution discusses the common-law principle of election of remedies, a subject matter which shall be dealt with later, is beside the point. It is interlocutory because the issue resolved therein is merely the admissibility

of the plaintiff's evidence.[19] As such, it does not dispose of the case completely but leaves something more to be done upon its merits.[20] There are things left undone in Civil Case No. 26899 after the issuance of the September 10, 1982 resolution not only because of its explicit dispositive portion but also due to the fact that even until now, the case is still pending and being heard.[21]

Furthermore, the lower court's holding in its July 9, 1985 order that petitioner's second motion for reconsideration is proscribed by the 1983 Interim Rules of Court which disallows such motion on a final order or judgment, should be rectified. As explained above, the resolution of September 10, 1982 is not a final one. It also contains conclusions on procedural matters which, if left unchecked, would prejudice petitioner's substantive rights.

In effect, therefore, the July 9, 1985 order is a shortcut disposition of Civil Case No. 26899 in total disregard of petitioner's right to a thorough ventilation of its claims. By putting a premium on procedural technicalities over the resolution of the merits of the case, the lower court rode roughshod over the basic judicial tenet that litigations should, as much as possible, be decided on their merits and not on technicalities.[22] The trial court's patent grave abuse of discretion therefore forces us to exercise supervisory authority to correct its errors notwithstanding the fact that ordinarily, this Court would not entertain a petition for certiorari questioning the legality and validity of an interlocutory order.[23]

Respondents' principal objection to the testimonies of Baylosis and Red is their alleged irrelevance to the issues raised in Civil Case No. 26899. The fallacy of this objection comes to fore upon a scrutiny of the complaint. Petitioner's theory therein is that after the Javiers had maliciously appropriated unto themselves \$999,000, the other private respondents conspired and participated in the concealment and dissipation of said amount. The testimonies of Baylosis and Red are therefore needed to establish the scheme to hide the erroneously sent amount.

Private respondents' protestations that to allow the questioned testimonies to remain on record would be in violation of the provisions of Republic Act No. 1405 on the secrecy of bank deposits, is unfounded. Section 2 of said law allows the disclosure of bank deposits in cases where the money deposited is the subject matter of the litigation.[24] Inasmuch as Civil Case No. 26899 is aimed at recovering the amount converted by the Javiers for their own benefit, necessarily, an inquiry into the whereabouts of the illegally acquired amount extends to whatever is concealed by being held or recorded in the name of persons other than the one responsible for the illegal acquisition.[25]

We view respondents' reliance on the procedural principle of election of remedies as part of their ploy to terminate Civil Case No. 26899 prematurely. With the exception of the Javiers, respondents failed to raise it as a defense in their answers and therefore, by virtue of Section 2, Rule 9 of the Rules of Court, such defense is deemed waived.[26] Notwithstanding its lengthy and thorough discussion during the hearing and in pleadings subsequent to the answers, the issue of election of remedies has not, contrary to the lower court's assertion, been elevated to a "substantive one." Having been waived as a defense, it cannot be treated as if it has been raised in a motion to dismiss based on the nonexistence of a cause of action.

Moreover, granting that the defense was properly raised, it is inapplicable in this case. In its broad sense, election of remedies refers to the choice by a party to an action of one of two or more coexisting remedial rights, where several such rights arise out of the same facts, but the term has been generally limited to a choice by a party between inconsistent remedial rights, the assertion of one being necessarily repugnant to, or a repudiation of, the other. In its technical and more restricted sense, election of remedies is the adoption of one of two or more coexisting remedies, with the effect of precluding a resort to the others.[27]

As a technical rule of procedure, the purpose of the doctrine of election of remedies is not to prevent recourse to any remedy, but to prevent double redress for a single wrong.[28] It is regarded as an application of the law of

estoppel, upon the theory that a party cannot, in the assertion of his right occupy inconsistent positions which form the basis of his respective remedies. However, when a certain state of facts under the law entitles a party to alternative remedies, both founded upon the identical state of facts, these remedies are not considered inconsistent remedies. In such case, the invocation of one remedy is not an election which will bar the other, unless the suit upon the remedy first invoked shall reach the stage of final adjudication or unless by the invocation of the remedy first sought to be enforced, the plaintiff shall have gained an advantage thereby or caused detriment or change of situation to the other.[29] It must be pointed out that ordinarily, election of remedies is not made until the judicial proceedings has gone to judgment on the merits.[30]

Consonant with these rulings, this Court, through Justice J.B.L. Reyes, opined that while some American authorities hold that the mere initiation of proceedings constitutes a binding choice of remedies that precludes pursuit of alternative courses, the better rule is that no binding election occurs before a decision on the merits is had or a detriment to the other party supervenes.[31] This is because the principle of election of remedies is discordant with the modern procedural concepts embodied in the Code of Civil Procedure which permits a party to seek inconsistent remedies in his claim for relief without being required to elect between them at the pleading stage of the litigation.[32]

It should be noted that the remedies pursued in the California case and in Civil Case No. 26899 are not exactly repugnant or inconsistent with each other. If ever, they are merely alternative in view of the inclusion of parties in the latter case who are not named defendants in the former. The causes of action, although they all stem from the erroneous transmittal of dollars, are distinct as shown by the complaints lengthily set out above. The bar of an election of remedies does not apply to the assertion of distinct causes of action against different persons arising out of independent transactions.[33]

As correctly pointed out by the petitioner, the doctrine of election of remedies is not favored in the United States for being harsh.[34] Its application with regards to two cases filed in two different jurisdictions is also circumscribed by jurisprudence on abatement of suits. Thus, in *Brooks Erection Co. v. William R. Montgomery & Associates, Inc.*,[35] it is held:

"The pendency of an action in the courts of one state or country is not a bar to the institution of another action between the same parties and for the same cause of action in a court of another state or country, nor is it the duty of the court in which the latter action is brought to stay the same pending a determination of the earlier action, even though the court in which the earlier action is brought has jurisdiction sufficient to dispose of the entire controversy. Nevertheless, sometimes stated as a matter of comity, not of right, it is usual for the court in which the later action is brought to stay proceedings under such circumstances until the earlier action is determined."

