

BEN WIT ULLMANN, PLAINTIFF AND APPELLANT, VS. FELIX ULLMANN & CO., DEFENDANTS AND APPELLEES,*G.R. No. 4196. March 20, 1908*

Ponente: TORRES, J.

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The plaintiff, Benwit Ullmann, in a written instrument dated the 7th of February, 1906, asked that judgment be entered in his favor for the recovery from the defendants, and each of them, of the sum of P17,492.23, with legal interest thereon from the time of the filing of this complaint, together with costs and any other relief which might be considered just and equitable. To this effect he alleged:

That, prior to the 14th day of December, 1899, the plaintiff herein was employed as clerk at a monthly salary of 600 francs, and with power to make sales on credit without limitation, by the regular collective mercantile association of Felix Ullmann & Co., established in these Islands, whereof Edmund Ullmann was an industrial partner.

That on the above-named date, the 14th of December, Felix Ullmann, the senior partner of the firm, entered into a contract in writing with the plaintiff, and in accordance therewith the latter was to give his personal services, as he had been doing thus far, during three years, at the said compensation of 600 francs, which he already received, with 10 per cent in addition on all the business and the net profits obtained by the firm.

That, notwithstanding the fact that he rendered the said services during the three years agreed to, the directors or partners of the company did not make up his account, and the plaintiff continued to render the services until the 20th day of January, 1906.

That on the 21st of April, 1905, Felix Ullmann, the manager, then residing in Paris, wrote from that city a letter to the plaintiff informing him that, notwithstanding his good services, his salary would be reduced to 400 francs per month from the end of May of that year with 10 per cent of the profits. Said letter was sent to Emmanuel Ullmann, the attorney in fact of the manager, who was in charge of the business in this city, but was not delivered by the latter to the plaintiff until the 14th of September of the said year 1905; but, prior to receiving and reading the aforesaid letter, the plaintiff had written to the manager, Felix Ullmann, on the 10th of July, 1905, demanding that interest be allowed on the salary already earned but not collected by him, which written claim was received by the defendant on or about the 11th of August of that year.

That the plaintiff, Benwit Ullmann, as soon as he received the aforesaid letter of April 21, with reference to the reduction of his salary, cabled to the defendant Felix Ullmann, in Paris, on the 15th of September of said year, manifesting his nonacceptance and requesting further that his account be made up and the balance paid to him, and also asked for a telegraphic reply; but Felix Ullmann did not answer, and his representative, Emmanuel Ullmann, of Manila, retained the plaintiff in the service of the firm under promise to pay him the same amount as usual, and in October of said year the representative of the defendant entered into a contract with the plaintiff in order that the latter should continue to render his services until the 31st of January, 1906, and engaged, in the

name of the defendants, to pay him 600 francs per month, or the equivalent thereof in Philippine currency at the rate of exchange on Paris ruling on the last day of each month, with 10 per cent of the profits in addition. The representative further bound himself to pay the plaintiff within the first twenty days of the months of November and December, 1905, and January, 1906, the sum of 400 on account of the balance standing in his favor.

That, in accordance with the agreement, the plaintiff received P400 corresponding to the month of November and December, 1905, but on the 20th of January, 1906, the defendants refused to continue the agreement, and failed to pay him the P400 corresponding to said month, for which reason the plaintiff left the service of the defendants on the said 20th day of January, and asked that his account be settled.

That the plaintiff does not agree to the statement of account submitted to him by the defendants, because it therein appears that, on the 31st of August, 1902, his share in the profits was credited to him at the rate of 5 per cent, when, according to agreement, it should have been 10 per cent, and, therefore, the same should be P1,325.18 in lieu of P662.59.

That in said account, and under the same date, the salary of the plaintiff during seven months and a half appears as having been credited at the rate of 300 francs per month While he was entitled to 600 francs per month, and that, therefore, the item which appears as P892.85 should be P1,785.70.

That, under date of the 15th of January, 1906, the debt of Vicente Hernaez incurred during the years 1896 and 1897, amounting to P3,264.91, has been charged to the plaintiff, and that said item should be eliminated because, if Hernaez did not pay, the plaintiff is not to blame, and that, in the same account, the plaintiff has been debited with P7,808.27, embezzled in the year 1901 by Edmund Ullmann, industrial partner and manager of Felix Ullmann & Co., and that said item must be eliminated there from, because the plaintiff had no control over the transactions of the embezzler, under whose orders he was serving during the whole length of time covered by the items in question, referred to in the complaint.

