Philippine Antichretic Law

By

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"Back of precedents are the basic juridical conceptions which are the postulates of judicial reasoning, and farther back are the habits of life, the institutions of society, in which those conceptions had their origin, and which, by a process of interaction, they have modified in turn." Cardozo, *Nature of the Judicial Process*, p. 19, citing Saleilles, *Die la Personalite Juridique;* Ehrlich, *Grundlegung der Soziologie des Rechts*, and Pound, *Proceedings of American Bar Assn.*, 1919.

I. INTRODUCTION

1) **Historical background.**—The evolution of Philippine antichretic law illustrates Cardozo's dictum that back of precedents are usages and habits of life, the "complex of belief and practice," which he styled the **mores** of the day. The **mores** modify, amplify and reshape the rules in the code, which of necessity are postulates behind judicial pronouncements, major premises supporting decisional conclusions. The adjudicated cases contain a law of antichresis modifying its basic juridical concepts and exhibiting some characteristics peculiarly Philippine.

Antichresis is a Greek word which literally means reciprocal use or wage. The literal meaning is consistent with the intrinsic nature of the contract. In antichresis the creditor enjoys the debtor's property, while the debtor uses the creditor's money.

The legal historian records that antichresis was known in Babylonian law. The Romans adopted it from Greek law. In Roman law it assumed the form of a special mortgage or pledge where the creditor was given the fruits of the debtor's property in lieu of interest. It applied equally to realty and personalty. In the modern form the creditor holds the debtor's realty with the obligation to apply the fruits to the interest, and then to the principal of the loan. The contract is recognized in modern codes of civil law countries.

The civil law antichresis resembles the **vivum vadium** (live pledge) and Welsh mortgage of the common law. The latter is a species of security, where the mortgagee takes possession of the mortgaged property, receives the rents and profits as a substitute for interest on the debt, and holds the estate until both principal and interest are paid either by the rents or by the mortgagor's payment. 40 C.J. 1362; 41 C.J. 281; 3 C. J. S. 1395; Burdick, Principles of Roman Law, p. 383; I Sher-

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man, Roman Law in the Modern World, p. 186; 12 Manresa 523-5; Sta. Rosa v. Noble, CA 35 O.G. 2724. 2726.

2) **Contract is customary in the Philippines.**—Before the Spanish civil code took effect in the Philippines in 1889 antichresis was unknown here, according to Chief Justice Arellano. Heirs of Jumero v. Lizares, 17 Phil. 112, 116.

However, there have been certain customary contracts which are akin to antichresis. Justice Briones observes that the contract known as "sangla" or "prenda" in the Bicol provinces and "saop" or "prenda" in Visayas or Mindanao relating to realty is antichresis. Together with **pacto de retro** sale, it is common in rural towns and barrios. It is resorted to by farmers and laborers to improve and expand their lands under cultivation, purchase property, augment their possessions, finance the marriage of their children and sometimes to defray funeral expenses. And the good jurist adds that the unfortunate passion for gambling indulged in by the peasant or rural worker also culminates sometimes in "ese contrato para amargar la existencia si no para labrar la ruina del pequeño proprietario." Vda. de Miranda v. Imperial, 44 O.G. 2211, 2215.

Justice Lopez Vito notes that certain contracts of loan are in vogue in various provinces of the archipelago, with peculiar names, by virtue of which the owner of realty who obtains a loan delivers to his creditor the possession and usufruct thereof so that the latter, while the debt is not paid, may make unlimited use of it for his own benefit without a definite term. Sta. Rosa v. Noble, CA 35 O.G. 2724, 2728.

The courts, confronted with the problem of classifying these customary contracts under any of the recognized pignorative agreements, characterized them as antichresis. Such contracts are interwoven with the economic life of the nation.

But the agreement known as "salda" in Guimba, Nueva Ecija, by which the creditor is entitled to possess land given by the debtor as security, to cultivate it and gather its products, and whereby the creditor retains possession and use while the loan remains unpaid and the land given as security is unredeemed, is not antichresis because it contains no stipulation as to interest. Coloma v. Domingo, CA 2 O.G. 495.

3) **Statutory rules.**—Antichresis used to be governed by arts. 1881 to 1886 of the Spanish civil code. The provisions are juxtaposed with those of mortgage and pledge. The governing rules are now found in arts. 2132 to 2139 of the new civil code, reproduced below:

> **ART. 2132. By the contract of antichresis the creditor acquires the right to receive the fruits of an immovable of his debtor, with the obligation to apply them to the payment of the interest, if owing, and thereafter to the principal of his credit.**

ART. 2133. The actual market value of the fruits at the time of the application thereof to the interest and principal shall be the measure of such application.

ART. 2134. The amount of the principal and of the interest shall be specified in writing; otherwise, the contract of antichresis shall be void.

ART. 2135. The creditor, unless there is a stipulation to the contrary, is obliged to pay the taxes and charges upon the estate.

He is also bound to bear the expenses necessary for its preservation and repair.

The sums spent for the purposes stated in this article shall be deducted from the fruits.

ART. 2136. The debtor cannot reacquire the enjoyment of the immovable without first having totally paid what he owes the creditor.

But the latter, in order to exempt himself from the obligations imposed upon him by the preceding article, may always compel the debtor to enter again upon the enjoyment of the property, except when there is a stipulation to the contrary.