However, in view of the fact that the California court wherein the case for recovery of the Kern property was first filed against the Javiers had stayed proceedings therein until after the termination of Civil Case No. 26899, the court below can do no less than expedite the disposition of said case.

We cannot dispose of this case without condemning in the strongest terms possible the acts of chicanery so apparent from the records. The respective liabilities of the respondents are still being determined by the court below. We must warn, however, against the use of technicalities and obstructive tactics to delay a just settlement of this case. The taking advantage of the petitioner's mistake to gain sudden and undeserved wealth is marked by circumstances so brazen and shocking that any further delay will reflect poorly on the kind of justice our courts dispense. The possible involvement of lawyers in this sorry scheme stamps a black mark on the legal profession. The Integrated Bar of the Philippines (IBP) must be made aware of the ostensible participation, if not instigation, in the spiriting away of the missing funds. The IBP must take the proper action at the appropriate time against all

lawyers involved in any misdeeds arising from this case.

WHEREFORE, the resolution of September 10, 1982 and the orders of October 28, 1982 and July 9, 1985 are hereby annulled. The lower court is ordered to proceed with dispatch in the disposition of Civil case No. 26899, considering that thirteen (13) years have gone by since the original erroneous remittance.

Service of this decision on the Javier spouses shall be in accordance with Section 6, Rule 13 of the Rules of Court. A copy of this decision shall be served on the Integrated Bar of the Philippines.

This decision is immediately executory. Costs against private respondents.

SO ORDERED.

Gutierrez, Jr., Feliciano, Bidin, and Cortes, JJ., concur.

[1] Rollo, p. 101.

[2] Civil Case No. 26899.

[3] Rollo, p. 73.

[4] Rollo, pp. 73-74.

[5] Rollo, p. 28.

[6] Rollo, pp. 118-119.

[7] 7 SCRA 804.

[8] Rollo, p. 167.

[9] Rollo, p. 251.

[10] See *Licup vs. Manila Railroad Co.*, 2 SCRA 267, 271. Underscoring supplied.

[11] Rollo, p. 17.

[12] Rollo, p. 459.

[13] Rollo, p. 467.

[14] See: *People vs. Court of Appeals*, No. 51635, December 14, 1982, 119 SCRA 162.

[15] Rollo, p. 483.

[16] Rollo, p. 601.

[17] Rollo, p. 615.

[18] Rollo, p. 607.

[19] *Lamagan vs. De la Cruz*, L-27950, July 29, 1971, 40 SCRA 101, 106-107.

[20] *Marcelo vs. De Guzman*, L-29077, June 29, 1982, 114 SCRA 657.

[21] Rollo, p. 636; Civil Case No. 26899 is now with the Regional Trial Court of Pasig, Branch 159, presided by Judge Maria Alicia M. Austria.

- [22] De Lima vs. Laguna Tayabas Co., L-35697-99, April 15, 1988, 160 SCRA 70.
- [23] Savory Luncheonette vs. Lakas ng Manggagawang Pilipino, L-38964, January 31, 1975, 62 SCRA 258; Manila Electric Co. vs. Enriquez, 110 Phil. 499.
- [24] Philippine National Bank vs. Gancayco, L-18343, September 30, 1965, 15 SCRA 91.
- [25] See Banco Filipino Savings and Mortgage Bank vs. Purisima, No. 56429, May 28, 1988, 161 SCRA 576.
- [26] Royal Resources, Inc. vs. Gibraltar Financial Corp., 603 P.2d 793.
- [27] People vs. Court of Appeals, No. 54641, November 28, 1980, 101 SCRA 450, 463-464 citing Whitney v. Vernon [Tex. Civ. A] 154, 264, 267 and Southern R. Co. vs. Attalla, 147 Ala. 653, 41 S. 664.
- [28] Royal Resources, Inc. vs. Gibraltar Financial Corp., supra.
- [29] Giron v. Housing Authority of Opelousas, 393 So. 2d 1267.
- [30] Colonial Leasing Co. of New England, Inc. v. Tracy, 557 P.2d 639, 276 Or. 1193; Johnson v. Dave's Auto Center, 257 Or. 34, 476 P. 2d 190.
- [31] Radiowealth, Inc. vs. Lavin, L-18563, April 27, 1963, 7 SCRA 804.
- [32] Giron vs. Housing Authority of the City of Opelousas, supra.
- [33] American Savings and Loan Association of Houston v. Musick, 531 S.W.2d 581 citing Custom Leasing, Inc. vs. Texas Bank & Tr. Co. of Dallas, 491 S.W. 2d 869.
- [34] Newport News Shipbuilding and Dry Dock Co. vs. Director, Office of Workers' Compensation Program, U.S. Dept. of Labor, 583 F.2d 1273, certiorari denied 99 S. Ct. 1232, 440 U.S. 915, 59 L.Ed.2d 465; Strauss v. DiCicco, 408 N.Y.S. 2d 810, 64 A.D. 2d 979; McCrary v. Taylor, 579 S.W. 2d 347.
- [35] 576 S.W. 2d 273.

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