46 Phil. 757

[G.R. No. 18666. February 17, 1923]

FLORENCIA VELAZQUEZ ET AL., PLAINTIFFS AND APPELLANTS, VS. JUSTO TEODORO ET AL., DEFENDANTS AND APPELLEES.

D E C I S I O N

ROMUALDEZ, J.:

In this action the plaintiffs seek to recover the title to, and possession of, certain lands, and damages. Some of said lands belonged to their father, Antonio Velazquez 1.°, and the others to their said father and their mother, Gregoria Talag, as conjugal property.

The defendants admit having been in possession of all the parcels of land described in the complaint, except parcel 2 of paragraph 7 thereof (p. 26, transcript, stenographic notes); but allege that the defendant Justo Teodoro, who is now in possession of said lands, bought them from the children of Leodegaria Valdez Angeles, their codefendants, who had inherited them from their aforesaid mother, who in turn had purchased them from Gregoria Talag, mother of the plaintiffs, who is also a defendant herein. They allege, further, that one of these parcels was acquired by Leodegaria Angeles from Ramon Valdez Angeles, who had obtained it by purchase from the same Antonio Velazquez 1.°.

There is no question but that these lands formerly belonged partly to Antonio Velazquez 1.°, and partly to said Velazquez 1.° and his wife Gregona Talag, nor is there any question but that the plaintiffs are children and heirs of said Antonio Velazquez 1.°.

What is to be examined and is the subject of controversy is the efficaciousness of the transfers made by the defendants. If these transfers are valid and efficacious and the plaintiffs have not lost their right to these lands, their action for recovery is well founded and must prosper.

In their chronological order, the first of these contracts is that contained in Exhibit 1 of the defendants who maintain it to be one of sale with the right of repurchase executed by Antonio Velazquez 1.° in favor of Ramon Valdez Angeles, while the defendants contend that it is a mortgage. By the terms of the document the contract is one of sale with the right of repurchase. But we find therein the following clause:

> "I also state that I am the owner of said realties free from any encumbrance and lien, and that I bind myself to defend my title thereto against any lawful claim and invasion that may be made by any other person. It has been stipulated that notwithstanding this alienation I will continue in the possession and enjoyment of the realties at the agreed annual rent of five hundred pesos (P500). At the expiration of one year I bind myself to return the principal with the stipulated interest in legal tender of the Islands, if the buyer so demands, and to secure the fulfilment of this obligation, Doña Leodegaria Valdez Angeles, resident of Guagua, Pampanga, Philippine Islands, of age, widow of D. Remigio Lilies and real estate owner, stands bound jointly and severally with me as surety."

From the clause above quoted it appears that the supposed seller, did not reserve the right to repurchase the property, as is done in the case of a conventional redemption (art. 1507, Civil Code), but bound himself to return the principal and interest at the expiration of one year, guaranteeing this *obligation* with the joint and several bond of Leodegaria Valdez Angeles. The principal part, therefore, of the contract was not the transfer of the property, but the return of the P2,500 and the interest thereon; and the secondary or subsidiary, as in every mortgage, which is a contract whose essential object is to secure the fulfilment of a principal obligation (art. 1857, par. 1, of the Civil Code), was the holding of the property subject to the principal obligation, to wit, the return of the principal and interest, until the same matured.

The expression *"if the buyer so demands"* does not mean that it was optional with the vendor to demand or not the payment of the principal and interest, for in fact such return must be regarded as indubitably and definitely

agreed upon; and this is the more so because it was secured with the bond of Leodegaria Valdez Angeles. It is to the time of such return of the principal and interest that such an expression refers, which returns was to be made at the expiration of the year *"if the buyer so demands."* So that if the latter did not make demand, the time could be, as it was in fact, extended, according to the statement made by Ramon Valdez Angeles himself in Exhibit 2, paragraph 4, more than three years later, wherein he says:

> "4th. The repurchase of the realties was not made within one year by reason of extensions and delays requested, not only by Don Antonio Velazquez 1.° in his lifetime, but also by his surety Doña Leodegaria Valdez upon the death of Velazquez which occurred in nineteen hundred and five."

