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failure to prosecute it for an unreasonable length of time. It was also held therein that the ruling under Section 3 of Rule 17 is applicable under Section 9 of Rule 40 to an appeal to the Court of First Instance from the decision of an inferior court. (*People's Car, Inc. v. Arcellana*, L-29098, July 22, 1971, and *Bolivar v. Bandayrel*, L-29373, July 22, 1971, 40 SCRA, 42). In assailing the order of dismissal by the trial court, the burden of showing abuse of judicial discretion rests upon the appellant since every presumption is in favor of the correctness of the lower court's action. This doctrine was re-affirmed in *New Japan Motors, Inc. v. Perucho*, L-44387, November 5, 1976, 74 SCRA 14.

In the case at bar, I agree that the trial court did not abuse its discretion in dismissing the appeal, after the case has been pending for four (4) years, without any action on the part of appellant.

SECOND DIVISION

[G.R. No. L-27406. May 31, 1979]

ALEXANDER T. CASTRO, *plaintiff-appellant, vs.* **LUIS ESCUTIN, Administrator in Special Proceeding No. V-2033,** *defendant-appellee.*

SYLLABUS

1. REMEDIAL LAW; EVIDENCE; PRESUMPTION; SUFFICIENCY OF CONSIDERATION FOR A WRITTEN CONTRACT. — The legal presumption is that there was a sufficient consideration for a written contract, and the burden of proof is on the party who would be defeated if no evidence where given on either side. The presumption is only *prima facie*, and must yield to evidence.

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2. **ID.; ID.; ID.; ID.; CIRCUMSTANCES OVERTHROWING PRESUMPTION OF SUFFICIENT CONSIDERATION.** — Where it appears that the contracts of mortgage and sale were executed merely to lend authenticity to what was calculated as the mortgagor-vendor's would-be status of insolvency to stave off attachment of his properties; that in addition to the contracts of sale and mortgage, two secret documents known as counter-receipt were executed; that neither the mortgagor-vendor nor his successors-in-interest ever paid interest under the mortgage nor the rentals under the deed of sale; that their possession of the lands was peaceful, adverse and continuous, and they exclusively enjoyed the fruits; that the certificate of title covering the lands remained in the mortgagor-vendor's name; that he declared the lands for taxation purposes and paid the taxes, a duty assumed by his heirs after his death; that the mortgagee-vendee, who was the mortgagor-vendor's bosom friend, took no steps to assume ownership of the land; HELD; that in their totality, these circumstances are sufficient to overthrow the legal presumption of sufficient consideration.

3. **CIVIL LAW; CONTRACTS; SIMULATED CONTRACTS; CONSIDERED VOID *AB INITIO*.** — Badges of fraud, when clear and unmistakable, will serve to destroy the camouflage of validity. Simulated and fictitious contracts of sale are void *ab initio*. In contemplation of law, it is as if they never were, with the result that the lands covered by the instruments remain under the ownership of the alleged vendor.

4. **ID.; ID.; RULE IN *PARI DELICTO* NOT APPLICABLE TO INEXISTENT CONTRACT.** — The rule of in *pari delicto non critur* action, that when two persons are equally at fault, the law will not relieve them, does not apply to an inexistent contract.

5. **ID.; ID.; FRAUD; ACCOMPANIED BY A SECRET TRUST.** — Fraud is generally accompanied by a secret trust, and the ostensible debtor selects a person in whom he can repose trust and confidence.

APPEARANCES OF COUNSEL

Luis F. de Castro & T. R. Reyes & Associates and *Pompeyo Diaz* for plaintiff-appellant.

Venicio Escolin for defendant-appellee.

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DECISION

ABAD SANTOS, *J.*:

This is an appeal from the decision of the Court of First Instance, Branch I, of Capiz in Civil Case No. V-2681, for recovery of property, consisting of 30 parcels of land and of unpaid rentals for their cultivation.

Plaintiff-appellant Alexander Castro is the adopted son of the late Father Eduardo N. Castro, parish priest of Tanjay, Negros Oriental. Defendant-appellee Luis Escutin is one of the heirs, and the administrator of the testate estate, of the late Nicanor Escutin, who died in 1955. Upon Nicanor's death, Special Proceedings No. V-2033 over his testate estate was filed in the Court of First Instance, Branch II. In the special proceedings, defendant-appellee Luis Escutin, in his capacity as Administrator, returned an inventory; plaintiff-appellant Alexander Castro filed a motion to exclude the subject 30 parcels of land from this inventory on the ground that they are his properties. Before this motion could be resolved in Branch II, the complaint in this case was filed in Branch I. Accordingly, the presiding judge in Branch II entered an order in Special Proceedings No. V-2033, holding in abeyance his resolution of the motion, pending final determination of the civil action in Branch I. The decision rendered on 7 July 1966 by the court *a quo* dismissed the complaint, with costs against the plaintiff. Hence, this appeal.

