

LEOPOLDO CRIADO, PLAINTIFF AND APPELLANT, VS. GUTIERREZ HERMANOS, DEFENDANT AND APPELLANT.*G.R. No. 12371. March 23, 1918*

Ponente: TORRES, J.

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In the ordinary proceedings prosecuted in the Court of First Instance of Manila by counsel for Leopoldo Criado against the firm of Gutierrez Hermanos for the recovery of a sum of money, on September 11, 1916, judgment was handed down whereby said firm was ordered to pay, in addition to other amounts therein specified, P54,296.62 with interest thereon at the rate of 6 per cent per annum from May 25, 1912, and whereby it was held that plaintiff was entitled to a share of .34064 per cent on P818,260.70, the total amount of the unpaid bills, subject to the liability of 10 per cent contracted toward the defendant in respect to said bills or to such part thereof as should be found to be uncollectible, with the costs against the defendant. Both parties excepted from this judgment and moved for a new trial, which motion was denied by an order of September 25th of the same year, to which both parties excepted. Plaintiff and defendant by mutual consent have filed but a single bill of exceptions and the same was approved, certified and forwarded to the clerk of this court, together with the oral and documentary evidence of record.

The original complaint was filed in the Court of First Instance on May 25, 1912, and after being twice amended was finally filed on January 15, 1913. Upon answering it, defendant interposed a cross-complaint. After full trial, judgment was rendered on July 8, 1913, by which, dismissing plaintiff's first, second, third, and fourth causes of action and the cross-complaint of the defendant the court sentenced the defendant, the firm of Gutierrez Hermanos, to pay the several sums specified in the fifth, sixth, seventh, eighth, ninth, and tenth causes of action, with legal interest thereon from May 25, 1912, and ordered same further to render accounts to the plaintiff for the reason therein stated, and to pay the costs. From this judgment defendant appealed and moved for a new trial. The motion was denied and defendant excepted and filed the proper bill of exceptions which was forwarded to this court. Upon hearing, a decision was rendered on March 24, 1915, whereby, for the reasons therein given, the judgment appealed from was set aside and the record remanded to the court of origin for the proper proceedings.

The proceedings in the Court of First Instance having been reopened upon petition by plaintiff, on May 24, 1915, the judge ordered the defendant Gutierrez Hermanos to render within a period of twenty days a detailed account, supported by vouchers, of the share which the plaintiff might have in the capital stock of said firm up to that date. In compliance with this order, the defendant presented an account (record, pp. 103-124) certified by the bookkeeper of the firm of Gutierrez Hermanos on June 3 of the same year.

In view of the fact that the defendant firm had not complied with the order of the court in respect to the account presented, counsel for plaintiff moved in writing that the clerk of court, McMicking, be appointed so that, in his presence and in that of the parties, G. B. Wicks might proceed to make a true liquidation of plaintiff's said share of the capital stock of the firm of Gutierrez Hermanos, since he began his connection therewith, on January 1, 1900, until his separation therefrom, on December 31, 1911. Said motion was accompanied by an affidavit in

which the plaintiff Leopoldo Criado declared under oath that he had examined the accounts presented by the defendant referring to his capital in that firm and that said accounts were based upon a false debit balance of P26,349.13—a balance which had been previously impeached by the affiant as well as the accounts from which said sum is sought to be derived. Wherefore he again assailed them in their totality on the grounds that some of the entries thereof were improper, others fraudulent, and still others false. Therefore plaintiff's counsel moved that defendant be ordered to place immediately at the disposal of Commissioner Wicks all the books, accounts, bills, vouchers, and other documents that might be necessary, in order that said liquidation might be made within a period of 30 days. Despite the motion made by defendant's counsel, by an order of September 2, 1915, the court ruled in conformity therewith, authorizing defendant to appoint another expert accountant who, together with the one already designated, Wicks, might examine the books and documents aforementioned. On motion by plaintiff, and notwithstanding the arguments made by the defendant firm, it was provided by another order of the court that said firm should comply with what the court had previously ordered, to wit, to place said books and documents at the disposal of the commissioner for his examination in the office of the clerk of court, on the three specified days of the week, from 2.30 o'clock up every afternoon.

After a rehearing of the case and an examination of George B. Wicks was made regarding the contents of the report that he had submitted after studying for that purpose the books and other documents placed at his disposal by the defendant—to which report he attached several documents in proof or substantiation of the different items mentioned in said report (Exhibit Z-3)—in view of the result and the evidence adduced by the parties, and by the said commissioner's report duly supported by vouchers, the court rendered the judgment aforementioned, on September 11, 1916. To this both parties excepted and moved for a new trial. This motion was denied, exception was taken, and, upon receipt of the proper bill of exceptions, both appeals were forwarded in the usual manner.

Counsel for the defendant-appellant assails in general the judgment appealed from because the trial court did not determine the issues raised in the first, second, third, fourth, sixth, seventh, eighth, ninth, and tenth causes of action, and in defendant's cross-complaint; and inasmuch as in the judgment the contrary appears with the exception of the first cause of action, the court will now proceed to examine each of the causes of action referred to in the complaint and assailed by the defendant and also the cross-complaint filed by the latter in its answer.

The first cause of action consists in the obligation assumed by Miguel Alonso, formerly one of the general partners and the manager of the firm of Gutierrez Hermanos, to pay to the plaintiff Leopoldo Criado the sum of P1,100 by reason of the contract of loan of said sum executed by Alonso in behalf of Criado, and to prevent plaintiff from suing for the recovery of that debt an action against the testate or intestate estate of the debtor who died without having paid his debt; the other partner Miguel Gutierrez de Celis, manager of the firm, succeeded in persuading the plaintiff Criado to refrain from suing for the recovery of his credit by promising to return said sum to Criado—this not being a strange obligation, for at the time of his death the deceased debtor Miguel Alonso, was a partner in the firm of Gutierrez Hermanos and had a share in the firm's assets. But the fact is that from 1898, when Alonso died, until 1912, the date the complaint was filed, such settlement had already been made of the decedent's said share and in spite of the attempts to collect made by the creditor he was unable to recover the loan.

