

ANTONIO C. GOQUIOLAY AND THE PARTNERSHIP ‘TAN SIN AN AND ANTONIO C. GOQUIOLAY”, PLAINTIFFS AND APPELLANTS VS. WASHINGTON Z. SYCIP, ET AL., DEFENDANTS AND APPELLEES.

G. R. No. L-11840. July 26, 1960

Ponente: REYES, J.B.L., J.

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REYES, J.B.L., J.:

Direct appeal from the decision of the Court of First Instance of Davao (the amount involved being more than P200,000) dismissing the plaintiffs-appellants' complaint.

From the stipulation of facts of the parties and the evidence on record, it would appear that on May 29, 1940, Tan Sin An and Antonio C. Goquiolay entered into a general commercial partnership under the partnership name "Tan Sin An and Antonio C. Goquiolay", for the purpose of dealing in real estate. The partnership had a capital of P30,000.00, P18,000.00 of which was contributed by Goquiolay and P12,000.00 by Tan Sin An. The agreement lodged upon Tan Sin An the sole management of the partnership affairs, stipulating that—

"III. The co-partnership shall be composed of said Tan Sin An as sole managing and partner (sic), and Antonio C. Goquiolay as co-partner.

"VIII. The affairs of the co-partnership shall be managed exclusively by the managing and partner (sic) or by his authorized agent, and it is expressly stipulated that the managing and partner (sic) may delegate the entire management of the affairs of the co-partnership by irrevocable power of attorney to any person, firm or corporation he may select upon such terms as regards compensation as he may deem proper, and vest in such person, firm or corporation full power and authority, as the agent of the co-partnership and in his name, place and stead to do anything for it or on his behalf which he as such managing and partner (sic) might do or cause to be done.

"IX. The co-partner shall have no voice or participation in the management, of the affairs, of the co-partnership; but he may examine its accounts once every six (6) months at any time during ordinary business hours, and in accordance with the provisions of the Code of Commerce." (Articles of Co-Partnership).

The lifetime of the partnership was fixed at ten (10) years and also that—

"In the event of the death of any of the partners at any time before the expiration of said term, the co-partnership shall not be dissolved but will have to be continued and the deceased partner shall be represented by his heirs or assigns in said co-partnership" (Art. XII, Articles of Co-Partnership).

However, the partnership could be dissolved and its affairs liquidated at any time upon mutual agreement in writing of the partners (Art. XIII, articles of Co-Partner ship).

On May 31, 1940, Antonio Goquiolay executed a general power of attorney to this effect:

"That besides the powers and duties granted the said Tan Sin An by the articles of co-partnership of said co-partnership "Tan Sin An and Antonio Goquiolay", the said Tan Sin An should act as my Manager for said co-partnership for the full period of the term for which said co-partnership was organized or until the whole period that the said capital of P30,000.00 of the co-partnership should last, to carry on to the best advantage and interest of the Said co-partnership, to make and execute, sign, seal and deliver for the co-partnership, and in its name, all bills, bonds, notes, specialties, and trust receipts or other instruments or documents in writing whatsoever kind or nature which" shall be necessary to the proper conduction of the said businesses, including the power to mortgage and pledge real and personal properties, to secure the obligation of the co-partnership, to buy real or personal properties for cash or upon such terms as he may deem advisable, to sell personal or real properties, such as lands and buildings of the co-partnership in any manner he may deem advisable for the best interest of said co-partnership, to borrow money on behalf of the co-partnership and to issue promissory notes for the repayment thereof, to deposit the fund's of the co-partnership in any local bank or elsewhere and to draw checks against funds so deposited * * *.

On May 29, 1940, the plaintiff partnership "Tan Sin An and Goquiolay" purchased the three (3) parcels of land, known as Lots Nos. 526, 441 and 521 of the Cadastral Survey of Davao, subject-matter of the instant litigation, assuming the payment of a mortgage obligation of. P25,000.00, payable to "La Urbana Sociedad Mutua de Construction y Prestamos" for a period of ten (10) years, with 10% interest per annum. Another 46 parcels were purchased by Tan Sin An in his individual capacity, and he assumed payment of a mortgage debt thereon for P35,000.00, with interest. The down payment and the amortization were advanced by Yutivo and Co., for the account of the purchasers.

On September 25, 1940, the two separate obligations were consolidated in an instrument executed by the partnership and Tan Sin An, whereby the entire 49 lots were mortgaged in favor of the "Banco Hipotecario de Filipinas" (as successor to "La Urbana") and the covenantors bound themselves to pay, jointly and severally, the remaining balance of their unpaid accounts amounting to P52,282.80 within eight 8 years, with 8% annual interest, payable in 96 equal monthly installments.

On June 26, 1942, Tan Sin An died, leaving as surviving heirs his widow, Kong Chai Pin, and four minor children, namely: Tan L. Cheng, Tan L. Hua, Tan C. Chiu and Tan K. Chuan". Defendant Kong Chai Pin was appointed administratrix of the intestate estate of her deceased husband.

In the meantime, repeated demands for payment were made by the Banco Hipotecario on the partnership and on Tan Sin An. In March, 1944, the defendant Sing Yee and Cuan, Co., Inc., upon request of defendant Yutivo Sons Hardware Co., paid the remaining balance of the mortgage debt, and the mortgage was cancelled.

Then in 1946, Yutivo Sons Hardware Co. and Sing Yee and Cuan Co., Inc. filed their claims in the intestate proceedings of Tan Sin An for P62,415.91 and P54,310.13, respectively, as alleged obligations of the partnership "Tan Sin An and Antonio C. Goquiolay" and Tan Sin An, for advances, interests and taxes paid in amortizing and discharging their obligations to "La Urbana" and the "Banco Hipotecario". Disclaiming knowledge of said claims at first, Kong Chai Pin later admitted the claims in her amended answer and they were accordingly approved by the Court.

On March 29, 1949, Kong Chai Pin filed a petition with the probate court for authority to sell all the 49 parcels of land to Washington Z. Sycip and Betty Y. Lee, for the purpose primarily of settling the aforesaid debts of Tan Sin An and the partnership. Pursuant to a court order of April 2, 1949, the administratrix executed on April 4, 1949, a deed of sale^[1] of the 49 parcels of land to the defendants Washington Sycip and Betty Lee in consideration of P37,000.00 and of vendees' assuming payment of the claims filed by Yutivo Sons Hardware Co. and Sing Yee and Cuan Co., Inc. Later, in July, 1949, defendants Sycip and Betty Lee executed in favor of the Insular Development Co., Inc. a deed of transfer covering the said 49 parcels of land.

Learning about the sale to Sycip and Lee, the surviving partner Antonio Goquiolay filed, on or about July 25, 1949, a petition in the intestate proceedings seeking to set aside the order of the probate court approving the sale in so far as his interest over the parcels of land sold was concerned. In its order of December 29, 1949, the probate court annulled the sale executed by the administratrix with respect to the 60% interest of Antonio Goquiolay over the properties sold. Kong Chai Pin appealed to the Court of Appeals, which court later certified the case to us (93 Phil., 413; 49 Off. Gaz. [7] 2307). On June 30, 1953, we rendered decision setting aside the orders of the probate court complained of and remanding the case for new trial, due to the non-inclusion of indispensable parties. Thereafter, new pleadings were filed.

The second amended complaint in the case at bar prays, among other things, for the annulment of the sale in favor of Washington Sycip and Betty Lee, and their subsequent conveyance in favor of the Insular Development Co., Inc., in so far as the three (3) lots owned by the plaintiff partnership are concerned. The answer averred the validity of the sale by Kong Chai Pin as successor partner, in lieu of the late Tan Sin An. After hearing, the complaint was dismissed by the lower court in its decision dated October 30, 1956; hence, this appeal taken directly to us by the plaintiffs, as the amount involved is more than P200,000.00. Plaintiffs-appellants assign as errors that—

I.—The lower court erred in holding that Kong Chai Pin became the managing partner of the partnership upon the death of her husband, Tan Sin An, by virtue of the articles of Partnership executed between Tan Sin An and Antonio Goquiolay, and the general power of attorney granted by Antonio Goquiolay.

II.—The lower court erred in holding that Kong Chai Pin could act alone as sole managing partner in view of the minority of the other heirs.

III.—The lower court erred in holding that Kong Chai Pin was the only heir qualified to act as managing partner.

