

**TESTATE ESTATE OF RICHARD THOMAS FITZSIMMONS, DECEASED.
MARCIAL P. LICHAUCO, ADMINISTRATOR AND APPELLEE, VS.
ATLANTIC, GULF & PACIFIC COMPANY OF MANILA, CLAIMANT
AND APPELLANT.**

G.R. No. L-2016. August 23, 1949

Ponente: OZAETA, J.

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OZAETA, J.:

This is an appeal from a judgment of the Court of First Instance of Manila denying appellant's claim of Php.63,868.67 against the estate of the deceased Richard T. Fitzsimmons, and granting appellee's counterclaim of Php.90,000 against the appellant.

The appellant Atlantic, Gulf & Pacific Company of Manila is a foreign corporation duly registered and licensed to do business in the Philippines, with its office and principal place of business in the City of Manila.

Richard T. Fitzsimmons was the president and one of the largest stockholders of said company when the Pacific war broke out on December 8, 1941. As such president he was receiving a salary of Php.3,000 a month. He held 1,000 shares of stock, of which 545 shares had not been fully paid for but for which he had executed promissory notes in favor of the company aggregating Php.245,250, at the rate of Php.450 a share. In 1941 the sum of Php.64,500 had been credited in his favor on account of the purchase price of the said 545 shares of stock out of bonuses and dividends to which he was entitled from the company. Under his agreements with the company dated April 11 and July 12, 1939, should he die without having fully paid for the said 545 shares of stock, the company, at its option, may either reacquire the said 545 shares of stock by returning to his estate the amount applied thereon, or issue in favor of his estate the corresponding number of the company's shares of stock equivalent to the amount paid thereon at Php.450 a share.

Soon after the Japanese army occupied Manila in January, 1942, it seized and took possession of the office and all the properties and assets of the appellant corporation and interned all its officials, they being American citizens.

Richard T. Fitzsimmons died on June 27, 1944, in the Santo Tomas internment camp, and special proceeding No. 70139 was subsequently instituted in the Court of First Instance of Manila for the settlement of his estate.

The Atlantic, Gulf & Pacific Company of Manila resumed business operations in March, 1945.

In due course the said company filed a claim against the estate of Richard T. Fitzsimmons which, as amended, consisted of the following items:

A. Personal overdraft of Richard T. Fitzsimmons with Atlantic, Gulf & Pacific Company of Manila in current account

Php.63,000.00

B. Charges from San Francisco agent of the company not included in above figure A as of November 30, 1945 (Php.1,002.00), less subsequent credit advice from San Francisco agent (Php.133.33)

868.67

Total

Php.63,868.67

In the same claim the company offered to reacquire the 545 shares sold to the deceased Fitzsimmons upon return to his estate of the amount of Php.64,500 paid thereon, and asked the court to authorize the setoff of the amount of its claim of Php.63,868.67 from the amount of Php.64,500 returnable to the estate.

In his answer to the amended claim the administrator denied the alleged indebtedness of the deceased to the claimant, expressed his conformity to the refund of Php.64,500 by the claimant to the estate and the retransfer by the latter to the former of the 545 shares of stock, and set up a counterclaim of Php.90,000 for salaries allegedly due the deceased from the claimant corresponding to the years 1942, 1943 and the first half of 1944, at Php.36,000 per annum.

The issues raised by this appeal are:

- Whether appellant's claims of Php.63,000 and Php.868.67 have been established by satisfactory evidence; and
- Whether the deceased Richard T. Fitzsimmons was entitled to his salary as president of the Atlantic, Gulf & Pacific Company of Manila from January, 1942, to June 27, 1944, when he died in the Santo Tomas internment camp.

I. Upon the claim of Php.63,000 (item A) the evidence for the claimant consisted of the testimony of Santiago Inacay and Modesto Flores, chief accountant and assistant accountant, respectively, of the Atlantic, Gulf & Pacific Company of Manila. (It is admitted that all the prewar books and records of the company were completely destroyed or lost during the war.)

Santiago Inacay testified in substance as follows: He was chief of the accounting department of the Atlantic, Gulf & Pacific Company from June, 1930, to December, 1941, and from March, 1945, to the present. The officers of the company had the privilege of maintaining personal accounts with the company. The deceased Fitzsimmons maintained such an account, which consisted of cash advances from the company and payments of bills from outside for his account. On the credit side were entered the salaries of the official and the payments made by him.