That Ramon Valdez had no intention to acquire the property in question, but what he was interested in was the payment to him of the P2,500 which Antonio Velazquez 1.° had taken from him, is further shown by his having transferred the property to Leodegaria Valdez (Exhibit A) more than two years before the assignment thereof by Ramon Valdez to Leodegaria Valdez herself. If Antonio Velazquez 1.° and his wife Gregoria Talag on the one hand, and Leodegaria Valdez, on the other, had understood Exhibit 1 to be a sale of the property in quetsion, Gregoria Talag would not have sold it afterwards because it no longer belonged to her husband, nor would Leodegaria Valdez have purchased it from her, for she had signed said supposed contract of sale as surety. Let it not be said, as the trial court observes, that said document, Exhibit A, was not accepted by Leodegaria Valdez, for while she did not sign it because it was executed in a unilateral form, which is the one ordinarily adopted since the publication of the forms of deeds given in section 127 of the Land Registration Act No. 496, yet it is an undisputed fact, which can be inferred from the record, that Leodegaria Valdez accepted, received, and kept said deed Exhibit A as vendor, when her heirs relied upon it on selling these same realties to Justo Teodoro in the document Exhibit 3.

Furthermore, Gregoria Talag, wife of Antonio Velazquez 1.°, who on account of this circumstance ought to have been conversant with this matter, testified that such a contract executed by her husband in favor of Ramon Valdez was one of

mortgage. And this testimony was, in no way objected to, nor contradicted.

> "ART. 1281 (Civil Code). * * * If the words appear to be contrary to the evident intention of the contracting parties, the intention shall prevail.
>
> "ART. 1282 (Ibid.). In order to judge as to the intention of the contracting parties, attention must be paid principally to their conduct at the time of making the contract and subsequently thereto."
>
> "SEC. 288 (Code of Civil Procedure). In the construction of a statute, the intention of the Legislature, and in the construction of an instrument, the intention of the parties, is to be pursued; etc."

The doctrine laid down by this court in the cases of Olino *vs*. Medina (13 Phil., 379); Perez *vs*. Cortes (15 Phil., 211), and Padilla *vs*. Linsangan (19 Phil., 65), is square in point.

Our conclusion, therefore, is that the contract, Exhibit 1, executed by Antonio Velazquez 1.° in favor of Ramon Valdez is a mortgage, thus upholding the assignment of error of the appellants to the action of the trial court in considering the contract as one of sale.

As Ramon Valdez did not acquire title to the property by virtue of Exhibit 1, he had no right to transfer it, as he did, to Leodegaria Valdez.

But Leodegaria Valdez acquired the same property and some others by purchase from Gregoria Talag by virtue of Exhibit A; so it becomes necessary to inquire into the validity and efficaciousness of this transfer, as evidenced by said deed Exhibit A.

The evidence as a whole shows that of the six parcels of land covered by Exhibit A, four were private property of Antonio Velazquez 1.°, namely, parcels 1, 2, 3, and 4 described in paragraph 6 of the complaint; and the rest belonged to the conjugal partnership of said Velazquez 1.° and his wife Gregoria Talag. Now, after the death of Antonio Velazquez 1.°, Gregoria Talag could not legally sell the private properties of her deceased husband, nor those of the conjugal partnership that would have been allotted to her said husband, and both kinds of

properties were, upon his death, transmitted to his children, the herein plaintiffs, by operation of law.

Consequently, such a sale made by Gregoria Talag by virtue of Exhibit A is valid only as to such part of the conjugal property as belonged to said Gregoria, and is of no legal effect as to the other properties which belonged, and do still belong, exclusively to the heirs of Antonio Velazquez 1.°, the herein plaintiffs.

Leodegaria Valdez, therefore, did not by virtue of Exhibit A acquire from Gregoria Talag, nor transmit to her heirs upon her death but such part of the conjugal property as would have belonged exclusively to said Gregoria. From this it follows that the heirs of Leodegaria Valdez did not acquire title but to the aforesaid portion of the conjugal property of Antonio Velazquez 1.° and Gregoria Talag, and therefore this portion and no more could have been, and was, legally and effectively transmitted to Justo Teodoro by virtue of the deeds Exhibit 3.

Therefore this Justo Teodoro, the actual possessor of these lands, has no valid title to them, except as regards said portion of the aforesaid conjugal property.

Having reached this point, the next question that presents itself for our consideration is that raised by the second special defense of the defendants to the effect that “the plaintiffs have lost their right to bring this action in view of the fact of more than ten years having elapsed from the time their right of action accrued, that is to say, that plaintiffs’ action has already prescribed.”