ART. 2137. The creditor does not acquire the ownership of the real estate for nonpayment of the debt within the period agreed upon.

Every stipulation to the contrary shall be void. But the creditor may petition the court for the payment of the debt or the sale of the real property. In this case, the Rules of Court on the foreclosure of mortgages shall apply.

ART. 2138. The contracting parties may stipulate that the interest upon the debt be compensated with the fruits of the property which is the object of the antichresis, provided that if the value of the fruits should exceed the amount of interest allowed by the laws against usury, the excess shall be applied to the principal.

ART. 2139. The last paragraph of article 2085, and articles 2089 to 2091 are applicable to this contract.

II. NATURE, ELEMENTS, DISTINCTIONS

4) **Statutory concept.**—The code provides that in antichresis the creditor acquires the right to receive the fruits of an immovable of his debtor with the obligation to apply them to the interest, if owing, and thereafter to the principal of his credit. The parties may stipulate that the interest be compensated with the fruits of the property. Arts, 2132, 2138.

5) **Kinds and characteristic features.**—Antichresis, like pledge and mortgage, is an accessory contract. It presupposes a principal contract, viz., the loan, which is secured. It is an independent contract in the sense that it is constituted separately from the loan and has its own proper nature and peculiar effects. Its essence is that as guaranty of a debt, the debtor transfers his realty to the creditor who gets the usufruct thereof. This makes it a real contract perfected by the delivery of the **res.** Ownership is retained by the debtor.

The parties may stipulate that the fruits should be applied by the creditor to the interest and later to the principal of the loan. This is the first kind of antichresis. If not otherwise expressly provided, it is assumed that the antichresis is of the first kind.

The second kind is contracted when the parties agree that the fruits should be enjoyed by the creditor in lieu of interest. This was the original form of antichresis in Roman law. It is the customary form in the Philippines. Sta. Rosa v. Noble, CA 35 O.G. 2724.

The requisites then are: a) there must be an interest-bearing loan; b) as security for the loan, the debtor transfers his realty to his creditor; and c) the creditor acquires the right to enjoy the fruits of the realty but with the obligation to apply such fruits to the interest and later to the principal, or the fruits may take the place of interest. Lichauco v. Soriano, 26 Phil. 593; Magdañgal v. Lichauco, 51 Phil. 894; Gov't of the P.I. v. Abalos, 63 Phil. 494.

It of course assumed that the debtor is the owner of the realty and that it is identified. Patriarca v. Orate, 7 Phil. 390, 394.

6) **Actual possession may not be delivered to the creditor.**—Generally it is indispensable that possession over the realty be transferred by the debtor to the creditor. However, the parties may stipulate that the debtor should remain in possession subject to the creditor's right to gather the fruits, either in lieu of interest or in payment thereof. This is an instance where local custom and the will of the parties have modified the usual elements of an ancient juridical concept like antichresis.

Thus in Sta. Rosa v. Noble et al., CA 35 O.G. 2724 the parties executed a writing where it was stipulated that the debtor ceded by way of pledge or as security a parcel of land on condition that the debtor remained as tenant on the land and the creditor would get 1/2 of the harvest in lieu of interest. The other half would correspond to the tenant-debtor. The land could be redeemed anytime except during the farming season or after the creditor's receipt of 1/2 of the harvest. The court held that the contract was antichresis.

In Vda. de Miranda v. Imperial, 44 O.G. 2211 the original creditor was in possession of the land given in antichresis. The contract was novated by a change of creditor. The new creditor agreed that the debtor might remain in possession of the land provided the latter should give the creditor his share of the fruits. The novated contract was held to be still antichresis. See Toquero v. Villegas, 40 O.G. 11th supp. 10.

6-A) **Contract may relate to only part of the fruits.**—Antichresis, as noted by Justice J. B. L. Reyes, normally covers all the fruits of the encumbered realty. But the law undoubtedly gives the parties freedom

to stipulate otherwise. The reduction of the amount of the fruits available to the creditor does not vary the nature of the contract. In Villanueva v. Ipondo and Conlu, CA 44 O.G. 4377, 4380 the agreement was that the creditor would apply to the credit only 1/3 of the fruits; in Sta. Rosa v. Noble, CA 35 O.G. 2724, the creditor was obliged to apply to the credit only 1/2 of the fruits. See Vda. de Miranda v. Imperial, 44 O.G. 2211; Toquero v. Villegas, CA 40 O.G. 11th supp. 10.

7) **Loan not in money.**—The obligation secured by antichresis need not be in money altho usually it is such. It might be in kind, that is, any fungible which may be the subject of **mutuum.** It might be rice loaned by the creditor to the debtor and payable in rice of equal amount and kind. Distor v. Dorado and Arroyo, 46 Phil. 162.

8) **An incumbrance on the land.**—Antichresis is a real incumbrance on the land. It is a preferred lien. Vda. de Miranda v. Imperial, 44 O.G. 2211, 2221. The public land law prohibits an incumbrance on a homestead within five years after the issuance of the patent. Antichresis constituted on the homestead within the said period is void. Kasilag v. Rodriguez, 40 OG 3rd supp. 280.

9) **Distinguished from pledge and chattel mortgage.**—The main distinction between antichresis and pledge or chattel mortgage is in subject matter. The former involves realty; the latter, personalty.