IV.—The lower court erred in holding that Kong Chai Pin had authority to sell the partnership properties by virtue of the articles of partnership and the general power of attorney granted to Tan Sin An in order to pay the partnership indebtedness.

V.—The lower court erred in finding that the partnership did not pay its obligation to the Banco Hipotecario.

VI.—The lower court erred in holding that the consent of Antonio Goquiolay was not necessary to consummate the sale of the partnership properties.

VII.—The lower court erred in finding that Kong Chai Pin managed the business of the partnership after the death of her husband, and that Antonio Goquiolay knew it.

VIII.—The lower court erred in holding that the failure of Antonio Goquiolay to oppose the management of the partnership by Kong Chai Pin estops him now from attacking the validity of the sale of the partnership properties.

IX.—The lower court erred in holding that the buyers of the partnership properties acted in good faith.

X.—The lower court erred in holding that the sale was, not fraudulent against the partnership and Antonio Goquiolay.

XI.—The lower court erred in holding that the sale was not only necessary but beneficial to the partnership.

XII.—The lower court erred in dismissing the complaint and, in ordering Antonio Goquiolay to pay the costs of suit."

There is merit in the contention that the lower court erred in holding that the widow, Kong Chai Pin, succeeded her husband, Tan Sin An, in the sole management of the partnership, upon the latter's death. While, as we

previously stated in our narration of facts, the Articles of Co-Partnership and the power of attorney executed by Antonio Goquiolay conferred upon Tan Sin An the exclusive management of the business, such power, premised as it is upon trust and confidence, was a mere personal right that terminated upon Tan's demise. The provision in the articles stating that "in the event of death of any one of the partners within the 10-year term of the partnership, the deceased partner shall be represented by his heirs", could not have referred to the managerial right given to Tan Sin An; more appropriately, it related to the succession in the proprietary interest of each partner. The covenant that Antonio Goquiolay shall have no voice or participation in the management of the partnership, being a limitation upon his right as a general partner, must be held coextensive only with Tan's right to manage the affairs, the contrary not being clearly apparent.

Upon the other hand, consonant with the articles of co-partnership providing for the continuation of the firm notwithstanding the death of one of the partners, the heirs of the deceased, by never repudiating or refusing to be bound under the said provision in the articles, became individual partners with Antonio Goquiolay upon Tan's demise. The validity of like clauses in partnership agreements is expressly sanctioned under Article 222 of the Code of Commerce.[1]

Appellants argue, however, that since the "new" members' liability in the partnership was limited merely to the value of the share or estate left by the deceased Tan Sin An, they became no more than limited partners and, as such, were disqualified from the management of the business under Article 148 of the Code of Commerce. Although ordinarily, this effect follows from the continuance of the heirs in the partnership,[2] it was not so with respect to the widow Kong Chai Pin, who, by her affirmative actions, manifested her intent to be bound by the partnership agreement not only as a limited but as a general partner. Thus, she managed and retained possession of the partnership properties and was admittedly deriving income therefrom up to and until the same were sold to Washington Sycip and Betty Lee. In fact, by executing the deed of sale of the parcels of land in dispute in the name of the partnership, she was acting no less than as a managing partner. Having thus preferred to act as such, she could be held liable for the partnership debts and liabilities as a general partner, beyond what she might have derived only from the estate of her deceased husband. By allowing her to retain control of the firm's property from 1942 to 1949, plaintiff estopped himself to deny her legal representation of the partnership, with the power to bind it by proper contracts.

The question now arises as to whether or not the consent of the other partners was necessary to perfect the sale of the partnership properties to Washington Sycip and Betty Lee. The answer is, we believe, in the negative. Strangers dealing with a partnership have the right to assume, in the absence of restrictive clauses in the co-partnership agreement, that every general partner has power to bind the partnership, specially those partners acting with ostensible authority. And so, we held in one case:

"* * * Third persons, like the plaintiff, are not bound in entering into a contract with any of the two partners, to ascertain whether or not this partner with whom the transaction is made has the consent of the other partner. The public need not make inquiries as to the agreements had between the partners. Its knowledge is enough that it is contracting with the partnership which is represented by one of the managing partners.

"There is a general presumption that each individual partner is an agent for the firm and that he has authority to bind the firm in carrying on the partnership transactions/ [Mills vs. Giggle, 112 Pac., 617]

"The presumption is sufficient to permit third persons to hold the firm liable on transactions entered into by one of the members of the firm acting apparently in its behalf and within the scope of his authority.' [Le Roy vs. Johnson, 7 U.S. Law, Ed., 391] (George Litton vs. Hill & Ceron, et al., 67 Phil. 513-514)."

We are not unaware of the provision of Article 129 of the Code of Commerce to the effect that—

"If the management of the general partnership has not been limited by special agreement to any of the members, all shall have the power to take part in the direction and management of the common business, and the members present shall come to an agreement for all contracts or obligations which may concern the association." (Emphasis supplied)

but this obligation is one imposed by law on the partners among themselves, that does not necessarily affect the validity of the acts of a partner, while acting within the scope of the ordinary course of business of the partnership, as regards third persons without notice. The latter may rightfully assume that the contracting partner was duly authorized to contract for and in behalf of the firm and that, furthermore, he would not ordinarily act to the prejudice of his co-partners. The regular course of business procedure does not require that each time a third person contracts with one of the managing partners, he should inquire as to the latter's authority to do so, or that he should first ascertain whether or not the other partners had given their consent thereto. In fact, Article 180 of the same Code of Commerce provides that even if a new obligation was contracted against the express will of one of the managing partners, "it shall not be annulled for such reason, and it shall produce its effects without prejudice to the responsibility of the member or members who contracted it, for the damages they may have caused to the common fund."

Cesar Vivante (2 Tratado de Derecho Mercantil, pp. 114115) points out:

"367. Primera hipotesis.—A falta de pactos especiales, la facultad de administrar corresponde a cada socio personalmente. No hay que esperar ciertamente concordia con tantas cabezas, y para cuando no vayan de acuerdo, la disciplina delCodigo no ofrece un sistema eficaz que evite los inconvenientes. Pero, ante el silencio del contrato, debia quiza el legislador privar de la administracion a uno de los socios en beneficio del otro? Seria una arbitrariedad. Debera quiza declarar nula la Sociedad que no haya elegido Administrador? El remedio seria peor que el mal. Deberd, tal vez, pretender que todos los socios concurren en todo acto de la Sociedad? Pero este concurso de todos habria reducido a la impotencia la administracion, que es asunto de todos los dias y de todas horas. Hubieran sido disposiciones menos oportunas que lo adoptado por elCodigo, el cual se confia al espiritu de reciproca confianza que deberia animar la colaboracion de los socios, y en la ley inflexible de responsabilidad que implies comunidad en los intereses de los mismos.

En esta hipotesis, cada socio puede ejercer todos los negocios comprendidos en el contrato social sin dar de ello noticia a los otros, porque cada uno de ellos ejerce la administracion en la totalidad de sus relaciones, salvo su responsabilidad en el caso de una administracion culpable. Si debiera dar noticia, el beneficio de su simul[^]&nia actividad, frecuentemente distribuida en lugares y en tiempos diferentes, se echaria a perder. Se objetara el que de esta forma, el derecho de oposicion de cada uno de los socios puede quedar frustrado. Pero se puede contestar que este derecho de oposicion concedido por la ley como un remedio excepcional, debe subordinate al derecho de ejercer el oficio de Administrador, que elCodigo concede sin limite: 'se presume que los socios se han concedido reciprocamente la facultad de administrar uno para otro.' Se harfa precipitar esta hipdtesis en la otra de una administracion colectiva (art. 1.721, Codigo Civil) y se acabaria con pedir el consentimiento, a lo menos tacito, de todos los socios—lo que el Cddigo excluye....., si se obligase al socio Administrador a dar noticia previa del negocio a los otros, a fin de que pudieran oponerse si no consintieran."

Commenting on the same subject, Gay de Montella (Codigo de Comercio, Tomo II, 147-148) opines:

"Para obligar a las Companias enfrente de terceros (art. 128 delCodigo), no es bastante que los actos y contratos hayan sido ejecutados por un socio o varios en nombre colectivo, sino que es preciso el concurso de estos dos elementos, uno, que el socio o socios tengan reconocida la facultad de administrar la Companla, y otro, que el acto o contrato haya teido ejecutado en nombre de la Sociedad y usando de su fima social. Asi es que toda obligacion contraida bajo la razon social, se presume contraida por la Companfa. Esta presuncion es impuesta por motivos de necesidad practica. El tercero no puede cada vez que trata con la Compania, inquirir si realmente el negocio concierne a la Sociedad. La presuncion es juris tantum y no juris et de jure, de modo

que si el gerente suscribe bajo la razon social una obligacion que no interesa a la Sociedad, este podra rechazar la accion del tercero probando que el acreedor conocia que la obligacion no tenia ninguna relacion con ella. Si tales actos y contratos no comportasen la concurrencia de ambos elementos, serfan nulos y podria decretarse la responteabilidad civil o penal contra sus autores.