From the records it appears that of the five children of the deceased Antonio Velazquez 1.°, three (Marcelina, Emilio, and Manuel) were minors at the time this action was brought, namely, on the 14th of August, 1919, for at the commencement of the trial of this case a guardian *ad litem* was appointed for Marcelina and Emilio, and Manuel Gonzalez attained majority only in December, 1919, some months after the institution of the action. Therefore, as regards these three minors, the period of limitations fixed by the law had not begun to run when this action was brought. (Sec. 42, Code of Civil

Procedure.)

As to Belen Velazquez, the record shows that she became of age on the 22d of November, 1917. The complaint herein having been filed on August 14, 1919, it is clear that this action was brought within the three years following the date when she ceased to be a minor. For this reason, the prescriptive period for minors had begun, but had not terminated, as to this plaintiff. (Sec. 42, Code of Civil Procedure.)

Therefore the prescription alleged by the defendants can have no application as to these four plaintiffs.

As to the plaintiff Florencia Velazquez, the evidence shows that she attained majority on February 19, 1916, that is to say, more than three years before the 14th of August, 1919, when this action was brought. Therefore, if the right she is now seeking to enforce in this case were exclusive and isolated, there could be no doubt but that her action has prescribed, according to section 42 of the Code of Civil Procedure. But this section was borrowed from the statutes of the State of Ohio, wherein the following doctrine was laid down by the supreme court of that State:

> "Where the interests of two defendants are joint and inseparable, and the rights of one are saved under the provision of the statute of limitations) on account of his disability, such saving inures to the benefit of the other defendant, although laboring under no disability." (Sturges and Anderson *vs*. Longworth and Home, 1 Ohio St., 545; Wilkins *vs*. Philips, 3 Ohio, 49.)

The first of these cases dealt with a mortgage of a land belonging to Sturges and Anderson in favor of Longworth and Home. The creditors Longworth and Horne brought the action for the foreclosure of the mortgage. Pending the action, it appeared that Sturges was insane, and for this reason a guardian *ad litem* was appointed for him, but that guardian never answered the complaint. A *nisi* decree was entered, and the complaint was considered confessed. Judgment was rendered in due course, ordering the sale of the land, which was done, the sale having been made to the plaintiffs. An action to review the

judgment was initiated in the Supreme Court of Ohio, but the complaint for review was filed five years after the entry of the original decree, for which reason the action for review had prescribed under the laws of the State so far as Anderson was concerned, but within five years from the removal of Sturges' insanity, and this fact protected him against prescription. That court held among other things: "That the interests of Sturges and Anderson cannot be separated, but that they are both necessary parties to the proceeding in review; and that Sturges coming within the proviso of the statute, Anderson's rights, as a necessary consequence, are also saved." In the same decision, it was said that this view was based on the doctrine laid down in Wilkins *vs*. Philips (3 Ohio, 49), and followed in several decisions, and could be considered as a well-settled law.

As may be seen, the benefit of the proviso of the statute of limitations, which was applicable to one of those two litigants, was extended to the other on account of their interests being joint and inseparable. That jointure and inseparability of interests consisted in that they were coowners of the land mortgaged. (*See also* McGee *vs*. Hall, 1 S. E. Rep., 711.)

In the case before us, the plaintiffs are also coowners of the lands claimed. It might be said that that case was one to review a judgment, while the one at bar is for recovery of title. That is true, but the instant case is now before us also for a review of the judgment appealed from.

Even considering this aspect of the case from the standpoint of the action for recovery of title brought by the herein plaintiffs, there exists a community of property between them with respect to the lands in question, since, as they allege and we find, said lands belong to them *pro indiviso* (art. 392, Civil Code). So long as this community exists, and it does exist until now, each coowner has a right over all the lands. (Pardell and Ortiz *vs*. De Bartolome and Ortiz, 23 Phil., 450.) The interests of the plaintiffs over said lands are joint and cannot be separated—are inseparable—so long as this community exists, which does exist until now. (Arts. 394, 395, 397, 398, 399, Civil Code.) This is as regards their rights and obligations, in a word, their interests. And as to the exercise of their right of action, such interests must also be considered as joint and inseparable.

If the case at bar is identical on the point under consideration to those cited in which the above quoted doctrine was laid down by the Supreme Court of the very State from whose statutes section 42 of our Code of Civil Procedure now in force was borrowed, we see no reason why said doctrine should not be applied in this jurisdiction to its full effect and extent.