That the transaction with Vicente Hernaez was executed by him as a clerk of the defendants within the limit of his powers, like many others during the period of his services, all of which were approved by the defendants; that the plaintiff was not prepared to wait for the result of the proceedings to which certain jewels to the value of P4,944, deposited in court, were subjected, because he had nothing to do with the proceedings, to collect what was due to him, the balance in his favor amounting to P17,311.23, in accordance with said account, upon rectification of the items challenged in the complaint.

And that his salary and subsistence from the 1st to the 20th of January, 1906, while working for the defendants, amounts to P181, which sum has not been included in said account, and upon the same being added to the aforesaid balance makes a grand total of P17,492.23.

By his writing dated January 23, 1907, the plaintiff asked that his complaint be considered as amended by the following additional petition: Also that 10 per cent of the net profits, obtained in their business by Felix Ullmann & Co. from the 31st of March, 1905, date of the last balance sheet of their accounts offered in evidence as Exhibit F, until January 20, 1906, from which date the plaintiff ceased to be in their service, be paid to said plaintiff, and that they be ordered to render to the court an accounting of the profits obtained and to pay such balance as may result.

In answer to the above, the attorney for the defendants stated that he admitted the allegations contained in the complaint with the exception of those set forth in paragraphs 14, 15, 16, 17, 18, and 19 of the same, relative to the reduction of the salary of the plaintiff and his interest in the profits of the business, contrary to what had been agreed to; also to the claim that there should be eliminated from the account of said plaintiff the indebtedness of

Vicente Hernaez, amounting to P3,264.91, and the sum of P7,808.27 misappropriated by Edmund Ullmann, discovered in 1901, which amounts have been improperly charged to the plaintiff; to the allegation that he was rendering services to said firm during the seven months and a half for which said reduction in his salary and share of profits was made; to the allegation that the said plaintiff would not receive any balance from the defendants until the latter recovered the jewels valued at P4,944 deposited in court, subject to the proceedings that were pending and with which he had nothing to do; to the allegation that his salary and subsistence from the 1st to the 20th of January, 1906, amounting to P181, was omitted in the aforesaid account, and that the balance in favor of said plaintiff amounted to P17,492.23; that although admitting the allegation in paragraph 4 which reads, "That prior to the 14th of December, 1899, the plaintiff was employed as clerk in the business of Felix Ullmann & Co., in the Philippine Islands, with the monthly salary of 600 francs," the subsequent allegation was, however, denied, wherein is stated "and with power to make sales on credit to any extent without limitation," as the plaintiff was never authorized to make such sales on credit, no matter how trifling may have been the amount thereof.

As a special defense, it was alleged:

That, although the defendants entered into a contract with the plaintiff on the 14th of December, 1899, whereby they bound themselves to pay him as compensation for his services the sum of 600 francs per month and 10 per cent of the profits obtained, the defendants, however, did not bind themselves to pay him any amount in case that, by reason of any circumstance which could not be imputed to them, the plaintiff failed to render such services, because he, voluntarily and for his own interest, left the Islands and ceased to render services to the defendants from the 15th of April, 1901, to the last days of November of said year, for which reason the defendants did not pay him the compensation that had been agreed to, although, by way of liberality and taking into account that he was a distant relative and an old employee, they credited him with one-half of the stipulated salary and 5 per cent of the profits obtained, which are respectively the sums of P662.59 and P892.85; and, notwithstanding the fact that they were not obliged to pay his traveling expenses for the reasons stated above, yet they did so, and credited his account with the amount of said expenses.

That the plaintiff, without authority therefor and exceeding his powers and without consulting with them, sold to Vicente Hernaez, on credit, jewelry to the value of P3,264.91, thereby causing them to suffer the loss of said sum.

That the defendants earnestly requested him to inspect and watch the acts of Edmund Ullmann, who, from the 14th of December, 1899, to 1901, was in charge of the business of the defendants in these Islands, giving him power to inspect the books and supervise the transactions of said Edmund Ullmann, informing the defendants of the same, and, in case he noticed anything anomalous and detrimental to the interest of the said defendants, who gave him special power for the purpose, to take charge of the business; but the plaintiff, instead of complying with the request, as it was his duty to do, disregarded it entirely, and, by his inexcusable negligence, gave the said Edmund Ullmann an opportunity to defraud the defendants in the sum of P15,616.54. For such negligence and carelessness the defendants have charged the plaintiff with only one-half of the aforesaid amount—that is, P7,808.27—whereas they are entitled to hold him responsible for the whole.

