RECENT DECISIONS

Administrative Law—*Seizure and Forfeiture of Smuggled Goods —Finality of Award of Collector of Customs.*

REPUBLIC OF THE PHIL. v. 259 PIECES OF JEWELRY,
G. R. No. L-3281, Prom. June 28, 1951

The Revised Administrative Code divides the liabilities to which imported goods which are attempted to be smuggled in may be subjected into payment of surcharges,[1] forfeiture,[2] and seizure.[3] In the first two instances, fraudulent intent is immaterial and need not be shown. A surcharge can be imposed if an importer undervaluates his goods [4] and the mere failure of an importer to declare merchandise in his baggage to the proper customs officer is sufficient ground for forfeiture.[5] But seizure can be availed of only after the im-

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[1] Secs. 1288 to 1291 of the Revised Adminsitrative Code provide for surcharges imposable by the collector. For failure to pay liquidated charges a surcharge of 5% is imposed; for failure to supply invoice, the collector may instead of requiring a bond for the subsequent production of the authentic invoice impose a surcharge of 25% of the duties, but in no case to be less than 10 pesos. Surcharge are also imposed for undervaluation and misdescription in entry and upon the refusal of a party to give evidence or submit documents for examination.

[2] Sec. 1363 (m-2) of the Revised Administrative Code provides: Property subject to forfeiture under customs laws—vessels, cargo, merchandise, and other objects and things shall under the conditions hereinbelow specified be subject to forfeiture:

(m) Any merchandise, the importation or exportation of which is effected or attempted in any of the ways or under any of the conditions hereinbelow described:

(2) Upon the failure of a person entering merchandise which has arrived from abroad in baggage to declare the same before the proper customs officer.

[3] Sec. 1292. Failure to Declare Baggage.—Whenever any article subject to duty is found in the baggage of any person arriving within the Philippines, which was not, at the time for making such entry of baggage mentioned to the Collector or other proper customs officials before whom such entry was made by the person making the entry, such article shall be seized and the person in which baggage it is found may be required to pay treble the value of such article unless it shall be established to the satisfaction of the collector that the failure to mention or declare was without fraud.

[4] An importer need not act fraudulently in order that a surcharge may be imposed upon him, an undervaluation of the merchandise being sufficient. But if the declaration is fraudulent, the merchandise is subject to seizure. Li Teck San vs. Collector of Customs, 55 Phil. 482; cf. U.S. v. One Pearl Necklace, 111 F. 164, 168; U.S. v. Harts, 131 F. 886, 140 F. 843; One Pearl Chain v. U.S. 123 F. 371, 375; Dodge v. U.S. 131 F. 849; 195 U.S. 632; U.S. v. Chesbrough, 176 F. 778.

[5] The Philippine law on Customs Duties was based on the Revised Statutes of the United States on Customs Duties. People v. Ang Hok Hin, 57 Phil. 567. See United States Code Annotated, Title 19, Customs Duties. Originally, Sec. 16 of Act of June 22, 1874, 18 Stat. 189 provided for forfeiture only if intent to defraud was present. But this section was repealed by Sec. 2802 and evil or fraudulent intent is no longer a necessary ingredient in incurring penalty of forfeiture. U.S. v. Harts, 131 F. 886. See Ynchausti & Co. vs. Wright, 47 Phil. 866.

porter fails to prove to the satisfaction of the collector that the failure to declare or mention was without fraud. Fraud is therefore presumed.[6]

The 259 pieces of jewelry in this case were concealed in a manner as to clearly show fraudulent intent. The jewels worth ₱25,726.00 were discovered when customs officials broke open the unusually thick bottom of a Chinese vase which constituted part of the claimant's baggage and which vase he declared at only ₱15.00.[7] Hence as to liability to seizure under Sec. 1292 of the Revised Administrative Code, there could be no question.

The Collector of Customs however subjected the jewelry to forfeiture or waiver of forfeiture upon the payment of a fine in an amount equal to three times the appraised value of the goods.

With regards to forfeiture, a proper disclosure seasonably made is a valid defense to such liability. A disclosure is proper if it is sufficient to put the customs officers to an inquiry as to the dutiable nature of the contents of the package.[8] A mere generalization as to the nature of the baggage without specifying its contents is not

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[6] The burden of proof has now shifted from the government to the importer. In U.S. v. Lim Cay Pit, 28 Phil. 418, in a criminal prosecution for a violation of Act No. 355 for having made a false declaration for entry relative to the value of merchandise which the accused was at the time importing, it is incumbent on the government to prove that the declaration as to value was false and that the accused knew it was false. The knowledge of the falsity can be proven by both direct and circumstantial evidence. The fact that the accused gave different values to the same merchandise at different times is not sufficient proof of criminal knowledge. Because of the failure to show knowledge, the accused was acquitted.

The burden of proof is upon importer to overcome the presumption of legal collection of duties that their exaction was unlawful. The question is, not whether the collector was wrong but whether the importer is right. Manila Railroad Company vs. Collector of Customs, 52 Phil. 950.

It is a general rule in the interpretation of all statutes levying taxes or duties upon citizens not to extend their provisions beyond the clear import of the language used or pointed out, although standing upon a close analogy. Revenue statutes are in no just sense either remedial laws or laws founded on a permanent public policy and therefore they are not to be liberally construed. Froelich and Kuttner v. Colector of Customs, 18 Phil. 461.

[7] See U.S. v. One Bag of Crushed Wheat, 166 F. 562 where a plan to smuggle is shown by the manner of packing and invoicing. Laces and silk were packed as fruit and invoiced as such.

The government is not particularly interested in the truth or falsity of statements as such. The act on customs duties is not a code of moral laws enacted to command truth and punish falsehood. It is to aid in collecting revenue for the United States. U.S. vs. 99 Diamonds, 139 F. 961. Fraud in the importation of goods must be such that if consummated it would result in depriving the United States of revenue.

[8] There is no way by which the government could protect itself except by some declaration on the part of the importer. One Pearl Chain v. U.S., 123 F. 371, 375. Any time before completion of entry, a disclosure sufficient to put customs officer to an inquiry as to dutiable character of contents of package is sufficient mention as would prevent seizure and forfeiture. Dodge v. U.S., 131 F. 849.

the sufficient mention required by law.[9] The disclosure is seasonably made if it is given when the goods have not yet been taken through the lines of customs authorities, but are delivered to the customs officers on board the vessel itself at the time when or before the obligation to make entry and pay duties arises.[10] But where disclosure is attempted only after the discovery of the jewels attempted to be smuggled in, the defense will not lie.

Granting that an importer lacks sufficient funds to pay customs duties upon arrival, still it is his duty to disclose his merchandize when required to do so and at the same time he may request postponement of inspection and delivery until such time as is convenient for him. Disclosure should be made even if corresponding duties can not yet be paid for lack of funds.[11]

The immateriality of fraudulent intent in forfeiture and its being presumed in the absence of satisfactory proof to the contrary in case of seizure is explained by the differences in liabilities and penalties.[12] The fine of three times the value of the goods in case

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[9] A passenger who described his pieces of baggage as consisting of certain numbers of trunks, valises, etc. and who said nothing as to what articles were contained therein did not make the sufficient mention required by law. U.S. v. Sixteen Bolts of Silk, 139 F. 1008; Harts v. U.S., 140 F. 843.

[10] The general rule is that importation of merchandise for purposes of revenue and other purposes is complete the moment the vessel enters the waters of the country. U.S. v. Chu Loy, 37 Phil. 510; cf. Callahan v. U.S., 53 F. 2d 467, where it was held that importation takes place whenever merchandise is brought within territorial waters of the United States with intent to illegally bring merchandise into the country.

A passenger's articles were seized before she was called upon to complete her entry and she is not responsible if she mentions the articles as required by law when she first makes her entry. Her declaration prior to examination was "wearing apparel, value not known." She was then directed to a roped off area but before she could complete her entry, the pearl chain and silk wearing apparel were seized. U.S. v. One Pearl Chain, 139 F. 513.

Goods intended to be smuggled in may not be seized while persons importing them may yet change their minds and observe necessary formalities in due season. *id.*

An accused who denied having anything to declare before declaration was required at port of entry but who on being searched while entry was being made admitted that his bag contained diamonds was not guilty of smuggling. Rittermann v. U.S. 12 F. 2d 849.

A passenger concealed Mexican gold coin on his person with intent not to declare it. But the coin was held not subject to forfeiture because possession thereof was disclosed as soon as opportunity to do so was afforded. Lozano v. U.S., 17 F. 2d 7.

[11] The claimant in this case never pretended that his omission to declare was due to inadvertence or ignorance. He explained that he was afraid he might be held up on his way from the airport to his Manila residence if he took with him the jewels on the night of his arrival. He also said that he was able to raise the necessary amount to pay customs duties, compensating tax, and other fees only on the day of the discovery of the jewels without his knowledge and one day after, his arrival from Bangkok.

[12] Under Sec. 1363 taken in conjunction with Secs. 1356, 1366, 1388 a fine cannot be greater than the appraised value of the seized article while under Sec. 1292 the fine is treble the value. Sec. 1365 provides for waiver of forfeiture and the imposition in lieu thereof of a fine upon the property in such amount as the nature of the case shall

of seizure is not excessive.[13] Neither does the fact of appellants having been previously convicted and fined by the courts in a criminal case for the same act of smuggling subject him to double jeopardy.[14]

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indicate as proper. Sec. 1366 provides for the enforcement of fines and forfeitures by the seizure of the vessel or property subject to the fine and forfeiture. Sec. 1388 provides for the settlement of a cause by the payment of the fine or redemption of forfeited property. In case of forfeiture only the appraised value of the property is required to be paid.

