

FRANCISCO BASTIDA, PLAINTIFF AND APPELLEE, VS. MENZI & CO., INC., J. M. MENZI AND P. C. SCHLOBOHM, DEFENDANTS. MENZI & CO., INC., APPELLANT.

G.R. No. L-35840. March 31, 1933

Ponente: VICKERS, J.

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VICKERS, J.:

This is an appeal by Menzi & Co., Inc., one of the defendants, from a decision of the Court of First Instance of Manila. The case was tried on the amended complaint dated May 26, 1928 and defendants' amended answer thereto of September 1, 1928. For the sake of clearness, we shall incorporate herein the principal allegations of the parties.

FIRST CAUSE OF ACTION

Plaintiff alleged:

I

That the defendant J. M. Menzi, together with his wife and daughter, owns ninety-nine per cent (99%) of the capital stock of the defendant Menzi & Co., Inc., that the plaintiff has been informed and therefore believes that the defendant J. M. Menzi, his wife and daughter, together with the defendant P. C. Schlobohm and one Juan Seiboth, constitute the board of directors of the defendant, Menzi & Co., Inc.;

II

That on April 27, 1922, the defendant Menzi & Co., Inc., through its president and general manager, J. M. Menzi, under the authority of the board of directors, entered into a contract with the plaintiff to engage in the business of exploiting prepared fertilizers, as evidenced by the contract marked Exhibit A, attached to the original complaint as a part thereof, and likewise made a part of the amended complaint, as if it were here copied verbatim;

III

That in pursuance of said contract, plaintiff and defendant Menzi & Co., Inc., began to manufacture prepared fertilizers, the former superintending the work of actual preparation, and the latter, through defendants J. M. Menzi and P. C. Schlobohm, managing the business and opening an account entitled "FERTILIZERS" on the books of the defendant Menzi & Co., Inc., where all the accounts of the partnership business were supposed to be kept; the plaintiff had no participation in the making of these entries, which were wholly in the defendants' charge, under whose orders every entry was made;

IV

That according to paragraph 7 of the contract Exhibit A, the defendant Menzi & Co., Inc., was obliged to render annual balance sheets to the plaintiff upon the 30th day of June of each year; that the plaintiff had no intervention in the preparation of these yearly balances, nor was he permitted to have any access to the books of account; and when the balance sheets were shown him, he, believing in good faith that they contained the true statement of the partnership business, and relying upon the good faith of the defendants, Menzi & Co., Inc., J. M. Menzi, and P. C. Schlobohm, accepted and signed them, the last balance sheet having been rendered in the year 1926;

V

That by reason of the foregoing facts and especially those set forth in the preceding paragraph, the plaintiff was kept in ignorance of the defendants' acts relating to the management of the partnership funds, and the keeping of accounts, until he was informed and so believes and alleges, that the defendants had conspired to conceal from him the true status of the business, and to his damage and prejudice made false entries in the books of account and in the yearly balance sheets, the exact nature and amount of which it is impossible to ascertain, even after the examination of the books of the business, due to the defendants' refusal to furnish all the books and data required for the purpose, and the constant obstacles they have placed in the way of the examination of the books of account and vouchers;

VI

That when the plaintiff received the information mentioned in the preceding paragraph, he demanded that the defendants permit him to examine the books and vouchers of the business, which were in their possession, in order to ascertain the truth of the alleged false entries in the books and balance sheets submitted for his approval, but the defendants refused, and did not consent to the examination until after the original complaint was filed in this case; but up to this time they have refused to furnish all the books, data, and Vouchers necessary for a complete and accurate examination of all the partnership's accounts; and

VII

That as a result of the partial examination of the books of account of the business, the plaintiff has, through his accountants, discovered that the defendants, conspiring and confederating together, presented to the plaintiff during the period covered by the partnership contract false and incorrect accounts,

- (a) For having included therein undue interest;
- (b) For having entered, as a charge to fertilizers, salaries and wages which should have been paid and were in fact paid by the defendant Menzi & Co., Inc.;
- (c) For having collected from the partnership the income tax which should have been paid for its own account by Menzi & Co., Inc.;
- (d) For having-collected, to the damage and prejudice of the plaintiff, commissions on the purchase of materials for the manufacture of fertilizers;
- (e) For having appropriated, to the damage and prejudice of the plaintiff, the profits obtained from the sale of fertilizers belonging to the partnership and bought with its own funds; and
- (f) For having appropriated to themselves all rebates for freight insurance, taxes, etc., upon materials for fertilizer bought abroad, no entries of said rebates having been made on the books to the credit of the

partnership.

Upon the strength of the facts set out in this first cause of action, the plaintiff prays the court:

- To prohibit the defendants, each and every one of them, from destroying and concealing the books and papers of the partnership constituted between the defendant Menzi & Co., Inc., and the plaintiff;
- To summon each and every defendant to appear and give a true account of all facts relating to the partnership between the plaintiff and the defendant Menzi & Co., Inc., and of each and every act and transaction connected with the business of said partnership from the beginning to April 27, 1927, and a true statement of all merchandise of whatever description, purchased for said partnership, and of all the expenditures and sales of every kind, together with the true amount thereof, besides the sums received by the partnership from every source together with their exact nature, and a true and complete account of the vouchers for all sums paid by the partnership, and of the salaries paid to its employees;
- To declare null and void the yearly balances submitted by the defendants to the plaintiff from 1922 to 1926, both inclusive;
- To order the defendants to give a true statement of all receipts and disbursements of the partnership during the period of its existence, besides granting the plaintiff any other remedy that the court may deem just and equitable.

Exhibit A

"CONTRATO

que se celebra entre los Sres. Menzi y Compañía, de Manila, como Primera Parte, y D. Francisco Bastida, tambien de Manila, como Segunda Parte, bajo las siguientes

"CONDICIONES

"1.^a El objeto de este contrato es la explotacion del negocio de Abonos o Fertilizantes Preparados, para diversas aplicaciones agricolas;

"2.^a La duracion de este contrato sera de cinco años, a contar desde la fecha de su firma;

"3.^a La Primera Parte se compromete a facilitar la ayuda financiera necesaria para el negocio;

"4.^a La Segunda Parte se compromete a poner su entero tiempo y toda su experiencia a la disposicion del negocio;

"5.^a La Segunda Parte no podra, directa o indirectamente, dedicarse por si sola ni en sociedad con otras personas, o de manera alguna que no sea con la Primera Parte, al negocio de Abonos, simples o preparados, o de materia alguna que se aplique comunmente a la fertilizacion de suelos y plantas, durante la vigencia de este contrato, a menos que obtenga autorizacion expresa de la Primera Parte para ello;

"6.^a La Primera Parte no podra dedicarse, por si sola ni en sociedad o combinacion con otras personas o entidades, ni de otro modo que en sociedad con la Segunda Parte, al negocio de Abonos o Fertilizantes preparados, ya sean ellos importados, ya preparados en las Islas Filipinas; tampoco podra dedicarse a la venta o negocio de materias o productos que tengan aplicacion como fertilizantes, o que se usen en la composicion de fertilizantes o abonos, si ellos son productos de suelo de la manufactura filipinos, pudiendo sin embargo vender o negociar en materias fertilizantes simples importados de los Estados Unidos o del Extranjero;

"7.^a La Primera Parte se obliga a ceder y a hacer efectivo a la Segunda Parte el 35 por ciento (treinta y cinco por ciento) de las utilidades netas del negocio de abonos, liquidables el 30 de junio de cada ano;

"8.^a La Primera Parte facilitara a la Segunda, mensualmente, la cantidad de P300 (trescientos pesos), a cuenta de su parte de beneficios;

"9.^a Durante el año 1923 la Primera Parte concedera a la Segunda permiso para que este se ausente de Filipinas por un periodo de tiempo que no exceda de un ano, sin menoscabo para los derechos de la Segunda Parte con arreglo a este contrato.

