

**NIELSON & COMPANY, INC., PLAINTIFF-APPELLANT, VS.
LEPANTO CONSOLIDATED MINING COMPANY,
DEFENDANT-APPELLEE.**

G.R. No. L-21601. December 17, 1966

Ponente: ZALDIVAR. J.

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ZALDIVAR. J.:

On February 6, 1958, plaintiff brought this action against defendant before the Court of First Instance of Manila to recover certain sums of money representing damages allegedly suffered by the former in view of the refusal of the latter to comply with the terms of a management contract entered into between them on January 30, 1937, including attorney's fees and costs.

Defendant in its answer denied the material allegations of the complaint and set up certain special defenses, among them, prescription and laches, as bars against the Institution of the present action.

After trial, during which the parties presented testimonial and numerous documentary evidence, the court rendered a decision dismissing the complaint with costs. The court stated that it did not find sufficient evidence to establish defendant's counterclaim and so it likewise dismissed the same.

The present appeal was taken to this Court directly by the plaintiff in view of the amount involved in the case.

The facts of this case, as stated in the decision appealed from, are hereunder quoted for purposes of this decision:

"It appears that the suit involves an operating agreement executed before World War II between the plaintiff and the defendant whereby the former operated and managed the mining properties owned by the latter for a management fee of P2,500.00 a month and a 10% participation in the net profits resulting from the operation of the mining properties. For brevity and convenience, hereafter the plaintiff shall be referred to as NIELSON and the defendant, LEPANTO.

"The antecedents of the case are: The contract in question (Exhibit 'C') was made by the parties on January 30, 1937 for a period of five (5) years. In the latter part of 1941, the parties agreed to renew the contract for another period of five (5) years, but in the meantime, the Pacific War broke out in December, 1941.

"In January, 1942 operation of the mining properties was disrupted on account of the war. In February of 1942, the mill, power plant, supplies on hand, equipment, concentrates on hand and mines, were destroyed upon orders of the United States Army, to prevent their utilization by the invading Japanese Army. The Japanese forces thereafter occupied the mining properties, operated the mines during the continuance of the war, and who were ousted from the mining properties only in August of 1945.

"After the mining properties were liberated from the Japanese forces, LEPANTO took possession thereof and embarked in rebuilding and reconstructing the mines and mill; setting up new organization; clearing the mill site; repairing the mines; erecting staff quarters and bodegas and repairing existing structures; installing new machinery and equipment; repairing roads and maintaining the same; salvaging equipment and storing the

same within the bodegas; doing police work necessary to take care of the materials and equipment recovered; repairing and renewing the water system; and retimbering (Exhibits 'D' and 'E'). The rehabilitation and reconstruction of the mine and mill was not completed until 1948 (Exhibit 'F'). On June 26, 1948 the mines resumed operation under the exclusive management of LEPANTO (Exhibit 'F-1').

"Shortly after the mines were liberated from the Japanese invaders in 1945, a disagreement arose between NIELSON and LEPANTO over the status of the operating contract in question which as renewed expired in 1947. Under the terms thereof, the management contract shall remain in suspense in case fortuitous event or force majeure, such as war or civil commotion, adversely affects the work of mining and milling.

'In the event of inundations, floodings of mine, typhoon, earthquake or any other force majeure, war, insurrection, civil commotion, organized strike, riot, injury to the machinery or other event or cause reasonably beyond the control of NIELSON and which adversely affects the work of mining and milling; NIELSON shall report such fact to LEPANTO and without liability or breach of the terms of this Agreement, the same shall remain in suspense, wholly or partially during the terms of such Inability.' (Clause II of Exhibit 'C').

NIELSON hold the view that, on account of the war, the contract was suspended during the war; hence the life of the contract should be considered extended for such time of the period of suspension. On the other hand, LEPANTO contended that the contract should expire in 1947 as originally agreed upon because the period of suspension accorded by virtue of the war did not operate to extend further the life of the contract.

"No understanding appeared from the record to have been had by the parties to resolve the disagreement. In the meantime, LEPANTO rebuilt and reconstructed the mines and was able to bring the property into operation only in June of 1948, xxx."

Appellant in its brief makes an alternative assignment of errors depending on whether or not the management contract basis of the action has been extended for a period equivalent to the period of suspension. If the agreement is suspended our attention should be focused on the first set of errors claimed to have been committed by the court a quo; but if the contrary is true, the discussion will then be switched to the alternative set that is claimed to have been committed. We will first take up the question whether the management agreement has been extended as a result of the supervening war, and after this question shall have been determined in the sense sustained by appellant, then the discussion of the defense of laches and prescription will follow as a consequence.

The pertinent portion of the management contract (Exh. C) which refers to suspension should any event constituting force majeure happen appears in Clause II thereof which we quote hereunder:

"In the event of inundations, floodings of the mine, typhoon, earthquake or any other force majeure, war, insurrection, civil commotion, organized strike, riot, injury to the machinery or other event or cause reasonably beyond the control of NIELSON and which adversely affects the work of mining and milling; NIELSON shall report such fact to LEPANTO and without liability or breach of the terms of this Agreement, the same shall remain in suspense, wholly or partially during the terms of such inability."

A careful scrutiny of the clause above-quoted will at once reveal that in order that the management contract may be deemed suspended two events must take place which must be brought in a satisfactory manner to the attention of defendant within reasonable time, to wit: (1) the event constituting the force majeure must be reasonably beyond the control of Nielson, and (2) it must adversely affect the work of mining and milling the company is called upon to undertake. As long as these two conditions exist the agreement is deemed suspended.

Does the evidence on record show that these two conditions had existed which may justify the conclusion that the management agreement had been suspended in the sense entertained by appellant? Let us go to the evidence.