Sec. 1320. Abandonment of merchandise.—The owner of imported merchandise may, within 10 days after entry, abandon to the government all or part of the merchandise included in an invoice and be relieved from the payment of duties thereon, provided the portion so abandoned shall amount to ten percentum or more of the total of the invoice and be not less than one package. The property so abandoned shall be delivered by the importer at such places within the port of arrival as the collector of customs may direct; and on the failure of the importer to comply with the directions of the collector in this respect, the importer shall be liable for any expense incident to the disposition of the property. (This section can not apply to this case because it refers only to invoiced goods.)

[13] The danger of real hardship or injustice arising from the imposition of harsh or oppressive penalties is substantially provided against by the discretion conferred upon the Collector of Customs under the supervision of the Courts whereby he may impose a penalty from a nominal amount to the extent allowed by law. U.S. vs. Steamship Rubi, 32 Phil. 228.

Where a person takes a direct part in the illegal importation of a large quantity of opium and profits thereby, a penalty of 2 years imprisonment and a fine of ₱1,000 is not excessive. U.S. vs. Pons, 34 Phil. 729.

[14] Information under this section for forfeiture of goods is a civil action. A civil proceeding to enforce the collection of a surcharge is distinct from criminal liability for failure to declare an article. Before the penalties in a criminal action can be imposed, a higher grade of culpability has to be established than that under this section. See U.S. v. Chesbrough, 176 F. 778.

A stricter interpretation is required under criminal prosecution and more evidence is necessary. Thus in the case of a Chinaman who declared as dried fish, dried cut radish, and cuttlefish 26 cases of Japanese artificial silk testilse, the court held that he could not be subjected to imprisonment for illegal importation of merchandise as the law sought to be applied, Section 2702 was taken from Sec. 3082 of the Revised Statutes and at the time it was enacted the current interpretation in the United States of that section was that it was limited to smuggling or "the bringing of merchandise into the United States contrary to law." Silk and dried fish are not prohibited articles of importation. Hence he was acquitted. People v. Ang Hok Hin, 57 Phil. 567

Commercial Law—*Agency—Banks and Banking—Officers and Agents—Agents Granting Loans Contrary to Regulations and Instructions of the Bank Held Liable for Uncollected Amounts.*

PHILIPPINE NATIONAL BANK v. BAGAMASPAD AND FERRER. G. R. No. L-3407, Prom. June 29, 1951

The Philippine National Bank acting upon instructions from the President of the Philippines, passed a resolution authorizing the granting of ten-month special crop loans to bona-fide food producers, landowners or their tenants, under certain conditions. The Cotabato Agency of said bank under the management of Bernardo Bagamaspad and Bienvenido Ferrer, Agent and Assistant-Agent, respectively, began granting these special crop loans in July, 1946. By March, 1947, said Agency had granted to over 5,000 borrowers, loan in the total amount of ₱8,688,864.00. The Rules and Regulations of the Bank, the circular letters issued to the agents and the Conference of Managers and Agents of the Bank, required compliance with the Rules and Regulations issued, namely, that crop loans should be granted only to bona-fide planters, landowners or tenants. Bagamaspad and Ferrer granted new special crop loans in excess of the limit allowed their Agency; utilized the funds intended for the payment of second installments, to be paid on first installments on loans; granted loans to persons who were neither bona-fide landowners or planters nor tenants; employed intermediaries in their transactions with borrowers; released loans without approval of a Loan Board; all contrary to the Rules and Regulations of the Philippine National Band and the express instructions given to them. The Bank initiated this suit for the purpose of recovering ₱704,-903.18 said to have been negligently disbursed and released by Bagamaspad and Ferrer without authority. Later, upon petition of the plaintiff's counsel, the amount of the claim was reduced to ₱699,803.57 due to payment made by some of the borrowers. *Held,* under the provisions of Arts. 1718 and 1719 of the Civil Code, defining and enumerating the duties and obligations of an agent and his liability for failure to comply with such duties, and Art. 259 of the Code of Commerce, and also Art. 1902 of the Civil Code, providing for the liability of one for his tortious act, the agent is liable. Judgment for the plaintiffs by the lower court affirmed.

As early as 1922, the Philippine Supreme Court, in a criminal case held liable the President of the Philippine National Bank for violating the provisions of Act. 2612, as amended, requiring loans to be granted to members of the board and agents only with the unanimous approval of the members of the Board of Directors.[1] Although the present case is civil in nature, from the aspect of vio-

[1] People v. Concepcion, 43 Phil. 653.

lating laws, rules and regulations, these two cases are not very dissimilar.

In the above case, the Supreme Court based its decision on the provisions of Arts. 1718 [2] and 1719 [3] of the Old Civil Code which Manresa believes "es una secuela de la aceptacion del mandato. Libre el mandatario para rehusarlo, puedo ahorarse sus molestias; mas acceptandolo, al no cumplirlo traciona la confianza en el depositada: ha contraido la obligacion de ejecutarlo, constituyendose en deudor del mandante y por tal titulo responde de los daños y perjuicios." [4] The principle is that agents of a corporation are charged with the duties of trustees and are bound to care for its property and manage its affairs in good faith, and for a violation of that duty, resulting in waste of its assets, injury to property or unlawful gain to themselves, they are liable to account in equity the same as ordinary trustees.[5] If they deliberately refrained from investigating that which it was their duty to investigate any resulting violation of statute or regulation must be regarded "in effect intentional" and being intentional, they are liable for damages.[6] If it is shown, however, that the agents have not exceeded their authority or have not acted with negligence, deceit or fraud they cannot be held responsible for the failure of their principal to accomplish the object of the agency.[7] But in this case it is clear that the "defendants have not only violated instructions of the plaintiff bank, including things which said Bank wanted done or not done, all of which were fully understood by them, but also violated standing regulations x x x through their carelessness, laxity and negligence." [8]

Art. 259 of the Code of Commerce [9] was also cited by the Supreme Court to support its decisions. This provision, though pertinent at the time the action accrued, can no longer be cited in sup-

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[2] "The agent by his acceptance shall become bound to fulfill the agency, and he shall answer for the losses and damages caused to the principal through his noncompliance, . . ." This is now Art. 1884 of the New Civil Code.

[3] "In complying with the agency the agent shall follow the instructions of the principal. In default of instructions, he shall do all that which, according to the nature of the business, a good father of the family would do." This is now Art. 1887 of the New Civil Code.

[4] Manresa, Comentarios al Codigo Civil, Tomo XI, p. 490.

[5] Bosworth v. Allen, 168 N.Y. 157, 55 L.R.A. 751, 762.

[6] Thomas v. Taylor, 224 U.S. 73, 82; Jones National Bank v. Yates, 240 U.S. 541, 555.

[7] Gutierrez Hermanos v. Oria Hermanos, 30 Phil. 491, 520; See also: Swentzel v. Penn. Bank, 15 L.R.A. 305, 316; Greenfield Savings Bank v. Abercrombie, *et al.*, 39 L.R.A. (N.S.) 173, 178; Briggs v. Spaulding, 141 U.S. 132, 146; Holman v. Cross, 75 F. (2d) 909, 912.

[8] Philippine National Bank v. Bagamaspad and Ferrer, G.R. L-3407, p. 10-11; see: Yates v. Jones National Bank, 206 U.S. 158, 180; Corsicana National Bank v. Johnson, 64 L. Ed. 141, 147.

[9] "An agent must observe the provisions contained in the laws and regulations with regard to the transaction which has been intrusted to him, and shall be liable for the results of their violation or omission. If he acted in virtue of the express order of the principal, the liabilities which may arise shall be incurred by both conjointly."

port of future decisions on a similar issue, because it has been expressly repealed by the New Civil Code.[10]

The Supreme Court further cited Art. 1902 [11] of the Old Civil Code "which provides for liability of one for his tortious act" as relevant to sustain the civil liability of the defendants. It is believed that Art. 1902 is not in point. The New Civil Code in defining quasi-delict [12] expressly states that such fault or negligence, if there is *no pre-existing contractual relation* between the parties, is called a quasi-delict." The facts of this case show that the plaintiff bank entered into a contract of agency with the defendants,[13] hence there was a pre-existing contractual relation. Although in the United States, the act may have been considered tortious,[14] in the Philippines, it is well-settled that once there is an existing contractual relation the resulting act cannot be considered tortious.[15] In our laws "quasi-delict" does not have the same meaning as the word "tort" in Anglo-American law.[16]

Defendants contend that the plaintiff should not be allowed to proceed against both the defendants for amounts loaned by them and the individual borrowers for amounts borrowed by them, since if that were permitted the plaintiffs would be enriching themselves at the expense of the defendants. The Supreme Court disposed of this by saying that "the plaintiff is not trying to enrich itself at the expense of the defendants but is merely trying to diminish as much as possible the loss to itself and automatically decrease the financial liability of the defendants x x x far from being iniquitous, is really beneficial to the defendants." [17]

Defendants further contend that the present action is premature, no showing having been previously made that the borrowers to whom they allegedly gave loans without authority are manifestly insolvent or unqualified. The Supreme Court said "it is not necessary for the plaintiff bank to first go against the individual borrowers, exhaust all remedies against them and then hold the defendants liable only for the balance which cannot be collected. x x x The damage as well as the injury was complete at that time and the Bank is not obliged to await maturity" of the obligation.[18]

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[10] Art. 2270: "The following laws and regulations are hereby repealed: . . . (2) The provisions of the Code of Commerce governing . . . agency . . ."