"En testimonio de lo cual firmamos el presente en la Ciudad de Manila, I. F., a veintisiete de abril de 1922.

"MENZI & CO., INC.

"Por (Fdo.) J. MENZI

"General Manager

"Primera Parte

(Fdo.)

F. BASTIDA

"Segunda Parte

"MENZI & CO., INC.

"(Fdo.) MAX KAEGI

"Acting Secretary"

Defendants denied all the allegations of the amended complaint, except the formal allegations as to the parties, and as a special defense to the first cause of action alleged:

- That the defendant corporation, Menzi & Co., Inc., has been engaged in the general merchandise business in the Philippine Islands since its organization in October, 1921, including the importation and sale of all kinds of goods, wares, and merchandise, and especially simple fertilizers and fertilizer ingredients, and as a part of that business, it has been engaged since its organization in the manufacture and sale of prepared fertilizers for agricultural purposes, and has used for that purpose trade-marks belonging to it;

- That on or about November, 1921, the defendant, Menzi & Co., Inc., made and entered into an employment agreement with the plaintiff, who represented that he had had much experience in the mixing of fertilizers, to superintend the mixing of the ingredients in the manufacture of prepared fertilizers in its fertilizer department and to obtain orders for such prepared fertilizers subject to its approval, for a compensation of 50 per cent of the net

profits which it might derive from the sale of the fertilizers prepared by him, and that said Francisco Bastida worked under said agreement until April 27, 1922, and received the compensation agreed upon for his services; that on the said 27th of April, 1922, the said Menzi & Co., Inc., and the said Francisco Bastida made and entered into the written agreement, which is marked Exhibit A, and made a part of the amended complaint in this case, whereby they mutually agreed that the employment of the said Francisco Bastida by the said Menzi & Co., Inc., in the capacity stated, should be for a definite period of five years from that date and under the other terms and conditions stated therein, but with the understanding and agreement that the said Francisco Bastida should receive as compensation for his said services only 35 per cent of the net profits derived from the sale of the fertilizers prepared by him during the period of the contract instead of 50 per cent of such profits, as provided in his former agreement; that the said Francisco Bastida was found to be incompetent to do anything in relation to its said fertilizer business with the exception of overseeing the mixing of the ingredients in the manufacture of the same, and on or about the month of December, 1922, the defendant, Menzi & Co., Inc., in order to make said business successful, was obliged to and actually did assume the full management and direction of said business;

- That the accounts of the business of the said fertilizer department of Menzi & Co., Inc., were duly kept in the regular books of its general business, in the ordinary course thereof, up to June 30, 1923, and that after that time and during the remainder of the period of said agreement, for the purpose of convenience in determining the amount of compensation due to the plaintiff under his agreement, separate books of account for its said fertilizer business were duly kept in the name of 'Menzi & Co., Inc., Fertilizer', and used exclusively for that purpose, and it was mutually agreed between the said Francisco Bastida and the said Menzi & Co., Inc., that the yearly balances for the determination of the net profits of said business due to the said plaintiff as compensation for his services under said agreement would be made as of December 31st, instead of June 30th, of each year, during the period of said agreement ; that the accounts of the business of its said fertilizer department, as recorded in its said books, and the vouchers and records supporting the same, for each year of said business have been duly audited by Messrs. White, Page & Co., certified public accountants, of Manila, who, shortly after the close of business at the end of each year up to and including the year 1926, have prepared therefrom a manufacturing and profit and loss account and balance sheet, showing the status of said business and the share of the net profits pertaining to the plaintiff as his compensation under said agreement; that after the said manufacturing and profit and the loss account and balance sheet for each year of the business of its said fertilizer department up to and including the year 1926, had been prepared by the said auditors and certified by them, they were shown to and examined by the plaintiff, and duly accepted, and approved by him, with full knowledge of their contents, and as evidence of such approval, he signed his name on each of them, as shown on the copies of said manufacturing and profit and loss account and balance sheet for each year up to and including the year 1926, which are attached to the record of this case, and which are hereby referred to and made a part of this amended answer, and in accordance therewith, the said plaintiff has actually received the portion of the net profits of its said business for those years pertaining to him for his services under said agreement; that at no time during the course of said fertilizer business and the liquidation thereof has the plaintiff been in any way denied access to the books and records' pertaining thereto, but on the contrary, said books and records have been subject to his inspection and examination at any time during business hours, and even since the commencement of this action, the plaintiff and his accountants, Messrs. Haskins & Sells, of Manila, have been going over and examining said books and records for months and the defendant, Menzi & Co., Inc., through its officers, have turned over to said plaintiff and his accountant the books and records of said business and even furnished them suitable accommodations in its own office to examine the same;

- That prior to the termination of the said agreement, Exhibit A, the defendant, Menzi & Co., Inc., duly notified the plaintiff that it would not under any conditions renew his said agreement or continue his said employment

with it after its expiration, and after the termination of said agreement of April 27, 1927, the said Menzi & Co., Inc., had the certified public accountants, White, Page & Co., audit the accounts of the business of its said fertilizer department for the four months of 1927 covered by plaintiff's agreement and prepare a manufacturing and profit and loss account and balance sheet of said business showing the status of said Business at the termination of said agreement, a copy of which was shown to and explained to the plaintiff; that at that time there were accounts receivable to be collected for business covered by said agreement of over P100,000, and there was guano, ashes, fine tobacco and other fertilizer ingredients on hand of over P75,000, which had to be disposed of by Menzi & Co., Inc., or valued by the parties, before the net profits of said business for the period of the agreement could be determined; that Menzi & Co., Inc., offered to take the face value of said accounts and the cost value of the other properties for the purpose of determining the profits of said business for that period, and to pay to the plaintiff at that time his proportion of such profits on that basis, which the plaintiff refused to accept, and being disgruntled because the said Menzi & Co., Inc., would not continue him in its service, the said plaintiff commenced this action, including therein not only Menzi & Co., Inc., but also its managers J. M. Menzi and P. C. Schlobohm, wherein he knowingly make various false and malicious allegations against the defendants; that since that time the said Menzi & Co., Inc., has been collecting the accounts receivable and disposing of the stocks on hand, and there is still on hand old stock of approximately P25,000, which it has been unable to dispose of up to this time; that as soon as possible a final liquidation and accounting of the net profits of the business covered by said agreement for the last four months thereof will be made and the share thereof appertaining to the plaintiff will be paid to him; that the plaintiff has been informed from time to time as to the status of the disposition of such properties, and he and his auditors have fully examined the books and records of said business in relation thereto.