It is a matter that this Court can take judicial notice of that war supervened in our country and that the mines in

the Philippines were either destroyed or taken over by the occupation forces with a view to their operation. The Lepanto mines were no exception for not only was the mine itself destroyed but the mill, power plant, supplies on hand, equipment and the like that were being used there were destroyed as well. Thus, the following is what appears in the Lepanto Company Mining Report dated March 13, 1946 submitted by its President C. A. DeWitt to the defendant:[1] "In February of 1942, our mill, power plant, supplies on hand, equipment, concentrates on hand, and mine, were destroyed upon orders of the U.S. Army to prevent their utilization by the enemy. The report also mentions the report submitted by Mr. Blessing, an official of Nielson, that "the original mill was destroyed in 1942" and "the original power plant and all the installed equipment were destroyed in 1942." It is then undeniable that beginning February, 1942 the operation of the Lepanto mines stopped or became suspended as a result of the destruction of the mill, power plant and other important equipment necessary for such operation in view of a cause which was clearly beyond the control of Nielson and that as a consequence such destruction adversely affected the work of mining and milling which the latter was called upon to undertake under the management contract. Consequently, by virtue of the very terms of said contract the same may be deemed suspended from February, 1942 and as of that month the contract still had 60 months to go.

On the other hand, the record shows that the defendant admitted that the occupation forces operated its mining properties subject of the management contract,[2] and from the very report submitted by President DeWitt it appears that the date of the liberation of the mine was August 1, 1945 although at the time there were still many booby traps.[3] Similarly, in a report submitted by the defendant to its stockholders dated August 25, 1948, the following appears: "Your Directors take pleasure in reporting that June 26, 1948 marked the official return to operations of this Company of its properties in Mankayan, Mountain Province, Philippines.[4]

It is, therefore, clear from the foregoing that the Lepanto mines were liberated on August 1, 1945, but because of the period of rehabilitation and reconstruction that had to be made as a result of the destruction of the mill, power plant and other necessary equipment for its operation it cannot be said that the suspension of the contract ended on that date. Hence, the contract must still be deemed suspended during the succeeding years of reconstruction and rehabilitation, and this period can only be said to have ended on June 26, 1948 when, as reported by the defendant, the company officially resumed the mining operations of the Lepanto. It should here be stated that this period of suspension from February, 1942 to June 26, 1948 is the one urged by plaintiff.[5]

It having been shown that the operation of the Lepanto mines on the part of Nielson had been suspended during the period set out above within the purview of the management contract, the next question that needs to be determined is the effect of such suspension. Stated in another way, the question now to be determined is whether such suspension had the effect of extending the period of the management contract for the period of said suspension. To elucidate this matter, we again need to resort to the evidence.

For appellant Nielson two witnesses testified, declaring that the suspension had the effect of extending the period of the contract, namely, George T. Scholey and Mark Nestle. Scholey was a mining engineer since 1929, an incorporator, general manager and director of Nielson and Company; and for some time he was also the vice-president and director of the Lepanto Company during the pre-war days and, as such, he was an officer of both appellant and appellee companies. As vice-president of Lepanto and general manager of Nielson, Scholey participated in the negotiation of the management contract to the extent that he initialed the same both as a witness and as an officer of both corporations. This witness testified in this case to the effect that the standard force majeure clause embodied in the management contract was taken from similar mining contracts regarding mining operations and the understanding regarding the nature and effect of said clause was that when there is suspension of the operation that suspension meant the extension of the contract. Thus, to the question, "Before the war, what was the understanding of the people in the particular trend of business with respect to the force majeure

clause?", Scholey answered: "That was our understanding that the suspension meant the extension of time lost.[6]

Mark Nestle, the other witness, testified along similar line. He had been connected with Nielson since 1937 until the time he took the witness stand and had been a director, manager, and president of the same company. When he was propounded the question: "Do you know what was the custom or usage at that time in connection with force majeure clause?", Nestle answered, "In the mining world the force majeure clause is generally considered. When a calamity comes up and stops the work like in war, flood, inundation, or fire, etc., the work is suspended for the duration of the calamity, and the period of the contract is extended after the calamity is over to enable the person to do the big work or recover his money which he has invested, or accomplish what his obligation is to a third person."[7]

And the above testimonial evidence finds support in the very minutes of the special meeting of the Board of Directors of the Lepanto Company issued on March 10, 1945 which was then chairmaned by Atty. C. A. DeWitt. We read the following from said report:

"The Chairman also stated that the contract with Nielson and Company would soon expire if the obligations were not suspended, in which case we should have to pay them the retaining fee of P2,500.00 a month. He believes however, that there is a provision in the contract suspending the effects thereof in cases like the present, and that even if it were not there, the law itself would suspend the operations of the contract on account of the war. Anyhow, he stated, we shall have no difficulty in solving satisfactorily any problem we may have with Nielson and Company."[8]

Thus, we can see from the above that even in the opinion of Mr. DeWitt himself, who at the time was the chairman of the Board of Directors of the Lepanto Company, the management contract would then expire unless the period therein stated is suspended but that, however, he expressed the belief that the period was extended because of the provision contained therein suspending the effects thereof should any of the case of force majeure happen like in the present case, and that even if such provision did not exist the law would have the effect of suspending it on account of the war. In substance, Atty. DeWitt expressed the opinion that as a result of the suspension of the mining operation because of the effects of the war the period of the contract had been extended.