En el caso que tales actos o contratos hayan sido tacitamente aprobados por la Compania, o contabilizados en sus libros, si el acto o contrato ha sido convalidado sin protesta y se trata de acto o contrato que ha producido beneficio social, tendria plena validez, aun cuando le faltase algunos o ambos de aquellos requisitos antes senalados.

Cuando los Estatutos o la escritura social no contienen ninguna clausula relativa al nombramiento o designacion de uno o mas de un socio para administrar la Compania (art. 129 delCodigo) todos tienen por un igual el derecho de concurrir a la decision y manejo de los negocios comunes. * * *

Although the partnership under consideration is a commercial partnership and, therefore, to be governed by the Code of Commerce, the provisions of the old Civil Code may give us some light on the right of one partner to bind the partnership. States Art. 1695 thereof:

"Should no agreement have been made with respect to the form of management, the following rules shall be observed:

- All the partners shall be considered agents, and whatever any one of them may do individually shall bind, the partnership; but each one may oppose any act of the others before it has become legally binding."

The records fail to disclose that appellant Goquiolay made any opposition to the sale of the partnership realty to Washington Z. Sycip and Betty Lee; on the contrary, it appears that he (Goquiolay) only interposed his objections after the deed of conveyance was executed and approved by the probate court, and, consequently, his opposition came too late to be effective.

Appellants assail the correctness of the amounts paid for the account of the partnership as found by the trial court. This question, however, need not be resolved here, as in the deed of conveyance executed by Kong Chai Pin, the purchasers Washington Sycip and Betty Lee assumed, as part consideration of the purchase, the full claims of the two creditors, Sing Yee and Cuan Co., Inc. and Yutivo Sons Hardware Co.

Appellants also question the validity of the sale covering the entire firm realty, on the ground that it, in effect, threw the partnership into dissolution, which requires consent of all the partners. This view is untenable. That the partnership was left without the real property it originally had will not work its dissolution, since the firm was not organized to exploit these precise lots but to engage in buying and selling real estate, and "in general real estate agency and brokerage business". Incidentally, it is to be noted that the payment of the solidary obligation of both the partnership and the late Tan Sin An, leaves open the question of accounting and contribution between the co-debtors, that should be ventilated separately.

Lastly, appellants point out that the sale of the partnership properties was only a fraudulent device by the appellees, with the connivance of Kong Chai Pin, to ease out Antonio Goquiolay from the partnership. The "device", according to the appellants, started way back sometime in 1945, when one Yu Khe Thai sounded out Antonio Goquiolay on the possibility of selling his share in the partnership; and upon his refusal to sell, was followed by the filing of the claims of Yutivo Sons Hardware Co. and Sing Yee and Cuan Co., Inc. in the intestate estate proceedings of Tan Sin An. As creditors of Tan Sin An and the plaintiff partnership (whose liability was alleged to be joint and several), Yutivo Sons Hardware Co. and Sing Yee and Guan Co., Inc. had every right to file their claims in the intestate proceedings. The denial of the claims at first by Kong Chai Pin (for lack of sufficient knowledge) negatives any conspiracy on her part in the alleged fraudulent scheme, even if she

subsequently decided to admit their validity after studying the claims and finding it best to admit the same. It may not be amiss to remark that the probate court approved the questioned claims.

There is complete failure of proof, moreover, that the price for which the properties were sold was unreasonably low, or in any way unfair, since appellants presented no evidence of the market value of the lots as of the time of their sale to appellees Sycip and Lee. The alleged value of P31,056,58 in May of 1955 is no proof of the market value in 1949, specially because in the interval, the new owners appear to have converted the land into a subdivision, which they could not do without opening roads and otherwise improving the property at their own expense. Upon the other hand, Kong Chai Pin hardly had any choice but to execute the questioned sale, as it appears that the partnership had neither cash nor other properties with which to pay its obligations. Anyway, we cannot consider seriously the inferences freely indulged in by the appellants as allegedly indicating fraud in the questioned transactions, leading to the conveyance of the lots in dispute to the appellee Insular Development Co., Inc.

Wherefore, finding no reversible error in the appealed judgment, we affirm the same, with costs against appellant Antonio doquiolay.

Padilla, Montemayor, Baustista Angelo, Labrador, Concepcion, Endeneia, Barrera, and Gutierrez-David, JJ., concur.

Judgment affirmed.

[1] In her capacity as administratrix of the intestate estate and as a managing partner of the plaintiff partnership (Exh. "AA-6").

[1] "General and limited partnership shall furthermore be dissolved by reason of the following cases: (1) The death of one of the general partners, if the partnership contract does not contain an express provision for the continuation of the heirs of the deceased partner in the partnership or for the continuation of the partnership among the surviving partners". (See also *Codigo Civil*, Manresa, Vol XI, pp. 423-424, 1950 ed.)

[2] Gay de Montella, *Tratado Practico de Sociedades Mercantiles*, Vol. II, p. 289; *Tratado de Derecho Mercantil*, Vivante, Vol. II, pp. 493-494.

RESOLUTION

December 10, 1963

REYES, J. B. L., J.:

The matter now pending is the appellant's motion for reconsideration of our main decision, wherein we have upheld the validity of the sale of the lands owned by the partnership Goquiolay & Tan Sin An, made in 1949 by the widow of the managingpartner, Tan Sin An (executed in her dual capacity of Administratrix of her /husband's estate and as partner, in lieu of the husband), in favor of buyers Washington Sycip and Betty Lee for the following consideration:

Cash paid

P37,000.00

Debts assumed by purchaser:

To Yutivo

62,415.91

To Sinsr Yee Cuan & Co

54,310.13

TOTAL

P153,726.04

Appellant Goquiolay, in his motion for reconsideration, insists that, contrary to our holding, Kong Chai Pin, widow of the deceased partner Tan Sin An, never became more than a limited partner, incapacitated by law to manage the affairs of the partnership; that the testimony of her witnesses Young and Lim belies that she took over administration of the partnership property; and that, in any event, the sale should be set aside because it was executed with the intent to defraud appellant of his share in the properties sold.

Three things must be always held in mind in the discussion of this motion to reconsider, being basic and beyond controversy:

(a) That we are dealing here with the transfer of partnership property by one partner, acting in behalf of the firm, to a stranger. There is no question between partners inter se, and this aspect of the case was expressly reserved in the main decision of 26 July 1960;

(b) That the partnership was expressly organized "to engage in real estate business, either by buying and selling real estate". The Articles of co-partnership, in fact, expressly provided that:

"IV. The object and purpose of the co-partnership are as follows:

- To engage in real estate business, either by buying and selling real estates; to subdivide real estates into lots for the purpose of leasing and selling them.* * *

(c) That the properties sold were not part of the contributed capital (which was in cash) but land precisely acquired to be sold, although subject to a mortgage in favor of the original owners, from whom the partnership had acquired them.

With these points firmly in mind, let us turn to the points insisted upon by appellant.

It is first averred that there is "not one iota of evidence" that Kong Chai Pin managed and retained possession of the partnership properties. Suffice it to point out that appellant Goquiolay himself admitted that—

"* * * Mr. Yu Eng Lai asked me if I can just let Mrs. Kong Chai Pin continue to manage the properties (as) she had no other means of income. Then, I said, because I wanted to help Mrs. Kong Chai Pin, she could just do it and besides I am not interested in agricultural lands. I allowed her to take care of the properties in order to help her and because I believe in God and I wanted to help her."

Q.— So the answer to my question is you did not take any steps?

A.— I did not.

Q.— And this conversation which you had with Mrs. Yu Eng Lai was few months after 1945?

A.— In the year 1945.** (Emphasis supplied)

The appellant subsequently ratified this testimony in his deposition of 30 June 1956, page 8-9, wherein he stated:

"that plantation was being occupied at that time by the widow, Mrs. Tan Sin Ant and of course they are receiving quite a lot of benefit from that plantation."