Even on the supposition that at the time of his death the debtor Miguel Alonso certainly and positively left this debt and that in order to avoid judicial proceedings on the part of the creditor, Miguel Gutierrez de Celis subrogated and put himself in the place of the debtor, binding himself to pay said amount to plaintiff, yet, in view of the fact that said loan was made as an independent private act, unconnected with the mercantile operations of the firm of Gutierrez Hermanos, and that the record does not duly show that this firm, through its manager assumed the obligation to reimburse the sum, there is no provision of law to warrant us in holding that the firm of Gutierrez Hermanos is obliged to pay the amount claimed by plaintiff as the subject-matter of his first cause of

action.

In the second cause of action plaintiff demands the payment of P43,410.86, and alleges that, pursuant to a notarial instrument of March 29, 1900, he became a partner of the firm of Gutierrez Hermanos; and that said document stipulated that the partnership should last for four years from January 1, 1900, and, among other conditions, it contained the following:

"Second. Therefore the partnership is organized among the parties to this instrument, Don Placido Gutierrez de Celis, Don Miguel Gutierrez de Celis, Don Miguel Alonso y Gutierrez, Don Daniel Perez y Alberto, and Don Leopoldo Criado y Garcia, the first three as capitalist partners, and the last two as industrial partners."

"Eighth. All earnings or profits that may be obtained shall be distributed among the partners in the following proportion: 37 per cent shall go to Don Placido Gutierrez de Celis; 37 per cent to Don Miguel Gutierrez de Celis; 16 per cent to Don Miguel Alonso y Gutierrez; 5 per cent, to Don Daniel Perez y Alberto; and 5 per cent to Don Leopoldo Criado y Garcia. In the same proportion above established for the profits the capitalist partners shall be liable for all losses or damages that may be sustained."

A copy of said instrument was presented as Exhibit A and made an integral part of the complaint.

Plaintiff also alleged that, according to the books of the defendant firm, his capital was P56,796.25 in 1902, and, according to the balance had on December 31, 1903, the profits obtained amounted to P256,025.31, 5 per cent of which, or P12,801.26, belonged to him, according to the eighth clause of the articles of partnership, although the manager Miguel Gutierrez de Celis, by means of false and erroneous entries in the books, succeeded in concealing such profits, thereby injuring him in said amount of P43,410.86. Plaintiff testified that as soon as he learned of such entries, he at once protested, but that said manager assured him that as soon as the probate proceedings concerning the estate of the decedent Miguel Alonso should be determined said amount would be refunded although in spite of his efforts said promise has not been fulfilled.

In its answer the defendant firm admitted that plaintiff Criado was an industrial partner entitled to 5 per cent of the profits, but denied all the other averments of the complaint. In special defense it alleged that on December 31, 1903, there was made a liquidation and balance of the business of the firm—operations which were approved by all the partners with no protest made by plaintiff before or after said liquidation, but on the contrary, he gave his assent thereto and without reserve whatsoever he executed a new partnership contract, inasmuch as the sum shown by said liquidation and balance of the business of the firm at the end of December, 1903, formed «the basis of the capital mentioned in the articles of partnership executed before a notary on May 9, 1904. Finally, the defendant alleged that, in accordance with the provisions of section 43 of the Code of Civil Procedure, this second cause of action had already prescribed, inasmuch as its object, the recovery of personal property, prescribed after four years, just as an action for damages by reason of fraud.

The purpose of the second cause of action exercised by plaintiff's counsel is to obtain from the defendant the share of the profits earned by the firm from 1900 to December 31, 1903, belonging to plaintiff, by reason of the partnership contract—a contract that produced reciprocal rights and obligation between the partners—and if the record shows as duly proven that there were profits, the obligation on the part of the defendant firm to pay to plaintiff his share of said profits at the rate of 5 per cent is inevitable, there appearing no just and legal reason in the record for exempting the defendant from the fulfillment of said obligation. It is therefore not proper to assert that the action brought by plaintiff has for its object the recovery of personal property, or to demand damages for fraud, and therefore the period for prescription is not the four years fixed by section 43, paragraph 3, of the Code of Civil Procedure, but that of ten years, as provided in paragraph 1 of said section, inasmuch as the action brought is founded on a contract in writing and demand is thereby made for the payment of a certain net sum,

entered in the books of the firm of Gutierrez Hermanos, for the prescription of which the lapse of ten years is required—a period which certainly has not elapsed since the last balance was made of the business of the firm of which Leopoldo Criado was a partner.

In order to determine whether—besides the sum of P25,129.09 which constituted the capital brought by the plaintiff Leopoldo Criado, as capitalist, during the second period of the firm newly organized in 1904—plaintiff still has a right to demand the sum that is the subject, of his complaint in the second cause of action, or any other sum that might be found to be a remainder of the salary owing him in his capacity of industrial partner during the first period of the firm organized for four years from January, 1900, it becomes necessary first to decide whether in fact the plaintiff is in estoppel and unable to oppose any valid objection against said liquidation and balance; inasmuch as, according to the inventory of the firm's business, made on December 31, 1903, which was signed by Leopoldo Criado, Miguel Gutierrez de Celis and Daniel Perez de Celis, plaintiff Criado's capital on that date was only P25,129.09, the sum recorded as his capital in the articles of partnership, Exhibit O, which were in force during the second period from January, 1904, although this contract was executed on May 9 of that year. From clause 7 of said contract, and according to said inventory of December 31, 1903, it appears that the firm's capital stock amounted to P1,605,479.30, of which the sum of P25,129.09 belonged to Leopoldo Criado. as the capital brought by him into the new firm.