[11] "Any person who by act or omission causes damage to another by his fault or negligence shall be liable for the damage so done."

[12] Art. 2176.

[13] Philippine National Bank v. Bagamaspad and Ferrer, G.R. L-3407, p. 1-2.

[14] See Bigelow v. Old Dominion Mining and Smelting Co., 225 U.S. 111, 132.

[15] Rakes v. Atlantic Gulf and Pacific Co., 7 Phil. 359; Cangco v. Manila Railroad, 38 Phil. 769; Del Prado v. Manila Electric, 52 Phil. 900.

[16] Report of the Code Commission, p. 161.

[17] Philippine National Bank v. Bagamaspad and Ferrer, G.R. L-3407, p. 11.

[18] *Ibid.*, p. 12; see also: Corsicana National Bank v. Johnson, 64 L. Ed. 141, 153-154.

Civil Law—*Duty to Render Accounting of Person Charged with Business and His Inability to Acquire an Interest Adverse to that of His Principal.*

DAVID THOMAS v. HERMOGENES PINEDA
G. R. No. L-2411, Prom. June 26, 1951

That a person who has been charged with some business or property to manage or to administer should render an accounting of such property or business is the fixed rule in our jurisdiction. So important and indispensable is such duty to account that it is explicitly declared in our statutes,[1] and clearly embodied in our jurisprudence.[2]

The duty to manage or to administer some business or property arises from various transactions. It will be noted as some of these transactions are considered, that more often than not, a fiduciary relation exists between the parties. Where such a relation exists it will be seen that the duty becomes more implicit. Thus is it in agency[3] where the relation of the parties has always been deemed to be fiduciary in character.[4] The Civil Code obliges an agent not only to render an account of his transactions,[5] but makes, moreover, every stipulation exempting the agent from such obligation void.[6] And he is bound to account not only for what he has received from his principal, but for all that may have come into his hands as a result of the agency.[7] Likewise, in a partnership,[8] a partner is

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[1] See Articles 1807, 1809, 1842 and 1891, Civil Code; Rule 61, 86, 97 of the Rules of Court.

[2] Jackson vs. Blum, 1 Phil. 4; U.S. vs. Kiene, 7 Phil. 736; Ojinaga vs. Estate of Perez, 9 Phil. 185; Aldecoa & Co. vs. Warner, Barnes & Co., 16 Phil. 423; Oria vs. Campbell & Gutierrez Hermanos, 34 Phil. 850; Martinez vs. Grano, 49 Phil. 214; In re Bamberger, 49 Phil. 962; Duhart Freres y Cie. vs. Macias, 54 Phil. 613; Asiatic Petroleum vs. Quey Sim Poo, 40 O.G. (12 S), 44; In re Jose T. Nueno, 47 O.G., No. 1, 143; Thomas vs. Pineda, G.R. L-2411, promulgated, June 28, 1951.

[3] Book IV, Title X, Civil Code.

[4] "The relations of an agent to his principal are fiduciary and it is an elementary and very old rule that in regard to property forming the subject matter of the agency, he is estopped from acquiring or asserting a title adverse to that of the principal." Severino vs. Severino, 44 Phil. 343, 350.

[5] Art. 1891, Civil Code. See also U.S. vs. Kiene, 7 Phil. 736; Ojinaga vs. Estate of Perez, 9 Phil. 185 (Note the dissenting opinion in this case which treats the agent more strictly); Duhart Freres y Cie. vs. Macias, 54 Phil. 613; Asiatic Petroleum vs. Quey Sim Poo, 40 O.G. (12 S), 44.

[6] Art. 1891, par. 2, Civil Code.

[7] "The duty of the agent to account to his principal for all money and property which may have come into his hands during and by virtue of the agency 'embraces not only such money and property as may be received directly from the principal, but also that which comes into the agent's hands as the result of his agency' (Mechem on Agency, Book IV, section 522; see also II Corpus Juris, p. 737)." Asiatic Petroleum vs. Quey Sim Poo, *supra*.

[8] "Above all other persons in business relations, partners are required to exhibit towards each other the highest degree of good faith. In fact the relation between

bound to account to the partnership.[9] He may in turn demand a formal account as to partnership affairs.[10] Of the same view is the holding of our Supreme Court that the manager of a joint-account partnership must, on its termination, render accounts, including inventory of the property in common, so that partition of the assets may be made.[11] And the right to an accounting is not a personal right, for the successor of a partner may demand an accounting from the partnership or from a third person in whose hands the property has passed.[12] It is now expressly declared that the right to an account shall accrue to any partner, or his legal representative.[13] So is an accounting demandable of an executor or administrator [14] not only of all the property of the estate which has come into his possession, but also of all the property which has come to his knowledge.[15] And before any account which he may render may be allowed, notice must necessarily be given to persons interested of the time and place of examining and allowing the same.[16] Likewise, a guardian is bound to render an account of the estate under his guardianship,[17] and a receiver of the subject of the receivership.[18] The refusal of the latter to render such an account has been held to be a ground for removal.[19] It may also be mentioned that the duty to render an accounting likewise devolves upon lawyers in respect of the money or property received by them for their clients.[20]

In the present case, the above doctrines were reiterated when the Court ruled that the defendants was bound to render to the plaintiff an accounting of the business which was entrusted to him to manage. The plaintiff in this case acquired ownership of a bar and restaurant known as Silver Dollar Cafe located at Plaza Santa Cruz, Manila, and defendant was employed as bar-tender until he became

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partners is essentially fiduciary, each being considered in law, as he is in fact, the confidential agent of the other. It is therefore accepted as fundamental in equity jurisprudence that one partner cannot, to the detriment of another, apply exclusively to his own benefit the results of the knowledge and information gained in the character of partner." Pang Lim and Galvez vs. Lo Seng, 42 Phil. 282.

[9] Art. 1807, Civil Code.

[10] See Articles 1809 and 1842, Civil Code.

[11] Aldecoa & Co. vs. Warner, Barnes & Co., 16 Phil. 423.

[12] Jackson vs. Blum, 1 Phil. 4.

[13] Art. 1842, Civil Code.

[14] Rule 86, Rules of Court.

[15] Tan vs. Co Chiong Lee, 46 Phil. 200.

[16] Rule 86, Rules of Court; see Villanueva vs. de Leon, 47 Phil. 780, where the court declared: "It is the right of all creditors and distributees of the estate to be present and, if so disposed, to contest the accounts of the executor or administrator. . . . Administrators and executors, instead of opposing the intervention of interested parties, should welcome the participation of the same for their own protection. In this connection, it has been held that an alleged partner of a deceased person has such interest in the estate of the deceased as to allow him to take part in the approval of the accounts."

[17] Sec. 7, Rule 97, Rules of Court.

[18] Sec. 8, Rule 61, Rules of Court.

[19] Martinez vs. Grano, *supra*.

[20] In re Bamberger, 49 Phil. 962; In re Jose T. Nueno, 47 O.G., No. 1, 143.

the manager, which position he occupied at the outbreak of the war. To prevent the business from falling into enemy hands, the plaintiff being a citizen of the United States, executed a fictitious sale of the property to the defendant, who, during the occupation, operated the business exclusively. On February 3, 1945, the building was destroyed by fire, but the defendant was able to remove some properties therein to a place of safety. Then on May 8, 1945 a bar was opened under the old name of Silver Dollar Cafe, which post-war business the court found to belong still to the plaintiff—with only the defendant as an industrial partner. Due to differences the plaintiff established a new Silver Dollar at Echague, while the defendant remained with the old Silver Dollar, having in the meantime registered the trade name as his own on Sept. 27, 1945. Thereupon, the plaintiff filed an action to compel an accounting of the defendant's operation of the business during the war and immediately after the liberation. The action prospered. The Court in so deciding did not determine the exact legal character of the defendant's relation to the plaintiff, not considering it necessary. It was considered sufficient that it was shown that defendant was entrusted with the possession and management of plaintiff's business. While for the sake of clarity, it would have been desirable if the Court had made a categorical finding on the character of defendant's relation to plaintiff, yet the fact that the Court went no further does not render its conclusion open to doubt since there is no more indispensable duty of a manager than his duty to render an accounting of the property entrusted to his management. For being so entrusted, defendant's character may be considered similar to that of agent, partner [21] or other person of a fiduciary character, in all of which cases it has been seen that an accounting may be lawfully demanded.

The principle that a person occupying fiduciary relations respecting property or persons is utterly disabled from acquiring for his own benefit property committed to his custody for management and is estopped from acquiring or asserting a title adverse to that of his principal is reaffirmed. First lengthily discussed in the case of Severino vs. Severino [22] although already evident in ear-

[21] As to post war business defendant was found to be so.

[22] "The relations of an agent to his principal are fiduciary and it is an elementary and very old rule that in regard to property forming the subject matter of the agency, he is estopped from acquiring or asserting a title adverse to that of the principal. His position is analogous to that of a trustee and he cannot consistently, with the principles of good faith be allowed to create in himself an interest in opposition to that of his principal or cestui que trust. Upon this ground and substantially with the principles of the Civil Law (see sentence of the supreme court of Spain of May 1, 1900), the English Chancellors held that in general whatever a trustee does for the advantage of the trust estate inures to the benefit of the cestui que trust. Greenlaw vs. Kinh, 5 Jur., 18; *Ex parte* Hughes, 6 Ves., 337; Oliver vs. Court, 8 Price, 127. The same principle has been consistently adhered to in so many American cases and is so well established that exhaustive citations of authorities are superfluous and we shall therefore limit ourselves to quoting a few of the numerous judicial expressions upon the subject. The principle is well stated in the case of Gilbert vs. Hewetson, 79 Minn., 326:

" 'A receiver, trustee, attorney, agent, or any other person occupying a fiduciary relation respecting property or persons, is utterly disabled from acquiring for his own

lier cases,[23] the question arose in this case since the defendant registered the Silver Dollar Cafe as a trade name in his own name, while still acting as an industrial partner for plaintiff and which

benefit the property committed to his custody for management. This rule is entirely independent of the fact whether any fraud has intervened. No fraud in fact need be shown, and no excuse will be heard from the trustee. It is to avoid the necessity of any such inquiry that the rule takes so general a form. The rule stands on the moral obligation to refrain from placing one's self in positions which ordinarily excite conflicts self-interest at the expense of one's integrity and duty to another, by making it impossible to profit by yielding to temptation. It applies universally to all who come within this principle.'