Discarding the self-serving expressions, these admissions of Goquiolay are certainly entitled to greater weight than those of Hernando Young and Rufino Lim, having been made against the party's own interest.

Moreover, the appellant's reference to the testimony of Hernando Young, that the witness found the properties "abandoned and undeveloped", omits to mention that said part of the testimony started with the question:

"Now, you said that about 1942 or 1943 you returned to Davao. Did you meet Mrs. Kong Chai Pin there in Davao at that time?"

Similarly, the testimony of Rufino Lim, to the effect that the properties of the partnership were undeveloped, and the family of the widow (Kong Chai Pin) did not receive any income from the partnership properties, was given in answer to the question:

"According to Mr. Goquiolay, during the Japanese occupation Tan Sin An and his family lived on the plantation of the partnership and derived their subsistence from that plantation. What can you say to that?" (Dep. 19 July 1956, p. 8)

And also—

"What can you say as to the development of these other properties of the partnership which you saw during the occupation?" (Dep., p. 13, Emphasis supplied)

to which witness gave the following answer:

I saw the properties in Mamay still undeveloped. The third property which is in Tigatto is about eleven (11) hectares and planted with abaca seedlings planted by Mr. Sin An. When I went there with Hernando Young we saw all the abaca destroyed. The place was occupied by the Japanese Army. They planted camotes and vegetables to feed the Japanese Army. Of course they never paid any money to Tan Sin An or his family." (Dep., Lim, pp. 13-14. (Emphasis supplied)

Plainly, Both Young and Lim's testimonies do not belie, or contradict, Goquiolay's admission that he told Mr. Yu Eng Lai that the widow "could just do it" (i. e., continue to manage the properties). Witnesses Lim and Young referred to the period of Japanese occupation; but Goquiolay's authority was, in fact, given to the widow in 1945, after the occupation.

Again, the disputed sale by the widow took place in 1949. That Kong Chai Pin carried out no acts of management during the Japanese occupation (1942-1944) does not mean that she did not do so from 1945 to 1949.

We thus find that Goquiolay did not merely rely on reports from Lim and Young; he actually manifested his willingness that the widow should manage the partnership properties. Whether or not she complied with this authority is a question between her and the appellant, and is not here involved. But the authority was given, and she did have it when she made the questioned sale, because it was never revoked.

It is argued that the authority given by Goquiolay to the widow Kong Chai Pin was only to manage the property,

and that it did not include the power to alienate, citing Article 1713 of the Civil Code of 1889. What this argument overlooks is that the widow was not a mere agent, because she had become a partner upon her husband's death, as expressly provided by the articles of co-partnership. Even more, granting that by succession to her husband, Tan Sin An, the widow only became a limited partner, Goquiolay's authorization to manage the partnership property was proof that he considered and recognized her as general partner, at least since 1945. The reason is plain: Under the law (Article 148, last paragraph, Code of Commerce), appellant could not empower the widow, if she were only a limited partner, to administer the properties of the firm, even as a mere agent:

"Limited partners may not perform any act of administration with respect to the interests of the co-partnership, not even in the capacity of agents of the managing partners" (Emphasis supplied)

By seeking authority to manage partnership property, Tan Sin An's widow showed that she desired to be considered a general partner. By authorizing the widow to manage partnership property (which a limited partner could not be authorized to do), Goquiolay recognized her as such partner, and is now in estoppel to deny her position as a general partner, with authority to administer and alienate partnership property.

Besides, as we pointed out in our main decision, the heir ordinarily (and we did not say "necessarily") becomes a limited partner for his own protection, because he would normally prefer to avoid any liability in excess of the value of the estate inherited so as not to jeopardize his personal assets. But this statutory limitation of responsibility being designed to protect the heir, the latter may disregard it and instead elect to become a collective or general partner, with all the rights and privileges of one, and answering for the debts of the firm not only with the inheritance but also with the heir's personal fortune. This choice pertains exclusively to the heir, and does not require the assent of the surviving partner.

It must be remembered that the articles of co-partnership here involved expressly stipulated that:

"In the event of the death of any of the partners at any time before the expiration of said term, the co-partnership shall not be dissolved but will have to be continued and the deceased partner shall be represented by his heirs or assigns in said co-partnership" (Art. XII, Articles of Co-Partnership).

The Articles did not provide that the heirs of the deceased would be merely limited partner; on the contrary, they expressly stipulated that in case of death of either partner "the co-partnership * * * will have to be continued" with the heirs or assigns. It certainly could not be continued if it were to be converted from a general partnership into a limited partnership, since the difference between the two kinds of associations is fundamental; and specially because the conversion into a limited association would leave the heirs of the deceased partner without a share in the management. Hence, the contractual stipulation does actually contemplate that the heirs would become general partners rather than limited ones.

Of course, the stipulation would not bind the heirs of the deceased partner should they refuse to assume personal and unlimited responsibility for the obligations of the firm. The heirs, in other words, can not be compelled to become general partners against their wishes. But because they are not so compellable, it does not* legitimately follow that they may not voluntarily choose to become general partners, waiving the protective mantle of the general laws of succession. And in the latter event, it is pointless to discuss the legality of any conversion of a limited partner into a general one. The heir never was a limited partner, but chose" to be, and became, a general partner right at the start. It is immaterial that the heir's name was not included in the firm name, since no conversion of status is involved, and the articles of co-partnership expressly contemplated the admission of the partner's heirs into the partnership.

It must never be overlooked that this case involves the rights acquired by strangers, and does not deal with the rights arising between partners Goquiolay and the widow of Tan Sin An. The issues between the partners inter se

were expressly reserved in our main decision. Now, in determining what kind of partner the widow of partner Tan Sin An had elected to become, strangers had to be guided by her conduct and actuations and those of appellant Goquiolay. Knowing that by law a limited partner is barred from managing the partnership business or property, third parties (like the purchasers) who found the widow possessing and managing the firm property with the acquiescence (or at least without apparent opposition) of the surviving partners were perfectly justified in assuming that she had become a general partner, and, therefore, in negotiating with her as such a partner, having authority to act for, and in behalf of, the firm. This belief, be it noted, was shared even by the probate court that approved the sale by the widow of the real property standing in the partnership name. That belief was fostered by the very inaction of appellant Goquiolay. Note that for seven long years, from partner Tan Sin An's death in 1942 to the sale in 1949, there was more than ample time for Goquiolay to take up the management of these properties, or at least ascertain how its affairs stood. For seven years Goquiolay could have asserted his alleged rights, and by suitable notice in the commercial registry could have warned strangers that they must deal with him alone, as sole general partner; But he did nothing of the sort, because he was not interested (*supra*), and he did not even take steps to pay, or settle, the firm debts that were overdue since before the outbreak of the last war. He did not even take steps, after Tan Sin An died, to cancel, or modify, the provisions of the partnership articles that he (Goquiolay) would have no intervention in the management of the partnership. This laches certainly contributed to confirm the view that the widow of Tan Sin An hail, or was given, authority to manage and deal with the firm's properties, apart from the presumption that a general partner dealing with partnership property has the requisite authority from his copartners (*Litton vs. Hill and Ceron, et al.*, 67 Phil., 513; quoted in our main decision, p. 11).

"The stipulation in the articles of partnership that any of the two managing partners may contract and sign in the name of the partnership with the consent of the other, undoubtedly creates an obligation between the two partners, which consists in asking the other's consent before contracting for the partnership. This obligation, of course is not imposed upon a third person who contracts with the partnership. Neither is it necessary for the third person to ascertain if the managing partner with whom he contracts has previously obtained the consent of the other. A third person may and has a right to presume that the partner with whom he contracts has, in the ordinary and natural course of business, the consent of his co-partner; for otherwise he would not enter into the contract. The third person would naturally not presume that the partner with whom he enters into the transaction is violating the articles of partnership, but on the contrary, is acting in accordance therewith. And this finds support in the legal presumption that the ordinary course of business has been followed (No. 18, section 334, Code of Civil Procedure), and that the law has been obeyed (No. 31, section 334). This last presumption is equally applicable to contracts which have the force of law between the parties." (*Litton vs. Hill & Cerón, et al.*, 67 Phil., 509, 516) (Emphasis supplied)

It is next urged that the widow, even as a partner, had no authority to sell the real estate of the firm. This argument is lamentably superficial because it fails to differentiate between real estate acquired and held as stock-in-trade and real state held merely as business site (*Vivante's "taller ó banco social"*) for the partnership. Where the partnership business is to deal in merchandise and goods, i.e., movable property, the sale of its real property (immovables) is not within the ordinary powers of a partner, because it is not in line with the normal business of the firm. But where the express and avowed purpose of the partnership is to buy and sell real estate (as in the present case), the immovables thus acquired by the firm form part of its stock-in-trade, and the sale thereof is in pursuance of partnership purposes, hence within the ordinary powers of the partner. This distinction is supported by the opinion of Gay de Montella[1], in the very passage quoted in the appellant's motion for reconsideration;

"La enajenacion puede entrar en las facultades del gerente: cuando es conforme a los fines sociales. Pero esta facultad de enajenar llimitada a las ventas conforme a los fines sociales, viene limitada a los objetos de comercio ó a los productos de la fabrica para explotacion de los cuales se ha constituido la Sociedad. Ocurrira una cosa

parecida cuando el objeto de la Sociedad fuese la compra y venta de inmuebles, en cuyo caso el gerente estaria facultado para otorgar las ventas que fuere necesario." (Montella) (Emphasis supplied)

The same rule obtains in American law.