If this is so, as we do find it to be, the conclusion is inevitable that in the instant case, the proviso in favor of the four plaintiffs above-named inures to the benefit of the plaintiff Florencia Velazquez.

Consequently, the prescription alleged by the defendants cannot be held applicable to the plaintiffs.

The property and possessory right of the plaintiffs to the aforesaid parcels being clear and manifest, the next point to be examined is their claim for damages.

The plaintiffs claim damages for "the use and occupation of said lands and the fruits thereof not received by them." As to the damages for the use and occupation of the lands, there is in the record no sufficient proof of either their existence or amount. And with regard to the fruits of the lands, first of all, it is necessary to determine whether or not the defendants are possessors in good faith of said realties, for if they are, they are not bound to return the fruits received until the legal interruption of their possession. Article 451 of the Civil Code provides the following:

> "Fruits received by one in possession in good faith before possession is legally interrupted become his own."

And article 434 of the same Code establishes a presumption of good faith in favor of a possessor in the following terms:

> "Good faith is always presumed, and the burden of proving bad faith on the part of the possessor rests upon the person alleging it."

No allegation was made, nor any proof presented, by the plaintiffs that the

possession of the defendants was in bad faith, it being incumbent upon them to affirm and prove it at the trial.

Article 433 of the Civil Code and the decision of this court in the case of Ortiz *vs*. Fuentebella (27 Phil., 537), are cited by the plaintiffs, but what this article provides is that even if there is a flaw in the title or mode of acquisition of the possessor whereby it is rendered invalid, he is deemed a possessor in good faith if he is unaware of it, and in bad faith if he knows it.

There is no proof that the defendants or any of them knew that in their title or mode of acquisition there existed a flaw that rendered it invalid which does not appear to have been declared by any court before the filing of this complaint, nor is there any proof of any act of the defendants tending to show any knowledge on their part that they were unduly holding the possession of the lands. They acquired these lands in good faith, and that good faith continued at least until they learned of the complaint. Article 435 of the Civil Code provides:

> "Possession acquired in good faith does not lose this character unless and until acts take place which show that the possessor is not unaware that his possession is wrongful."

There is, therefore, no ground for holding these defendants responsible for the damages claimed by the plaintiffs.

If the plaintiffs are entitled to recover the title to, and possession of, the lands in dispute, another question presents itself for determination, to wit, whether or not they must pay the debt of their father Antonio Velazquez, which was the original cause for making the transfers aforesaid, according to the opinion of the trial court, stated in its decision, which on this particular point says:

> "* * * The plaintiffs may claim their share in said realties, deducting one-half of each and every one of them and the part of the usufruct that belongs to Gregoria Talag, upon payment to Justo Teodoro or the Lilles heirs, should he

> choose to rescind the contract with the Lilles people, heirs of Leodegaria Valdez, of the amount that they are bound to pay on account of the, debt of Antonio Velazquez, according to the price for which they were sold by Gregoria Talag to Leodegaria Valdez, as shown by Exhibit A."

This debt due to Ramon Valdez Angeles which amounts to P2,500, was incurred by Antonio Velazquez 1.°, father of the plaintiffs. (Exhibit 1.) It was paid to the former by the surety Leodegaria Valdez Angeles. (Exhibit 2.) In consideration of this debt, which was thus assigned to Leodegaria Valdez Angeles, and of other sums of money, with which this appeal is not concerned, Gregoria Talag transferred the lands in question to Leodegaria Valdez Angeles in payment thereof, executing the document Exhibit A to that end. As said transfer is held void and of no legal effect, as regards the private property of Antonio Velazquez 1.° and his share of the conjugal property, the aforesaid debt of Antonio Velazquez 1.° of P2,500 stands unpaid.

The children of Antonio Velazquez 1.°, the plaintiffs herein, contend that they are not bound to pay this debt, because the same was not duly presented to the committee on claims and appraisal, as provided by section 669 of the Code of Civil Procedure. But it is obvious that the defendants considered the debt as paid with the lands in question, and it was not logical to expect them to claim payment of said debt But now that it is adjudged in this case for the first time that the assignment in payment of the aforesaid debt is ineffective, so far as the exclusive property of Antonio Velazquez 1.° is concerned, would it be legal and equitable merely to restore the things to the same situation as they were in before such assignment and order the return of the lands to the plaintiffs, without requiring payment of the debt which was considered by the defendants as paid with the lands of which they are now deprived? And who must now pay such debt of Antonio Velazquez 1.° but his heirs, the plaintiffs herein, who are the ones to receive said lands? *Nemo debet ex alieno damno lucrari*.