SECOND CAUSE OF ACTION

As a second cause of action plaintiff alleged:

- That the plaintiff hereby reproduces paragraphs I, II, III, IV, and V of the first cause of action.
- That the examination made by the plaintiffs auditors of some of the books of the partnership that were furnished by the defendants disclosed the fact that said defendants had charged to "purchases" of the business, undue interest, the amount of which the plaintiff is unable to determine as he has never had at his disposal the books and vouchers necessary for that purpose, and especially, owing to the fact that the partnership constituted between the plaintiff and the defendant Menzi & Co., Inc., never kept its own cash book, but that its funds were maliciously included in the private funds of the defendant entity, neither was there a separate BANK ACCOUNT of the partnership, such account being included in the defendant's bank account.
- That from the examination of the partnership books as aforesaid, the plaintiff estimates that the partnership between himself and the defendant Menzi & Co., Inc., has been defrauded by the defendants by way of interest in an amount of approximately P184,432.51, of which 35 per cent, or P64,551.38, belongs to the plaintiff exclusively.

Wherefore, the plaintiff prays the court to render judgment ordering the defendants jointly and severally to pay him the sum of P64,551.38, or any amount which may finally appear to be due and owing from the defendants to the plaintiff upon this ground, with legal interest from the filing of the original complaint until payment.

Defendants alleged:

- That they repeat and make a part of this special defense paragraphs 1, 2, 3 and 4, of the special defense to the first cause of action in this amended answer;
- That under the contract of employment, Exhibit A, of the amended complaint, the defendant, Menzi & Co., Inc.,

only undertook and agreed to facilitate financial aid in carrying on the said fertilizer business, as it had been doing before the plaintiff was employed under the said agreement; that the said defendant, Menzi & Co., Inc., in the course of the said business of its fertilizer department, opened letters of credit through the banks of Manila, accepted and paid drafts drawn upon it under said letters of credit, and obtained loans and advances of moneys for the purchase of materials to be used in mixing and manufacturing its fertilizers and in paying the expenses of said business; that such drafts and loans naturally provided for interest at the banking rate from the dates thereof until paid, as is the case in all such business enterprises, and that such payments of interest as were actually made on such drafts, loans and advances during the period of the said employment agreement constituted legitimate expenses of said business under said agreement.

THIRD CAUSE OF ACTION

As third cause of action, plaintiff alleged:

- That he hereby reproduces paragraphs I, II, III, IV, and V of the first cause of action.
- That under the terms of the contract Exhibit A, neither the defendants J. M. Menzi and P. C. Schlobohm, nor the defendant Menzi & Co., Inc., had a right to collect for itself or themselves any amount whatsoever by way of salary for services rendered to the partnership between the plaintiff and the defendant, inasmuch as such services were compensated with the 65% of the net profits of the business constituting their share.
- That the plaintiff has, on his own account and with his own money, paid all the employees he has placed in the service of the partnership, having expended for their account, during the period of the contract, over P88,000, without ever having made any claim upon the defendants for this sum because it was included in the compensation of 35 per cent which he was to receive in accordance with the contract Exhibit A.
- That the defendants J. M. Menzi and P. C. Schlobohm, not satisfied with collecting undue and excessive salaries for themselves, have made the partnership, or the fertilizer business, pay the salaries of a number of the employees of the defendant Menzi & Co., Inc.
- That under this item of undue salaries the defendants have appropriated P43,920 of the partnership funds, of which 35 per cent, or P15,372 belongs exclusively to the plaintiff.

Wherefore, the plaintiff prays the court to render judgment ordering the defendants to pay jointly and severally to the plaintiff the amount of P15,372, with legal interest from the date of the filing of the original complaint until the date of payment.

Defendants alleged:

- That they repeat and make a part of this special defense paragraphs 1, 2, 3 and 4, of the special defense to the first cause of action in this amended answer;
- That the defendant, Menzi & Co., Inc., through its manager, exclusively managed and conducted its said fertilizer business, in which the plaintiff was to receive 35 percent of the net profits as compensation for his services, as hereinbefore alleged, from on or about January 1, 1923, when its other departments had special experienced Europeans in charge thereof, who received not only salaries but also a percentage of the net profits of such departments; that its said fertilizer business, after its manager took charge of it, became very successful, and owing to the large volume of business transacted, said business required great deal of time and attention, and actually consumed at least one-half of the time of the manager and certain employees of Menzi & Co., Inc., in carrying it on; that the said Menzi & Co., Inc., furnished office space, stationery and other incidentals, for said business, and had its employees perform the duties of cashiers, accountants, clerks, messengers, etc., for the same,

and for that reason the said Menzi & Co., Inc., charged each year, from and after 1922, as expenses of said business, which pertained to the fertilizer department, as certain amount as salaries and wages to cover the proportional part of the overhead expenses of Menzi & Co., Inc.; that the same method is followed in each of the several departments of the business of Menzi & Co., Inc., that each and every year from and after 1922, a just proportion of said overhead expenses were charged to said fertilizer departments and entered on the books thereof, with the knowledge and consent of the plaintiff, and included in the auditors' reports, which were examined, accepted and approved by him, and he is now estopped from saying that such expenses were not legitimate and just expenses of said business.

FOURTH CAUSE OF ACTION

As fourth cause of action, the plaintiff alleged:

- That he hereby reproduces paragraphs I, II, III, IV, and V of the first cause of action.
- That the defendant Menzi & Co., Inc., through the defendants J. M. Menzi and P. C. Schlobohm, has paid, with the funds of the partnership between the defendant entity and the plaintiff, the income tax due from said defendant entity for the fertilizer business, thereby defrauding the partnership in the amount of P10,361.72 of which 35 per cent belongs exclusively to the plaintiff, amounting to P3,626.60.
- That the plaintiff has, during the period of the contract, paid with his own money the income tax corresponding to his share which consists in 35 per cent of the profits of the fertilizer business, expending about P5,000 without ever having made any claim for reimbursement against the partnership, inasmuch as it has always been understood among the partners that each of them would pay his own income tax.

Wherefore, the plaintiff prays the court to order the defendants jointly and severally to pay the plaintiff the sum of P3,626.60, with legal interest from the date of the filing of the original complaint until its payment.

Defendants alleged:

- That they repeat and make a part of this special defense paragraphs 1, 2, 3 and 4, of the special defense to the first cause of action in this amended answer;
- That under the Income Tax Law Menzi & Co., Inc., was obliged to and did make return to the Government of the Philippine Islands each year during the period of the agreement, Exhibit A, of the income of its whole business, including its fertilizer department; that the proportional share of such income taxes found to be due on the business of the fertilizer department was charged as a proper and legitimate expense of that department, in the same manner as was done in the other departments of its business; that inasmuch as the agreement with the plaintiff was an employment agreement, he was requested to make his own return under the Income Tax Law and to pay his own income taxes, instead of having them paid at the source, as might be done under the law, so that he would be entitled to the personal exemptions allowed by the law; that the income taxes paid by the said Menzi & Co., Inc., pertaining to the business of the fertilizer department and charged to that business, were duly entered on the books of that department, and included in the auditors' reports hereinbefore referred to, which reports were examined, accepted and approved by the plaintiff, with full knowledge of their contents, and he is now estopped from saying that such taxes are not a legitimate expense of said business.

FIFTH CAUSE OF ACTION

As fifth cause of action, plaintiff alleged:

- That he hereby reproduces paragraphs I, II, III, IV, and V of the first cause of action.

- That the plaintiff has discovered that the defendant Menzi & Co., Inc., had been receiving, during the period of the contract Exhibit A, from foreign firms selling fertilizing material, a secret commission equivalent to 5 per cent of the total value of the purchases of fertilizing material made by the partnership constituted between the plaintiff and the defendant Menzi & Co., Inc., and that said 5 per cent commission was not entered by the defendants in the books of the business, to the credit and benefit of the partnership constituted between the plaintiff and the defendant, but to the credit of the defendant Menzi & Co., Inc., which appropriated it to itself.