In an affidavit plaintiff stated that when he learned of the contents of the firm's books, he protested against the entries therein, but that the manager Gutierrez de Celis assured him that he would lose nothing by those entries made in connection with a serious matter then pending; that afterwards he learned that said entries had been made in the books through fear that Jose Fortiz, a creditor of 5 per cent of the profits, should claim his share of the profits pertaining to the years 1902 and 1903; that in fact Fortiz did bring suit against Gutierrez Hermanos and obtained a favorable judgment not only in the Court of First Instance but also in the Supreme Court which affirmed the judgment of the lower court (record, p. 381) ; that another reason why said false and erroneous entries were made in the firm's books by Gutierrez de Celis was to show the family of the deceased Miguel Alonso that the losses reported in his letter received during his lifetime from Gutierrez de Celis were due to his poor management of the firm's business (record, pp. 381 and 382) ; that as, in spite of the repeated steps taken by plaintiff, said Gutierrez de Celis did not fulfill his promise to pay the sums which had been unduly withheld by means of those improper entries, plaintiff therefore finally refused to sign the, balance sheet for the business of 1909, but did sign the previous one containing the record of a loss of P110,000 and also the partnership contract of 1904, showing his capital to be P25,129.09 as he believed that Miguel Gutierrez de Celis would reimburse him, as he had promised, his share of the sums which had been entered as losses in the firm's books.

In Exhibit 10 (record, p. 205) there appears an entry which reads thus:

"P501,513.57, amount of the bills cancelled in the books in this date which should have been cancelled in previous years on account of difficulty in their collection, some of these bills being of such a nature that they should be charged to the account of the management as they are contrary to the provisions of the 5th and 10th clauses of the partnership contract * * * but, in view of the fact that the author of these irregularities is not living so that compliance with the contract may be demanded of him, we have distributed the losses equally among the three principal partners * * * and 5 per cent against each of the industrial partners, Leopoldo Criado's share of the losses being P25,080.68."

Without doubt this entry was made for the purpose of showing that Miguel Alonso, former manager of the partnership, was to blame for these losses. It is to be noted that, according to the contract, plaintiff as an industrial partner is not liable for said losses; therefore in this distribution said sum was unduly deducted from his share of the assets.

In order to prove the certainty of the protest made by plaintiff and the repeated promises of payment by Miguel Gutierrez de Celis, Attorney Eduardo Gutierrez Repide was called as a witness and testified that, as a consequence to the complaint made by the plaintiff to the attorney Marple, one of the members of the Hartigan law firm, against the acts of the manager of the firm of Gutierrez Hermanos—a proceeding which, as plaintiff stated produced the effect of continually reducing his assets in the firm by order of the said Marple—he, witness, went to confer with said manager Gutierrez de Celis who after learning of plaintiff's complaint stated to witness that there was then good and sufficient reason for making it appear in the firm's books that the industrial partner Leopoldo Criado had less assets in the firm than in reality he had, but that he should not worry further as later on the firm would pay him the reduced amount of the forty-three thousand and odd pesos which made up the reduction, and that, sometime afterwards, witness having been called as a friend, and not as an attorney, by said manager of the firm, on meeting the latter, he learned that just then Leopoldo Criado was refusing to sign the instrument setting forth the new articles of partnership for a new period because said manager had not fulfilled his promise to return to plaintiff the aforesaid sum deducted from his capital stock, on which occasion the notary Barrera was there waiting; that then Gutierrez de Celis directed the witness to tell plaintiff not to worry, and that said sum would be returned to him; that therefore witness, trusting in these words of the manager, advised plaintiff to sign the instrument, just as he did; and that witness afterwards learned that these promises had not been fulfilled.

In view of the evidence adduced by plaintiff, not rebutted by counsel for the defendant, it cannot be held that plaintiff was in estoppel immediately after having signed the partnership contract of May 9, 1904, in which it appears that he brought into the new firm, as capital of his own, P25,129.09, nor may it be said that he was not entitled to claim the rest of his assets in the firm during the first period from 1900 to 1903, to wit, the difference between the sum of P56,793.25, plaintiff Criado's capital as an industrial partner and said P25,129.09, the capital brought into the new firm, inasmuch as it was not the plaintiff, but the manager of the firm, Miguel Gutierrez de Celis, who intentionally and deliberately induced Leopoldo Criado to sign said partnership contract of May, 1904, in which plaintiff appeared as a capitalist partner for the last mentioned sum brought into the general assets of the firm under the repeated promise that he would afterwards be paid the rest of the assets due him up to the aforesaid sum of P56,793.25, the amount of capital standing to his credit at the time of the termination of the previous partnership on December 31, 1903.

As aforesaid, plaintiff signed the instrument of 1904 in the belief that the manager of the firm of Gutierrez Hermanos would fulfill the promise he had made not only to the plaintiff but also to attorney Gutierrez Repide; wherefore, it is evident that the defendant cannot set up estoppel against the plaintiff, who relied upon said repeated promise (Act No. 190, sec. 333), inasmuch as the defendant was aware that plaintiff, as an industrial partner, was entitled to collect a greater sum as a part of his capital than that brought into the new partnership and he had an indisputable right to contradict and adduce oral evidence against the contents of said instrument of May 9, 1904 (Act No. 190, sec. 285), in case the exception of the plaintiff which the defendant denied were based on the contents of that instrument, and likewise against the liquidation and balance made at the expiration of the term of the first partnership, causing to appear in said balance and in the books of the firm, among other entries, that aforementioned sum of P501,513.57, certified to in the document Exhibit 10, this amount is sufficiently large when distributed among the partners, as losses when plaintiff Criado, as one of the industrial partners is not liable for the losses which the firm may have sustained according to the eighth clause of the notarial instrument of May 29, 1900. The allotment to the industrial partner Leopoldo Criado of the amount of P25,080.68 as losses suffered by the firm in its business during the years 1900 to 1903 was notoriously illegal, inasmuch as he, being merely an industrial partner, was not liable for any loss whatever.

Plaintiff assails several entries made in the books of the firm consisting of losses in hemp, merchandise,

depreciation of steamers, and reductions in the capital stock belonging to the partners, all amounting to P793,199.24, as well as the net loss estimated at P110,578.38. But it suffices our purpose to mention the reduction as losses, distributed among the partners, of P501,613.57, P25,080.68 of which was charged against the plaintiff as his proportionate loss of the capital, in order to show the propriety of plaintiff's averments that without any good reason or ground whatever he sustained a loss by the decrease of his capital.