We are of opinion that the plaintiffs are under obligation to pay the defendant heirs of Leodegaria Valdez Angeles the sum of P2,500 in proportion to the price of the lands in question that the defendants are bound to return to them.

As to the interest on the said sum of P2,500, we hold that it should be computed from the date of the judgment appealed from, wherein for the first time such an obligation to pay the aforesaid sum was declared. The defendants acquired the fruits of the lands and are not required to return them on account of their possession having been in good faith. In the same way, the plaintiffs cannot be compelled to pay interest on the debt of their father which the creditors considered as paid and for this reason never claimed it. No application can be made to the instant case of article 1303, and others related thereto, of the Civil Code, because neither is the present action one for annulment of the contract, nor are the plaintiffs a party to any of the above-mentioned contracts.

This action is simply for the recovery of the aforesaid lands, but in the adjudication of the controversy, and to do justice to all the parties, it is necessary, in view of the questions raised by them in their pleadings, to determine the points above set forth, which we deem necessary for the complete and final decision of the litigation.

It remains for us to determine the parcels and portions thereof to which the plaintiffs are entitled, as shown by the record. As already stated, the defendants, through their attorney, admitted having been in possession of all the parcels of land described in the complaint, except parcel 2 of paragraph 7 of the complaint.

It was not sufficiently proven that the defendants, or any of them, are in possession of parcel 2 of paragraph 6 of the complaint.

Of the seven parcels in the possession of the defendants, three belong exclusively to the plaintiffs who have inherited them from their deceased father, the original owner of the same. These three parcels of land are those marked as parcels 1, 3, and 4 in paragraph 6 of the complaint.

The remaining four parcels belonged to the conjugal partnership of the aforesaid spouses Antonio Velazquez 1.° and Gregoria Talag. Upon the dissolution of this partnership by the death of the husband, an undivided one- half of said realties was transmitted to his children, the herein plaintiffs, as their inheritance, and the other undivided one-half, corresponding to Gregoria Talag,

was sold by her by virtue of Exhibit A, and transmitted afterwards successively until it reached Justo Teodoro, who thus became, and is, the owner of said undivided one-half of these remaining four parcels of land, which are the four parcels described in paragraph 7 of the complaint.

For the foregoing reasons, the judgment appealed from is modified, and it is adjudged and decreed: First, that the plaintiff children of Antonio Velazquez 1.° are the exclusive and *pro indiviso* owners, and are entitled to the possession of parcels 1, 3, and 4 described in paragraph 6 of the complaint, as well as of the undivided one-half of each of the parcels described in paragraph 7 of the complaint; second, that the defendant Justo Teodoro is the absolute owner of the other undivided one-half of each of the said parcels described in paragraph 7 of the complaint; third, that the plaintiffs are under obligation to pay the defendant heirs of Leodegaria Valdez Angeles the sum of P2,500, with legal interest thereon from the date of the judgment appealed from, November 8, 1921.

Wherefore, the defendants are sentenced to deliver to plaintiffs, parcels 1, 3, and 4 described in paragraph 6 of the complaint, and the undivided one-half of each of the four parcels described in paragraph 7 of the complaint. The plaintiffs are sentenced to pay to the defendant children of Leodegaria Valdez Angeles the sum of P2,500, with interest at the rate of 6 per cent per annum from November 8, 1921, until it is fully paid, the right being reserved to Justo Teodoro to bring such action as he may be entitled to by reason of this eviction without special pronouncement as to costs.

The judgment appealed from is reversed in so far as it is inconsistent with this opinion. So ordered.

Araullo, C.J., Johnson, Malcolm, Avanceña,
and *Villamor, JJ.,* concur.

DISSENTING

STREET, J., with whom concurs **JOHNS,**

J.:

I respectfully dissent from so much of this decision as holds that Florencia Velazquez can recover in this case. Her right had cleary been extinguished by the statute of limitations before the action was instituted; and her interest is not saved by the circumstance that her younger brothers and sisters are not barred. I deem it the more important to indicate the reasons for my dissent because of the circumstance that the decision of the court upon this point proceeds upon what I consider to be an erroneous application of the American authorities.