- That the exact amount, or even the approximate amount of the fraud thus suffered by the plaintiff cannot be determined, because the entries referring to these items do not appear in the partnership books, although the plaintiff believes and alleges that they do appear in the private books of the defendant Menzi & Co., Inc., which the latter has refused to furnish, notwithstanding the demands made therefor by the auditors and the lawyers of the plaintiff.

- That taking as basis the amount of the purchases of some fertilizing material made by the partnership during the first four years of the contract Exhibit A, the plaintiff estimates that this 5 per cent commission collected by the defendant Menzi & Co., Inc., to the damage and prejudice of the plaintiff, amounts to P127,375.77 of which 35 per cent belongs exclusively to the plaintiff.

Wherefore, the plaintiff prays the court to order the defendants to pay jointly and severally to the plaintiff the amount of P44,581.52, or the exact amount owed upon this ground, after both parties have adduced their evidence upon the point.

Defendants alleged:

- That they repeat and make a part of this special defense paragraphs 1, 2, 3 and 4, of the special defense to the first cause of action in this amended answer;

- That the defendant, Menzi & Co., Inc., did have during the period of said agreement, Exhibit A, and has now what is called a "Propaganda Agency Agreement" with the Deutsches Kalesyndikat, G. M. B., of Berlin, which is a manufacturer of potash, by virtue of which the said Menzi & Co., Inc., was to receive, for its propaganda work in advertising and bringing about sales of its potash a commission of 5 per cent on all orders of potash received by it from the Philippine Islands; that during the period of said agreement, Exhibit A, orders were sent to said concern for potash, through C. Andre & Co., of Hamburg, as the agent of the said Menzi & Co., Inc., upon which the said Menzi & Co., Inc., received a 5 per cent commission, amounting in all to P2,222.32 for the propaganda work which it did for said firm in the Philippine Islands; that said commissions were not in any sense discounts on the purchase price of said potash, and have no relation to the fertilizer business of which the plaintiff was to receive a share of the net profits for his services, and consequently were not credited to that department;

- That in going over the books of Menzi & Co., Inc., it has been found that there are only two items of commissions, which were received from the United Supply Co., of San Francisco, in the total sum of \$66.51, which, through oversight, were not credited on the books of the fertilizer department of Menzi & Co., Inc., but due allowance has now been given to that department for such item.

SIXTH CAUSE OF ACTION

As sixth cause of action, plaintiff alleged:

- That he hereby reproduces paragraphs I, II, III, IV, and V, of the first cause of action.

- That the defendant Menzi & Co., Inc., in collusion with and through the defendants J. M. Menzi and P. C. Schlobohm and their assistants, has tampered with the books of the business making fictitious transfers in favor of

the defendant Menzi & Co., Inc., of merchandise belonging to the partnership, purchased with the latter's money, and deposited in its warehouses, and then sold by Menzi & Co., Inc., to third persons, thereby appropriating to itself the profits obtained from such resale.

- That it is impossible to ascertain the amount of the fraud suffered by the plaintiff in this respect as the real amount obtained from such sales can only be ascertained from an examination of the private books of the defendant entity, which the latter has refused to permit notwithstanding the demand made for the purpose by the auditors and the lawyers of the plaintiff, and no basis of computation can be established, even approximately, to ascertain the extent of the fraud sustained by the plaintiff in this respect, by merely examining the partnership books.

Wherefore, the plaintiff prays the court to order the defendants J. M. Menzi and P. C. Schlobohm, to make a sworn statement as to all the profits received from the sale to third persons of the fertilizers pertaining to the partnership, and the profits they have appropriated, ordering them jointly and severally to pay 35 per cent of the net amount, with legal interest from the filing of the original complaint until the payment thereof.

Defendants alleged:

- That they repeat and make a part of this special defense paragraphs 1, 2, 3 and 4, of the special defense to the first cause of action in this amended answer:

- That under the express terms of the employment agreement, Exhibit A, the defendant, Menzi & Co., Inc., had the right to import into the Philippine Islands in the course of its fertilizer business and sell for its exclusive account and benefit simple fertilizer ingredients; that the only materials imported by it and sold during the period of said agreement were simple fertilizer ingredients, which had nothing whatever to do with the business of mixed fertilizers, of which the plaintiff was to receive a share of the net profits as a part of his compensation.

SEVENTH CAUSE OF ACTION

As seventh cause of action, plaintiff alleged:

- That he hereby reproduces paragraphs I, II, III, IV, and V of the first cause of action.

- That during the existence of the contract Exhibit A, the defendant Menzi & Co., Inc., for the account of the partnership constituted between itself and the plaintiff, and with the latter's money, purchased from several foreign firms various simple fertilizing material for the use of the partnership.

- That in the paid invoices for such purchases there are charged, besides the cost price of the merchandise, other amounts for freight, insurance, duty, etc., some of which were not entirely thus spent and were later credited by the selling firms to the defendant Menzi & Co., Inc.

- That said defendant Menzi & Co., Inc., through and in collusion with the defendants J. M. Menzi and P. C. Schlobohm upon receipt of the credit notes remitted by the selling firms of fertilizing material, for rebates upon freight, insurance, duty, etc., charged in the invoice but not all expended, did not enter them upon the books to the credit of the partnership constituted between the defendant and the plaintiff, but entered or had them entered to the credit of Menzi & Co., Inc., thereby defrauding the plaintiff of 35 per cent of the value of such reductions.

- That the total amount, or even the approximate amount of this fraud cannot be ascertained without an examination of the private books of Menzi & Co., Inc., which the latter has refused to permit notwithstanding the demand to this effect made upon them by the auditors and the lawyers of the plaintiff.

Wherefore, the plaintiff prays the court to order the defendants J. M. Menzi and P. C. Schlobohm, to make a

sworn statement as to the total amount of such rebates, and to sentence the defendants to pay to the plaintiff jointly and severally 35 per cent of the net amount.

Defendants alleged:

- That they repeat and make a part of this special defense paragraphs 1, 2, 3 and 4, of the special defense to the first cause of action in this amended answer:
- That during the period of said employment agreement, Exhibit A, the defendant, Menzi & Co., Inc., received from its agent, C. Andre & Co., of Hamburg, certain credits pertaining to the fertilizer business in the profits of which the plaintiff was interested, by way of refunds of German Export Taxes, in the total sum of P1,402.54; that all of said credits were duly noted on the books of the fertilizer department as received, but it has just recently been discovered that through error an additional sum of P216.22 was credited to said department, which does not pertain to said business in the profits of which the plaintiff is interested.