For the practical application and the fulfillment of the stipulations made by the partners, in the second and eighth clauses of said articles of partnership of March 29, 1900, it should be understood that, for the purpose of determining the profits that correspond to an industrial partner who shares in the profits, but is not liable for the losses, all the various profits from the different transactions carried on by the firm must be added together from which sum must be subtracted that of the losses sustained in its business, and in the difference which represents the net profits—if these are greater than the losses—the industrial partner shares, i. e., in the sum total of the profits. But if, on the contrary, the losses are greater and exceed the* profits in said difference the industrial partner should not be liable, for this constitutes a real loss to the firm.

Wherefore, having examined the documents presented at the trial, among them Exhibits C, F, H, P, 2 and 8 as well as the report of the commissioner, Wicks, Exhibit Z-3, together with the documents attached by him to his report, and taking into account that only sixty-seven thousand and odd pesos could be collected from the credits considered as uncollectible, and that the plaintiff, as an industrial partner, should not be liable for the losses, according to the articles of partnership, it follows that, at the termination of the partnership in 1903, plaintiff's assets were P56,793.25, and his liabilities P1,054.56, there being in his favor consequently a balance of P55,738.69; but as in the instrument of May, 1904, he was credited with only P25,129.09, as capital brought into the new company, the plaintiff is entitled to demand that the firm of Gutierrez Hermanos pay him in the sum of P30,609.60.

Furthermore, in the instrument of May 9, 1904, it is not stated that the amount brought in by plaintiff was the balance and sole asset that he had as an industrial partner in the extinct firm in 1903, nor that he condoned and renounced any other assets he might have therein; consequently, he has not lost his right to collect the rest of his capital by having signed said, instrument, and it is not fair that his copartners should benefit with no just reason and to his prejudice.

The commissioner, Wicks, awarded plaintiff P32,875.46, as a part of his capital which he was entitled to collect (Exhibit Z-3). Plaintiff accepts this sum, though he demanded more in his complaint; but this court can not accept the commissioner's conclusion in this particular, inasmuch as plaintiff admitted that his capital, on December 31, 1902, was the sum aforementioned which appears in the defendant's books, and in 1903 the firm of Gutierrez Hermanos netted no profits from its business; because, as a result of the commissioner's examination of the books and papers of the defendant firm, he unduly awarded plaintiff P6,205.25, as a part of his capital, which the defendant had failed to pay him in the years 1900 to 1902, and P1,660.91, as a part of his assets unduly excluded by the defendant firm from his account of invested capital in 1903, both amount aggregating P7,866.17. It is to be observed that plaintiff agrees that his capital in 1903, according to the defendant firm's books, amounts to P56,793.25, without the debt of P1,054.56.

On pages 8 to 12 of Exhibit Z-3 the commissioner Wicks also unduly charged plaintiff 5 per cent of the interests on certain personal accounts that were canceled in the books, and on certain sums which appeared on the firm's books as losses pertaining to the years 1904 to 1911, as being related to certain other accounts that originated during the period 1900 to 1903. These charges were improper because the interests on the accounts stricken from the books are, like the principal debts, also losses for which, according to the articles of partnership, the industrial partner should not be held liable. The amount thus unduly charged against plaintiff on account of the said 5 per

cent interest aggregates P5,600.32, which sum, subtracted from said P7,866.17, an amount also unduly paid, leaves a difference of P2,265.85 likewise unduly credited to plaintiff and which apparently increases his assets. This latter sum, subtracted from that awarded by the commissioner, shows that plaintiff is entitled only to the sum of P30,609.60, a sum which, with the sole difference of one centavo through inaccuracy in the calculations, we deem to be mathematically correct, lawful, just, and in conformity with the stipulations made by and among the partners in said instrument; and therefore the defendant should be ordered to pay the same, together with the legal interest thereon from the date of the filing of the complaint.

As regards the third cause of action in the previous judgment which was set aside, the complaint, in so far as this cause of action was concerned, was dismissed and upon a reopening of the case, in the subsequent judgment rendered therein on September 11, 1916, the court abstained from granting the petition made in connection with said third cause of action; notwithstanding, the plaintiff-appellant in his brief made no assignment of error with respect to this matter, nor did he request the court to make any ruling on the petition submitted in connection with said cause of action. Therefore, notwithstanding the agreement contained in the document Exhibit 50, and in view of the fact that plaintiff tacitly waived any right he might have had to enforce this claim, judging from his conduct in the matter of the collection of the sum of P406.99, also mentioned by the commissioner in his report Exhibit Z-3, this court dismisses the complaint in so far as said third cause of action is concerned.

In the judgment appealed from, the trial court holds that the item relative to the shares of stock in the Bataan mines pertained to the losses suffered in 1906 and should have been charged to the account of profits and losses as, according to the 8th clause of the articles of partnership, plaintiff had suffered a loss not only of 5 but 10 per cent. The plaintiff-appellant, likewise makes no assignment of error against this judicial declaration. Therefore the complaint is also dismissed with respect to the fourth cause of action. By the fifth cause of action counsel for plaintiff demands payment of the sum of P88,245.93, and the trial court, for the reasons stated in the judgment, held that the defendant firm was obliged to pay to plaintiff the sum of P51,296.62, with legal interest thereon from May 25, 1912, the date of the filing of the complaint. This finding has not been assailed, nor has any error been assigned against it by the plaintiff-appellant in his brief, but the defendant-appellant, ordered in the judgment to pay that sum, made an assignment of errors based on the reasons set forth in its brief.

The plaintiff having impliedly acquiesced in the finding of the trial court with respect to the fifth cause of action, we shall now proceed merely to inquire whether that court actually committed the errors assigned to the judgment by the defendant-appellant.

According to the document Exhibit 7, presented by the defendant, which appears to be a copy of plaintiff's stock account, certified as authentic by the defendant's bookkeeper, the capital stock of the plaintiff Leopoldo Criado, prior to December 29, 1911, was P73,147.87, an amount which also appears in the document (Exhibit P) and tends to prove that on December 31, 1911, plaintiff's capital was the amount stated, before the annotation of the entries assailed as false and fraudulent by plaintiff.