"The personal account of Mr. Fitzsimmons, in the year 1941, was on the debit balance; that is, he owed money to the company." "Q. How much was the amount of that debit account of Mr. Fitzsimmons, basing on your recollection? A. In my recollection of the account, personal account of Mr. Fitzsimmons, as of the last statement of account rendered in the year 1941, it was around Php.63,000." At the end of each month the accounting department rendered to the deceased a statement of his account showing the balance of his account, and at the bottom of that statement the deceased signed his conformity to the correctness of the balance. The last statement of account rendered to the deceased was that corresponding to the month of November, 1941, the office of the company having closed on December 29, 1941. Asked how it was possible for him to remember the status of the personal account of Mr. Fitzsimmons, he replied: "As Mr. Fitzsimmons was the president and member of the board of directors, I have to remember it, because it is very shameful on my part that when the said officer and other officers of the company come around and ask me about their balance, I could not tell them the amount of their balance, although not in exact figures, at least in round figures." This witness further testified on direct examination as follows:

"Q. You said that Mr. Fitzsimmons is one of those officers whose personal account with the Atlantic, Gulf & Pacific Co. used to be on the debit side in the years previous to 1941. Can you tell the Honorable Court what would happen at the end of each year to the personal account, and to the status of the personal account of Mr. Fitzsimmons?—"A. At the end of each year, after the declaration of dividends on paid shares, bonuses and directors' fees, the account will balance to a credit balance. In other words, at the start of the following years, the account will be on the credit side.

"Q. So that I gather from you, Mr. Inacay, that the personal account of Mr. Fitzsimmons, as well as the other officers of the Atlantic, Gulf & Pacific Co., at the end of each year, and at the beginning of the incoming year, generally, would be in the credit balance; because of the application of dividends on paid shares, bonuses and the directors' fees? " A. Yes, sir." (Page 80, t.s.n.)

On cross-examination the witness admitted that he could not recollect the amount of the balance, either debit or credit, of each of the Americans and other employees who maintained a current account with the company; and on redirect examination he explained that he remembered the balance of the account of Mr. Fitzsimmons "because as accountant I should be—I should have knowledge more or less, of the status of the account of the president, the treasurer, and the rest of the directors."

Modesto Flores testified in substance as follows: He was assistant accountant of the Atlantic, Gulf & Pacific Company from October 1, 1935, to December, 1941, and from March 8, 1945, to the present. In 1941 Mr. Fitzsimmons, president of the company, had a personal account with the latter consisting of cash advances which he withdrew from the company and of payments for his account of groceries, automobile, salary of his chauffeur, gasoline and oil, and purchases of furniture for his house and other articles for his personal use. On the credit side of his account were entered his monthly salaries, the dividends declared, if any, the bonuses, and the director's fees. Witness was the one who as accountant made the entries in the books of the company. When Mr. Fitzsimmons withdrew funds by way of cash advances from the company, he signed receipts there for which were delivered to the cashier, who in turn delivered them to him. When creditors of Mr. Fitzsimmons presented bills to the accounting department for payment, those bills were approved by Mr. Fitzsimmons and the company paid them and charged them to his account. All the books, receipts, papers, documents, and accounts referring to the personal account of Mr. Fitzsimmons were lost during the war. Witness remembered that the personal account of Mr. Fitzsimmons on December 29, 1941, was on the debit side, amounting to Php.63,000 more or less, according to his best recollection. On cross-examination he testified that in the absence of the records he could not state what part of the Php.63,000 represented cash advances and what part represented payments made by the company to the creditors of Mr. Fitzsimmons.

Aside from Santiago Inacay and Modesto Flores, the claimant also called as witnesses Mr. Henry J. Belden and Mr. Samuel Garmezy, vice-president-treasurer and president, respectively, of the claimant company, to testify on the status of the personal account of the deceased Fitzsimmons with the company as of December, 1941; but upon objection of the administrator the trial court refused to admit their testimony on that point on the ground that said witnesses were incompetent under section 26 (c) of Rule 123, they being not only large stockholders and members of the board of directors but also vice-president treasurer and president, respectively, of the claimant company.