10) **Distinguished from usufruct.**—In usufruct the usufructuary has no obligation to apply the fruits to the obligation of the debtor-owner. In antichresis the creditor-usufructuary must apply the fruits to the interest of the loan and then to the principal thereof. Sta. Rosa v. Noble, CA 35 O.G. 2724, 2726.

11) **Distinguished from censos.**—While the civil law censos and the ground rents of American jurisprudence also relate to realty and may be confused with antichresis, they are not accessory contracts like the latter.

12) **Distinguished from sale.**—Ordinarily antichresis cannot be confounded with sale. But there may be exceptional transactions which are really sales and yet they have antichretic features. A contract whereby the debtor agreed to pay a loan within a certain period, and if it was not paid as stipulated, the debtor's house and lot would be considered sold to the creditor for the amount of the unpaid loan is not antichresis, because, according to the court, the creditor was never in possession of the property nor enjoyed it, nor for one moment ever received its rents. Alcantara v. Alinea, 8 Phil. 111, 115.

Where the purchaser of land forfeited to the government for delinquency in land taxes redeemed the land by paying the back taxes, and then, to protect his rights as owner, declared it for tax purposes, and the previous owner has been paying royalty to the purchaser for a long

time without seeking accounting, the contract is sale and not antichresis. Baliwag v. Varcena and Beceño, CA 2 O.G. 495.

13) **Antichresis converted into loan.**—In the Sta. Rosa v. Noble case the court held that antichresis is a loan subject to the usury law. This statement is not accurate. As already observed, antichresis is merely accessory to a loan. In another case the supreme court held that an antichresis contract was converted into loan. The heirs of a decedent's estate and their lawyer agreed that certain lands were specially mortgaged as security for the payment of the fees of the lawyer and that the lawyer would hold the lands until his fees were paid. If at the end of 5 years from the approval of the project of partition, their heirs should not have been able to pay in full the attorney's fees, then the lands would be definitely adjudicated to the lawyer. The contract was held to be antichresis with **pacto comisorio.**

But when the lawyer assigned his rights under said agreement and the assignee extended the 5-year period and imposed on the heirs the condition to pay 12% interest a year, the contract was converted into a simple loan. Soncuya v. Azarraga, 38 OG 2277, 2280, 2283.

14) **Judgment creditor becoming antichretic creditor.**—Euriquez v. Philippine National Bank, 55 Phil. 414, 416 is a case of a judgment creditor becoming an antichretic creditor. Marcelo Enriquez was indebted to the bank. One of his sureties was Laureano Abella. The bank sued Enriquez and his sureties. The court sentenced them to pay solidarily ₱4,512 to the bank.

Later the parties agreed in court that execution should first be issued against Enriquez and in case of his insolvency, against the sureties. In accordance with the agreement 2 parcels of land belonging to Enriquez were attached and sold to the bank as the highest bidder. Enriquez' right of redemption was sold to his surety Abella. But for non-payment of land tax the 2 lots were forfeited to the government. At Enriquez' request the bank redeemed the lots from the government by paying the delinquent taxes.

Enriquez instituted an action to annul the auction sale to the bank. The court voided the sale, but held the bank as lawfully in possession of the 2 lots because it was a creditor with a lien arising from its redemption of the property from the government. And as the bank took possession of the lots with Enriquez' consent, it possessed the land as antichretic creditor with right to collect the credit plus interest from the fruits, returning to the debtor the balance, it any, after deducting the expenses. The fact that Enriquez asked the bank to manage the property did not entitle the bank to appropriate to itself the fruits, unless Enriquez waived his right thereto. The fruits must be applied to the debtor's obligation.

III. MORTGAGE AND ANTICHRESIS

15) Distinguished from mortgage.—In a real mortgage the creditor does not generally acquire possession and usufruct of the debtor's realty. In antichresis possession and usufruct are usually acquired by the creditor. Sta. Rosa v. Noble, CA 35 O.G. 2726. Mortgage requires a public instrument and registration, formalities not indispensable in antichresis.

De la Vega v. Ballilos, 34 Phil. 683 dealt with a contract called a mortgage by the parties but which the court held to be in reality antichresis. In the contract it was agreed that the debtor assigned the ownership and possession of the land to the creditor for his management and enjoyment as a profit from the amount for which it had been mortgaged. Alojado v. Lim Siongco, 51 Phil. 339, 341.

In Villanueva v. Ipondo and Conlu, CA 44 OG 4377 the contract provided that the creditor would have the usufruct over the land until the debt was paid. The court held that the contract should be considered antichresis, following the rule laid down in the Ballilos case.

16) Mortgage and antichresis on the same land.—There is a dictum in Macapinlac v. Gutierrez Repide, 43 Phil. 770, 787 that there may be at the same time upon the same piece of land a mortgage in favor of one creditor and antichresis in favor of another. The explanation is that mortgage operates on the land, while antichresis operates on the fruits. Pickersgill v. Brown, 7 La. Ann. 297, 314 cited in Principles of Roman Law, Burdick, p. 383. However, actually there might be incompatibility between the two, unless one is made subordinate to the other.