The eighth and sixteenth clauses of the articles of partnership, Exhibit O (record, p. 82), executed in May, 1904, which ratified and approved the transactions of the firm of Gutierrez Hermanos from January of that year state the following:

"Eighth. The earnings or profits which may be obtained shall be distributed among the partners in the following proportion:

"Forty per cent to D. Placido Gutierrez de Celis;

"Forty per cent to D. Miguel Gutierrez de Celis;

"Ten per cent to D. Daniel Perez Albertos; and

"Ten per cent to D. Leopoldo Criado Garcia.

"In the same proportion provided for the profits, the partners shall be liable for the losses that may be incurred."

"Sixteenth. In case the partnership business should incur such losses as to prevent a continuance of the business or to make a dissolution of the partnership advisable, same shall be liquidated, each capitalist partner bearing such loss in a pro rata proportion to the capital he represents, the expenses necessary for the prosecution of the business being chargeable to the firm as a whole. Notwithstanding these provisions the partners Don Placido and Don Miguel as principal capitalist partners may liquidate the partnership or alienate its rights whenever they deem proper so to do."

By a notarial instrument of January 2, 1908, the life of the partnership was extended to another term of four years, upon the same bases and conditions (Exh. X, p. 100).

From the two preinserted clauses of the partnership contract it is deduced that the partners should be liable for all the losses incurred by the partnership in the proportion fixed in the 8th clause; but that, in case such losses should be of so great importance as to prevent a continuation of the partnership business, or to make advisable the dissolution of the partnership, then due action should be taken in conformity with the provisions of said clause 16, and the partners should be liable from the losses in a proportion pro rata to their share in the partnership assets; in consequence whereof, plaintiff should be liable at the rate of 10 per cent of the losses sustained.

The trial judge held that, according to the balance sheet (Exhibit P) admitted by the defendant (sten. notes, p. 45), the profits in 1911 were P120,986.34; but a mere reading of this balance sheet shows that the profits were not so much as the plaintiff claims, even by adding thereto the sum of P30,000, nor did they amount to the sum fixed by the court, for the reason that that same document shows losses of P21,963.38 for general expenses and of P22,569.41 for the account on its face, which accounts bear debit balances.

In order to determine the exact amount of the profits and losses during the year 1911, it becomes necessary to examine the 1910 inventory, not discussed by the litigants, and to make a comparison between its contents and those of the 1911 inventory. Having examined various documents stating accounts of several kinds relating to the business of the firm of Gutierrez Hermanos, as those of merchandise, various debtors, furnitures, shares, consignments, vessels, cash operations of provincial business, and rural and urban properties, it appears that the active capital of the partnership was, on December 31, 1911, P2,685,096.40.

According to the inventory Exhibit 51 (record, p. 172), the liabilities of the partnership were P789,228.65 in 1911.

The unpaid accounts aggregate a total of P148,965.66. In his report (Exhibit Z-3) the commissioner classified these credits as uncollectible, doubtful and of slow collection, a classification we find very just, since the entry No. 1657, Exhibit T, admits that a part of such credits, without being uncollectible or doubtful, is of slow collection. According to said commissioner's report, the uncollectible credits amount to P33,746.58, an amount which may, in justice, be considered as lost; those doubtful amount to P39,864.49, and those of slow collection to P75,354.59, making a total of P118,219.08.

We cannot consider as lost the credits of slow collection nor even the doubtful ones, as there is the hope that they may be collected in the future; therefore the sum of the doubtful credits and those of slow collection should be deducted, as unpaid accounts from the liabilities which, consequently, are reduced to P671,019.57, an amount that still must be reduced to P662,337, because in 1912 the balance of P8,682.57, Ramon Madarieta's debt, was collected as the commissioner states in his report. According to the entry No. 1658, Exhibit U, the active capital

was reduced on account of the difference in the price of hemp, by the sum of P110,091.19. Therefore, deducting from the liabilities the excess of P102,534.27, it appears that, on, December 31, 1911, the liabilities were only P559,802.73, which amount, subtracted from the active capital, shows that the firm's net capital stock on that date was P2,125,293.67, and this sum, compared with the capital that the defendant firm had on December 31, 1910, which, according to Exhibit Z (record, p. 120) was P2,182,010.04, shows a loss of P56,716.57. Consequently, there should be deducted from plaintiff's capital 10 per cent of this sum or P5,671.64 as his share of the loss.

The capital which plaintiff had in the firm in 1911, according to Exhibit 7 (record, p. 197), amounts to P76,141.08, a balance which constituted his capital on December 31, 1910, and adding thereto the sum of the amounts collected, P605.50, the result is that plaintiff's true assets, in his account of capital stock, must be P76,746.58. Deducting from this sum that of P2,570.98 which is charged as a debit against plaintiff, there appears a net balance in his favor of P74,175.60 and, deducting from this sum 10 per cent of the P56,716.37, or P5,671.64 as losses, there results the difference of P68,503.97, the sum which he was entitled to collect from the defendant by this fifth cause of action— although the amount was reduced to P51,296.62 as fixed in the judgment—the payment of which the defendant is obliged in the manner stipulated in the 19th clause of the articles of partnership, in proportion to the total net capital, that is, at the rate of 3.22 per cent with legal interest from the date of the filing of the complaint.

By the sixth cause of action plaintiff claims the sum of P2,000, alleging that same was unduly charged against his private account when, in truth and in fact, in consequence of a compromise made by advice of the attorneys of the defendant, the former firm of Del Pan and Ortigas, he, as manager of the defendant firm, paid said sum to Leopoldo who for this reason, in spite of his better right, desisted from claiming P8,000 from Tirso Nery against whom the defendant then had an action pending.

The trial court rendered judgment in favor of the plaintiff for P2,000, with legal interest thereon, at the first hearing of this case, and at the second hearing held that plaintiff should be paid P1,800, considering the remaining P200 as plaintiff's share in the loss suffered by the firm on account of said compromise.