In view of the ruling of the trial court, counsel for the claimant stated in the record that Mr. Belden, if permitted to testify, would testify as follows: That the deceased Fitzsimmons, being president of the Atlantic, Gulf & Pacific Company in the year 1941, had a current account with said company which, upon the outbreak of the war in December, 1941, had a debit balance against him of Php.63,000, and that said sum or any part thereof had not been paid. At the suggestion of the court counsel asked his witness whether, if permitted, he really would so testify, and the witness answered in the affirmative, whereupon the court said: "Let Attorney Gomez's offer of testimony ratified by the witness Mr. Belden be made of record."

With regard to the witness Mr. Garmezy, counsel for the claimant also made the following offer of proof, to wit: That if said witness were allowed to testify, he would testify as follows:

"That sometime in November—sometime during the last days of November, or the first days of December, 1941—he received a copy of the trial balance sheet, and in that trial balance sheet, among other things, the personal accounts of each and every one of the officers of the Atlantic Gulf & Pacific Co., including himself, and also the deceased R. T. Fitzsimmons, appear; and that this witness would also testify to the fact that on that occasion he checked up his own personal record with the entries appearing in the said trial balance sheet, and he then had occasion to find out that the account of the deceased Fitzsimmons with the Atlantic Gulf & Pacific Co. was a debit account in the amount of around sixty-three thousand pesos, while the personal account of Mr. Garmezy, the witness now testifying, showed a credit account in the sum of around sixty-three thousand pesos. This witness will also testify that this account of sixty-three thousand pesos owed by Mr. Fitzsimmons appeared in that trial balance, which he had occasion to read in the first days of December, 1941, was not paid by Mr. Fitzsimmons until the present date." (Pages 35-36, t.s.n.)

That offer of proof was likewise ratified by the witness Garmezy and made of record by the trial court.

The evidence for the administrator against this claim of Php.63,000 consisted of Exhibit 1 and the testimony of Mr. Marcial P. Lichauco explaining the circumstances under which said document was prepared and signed by the deceased Fitzsimmons. It appears that on December 15, 1942, Richard Thomas Fitzsimmons sued his wife Miguela Malayto for divorce in the Court of First Instance of Manila. On August 9, 1943, after due trial, the court rendered judgment granting plain tiff's petition for divorce and ordering the dissolution of the marriage between the parties. Attorney Lichauco represented the plaintiff in that divorce case. After the decree of divorce had become final the plaintiff Fitzsimmons, pursuant to the provisions of the divorce law then in force, submitted to the court an inventory of the assets and liabilities of the conjugal partnership, with a proposed adjudication or division of the net assets among the ex-spouses and their children. A carbon copy of said inventory, which was signed by Richard Thomas Fitzsimmons on November 9, 1943, and filed in the Court of First Instance of Manila on the same date in civil case No. 296, was presented by the administrator as Exhibit 1 in this case and admitted by the trial court over the objection of the claimant. The administrator Mr. Lichauco testified herein that as attorney for Mr. Fitzsimmons in the divorce case he prepared the said inventory from the data furnished him by Mr. Fitzsimmons after he had conferred with and explained to the latter why it was necessary to prepare said inventory, telling him that under the divorce law the conjugal properties had to be liquidated; that since he (Fitzsimmons) was married to Miguela Malayto in the year 1939, he had to include in said inventory all the properties acquired by him between the date of his marriage and the date of his divorce, and that all the

obligations incurred by him and not yet paid during the same period should be included because they had to be deducted from the assets in order to determine the net value of the conjugal properties; that he made it very clear to Mr. Fitzsimmons that he should not forget the obligations he had because they would diminish the amount his wife was going to receive, and that any obligation not included in the inventory would be borne by him alone after his wife had received her share.

According to Exhibit 1 the gross value of the assets of the conjugal partnership between the deceased Fitzsimmons and his wife Miguela Malayto as of November, 1943 was Php.174,700, and the total amount of the obligations was Php.30,082. These obligations consisted of only two items—one of Php.21,426 in favor of the Peoples Bank and Trust Company and another of Php.8,656 in favor of the Philippine Bank of Commerce. In other words, no obligation whatsoever in favor of the Atlantic, Gulf & Pacific Company of Manila was listed in said inventory Exhibit 1. And upon that fact the administrator based his opposition to the claim in question.