Contrary to what appellant's evidence reflects insofar as the interpretation of the force majeure clause is concerned, however, appellee gives Us an opposite interpretation invoking in support thereof not only a letter Atty. DeWitt sent to Nielson on October 20, 1945,[9] wherein he expressed for the first time an opinion contrary to what he reported to the Board of Directors of Lepanto Company as stated in the portion of the minutes of its Board of Directors as quoted above, but also the ruling laid down by our Supreme Court in some cases decided sometime ago, to the effect that the war does not have the effect of extending the term of a contract that the parties may enter into regarding a particular transaction, citing infills connection the cases of *Victorias Planters Association v. Victorias Hilling Company*, 51 O.G. 4010; *Rosario S. Vda. de Lacson, et al. v. Abelardo G. Diaz*, 87 Phil., 150; and *Lo Ching y So Young Chong Co. v. Court of Appeals, et al.*, 81 Phil., 601.

To bolster up its theory, appellee also contends that the evidence regarding the alleged custom or usage in mining contract that appellant's witnesses tried to introduce was incompetent because (a) said custom was not specifically pleaded; (b) Lepanto made timely and repeated objections to the introduction of said evidence; (c) Nielson failed to show the essential elements of usage which must be shown to exist before any proof thereof can be given to affect the contract; and (d) the testimony of its witnesses cannot prevail over the very terms of the management contract which, as a rule, is supposed to contain all the terms and conditions by which the parties intended to be bound.

It is here necessary to analyze the contradictory evidence which the parties have presented regarding the

interpretation of the force majeure clause in the management contract.

At the outset, it should be stated that, as a rule, in the construction and interpretation of a document the intention of the parties must be sought (Rule 130, Section 10, Rules of Court). This is the basic rule in the interpretation of contracts because all other rules are but ancillary to the ascertainment of the meaning intended by the parties. And once this intention has been ascertained it becomes an integral part of the contract as though it had been originally expressed therein in unequivocal terms (*Shoreline Oil Corp. v. Guy*, App. 189, So., 348, cited in 17A C.J.S. p. 47). How is this intention determined?

One pattern is to ascertain the contemporaneous and subsequent acts of the contracting parties in relation to the transaction under consideration (Article 1371, Civil Code). In this particular case, it is worthy of note what Atty. C. A. DeWitt has stated in the special meeting of the Board of Directors of Lepanto in the portion of the minutes already quoted above wherein, as already stated, he expressed the opinion that the life of the contract, if not extended, would last only until January, 1947 and yet he said that there is a provision in the contract that the war has the effect of suspending the agreement and that the effect of that suspension was that the agreement would have to continue with the result that Lepanto would have to pay the monthly retaining fee of P2,500.00. And this belief that the war suspended the agreement and that the suspension meant its extension was so firm that he went to the extent of intimating that even if there was no provision for suspension in the agreement the law itself would suspend it.

It is true that Mr. DeWitt later sent a letter to Nielson dated October 20, 1945 wherein apparently he changed his mind because there he stated that the contract was merely suspended, but not extended, by reason of the war, contrary to the opinion he expressed in the meeting of the Board of Directors already adverted to, but between the two opinions of Atty. DeWitt we are inclined to give more weight and validity to the former not only because such was given by him against his own interest but also because it was given before the Board of Directors of Lepanto and in the presence of some Nielson officials^[10] who, on that occasion were naturally led to believe that that was the true meaning of the suspension clause, while the second opinion was merely self-serving and was given as a mere afterthought.

Appellee also claims that the issue of true intent of the parties was not brought out in the complaint, but anent this matter suffice it to state that in paragraph No. 19 of the complaint appellant pleaded that the contract was extended.^[11] This is a sufficient allegation considering that the rules on pleadings must as a rule be liberally construed.

It is likewise noteworthy that in this issue of the intention of the parties regarding the meaning and usage concerning the force majeure clause, the testimony adduced by appellant is uncontradicted. If such were not true, appellee should have at least attempted to offer contradictory evidence. This it did not do. Not even Lepanto's President, Mr. V. E. Lednicky, who took the witness stand, contradicted said evidence.

In holding that the suspension of the agreement meant the extension of the same for a period equivalent to the suspension, we do not have the least intention of overruling the cases cited by appellee. We simply want to say that the ruling laid down in said cases does not apply here because the material facts involved therein are not the same as those obtaining in the present. The rule of *stare decisis* cannot be invoked where there is no analogy between the material facts of the decision relied upon and those of the instant case.

Thus, in *Victorias Planters Association v. Victorias Milling Company*, 51 O.G. 4010, there was no evidence at all regarding the intention of the parties to extend the contract equivalent to the period of suspension caused by the war. Neither was there evidence that the parties understood the suspension to mean extension; nor was there evidence of usage and custom in the industry that the suspension meant the extension of the agreement. All these

matters, however, obtain in the instant case.

Again, in the case of *Rosario S. Vda. de Lacson v. Abelardo G. Diaz*, 87 Phil., 150, the issue referred to the interpretation of a pre-war contract of lease of sugar cane lands and the liability of the lessee to pay rent during and immediately following the Japanese occupation and where the defendant claimed the right of an extension of the lease to make up for the time when no cane was planted. This Court, in holding that the years which the lessee could not use the land because of the war could not be discounted from the period agreed upon, held that "Nowhere is there any insinuation that the defendant-lessee was to have possession of lands for seven years excluding years on which he could not harvest sugar." Clearly, this *ratio decidendi* is not applicable to the case at bar wherein there is evidence that the parties understood the "suspension clause by force majeure" to mean the extension of the period of the agreement.