In *Rosen vs. Rosen*, 212 N. Y. Supp. 405, 406, it was held:

"a partnership to deal in real estate may be created "and either partner has the legal right to sell the firm real estate"

In *Chester vs. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550:

"And hence, when the partnership business is to deal in real estate, one partner has ample power, as a general agent of the firm, to enter into an executory contract for the sale of real estate/"

And in *Rovelsky vs. Brown*, 92 Ala. 522, 9 South 182, 25 Am. St., Rep. 83:

"If the several partners engaged in the business of buying and selling real estate can not bind the firm by purchases or sales of such property made in the regular course of business, then they are incapable of exercising the essential rights and powers of general partners and their association is not really a partnership at all, but a several agency/"

Since the sale by the widow was in conformity with the express objective of the partnership, "to engage * * * in buying and selling real estate" (Art. IV, No. 1, Articles of Copartnership), it can not be maintained that the sale was made in excess of her powers as general partner.

Considerable stress is laid by appellant in the ruling of the Supreme Court of Ohio in *McGrath, et al., vs. Cowen, et al.*, 49 N. E., 338. But the facts of that case are vastly different from the one before us. In the *McGrath* case, the Court expressly found that:

"The firm was then, and for some time had been/ insolvent, in the sense that its property was insufficient to pay its debts, though it still had good credit, and was actively engaged in the prosecution of its business. On that day, which was Saturday, the plaintiff caused to be prepared, ready for execution, the four chattel mortgages in question, which cover all the tangible property then belonging to the firm, including the counters, shelving, and other furnishings and fixtures necessary for, and used in carrying on, its business, and signed the same in this form: "In witness whereof, the said Cowen & McGrath, a firm, and Owen McGrath, surviving partner of said firm, and Owen McGrath, individually, have hereunto set their hands, this 20th day of May, A. D. 1893. Cowen & McGrath, by Owen McGrath. Owen McGrath, Surviving partner of Cowen & McGrath. Owen McGrath" At the same time, the plaintiff had prepared, ready for filing, the petition for the dissolution of the partnership and appointment of a receiver, which he subsequently filed, as hereinafter stated. On the day the mortgages were signed, they were placed in the hands of the mortgagees, which was the first intimation to them that there was any intention to make then. At that time none of the claims secured by the mortgagee were due, except, it may be, a small part of one of them, and none of the creditors to whom the mortgages were made had requested security, or were pressing for the payment of their debts. * * * The mortgages appear to be without a sufficient condition of defeasance, and contain a stipulation authorizing the mortgagees to take immediate possession of the property, which they did as soon as the mortgages were filed, through the attorney who then represented 'them, as well as the plaintiff; and the stores, were at once" closed, and possession delivered by them to the receiver appointed upon the filing of the petition. The avowed purpose of the plaintiff in the course pursued by him, was to terminate the partnership, place its property beyond the control of the firm, and insure the preference of the mortgages, all of which was known to them at the time; * * * ." (Cas cit., p. 343, Italics supplied)

It is natural that from these facts the Supreme Court of Ohio should draw the conclusion that conveyances were

made with intent to terminate the partnership, and that they were not within the powers of McGrath as partner. But there is no similarity between those acts and the sale by the widow of Tan Sin An.

First, as to the price: As already noted, this property was actually sold for a total of P153,726.04, of which P37,000.00 was in cash, and the rest in partnership debts assumed by the purchaser. These debts (P62,415.91 to Yutivo, and P54,310.13 to Sing Yee Cuan & Co.) are not questioned; they were approved by the Court, and its approval is now final. The claims were, in fact, for the balance on the original purchase price of the land sold (due first to La Urbana, later to the Banco Hipotecario) plus accrued interests and taxes, redeemed by the two creditors-claimants. To show that the price was inadequate, appellant relies on the testimony of the realtor Mata, who in 1955, six years after the sale in question, asserted that the land was worth P312,000.00. Taking into account the continued rise of real estate values since liberation, and the fact that the sale in question was practically a forced sale because the partnership had no other means to pay its legitimate debts, this evidence certainly does not show such "gross inadequacy" as to justify rescission of the sale. If at the time of the sale (1949) the price of P153,726.04 was really low, how is it that appellant was not able to raise the amount, even if the creditor's representative, Yu Khe Thai, had already warned him four years before (1945) that the creditors wanted their money back, as they were justly entitled to?

It is argued that the land could have been mortgaged to raise the sum needed to discharge the debts. But the lands were already mortgaged, and had been mortgaged since 1940, first to La Urbana, and then to the Banco Hipotecario. Was it reasonable to expect that other persons would loan money to the partnership when it was unable even to pay the taxes on the property, and the interest on the principal since 1940? If it had been possible to find lenders willing to take a chance on such a bad financial record, would not Goquiolay have taken advantage of it? But the fact is clear on the record that since liberation until 1949 Goquiolay never lifted a finger to discharge the debts of the partnership. Is he entitled now to cry fraud after the debts were discharged with no help from him?

With regard to the relationship between the parties, suffice it to say that the Supreme Court has ruled that relationship alone is not a badge of fraud (*Oria Hnos. vs. McMicking*, 21 Phil., 243; also *Hernandez de Somo. Nombre de Jesus vs. Sanchez*, 40 Off. Gaz., 1685). There is no evidence that the original buyers, Washington Sycip and Betty Lee, were without independent means to purchase the property. That the Yutivos should be willing to extend credit to them, and not to appellant, is neither illegal nor immoral; at the very least, these buyers did not have a record of inveterate defaults like the partnership "Tan Sin An & Goquiolay".

Appellant seeks to create the impression that he was the victim of a conspiracy between the Yutivo firm and their component members. But no proof is adduced. If he was such a victim, he could have easily defeated the conspirators by raising money and paying off the firm's debts between 1945 and 1949; but he did not; he did not even care to look for a purchaser of the partnership assets. Were it true that the conspiracy to defraud him arose (as he claims) because of his refusal to sell the lands when in 1945 Yu Khe Thai asked him to do so, it is certainly strange that the conspirators should wait 4 years, until 1949, to have the sale effected by the widow of Tan Sin An, and that the sale should have been routed through the probate court taking cognizance of Tan Sin An's estate, all of which increased the risk that the supposed fraud should be detected. Neither was there any anomaly in the filing of the claims of Yutivo and Sing Yee Cuan & Co., (as subrogees of the Banco Hipotecario) in proceedings for the settlement of the estate of Tan Sin An. This for two reasons: First, Tan Sin An and the partnership "Tan Sin An & Goquiolay" were solidary (joint and several) debtors (Exhibit "N" mortgage to the Banco Hipotecario), and Rule 87, section 6, is to the effect that:

"Where the obligation of the decedent is joint and several with another debtor, the claim shall be filed against the decedent as if he were the only debtor, without prejudice to the right of the estate to recover contribution

from the other debtor." (Emphasis supplied)

Secondly, the solidary obligation was guaranteed by a mortgage on the properties of the partnership and those of Tan Sin An personally, and a mortgage in indivisible, in the sense that each and every parcel under mortgage answers for the totality of the debt (Civ. Code of 1889, Article 1860; New Civil Code, Art. 2089).