Before weighing the evidence hereinabove set forth to determine whether it is sufficient to prove appellant's claim of Php.63,000, it is necessary for us to pass upon appellant's first and third assignments of error referring, respectively, to the trial court's rejection of the testimony of the witnesses Belden and Garmezzy and its admission of Exhibit 1.

The question raised by the first assignment of error is whether or not the officers of a corporation which is a party to an action against an executor or administrator of a deceased person are disqualified from testifying as to any matter of fact occurring before the death of such deceased person, under Rule 123, section 26 (c), of the Rules of Court, which provides:

"Parties or assignors of parties to a case, or persons in whose behalf a case is prosecuted, against an executor or administrator or other representative of a deceased person, or against a person of unsound mind, upon a claim or demand against the estate of such deceased person or against such person of unsound mind, cannot testify as to any matter of fact occurring before the death of such deceased person or before such person became of unsound mind."

This provision was taken from section 383, paragraph 7, of our former Code of Civil Procedure, which in turn was derived from article 1880 of the Code of Civil Procedure of California.

In the case of *City Savings Bank vs. Enos*, 135 Cal. 167, 67 Pac. 52, 55, the Supreme Court of California, interpreting said article 1880, said:

"* * * The provision applies only to parties or assignors of parties, and Haslam was neither the one nor the other. If he was a stockholder, which it is claimed he was, that fact would make no difference, for interest no longer disqualifies under our law. Civ. Code Proc. sec. 1879. Appellant cites section 14, Civ. Code, to the effect that the word 'person' includes a corporation; and claims that, as the corporation can only speak through its officers, the section must be held to apply to all who are officially related to the corporation. A corporation may be conceded to be a person, but the concession does not help appellant. To hold that the statute disqualifies all persons from testifying who are officers or stockholders of a corporation would be equivalent to materially amending the statute by judicial interpretation. Plainly the law disqualifies only 'parties or assignors of parties,' and does not apply to persons who are merely employed by such parties or assignors of parties."

In a later case, *Merriman vs. Wickersham*, vs. Cal. 567, 75 Pac. 180, 181-182, the same tribunal, in passing upon the competency of a vice- president and principal stockholder of a corporation to testify, reaffirmed its ruling in *City Savings Bank vs. Enos*, supra, after examining decisions of other state supreme courts in relation to their respective statutes on the same subject. The court said:

"The Burnham & Marsh Company is a corporation. Mr. Marsh, vice president and one of its principal

stockholders, was allowed to testify to matters and facts in issue. It is contended that the evidence was improperly admitted, in violation of section 1880 of the Code of Civil Procedure, which provides that 'the following persons cannot be witnesses: * * * Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person. At common law interest disqualified any person from being a witness. That rule has been modified by statute. In this state interest is no longer a disqualification, and the disqualifications are only such as the law imposes. Code Civ. Proc. sec. 1879. An examination of the authorities from other states will disclose that their decisions rest upon the wordings of their statutes, but that generally, where interest in the litigation or its outcome has ceased to disqualify, officers and directors of corporations are not considered to be parties within the meaning of the law. In example, the statute of Maryland (Pub. Gen. Laws, art. 35, sec. 2) limits the disability to the 'party' to a cause of action or contract, and it is held that a salesman of a corporation, who is also a director and stockholder, is not a party, within the meaning of the law, so as to be incompetent to testify in an action by the company against the other party, who is insane or dead. *Flach v. Gottschalk Co.* 88 Md. 368, 41 Atl. 908, 42 L.R.A. 745, 71 Am. St. Rep 418. To the contrary, the Michigan law expressly forbids 'any officer or agent of a corporation' to testify at all in relation to matters which, if true, must have been equally within the knowledge of such deceased person. *Howell's Ann. St. Mich.* sec. 7545. The Supreme Court of Michigan, in refusing to extend the rule to agents of partnerships, said: 'it is conceded that this testimony does not come directly within the wording of the statute, but it is said there is the same reason for holding the agent of a partnership disqualified from testifying that there is in holding the agent of a corporation. This is an argument which should be directed to the legislative rather than to the judicial department of government * * * The inhibition has been put upon agents of corporations, and has not been put upon agents of partnerships. We cannot, by construction, put into the statute what the Legislature has not seen fit to put into it.' *Demary v. Burtenshaws' Estate* (Mich.) 91 N.W. 649. In New York the statute provides that against the executor, administrator, etc., 'no party or person interested in the event, or person from, through, or under whom such party or interested person derives his interest or title shall be examined as a witness in his own behalf or interest.' This is followed by the exception that a person shall not be deemed interested by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding or interested in the event thereof. *Ann. Code Civ. Proc. N.Y.* sec. 829. Here it is apparent that the interest of the witness is made a disqualification, and it is of course held that stockholders and officers of corporations other than banking corporations are under disqualification. *Keller v. West Bradley Mfg. Co.*, 39 Hun, 348.