The Supreme Court took cognizance of the appeal because the value of the property involved is in excess of TWO HUNDRED THOUSAND PESOS ₱200,000.00, Philippine currency. Plaintiff-appellant Alexander T. Castro executed a subscribed verification stating that in his complaint, he claims ownership of the 30 parcels of land which his predecessor-in-interest, the late Father Castro, allegedly purchased in the sum of SIXTY NINE THOUSAND THREE HUNDRED PESOS (₱69,300.00). He further stated that the 30 lots contain a total area of 141 hectares more or less, most of which are ricelands very near the *poblacion* of Dao, Capiz, and the rest of which are lands in the *poblacion* itself. He also stated that at the

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rate of ₱1,400.00 per hectare, the ricelands near the *poblacion* of Dao are worth at least ₱182,000.00. This amount, added to the amount representing the value of the lands in the *poblacion*, total TWO HUNDRED FOUR THOUSAND PESOS (₱204,000.00), an aggregate value which he considers to be conservative. (Record on Appeal, pp. 127-130).

It appears that the late Nicanor Escutin was a sugar planter who owned Hacienda Escutin in Lacaron, Dao, Capiz. For financing, he turned to the Asturias Sugar Central Inc. at Dumalag, Capiz, which extended him a running account. Unfortunately, financial reverses visited the *hacienda*, provoking from Asturias a threat to foreclose the pending mortgage (See Exhibit 2). This was no idle threat, for Asturias had previously foreclosed the mortgages on the haciendas of two other millers. If the threat was carried out, foreclosure would mean losing not only the hacienda, but also the other Escutin properties by means of a deficiency judgment. Nicanor decided to seek the advice of a close family friend and lawyer, Gervasio Diaz. He recommended that they should simulate an encumbrance on Nicanor's properties not directly involved with Asturias, to stave off attachment or execution for the satisfaction of a possible deficiency judgment.

In this simulated encumbrance, the role of creditor was played by Father Eduardo N. Castro Nicanor's close boyhood friend and schoolmate. Father Castro was godfather to Nicanor's eldest son, the defendant-appellee. Father Castro also solemnized the second marriage of Nicanor. He stayed with Nicanor when he was assigned as parish priest of Dao.

Gervasio prepared a deed of mortgage on Nicanor's 30 parcels of land in favor of Father Castro. This contract, styled "*Escritura de Prestamo con Hipoteca*," (Exhibit A) appears to have been executed on 5 June 1932 in Ayuquitan (now Amlan) Negros Oriental, "for the consideration of a loan of ₱63,000.00, with interest at 10% per annum," to be paid on or before 30 December 1944. The contract was accompanied by a counter-receipt (*contra recibo*) by the mortgagee, acknowledging payment of the redemption price stipulated in the contract of mortgage (*See*

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Exhibit 13). After the mortgage contract and counter-receipt were signed, Father Castro sent the mortgage contract to Notary Public Pedro Bandoquillo for acknowledgment.

Nicanor's financial problems did not lighten; in fact they deteriorated, and Asturias required him to sign a promissory note. At this occasion, the threat of foreclosure was reiterated, and this prompted Nicanor to seek further legal advice from Gervacio. To fortify Nicanor's position, Gervacio drafted a deed of sale, styled "*Escritura de Venta Definitiva*" (Exhibit B). It appears to have been executed on 27 July 1933 at Tanjay, Negros Oriental, and stipulated that Nicanor sold, conveyed, and transferred all the parcels of land described in Exhibit A in favor of Father Castro for the sum of ₱63,000.00 plus ₱6,300.00, representing the unpaid interest of 10% per annum, as stipulated in the aforementioned Exhibit A, or at the total price of ₱69,300.00. The deed of sale had a built-in agreement of lease in favor of Nicanor at ₱1,000.00 yearly for all of the same properties described in Exhibit A. Nicanor and Father Castro signed the deed of sale with the built-in lease agreement, and the corresponding counter-receipt.

Defendant-appellee introduced evidence to show that despite the deed of sale, Nicanor continued to possess and enjoy, and exercise acts of ownership over, all the properties. After Nicanor's death, these properties were partitioned and distributed to his heirs who, at the time this civil action was filed in 1963, had been individually in possession of their respective shares since 1956 (Exhibits 8, 8-A, 8-B and 8-C). Defendant-appellee's evidence also shows that the properties remained registered in Nicanor's name. The tax declarations were in his name; he paid the taxes in his own capacity, and not as agent for another. After his death, his children paid the taxes. Neither Nicanor nor his surviving heirs ever paid the interest stipulated in the contract of mortgage, nor the yearly rental stipulated in the deed of sale.

At the pre-trial conference, the parties admitted the genuineness and due execution, both of the contract of mortgage, and of the deed of definite sale with the built-in lease contract.

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Therefore, the only issue left was whether the two contracts, which are onerous in character, were executed for consideration and therefore valid, as claimed by plaintiff-appellant; or were simulated and therefore void, as claimed by defendant-appellee. This remains the issue on appeal.