A final and conclusive consideration. ' The fraud charged not being one used to obtain a party's consent to a contract (i.e., not being deceit or *dolus in contrahendo*); if there is fraud at all, it can only be a fraud of creditors that gives rise to a rescission of the offending contract. But by express provision of law (Article 1294, Civil Code of 1889; Article 1383, New Civil Code), "the action for rescission is subsidiary; it can not be instituted except when the party suffering damage has no other legal means to obtain reparation for the same". Since there is no allegation, or evidence, that Goquiolay can not obtain reparation from the widow and heirs of Tan Sin An, the present suit to rescind the sale in question is not maintainable, even if the fraud charged actually did exist.

Premises considered, the motion for reconsideration is denied.

Bengzon, C. J., Padilla, Conception, Barrera, and Dizon, JJ., concur.

[1] *Tratado Practico de Sociedades Mercantiles*, Tomo I, p. 223. (Italics supplied)

DISSENTING

BAUTISTA ANGELO, J.,

This is an appeal from a decision of the Court of First Instance of Davao dismissing the complaint filed by Antonio C. Goquiolay, et al., seeking to annul the sale made by Kong Chai Pin of three parcels of land to Washington Z. Sycip and Betty Y. Lee on the ground that it was executed without proper authority and under fraudulent circumstances. In a decision rendered on July 26, 1960, we affirmed this decision although on grounds different from those on which the latter is predicated. The case is once more before us on a motion for reconsideration filed by appellants raising both questions of fact and of law.

On May 29, 1940, Tan Sin An and Antonio C. Goquiolay executed in Davao City a commercial partnership for a period, of ten years with a capital of P30,000.00 of which Goquiolay contributed P18,000.00 representing 60% while Tan Sin An P12,000.00 representing 40%. The business of the partnership was to engage in buying real estate properties for subdivision, resale and lease. The partnership was duly registered, and among the conditions agreed upon in the partnership agreement which are material to this case are: (1) that Tan Sin An would be the exclusive managing partner, and (2) in the event of the death of any of the partners the partnership would continue, the deceased to be represented by his heirs. On May 31, 1940, Goquiolay executed a general power of attorney in favor of Tan Sin An appointing the latter manager of the partnership and conferring upon him the usual powers of management.

On May 29, 1940, the partnership acquired three parcels of land known as Lots Nos. 526, 441 and 521 of the cadastral survey of Davao, the only assets of the partnership, with the capital originally invested, financing the balance of the purchase price with a mortgage in favor of "La Urbana Sodedad Mutua de Construccidn Prestamos" in the amount of P25,000.00 payable in ten years. On the same date, Tan Sin An, in his individual capacity, acquired 46 parcels of land executing a mortgage thereon in favor of the same company for the sum of

P35,000.00. On September 25, 1940, these two mortgage obligations were consolidated and transferred to the Banco Hipotecario de Filipinas-and as a result Tan Sin An, in his individual capacity, and the partnership bound themselves to pay jointly and severally the total amount of P52,282.80, with 8% annual interest thereon within the period of eight years mortgaging in favor of said entity the 3 parcels of land belonging to the partnership to Tan Sin An.

Tan Sin An died on June 26, 1942 and was survived by his widow, defendant Kong Chai Pin, and four children, all of whom are minors of tender age: On March 18, 1944, Kong Chai Pin was appointed administratrix of the intestate estate of Tan Sin An. And on the same date, Sing, Yee and Cuan Co., Inc. paid to the Banco Hipotecario the remaining unpaid balance of the mortgage obligation of the partnership amounting to P46,116.75 in Japanese currency.

Sometime in 1945, after the liberation of Manila, Yu Khe Thai, president and general manager of Yutivo Sons Hardware Co. and Sing, Yee and Cuaji Co., Inc., called for Goquiolay and the two had a conference in the office of the former during which he offered to buy the interest of Goquiolay in the partnership. In 1948, Kong Chai Pin, the widow, sent her counsel, Atty. Dominador Zuño, to ask Goquiolay to execute in her favor a power of attorney. Goquiolay refused both to sell his interest in the partnership as well as to execute the power of attorney.

Having failed to get Goquiolay to sell his share in the partnership, Yutivo Sons Hardware Co., and Sing, Yee and Cuan Co., Inc. filed in November, 1946 a claim each in the intestate proceedings of Tan Sin An for the sum of P84,705.48 and P66,529.91, respectively, alleging that they represent obligations of both Tan Sin An and the partnership. After first denying any knowledge of the claims, Kong Chai Pin, as administratrix, admitted later without qualification the two claims in an amended answer she filed on February 28, 1947. The admission was predicated on the ground that she and the creditors were closely related by blood, affinity and business ties. In due course, these two claims were approved by the court.

On March 29, 1949, more than two years after the approval of the claims, Kong Chai Pin filed a petition in the probate court to sell all the properties of the partnership as well as some of the conjugal properties left by Tan Sin An for the purpose of paying the claims. Following approval by the court of the petition for authority to sell, Kong Chai Pin, in her capacity as administratrix, and presuming to act as managing partner of the partnership, executed on April 4, 1949 a deed of sale of the properties owned by Tan Sin An and by the partnership in favor of Betty Y. Lee and Washington Z. Sycip in consideration of the payment to Kong Chai Pin of the sum of P37,000.00, and the assumption by the buyers of the claims filed by Yutivo Sons Hardware Co. and Sing, Yee and Cuan Co., Inc. in whose favor the buyers executed a mortgage on the properties purchased. Betty Y. Lee and Washington Z. Sycip subsequently executed a deed of sale of the same properties in favor of their co-defendant Insular Development Company, Inc. It should be noted that these transactions took place without the knowledge of Goquiolay and it is admitted that Betty Y. Lee and Washington Z. Sycip bought the properties on behalf of the ultimate buyer, the Insular Development Company, Inc., with money given by the latter.

Upon learning of the sale of the partnership properties, Goquiolay filed on July 25, 1949 in the intestate proceedings a petition to set aside the order of the court approving the sale. The court granted the petition. While the order was pending appeal in the Supreme Court, Goquiolay filed the present case on January 15, 1953 seeking to nullify Goquiolay, et al vs. Sycip, et al the sale as stated in the early part of this decision. In the meantime, the Supreme Court remanded the original case to the probate court for rehearing due to lack of necessary parties.

The plaintiffs in their complaint challenged the authority of Kong Chai Pin to sell the partnership properties on the ground that she had no authority to sell because even granting that she became a partner upon the death of Tan Sin An the power of attorney granted in favor of the latter expired after his death.

Defendants, on the other hand, defended the validity of the sale on the theory that she succeeded to all the rights and prerogatives of Tan Sin An as managing partner.

The trial court sustained the validity of the sale on the ground that under the provisions of the articles of partnership allowing the heirs of the deceased partner to represent him in the partnership after his death Kong Chai Pin became a managing partner, this being the capacity held by Tan Sin An when he died.

In the decision rendered by this Court on July 26, 1960, we affirmed this decision but on different grounds, among which the salient points are: (1) the power of attorney given by Goquiolay to Tan Sin An as manager of the partnership expired after his death; (2) his widow Kong Chai Pin did not inherit the management of the partnership, it being a personal right; (3) as a general rule, the heirs of a deceased general partner come into the partnership in the capacity only of limited partners; (4) Kong Chai Pin, however, became a general partner because she exercised certain alleged acts of management; and (5) the sale being necessary to pay the obligations of the partnership, she was therefore authorized to sell the partnership properties without the consent of Goquiolay under the principle of estoppel, the buyers having the right to rely on her acts of management and to believe her to be in fact the managing partner.

Considering that some of the above findings of fact and conclusions of law are without legal or factual basis, appellants have in due course filed a motion for reconsideration which because of the importance of the issues therein raised has been the subject of mature deliberation.

In support of said motion, appellants advanced the following arguments:

- If the conclusion of the Court is that heirs as a general rule enter the partnership as limited partners only, therefore Kong Chai Pin, who must necessarily have entered the partnership as a limited partner originally, could have not chosen to be a general partner by exercising the alleged acts of management, because under Article 148 of the Code of Commerce a limited partner cannot intervene in the management of the partnership, even if given a power of attorney by the general partners. An Act prohibited by law cannot give rise to any right and is void under the express provisions of the Civil Code.

- The buyers were not strangers to Kong Chai Pin, all of them being members of the Yu (Yutivo) family, the rest, members of the Jaw firm which handles the Yutivo interests and handled the papers of sale. They did not rely on the alleged acts of management—they believed (this was the opinion of their lawyers) that Kong Chai Pin succeeded her husband as a managing partner and it was on this theory alone that they submitted the case in the lower court.