"In the case of Massie vs. Watts (6 Cranch, 148), the United States Supreme Court, speaking through Chief Justice Marshall, said:

" ' But Massie, the agent of Oneale, has entered and surveyed a portion of that land for himself and obtained a patent for it in his own name. According to the clearest and best established principles of equity, the agent who so acts becomes a trustee for his principal. He cannot hold the land under an entry for himself otherwise than as trustee for his principal.'

"In the case of Felix vs. Patric (145 U.S., 317), the United States Supreme Court, after examining the authorities, said:

" 'The substance of these authorities is that, wherever a person obtains the legal title to land by any artifice or concealment, or by making use of facilities intended for the benefit of another, a court of equity will impress upon the land so held by him a trust in favor of the party who is justly entitled to them, and will order the trust executed by decreeing their conveyance to the party in whose favor the trust was created.' (Citing Bank of Metropolis vs. Guttschlick, 14 Pet., 19, 31; Moses vs. Codrington, Johns. Ch., 119; Cumberland vs. Codrington, 3 Johns. Ch., 229, 261; Neilson vs. Blight, 1 Johns. Cas., 205; Weston vs. Barker, 12 Johns., 276.)" Severino vs. Severino, 44 Phil. 343, 350-352.

The same principle was applied by the Supreme Court in the case of Barretto vs. Tuason (50 Phil. 888) in view of the court's opinion that a mayorazgo is in essence a trust. And in Palet vs. Teodoro (55 Phil. 790), while the court followed the same principle, a limitation is in a manner declared, as follows: "Whether or not there is bad faith in obtaining a decree with respect to a registered property, the same does not belong to the person in whose favor it was issued, and the real owners would be entitled to recover the ownership of the property *so long as the same has not been transferred to a third person* who has acquired it in good faith and for a valuable consideration. (Italics ours). Likewise the principle was applied in Palma vs. Reyes Cristobal, 44 O.G., No. 1, 67 and in Pacheco vs. Arro, *et al.*, G.R. No. 48090, prom. Feb. 16, 1950.

[23] The earlier cases mostly concerned the admissibility of parol evidence as between the fiduciary and *cestui que* trust to prove that a person in whose name the title to certain property appears has acquired the same for the benefit of another. A discussion of such cases appears in Camacho vs. Mun. of Baliuag (28 Phil. 466, 468-469), as follows: "There have been a number of cases before this court in which a title to real property was acquired by a person in his own name while acting in a fiduciary capacity, and who afterwards sought to take advantage of the confidence reposed in him by claiming the ownership of the property for himself. This Court has invariably held such evidence competent as between the fiduciary and the *cestui que trust*. . . . In Taguinot vs. Municipality of Tanay (9 Phil. 396), the plaintiffs as heirs of their father, sought to recover possession of a parcel of land held by the municipality on

name the plaintiff owned for many years before the war. The Court ruled that the registration by the defendant in his own name of the Silver Dollar Cafe cannot affect the right of the plaintiff because of the fiduciary relation then existing between them. Thus, this case bolster the precedents that tend to render fixed, though implicit, the duties and disabilities arising out of a fiduciary relation.

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the strength of a Spanish patent issued to him. It was proved (largely by parol evidence) that their father acted on behalf and at the expense of the municipality in securing the patent. The patent was retained by the gobernadorcillo, a copy only being issued to the patentee. The latter also drew up a private document engaging to execute a conveyance to the municipality, the same being offered in evidence. The municipality had continuously occupied the land since the issuance of the title. The judgment of the court below dismissing the complaint was affirmed.

"In the following cases of a similar character, parol evidence was held not sufficient to overcome the case made out by the holder of the registered title: Belen vs. Belen, 13 Phil. 202; Garen vs. Pilar, 17 Phil. 132; Balatian vs. Agra, 17 Phil. 501. Agonoy vs. Ruiz (11 Phil. 204) and Madariaga vs. Castro (20 Phil. 563) were both cases wherein one person was delegated by a community of property owners to secure in his own name a patent from the Spanish Government covering all their lands, the object being to save the expense of obtaining individual patents in the name of each. After securing these patents, the therein grantees ejected their neighbors from the land covered by the patents and respectively claimed the land as their own. The evidence tending to establish these facts was considered by the court in both cases. Relief by reformation of the patent or a compulsory conveyance to the injured persons was denied in each case, because the rights of an innocent third purchaser intervened. But in the first case the injured persons were held entitled to damages, provided they were able to establish the same. In the second case, however, the court presumed a waiver of their claims by reason of other evidence of record. The fact that the parol evidence relied upon in the cases cited in this paragraph to defeat the documents of title was carefully considered by the court, impliedly admits its competency. It failed in its purpose in these cases merely because it was not sufficiently strong to overcome the case in favor of the holders of the registered titles."

The same doctrine was applied in the case of Uy Aloc vs. Cho Jan Ling (19 Phil. 202) where it appeared that a number of Chinese merchants raised a fund by voluntary subscription with which they purchased a valuable tract of land and erected a large building to be used as a sort of club house for the mutual benefit of the subscribers to the fund. By agreement the title to the property was placed in the name of one of the members who in turn accepted the trust. After the club building was completed, the member in whose name the property was collected some ₱25,000 in rents for which he refused to account. When an action was brought to compel him, he set up the title to the property. The decree of the lower court provided, among other things, for the conveyance of the club house and the land on which it stood from the member in whose name it appeared to the members of the association. In affirming the decree, the Supreme Court said: "In the case at bar the legal title to the holder of their registered title is not questioned; it is admitted that the members of the association voluntarily obtained the inscription in the name of Cho Jan Ling, and that they had no right to have the inscription cancelled; they do not seek such cancellation, and on the contrary they allege and prove but they maintain, that he holds it under an obligation, both express and implied, to deal with it exclusively for the benefit of the members of the association, and subject to their will."

Civil Law—*Right to Custody of a Natural Child Recognized By Both Parents Living Separately.*

GARCIA V. PONGAN
G. R. No. L-4362, Prom. Aug. 31, 1951

The recognition of a natural child produces effects on the right of the recognizing parent to exercise parental authority over it.[1] It is not only a right but also more of a duty on the part of the recognizing parent to have custody of the child [2] in order that the former may be able to comply with the duty to maintain and support the latter.[3] When there is only one parent recognizing such child, no serious problem may arise because the other parent is unknown. The law prohibits investigation of paternity or of maternity in such a case, thus custody of the child may be had by the recognizing parent alone.[4] Such investigation can only be had in case of compulsory recognition for there is really but a confirmation of the existing relation between parent and child.[5] However, recog-

[1] Parental authority over a natural child is not acquired until after he has been legally recognized. It is the act of recognition which gives rise to parental authority. Legare v. Cuerques, 34 Phil. 221.

Likewise, a natural child is entitled to certain successional and other rights, but but these depend upon the act of recognition. The effect of such recognition, however, retroacts to the date of its birth and not merely to the date of the parent's death. The rights of the child only *vest* from the date of the recognition. See Tiamson v. Tiamson, 32 Phil. 62; Dusepec v. Torres, 39 Phil. 760; De Gala vs. De Gala, 51 Phil. 480. See also Art. 282, Civil Code.

[2] Although this *right* of the parents may be expressly or tacitly waived, under no condition can there be a waiver of their *duty*. The principle had been uniformly followed since the decision in the case of Reyes v. Alvarez, 8 Phil. 712.

In the case of Diaz v. Estrera, 44 O.G. 4354, the dissenting opinion seems to express the better view. The opinion explains:

"To have the custody of the unemancipated children is not only a right but also a duty. The obligation of the illegitimate father to support his illegitimate child—which may also be considered a right—is subject to the obligation of the natural mother to have custody of her minor child, a right superior to the obligation of the illegitimate father."

As a *right*, parental authority cannot be transferred to another except in cases of guardianship, adoption, or emancipation by concession. See Arts. 313, 327, 334, and 397, Civil Code; also Rule 93.

As a *duty*, it cannot be waived. Padilla, Civil Code Annotated, Vol. I, p. 406.

[3] Art. 316, par. 1 of the Civil Code imposes upon the parents the duty to support, educate and instruct, and keep in their company their unemancipated children.

[4] It is settled that in case of separate recognition, investigation of paternity or maternity is prohibited if such recognition is voluntary. Infante v. Figueras, 4 Phil. 738; Tengco v. Sanz, 11 Phil. 163; In re Estate of Enriquez, 29 Phil. 167; Borres vs. Panay, 42 Phil. 643; Allarde v. Abaya, 57 Phil. 909. See also Arts. 276, 277, and 280, Civil Code.