Lastly, in the case of *Lo Ching y So Young Chong Co. v. Court of Appeals, et al.*, 81 Phil., 601, appellant leased a building from appellee beginning September 13, 1940 for three years, renewable for two years. The lessee's possession was interrupted in February, 1942 when he was ousted by the Japanese who turned the same over to German Otto Schulze, the latter occupying the same until January, 1945 upon the arrival of the liberation forces. Appellant contended that the period during which he did not enjoy the leased premises because of his dispossession by the Japanese had to be deducted from the period of the lease, but this was overruled by this Court, reasoning, that such dispossession was merely a simple "*perturbacion de mero hecho y de la cual no responde el arrendador*" under Article 1560 of the old Civil Code (now Art. 1664). This ruling is also not applicable in the instant case because in that case there was no evidence of the intention of the parties that any suspension of the lease by force majeure would be understood to extend the period of the agreement.

In resumé, there is sufficient justification for Us to conclude that the cases cited by appellee are inapplicable because the facts therein involved do not run parallel to those obtaining in the present case.

We shall now consider appellee's defense of laches. Appellee is correct in its contention that the defense of laches applies independently of prescription. Laches is different from the statute of limitations. Prescription is concerned with the fact of delay, whereas laches is concerned with the effect of delay. Prescription is a matter of time; laches is principally a question of inequity of permitting a claim to be enforced, this inequity being founded on some change in the condition of the property or the relation of the parties. Prescription is statutory; laches is not. Laches applies in equity, whereas prescription applies at law. Prescription is based on fixed time, laches is not. (30 C.J.S., p. 522; See also *Pomeroy's Equity Jurisprudence*, Vol. 2, 5th ed., 177.)

The question to determine is whether appellant Nielson is guilty of laches within the meaning contemplated by the authorities on the matter. In the leading case of *Go Chi Gun, et al. v. Go Cho, et al.*, 96 Phil., 622, this Court enumerated the essential elements of laches as follows:

"(1) conduct on the part of the defendant, or of one under whom he claims, giving rise to the situation of which complaint is made and for which the complaint seeks a remedy; (2) delay in asserting the complainant's rights, the complainant having had knowledge or notice of the defendant's conduct and having been afforded an opportunity to institute a suit; (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit; and (4) injury or prejudice to the defendant in the event relief is accorded to the complainant, or the suit is not held barred."

Are these requisites present in the case at bar?

The first element is conceded by appellant Nielson when it claimed that defendant refused to pay its management fees, its percentage of profits and refused to allow it to resume the management operation.

Anent the second element, while it is true that appellant Nielson knew since 1945 that appellee Lepanto has refused to permit it to resume management and that since 1948 appellee has resumed operation of the mines and it filed its complaint only on February 6, 1958, there being apparent delay in filing the present action, We find the delay justified and as such cannot constitute laches. It appears that appellant had not abandoned its right to operate the mines for even before the termination of the suspension of the agreement as early as January 20, 1946[12] and even before March 10, 1945, it already claimed its right to the extension of the contract[13] and it pressed its claim for the balance of its share in the profits from the 1941 operation[14] by reason of which negotiations had taken place for the settlement of the claim[15] and it was only on June 25, 1957 that appellee finally denied the claim. There is, therefore, only a period of less than one year that had elapsed from the date of the final denial of the claim to the date of the filing of the complaint, which certainly cannot be considered as unreasonable delay.

The third element of laches is absent in this case. It cannot be said that appellee Lepanto did not know that appellant would assert its rights on which it based its suit. The evidence shows that Nielson had been claiming for sometime its rights under the contract, as already shown above.

Neither is the fourth element present, for if there has been some delay in bringing the case to court it was mainly due to the attempts at arbitration and negotiation made by both parties. If Lepanto's documents were lost, it was not caused by the delay of the filing of the suit but because of the war.

Another reason why appellant Nielson cannot be held guilty of laches is that the delay in the filing of the complaint in the present case was the inevitable result of the protracted negotiations between the parties concerning the settlement of their differences. It appears that Nielson asked for arbitration[16] which was granted. A committee consisting of Messrs. DeWitt, Farnell and Blessing was appointed to act on said differences but Mr. DeWitt always tried to evade the issue[17] until he was taken ill and died. Mr. Farnell offered to Nielson the sum of P13,000.58 by way of compromise of all its claim arising from the management contract[18] but apparently the offer was refused. Negotiations continued with the exchange of letters between the parties but with no satisfactory result.[19] It can be said that the delay due to protracted negotiations was caused by both parties. Lepanto, therefore, cannot be permitted to take advantage of such delay or to question the propriety of the action taken by Nielson. The defense of laches is an equitable one and equity should be applied with an even hand. A person will not be permitted to take advantage of, or to question the validity, or propriety of, any act or omission of another which was committed or omitted upon his own request or was caused by his conduct (*R. H. Stearns Co. v. United States*, 291 U.S. 54, 78 L. Ed., 647, 54 S. Ct., 325; *United States v. Henry Frentiss & Co.*, 288 U.S. 73, 77 L. Ed., 626, 53 S. Ct., 283).

Had the action of Nielson prescribed? The court a quo held that the action of Nielson is already barred by the statute of limitations, and that ruling is now assailed by the appellant in this appeal. In urging that the court a quo erred in reaching that conclusion the appellant has discussed the issue with reference to particular claims.

The first claim is with regard to the 10% share in profits of 1941 operations. Inasmuch as appellee Lepanto alleges that the correct basis of the computation of the sharing in the net profits shall be as provided for in Clause V of the Management Contract, while appellant Nielson maintains that the basis should be what is contained in the minutes of the special meeting of the Board of Directors of Lepanto on August 21, 1940,[20] this question must first be elucidated before the main issue is discussed.