That the plaintiff advised and induced the defendants to give to two persons, for sale on commission, jewels to the value of P4,944, under his guaranty as to their solvency and honesty, but neither the jewels nor the price thereof were received by the defendants in due course, for which reason he must be held liable for said sum as surety for said persons. That they credited his account with his salary and subsistence for the nineteen days of January, 1906, during which he rendered them services, with the sum of P85.08, and refused to pay the P93.12 still remaining in his favor, because, according to the plaintiff's account, he is responsible for the above stated sum of P4,944, and unless said sum is paid to the defendants he could not recover the said P93.12, and, in consequence, the attorney for the defendants asked that the complaint be dismissed with costs against the plaintiff.

Evidence having been adduced by both parties, and documents exhibited by the same having been attached to the record, the judge entered judgment on the 15th of June, 1907, sentencing the defendants to pay the plaintiff, Benwit Ullmann, the sum of P8,128.52, with legal interest thereon at the rate of 6 per cent per annum from the 8th of February, 1906, the date on which the complaint was filed, until full payment was made, without any special ruling as to costs.

In the judgment appealed from by the plain tiff, the latter, as clerk to the firm of Felix Ullmann & Co., was held liable for one-half of the amount misappropriated by the managing partner, Edmund Ullmann, for the reason that he did not inform the senior partner, Felix Ullmann, residing in Paris, of the mismanagement of the said Edmund Ullmann, the managing partner and son of the capitalist, as the latter had requested him to do by his letter of the 14th of December, 1899.

The record does not show that Benwit Ullmann had guaranteed, as surety, the actions of Edmund Ullmann in the direction and management of the firm of Felix Ullmann & Co., in such manner that he could afterwards be held responsible and compelled to pay the amount misappropriated by the said manager to the prejudice of the company. Even considering that he had accepted the charge of the senior partner, Felix Ullmann, as contained in the letter of the 14th of December, 1899, which he addressed to the plaintiff, a condemnatory sentence against the latter can not be based thereon for the very reason that he was not a partner or a comanager with the embezzler, but simply a clerk in the employ of the firm.

Under the contract entered into by Benwit Ullmann with the above-named firm, he was to perform the duties of salesman and clerk; under no consideration was he to act as manager or comanager of the company; and, as a matter of fact, beyond the request alluded to, the head of the firm never gave him special or general powers to cooperate with or assist the manager, Edmund Ullmann, in the business of said firm. (Arts. 281 et seq., Code of Commerce.)

Benwit Ullmann may have been morally guilty for not informing Felix Ullmann, the father of the managing partner, Edmund Ullmann, of the disorderly life and conduct observed by the latter during the year 1900 and the early part of 1901 in Manila, although the plaintiff was no guardian or tutor to Edmund, nor a properly authorized representative of his father; but in no wise can he be held civilly responsible before the courts for the total amount misappropriated or any portion thereof, and much less can he be charged with criminal responsibility as an accessory, as claimed in the brief of the defendants.

Edmund Ullmann managed the firm of Ullmann & Co. from 1896 until the early part of 1901, and in March of the last-named year he was relieved by Emmanuel Ullmann. In January, 1899, the senior partner, Felix Ullmann, came to Manila and remained in this city until the 15th of December of the same year, at which time the latter himself made up the accounts and struck a balance, and thus became aware of the mismanagement and shortage of his son Edmund; when cross-examined on this subject, Felix Ullmann answered that no one had anything to do with what had been done by his son Edmund; that he alone was competent to judge of his conduct because the money spent was his own and no one had any interest therein. (Folio 116 of the record.)

Hence, before Felix Ullmann wrote the letter of the 14th of December, 1899, he was already aware of the disorderly life and of the mismanagement of his son Edmund; and the latter continued to observe the same conduct until 1901; the father was aware of the facts, because in February of the same year he sent to these Islands his brother Manuel to relieve his son, and the plaintiff, Benwit, upon his arrival in Paris in May of the same year, confirmed it, as has been stated by the senior partner. Therefore, it was not necessary that he should have complied with the request made in the said letter during the year 1900, there being no reason to state that Edmund had reformed and ceased his reckless spending of money and his dissipation of the two or three previous years,

and that it was not to be expected that he would continue such conduct.

The provisions of articles 1101 and 1902 of the Civil Code are not applicable to this case, inasmuch as Benwit Ullmann, in the performance of his duties as salesman or clerk of the firm of Ullmann, does not appear to have acted with deceit, negligence, or carelessness, or failed to fulfill the same, because it is not the duty of a clerk to control or supervise the actions of the manager of the firm under whose orders he is serving, where in connection with such matters there was no agreement whatever that he should do so; therefore, it can not be held that Benwit Ullmann committed any act or made any omission which, owing to his negligence or fault, he is obliged to repair, because of the loss occasioned by his principal to the other partners.