The defendant alleged that its manager's statement shows that this sum of P2,000 was paid by Gutierrez Hermanos on the account of Leopoldo Criado, as there was no need of buying this credit of Leopoldo. Ferrer against Tirso Nery, and that while acting as manager plaintiff took advantage of the opportunity to buy said credit for 25 per cent of its nominal value.

Plaintiff testified that Miguel Gutierrez de Celis read the complaint of Leopoldo Ferrer and believed that it was advisable to pay this creditor's claim; that therefore De Celis himself drew the check for the payment of Ferrer's claim and ordered plaintiff to go to court in company with the attorney to stipulate a compromise about the matter.

The manager, Miguel Gutierrez de Celis, testified that he had no knowledge of that complaint and of that compromise ; but the court, who saw and observed these witnesses while they were testifying, gave credence to plaintiff's testimony, and we see no reason whatever for modifying his judgment in this matter, for the evidence as a whole tends to prove that plaintiff told the truth.

So therefore plaintiff is entitled to recover from the defendant the sum of P1,800 but must suffer the loss of the remaining P200 as his share of the loss of the credit.

In the seventh cause of action plaintiff claims compensation for the services rendered the defendant firm at the instance of Miguel Gutierrez de Celis, and alleged that a just and reasonable compensation from December 31, 1911, when he left the firm, until March 30, 1912, is P1,000 per month, such services being rendered at the request of Miguel Gutierrez de Celis, with the promise that compensation; would be in accordance with the profits

obtained; that this value of services, P1,000 per month, was estimated on the basis of the work done by him and the profits obtained; that he therefore demanded of Miguel Gutierrez de Celis the payment of said compensation, but that the latter refused. to pay anything (record, p. 427).

The manager Miguel Gutierrez de Celis testified that Leopoldo Criado lodged and boarded in the house of Gutierrez Hermanos during the months of January, February, and March, 1912; that his work consisted solely in being there and seeing that the things were accomplished; that he intervened in the preparation of the balance sheets; and that consequently his services were of no value.

Upon the foregoing evidence the lower court rendered judgment in favor of the plaintiff for the amount claimed and fixed by himself, and basing judgment on the nature of his work and on what he had earned previously as a partner.

In trying to prove that the trial court erred in its award in favor of plaintiff for this cause of action, counsel for the defendant says, on page 33 of the Spanish brief, No. 9300, that plaintiff could not establish his right under this cause of action; that, according to the testimony of the defendant's manager, the sole reason why plaintiff continued in the firm after December 31, 1911, was to make the final balance sheets; and that therefore he can recover nothing for his services because the rule established in various American cases cited is that a liquidator-partner is not entitled to any compensation for his services as such, unless there are special stipulations in the matter of circumstances from which such contractual stipulations may be deduced.

Assuming that the rule cited were applicable in this country, the same rule favors the plaintiff for, in the present case, there was not only an implied but an express contract that defendant should pay plaintiff a compensation proportionate to the profits that might be obtained from the business of the firm.

With respect to the amount of that compensation, counsel for the defendant say on the aforecited page of their brief, that plaintiff testified that his salary ought to be in accordance with the profits that might be obtained but that he did not prove how much he could have earned elsewhere.

It is undeniable that plaintiff did render services to the defendant firm when he was not obliged to do so gratuitously, for, neither in the partnership contract (Exhibit 0), nor in the law, is there any provision whatever to the effect that plaintiff as a partner was obliged to liquidate the business without compensation, since among the partner's obligations as prescribed by articles 170 to 174 of the Code of Commerce, such an obligation does not appear, but on the contrary, articles 228 and 229 of the said Code provide that in general or limited partnerships, should there be no objection on the part of any of the partners, the persons who managed the common funds shall continue in charge of the liquidation. Plaintiff, without being obliged, rendered service to the defendant at the manager's request, with the understanding that his compensation should be in proportion to the profits that might be obtained, and, therefore, it is just and reasonable that such services should be remunerated.

As regards the amount of the compensation we do not find satisfactory rebuttal of plaintiff's testimony in this matter, as the manager merely said that plaintiff's services were worth nothing, a statement that falls by its own weight, for, however insignificant may be the work one person does on behalf of another, it is always worth something. There is no evidence that the benefits on which plaintiff bases the estimate of his compensation were not received nor do we find his estimate exaggerated. Nor does there appear any reason whatever for modifying the judgment of the trial court in respect to this point.

Therefore the defendant ought in justice pay to the plaintiff the amount claimed in this seventh cause of action.

In the eighth cause of action plaintiff claims the sum of P52 as his 10 per cent share of the P520 which La Germinal paid the defendant as dividend obtained in 1911 and corresponding to the shares of stock the defendant

held in that company, alleging that, notwithstanding the fact that the defendant collected said amount, it failed to credit him with P52, the sum to which he was entitled.

In its answer defendant admitted that it collected the dividend mentioned, and that plaintiff was entitled to the payment of the P52.

Plaintiff testified (record, p. 429) that the books do not show that the sum of P520 was divided among the partners. Counsel for the defendant admitted that they had no evidence to present in respect to this cause of action.

Therefore plaintiff has an unquestionable right to collect from the defendant the sum of P52, as held by the trial court.

By the ninth cause of action plaintiff claims the payment of P1,171.11 as his 10 per cent share of the P11,711.16 which the insurers of several of the defendant's steamers paid on account of certain damages suffered by these vessels—said repairs were paid proportionately by all the partners—and that, notwithstanding the collection of this sum, defendant did not pay him his share thereof.

Defendant denied that it received P11,711.16, but admitted that it did receive P9,032.92, and that of this sum plaintiff should be credited with P953.90.

The court below rendered in favor of plaintiff judgment for P953.90, from which judgment he did not appeal, nor did the defendant make any assignment of error in respect thereto. We see no reason whatever for changing or modifying this finding, for the defendant admitted, as aforesaid, that plaintiff was entitled to the amount awarded him in the judgment. We therefore affirm this part of the judgment.