Section 42 of our Code of Civil Procedure, dealing with exceptions in favor of persons under disability, is taken from the Ohio statutes. It has been held over and over again by the Supreme Court of that State that where there are several heirs suing in a common right, the right of those who are within the saving of the statute will be saved, while others not so circumstanced will be barred. This is exactly the contrary doctrine to that which is attributed to the Ohio Supreme Court by the opinion in this case. In Bronson *vs*. Adams (10 Ohio, 135), the action was brought by three sons to secure partition of a piece of property which they had inherited from their father. The defendant had been in adverse possession for a sufficient length of time to have acquired a perfect title, and only the younger of the three sons was within the saving of the statute. The Supreme Court held that, inasmuch as the defendant had been in continuous possession for the time prescribed by law, the right of the two elder sons was destroyed, while the right of the younger was preserved by his minority. Said the court: "The three heirs held a right in common in the lots, which the defendant occupied, and the statute extinguished the claims of two."

In Moore *vs*. Armstrong (10 Ohio, 11), this subject had been previously discussed by the same court with much learning, and it was held upon full consideration that a disability saving one heir from the operation of the statute of limitations is no protection to his coheirs; and the court observed that, whatever opinion may once have been entertained on this point, it is now conclusively settled both in Great Britain and in the United States, that the saving statute operates only in favor of the person laboring under disability. "This is the rule," said the court, "with respect both to coparceners and

tenants in common." This case is reported in 36 Am. Dec, 63, and an elaborate note is appended in which the authorities will be found marshalled at pages 77, 78. In the same decision the Supreme Court of Ohio referred to the case of Wilkins *vs*. Philips (3 Ohio, 49), which is cited in the opinion of the court, and that case was declared to be inapplicable, if not erroneous.

In order to appreciate the American decisions on this point at their true value, it is necessary to bear in mind the difference between the right of action which is exclusively joint, like that of partners at common law or joint tenants at common law, and the right of action which is joint and several, as in the case of tenants in common; and I take the distinction to be this: If a right of action vested in several persons is exclusively joint in the sense that the action cannot be maintained without joining all as plaintiffs, then by the weight of American authority, if the action is barred as to some, it is barred as to all; though there is a respectable line of decisions to the effect that in this case the action can be brought in behalf of all if a right of action still subsists in any one of the persons jointly entitled to sue. With that controversy we are not here concerned, as the case before us arises with respect to several coheirs, or coowners, whose tight of action is not joint but both joint and several. Coheirs and coowners under the civil law are precisely in the position of tenants in common at common law. In other words, the coowner has a joint and several right of action, and can either join with others or sue separately to vindicate his own right.

Under such conditions, that is, where the right is separable, the practically universal rule is that the exception of the statute of limitations operates only in favor of those who are within the saving and that those who are not will be barred. As stated by the annotator of Moore *vs*. Armstrong (36 Am. Dec., 63), the rule is: "Where the rights of the parties are not joint, the cases are uniform, and hold that the disability of one will prevent the operation of the statute as to him, but that those who are not under a disability will be barred."

A careful examination of the American decisions will show, however, that there is one State where the benefit of the saving of the statute as to one heir inures to the benefit of all. This is the State of South Carolina, as will be seen from the cases collected in the article on "Limitations of Actions," 25

Cyc., 1273, notes 61-63. That anomaly should not be perpetuated here; for it is not only contrary to the principle underlying American cases but is inconsistent with the conception of coownership under the Civil Code.

DISSENTING

OSTRAND, J.:

I fully concur in the dissent of Mr. Justice Street in regard to the effect of the Statute of Limitations where some tenants in common are under disability and others are not.

But not only in regard to the Statute of Limitations has the court gone astray; in my humble opinion, its decision suffers from other and equally grave infirmities. By its terms Exhibit 1 evidences a sale of land; it is only by holding that the document itself does not express the true intent of the parties and by invoking the aid of oral evidence as to that intent that the transaction can be construed into an equitable mortgage. This would have been permissible as between the original parties, but here the present possessor of the land is an innocent third party, a purchaser for value and, as far as we know, in good faith. Under the documentary evidence before us he unquestionably holds the legal title to the land and it is only by applying equitable doctrines that the plaintiffs can be held to have superior rights.

It is to the public interest that *bona fide* possessors of land should, as far as possible, be protected in their possession and by its reckless application of equitable principles *in rem* instead of *in personam* the court opens the way for fraud and injustice.

The judgment appealed from should have been affirmed.

Date created: September 27, 2018