The facts relative to the matter of profit sharing follow: In the management contract entered into between the parties on January 30, 1937, which was renewed for another five years, it was stipulated that Nielson would receive a compensation of P2,500.00 a month plus 10% of the net profits from the operation of the properties for the preceding month. In 1940, a dispute arose regarding the computation of the 10% share of Nielson in the

profits. The Board of Directors of Lepanto, realizing that the mechanics of the contract was unfair to Nielson, authorized its President to enter into an agreement with Nielson modifying the pertinent provision of the contract effective January 1, 1940 in such a way that Nielson shall receive (1) 10% of the dividends declared and paid, when and as paid, during the period of the contract and at the end of each year, (2) 10% of any depletion reserve that may be set up, and (3) 10% of any amount expended during the year out of surplus earnings for capital account.[21] Counsel for the appellee admitted during the trial that the extract of the minutes as found in Exhibit B is a faithful copy from the original.[22] Mr. George Scholey testified that the foregoing modification was duly agreed upon.[23]

Lepanto claims that this new basis of computation should be rejected (1) because the contract was clear on the point of the 10% share and it was so alleged by Nielson in its complaint, and (2) the minutes of the special meeting held on August 21, 1940 was not signed.

It appearing that the issue concerning the sharing of the profits had been raised in appellant's complaint and evidence on the matter was introduced[24] the same can be taken into account even if no amendment of the pleading to make it conform to the evidence has been made, for the same is authorized by Section 4, Rule 17, of the old Rules of Court (now Section 5, Rule 10, of the new Rules of Court).

Coming now to the question of prescription raised by defendant Lepanto, it is contended by the latter that the period to be considered for the prescription of the claim regarding participation in the profits is only four years, because the modification of the sharing embodied in the management contract is merely verbal, no written document to that effect having been presented. This contention is untenable. The modification appears in the minutes of the special meeting of the Board of Directors of Lepanto held on August 21, 1940, it having been made upon the authority of its President, and in said minutes the terms of the modification had been specified. This is sufficient to have the agreement considered, for the purpose of applying the statute of limitations, as a written contract even if the minutes were not signed by the parties (3 A.L.R., 2d, p. 831). It has been held that a writing containing the terms of a contract if adopted by two persons may constitute a contract in writing even if the same is not signed by either of the parties (3 A.L. R., 2d, pp. 812-813). Another authority says that an unsigned agreement the terms of which are embodied in a document undonditionally accepted by both parties is a written contract (Corbin on Contracts, Vol. I, p. 85)

The modification, therefore, made in the management contract relative to the participation in the profits by appellant, as contained in the minutes of the special meeting of the Board of Directors of Lepanto held on August 21, 1940, should be considered as a written contract insofar as the application of the statutes of limitations is concerned. Hence, the action thereon prescribes within 10 years pursuant to Section 43 of Act 190.

Coming now to the facts, We find that the right of Nielson to its 10% participation in the 1941 operations accrued on December 31, 1941 and the right to commence an action thereon began on January 1, 1942 so that the action may be brought within 10 years from the latter date. It is true that the complaint was filed only on February 6, 1958, that is 16 years, 1 month and 5 days after the right of action accrued, but the action has not yet prescribed for various reasons which We will hereafter discuss.

The first reason is the operation of the Moratorium Law, for appellant's claim is undeniably a claim for money. Said claim accrued on December 31, 1941, and Lepanto is a war sufferer. Hence the claim was covered by Executive Order No. 32 of March 10, 1945. It is well-settled that the operation of the Moratorium Law suspends the running of the statute of limitations (Pacific Commercial Co. v. Aquino, G. R. No. L-10274, February 27, 1957).

This Court has held that the Moratorium Law had been enforced for 8 years, 2 months and 8 days (Tioseco v.

Day, et al., L-9944, April 30, 1957; Levy Hermanos, Inc. v. Perez, L-14487, April 29, 1960), and deducting this period from the time that had elapsed since the accrual of the right of action to the date of the filing of the complaint, the extent of which is 16 years, 1 month and 5 days, we would have less than 8 years to be counted for purposes of prescription. Hence appellant's action on Its claim of 10% on the 1941 profits has not yet prescribed.

Another reason that may be taken into account in support of the no-bar theory of appellant is the arbitration clause embodied in the management contract which requires that any disagreement as to any amount of profits before an action may be taken to court shall be subject to arbitration.[25] This agreement to arbitrate is valid and binding.[26] It cannot be ignored by Lepanto. Hence Nielson could not bring an action on its participation in the 1941 operations-profits until the condition relative to arbitration had been first complied with.[27] The evidence shows that an arbitration committee was constituted but it failed to accomplish its purpose on June 25, 1957.[28] From this date to the filing of the complaint the required period for prescription has not yet elapsed.

Nielson claims the following: (1) 10% share in the dividends declared in 1941, exclusive of interest, amounting to P17,500.00; (2) 10% in the depletion reserves for 1941; and (3) 10% in the profits for years prior to 1948 amounting to P19,764.70.

With regard to the first claim, the Lepanto's report for the calendar year of 1954[29] shows that it declared a 10% cash dividend in December, 1941, the amount of which is P175,000.00. The evidence in this connection (Exhibits L and Q) was admitted without objection by counsel for Lepanto.[30] Nielson claims 10% share in said amount with interest thereon at 6% per annum. The document (Exhibit L) was even recognized by Lepanto's President V. L. Lednicky,[31] and this claim is predicated on the provision of paragraph V of the management contract as modified pursuant to the proposal of Lepanto at the special meeting of the Board of Directors on August 21, 1940 (Exh. B), whereby it was provided that Nielson would be entitled to 10% of any dividends to be declared and paid during the period of the contract.

With regard to the second claim, Nielson admits that there is no evidence regarding the amount set aside by Lepanto for depletion reserve for 1941[32] and so the 10% participation claimed thereon cannot be assessed.