[5] Padilla, Civil Code Annotated, Vol. I, p. 369; Arts. 283 and 284. The new Civil Code has relaxed the rule prohibiting investigation of paternity or maternity in order to afford material and moral protection to the mother of an illegitimate child.

nition may also be made by both parents jointly.[6] In that case, both may exercise parental authority over the child.

It is possible that recognition may be made not only separately when the other parent is unknown, but also jointly when both parents are known. It is also possible to have successive separate recognitions by both parents in a contest for the custody of the child.[7] In the latter case, there is a balancing of conflicting interests inasmuch as the parents cannot exercise parental authority or have custody of the child jointly because they are living separately.

In the present case,[8] the problem of resolving conflicting claims to the custody of a natural child was posed before the Supreme Court. Both parents recognized the child not jointly or concurrently, but by separate acts and in different ways. Claiming to have the rightful custody of the child, the father filed a petition for habeas corpus against the mother with whom the child was living. It appeared that the father had recognized the child by judgment of the court, while the mother did so by voluntarily testifying under oath before the trial court that the child was hers.[9] The latter method is a new way of voluntary recognition provided under the new Civil Code,[10] for her statement before a court of record satisfies the law.[11] This kind of voluntary recognition does not require judicial approval even if made incidentally in a court proceeding because the child's status is recognized formally therein.[12]

The present case at bar involves the custody of a natural child who was thirteen years old. She expressed preference to live with her mother, the respondent, with whom she was living prior to the

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Under the old Code, there was always a stigma upon the woman who is prevented from making a disclosure of the identity of the child's father. See Report of the Code Commission, pp. 12-13.

[6] Art. 276, Civil Code.

[7] When a natural child has been acknowledged by its mother, and has been living with the latter since birth, a subsequent acknowledgment by the father will not serve to deprive the mother of her parental uuthority. 5 Sanchez Roman 1134, *et seq.*

The case of Legare v. Cuerques, 34 Phil 221 is almost the same as the present case. In that case, however, the mother of the children had previously acknowledged the children as her own before the action, while the father did so only subsequently in a public instrument to deprive the mother of her custody over them. The present case seems to show a similar situation because by merely testifying in court that she recognizes the child as her own, the mother can defeat the father's rights with the same impunity.

[8] G.R. No. L-4362, prom. Aug. 31, 1951.

[9] *Id.*, p. 2.

[10] Under Art. 131 of the old Civil Code, there were only three ways of voluntary recognition; by means of (1) record of birth, (2) a will, or (3) a public document.

Article 278 of the present Code adds "statement before a court of record" as a fourth method ,and the third method above is now any "authentic writing."

In Castellort v. Pasion, 37 O.G. 3049, voluntary recognition was effective even if made in court incidentally in intestate proceedings. Judicial approval is not necessary in such case, the Court ruled.

[11] Castellort v. Pasion, *supra.*

[12] See Donado v. Menendez Donado, 55 Phil. 861. Also Note 10, *supra.*

proceedings.[13] The trial court, therefore, awarded the custody of the child to the mother, in its exercise of the discretion granted by law.[14] There was no showing made by the father of the unfitness of the mother to continue taking charge of the child.[15]

Not contented with the decision of the trial court on his petition for habeas corpus,[16] the father appealed to the Supreme Court. The findings and conclusions of the lower court, however, were not disturbed on appeal. Applying Rule 100, section 6 of the Rules of Court,[17] the Supreme Court sustained the trial court by saying that although said provision applies to legitimate minor children whose parents are living separately, it applied also to the present case of a natural child. Justice Feria noted that the child was legally recognized by both parents and so either of them had the right to its custody by reason of their parental authority.

In affirming the judgment of the lower court, the Supreme Court merely adhered to the settled rule that the determination of the person who is to have custody of the child is a matter within the sound discretion of the court, the exercise of which will not be interfered with unless abuse thereof is shown.[18] It is true that both parents had equal rights to the custody of the child because of their parental authority arising from their recognition. The statement of Justice Feria would apply to a case where both parents are living together and are asserting equality of their rights.[19] In this case,

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[13] *Id.*, p. 2.

[14] Rule 100, section 6 confers such discretion upon the court to consider the best interests of the child, the fitness of the parent, and the choice of the child itself.

Even if the minor child chooses to stay with another, if the latter be a stranger, the parents may recover its custody by habeas corpus. Salvana v. Gaela, 55 Phil. 680.

But the converse is not true. Thus, a fiancee of a minor cannot recover custody of the latter from its parents who object to a proposed marriage of the two. Abbey v. Maneru, 37 O.G. 2252.

[15] If the mother be shown to be unfit, the father may recover custody of the child. See Perkins v. Perkins, 57 Phil. 217.

Abandonment by one parent of the child, neglect, withholding of parental care, or refusal to perform parental duties, are sufficient grounds to render such parent unfit. Castillo v. Castillo, 39 O.G. 968.

[16] Habeas corpus lies only in case of withholding of rightful custody, in cases like this. Rule 102, sec. 1.

This remedy had been availed of in the cases cited herein.

[17] Said provision expressly refers to legitimate minor children. In many ways, however, recognized natural childrecn are treated just like legitimate children, except as to successional rights. See Arts. 264 and 282, Civil Code. See also Art. 895 for legitime of natural child.

[18] The exercise of discretion by the court was specially important in Perkins v. Perkins, *supra*. In that case, the mother used to bring the child to the court where there were pending proceedings in which it could hear charges and countercharges, all involving its parents. So the custody of the child was given to the father so that the latter would send her to a school in Switzerland.

[19] Justice Feria who penned the decision stated that: "either the father or the mother has a preferred right to such care, custody and control in the exercise of parental authority they have over the person of their unemancipated children. In the present

however, the parents were asserting their rights against each other, *inter se*. They were litigating for the exercise of custody by either of them to the exclusion of the other, not for an equal exercise of such custody.

Where there is joint recognition by both parents who are living together although unmarried, there may be no problem. Should they subsequently marry each other to legalize their relations, the child would be legitimated and raised from the status of a natural child to one akin to a legitimate child.[20] The present case, however, present difficulties for parents living separately.

In this case, the father had recognized the child by judgment of the court. The mother did so voluntarily by testifying before the lower court under oath. The Supreme Court, however, seems to have overlooked the fact, that there was in effect not a *joint* recognition but one made by both parents *separately in different ways*. It is apparent from the decision that in point of time, the father probably was first to recognize the child because the mother did so only during the proceedings in the trial court.[21]

It is to be observed that the Supreme Court seems to have applied the rule of "preferred rights" of the parents erroneously in this case. The parents were not suing a stranger. They were suing each other. But whatever error may have been committed, the Court appreciated the rule that the best interests of the child are of paramount importance in determining who is entitled to the custody thereof.[22] In cases of this kind, to transfer such custody from the mother to the father would only run counter to the expressed choice of the child who, after all, is also entitled to a voice.[23] Thus, as to the question of preference in favor of parents and against all others, the Supreme Court stated the correct rule. In applying such rule, however, to this case, there seems to be no justification. Nevertheless, the Court acted correctly in sustaining the exercise of discretion by the lower court in the absence of a showing that it has been abused. What the court failed to consider is the question as to who between the father or the mother has a greater right to the custody of the child, independently of the exercise of discretion by the court.

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case, the minor Teofila Garcia having been legally recognized by both the appellant the appellee as their natural child, either one of them has the right to have the care, control and custody of said minor by virtue of their parental authority over her." *Id.*, pp. 2-3.

The statement does not seem to dispose directly of the issue as between father and mother, for it refers to a case where the parents assert better rights against strangers.

[20] Cosio v. Pili, 10 Phil. 72; Serrano v. Aragon, 22 Phil. 10; De Torres v. De Torres, 28 Phil. 49.

[21] *Id.*, p. 2. Whether the father's recognition was by judgment of the lower court or by another judgment in a different action is not, however, clear from the decision.

[22] Pizarpo v. Vasquez, 36 O.G. 449; Perkins v. Perkins, *supra*.

[23] The child, if over ten years old, is permitted to make a choice, and it is usually followed unless the parent chosen is unfit to have its custody. Rule 100, sec. 1, as applied in the case of Perkins v. Perkins, *supra*. See also Moran, Rules of Court Annotated, Vol. II, pp. 443-444.

Taxation—*Taxability of Insurance Premiums Deemed Paid by Virtue of Automatic Premium Loan Clauses.*

THE MANUFACTURER LIFE INSURANCE CO. v. MEER
G. R. No. L-2910 Prom. June 29, 1951

Sec. 255 [1] of our National Internal Revenue Code [2] entitled "Taxes on Insurance Premiums" is not a unique law. It has been said that in the United States the most common form of taxation, both of domestic and foreign insurance companies, is a tax on gross premiums received.[3] This "gross premium tax is not a property tax, but is an excise tax, or, otherwise stated, a privilege or franchise tax which the company must pay for the privilege of doing business within the state" and "does not violate the due process clause even though no such gross premium tax is exacted from domestic insurance companies." [4] The validity of the law has never been raised in this jurisdiction, however. But questions involving its application have arisen, particularly whether on account of premium advances under automatic premium loan clauses [5] there are "premiums

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[1] "Sec. 255. *Taxes on insurance premiums.*—There shall be collected from every person, company, or corporation (except purely cooperative companies or associations) doing business of any sort in the Philippines a tax of one per centum of the total premiums collected . . . whether such premiums are paid in money, notes, credits, or any substitute for money but premiums refunded within six months after payment on account of rejection of risk or returned for other reason to person insured shall not be included in the taxable receipt . . ."

[2] Commonwealth Act No. 466.