"To like effect is the statute of Illinois, which declares that no party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify under the given circumstances. Under this statute it is held that stockholders are interested, within the meaning of the section, and are incompetent to testify against the representatives of the deceased party. *Albers Commission Co. v. Sessel*, 193 Ill. 153, 61 N.E. 1075. The law of Missouri disqualifies parties to the contract or cause of action,' and it is held that a stockholder, even though an officer of the bank, is not disqualified by reason of his relation to the corporation when he is not actually one of the parties to the making of the contract in the interest of the bank.

"Our own statute, it will be observed, is broader than any of these. It neither disqualifies parties to a contract nor persons in interest, but only parties to the action (Code Civ. Proc. sees. 1879, 1880); and thus it is that in *City Savings Bank v. Enos*, 135 Cal. 167, 67 Pac. 52, it has been held that one who is cashier and at the same time a stockholder of a bank was not disqualified, it being said: 'To hold that the statute disqualifies all persons from testifying who are officers or stockholders of a corporation would be equivalent to materially amending the statute by judicial interpretation.' It is concluded, therefore, that our statute does not exclude from testifying a stockholder of a corporation, whether he be but a stockholder, or whether, in addition thereto, he be a director or officer thereof."

The same view is sustained in *Fletcher Cyclopedia Corporations*, Vol. 9, pages 535-538; in *Jones on Evidence*, 1938 Ed. Vol. 3, page 1448; and in *Moran on the Law of Evidence in the Philippines*, 1939 Ed. pages 141-142.

The appellee admits in his brief that in those states where the "dead man's statute" disqualifies only parties, to an action, officers and stockholders of a corporation have been allowed to testify in favor of the corporation, while in those states where "parties and persons interested in the outcome of the litigation" are disqualified under the statute, officers and stockholders of the corporation have been held to be incompetent to testify against the estate of a deceased person.

The weight of authority sustains appellant's first assignment of error. Inasmuch as Sec. 26 (c) of Rule 123 disqualifies only parties or assignors of parties, we are constrained to hold that the officers and/or stockholders of a corporation are not disqualified from testifying, for or against the corporation which is a party to an action upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person.

It results that the trial court erred in not admitting the testimony of Messrs. Belden and Garmezy. It is not necessary, however, to remand the case for the purpose of taking the testimony of said witnesses because it would be merely corroborative, if at all, and in any event what said witnesses would have testified, if permitted, already appears in the record as hereinabove set forth, and we can consider it together with the testimony of the chief accountant and the assistant accountant, who according to the appellant itself were the only ones in the best of position to testify on the status of the personal account" of the deceased Fitzsimmons.

The third assignment of error raises the question of the admissibility of Exhibit 1. Appellant contends that it is a self-serving declaration, while appellee contends that it is a declaration against interest.

A self-serving declaration is a statement favorable to the interest of the declarant. It is not admissible in evidence as proof of the facts asserted. "The vital objection to the admission of this kind of evidence is its hearsay character. Furthermore such declarations are untrustworthy; to permit their introduction in evidence would open the door to frauds and perjuries." (20 Am. Jur., Evidence, sec. 558, pages 470-471.)

On the other hand, a declaration against the interest of the person making it is admissible in evidence, notwithstanding its hearsay character, if the declaration is relevant and the declarant has died, become insane, or for some other reason is not available as a witness. "The true test in reference to the reliability of the declaration is not whether it was made ante litem motam, as is the case with reference to some classes of hearsay evidence, but whether the declaration was uttered under circumstances justifying the conclusion that there was no probable motive to falsify." (Id., section 556, pp. 467-468.)