17) Mortgage converted into antichresis.—A mortgage may be converted into antichresis by giving the mortgagee possession of the property on condition that he would apply the fruits to the payment of interest, or that the interest would set off against the fruits of the property. Kasilag v. Rodriguez, 40 OG 3rd supp. 280. If only ½ of a big tract of land was mortgaged, but the mortgagor conveyed the whole land to the mortgagee so that its fruits might be applied to the interest and then to the principal, the antichresis would extend to the whole land. Barretto v. Barretto, 37 Phil. 234.

In Diaz and Rubillos v. De Mendezona, 48 Phil. 666, the mortgage was converted into antichresis in this manner: There was a judicial foreclosure of the mortgage. During the 90-day period within which the debtor was allowed to pay the mortgage debt, the trial court erroneously issued a writ of execution against the mortgaged property. The supreme court ultimately annulled the proceedings. It was held that

during the time that the mortgagee was in possession he occupied the position of antichresis creditor with the obligation of rendering an account of the fruits and of applying them to the debt.

Another instance is Pando v. Gimenez, 54 Phil. 459. In this case a mortgage was constituted over a house and the leasehold right on the lot upon which it stands. It was agreed that the mortgagee would collect the rents on the house and apply the same to the payment of the interest on the debt. Later the agreement was amplified in the sense that the mortgagee would directly administer the premises, by paying the realty tax on the house and rent for the land. The court held that the administration assumed by the mortgagee was antichretic in character.

In Villanueva v. Ipondo and Conlu, CA 44 OG 4377 Raymundo Melliza, owner of certain lands, asked his brother-in-law Eusebio Conlu to manage the same. Conlu made improvements on the land. To reimburse him for such improvements, Melliza executed a deed recognizing a debt of ₱20,000 to Conlu for the value of the improvements and authorizing Conlu to apply 1/3 of the fruits of the lands to the payment of said debt. The parties labeled the deed as a mortgage, but in reality it was antichresis because the credit was to be paid by means of the fruits, which together with the creditor's possession of the lands, is a characteristic feature of antichresis. Even if the deed were viewed as a mortgage, it would actually operate as antichresis because the mortgagee was in possession.

18) Antichresis creditor is like mortgagee in possession.—The respective rights and obligations of the parties in antichresis appear to be similar and in many respects identical with those recognized in equity jurisprudence as incident to the position of a mortgagee in possession. If the mortgagee acquires possession in any lawful manner, he is entitled to retain such possession until the debt is paid and the property redeemed. Nonpayment of the debt within the term agreed upon does not vest ownership of the property in the creditor. The general duty of the mortgagee in possession toward the premises in that of ordinary prudent owner. He must account for the rents and profits of the land or its value for purposes of use and occupation, any amount thus realized going toward the discharge of the debt. If he remains in possession after the debt is satisfied, he becomes a trustee of the mortgagor as to the excess of the rents and profits over the debt. Lastly, the mortgagor can only enforce his right to the land by an equitable action for accounting and redemption. 3 Pom. Eq. Jur. secs. 1215-8; Macapinlac v. Gutierrez Repide, 43 Phil. 770, 786; Diaz and Rubillos v. De Mendezona, 48 Phil. 666, 670; Agricultural and Industrial Bank v. Tanbunting, 1 OG 341, 342.

19) **Pacto de retro sale found to be a mortgage converted into antichresis.**—In Macapinlac v. Gutierrez Repide, 43 Phil. 770 a hacienda valued at ₱800,000 was sold with right of repurchase to Bachrach Garage & Taxicab Co. to secure ₱12,960 owned by Jose Macapinlac to the company. The debt was the cost of a car purchased on credit by Macapinlac from the company. Later the company assigned to Francisco Gutierrez Repide for ₱5,000 its rights to the hacienda. After Macapinlac's failure to redeem the hacienda, Gutierrez secured in his name the corresponding title and took possession of the hacienda.

The court held that the **pacto de retro** sale was in reality an equitable mortgage. Gutierrez' position was that of a mortgagee in possession, which in turn is the same as that of an antichretic creditor. The court cited the Barretto case, 37 Phil. 234 where the heirs of a mortgagee were found in possession of the mortgaged property more than 30 years after the execution of the mortgage. The mortgage had never been foreclosed. It was held that the rights of the parties, heirs respectively of the mortgagor and mortgagee, were essentially the same as under antichresis. See Tansioco v. Ramoso, 59 Phil. 672, 686.

In Javier v. Cabanos, 53 Phil. 678 the parties entered into a **pacto de retro** sale. Possession of the lands sold was transferred to the vendee. It was agreed that during the 4-year period for redemption the vendee would enjoy the fruits of the land while the vendor would make use of the purchase price. But before the expiration of the period the parties entered into a compromise whereby the vendee renounced his right as such vendee and contented himself with being a mortgage creditor. Under this novated contract the vendee should have surrendered the lands to the vendor-mortgagor, making a stipulation as to the payment of the interest by the vendor, but they did not do this and preferred to maintain the former relation as to the lands: the mortgagor continued making use of the price as a loan and the mortgagee enjoyed the fruits of the lands in lieu of interest.

It was held that the contract was in reality antichresis. The mortgagor cannot recover the lands without paying to the mortgagee the amount loaned, which was formerly the price of the conditional sale. See Villanueva v. Ipondo and Conlu, CA 44 OG 4377, 4381.