[3] Alabama. Brown vs. Protective Life Ins. Co., 188 Ala. 166, 66 So. 47; Citizens Mut. Ins. Co. v. Lott, 45 Ala. 185, holding it immaterial that part of the proceeds were paid out in dividends.

Georgia. Georgia Fire Ins. Co. vs. City of Cedartown, 134 Ga. 87, 67 S.E. 410, 19 Ann. Cas. 954.

Iowa. In re Continental Casualty Co., 189 Iowa 933, 179 N.W. 185.

Kansas, State ex rel. Hopkins v. Travis, 108 Kan. 257, 195 Pac. 182.

Michigan. People v. State Treasurer, 31 Mich. 6.

New York. People ex rel. Provident Sav. Life Assur. Society v. Miller, 179 N.Y. 227, 71 N.E. 930; People ex rel. Continental Ins. Co. v. Miller, 177 N.Y. 515, 70 N.E. 10; People ex rel Commonwealth Ins. Co. vs. Coleman, 121 N.Y. 542, 25 N.E. 51; People v. Metropolitan Surety Co., 158 N.Y. App. Div. 657, 144 N.Y. Supp. 201.

Ohio. State ex rel. Penn. Mut. Life Ins. Co. of Philadelphia v. Hahn, 50 Ohio St. 714, 35 N.E. 1052.

Pennsylvania. Com. v. Metropolitan Life Ins. Co., 254 Pa. 510, 98 Atl. 1072.

See Cooley, The Law of Taxation, sec. 941.

[4] Great Northern Life Ins. Co. vs. Read, 322 U.S. 47; see 19 Appleman, Insurance Law and Practice, 1946 ed., pp. 288-290.

[5] A sample of an automatic premium loan would be that involved in the case of Manufacturers Life Ins. Co. v. Meer, supra, as follows: "This policy shall not lapse for non-payment of any premium after it has been three full years in force, if, at the due date of such premium, the Cash Value of this Policy and of any bonus

collected," and if so, whether premiums collected are in "money, notes, credits, or any substitute for money." [6] Much importance was placed on the resolution of the question because of the relatively large operation of automatic premium loan clauses during the occupation arising out of the inability of the insured to pay the premiums due during such period. It will be noted that such non-payment would have ordinarily caused the forfeiture of the policies with no right on the part of the insured except to an equitable return of the premiums so far paid. The war cannot be put up as a valid excuse for non-payment. Several cases have so decided.[7]

For the first time, our Supreme Court in the instant case, resolved the question previously mentioned, that is, whether premiums deemed paid by virtue of automatic loan clauses in life insurance policies are taxable [8] under Sec. 255 of the National Internal Revenue Code. The Supreme Court ruled affirmatively on the question.

In this case the plaintiff is an insurance company with head office in Canada, but with a branch office and doing business in Manila. It was engaged in the insurance business at the outbreak of the war, but had to close its branch office in Manila from 1942 up to September, 1945, on account of the war. In the course of its operations before the war, plaintiff issued a number of life insurance policies in the Philippines with non-forfeiture clauses in the nature of automatic premium loans.[9] The insured having failed to pay the premiums due during the occupation, these automatic premium loan clauses were applied by the plaintiff's head office in Canada. The net amount of premiums so advanced or loaned totalled ₱1,069,254.98, out of which ₱158,666.63 have been repaid.[10] Taxes on premiums not repaid were assessed by the defendant Collector of Internal Revenue in the amount of ₱17,917.12, including surplusage. This

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additions and dividends left on accumulation (after deducting any indebtedness to the Company and the interest accrued thereon) shall exceed the amount of said premium. In which event the Company will, without further request, treat the premium then due as paid, and the amount of such premium, with interest from its actual due date at six per cent, per annum, compounded yearly, and one per cent., compounded yearly for expenses, shall be a first lien on this Policy in the Company's favor in priority to the claim of any assignee or any other person. The accumulated lien may at any time, while the Policy is in force, be paid in whole or in part . . ."

[6] A perusal of sec. 255 (see footnote 1) will reveal that these must concur in order that taxes may validly be collected under such provision.

[7] Constantino vs. Asia Life Insurance Co., G.R. L-1669, Aug. 31, 1950; Peralta vs. Asia Life Insurance Co., G.R. L-1670, Aug. 31, 1950; McGuire vs. Manufacturers Life Insurance Co., G.R. L-3581, Sept. 21, 1950; National Leather vs. U.S. Life Insurance Co., G.R. L-2668, Sept. 30, 1950; Hidalgo Vda. de Carrero vs. Manufacturers Life Insurance Co., G.R. L-3032, Oct. 10, 1950; West Coast Life Insurance Company vs. Patricio Gubaras, G.R. L-2810, October 10, 1950.

[8] It must be noted that actually the premiums paid are merely used as the basis in determining the amount of the tax to be collected for the privilege of doing insurance business in the state.

[9] See footnote 5.

[10] Taxes on this amount repaid were paid without protest.

amount was paid under protest. Hence, this action for its recovery.[11]

The Court denied the plaintiff's petition, considering the assessment and collection to be valid. No precedent was cited and not surprisingly, for this is the first case of its kind. This being so, it may, therefore, be well to consider the court's opinion in arriving at its conclusion.

It would be best to note that premiums as a general rule should be paid in cash [12] in the absence of an agreement (which must not however violate the essence of the contract or any prohibitory enactments) or statutory provision to the contrary.[13] In the present case, the provisions of Section 184 (g) of our Insurance Law,[14] and the agreement on the application of the automatic premium loan substitute premium loan for cash payment.

The first question is whether premiums were collected. The Court believed that in effect the insurance company loaned to the insured an amount equal to the premium due, which amount the insured in turn paid to the insurance company. Thus, the insurance company collected premiums. It was argued, however, that there could be no such a collection, as in effect it would make the insurer, a creditor, enable him to acquire a lien on the policy and entitle him to collect interest on the amount of the unpaid premiums. While, it is admitted that the insurer became a creditor and therefore entitled to collect interest, his right to collect interest was not on the premiums, nor of interest thereon, but on the loan.[15] Pressing the point further, however, plaintiff contended that there could not possibly be any collection because its assets remained exactly the same after making the advances in question. The view is not well taken

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[11] See Sec. 306, National International Revenue Code.

[12] "The same doctrine is laid down in Kerr on Insurance citing Hoffman v. Ins. Co., 92 U.S. 161, 23 L. Ed. 539. Mr. Justice Swayne says: 'Life insurance is a cash business. Its disbursements are all in money and its receipts must necessarily be in the same medium. This is the universal usage and rule of all such companies. . . . If the agent had the authority to take the horse in question, he could have taken them in all cases. This would have carried with it the right to establish a stable, employ hands, and do everything else necessary to take care of the horses until they could be sold. The company might then find itself carrying a business alien to its charter, and in which it had never though of embarking. The exercise of such power by the agent was liable to two objections, it was ultra vires, and it was a fraud as respects the company. . . . No valid contract as to the company could arise from such transaction.'" (Folb vs. Firemen's Insurance Company, 45 S.E. 547). See 3 Courch on Insurance, pp. 1933, 1947.

[13] "In the absence of special regulation or agreement, premiums or assessments are payable in money or cash, although it may be, and frequently is, stipulated or agreed otherwise, in which case any agreed medium may be employed, provided the agreement does not violate the essence of the contract or any prohibitory enactments." (3 Courch on Insurance, p. 1933).

[14] Act No. 2427.

[15] Note that such debt could be paid by the insured in either of three ways: (1) by paying it in money; (2) by letting the cash value of the policy compensate it; or (3) in case the insured should die, the debt may be deducted from the policy.

for there actually was an increase in assets. There was the new credit for the advances made. Of course, the plaintiff could not sue the insured to enforce the credit. Yet, it had means of satisfaction out of the cash surrender value. To the argument that satisfying the credit from the cash surrender value would not increase the assets of the company any, the Court answered that: considering that the cash surrender value is an amount which the insurance company holds in trust [16] for the insured to be delivered upon demand, payment out of it would mean a decrease in the liability of the company to the insured, for actually the cash value of the policy is a

[16] The Court in the course of its opinion defined "cash surrender value" thus: "As applied to a life insurance policy, it is the amount of money the company agrees to pay to the holder of the policy if he surrenders it and releases his claim upon it. The more premiums the insured has paid the greater will be the surrender value; but the surrender value is always a lesser sum than the total amount of premius paid. (Cyclopedia Law Dictionary, 3d Ed. 1077)." Vance has this to say: "Most life policies, especially in later years, stipulate that, if the policy shall be in force for a given number of years, usually three, there shall be paid to the insured a certain amount upon his surrendering his policy for cancellation. The amount of this surrender value offered is based upon the reserve value of the policy at the time of surrender, and it is plain that the insurer can well afford to pay to the insured the entire reserve value of his policy in consideration of his surrendering it for cancellation; but, inasmuch as insurance companies desire to discourage the surrender of policies so far as they can equitably do so, the surrender value fixed upon a policy is usually set at a considerably lower figure than that which would be established by its reserve value. It seems that, in the absence of a specified promise so to do, the insurer is under no obligation to pay any portion of the reserve value of a policy upon its surrender." (Vance, Law of Insurance, 2nd ed. pp. 54-56).