By the tenth cause of action plaintiff asks judgment for P3,000, alleging that in 1911, after he had ceased to be a partner of Gutierrez Hermanos, the defendant firm charged to the account of "Items pending collection" and credited in favor of Movellan and Angulo, of Paris, insurers of the defendant's steamers, P35,334.09 for the premiums on the insurance of said steamers for the year 1912, thereby diminishing the partners' capital; and that of said P35,334.09, he is entitled to P3,000 which the defendant's manager failed to pay plaintiff, notwithstanding the demand made upon him so to do.

The defendant alleges that the premiums pertaining to the year 1912 amount to only, P958.97, of which P95.89 belongs to plaintiff, and admits that said sum should be credited to plaintiff's account.

The lower court rendered judgment in favor of plaintiff for P1,001.22, from which judgment he did not appeal, and although the defendant appealed from this award of the judgment, it was not included in its assignment of errors. Nor do we find anything in the record to show that the trial court erred; on the contrary, we see that the dates and premiums of the insurance policies mentioned in the judgment, for which plaintiff should not be held liable, agree with those given in Exhibit 45 (record, p. 297) which is a copy of the insurance policies of the steamers Montañez, Dos Hermanos, and Magallanes, certified to by the bookkeeper of the defendant firm, no policies of other steamers having been presented, while the report of the commissioner (record, p. 77), schedule 28 of Exhibit Z-3, differs very much from Exhibit 45. Therefore said award of the trial court should likewise be affirmed.

DEFENDANT'S CROSS-COMPLAINT.

The defendant asks therein that plaintiff be ordered to pay any amount proved due the partnership, and alleges that during the time that plaintiff acted as the official in charge and the manager of the defendant firm's business, to wit, during the period between May 1 and December 10, 1903, he, knowingly and in contravention of the stipulations contained in the articles of partnership, sold and delivered various merchandise and other effects to

several debtors, such as Antonio de la Riva, whose debt had then reached the amount of P88,617.96, and Gerena & Co. whose account showed a debit balance of P39,417.16, without having the security required by the articles of partnership; that therefore plaintiff alone is responsible for the losses occasioned through such procedure; and that, upon making the balance sheet on December 31, 1911, a loss was found whereby plaintiff owed the defendant more than P26,000.

The clause to which this cross-complaint refers and which was violated by plaintiff is the fifth of the instrument of March 16, 1900, presented as Exhibit A (record, p. 58), and is of the following tenor:

"The purpose of the partnership shall be the transaction of business in the purchase and sale of groceries and beverages from Europe and America, and domestic merchandise; and in the advancement of funds on goods under security to companies or to private parties, the credit allowed thereon not to exceed thirty thousand pesos and granted only on the approval of the principal capitalist partners."

The trial court dismissed this cross-complaint, for the reason that the transactions, the responsibility for which the defendant claims to hold plaintiff liable, were ratified by Miguel Gutierrez de Celis upon his arrival in the Philippines.

The cross-complaint raises two questions, to wit: (First.) Is plaintiff liable for the debts of Antonio de la Riva and of Gerena & Co.? (Second.) Is plaintiff in debt to the defendant in the sum of twenty-six thousand and odd pesos ?

With respect to the second question we have already shown in discussing the fifth cause of action, that, as disclosed by the record, the defendant is indebted to plaintiff. This question should therefore be determined in the negative.

As regards the first question, even supposing that plaintiff has violated the stipulations of the articles of partnership by giving credit to various persons without taking the security required in the fifth clause of said articles, yet in the cross-complaint no other reasons are alleged by virtue of which he should be held liable for said breach of contract.

Article 144 of the Code of Commerce makes a partner liable for the damages suffered by the partnership by reason of his malice, abuse of powers, or serious negligence, and requires him to indemnify the partnership, should the other partners so require, provided an express or verbal approval or ratification of the act on which the claim is based can not be deduced in any manner whatsoever. According to this legal provision, in order that the partner at fault may be compelled to pay an indemnity, it is indispensable, in the first place, that his conduct shall have caused some damage to the partnership, and, in the second place, that his conduct should not have been expressly or impliedly ratified by the other partners or by the manager of the partnership.

In the cross-complaint the allegation is made that plaintiff, violating said fifth clause of the articles of partnership, sold and delivered merchandise and other effects to various debtors, such as Antonio de la Riva and Gerena & Co., without the security required in said articles; and that, because of the large sums which said debtors owe to the partnership, plaintiff is liable for all the damage and harm caused, amounting to P128,035.12.

Plaintiff Leopoldo Criado testified, with respect to Gerena & Co., that subsequent to his arrival in this country, Miguel Gutierrez de Celis continued to maintain commercial relations with said debtor firm, whose debt would have been collected had Gutierrez de Celis followed his (plaintiff's) advice and that of the attorneys of the firm of Gutierrez Hermanos—aside from the fact that the firm of Gerena & Co. was solvent and could pay its debt; so it is that the manager Miguel Gutierrez de Celis continuing said business ratified plaintiff's procedure during the three months and several days that he acted temporarily, in 1903, as manager of the partnership; and for said reason there is no ground upon which plaintiff may be held liable for the harm occasioned by the non-payment of the

debt of Gerena & Co.; and that rather did the liability for such harm fall upon the manager Gutierrez de Celis who conscientiously never believed that plaintiff was solely liable for the loss, for the Entry No. 1889 (Exhibit 10, *aforecited*) contains the statement that the author of such losses no longer exists, the fault being attributed to the deceased Miguel Alonso, although Miguel Gutierrez de Celis testified (record, p. 557) that he gave his approval to what had been done, without knowing what it was, and that he afterwards saw that it was an error, for it was plaintiff who gave the money to Gerena & Co. This testimony is in direct contradiction to the evidence contained in the entry *aforementioned*, written on December 31, 1903, and notwithstanding that error was discovered by Gutierrez de Celis, as he stated, the truth is that the amount of the loss was not charged to Leopoldo Criado, neither was a similar charge made in respect to the amount paid to Leopoldo Ferrer of which mention has previously been made herein above. So said Entry No. 1889 of the document Exhibit 10 remained intact.