EIGHTH CAUSE OF ACTION

As eighth cause of action, plaintiff alleged:

- That he hereby reproduces paragraphs I, II, III, IV, and V of the first cause of action.
- That on or about April 21, 1927, that is, before the expiration of the contract Exhibit A of the complaint, the defendant Menzi & Co., Inc., acting as manager of the fertilizer business constituted between said defendant and the plaintiff, entered into a contract with the Compañia General de Tabacos de Filipinas for the sale to said entity of three thousand tons of fertilizers of the trade mark "Corona No. 1", at the rate of P111 per ton, f. o. b. Bais, Oriental Negros, to be delivered, as they were delivered, according to information received by the plaintiff, during the months of November and December, 1927, and January, February, March, and April, 1928.
- That both the contract mentioned above and the benefits derived therefrom, which the plaintiff estimates at P90,000, Philippine currency, belongs to the fertilizer business constituted between the plaintiff and the defendant, of which 35 per cent, or P31,500, belongs to said plaintiff.
- That notwithstanding the expiration of the partnership contract Exhibit A, on April 27, 1927, the defendants have not rendered a true accounting of the profits obtained by the business during the last four months thereof, as the proposed balance submitted to the plaintiff was incorrect with regard to the inventory of merchandise, transportation equipment, and the value of the trade marks, for which reason such proposed balance did not represent the true status of the business of the partnership on April 30, 1927.
- That the proposed balance submitted to the plaintiff with reference to the partnership operations during the last four months of its existence, was likewise incorrect, inasmuch as it did not include the profit realized or to be realized from the contract entered into with the Compañia General de Tabacos de Filipinas, notwithstanding the fact that this contract was negotiated during the existence of the partnership, and while the defendant Menzi & Co., Inc., was the manager thereof.
- That the defendant entity now contends that the contract entered into with the Compañia General de Tabacos de Filipinas belongs to it exclusively, and refuses to give the plaintiff his share consisting in 35 per cent of the profits produced thereby.

Wherefore, the plaintiff prays the honorable court to order the defendants to render a true and detailed account of the business during the last four months of the existence of the partnership, i. e., from January 1, 1927 to April 27, 1927, and to sentence them likewise to pay the plaintiff 35 per cent of the net profits.

Defendants alleged:

- That they repeat and make a part of this special defense paragraphs 1, 2, 3 and 4, of the special defense to the first cause of action in this amended answer;
- That the said order for 3,000 tons of mixed fertilizer, received by Menzi & Co., Inc., from the Compañia General de Tabacos de Filipinas on April 21, 1927, was taken by it in the regular course of its fertilizer business, and was to be manufactured and delivered in December, 1927, and up to April, 1928; that the employment agreement of the plaintiff expired by its own terms on April 27, 1927, and he has not been in any way in the service of the defendant, Menzi & Co., Inc., since that time, and he cannot possibly have any interest in the fertilizers manufactured and delivered by the said Menzi & Co., Inc., after the expiration of his contract for any service rendered to it.

NINTH CAUSE OF ACTION

As ninth cause of action, plaintiff alleged:

- That he hereby reproduces paragraphs I, II, III, IV, and V of the first cause of action.
- That during the period of the contract Exhibit A, the partnership constituted thereby registered in the Bureau of Commerce and Industry the trade marks "CORONA No. 1", "CORONA No. 2", "ARADO", and "HOZ", the plaintiff and the defendant having by their efforts succeeded in making them favorably known in the market.
- That the plaintiff and the defendant, laboring jointly, have succeeded in making the fertilizing business a prosperous concern to such an extent that the profits obtained from the business during the five years it has existed, amount to approximately P1,000,000, Philippine currency.
- That the value of the good-will and the trade marks of a business of this nature amounts to at least P1,000,000, of which sum 35 per cent belongs to the plaintiff, or, P350,000.
- That at the time of the expiration of the contract Exhibit A, the defendant entity, notwithstanding and in spite of the plaintiff's insistent opposition, has assumed the charge of liquidating the fertilizing business, without having rendered a monthly account of the state of the liquidation, as required by law, thereby causing the plaintiff damages.
- That the damages sustained by the plaintiff, as well as the amount of his share in the remaining property of the business, after its expiration, are wholly unknown to the plaintiff, and may only be truly and correctly ascertained by compelling the defendants J. M. Menzi and P. C. Schlobohm to declare under oath and explain to the court in detail the sums obtained from the sale of the remaining merchandise, after the expiration of the partnership contract.
- That after the contract Exhibit A had expired, the defendant continued to use for its own benefit the good-will and trade marks belonging to the partnership, as well as its transportation equipment and other machinery, thereby indicating its intention to retain such good-will, trade marks, transportation equipment and machinery, for the manufacture of fertilizers, by virtue of which the defendant is bound to pay the plaintiff 35 per cent of the value of said property.
- That the true value of the transportation equipment and machinery employed in the preparation of the fertilizers amounts to P20,000, 35 per cent of which amounts to P7,000.
- That the plaintiff has repeatedly demanded that the defendant entity render a true and detailed account of the state of the liquidation of the partnership business, but said defendant has ignored such demands, so that the

plaintiff does not, at this date, know whether the liquidation of the business has been finished, or what the status of it is at present.

Wherefore, the plaintiff prays the Honorable Court:

"1. To order the defendants J. M. Menzi and P. C. Schlobohm to render a true and detailed account of the status of the business in liquidation, that is, from April 28, 1927, until it is finished, ordering all the defendants to pay the plaintiff jointly and severally 35 per cent of the net amount.

"2. To order the defendants to pay the plaintiff jointly and severally the amount of P350,000, which is 35 per cent of the value of the goodwill and the trade marks of the fertilizer business;

"3. To order the defendants to pay the plaintiff jointly and severally the amount of P7,000, which is 35 per cent of the value of the transportation equipment and machinery of the business; and

"4. To order the defendants to pay the costs of this trial, and further, to grant any other remedy that this Honorable Court may deem just and equitable."

Defendants alleged:

- That they repeat and make a part of this special defense paragraphs 1, 2, 3 and 4, of the special defense to the first cause of action in this amended answer;

- That the goodwill, if any, of the said fertilizer business of the defendant, Menzi & Co., Inc., pertains exclusively to it, and the plaintiff can have no interest therein of any nature under his said employment agreement; that the trade-marks mentioned by the plaintiff in his amended complaint, as a part of such goodwill, belonged to and have been used by the said Menzi & Co., Inc., in its fertilizer business from and since its organization, and the plaintiff can have no rights to or interest therein under his said employment agreement; that the transportation equipment pertains to the fertilizer department of Menzi & Co., Inc., and whenever it has been used by the said Menzi & Co., Inc., in its own business, due and reasonable compensation for its use has been allowed to said business; that the machinery pertaining to the said fertilizer business was destroyed by fire in October, 1926, and the value thereof in the sum of P20,000 was collected from the Insurance Company, and the plaintiff has been given credit for 35 per cent of that amount; that the present machinery used by Menzi & Co., Inc., was constructed by it, and the costs thereof was not charged to the fertilizer department, and the plaintiff has no right to have it taken into consideration in arriving at the net profits due to him under his said employment agreement.

The dispositive part of the decision of the trial court is as follows:

"Wherefore, let judgment be entered:

"(a) Holding that the contract entered into by the parties, evidenced by Exhibit A, is a contract of general regular commercial partnership, wherein Menzi & Co., Inc., was the capitalist, and the plaintiff, the industrial partner;

"(b) Holding that the plaintiff, by the mere fact of having signed and approved the balance sheets, Exhibits C to C-8, is not estopped from questioning the statements of accounts therein contained;

"(c) Ordering Menzi & Co., Inc., upon the second ground of action, to pay the plaintiff the sum of P60,385.67 with legal interest from the date of the filing of the original complaint until paid;

"(d) Dismissing the third cause of action;

"(e) Ordering Menzi & Co., Inc., upon the fourth cause of action, to pay the plaintiff the sum of P3,821.41, with legal interest from the date of the filing of the original complaint until paid;

"(f) Dismissing the fifth cause of action;

"(g) Dismissing the sixth cause of action;

"(h) Dismissing the seventh cause of action;

"(i) Ordering the defendant Menzi & Co., Inc., upon the eighth cause of action, to pay the plaintiff the sum of P6,578.38 with legal interest from January 1, 1929, the date of the liquidation of the fertilizer business, until paid;

"(j) Ordering Menzi & Co., Inc., upon the ninth cause of action to pay the plaintiff the sum of P196,709.20 with legal interest from the date of the filing of the original complaint until paid;

"(k) Ordering the said defendant corporation, in view of the plaintiff's share of the profits of the business accruing from January 1, 1927 to December 31, 1928, to pay the plaintiff 35 per cent of the net balance shown in Exhibits 51 and 51-A, after deducting the item of P2,410 for income tax, and any other sum charged for interest under the entry 'Purchases';

"(l) Ordering the defendant corporation, in connection with the final liquidation set out in Exhibits 52 and 52-A, to pay the plaintiff the sum of P17,463.54 with legal interest from January 1, 1929, until fully paid;

"(m) Dismissing the case with reference to the other defendants, J. M. Menzi and P. C. Schlobohm; and

"(n) Menzi & Co., Inc., shall pay the costs of the trial."