Our Supreme Court has previously in some detail explained the nature of "cash surrender value" in the case of Sun Life Assurance Company vs. Ingersoll and Tan Sit, 42 Phil. 331. It will be seen that the holding of the court in this case supports the view that the "cash surrender value" is held in trust by the insurance company for the insured. The Court in that case said: ". . . the surrender value of a policy arises from the fact that the fixed annual premium is much in excess of the annual risk during the earlier years of the policy, an excess made necessary in order to balance the deficiency of the same premium to meet the annual risk during the later years of the policy. This excess in the premium paid over the annual cost of insurance, with accumulations of interest, constitutes the surrender value. Though this excess of premiums paid is legally the sole property of the company, still in practical effect, though not in law, it is moneys of the assured deposited with the company in advance to make up the deficiency in later premiums to cover the annual cost of insurance, instead of being retained by the assured and paid by him to the company in the shape of greatly-increased premiums, when the risk is greatest. It is the 'net reserve' required by law to be kept by the company for the benefit of the assured, and to be maintained to the credit of the policy. So long as the policy remains in force the company has not practically any beneficial interest in it, except as its custodian, with the obligation to maintain it unimpaired and suitably invested for the benefit of the insured. This is the practical, though not the legal, relation of the company to this fund."

It is seen, therefore, that while the naked ownership of the cash surrender value may lie with the company, yet in actuality, the company is but the mere trustee and the insured the cestui que trust of the cash surrender value. The insured's rights therein are more than mere equities. His is the beneficial interest.

liability of the company. The logic of the Court is quite clear, in spite of the view advanced that what the insurance company did was not to lend, but merely to advance, quoting Section 184(g), of Act No. 2427, to wit: "company at any time x x x will advance x x x a sum equal x x x to the reserve at the end of the current policy year x x x." [17] It will be noted, however, that the very clause of the policy uses the word "loan." [18] Furthermore, it may be stated that " x x x in determining whether the transaction is a loan or the payment of a premium the word loan must not be too strictly construed," and that "it is not necessary to the creation of a loan that the money should be paid on one hand and received on the other, for the matter of a man's money remaining in another's hands, as a result of the agreement will equally constitute a loan." [19] And then it will be seen that the interpretation given by the court is in consonance with the rule that "the test of the meaning of words commonly used, should be their ordinary and popular meaning" [20] and "should be construed strictly against the person (insurer) using them." [21]

But if there was payment, was the payment in "money, notes, credits, or any substitute for money" as required by the same section of the Internal Revenue Code? The Court ruled affirmatively on this point on the ground that the insurer "agreed" to consider the premium paid on the strength of the automatic loan. It will be further noted that under the agreement the amount corresponding to the premium considered paid bears interest and is a first lien on the policy, giving the transaction in this insurance all the earmarks of a payment in "credit." This, manifestly, is but consistent with the first conclusion that the insurance company lent the insured, which money owned in turn was applied in payment of the loan.

The insurance company also alleged that there was double taxation because the "advance" (as they alleged it to be) was taken from the cash value of the policy, which cash value had already been subjected to the same tax, consisting of previous premiums, paid. The court in disposing of the argument, stated that the argument assumes erroneously that all advances are necessarily repaid from the cash surrender value because there are instances where there is a remittance of the money. The statement of the court may be misleading in that it might imply that if there should be no remittance

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[17] The Insurance Law.

[18] See footnote 5. It was claimed that this was a mere grammatical misnomer.

[19] Paul vs. Columbian Nat. L. Ins. Co., 15 A. 2d 636. The case of McAdams vs. Randolph, 41 N.J.L. 218, 221, was cited.

[20] Cleaver vs. Central States L. Ins. Co., 142 S.W. 2d, 474, 477.

[21] " 'The insurer has the opportunity to have the language of the contract selected with great care and deliberation by experts and legal advisers acting exclusively in its interests, and it is responsible for any ambiguities found therein. . . . It is, therefore, well established that where the meaning of a policy provision is doubtful or susceptible of different constructions, the policy should be construed strictly against the insurer and liberally in favor of the insured.' Henderson v. Massachusetts Bonding & Ins. Co., 337 Mo. 1, 84 S.W. 2d. 922, 924." (Paul v. Columbian Nat. L. Ins. Co., 15 A. 2d, 636). See also Vance on Insurance, 2nd ed. 303.

by the insured, there would be double taxation. The court should have relied solely on the fact that the tax being collected is on a new premium and not on past premiums. In this instance it would be quite immaterial how this payment is made so long as there is payment, in which event there is at once something to be taxed. The court then, added "in any event there is no constitutional prohibition against double taxation." [22]

The plaintiff argued that as the advances of premiums were made in Toronto, such premiums are deemed to have been paid there and not in the Philippines, and therefore, not subject to local taxation. The Court in overruling this contention said that "the thesis overlooks the fact that the loans are made to policyholders in the Philippines, who in turn pay therewith the premium to the insurer thru the Manila branch." Arguing from effect, the Court proceeded to say that "approval of appellant's position will enable foreign insurers to evade the tax by contriving to require that premium payments shall be made at their head office." It is believed that in considering this point it would be well to consider the nature of the tax—that such a tax is generally held to be an excise rather than a property tax.[23] For then it will be seen that actually it is not the payment which is being taxed, but the privilege granted to companies to pursue the insurance business. This is made emphatic when we consider that "the law does not contemplate premiums collected in the Philippines." As the Court opined: "It is enough that the insurer is doing insurance business in the Philippines, irrespective of the place of its organization and establishment." Presumably this is the reason why the Court did not even discuss appellant's contention regarding the territoriality of tax laws and the situs of intangible personalty.

Finally the plaintiff contended that it was not engaged in business in the Philippines during the years 1942 to September 1945, which fact, it will be noted, has become material in view of the preceding arguments and because section 255 applies only to companies "doing insurance business in the Philippines." Although plaintiff's contention is factually true, yet, the Court overruled it, considering that "still it was practically and legally operating in this country by collecting premiums on its outstanding policies, incurring the risk and/or enjoying the benefits consequent thereto, without having previously taken any steps indicating withdrawal in good faith from this field of economic activity."

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[22] "In this jurisdiction double taxation of the same property either to the same or different persons, while not unlawful, should, wherever possible, be avoided and prevented (De Villata vs. Stanley, 32 Phil. 541). But says Justice Holmes, the due process clause 'no more forbids double taxation than it does doubling the amount of a tax, short of confiscation or proceedings unconstitutional on other grounds' (Ft Smith Lumber Co. vs. Arkansas, 251 U.S. 532)." Sinco, Phil. Political Law, 2nd Rev. Ed., p. 509.

[23] Equitable Life Assurance Society vs. Pennsylvania, 238 U.S. 143; See Cooley, The Law of Taxation, sec. 847.

Civil Law—*Pacto De Retro Sales Without Stipulation for the Period of Repurchase.*

BORLAZA AND BORGONIA v. RAMOS AND ARVISU
G. R. No. L-3433, Prom. July 16, 1951

Admittedly one of the gravest problems in the law on contracts is that raised by the much-abused pacto de retro sale, often made a shield for usurious loans secured by real mortgage.[1] Some of these, however, may be really contracts of sale with reservations of the right to repurchase, although they may be defective in form. Usually, a period within which the repurchase is to be effected is agreed upon expressly.[2] But this is not always the case, for there may be no such period provided for.[3]

In the absence of any stipulation as to the period of repurchase, the law steps in.[4] Article 1606 of the Civil Code [5] provides that the period of repurchase shall be four years from the date of the con-

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[1] In several cases, the Supreme Court found out contracts which were drafted as pacto de retro sales were really usurious loans. Cabigao v. Lim, 50 Phil. 844; Aquino v. Deala, 63 Phil. 583; Ignacio v. Chua Hong, 52 Phil. 940; Marquez v. Valencia, 44 O.G. 895; Escoto v. Arcilla, G.R. No. L-2819.

[2] In case a stipulation is made as to the length of the period for repurchase, the same cannot exceed ten years. Art. 1606, par. 2, Civil Code. See Yadao v. Yadao, 20 Phil. 260; Rosales v. Reyes, 25 Phil. 495.

But should the period stipulated exceed ten years, the stipulation for the excess is null and void and does not affect the validity of the contract. Montero v. Salgado, 27 Phil. 631; Alojado v. Lim Siongco, 51 Phil. 339.

In Soriano v. Abalos, G.R. No. L-1525 (July 27, 1949), however, the Court considered the stipulation to repurchase "at any time they have the money" as expressing a time even if it be indefinite. This follows closely the rulings in Espana v. Lucido, 8 Phil. 419; Bandong vs. Austria, 31 Phil. 479; Jumero v. Lizares, 17 Phil. 112; and Gonzaga v. Go, 40 O.G. (7 Sup.) No. 11, 71.

[3] See for example, Tuason v. Goduco, 23 Phil. 342; Dorado v. Virina, 34 Phil. 264; and Medel v. Francisco, 51 Phil. 367.

But see Yacapin v. Neri, 40 Phil. 61, in which the Supreme Court considered the right of repurchase as arising from a contract orally made, independent of the contract of sale. The ruling seems erroneous under Art. 1508, par. 1 of the old Civil Code, now Art. 1606, par. 1 of the present Code.

Even without a stipulation as to the period, the period provided for by the Civil Code can be extended by the parties by subsequent agreement, provided the total period should not exceed ten years. See Umale v. Fernandez, 28 Phil. 89; Castillo v. Belisario, 25 Phil. 89.

[4] Article 1606, par. 1, Civil Code. See also Padilla, *Civil Code Annotated,* Vol. II, pp. 882-883.

[5] This provision of the present Code was taken from Art. 1508 of the Spanish Civil Code in substantially the same words, except with the addition of a third paragraph. The additional paragraph gives the vendor the right to repurchase within thirty days from a judgment declaring the contract a true sale with right to repurchase and not an equitable mortgage. See Padilla, *op. cit.*, p. 883.

tract. This legal provision exists primarily to protect the vendor's right to redeem. The matter of the period is one of public interest,[6] although the vendor may lose his right of repurchase if he fails to exercise it within the legal period.