20) **Interest stipulation is indispensable.**—The absence of a stipulation for interest may spell the difference between mortgage and antichresis. When a loan with security does not stipulate interest but provides for delivery to the creditor by the debtor of the realty constituted as security in order that the creditor may administer the same and avail himself of its fruits, without stating that the fruits are to be applied to the interest, if any, and afterwards to the principal, the contract is mortgage and not antichresis.

In Legaspi v. Celestial, 38 OG 2574 the debtor agreed to turn over to the creditors certain salt beds so that the latter after paying the expenses of production, administration and harvest of the salt with ½ of the produce, may keep the other half for their use, benefit and enjoyment. It was not stipulated that the net produce of the salt beds should first be applied to the interest, if any, and afterwards to the principal. Both contracts, in which this stipulation was contained, one of which was designated "mortgage" and the other "antichresis", merely provided that the creditors would keep ½ of the products.

It was held that the contracts were not antichresis. The court reasoned out that it is not an essential requisite of mortgage that the property mortgaged remain in the mortgagor's possession. The latter may deliver the property to the mortgagee, without thereby altering the nature of the contract. It is not an essential requisite of mortgage that the loan should bear interest or that the interest be in the form of fruits of the mortgaged property.

It was stipulated in the contracts that during the term thereof and while the total loan remained unpaid the salt beds constituted as security would be administered by the creditors who would destine ½ of the products thereof for the maintenance and support of the croppers and the improvements of the property, keeping the other ½ for themselves.

The debtor instead of paying interest delivered the mortgaged properties to the creditors. The said contracts have all the essential requisites of mortgage. The same ruling was made in Coloma v. Domingo, CA 2 OG 495.

In Distor v. Dorado and Arroyo, 46 Phil. 162 the owner transferred his land to another by way of mortgage in consideration of rice delivered by the latter to the former. The intention was to allow the transferee to enjoy the land. After 6 years if the owner of the land should return to the other party the rice received from the latter, the mortgage would be void, otherwise it would be in force. It was held that the contract was antichresis and not mortgage, since the debtor delivered his land to the creditor in order that the latter might enjoy the same, without obligation on the debtor's part to pay any interest on his debt.

21) **Void antichresis does not annul the mortgage.**—In Kasilag v. Rodriguez, 40 OG 3rd supp. 280 a mortgage was converted into antichresis. As the land involved was a homestead the antichresis was void. However this did not render the mortgage void, because the antichresis was independent of the mortgage, was separable from it and could be eliminated, thereby leaving the mortgage in force.

IV. PACTO DE RETRO SALE AND ANTICHRESIS

22) Distinguished from pacto de retro sale.—Antichresis might be confused with sale of realty with right of repurchase. The antichretic debtor is analogous to the vendor the creditor to the vendee. There is a transfer of realty in both contracts. In antichresis the transfer does not affect the title over the realty. Title remains in the transferor or debtor. In sale title is transferred to the vendee, subject to the resolutory condition of redemption. Heirs of Jumero v. Lizares, 17 Phil. 112

The vendor cannot exercise the right of redemption without returning to the vendee the price. If the vendor does not do this within the stipulated period, the vendee irrevocably acquires ownership of the realty by nonpayment of the debt within the term agreed upon. Davis v. Neyra, 24 Phil. 417. 420; Director of Lands and Muyrong v. Corpus, 58 Phil. 849.

What characterizes antichresis is that the creditor acquires the right to receive the fruits of property of his debtor with the obligation to apply them to the interest, if any is due, and then to the principal of his credit. When such covenant is not made in the contract, which speaks unequivocally of a sale and transfer of land with right of repurchase, the contract is **pacto de retro** sale, not antichresis. Alojado v. Lim Liongco, 51 Phil. 339, 341; Santos v. Heirs of Crisostomo and Tiongson, 41 Phil. 342, 347.

23) Illustrative cases.—When money is loaned and the debtor places the creditor in possession of a piece of land as security for the loan in order that he may hold it in usufruct, the contract is not a mortgage, altho purportedly to be such, inasmuch as it is not in a public instrument duly registered.

Neither can the contract be classified as sale with right of repurchase, altho it is set forth therein that the debtor cedes to the creditor the ownership and possession of the land.

Such contract should be classified as antichresis by means of which the creditor acquires the right to collect the fruits of the land turned over to him by his debtor, with the obligation to apply them to the interest. The parties may stipulate that the interest may be paid with the fruits. De la Vega v. Ballilos, 34 Phil. 683.

In Valencia v. Acala, 42 Phil. 177 the agreement reads: "We, Daniel Adepueng and Dionisia Valencia, acknowledged being indebted to Severino Agbagala in the sum of ₱6.75, which we will pay with the fruits of the land and the possession of which we now turn over to him. We have mortgaged it for ₱6.75, it being covenanted that we may redeem it by paying the same price, without taking into account the fruits of the land and the interest of the money."

It was held that the foregoing was not a mortgage nor sale with right of repurchase, but antichresis, as there was a loan by virtue of which the debtor conveyed to the creditor the possession of realty to hold it in usufruct, compensating the interest with the fruits of the land.