The appellant makes the following assignments of error:

"I. The trial court erred in finding and holding that the contract Exhibit A constitutes a regular collective commercial copartnership between the defendant corporation, Menzi & Co., Inc., and the plaintiff, Francisco Bastida, and not a contract of employment.

"II. The trial court erred in finding and holding that the defendant, Menzi & Co., Inc., had wrongfully charged to the fertilizer business in question the sum of P10,918.33 as income taxes partners' balances, foreign drafts, local drafts, and on other credit balances in the sum of P172,530.49, and that 35 per cent thereof, or the sum of P60,385.67, with legal interest thereon from the date of filing his complaint, corresponds to the plaintiff.

"III. The trial court erred in finding and holding that the defendant, Menzi & Co., Inc., had wrongfully charged to the fertilizer business in question the sum of P10,918.33 as income taxes for the years 1923, 1924, 1925 and 1926, and that the plaintiff is entitled to 35 per cent thereof, or the sum of P3,821.41, with legal interest thereon from the date of filing his complaint, and in disallowing the item of P2,410 charged as income tax in the liquidation in Exhibits 51 and 51-A for the period from January 1 to April 27, 1927.

"IV. The trial court erred in refusing to find and hold under the evidence in this case that the contract, Exhibit A was during the whole period thereof considered by the parties and performed by them as a contract of employment in relation to the fertilizer business of the defendant, and that the accounts of said business were kept by the defendant, Menzi & Co., Inc., on that theory with the knowledge and consent of the plaintiff, and that at the end of each year for five years a balance sheet and profit and loss statement of said business were prepared from the books of account of said business on the same theory and submitted to the plaintiff, and that each year said balance sheet and profit and loss statement were examined, approved and signed by said plaintiff and he was paid the amount due him under said contract in accordance therewith with full knowledge of the manner in which said business was conducted and the charges for interest and income taxes made against the same and that by reason of such facts, the plaintiff is now estopped from raising any question as to the nature of said contract or the propriety of such charges.

"V. The trial court erred in finding and holding that the plaintiff, Francisco Bastida, is entitled to 35 per cent of

the net profits in the sum of P18,795.38 received by the defendant, Menzi & Co., Inc., from its contract with the Compañia General de Tabacos de Filipinas, or the sum of P6,578.38, with legal interest thereon from January 1, 1929, the date upon which the liquidation of said business was terminated.

"VI. The trial court erred in finding and holding that the value of the good-will of the fertilizer business in question was P562,312, and that the plaintiff, Francisco Bastida, was entitled to 35 per cent of such valuation, or the sum of P196,709.20, with legal interest thereon from the date of filing his complaint.

"VII. The trial court erred in rendering judgment in favor of the plaintiff and against the defendant, Menzi & Co., Inc., (a) on the second cause of action, for the sum of P60,385.67, with legal interest thereon from the date of filing the complaint; (b) on the fourth cause of action, for the sum of P3,821.41, with legal interest thereon from the date of filing the complaint; (c) on the eighth cause of action, for the sum of P6,578.38, with legal interest thereon from January 1, 1929; and (d) on the ninth cause of action, for the sum of P196,709.20, with legal interest thereon from the date of filing the original complaint; and (e) for the costs of the action, and in not approving the final liquidation of said business, Exhibits 51 and 51-A and 52 and 52-A, as true and correct, and entering judgment against said defendant only for the amounts admitted therein as due the plaintiff with legal interest, with the costs against the plaintiff.

"VIII. The trial court erred in overruling the defendants' motion for a new trial."

It appears from the evidence that the defendant corporation was organized in 1921 for the purpose of importing and selling general merchandise, including fertilizers and fertilizer ingredients. It acquired through John Bordman and the Menzi-Bordman Co. the good-will, trade-marks, business, and other assets of the old German firm of Behn, Meyer & Co., Ltd., including its fertilizer business with its stocks and trade-marks. Behn, Meyer & Co., Ltd., had owned and carried on this fertilizer business from 1910 until that firm was taken over by the Alien Property Custodian in 1917. Among the trade-marks thus acquired by the appellant were those known as the "ARADO", "HOZ", and "CORONA". They were registered in the Bureau of Commerce and Industry in the name of Menzi & Co. The trade-marks "ARADO" and "HOZ" had been used by Behn, Meyer & Co., Ltd., in the sale of its mixed fertilizers, and the trade-mark "CORONA" had been used in its other business. The "HOZ" trade-mark was used by John Bordman and the Menzi-Bordman Co. in the continuation of the fertilizer business that had belonged to Behn, Meyer & Co., Ltd.

The business of Menzi & Co., Inc., was divided into several different departments, each of which was in charge of a manager, who received a fixed salary and a percentage of the profits. The corporation had to borrow money or obtain credits from time to time and to pay interest thereon. The amount paid for interest was charged against the department concerned, and the interest charges were taken into account in determining the net profits of each department. The practice of the corporation was to debit or credit each department with interest at the bank rate on its daily balance. The fertilizer business of Menzi & Co., Inc., was carried on in accordance with this practice under the "Sundries Department" until July, 1923, and after that as a separate department.

In November, 1921, the plaintiff, who had had some experience in mixing and selling fertilizer, went to see Toehl, the manager of the sundries department of Menzi & Co., Inc., and told him that he had a written contract with the Philippine Sugar Centrals Agency for 1,250 tons of mixed fertilizers, and that he could obtain other contracts, including one from the Calamba Sugar Estates for 450 tons, but that he did not have the money to buy the ingredients to fill the order and carry on the business. He offered to assign to Menzi & Co., Inc., his contract with the Philippine Sugar Centrals Agency and to supervise the mixing of the fertilizer and to obtain other orders for fifty per cent of the net profits that Menzi & Co., Inc., might derive therefrom. J. M. Menzi, the general manager of Menzi & Co., accepted plaintiff's offer. Plaintiff assigned to Menzi & Co., Inc., his contract with the Sugar Centrals Agency, and the defendant corporation proceeded to fill the order. Plaintiff supervised the mixing of the fertilizer.

On January 10, 1922 the defendant corporation at plaintiff's request gave him the following letter, Exhibit B:

"MANILA, 10 de enero de 1922

"Sr. FRANCISCO BASTIDA

"Manila

"MUY SR. NUESTRO: Interin formalizamos el contrato que, en principio, tenemos convenido para la explotacion del negocio de abono y fertilizantes, por la presente venimos en confirmar su derecho de 50 por ciento de las utilidades que se deriven del contrato obtenido por Vd. de la Philippine Sugar Centrals (por 1250 tonel.) y del contrato con la Calamba Sugar Estates, asi como de cuantos contratos se cierren con compradores de abonos preparados antes de la formalizaci6n definitiva de nuestro contrato mutuo, lo que hacemos para garantia y seguridad de Vd.