This was re-stated by the Supreme Court in the case under discussion. It appeared that the Pile brothers and sisters executed a deed conveying two adjoining parcels of land to Isidro Borgonia and Gregorio Ramos, both taking possession of the northern and southern parcels, respectively. The Piles repurchased the northern parcel and recovered its possession from Borgonia,[7] and then executed a deed of sale of the two parcels in favor of the plaintiffs before the other parcel could be redeemed.[8] When the plaintiffs tendered the repurchase price to Ramos for the other parcel, the latter refused on the ground that the period for repurchase had expired. So, the plaintiffs deposited the money with the clerk of court.[9] Subsequently, Ramos executed an affidavit of consolidation of title to the southern parcel.[10] Hence, plaintiffs sued Ramos to compel him to accept the repurchase price and deliver possession of said parcel to them.

It should be noted that the pacto de retro sale between the Piles and Ramos did not provide for a period within which the repurchase

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[6] On this point, the policy of the law is to prevent the keeping of the ownership of property subject to resolutory conditions for a long time. The sense of the Code in this respect is, therefore, restrictive, and doubts should be construed in favor of the repurchase. Tolentino, *Civil Code Annotated,* Vol. II, p. 892, citing 10 Manresa 302.

[7] Had Ramos been a party to the repurchase, he could have compelled the vendors *a retro* to redeem the whole property, assuming that it was undivided. In this case, however, there were two distinct parcels. See Art. 1611, Civil Code.

[8] The vendors *a retro* had no legal title to the property, so they only sold to the plaintiffs their right of redemption as to the southern parcel. The northern parcel, however, was validly sold to plaintiffs because there was a repurchase of the same prior to the second sale.

Pending the redemption, the vendor has no right over the property except the right to redeem it. Such right can be transferred, as was held in Davis v. Neyra, 24 Phil. 417; Evangelista v. Abad (C.A.), 36 O.G. 2913. The vendor may thus register the property in his name only with an express statement of the purchasers' title thereto, although this seems doubtful. Montera v. Martinez, 14 Phil. 541; Montero v. Salgado, 27 Phil. 631.

[9] The tender, if made within the period for redemption, would be sufficient. In case of the vendee's refusal, such offer is unnecessary, and the proper action on the part of the vendor is to deposit the money in court. Villegas v. Capistrano, 9 Phil. 416; Martin v. Manuel, 47 O.G. No. 2, 768; Rumbaoa v. Arzaga, 47 O.G. 1827; Gonzaga v. Go, 40 O.G. (7 Sup.) No. 11, p. 71; cited in Padilla, *op. cit.*, 898-899.

[10] Under Art. 1509 of the old Civil Code, the vendee irrevocably acquires ownership of the property sold. The provisions of Art. 1607 of the new Code relaxes the stringency of this rule, providing that the recording of the affidavit of consolidation should be made only under a judicial order after the vendor has been duly heard.

Decisions under the old Code deprived the vendor *a retro* of all rights upon the mere failure to redeem. See Ortiz v. Ortiz, 26 Phil. 280; Krapfenbauer v. Orbeta, 52 Phil. 201; Patricio v. Aragon, 4 Phil. 615; Rafols v. Rafols, 22 Phil. 236; Gonzales v. Salas, 49 Phil. 1.

was to be effected. It merely provided that the possession, ownership and usufruct of the property were to be held by the vendee *a retro* "from now on and until the repurchase has not as yet (been) done." [11] The Supreme Court considered this merely as a reservation of the right of repurchase, and not an agreement as to the period within which it should be exercised. In thus affirming the judgment of the Court of Appeals which sustained the trial court's findings, it followed the rule laid down in earlier decisions.[12]

Plaintiffs, however, petitioned for a writ of certiorari to review this finding of the Court of Appeals, urging that it is contrary to the ruling made in *Estiva vs. Alvero*.[13] Without giving this contention any consideration in the decision,[14] the Supreme Court applid Article 1508 of the old Civil Code [15] and held that the repurchase should have been made within four years from the date of the contract. Plaintiffs and their predecessors in interest having failed to do so, they lost their right upon the consolidation of title in the vendee *a retro*.[16]

The strictness of the rule is obvious. Plaintiffs could have obtained an extension of the legal period of four years by subsequent agreement.[17] This they failed to do. And even if they did so, their unilateral action would be void without the vendee's concurrence.[18] The stringency of the rule under the old Civil Code lies in the fact that mere failure to redeem within the legal period consolidated the title of the vendee *a retro*, entitling the latter to execute an affidavit of consolidation.[19] The rule under the present Code has relaxed this to some extent, as such affidavit cannot now be recorded in the Registry of Property without a judicial order after the vendor has been duly heard.[20] The right of the vendor is thus given more protection under the present Code.

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[11] *Id.*, p. 3. Cf. Soriano v. Abalos, G.R. No. L-1525, holding that the phrase "any time" is an expression of a period for repurchase, following the earlier cases of Jumero v. Lizares, 17 Phil. 112; Bandong v. Austria, 31 Phil. 479; and Gonzaga v. Go, G.R. No. 47061.

[12] See Note 11.

[13] 37 Phil. 497. An examination of the issues involved in this case will reveal its inapplicability to the case at bar. The Court said in that case:

"We do not deem it proper to make such a finding in these proceedings instituted solely for the registration of the property in question, and not for the declaration of other rights."

[14] Nowhere in the decision is the case referred to in Note 13 considered.

[15] Now Art. 1606 of the present Civil Code. See Note 5.

[16] See Note 10.

[17] This is possible despite the absence of a period in the contract, provided the extension of the legal period appears in another agreement. See Umale v. Fernandez, 28 Phil. 89.

[18] While the exercise of the right is potestative because it depends upon the will of the vendor, an express stipulation must be assented to by both parties. Padilla, *op. cit.*, p. 870. See also Art. 1256, old Civil Code.

[19] Art. 1509, old Civil Code. See Note 10.

[20] Art. 1607, new Civil Code.

The Supreme Court, however, did not have any opportunity to apply the rule under the present Code inasmuch as the contract was made in 1936. Thus, the old rule in the former Code was proper because contracts are governed by the laws existing at the time of their execution.[21] While it is true that the parties thereto are bound by the rule that the contract is the law as between themselves, they could not have stipulated against the law.[22]

Another question in issue involved the principle of estoppel. Borlaza, one of the petitioners, was the notary public who drafted and acknowledged the execution of the deed. Before the court he claimed that said instrument was only an equitable mortgage and not a pacto de retro sale.[23] Both the Court of Appeals and the trial court were of the opinion that he was estopped from asserting that it was an equitable mortgage, a finding questioned before the Supreme Court. The objection was based on the claim that the rule on estoppel [24] was erroneously applied by the lower courts for this was a question of substance not yet decided by the Supreme Court. The latter, however, held that there was no use of the term "estoppel" in its technical sense but only as an aid in weighing the eviddence. Accordingly, it seems as if the Court allowed the use of the principle of estoppel for a new purpose not at all contemplated by the present rule.[25] This enlarges the scope of estoppel principles to some extent.[26]

It should be noted that the vendee *a retro* executed the affidavit of consolidation of title after the tender of the repurchase price by plaintiffs. This seems to be an act of bad faith on his part if considered alone. That would be the conclusion if he did not have the legal title to the property.[27] But at the time of the sale to the plaintiffs, Ramos was already the legal owner of the property. Plaintiffs, therefore, only bought one parcel from the Piles—the one repurchased from Borgonia. As to the other parcel, they only bought

[21] Art. 1258, old Civil Code.

[22] Art. 1255, old Civil Code, corresponding to Art. 1306 of the new Civil Code. Cf. Molina v. De la Riva, 6 Phil. 12; Warner Barnes and Co. v. Jaucian, 13 Phil. 4.

[23] The new Civil Code now has provisions on the presumption of a contract as an equitable mortgage. See Arts. 1602, 1603, and 1604.

In addition, reformation of the contract may be had at the instance of the apparent vendor. Art. 1605.

See also Report of the Code Commission, pp. 61-63.

[24] Rule 123, sec. 68, Rules of Court.

[25] The provision referred to applies only to parties to an instrument. The presumption is conclusive in such cases.

[26] Under the new Code, there are provisions on estoppel extending the rule in the Rules of Court. See Arts. 1431-1439.

[27] The vendee *a retro* is the legal owner of the property, and the right of redemption is only a personal right as between the parties. So, the execution of an affidavit of consolidation of title by the vendee is only a formality under the old Code. This negatives bad faith in the present case. See Lichauco v. Berenguer, 20 Phil. 12; Alderete v. Amandoron, 46 Phil. 488.

the right of redemption.[28] Their failure to exercise such right made them lose it perpetually.

The present decision does justice to the established rule that the period of redemption shall be four years in the absence of a stipulation regarding the same. At the same time, it illustrates the evil sought to be avoided by the present Civil Code.[29] It is unfortunate, however, that the facts of the case did not warrant application of the new rule requiring the registration of the affidavit of consolidation pursuant to a judicial order.

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[28] The right of redemption is within the commerce of man and can be alienated. See Note 8.

[29] The Code Commission observed that in many cases the real intention of the parties to a pacto de retro sale is that the pretended purchase price is money loaned. Then they draw up another contract purporting to be a lease of the property to the vendor who pays rentals, which in fact are usurious interests. The usury law is thus defeated. See Report of the Code Commission, pp. 61-63.