To resolve the issue, we start with the legal presumption that there was a sufficient consideration for a written contract. (Rules of Court, Rule 131, Section 5, paragraph r). At the outset, then, the regular presumption weights the case in favor of plaintiff-appellant, and imposes the burden of proof on the defendant-appellant, since the burden of proof lies on the party who would be defeated if no evidence were given on either side. (Rules of Court, Rule 131, Section 1). However, granting that even private transactions are to be presumed fair and regular, the presumption is only *prima facie*, and must yield to evidence. (*Genato v. de Lorenzo*, L-24983, 20 May 1968; 23 SCRA 618).

The cumulative effect of the evidence presented by the defendant-appellee is to identify certain badges of fraud that attach themselves to both contracts under consideration. Neither Nicanor nor his successors-in-interest ever paid interest or rentals, pursuant to the provisions of the two instruments. Their possession of all the lands was peaceful, adverse, and continuous, and they exclusively enjoyed its fruits. The certificate of title covering the lands remained in Nicanor's name, and it was he who declared them for taxation purposes and paid the taxes, a duty assumed by his heirs after his death.

More startling to the dispassionate mind is the incongruence between the income supposed to be earned by the property under the deed of mortgage on the one hand, and the income supposed to be earned under the deed of sale on the other hand. Under the deed of mortgage, Father Castro apparently was to earn ₱6,300.00 yearly, representing the interest at 10% per annum on the principal loan. But under the deed of sale, Father Castro apparently was to earn only ₱1,000.00 yearly, representing the payment for the lease. It thus appears that when Father Castro extended a loan secured by the mortgage, he stood to earn more by way of interest payments, than when

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he bought the land outright and then leased it out. Such an obvious discrepancy would not escape the notice of a reasonable man, and can only be explained as a grave symptom of simulation. Moreover, the late Father Castro took no step whatsoever to assume ownership over the land, such as demanding payment for interest or rentals. This failure to take exclusive possession of the property allegedly sold to him is a clear badge of fraud [*See Oria vs. McMicking*, 21 Phil. 243 (1912)].

The plaintiff-appellant implicitly admits as much, for in the lower court, he argued that this case should be subsumed under the principle of *In pari delicto non oritur action* (Record on Appeal, page 121). However, to the general rule that when two persons are equally at fault, the law will not relieve them, the Supreme Court has laid down an exception, by deciding that the rule does not apply to an inexistent contract [*Gonzales vs. Trinidad,* 67 Phil. 682 (1939)]. Moreover, the intent to defraud, which was the animus of the two simulated contracts, was never effectuated. For the finances of the Hacienda Escutin subsequently took a turn for the better, and Asturias abandoned the threat to foreclose the mortgage on the *hacienda.*

Another token of fraud is the relationship between Nicanor and Father Castro, the ostensible mortgagee-vendee. It has been observed that fraud is generally accompanied by a secret trust, and that, as in this case, the ostensible debtor selects a person in whom he can repose trust and confidence. [See *Ford v. Chelf*, 112 Vd. 98, 102, 70 S.E. 500, cited in *Garcia, et al. v. Bituin, etc. et al.*, CA-G.R. No. 12297-R, 55 O.G. 1785 (1958)]. Nicanor and Father Castro were bosom friends with a long history of trust and intimacy. The element of trust is further accentuated by the execution between them, in addition to the two instruments in question, of two secret documents known as the counter-receipt (*contra recibo*).

Thus, in their totality defendant-appellee's proof is sufficiently weighty to overthrow the legal presumption of sufficient consideration. Badges of fraud, when clear and unmistakable, will serve to destroy the camouflage of validity. Indeed, we find overwhelming proof that the instruments in question were

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without consideration and fraudulent, executed merely to lend color of authenticity to what was calculated as Nicanor's would-be status of insolvency. Since both the mortgage and the sale were fictitious and simulated, they were void *ab initio* [New Civil Code, Art. 1409. *See Mapalo v. Mapalo*, L-21489 & L-21628, 19 May 1966; 17 SCRA 114; *Vda. de Rodriguez v. Rodriguez*, L-23002, 31 July 1967; 20 SCRA 908]. In the contemplation of law, it is as if they never were, with the result that the lands covered by the instruments remain under the ownership of the alleged mortgagor-vendor, Nicanor Escutin, and his successors-in-interest.

WHEREFORE, the judgment of dismissal is hereby affirmed. Without costs.

SO ORDERED.

Antonio (Actg. Chairman), Aquino, Santos, and *De Castro, JJ.*, concur.

De Castro, J., has been designated to sit with the Second Division.

Barredo and *Concepcion Jr., JJ.*, on leave.

FIRST DIVISION

[G.R. No. L-29889. May 31, 1979]

VICTORINO CUSI and PILAR POBRE, *plaintiffs-appellees, vs.* **PHILIPPINE NATIONAL RAILWAYS,** *defendant-appellant.*

SYLLABUS

1. REMEDIAL LAW; CIVIL PROCEDURE; APPEAL; FINDINGS OF FACT OF LOWER COURT; DESERVES GREAT RESPECT.