"MENZI & CO.

"Por (Fdo.)

W. TOEHL"

Menzi & Co., Inc., continued to carry on its fertilizer business under this arrangement with the plaintiff. It ordered ingredients from the United States and other countries, and the interest on the drafts for the purchase of these materials was charged to the business as a part of the cost of the materials. The mixed fertilizers were sold by Menzi & Co., Inc., between January 19 and April 1, 1922 under its "CORONA" brand. Menzi & Co., Inc., had only one bank account for its whole business. The fertilizer business had no separate capital. A fertilizer account was opened in the general ledger, and interest at the rate charged by the Bank of the Philippine Islands was debited or credited to that account on the daily balances of the fertilizer business. This was in accordance with appellant's established practice, to which the plaintiff assented.

On or about April 24, 1922 the net profits of the business carried on under the oral agreement were determined by Menzi & Co., Inc., after deducting interest charges, proportional part of warehouse rent and salaries and wages, and the other expenses of said business, and the plaintiff was paid some twenty thousand pesos in full satisfaction of his share of the profits.

Pursuant to the aforementioned verbal agreement, confirmed by the letter, Exhibit B, the defendant corporation on April 27, 1922 entered into a written contract with the plaintiff, marked Exhibit A, which is the basis of the present action.

The fertilizer business was carried on by Menzi & Co., Inc., after the execution of Exhibit A in practically the same manner as it was prior thereto. The intervention of the plaintiff was limited to supervising the mixing of the fertilizers in Menzi & Co.'s, Inc., bodegas.

The trade-marks used in the sale of the fertilizer were registered in the Bureau of Commerce & Industry in the name of Menzi & Co., Inc., and the fees were paid by that company. They were not charged to the fertilizer business, in which the plaintiff was interested. Only the fees for registering the formulas in the Bureau of Science were charged to the fertilizer business, and the total amount thereof was credited to this business in the final liquidation on April 27, 1927.

On May 3, 1924 the plaintiff made a contract with Menzi & Co., Inc., to furnish it all the stems and scraps of

tobacco that it might need for its fertilizer business either in the Philippine Islands or for export to other countries. This contract is referred to in the record as the "Vastago Contract". Menzi & Co., Inc., advanced the plaintiff large sums of money for buying and installing machinery, paying the salaries of his employees, and other expenses in performing his contract. White, Page & Co., certified public accountants, audited the books of Menzi & Co., Inc., every month, and at the end of each year they prepared a balance sheet and a profit and loss statement of the fertilizer business. These statements were delivered to the plaintiff for examination, and after he had had an opportunity of verifying them he approved them without objection and returned them to Menzi & Co., Inc.

Plaintiff collected from Menzi & Co., Inc., as his share or 35 per cent of the net profits of the fertilizer business the following amounts:

1922

.....

P1,874.73

1923

.....

30,212.62

1924

.....

101,081.56

1925

.....

35,665.03

1926

.....

27,649.98

Total

P196,483.92

To this amount must be added plaintiff's share of the net profits from January 1 to April 27, 1927, amounting to P34,766.87, making a total of P231,250.79.

Prior to the expiration of the contract, Exhibit A, the manager of Menzi & Co., Inc., notified the plaintiff that the contract for his services would not be renewed.

When plaintiff's contract expired on April 27, 1927, the fertilizer department of Menzi & Co., Inc., had on hand materials and ingredients and two Ford trucks of the book value of approximately P75,000, and accounts receivable amounting to P103,000. There were claims outstanding and bills to pay. Before the net profits could be finally determined, it was necessary to dispose of the materials and equipment, collect the outstanding accounts, and pay the debts of the business. The accountants for Menzi & Co., Inc., prepared a balance sheet and a profit and loss statement for the period from January 1 to April 27, 1927 as a basis of settlement, but the plaintiff refused to accept it, and filed the present action.

Menzi & Co., Inc., then proceeded to liquidate the fertilizer business in question. In October, 1927 it proposed to the plaintiff that the old and damaged stocks on hand having a book value of P40,000, which the defendant corporation had been unable to dispose of, be sold at public or private sale, or divided between the parties. The plaintiff refused to agree to this. The defendant corporation then applied to the trial court for an order for the sale of the remaining property at public auction, but apparently the court did not act on the petition.

The old stocks were taken over by Menzi & Co., Inc., and the final liquidation of the fertilizer business was completed in December, 1928, and a final balance sheet and a profit and loss statement were submitted to the plaintiff during the trial. During the liquidation the books of Menzi & Co., Inc., for the whole period of the contract in question were reaudited by White, Page & Co., certain errors of bookkeeping were discovered by them. After making the corrections they found the balance due the plaintiff to be P21,633.20.

Plaintiff employed a certified public accountant, Vernon Thompson, to examine the books and vouchers of Menzi & Co. Thompson assumed the plaintiff and Menzi & Co., Inc., to be partners, and that Menzi & Co., Inc., was obliged to furnish free of charge all the capital the partnership should need. He naturally reached very different conclusions from those of the auditors of Menzi & Co., Inc.

We come now to a consideration of appellant's assignments of error. After considering the evidence and the arguments of counsel, we are unanimously of the opinion that under the facts of this case the relationship established between Menzi & Co. and the plaintiff by the contract, Exhibit A, was not that of partners, but that of employer and employee, whereby the plaintiff was to receive 35 per cent of the net profits of the fertilizer business of Menzi & Co., Inc., in compensation for his services of supervising the mixing of the fertilizers. Neither the provisions of the contract nor the conduct of the parties prior or subsequent to its execution justified the finding that it was a contract of copartnership. Exhibit A, as appears from the statement of facts, was in effect a continuation of the verbal agreement between the parties, whereby the plaintiff worked for the defendant corporation for one-half of the net profits derived by the corporation from certain fertilizer contracts. Plaintiff was

paid his share of the profits from those transactions after Menzi & Co., Inc., had deducted the same items of expense which he now protests. Plaintiff never made any objection to defendant's manner of keeping the accounts or to the charges. The business was continued in the same manner under the written agreement, Exhibit A, and for four years the plaintiff never made any objection. On the contrary he approved and signed every year the balance sheet and the profit and loss statement. It was only when plaintiff's contract was about to expire and the defendant corporation had notified him that it would not renew it that the plaintiff began to make objections.

The trial court relied on article 116 of the Code of Commerce, which provides that articles of association by which two or more persons obligate themselves to place in a common fund any property, industry, or any of these things, in order to obtain profit, shall be commercial, no matter what its class may be, provided it has been established in accordance with the provisions of this Code; but in the case at bar there was no common fund, that is, a fund belonging to the parties as joint owners or partners. The business belonged to Menzi & Co., Inc. The plaintiff was working for Menzi & Co., Inc. Instead of receiving a fixed salary or a fixed salary and a small percentage of the net profits, he was to receive 35 per cent of the net profits as compensation for his services. Menzi & Co., Inc., was to advance him P300 a month on account of his participation in the profits. It will be noted that no provision was made for reimbursing Menzi & Co., Inc., in case there should be no net profits at the end of the year. It is now well settled that the old rule that sharing profits as profits made one a partner is overthrown. (Mechem, second edition, p. 89.)