Anent the third claim relative to the 10% participation of Nielson on the sum of P197,647.08, which appears in Lepanto's annual report for 1948[33] and entered as profit for prior years in the statement of income and surplus, which amount consisted "almost in its entirety of proceeds of copper concentrates shipped to the United States during 1947", this claim should be denied because the amount is not "dividend declared and paid" within the purview of the management contract.

The fifth assignment of error of appellant refers to the failure of the lower court to order Lepanto to pay its management fees for January, 1942, and for the full period of extension amounting to P150,000.00, or P2,500. 00 a month for sixty (60) months, a total of P152,500.00 — with interest thereon from the date of judicial demand.

It is true that the claim of management fee for January, 1942 was not among the causes of action in the complaint, but inasmuch as the contract was suspended in February, 1942 and the management fees asked for included that of January, 1942, the fact that such claim was not included in a specific manner in the complaint is of no moment because an appellate court may treat the pleading as amended to conform to the evidence where the facts show that the plaintiff is entitled to relief other than what is asked for in the complaint (Alonzo v. Villamor, 16 Phil., 315). The evidence shows that the last payment made by Lepanto for management fee was for November and December, 1941.[34] If, as We have declared the management contract was suspended beginning February 1942, it follows that Nielson is entitled to the management fee for January, 1942.

Let us now come to the management fees claimed by Nielson for the period of extension. In this respect, it has

been shown that the management contract was extended from June 27, 1948 to June 26, 1953, or for a period of sixty months. During this period Nielson had a right to continue in the management of the mining properties of Lepanto and Lepanto was under obligation to let Nielson do it and to pay the corresponding management fees. Appellant Nielson insisted in performing its part of the contract but Lepanto prevented it from doing so. Hence, by virtue of Article 1186 of the Civil Code, there was a constructive fulfillment on the part of Nielson of its obligation to manage said mining properties in accordance with the contract and Lepanto had the reciprocal obligation to pay the corresponding management fees and other benefits that would have accrued to Nielson if Lepanto allowed it (Nielson) to continue in the management of the mines during the extended period of five years.

We find that the preponderance of evidence is to the effect that Nielson had insisted in managing the mining properties soon after liberation. In the report^[35] of Lepanto, submitted to its stockholders, for the period from 1941 to March 13, 1946, are stated the activities of Nielson's officials in relation to Nielson's insistence in continuing the management. This report was admitted in evidence without objection. We find the following in the report:

Mr. Blessing, in May, 1945, accompanied Clark and Stanford to San Fernando (La Union) to await the liberation of the mines. (Mr. Blessing was the Treasurer and Metallurgist of Nielson), Blessing with Clark and Stanford went to the property on July 16 and found that while the mill site had been cleared of the enemy the latter was still holding the area around the staff houses and putting up a strong defense. As a result, they returned to San Fernando and later went back to the mines on July 26. Mr. Blessing made the report, dated August 6, recommending a program of operation. Mr. Nielson himself spent a day in the mine early in December, 1945 and reiterated the program which Mr. Blessing had outlined. Two or three weeks before the date of the report, Mr. Coldren of the Nielson organization also visited the mine and told President C. A. DeWitt of Lepanto that he thought that the mine could be put in condition for the delivery of the ore within 10 days. And according to Mark Nestle, a witness of appellant, Nielson had several men including engineers to do the job in the mines and to resume the work. These engineers were in fact sent to the mine site and submitted reports of what they had done.^[36]

On the other hand, appellee claims that Nielson was not ready and able to resume the work in the mines, relying mainly on the testimony of Dr. Juan Nabong, former secretary of both Nielson and Lepanto, given in the separate case of *Nancy Irving Romero v. Lepanto Consolidated Mining Company* (Civil Case No. 652, CFI, Baguio), to the effect that as far as he knew "Nielson and Company had not attempted to operate the Lepanto Consolidated Mining Company because Mr. Nielson was not here in the Philippines after the last war. He came back later," and that Nielson and Company had no money nor stocks with which to start the operation. He was asked by counsel for the appellee if he had testified that way in Civil Case No. 652 of the Court of First Instance of Baguio, and he answered that he did not confirm it fully. When this witness was asked later by the same counsel whether he confirmed that testimony, he said that when he testified in that case he was not fully aware of what happened and that after he learned more about the officials of the corporation it was only then that he became aware that Nielson had really sent his men to the mines along with Mr. Blessing and that he was aware of this fact personally. He further said that Mr. Nielson was here in 1945 and "he was going out and contacting his people."^[37]

Lepanto admits, in its own brief, that Nielson had really insisted in taking over the management and operation of the mines but that it (Lepanto) unequivocally refused to allow it. The following is what appears in the brief of the appellee:

"It was while defendant was in the midst of the rehabilitation work which was fully described earlier, still reeling under the terrible devastation and destruction wrought by war on its mine that Nielson insisted in taking over the management and operation of the mine. Nielson thus put Lepanto in a position where defendant, under

the circumstances, had to refuse, as in fact it did, Nielson's insistence in taking over the management and operation because, as was obvious, it was impossible, as a result of the destruction of the mine, for the plaintiff to manage and operate the same and because, as provided in the agreement, the contract was suspended by reason of the war. The stand of Lepanto in disallowing Nielson to assume again the management of the mine in 1945 was unequivocal and cannot be misinterpreted, *infra*." [38]

Based on the foregoing facts and circumstances, and Our conclusion that the management contract was extended, We believe that Nielson is entitled to the management fees for the period of extension. Nielson should be awarded on this claim sixty times its monthly pay of P2,500.00, or a total of P150,000.00.