24) **Denomination given by the parties is not controlling.**—Even if the parties call a contract a mortgage, it will not be treated as such if the instrument is not public and is unregistered. The use of the words "grant and convey my ownership" in reference to the land transferred will not make the contract one of sale with right to repurchase if no redemption is provided for. If the contract tho styled a "mortgage" and tho importing conveyance of ownership is really a transfer of land to the creditor as security for the debt and on condition that the creditor will apply the fruits to the payment of interest, then it is antichresis and not mortgage or **pacto de retro** sale. De Vega v. Ballilos, 34 Phil. 683, 687-8; Legaspi v. Celestial, 38 OG 2574.

V. FORM; OTHER FEATURES

25) **Necessity of writing.**—Antichresis may be constituted orally. It is said to be a consensual contract. Barretto v. Barretto, 37 Phil, 234, 252. But this is not altogether accurate. It is, to be exact, a real contract. It may be argued that under art. 1280 of the civil code, now art. 1260 of the new code, antichresis must be in a public document because it is a contract which has for its object the creation of real right over immovable property. Heirs of Jumero v. Lizares, 17 Phil. 112, 118.

The fact remains that the court sustained in many instances oral antichresis. Undoubtedly, the reason is that the very delivery of the realty to the creditor is a much more effective evidence of the antichresis than any instrument. The Louisiana civil code requires a writing. Livingston's Executrix v. Story, 11 Pet, 349, 9 L ed 746, 761.

Indeed the phenomenon that antichresis is a very common form of security or mode of guaranty in rural places may be explained by the fact that it is easy to execute. Writing may be dispensed with. In mortgage and **pacto de retro** sale public instrument is necessary. If the parties are illiterate, they find difficulty in executing an instrument. They find it convenient to embody the guaranty orally in antichresis form.

The law only requires in art. 2134 that the principal and interest shall be specified in writing; otherwise the antichresis is void. What should be written is the main obligation secured. The antichresis itself, consisting of the delivery of the realty by the debtor to the creditor

on the understanding that the creditor will apply the fruits to the interest, need not be in writing. Diaz and Rubillos v. De Mendezona, 48 Phil. 666.

Thus where the parties, who were indebted in a certain amount, secured the debt by a mortgage over ½ of their hacienda, delivered the whole hacienda to the creditor, with the object that the creditor may collect by means of usufruct his credit and the interest, the verbal contract deserved in law the name of antichresis. Barretto v. Barretto, 37 Phil. 234; Diaz and Rubillos v. De Mendozona, supra.

In Kasilag v. Rodriguez, 40 OG 3rd supp. 294 it was verbally agreed between mortgagor and mortgagee that possession over the mortgaged land should be given to the mortgagee who would then condone the interest on the loan and pay the land tax. This converted the mortgage into antichresis. It is valid. See Enriquez v. Philippine National Bank, 55 Phil. 444.

26) **3rd persons may constitute antichresis.**—As in mortgage and pledge, third persons who are not parties to the loan may secure the latter by giving their property in antichresis to the creditor. Art. 2085, last par.; Art. 2139; Sta. Rosa v. Noble, CA 35 O.G. 25.

27) **Indivisibility.**—Like pledge and mortgage, antichresis is indivisible even tho the debt may be divided among the successors in interest of the debtor or the creditor.

Therefore, the debtor's heir who has paid a part of the debt cannot ask for the proportionate extinguishment of the antichresis as long as the debt is not completely satisfied.

Neither can the creditor's heir who received his share of the debt return the property held in antichresis to the prejudice of the other heirs who have not been paid.

From these provisions is excepted the case in which, there being several things given in antichresis, each of them guarantees only a determinate portion of the credit.

The debtor, in this case, shall have a right to the extinguishment of the antichresis as the portion of the debt for which each thing is specially answerable is satisfied

The indivisibility of the antichresis is not affected by the fact that the debtors are not solidarily liable. Arts. 2089, 2090 and 2139; Javier v. Cabanos, 53 Phil. 678, 680.

28) **All kinds of obligations may be secured.**—Antichresis may secure all kinds of loans, be they unconditional or subject to suspensive or resolutory condition. Arts. 2091, 2139.

29) **Usury law applies.**—Under Art. 2138 the usury law is made applicable to antichretic interest. In Sta. Rosa v. Noble, 35 O.G. 2724 the court held that the usury law applies to the first form of antichresis where there is an agreement that the fruits would be applied to the interest and later to the principal of the debt.

In Vda. de Miranda v. Imperial, 44 O.G. 2211 and Toquero v. Villegas, CA 40 O.G. 11th supp. 10, 15, it was held that the usury law does not apply to the 2nd form of antichresis, where the fruits are set off against the interest. This doctrine is overruled by the new provision in Art. 2128. The usury law applies to the 2 forms of antichresis.

30) **Market value of the fruits.**—Art. 2133 lays down a new rule. It requires that the actual market value of the fruits at the time of the application thereof to the interest and principal shall be the measure of such application. The law seeks to protect the debtor in this case.

The law is partial to the debtor because antichresis "though one of choice and convenience, very frequently, it is commonly the resort of distress in the last alternative, when all other means of raising money have failed." Livingston v. Story, 11 Pet. 351, 389, 9 L ed 746. Manresa notes that Justinian, in a spirit of solicitude, prohibited antichretic pacts with Thracian laborers and that the Partidas and the commercial law condemned antichresis as usurious.