It is nowhere stated in Exhibit A that the parties were establishing a partnership or intended to become partners. Great stress is laid by the trial judge and plaintiff's attorneys on the fact that in the sixth paragraph of Exhibit A the phrase "en sociedad con" is used in providing that defendant corporation shall not engage in the business of prepared fertilizers except in association with the plaintiff (en sociedad con). The fact is that en sociedad con as there used merely means en reunion con or in association with, and does not carry the meaning of "in partnership with".

The trial judge found that the defendant corporation had not always regarded the contract in question as an employment agreement, because in its answer to the original complaint it stated that before the expiration of Exhibit A it notified the plaintiff that it would not continue associated with him in said business. The trial judge concluded that the phrase "associated with", used by the defendant corporation, indicated that it regarded the contract, Exhibit A, as an agreement of copartnership.

In the first place, the complaint and answer having been superseded by the amended complaint and the answer thereto, and the answer to the original complaint not having been presented in evidence as an exhibit, the trial court was not authorized to take it into account. "Where amended pleadings have been filed, allegations in the original pleadings are held admissible, but in such case the original pleadings can have no effect, unless formally offered in evidence." (Jones on Evidence, sec. 273; Lucido vs. Calupitan, 27 Phil, 148.)

In the second place, although the word "associated" may be related etymologically to the Spanish word "socio", meaning partner, it does not in its common acceptation imply any partnership relation.

The 7th, 8th, and 9th paragraphs of Exhibit A, whereby the defendant corporation obligated itself to pay to the plaintiff 35 per cent of the net profits of the fertilizer business, to advance to him P300 a month on account of his share of the profits, and to grant him permission during 1923 to absent himself from the Philippines for not more than one year are utterly incompatible with the claim that it was the intention of the parties to form a copartnership. Various other reasons for holding that the parties were not partners are advanced in appellant's brief. We do not deem it necessary to discuss them here. We merely wish to add that in the Vastago contract, Exhibit A, the plaintiff clearly recognized Menzi & Co., Inc., as the owners of the fertilizer business in question.

As to the various items of expense rejected by the trial judge, they were in our opinion proper charges and erroneously disallowed, and' this would be true even if the parties had been partners. Although Menzi & Co., Inc., agreed to furnish the necessary financial aid for the fertilizer business, it did not obligate itself to contribute any fixed sum as capital or to defray at its own expense the cost of securing the necessary credit. Some of the contentions of the plaintiff and his expert witness Thompson are so obviously without merit as not to merit serious consideration. For instance, they objected to the interest charges on draft for materials purchased abroad. Their contention is that the corporation should have furnished the money to purchase these materials for cash,' overlooking the fact that the interest was added to the cost price, and that the plaintiff was not prejudiced by the practice complained of. It was also urged, and this seems to us the height of absurdity, that the defendant corporation should have furnished free of charge such financial assistance as would have made it unnecessary to discount customers' notes, thereby enabling the business to reap the interest. In other words, the defendant corporation should have enabled the fertilizer department to do business on a credit instead of a cash basis.

The charges now complained of, as we have already stated, are the same as those made under the verbal agreement, upon the termination of which the parties made a settlement; the charges in question were acquiesced in by the plaintiff for years, and it is now too late for him to contest them. The decision of this court in the case of *Kriedt vs. E. C. McCullough & Co.* (37 Phil., 474), is in point. A portion of the syllabus of that case reads as follows:

"1. CONTRACTS; INTERPRETATION; CONTEMPORANEOUS ACTS OF PARTIES.—Acts done by the parties to a contract in the course of its performance are admissible in evidence upon the question of its meaning, as being their own contemporaneous interpretation of its terms.

"2. ID.; ID.; ACTION OF PARTIES UNDER PRIOR CONTRACT.—In an action upon a contract containing a provision of doubtful application it appeared that under a similar prior contract the parties had, upon the termination of said contract, adjusted their rights and made a settlement in which the doubtful clause had been given effect in conformity with the interpretation placed thereon by one of the parties. Held: That this action of the parties under the prior contract could properly be considered upon the question of the interpretation of the same clause in the later contract.

"3. ID. ; ID.; ACQUIESCENCE.—Where one of the parties to a contract acquiesces in the interpretation placed by the other upon a provision of doubtful application, the party so acquiescing is bound by such interpretation.

"4. ID. ; ID.; ILLUSTRATION. —One of the parties to a contract, being aware at the time of the execution thereof that the other placed a certain interpretation upon a provision of doubtful application, nevertheless proceeded, without raising any question upon the point, to perform the services which he was bound to render under the contract. Upon the termination of the contract by mutual consent a question was raised as to the proper interpretation of the doubtful provision. Held: That the party raising such question had acquiesced in the interpretation placed upon the contract by the other party and was bound thereby."

The trial court held that the plaintiff was entitled to P6,578.38 or 35 per cent of the net profits derived by Menzi & Co., Inc., from its contract for fertilizers with the Tabacalera. This finding in our opinion is not justified by the evidence. This contract was obtained by Menzi & Co., Inc., shortly before plaintiff's contract with the defendant corporation expired. Plaintiff tried to get the Tabacalera contract for himself. When this contract was filled, plaintiff had ceased to work for Menzi & Co., Inc., and he has no right to participate in the profits derived therefrom.

Appellant's sixth assignment of error is that the trial court erred in finding the value of the good-will of the fertilizer business in question to be P562,312, and that the plaintiff was entitled to 35 per cent thereof or P196,709.20. In reaching this conclusion the trial court unfortunately relied on the opinion of the accountant,

Vernon Thompson, who assumed, erroneously as we have seen, that the plaintiff and Menzi & Co., Inc., were partners; but even if they had been partners there would have been no good-will to dispose of. The defendant corporation had a fertilizer business before it entered into any agreement with the plaintiff; plaintiff's agreement was for a fixed period, five years, and during that time the business was carried on in the name of Menzi & Co., Inc., and in Menzi & Co.'s warehouses and after the expiration of plaintiff's contract Menzi & Co., Inc., continued its fertilizer business, as it had a perfect right to do. There was really nothing to which any good-will could attach. Plaintiff maintains, however, that the trade-marks used in the fertilizer business during the time that he was connected with it acquired great value, and that they have been appropriated by the appellant to its own use. That seems to be the only basis of the alleged good-will, to which a fabulous valuation was given. As we have seen, the trade-marks were not new. They had been used by Behn, Meyer & Co. in its business for other goods and one of them for fertilizer. They belonged to Menzi & Co., Inc., and were registered in its name; only the expense of registering the formulas in the Bureau of Science was charged to the business in which the plaintiff was interested. These trade-marks remained the exclusive property of Menzi & Co., and the plaintiff had no interest therein on the expiration of his contract.

The balance due the plaintiff, as appears from Exhibit 52, is P21,633.20. We are satisfied by the evidence that said balance is correct.

For the foregoing reasons, the decision appealed from is modified and the defendant corporation is sentenced to pay the plaintiff twenty-one thousand, six hundred and thirty-three pesos and twenty centavos (P21,633.20), with legal interest thereon from the date of the filing of the complaint or June 17, 1927, without a special finding as to costs.

Street, Villamor, and Villa-Real, JJ., concur.

Justice Hull participated in this case, but on account of his absence on leave at the time of the promulgation of the decision he authorized the undersigned to certify that he voted to modify the decision of the trial court as appears in the foregoing decision of this court.—Villamor, J., Presiding.

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