In its sixth assignment of error Nielson contends that the lower court erred in not ordering Lepanto to pay it (Nielson) the 10% share in the profits of operation realized during the period of five years from the resumption of its post-war operations of the Mankayan mines," in the total sum of P2,403,053.20 with interest thereon at the rate of 6% per annum from February 6, 1958 until full payment. [39]

The above claim of Nielson refers to four categories, namely: (1) cash dividends; (2) stock dividends; (3) depletion reserves; and (4) amount expended on capital investment.

Anent the first category, Lepanto's report for the calendar year 1954 [40] contains a record of the cash dividends it paid up to the date of said report, and the post-war dividends paid by it corresponding to the years included in the period of extension of the management contract are as follows:

"POST-WAR

8

10%

November 1949

P2,000,000.00

9

10%

July 1950

3,000,000.00

10

10%

October 1950

5,000,000.00

11

20%

December 1950

1,000,000.00

12

20%

March 1951

1,000,000.00

13

20%

June 1951

1,000,000.00

14

20%

September 1951

1,000,000.00

15

40%

December 1951

2,000,000.00

16

20%

March 1952

1,000,000.00

17

20%

May 1952

1,000,000.00

18

20%

July 1952

1,000,000.00

19

20%

September 1952

1,000,000.00

20

20%

December 1952

1,000,000.00

21

20%

March 1953

1,000,000.00

22

20%

June 1953

1,000,000.00

P14,000,000.00"

According to the terms of the management contract as modified, appellant is entitled to 10% of the P14,000,000.00 cash dividends that had been distributed, as stated in the above-mentioned report, or the sum of P1,400,000.00.

With regard to the second category, the stock dividends declared by Lepanto during the period of extension of the contract are: On November 28, 1949, the stock dividend declared was 50% of the outstanding authorized capital of P2,000,000.00 of the company, or stock dividends worth P1,000,000.00; and on August 22, 1950, the dividend declared was 66-2/3% of the standing authorized capital of P3,000,000.00 of the company, or stock dividends worth P2,000,000.00.[41]

Appellant's claim that it should be given 10% of the cash value of said stock dividends with interest thereon at 6% from February 6, 1958 cannot be granted for that would not be in accordance with the management contract which entitles Nielson to 10% of any dividends declared paid, when and as paid. Nielson, therefore, is entitled to 10% of the stock dividends and to the fruits that may have accrued to said stock dividends pursuant to Article 1164 of the Civil Code. Hence to Nielson is due shares of stock worth P100,000.00, as per stock dividends declared on November 28, 1949 and all the fruits accruing to said shares after said date; and also shares of stock worth P200,000.00 as per stock dividends declared on August 20, 1950 and all fruits accruing thereto after said date.

Anent the third category, the depletion reserve appearing in the statement of income and surplus submitted by Lepanto corresponding to the years covered by the period of extension of the contract, may be itemized as follows:

In 1948, as per Exh. F. p. 36 and Exh. Q, p. 5, the depletion reserve set up was P11,602.80.

In 1949, as per Exh. G, p. 49 and Exh. Q, p. 5, the depletion reserve set up was P33,556.07.

In 1950, as per Exh. H, p. 37, Exh. Q, p. 6 and Exh. I, p. 37, the depletion reserve set up was P84,963.30.

In 1951 as per Exh. I, p. 45, Exh. Q, p. 6, and Exh. J, p. 45, the depletion reserve set up was P129,089.88.

In 1952, as per Exh. J, p. 45, Exh. Q, p. 6 and Exh. K, p. 41, the depletion reserve was P147,141.54.

In 1953, as per Exh. K, p. 41, and Exh. Q, p. 6, the depletion reserve set up was P277,493.25.

Regarding the depletion reserve set up in 1948 it should be noted that the amount given was for the whole year. Inasmuch as the contract was extended only for the last half of the year 1948, said amount of P11,602.80 should be divided by two, and so Nielson is only entitled to 10% of the half amounting to P5,801.40.

Likewise, the amount of depletion reserve for the year 1953 was for the whole year and since the contract was extended only until the first half of the year, said amount of P277,493.25 should be divided by two, and so Nielson is only entitled to 10% of the half amounting to — P138,746.62. Summing up the entire depletion reserves, from the middle of 1948 to the middle of 1953, we would have a total of P539,298.81, of which Nielson is entitled to 10%, or to the sum of P53,928.88.

Finally, with regard to the fourth category, there is no figure in the record representing the value of the fixed assets as of the beginning of the period of extension on June 27, 1948. It is possible, however, to arrive at this amount needed by adding to the value of the fixed assets as of December 31, 1947 one-half of the amount spent for capital account in the year 1948. As of December 31, 1947, the value of the fixed assets was P1,061,878.88[42] and as of December 31, 1948, the value of the fixed assets was P3,270,408.07.[43] Hence, the increase in the value of the fixed assets for the year 1948 was P2,208,529.19, one-half of which is P1,104,264.59, which amount represents the expenses for capital account for the first half of the year 1948. If to this amount we add the fixed assets as of December 31, 1947 amounting to P1,061,878.88, we would have a total of P2,166,143.47 which represents the fixed assets at the beginning of the second half of the year 1948.

There is also no figure representing the value of the fixed assets when the contract, as extended, ended on June 26, 1953; but this may be computed by getting one-half of the expenses for capital account made in 1953 and adding the same to the value of the fixed assets as of December 31, 1952. The value of the fixed assets as of December 31, 1953 is P9,755,840.41[44] while the value of the fixed assets as of December 31, 1952 is P8,463,741.82, the difference being P1,292,098.69. One-half of this amount is P646,049.34 which would represent the expenses for capital account up to June, 1953. This amount added to the value of the fixed assets as of December 31, 1952 would give a total of P9,109,791.16 which would be the value of fixed assets at the end of June, 1953.