Insofar, at least, as the appellant was concerned, there was no probable motive on the part of Fitzsimmons to falsify his inventory Exhibit 1 by not including therein appellant's present claim of Php.63,000 among his obligations or liabilities to be deducted from the assets of the conjugal partnership between him and his divorced wife. He did not know then that he would die within one year and that the corporation of which he was the president and one of the largest stockholders would present the claim in question against his estate. Neither did he know that the books and records of that corporation would be destroyed or lost. Yet, although he listed in said inventory his obligations in favor of the Peoples Bank and Trust Company and the Philippine Bank of Commerce aggregating more than Php.30,000, he did not mention at all any obligation in favor of the corporation of which he was the president and one of the largest stockholders.

Assuming that he owed his corporation Php.63,000 for which he signed receipts and vouchers and which appeared in the books of said corporation, there was no probable motive for him not to include such obligation in the inventory Exhibit 1. It would have been to his interest to include it so that his estranged and divorced wife might share in its payment. The net assets appearing in Exhibit 1 amounted to Php.144,618, one half of which was adjudicated to the children and the other half was divided between the spouses, so that each of the latter received

only Php.36,154.50. By not including the obligation of Php.63,000 claimed by the appellant (assuming that he owed it), Fitzsimmons' adjudicated share in the liquidation of the conjugal partnership would be short by nearly Php.27,000 to meet said claim, whereas by including said obligation he would have received a net share of more than Php.10,000 free from any liability.

We find, therefore, that Exhibit 1, insofar as the omission therefrom of the claim in question was concerned, far from being self-serving to, was a declaration against the interest of, the declarant Fitzsimmons. He having since died and therefore no longer available as a witness, said document was correctly admitted by the trial court in evidence.

We shall now pass upon appellant's second assignment of error, which raises the question of whether or not appellant's claim has been satisfactorily proven. We shall consider the claim of Php.63,000 separately from the item of Php.868.67.

We have no reason whatsoever to doubt the good faith of Messrs. Samuel Garmezzy and Henry J. Belden, president and vice-president-treasurer, respectively, of the claimant corporation, in presenting the claim of PHP.63,000 against the estate of Fitzsimmons, nor the good faith of the administrator Mr. Marcial P. Lichauco in opposing said claim. They are all men of recognized integrity and of good standing in society. The officers of the claimant corporation have shown commendable fairness in their dealings with the estate of Fitzsimmons. They voluntarily informed the administrator that Fitzsimmons had paid Php.64,500 on account of the purchase price of 545 shares of stock of the company, and not Php.45,000 only, as the administrator believed. Likewise, they voluntarily informed him in connection with his claim for Fitzsimmons' back salaries that Fitzsimmons' annual salary was Php.36,000 and not Php.30,000, as the administrator believed. We can therefore readily assume that Messrs. Garmezzy and Belden "believed in good faith that the books of the corporation showed a debit balance of around Php.63,000 as of the out break of the Pacific war on December 8, 1941.

On the other hand, if Mr. Fitzsimmons, who was the president and one of the largest stockholders of the claimant corporation, really owed the latter around Php.63,000 on December 8, 1941, and had not paid it before he liquidated his conjugal partnership in November, 1943, as a consequence of the decree of divorce he obtained against his wife, we see no reason why he did not include such obligation in said liquidation. Judging from the high opinion which the officers and stockholders of the corporation entertained of Fitzsimmons as shown by their resolutions hereinafter quoted, they cannot impute bad faith to him in not acknowledging the claim in question.

There is a possible explanation of this seemingly irreconcilable conflict, which in the absence of other proofs we consider satisfactory but which both parties seem to have overlooked. We find it in the testimony on direct examination of appellant's witness Santiago Inacay, page 80 of the transcript, hereinabove quoted. According to Inacay, at the end of each year, after the declaration of dividends, bonuses, and director's fees, the account of Fitzsimmons was brought up to a credit balance. "In other words," he said, "at the start of the following year the account will be on the credit side." Not satisfied with that categorical statement, counsel for the appellant asked his own witness the following question and the witness gave the following answer:

"Q. So that I gather from you, Mr. Inacay, that the personal account of Mr. Fitzsimmons, as well as the other officers of the Atlantic, Gulf & Pacific Co., at the end of each year, and at the beginning of the incoming year, generally, would be in the credit balance; because of the application of dividends on paid shares, bonuses, and director's fees?—"A. Yes, sir.