- The alleged acts of management were denied and repudiated by the very witnesses presented by the defendants themselves.

The arguments advanced by appellants are in our opinion well-taken and furnish sufficient basis to reconsider our decision if we want to do justice to Antonio C. Goquiolay. And to justify this conclusion, it is enough that we lay stress on the following points: (1) there is no sufficient factual basis to conclude that Kong Chai Pin executed acts of management to give her the character of general manager of the partnership, or to serve as basis for estoppel that may benefit the purchasers of the partnership properties; (2) the alleged acts of management, even if proven could not give Kong Chai Pin the character of general manager for the same is contrary to law and wellknown authorities; (3) even if Kong Chai Pin acted as general manager she had no authority to sell the partnership properties as to make it legal and valid; and (4) Kong Chai Pin had no necessity to sell the properties to pay the

obligation of the partnership and if she did so it was merely to favor the purchasers who were close relatives to the prejudice of Goquiolay.

- This point is pivotal for if Kong Chai Pin did not execute the acts of management imputed to her our ruling cannot be sustained. In making our aforesaid ruling we apparently gave particular importance to the fact that it was Goquiolay himself who tried to prove the acts of management. Appellants, however, have emphasized the fact, and with reason, that the appellees themselves are the ones who denied and refuted the so-called acts of management imputed to Kong Chai Pin. To have a clear view of this factual situation, it becomes necessary that we analyze the evidence of record.

Plaintiff Goquiolay, it is intimated, testified, on crossexamination that he had a conversation with one Hernando Young in Manila in the year 1945 who informed him that Kong Chai Pin "was attending to the properties and deriving some income therefrom and she had no other means of livelihood except those properties and some rentals derived from the properties." He went on to say by way of remark that she could continue doing this because he wanted to help her. On point that he emphasized was that he was "not interested in agricultural lands."

On the other hand, defendants presented Hernando Young, the same person referred to by Goquiolay, who was a close friend of the family of Kong Chai Pin, for the purpose of denying the testimony of Goquiolay. Young testified that in 1945 he was still in Davao, and insisted no less than six times during his testimony that he was not in Manila in 1945, the year when he allegedly gave the information to Goquiolay, stating that he arrived in Manila for the first time in 1947. He testified further that he had visited the partnership properties during the period covered by the alleged information given by him to Goquiolay and that he found them "abandoned and underdeveloped," and that Kong Chai Pin was not deriving any income from them.

The other witness for the defendants, Rufino Lim, also testified that he had seen the partnership properties and corroborated the testimony of Hernando Young in all respects : "the properties in Mamay were underdeveloped, the shacks were destroyed in Tigato, and the family of Kong Chai Pin did not receive any income from the partnership properties." He specifically rebutted the testimony of Goquiolay in his deposition given on June 30, 1956 that Kong Chai Pin and her. family were living in the partnership properties and stated that the family never actually lived in the properties of the partnership even before the war or after the war,"

It is unquestionable that Goquiolay was merely repeating an information given to him by a third person, Hernando Young—he stressed this point twice. A careful analysis of the substance of Goquiolay's testimony will show that he merely had no objection to allowing Kong Chai Pin to continue attending to the properties in order to give her some, means of livelihood, because, according to the information given him by Hernando Young, which he assumed to be true, Kong Chai Pin had no other means of livelihood. But certainly he made it very clear that he did not allow her to manage the partnership when he explained his reason for refusing to sign a general power of attorney for Kong Chai Pin which her counsel, Atty. Zuño, brought with him to his house in 1948. He said:

"* * * Then Mr Yu Ens Lai told me that he brought with him Atty. Zuño and he asked me if I could execute a general power of attorney for Mrs. Kong Chai Pin. Then I told Atty. Zuño what is the use of executing a general power of attorney for Mrs. Kong Chai Pin when Mrs. Kong Chai Pin had already got that plantation for agricultural purposes, I said for agricultural purposes she can use that plantation * * *" (T.s.n., p. 9, Hearing' on May 5, 1955)

It must be noted that in his testimony Goquiolay was categorically stating his opposition to the management of the partnership by Kong Chai Pin and carefully made the distinction that his conformity was for her to attend to the partnership properties in order to give her merely a means of livelihood. It should be stated that the period covered by the testimony refers to the period of occupation when living condition was difficult and precarious. And Atty.

Zuño, it should also be stated, did not deny the statement of Goquiolay.

It can therefore be seen that the question as to whether Kong Chai Pin exercised certain acts of management of the partnership properties is highly controverted. The most that we can say is that the alleged acts are doubtful more so when they are disputed by the defendants themselves who later became the purchasers of the properties, and yet these alleged acts, if at all, only refer to management of the properties and not to management of the partnership, which are two different things.

In resumé, we may conclude that the sale of the partnership properties by Kong Chai Pin cannot be upheld on the ground of estoppel, first, because the alleged acts of management have not been clearly proven; second, because the record clearly shows that the defendants, or the buyers, were not misled nor did they rely on the acts of management, but instead they acted solely on the opinion of their counsel, Atty. Quisumbing, to the effect that she succeeded her husband in the partnership as managing partner by operation of law; and third, because the defendants are themselves estopped to invoke a defense which they tried to dispute and repudiate.

- Assuming *arguendo* that the acts of management imputed to Kong Chai Pin are true, could such acts give her the character of general manager of the partnership as we have concluded in our decision?

Our answer is in the negative because it is contrary to law and precedents. Garrigues, a well-known commentator, is clearly of the opinion that mere acceptance of the inheritance does not make the heir of a general partner a general partner himself. He emphasized that the heir must declare that he is entering the partnership as a general partner unless the deceased partner has made it an express condition in his will that the heir accepts the condition of entering the partnership as a prerequisite of inheritance, in which case acceptance of the inheritance is enough.[1] But here Tan Sin An died intestate.

Now, could Kong Chai Pin be deemed to have declared her intention to become general partner by exercising acts of management? We believe not, for, in consonance with our ruling that as a general rule the heirs of a deceased partner succeed as limited partners only by operation of law, it is obvious that the heir, upon entering the partnership, must make a declaration of his character, otherwise he should be deemed as having succeeded as limited partner by the mere acceptance of inheritance. And here Kong Chai Pin did not make such declaration. Being then a limited partner upon the death of Tan Sin An by operation of law, the peremptory prohibition contained in Article 148 [2] of the Code of Commerce became binding upon her and as a result she could not change her status by violating its provisions not only under the general principle that prohibited acts cannot produce any legal effect, but also because under the provisions of Article 147 [3] of the same Code she was precluded from acquiring more rights than those pertaining to her as a limited partner. The alleged acts of management, therefore, did not give Kong Chai Pin the character of general manager to authorize her to bind the partnership.

Assuming also *arguendo* that the alleged acts of management imputed to Kong Chai Pin gave her the character of a general partner, could she sell the partnership properties without authority from the other partners?

Our answer is also in the negative in the light of the provisions of the articles of partnership and the pertinent provisions of the Code of Commerce and the Civil Code. Thus, Article 129 of the Code of Commerce says:

"If the management of the general partnership has not been limited by special agreement to any of the members, all shall have the power to take part in the direction and management of the common business, and the members present shall come to an agreement for all contracts or obligations which may concern the association."

And the pertinent portions of the Articles of partnership provides:

"VII. The affairs of the co-partnership shall be managed exclusively by the managing partner or by his authorized agent, and it is expressly stipulated that the managing partner may delegate the entire management of the affairs of the co-partnership by irrevocable power of attorney to any person, firm or corporation he may select, upon such terms as regards compensation as he may deem proper, and vest in such person, firm or corporation full power and authority, as the agent of the co-partnership and in his name, place and stead to do anything for it or on his behalf which he as such managing partner might do or cause to be done." (Page 23, Record on Appeal)

It would thus be seen that the powers of the managing partner are not defined either under the provisions of the Code of Commerce or in the articles of partnership, a situation which, under Article 2 of the same Code, renders applicable herein the provisions of the Civil Code. And since, according to well-known authorities, the relationship between a managing partner' and the partnership is substantially the same as that of the agent and his principal,[4] the extent of the power of Kong Chai Pin must, therefore, be determined under the general principles governing agency. And on this point, the law says that an agency created in general terms includes only acts of administration, but with regard to the power to compromise, sell, mortgage, and other acts of strict ownership, an express power of attorney is required,[5] Here Kong Chai Pin did not have such power when she sold the properties of the partnership.