VI. OTHER RIGHTS AND DUTIES OF PARTIES

31) **Ejectment of usurping debtor.**—If the debtor usurps the land given in antichresis, he may be ejected by the creditor. The action to recover a thing, where the legitimate possessor has been deprived of his possession, takes place in accordance with law, even against the owner himself, who wrested possession, because the despoiler can never be protected by the law even on his right of ownership, without first restoring what he acquired thru this authority by an illegal act of dispossession. Barretto v. Barretto, 37 Phil. 234, 245.

32) **No prescription.**—The antichresis creditor cannot acquire by prescription ownership over the realty received in antichresis as he is in possession of the same not as owner but as creditor. His possession is not adverse. Barretto v. Barretto, 37 Phil. 234, 253; Valencia v. Acala, 42 Phil. 177, 180. Title does not pass to the creditor. Diaz and Rubillos v. De Mendezona, 48 Phil. 666, 670.

33) **Right to lease the land.**—The antichretic creditor may lease the land to other persons provided that the rentals are applied to the payment of the interest and principal. Magdañgal v. Lichauco, 51 Phil. 894, 902.

34) **Expenses incurred by creditor are deductible from the fruits.**—A piece of land having been given in antichresis, the creditor who possesses it by virtue of said contract is entitled to be reimbursed for his expenses for machinery and other improvements on the land for the sums paid as land tax. The expenses are deductible from the fruits received by creditor. Art. 2135; Magdañgal v. Lichauco, 51 Phil. 894, 908.

35) **Where creditor discharged liens.**—If the creditor discharged other liens on the property, he is entitled to collect from the debtor the amounts he paid for the purpose. He may retain the property until he is reimbursed in obedience to the maxim that he who seeks equity must do equity. Macapinlac v. Gutierrez Repide, 43 Phil. 770, 787.

36) **Creditor may be sued for accounting.**—The creditor must always account for the fruits. He may be sued for accounting. Barretto, Macapinlac, Diaz cases; Enriquez v. Philippine National Bank, 55 Phil. 414; Magdañgal v. Lichauco, 51 Phil. 894.

37) **Creditor is liable for damages for failure to comply with his obligations.**—The creditor is liable to the debtor for damages if he fails to pay the taxes and charges of the estate and to the prejudice of the debtor. This is illustrated in Pando v. Jimenez, 54 Phil. 459. In this case the contract was originally a mortgage over a house and leasehold right on the lot upon which the house stands, as security for a debt of ₱8,000. It was later agreed that the mortgagee would administer the house, collecting the rents therefrom and applying the same to the payment of the realty tax on the house, the rentals on the lot and the remainder to the interest of the debt.

Thus the mortgage became antichresis. Due to the creditor's failure to pay the tax, the house was sold at public auction, and for failure to exercise the right of redemption, the city government executed a final deed of sale in favor of the purchaser at the tax sale. Furthermore, for default in the payment of rentals on the lot, the lessor cancelled the lease.

The court held that the creditor failed to comply with his legal obligations, which arose from the very nature of the agreement and was correlated with his right to take charge of the property. Manresa says that the right of the creditor to enjoy the fruits carries the obligation to pay taxes and expenses for the preservation and repair of the property.

For his failure to comply with his obligation he should indemnify the debtor. The court fixed the damages at ₱5,000 deductible from the ₱8,000 credit.

38) **Antichretic creditors may form partnership.**—In Lichauco v. Soriano, 26 Phil. 593 the debtors delivered their hacienda to the creditors so that the debt may be paid out of the fruits thereof. The creditors in turn formed a partnership for the management of the estate to continue until their claims against the debtors were satisfied.

VII. NO PACTO COMISORIO

39) **Prohibition against pacto comisorio stipulation.**—Art. 2137 provides that the antichretic creditor does not acquire ownership of the realty for nonpayment of the debt within the period agreed upon. A stipulation to the contrary is void. The creditor's remedy is court action for the recovery of the loan and foreclosure in accordance with the rules of court on foreclosure of mortgages. Barretto v. Barretto, 37 Phil. 234, 245; Sta. Rosa v. Noble, 35 OG 2724.

The prohibition in art. 2137 is similar to the ban against **pacto comisorio** stipulation in pledge and mortgage. The creditor cannot appropriate the things given by way of pledge or mortgage, or dispose of them. Any stipulation to the contrary is void. Art. 2088.

40) **Reason for the prohibition.**—The prohibition is based upon a recognition of the inequality of the position of debtor and creditor. As the necessitous debtor is at the creditor's mercy, the creditor necessarily has a power over him which may be exercised inequitably. The debtor is liable to yield to the exertions of such power. The law protects him absolutely from the consequences of his inferiority and of his own act done thru infirmity of will. Dissent, Street, J., Dalay v. Aquiatin and Maximo, 47 Phil. 951, 956, 957.

Usually the realty given in antichresis has a value much more than the debt. The creditor would enrich himself unjustly at the debtor's expense if the law sanctioned a stipulation making the creditor automatically the owner of the realty upon nonpayment of the obligation. As the creditor is usually given possession of the property, he could easily appropriate it if there were no prohibition.

41) **Illustrative case.**—Certain lands were conveyed to a lawyer as security for the payment of his fees, with the right to enjoy the same fruits in lieu of interest, and on condition that the lands would be definitely adjudicated to him if his fees were not paid in 5 years. This stipulation is void, being **pacto comisorio.** Soncuya v. Azarraga, 38 OG 2277, 2280, 2283; Tan Chun Tic v. West Coast Life Assurance Co. and Locsin, 54 Phil. 361, 364.