"Q. In the year 1941, therefore, no declaration of dividends for the last six months—there were no declarations of director's fees * * * I withdraw the question, and that is all."

It is to be regretted that neither counsel for the appellant nor counsel for the appellee pursued the examination of

the witness to determine, if possible, the approximate amount of the dividends, bonuses, and director's fees that would have been credited to Fitzsimmons as of the end of the year 1941. But enough appears in his testimony to warrant the deduction that had the war not forced the corporation to close office on December 29, 1941, dividends, bonuses, and director's fees for the year 1941 would, as of the end of that year, have been declared and credited to the account of Fitzsimmons, which as in previous years would or might have brought that account on the credit side. President Garmezy reported to the meeting of the stockholders that the volume of work performed by the company in 1941 "exceeded that of 1940." (Exhibit 2.) We cannot assume that the company earned less profits in 1941 than in 1940. Probably the reason why Fitzsimmons did not include or mention any obligation in favor of his own corporation in his inventory Exhibit 1 was that he believed he was entitled to be credited by said corporation with dividends, bonuses, and director's fees corresponding to the year 1941, which as in previous years would bring his account on the credit side. If that was the case, the company was technically correct in asserting that at the outbreak of the Pacific war in December, 1941, its books showed a debit balance against Fitzsimmons—no dividends, bonuses, and director's fees having been actually declared and credited to Fitzsimmons at that time. But we think Fitzsimmons was justified in considering his account as having to all intents and purposes been brought on the credit side; because if such dividends, bonuses, and director's fees had been earned, the fact that they were not actually declared and credited to him, should not prejudice him. The subsequent loss of the company's properties and assets as a result of the war should be borne by the company and not by its officers.

Leaving the foregoing reflections aside, we are confronted only, on the one hand, by the oral testimony of the witnesses for the claimant based entirely on their memory as to the status of Fitzsimmons' account, and on the other by Exhibit 1, which contradicts said testimony. Realizing the frailty and unreliability of human memory, especially with regard to figures, after the lapse of more than five years, we find no sufficient basis upon which to reverse the trial court's finding that this claim had not been satisfactorily proven.

With reference to the item of Php.868.67, we find it to have been sufficiently proven by the testimony of Santiago Inacay and Modesto Flores, supported by the documents Exhibits A, B, C, and D, which establish the fact that in November and December, 1941, the San Francisco agent of the company deposited in the Crocker First National Bank of San Francisco the total sum of \$500 to the account of Fitzsimmons, which said agent debited against the company. Debit notices of the deposits were not received by the company until after the liberation. The administrator admitted in his testimony that after the death of Fitzsimmons he received from the Crocker First National Bank of San Francisco the balance of Mr. Fitzsimmons' account in the sum of Php.1,788.75. Aside from that debit of Php.1,000 against the company for the account of Fitzsimmons, the agent also paid \$1 or Php.2 for Fitzsimmons' subscription to the San Francisco Chronicle, making a total of Php.1,002. From this was deducted a credit of php.133.33, consisting of a payment made on June 30, 1946, by a creditor of Fitzsimmons named J. H. Chew, as testified to by Mr. Flores and supported by Exhibit E, leaving a balance of Php.868.67.

The trial court therefore erred in not allowing said claim.

II. We shall now pass upon appellant's fourth assignment of error, which assails the trial court's granting of appellee's counterclaim of Php.90,000 for salaries allegedly due to the deceased Fitzsimmons as president of the appellant corporation for the years 1942, 1943, and the first six months of 1944.

The undisputed facts are: Fitzsimmons was the president of the appellant corporation in 1941 with a salary of Php.36,000 a year. The corporation was forced to suspend its business operations from December 29, 1941, to March 8, 1945, on account of the war, its office and all its properties having been seized by the Japanese invader. Fitzsimmons, together with the other officers of the corporation, was interned by the enemy in the Santo Tomas internment camp, where he died on June 27, 1944.