With respect to the account of Antonio de la Riva which shows, as of December 31, 1903, a debit balance of P91,000 and odd pesos, plaintiff testified (record, p. 590) that as security for this debt De la Riva had delivered to the firm of Gutierrez Hermanos a lot of hemp worth P33,218.06, a power of attorney to collect P26,000 from the store "Isla de Cuba" in monthly installments of P2,000, and the insurance policy of the launch Concha, which represented P34,000; whereby the debt was reduced to P12,000, on December 31, 1903.

This testimony appears corroborated by the documents and other evidence of record for, with respect to the power of attorney to collect the sum mentioned from the "Isla de Cuba," the same exhibit, No. 5, which is the account of Antonio de la Riva, certified to by the defendant's bookkeeper, shows that on July 3, August 5, and September 5, 1903, the account of Antonio de la Riva's indebtedness to the partnership was credited with various sums collected from the "Isla de Cuba." With respect to the hemp referred to by witness, the manager himself Miguel Gutierrez de Celis testified (record, p. 565) that upon his arrival in the Philippines, he allowed an increase in De la Riva's debt, by reason of the security of the hemp which this debtor was sending to the firm. With reference to the insurance of the launch Concha,, there is no evidence of record in contradiction of the facts, except the testimony of Miguel Gutierrez de Celis in which the latter claims that the launch was purchased by plaintiff in his own name with money belonging to the firm, in order afterwards to sell it to Antonio de la Riva (record, p. 567). The manager De Celis does not deny that the partnership held said insurance policy on the launch as security, nor that De la Riva was the owner of the boat, for, if the launch were sold to De la Riva and the proceeds from the sale were charged to the latter's account, together with the expenses occasioned by the trips made by that boat (Exhibit 5), it is obvious that Antonio de la Riva was the owner of the launch, although he was a debtor to the firm of Gutierrez Hermanos for its price and the expenses incurred.

Consequently it is indisputable and beyond all doubt that when plaintiff turned over to Miguel Gutierrez de Celis the management and administration of the business of the firm, this business was in very good condition, and if afterwards losses had been sustained same were due to the fault of Gutierrez de Celis himself; so it is that, in canceling in the books the account of Antonio de la Riva, he divided the amount thereof among all the partners, in the belief that it was a loss that affected them all.

Starting from the fact that the record shows that the defendant owes plaintiff various sums of greater or lesser importance, as stated in the findings on the majority of the causes of action prosecuted by plaintiff, it is logical that this court should not find any well-founded or legal reason by virtue of which judgment may be rendered against plaintiff for whatever amount he may be owing the defendant firm, inasmuch as the latter is shown to be his debtor. Therefore plaintiff should be absolved from the cross-complaint filed by the defendant.

As regards the amount of the collectible accounts and of unpaid credits which total sum is stated in the part of this decision relative to the fifth cause of action, it is undeniable that the plaintiff Leopoldo Criado, as a capitalist partner of the partnership organized in May, 1904, is entitled to receive 10 per cent of every sum collected from

the date on which he ceased to belong to the firm, January, 1912, and of whatever sum that in the future may be collected from said collectible accounts or unpaid credits, and it is so held, without any liability on his part in relation to the bad or uncollectible credits. Therefore, in view of section 126 of Act No. 190, we reverse that part of the judgment of the court below whereby such liability for 10 per cent is imposed upon the plaintiff.

The last error assigned by the defendant to the judgment of the court below relates to the order of September 2, 1915, in which it is held that the accounts presented by the defendant are not in accord with the orders given by the Supreme Court in its previous decision, in so far as it was directed that the firm of Gutierrez Hermanos should render a new account supported by vouchers to determine exactly plaintiff's share in the firm's assets. In fact the defendant was ordered immediately to present to the court all its books, vouchers and other documents that might be necessary for the settlement of the assets pertaining to plaintiff during the years 1900 to 1911, and to place the same at the disposal of the expert, G. B. Wicks, and was authorized to appoint another expert who, with said Wicks, might examine the books and papers of the firm of Gutierrez Hermanos. This order is perfectly legal and just. It is an interlocutory order of mere procedure, issued in compliance with and in consequence of the decision of this court, to the end that, with the result of the liquidation of the accounts made by the expert appointed, without the defendant having wished to appoint another in use of its right so to do, this court may decide this suit equitably, in accordance with its true merits and in conformity with the law.

For the foregoing reasons, whereby the errors assigned to the judgment appealed from with respect to the parts thereof discussed in this decision have been refuted, the defendant should be, as it hereby is absolved from the complaint by the first cause of action. By the second cause of action the firm of Gutierrez Hermanos, the defendant, should be, as it hereby is ordered to pay to the plaintiff Leopoldo Criado the sum of P30,609.60, with legal interest thereon from May 25, 1912, the date of the filing of the complaint. In so far as it is based on the third and the fourth causes of action, said complaint is dismissed. In accordance with the fifth cause of action, the defendant should be, as it hereby is, ordered to pay to plaintiff the sum of P51,296.62 fixed in the judgment appealed from, with legal interest thereon from the date when the original complaint was filed, May, 1912, and the plaintiff must pay said sum in the manner prescribed in the 19th clause of the articles of partnership of 1904. By the sixth cause of action, the defendant is likewise ordered to pay P1,800; by the seventh, P3,000; by the eighth, P52; by the ninth, P953.90; and by the tenth, P1,001.22. That part of the judgment relating to plaintiff's liability for 10 per cent of the outstanding and the uncollectible bills is reversed, and he is reserved his right in the sums collected or which may be collected from same. The plaintiff Leopoldo Criado is absolved from the cross-complaint filed by the defendant Gutierrez Hermanos.

The plaintiff shall pay one-third, and the defendant, two-thirds, of the costs of both instances. The judgment appealed from is thus affirmed in so far as it is in accord with this decision, and is reversed in so far as it is not. So ordered.

Arellano, C. J., Johnson, Araullo, Street, Malcolm, Avanceña, and Fisher, JJ., concur.

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