42) Stipulations resembling to pacto comisorio held valid.—But if the stipulation were that the realty would be ceded to the creditor as payment of the loan, it would not be **pactum comisorium.** The stipulation would be valid. The debtor may make an assignment of his properties in payment of a debt. Dalay v. Aquiatin and Maximo, 47 Phil. 951, 954; Tan Chun Tic v. West Coast Life Assurance Co. and Locsin, 54 Phil. 361, 369.

A contract whereby the debtor agreed to pay the loan within a certain period, and if it was not paid as stipulated the debtor's house and lot would be considered as sold to the creditor for the amount of the unpaid loan does not contain any **pactum comisorium** stipulation. The contract is not antichresis because the creditor was not in possession of the realty nor for one moment enjoyed its rents. Alcantara v. Alinea, 8 Phil. 111, 115.

The prohibition against **pacto comisorio** stipulation does not apply to a case where the creditor is authorized, because of nonpayment of the debt within the term fixed by the parties, to sell the thing given in antichresis at a public extrajudicial sale. Such procedure is sanctioned by Spanish and Anglo-American jurisprudence. It is expressly authorized by Act 3134 in the case of real mortgages. El Hogar Filipino v. Paredes, 45 Phil. 176.

43) Pacto comisorio does not vitiate contract.—An antichresis containing a void **pacto comisorio** stipulation is valid. The stipulation shall be deemed as not imposed. Mahoney v. Tuason, 39 Phil. 952; Tan Chun Tic v. West Coast Life Assurance Co. and Locsin, 54 Phil. 361, 366.

VIII. FORECLOSURE AND EXTINCTION

44) Judicial foreclosure.—Art. 2137 authorizes the creditor in case the debtor has failed to pay the debt to resort to judicial foreclosure in accordance with rule 70, rules of court. See Vda. de Miranda v. Imperial, 44 OG 2211; Pando v. Gimenez, 54 Phil. 459; Tansioco v. Ramoso, 59 Phil. 672, 686.

45) Extrajudicial foreclosure is allowed.—Extrajudicial foreclosure of the security is permitted. Stipulations in a contract of antichresis for extrajudicial foreclosure of the security may be allowed in the same manner as they are allowed in mortgage or pledge. Peterson v. Azada, 8 Phil. 432, 437; El Hogar Filipino v. Paredes, 45 Phil. 178; Pardo de Tavera et al. v. El Hogar Filipino, 40 OG 3rd supp. 17, 21.

46) Extinction.—Antichresis may be extinguished in the same manner as other obligations. The usual way is by payment of the debt and its interest. Barretto v. Barretto, 37 Phil. 234, 253.

The debtor cannot reacquire the property without paying the debt. Art. 2136; Aldea v. Fuentes, 24 Phil. 303, 308; Macapinlac v. Gutierrez Repide, 43 Phil. 770, 786; Diaz and Rubillos v. De Mendezona, 48 Phil. 666; Barretto v. Barretto, 37 Phil. 234, 245; Tansicoco v. Ramoso, 59 Phil. 672, 686; Legaspi v. Celestial, 38 O.G. 2574; Villanueva v. Ipondo, 44 OG 4377, 4380.

However, the creditor may always terminate the antichresis by compelling the debtor to enter upon the enjoyment of the property, unless there is a contrary stipulation. Art. 2136.

IX. CONCLUDING OBSERVATIONS

47) **Conclusion.**—The new code severely regulates **pacto de retro** sale of realty because it had become an iniquitous contract used by usurers to camouflage their nefarious activities. In ancient times antichresis was similarly outlawed because essentially usurious. To prevent creditors from using antichresis as an instrument for the satisfaction of their avarice and for oppressing the debtor, the code applies the usury law to antichretic interest.

Other safeguards, all intended for the debtor's protection and closing the loopholes in the old law, are prescribed. The market value of the fruits is the measure for the application thereof to the interest and principal. The amount of the principal and interest must be specified in writing, otherwise the antichresis is void. **Pacto comisorio** stipulation, the automatic appropriation by the creditor of the realty given as security in case of the debtor's default, is prohibited. The remedy of foreclosure is prescribed as the means for satisfying the loan in case of default.

The restrictions on **pacto de retro** sale might lessen its utility and make antichresis a more frequent pignorative agreement. It is preferable to mortgage because it may be orally constituted. Mortgage is cumbersome as it requires a public instrument and registration. Moreover in antichresis the creditor has a stronger security because the debt and its interest are payable out of the fruits of the property which is generally in the creditor's possession.

It is true that mortgage includes also the fruits, as prescribed in art. 2127 formerly art. 1877 of the old code. But as already shown, the courts have considered the mortgagee in possession enjoying the fruits as an antichretic creditor.

Whether all the beneficent provisions designed to place the antichretic debtor on the same footing as the creditor would actually be availed of by him is another question. The lawmaking body has its part to protect the debtor in distress. It is for the courts and administrative agencies to enforce the legislative intention. Good laws are never good if not properly enforced.

Doubtless, many creditors would still venture to harass the debtor thru antichretic agreements. They would be able to do so only with the collusion of the debtor himself, who would then forfeit the protection accorded to him by a wisely conceived law.

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