At the annual meeting of the stockholders of the corporation held on January 21, 1946, the president, S. Garmezy, reported among other things as follows:

"While interned, the Company borrowed money on notes signed by Mr. Fitzsimmons and Mr. Garmezy; money was also received for the same purpose without signing of notes. Mr. Kihlstedt, who before the war was Superintendent of the Philippine Iron Mines, helped a great deal in obtaining this money, bringing it to Camp and distributing it to families living outside the Camp. Mr. Kihlstedt being a Swedish citizen, was able to live outside and he did some very good work."

And in that meeting the following resolutions, among others, were approved:

"RESOLVED, that all acts in 1941 thru 1945 of the Directors in office since their election in 1941 and elected in the interim, as duly recorded in the minutes of the meetings of the Board, are hereby approved, ratified and confirmed, and are to be accepted as acts of this corporation."

"RESOLVED, that in the death of R. T. Fitzsimmons, President of the Company from March, 1939, to the time of his death, which occurred in the Santo Tomas Internment Camp, Manila, on June 27, 1944 the Company suffered a distinct loss and his country a loyal American;

"FURTHER, that his passing is keenly felt and mourned by those of the Company with whom he was associated for more than thirty years, not only because of his value to the Company as an executive but also for the kindness, consideration and tolerance he showed to all at all times;

"BE IT FURTHER RESOLVED, that the Company convey its sympathies to the family and other immediate relatives of the late Mr. Fitzsimmons, transmitting to them a copy of this resolution."

Based upon those facts, the trial court granted the "back pay" claimed by the appellee.

There was no resolution either of the stockholders or of the board of directors of the company authorizing the payment of the salaries of the president or any other officer or employee of the corporation for the period of the war when the corporation was forced completely to suspend its business operations and when its officers were interned or virtually held prisoners by the enemy.

The theory of the appellee, which was sustained by the trial court, is that as long as a corporate officer with a fixed salary retains the office he is entitled to that salary notwithstanding his inability to perform his duties. The main case cited by the appellee in support of his theory is *Brown vs. Galveston Wharf Co.*, 50 S.W. 126, 128; 92 Tex. 520. In that case the president of the defendant corporation claimed his salary for a period of almost eleven months, during which he was on an indefinite leave of absence, and the court allowed it, holding that "so long as he remained the president of the company, the salary was an incident to the office, and ran with it for the whole time, although he may have failed to perform the duties of president for any given part of such time."

If such a sweeping pronouncement is to be applied regardless of whether or not the corporation was in operation during the period covered by the claim for the salary, as seems to be contended by the appellee, we must say that we cannot subscribe to it.

We know of no principle of law that would authorize the court to compel a corporation, which for a long period was not in operation and did not receive any income, to pay the salaries of its officers during such period, even though they were incapacitated and did not perform any service. To do so would be tantamount to depriving the corporation or its stockholders of their property without due process of law.

The resolutions of the stockholders hereinabove quoted are invoked by the appellee to support the proposition that Fitzsimmons, during his internment, performed certain acts as president of the corporation, which were ratified and confirmed by the stockholders in their annual meeting on January 21, 1946. But those acts consisted merely

of borrowing money for himself and the other officers of the corporation and their respective families to enable them to eke out an existence during their internment. The ratification of those acts by the stockholders had for its purpose to relieve Fitzsimmons of personal liability for the obligations 1 thus contracted by him in the name of the company. To say that by thus ratifying those acts of Fitzsimmons the corporation became obligated to pay his salaries during his internment aggregating Php.90,000, would be the height of absurdity.

We are clearly of the opinion that the estate of Fitzsimmons is not entitled to its counterclaim of Php.90,000 or any part thereof.

Let judgment be entered modifying that of the trial court to read as follows:

"The appellant Atlantic, Gulf & Pacific Company of Manila is ordered to pay to the administrator the sum of Php.64,500 upon the retransfer by the latter to the former of the 545 shares of stock purchased by the decedent in 1939.

"The administrator is ordered to pay to the said company the sum of Php.868.67.

"The claim of the company against the estate for Php.63,000 and the counterclaim of the estate against the company for Php.90,000 are disapproved."

It is so ordered, without costs.

Moran, C.J., Paras, Feria, Bengzon, Padilla, Tuason, Montemayor, and Reyes, JJ., concur.

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