The increase, therefore, of the value of the fixed assets of Lepanto from June, 1948 to June, 1953 is P6,943,647.69, which amount represents the difference between the value of the fixed assets of Lepanto in the year 1948 and in the year 1953, as stated above. On this amount Nielson is entitled to a share of 10%, or to the amount of P694,364.76.

Considering that most of the claims of appellant have been entertained, as pointed out in this decision, We believe that appellant is entitled to be awarded attorney's fees, especially when, according to the undisputed testimony of Mr. Mark Nestle, Nielson obliged himself to pay attorney's fees in connection with the institution of the present case. In this respect, We believe, considering the intricate nature of the case, an award of fifty thousand (P50,000.00) pesos for attorney's fees would be reasonable.

IN VIEW OF THE FOREGOING CONSIDERATIONS, We hereby reverse the decision of the court a quo and enter in lieu thereof another, ordering the appellee Lepanto to pay appellant Nielson the different amounts as

specified herein below:

- (1) 10% share of cash dividends of December, 1941 in the amount of P17,500.00, with legal interest thereon from the date of the filing of the complaint;
 - (2) management fee for January, 1942 in the amount of P2,500.00, with legal interest thereon from the date of the filing of the complaint;
 - (3) management fees for the sixty-months period of extension of the management contract, amounting to P150,000.00, with legal interest from the date of the filing of the complaint;
 - (4) 10% share in the cash dividends during the period of extension of the management contract, amounting to P1,400,000.00, with legal interest thereon from the date of the filing of the complaint;
 - (5) 10% of the depletion reserve set up during the period of extension, amounting to P53,928.88, with legal interest thereon from the date of the filing of the complaint;
 - (6) 10% of the expenses for capital account during the period of extension, amounting to P694,364.76, with legal interest thereon from the date of the filing of the complaint;
 - (7) to issue and deliver to Nielson and Co. Inc. shares of stock of Lepanto Consolidated Mining Co. at par value Equivalent to the total of Nielson's 10% share in the stock dividends declared on November 28, 1949 and August 22, 1950, together with all cash and stock dividends, if any, as may have been declared and issued subsequent to November 28, 1949 and August 22, 1950, as fruits that accrued to said shares;
- If sufficient shares of stock of Lepanto's are not available to satisfy this judgment, defendant-appellee shall pay plaintiff-appellant an amount in cash equivalent to the market value of said shares at the time of default (12 C.J.S., p. 130), that is, all shares of stock that should have been delivered to Nielson before the filing of the complaint must be paid at their market value as of the date of the filing of the complaint; and all shares, if any, that should have been delivered after the filing of the complaint at the market value of the shares at the time Lepanto disposed of all its available shares, for it is only then that Lepanto placed itself in condition of not being able to perform its obligation (Article 1160, Civil Code);
- (8) the sum of P50,000.00 as attorney's fees; and
 - (9) the costs.

IT IS SO ORDERED.

Concepcion, C.J., Regala, Makalintal, Bengzon, J.P., Sanchez and Ruiz Castro, JJ., concur.

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- [1] Exhibit D.
- [2] Par. 15, Defendant's Answer, pp. 63-64, Record on Appeal.
- [3] Page 7, Exhibit D.
- [4] Page 1, Exhibit F-1.
- [5] Appellant's Brief, pp. 86-87.
- [6] T.s.n., June 27, 1962, p. 25.
- [7] T.s.n., July 3, 1962, pp. 24-25.

- [8] Page 4, Exhibit B.
- [9] Exhibit O.
- [10] Exh. B, p. 3; Exh. N, p. 4.
- [11] Page 7, Record on Appeal.
- [12] Exhibit P.
- [13] Exhibit B, p. 4.
- [14] Exhibit P.
- [15] Exhibit U.
- [16] T.s.n., July 3, 1962, p. 37.
- [17] Exhibit 3, p. 3.
- [18] Exhibit U.
- [19] Exhibit V to V-5.
- [20] Exhibit B, B-1, pp. 2-3.
- [21] Exhibits B, B-1, pp. 2-3.
- [22] T.s.n., July 3, 1962, p. 7.
- [23] T.s.n., June 27, 1962, p. 14.
- [24] Exhibit B is admitted as evidence without objection by counsel for the appellee, t.s.n., October 24, 1962, p. 3.
- [25] Clause XIII, Exh. C; See Record on Appeal pp. 54-55.
- [26] Chong v. Assurance Corp., 8 Phil., 399.
- [27] 13-A C.J.S., pp. 918, 919; Chitty on Contracts, 22nd ed., 1961, Vol. I, pp. 315-316.
- [28] Exhibit V-6.
- [29] Exhibit L, p. 3; Exhibit Q, p. 7.
- [30] T.s.n., October 24, 1962, p. 3.
- [31] T.s.n., July 6, 1962, p. 34.
- [32] Appellant's Brief, p. 59.
- [33] Exhibit F, p. 36.
- [34] Lepanto's Exhibit 1.
- [35] Exhibit D, pp. 7, 11, 12.
- [36] T.s.n., July 3, 1962, pp. 32-34.
- [37] T.s.n., November 29, 1962, pp. 6-9.
- [38] Appellee's Brief, pp. 9-10.

[39] Appellant's Brief, pp. 97, 98, 111.

[40] Exhibit L, p. 3.

[41] Exhibit L, p. 2.

[42] Exhibit E, p. 6. [43] Exhibit E, p. 6.

[44] Exhibit K, p. 39.

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