Of course, there is authority to the effect that a managing partner, even without express power of attorney, may perform acts affecting ownership if the same are necessary to promote or accomplish a declared object of the partnership, but here the transaction is not for this purpose. It was effected not to promote any avowed object of the partnership.[6] Rather, the sale was effected to pay an obligation of the partnership by selling its real properties which Kong Chai Pin could not do without express authority. The authorities supporting this view are overwhelming.

"La enajenacion puede entrar en las facultades del gerente, cuando es conforme a los fines sociales. Pero esta facultad de enajenar limitada a las ventas conforme a los fines sociales, viene limitada a los objetos de comercio, o los productos de la fabrica para explotacion de los cuales se ha constituido la Sociedad. Ocurrira una cosa parecida cuando el objeto de la Sociedad fuese la compra y venta de inmuebles, en cuyo caso el gerente estaria facultado para otorgar las ventas que fuere necesario. Por el contrario, el gerente no tiene atribuciones para vender las instalaciones del comercio ni la fabrica, ni las maquinarias, vehiculos de transporte, etc., que forman parte de la explotacion social. En todos estos casos, igualmente que si tratase de la venta de una marca o procedimiento mecanico o quimico, etc., siendo actos de disposicion seria necesario contar con la conformidad expresa de todos los socios." (R. Gay de Montella, id., pp. 223-224, *Italics supplied*)

"Los poderes de los Administradores no tienen ante el silencio del contrato otros limites que los senalados por el objeto de la Sociedad y, por consiguiente, pueden llevar a cabo todas las operaciones que sirven para aquel ejercicio, incluso cambiando repetidas veces los propios acuerdos segun el interes convenido de la Sociedad. Pueden contratar y despedir a los empleados, tomar en arriendo almacenes y tiendas, expedir cambiales, girarlas, avalarlas, dar en prenda o en hipoteca los bienes de la sociedad y adquirir inmuebles destinados a su explotacion o al empleo estable de sus capitales. Pero no podran ejecutar los actos que estdn en contradiccion con la explotacion que les fue confiada no podran cambiar el objeto, el domicilio la razon social; fundir a la Sociedad en otra; ceder la accion, y' por tanto, el uso de la firma social a otro renunciando definitivamente el ejercicio de uno de otro ramo de comercio que se les haya confiado y enajenar o pignorar el taller o el banco social excepto que la venta o pignoracion tengan por el objeto procurar los medios necesarios para la continuacion de la empresa social." (Cesar Vivante, *Tratado de Derecho Mercantil*, pp. 124-125, Vol. II, 1a. ed.; *Italics supplied*)

"The act of one partner to bind the firm, must be necessary for the carrying on of its business. If all that can be said of it was that it was convenient, or that it facilitated the transaction of the business of the firm, that is not

sufficient, in the absence of evidence of sanction by other partners. Nor, it seems, will necessity itself be sufficient if it be an extraordinary necessity. / What is necessary for carrying on the business of the firm under ordinary circumstances and in the usual way, is the test. Lindl. Partn. Sec. 126. While, within this rule, one member of a partnership may, in the usual and ordinary course of its business, make a valid sale or pledge, by way of mortgage or otherwise, of all or part of its effects intended for sale, to a bona fide purchaser or mortgagee, without the consent of the other members of the firm, it is not within the scope of his implied authority to make a final disposition of all of its effects, including those employed as the means of carrying on its business, the object and effect of which is to immediately terminate the partnership, and place its property beyond its control. Such a disposition, instead of being within the scope of the partnership business, or in the usual and ordinary way of carrying it on, is necessarily subversive of the object of the partnership, and contrary to the presumed intention of the partnership in its formation." (McGrath, et al. vs. Cowen, et al., 49 N.F. 338, 343; Italics supplied)

Since Kong Chai Pin sold the partnership properties not in line with the business of the partnership but to pay its obligation without first obtaining the consent of the other partners, the sale is invalid being in excess of her authority.

- Finally, the sale under consideration was effected in a suspicious manner as may be gleaned from the following circumstances:

(a) The properties subject of the instant sale which consist of three parcels of land situated in the City of Davao have an area of 200 hectares more or less, or 2,000,000 square meters. These properties were purchased by the partnership for purposes of subdivision. According to y realtor Mata, who testified in court, these properties could command at the time he testified a value of not less than P312,000.00, and according to Dalton Chen, manager of the firm which took over the administration, since the date of sale no improvement was ever made thereon precisely because of this litigation. And yet, for said properties, aside from the sum of P37,00.00 which was paid for the properties of the deceased and the partnership, only the paltry sum of P66,529. It was paid as a consideration therefor, of which the sum of P46,116.75 was even paid in Japanese currency.

(b) Considering the area of the properties Kong Chai Pin had no valid reason to sell them if her purpose was only to pay the partnership's obligation. She could have negotiated a loan if she wanted to pay it by placing the properties as security, but preferred to sell them even at such low prices because of her close relationship with the purchasers and creditors who conveniently organized a partnership to exploit them, as may be seen from the following relationship of their pedigree:

KONG CHAI PIN, the administratrix, was a granddaughter of Jose P. Yutivo, founder of the defendant Yutivq Sons Hardware Co. Yutivo Sons Hardware Co, and Sin Yee v Cuan Co, Inc., alleged creditors, are owned by the heirs of Jose P. Yutivo (Sing, Yee & Cuan are the three children of Jose). Yu Khe Thai is a grandson of the same Jose P. Yutivo, and president of the two alleged creditors. He is the acknowledged head of the Yu families. Washington Z. Sycip, one of the original buyers, is married to Ana Yu, a daughter of Yu Khe Thai, Betty Y. Lee, the other original buyer, is also a daughter of Yu Khe Thai. The Insular Development Co., the ultimate buyer, was organized for the specific purpose of buying the partnership properties. Its incorporators were: Ana Yu and Betty V. Lee, Atty. Quisumbing and Salazar the lawyers who studied the papers of sale and have been counsel for the Yutivo interests; Dalton Chen a brother-in-law of Yu Khe Thai and an executive of Sing Yee & Cuan Co; Lillian Yu, daughter of Yu Eng Poh, an executive of Yutivo Sons Hardware, and Simeon Daguiwagl a trusted employee of the Yutivos.

(c) Lastly, even since Tan Sin An died in 1942 the creditors, who were close relatives of Kong Chai Pin, have already conceived the idea of possessing the lands for purposes of subdivision, excluding Goquiolay from their plan, and this is evident from the following sequence of events:

Tan Sin An died in 1942 and intestate proceedings were opened in 1944. In 1946, the creditors of the partnership filed their claim against the partnership in the intestate proceedings. The creditors studied ways and means of liquidating the obligation of the partnership, leading to the formation of the defendant Insular Development Co., composed of members of the Yutivo family and the counsel of record of the defendants, which subsequently bought the properties of the partnership and assumed the obligation of the latter in favor of the creditors of the partnership, Yutivo Sons Hardware and Sing, Yee & Cuan, also of the Yutivo family. The buyers took time to study the commercial potentialities of the partnership properties and their lawyers carefully studied the document and other papers involved in the transaction. All these steps led finally to the sale of the three partnership properties.

Upon the strength of the foregoing considerations, I vote to grant motion for reconsideration.

Labrador, Paredes, and Makalintal, JJ., concur.

Motion for reconsideration denied.

[1] "Tratado de Derecho Mercantil, Tomo I, Vol. 30 pp. 1211-1212.

[2]"* * * The limited partner may not perform any act in the administration of the interests of the company, even in the capacity of attorney-in-fact of the managing partners."

[3] "Should any limited partner include his name or allow its inclusion in the firm name, he shall be subject, with respect to persons not members of the company, to the same responsibilities as the managers, without acquiring more rights than those corresponding to his character as limited partner" (*Italics supplied*)

[4] Derecho Mercantil, David Supino, 4a ed., p. 179; Cesar Vivante, Tratado de Derecho Mercantil, pp. 124-125, Vol. II, 1a. ed., R. Gay de Montella, Tratado Practico de Sociedades Mercantiles, pp. 223-224. Tomo I, 3a. ed.

[5] Article 1713, Spanish Civil Code.

[6] The main business of the partnership is to engage in the real estate business in general, particularly in buying and selling real estate. (Page 23, Record on Appeal)

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