In December, 1899, Felix Ullmann, the senior partner, was already aware of the shortage of his son Edmund, as was also his brother Emmanuel, the managing partner, when he relieved the latter in March, 1901, from the management of the firm; and yet no claim was made against Benwit for either the whole or any portion of the shortage until he finally left the service of the firm and claimed from it, in January, 1906, what he had earned during all the time he had rendered services. In view of the cordial relations which existed between them up to that time, as the record shows, it is to be presumed that, until the same were broken off, the defendants did not consider that the clerk, Benwit Ullmann, was responsible for what had been misappropriated by the managing partner, Edmund Ullmann.

From the foregoing considerations it is deduced that the plaintiff, Benwit Ullmann, is not liable for the sum embezzled or misappropriated by Edmund Ullmann, and that, therefore, there exists no legal reason for the one-half of such sum being charged, or that the same should be placed on the debit side of the account of the said plaintiff, which is the first error assigned in the judgment appealed from.

The second error assigned is unfounded, and said judgment is Considered to be in accordance with the law when recognizing, in favor of the plaintiff, the right to recover only one-half of his salary and of his share in the profits during the seven months and a half he was absent from this city.

The plaintiff, Benwit Ullmann, embarked for Europe voluntarily and on his own account, undoubtedly for the purpose of enjoying a vacation and to rest after several years' stay in these Islands; it does not appear that his departure was due to orders received from the heads of the firm, or that he rendered services in some other place outside of these Islands, because he was specially engaged to serve as clerk to the firm of Ullmann, of Manila, and the minor services he performed for the senior partner during his stay in Paris should not be considered as services rendered to the company for which full compensation is required in accordance with the contract between them; the more so because in said contract nothing is provided with respect to such a case—that is, whether or not the plaintiff was entitled to receive a salary and a percentage of the profits whenever he was absent from this city.

It was not agreed between the contracting parties that Benwit Ullmann should receive a salary and 10 per cent of the profits during his vacations, and for this reason neither rights nor obligations have been established on this matter between the parties, and whatever amount was conceded in his favor was solely due to the liberality of the capitalist partner, who even paid his. passage.

It has been affirmed, without contradiction, by the managing partner (on p. 104 of the record), that the resolution adopted by the partners to pay him the passage to and from Europe and one-half of his salary and for his share of the profits during his absence had been duly communicated to him and that with his consent entries were made in the books before they were closed on the 31st of August, 1902, and that upon the plaintiff becoming aware of the same he manifested his satisfaction and expressed his thanks to the manager, Manuel Ullmann. The finding of the court, accepting what had been determined by the firm of Ullmann, is just and is in accordance with the law.

If until the 20th of January, 1906, the plaintiff did not leave the service of the firm of Ullmann, and it is unquestionable that he is entitled to 10 per cent of the profits of the company, besides his monthly salary, as agreed upon, it is just and equitable that his petition, in addition to the original complaint (folio 10 of the bill of exceptions), be granted, and that the defendants be directed to render an accounting of the profits obtained by the business from the 31st of March, the date of the last balance sheet, as appears in the account submitted as Exhibit F, until the said 20th day of January, 1906, and that they pay Benwit Ullmann such amount as may result from the liquidation thus made.

It is an unquestionable fact that the defendant party has not submitted nor presented to this court the corresponding bill of exceptions, as required by the provisions of section 143 of the Code of Civil Procedure; for this reason it becomes necessary to pass upon the petition of the plaintiff in his motion of the 7th of October, at which time the defendant was cited to appear, and decision on which was reserved by the court in its final judgment of the 23d of said month.

In order that an exception presented in proper time to a decision of the court below may be considered by this court, it is indispensable that the corresponding bill of exceptions, which must be admitted, approved, and forwarded to the second instance as provided by law, be presented within the period allowed by law. This doctrine, established in the case of *Puruganan vs. Martin*,^[1] is in accordance with that laid down in the decision of *Naval vs. Benavides*,^[2] which holds that:

"Where both the plaintiff and defendant except to the judgment of the lower court, they must each present a bill of exceptions with assignments of error; assignments of error without a bill of exceptions will not be considered."

Without a bill of exceptions prepared, submitted, and presented to this court in accordance with the provisions of section 143 of the Code of Civil Procedure and of Act No. 1123, amending Act No. 190, this court can not consider the errors attributed to the trial judge nor review the judgment appealed from in connection with the questions set up by the appellant, who, by such omission, is assumed to have waived his rights, and to have abandoned his appeal, placing himself in the same position as one who has not excepted in time to a decision which, in such a case, becomes final and is subject to execution. By the foregoing it has been shown that the plaintiff:

- (1) Is entitled to collect 181, as salary earned during the first twenty days of January, 1900.
- (2) That he should only recover one-half of the salary, and of the 10 per cent of the profits, for the period of seven months and a half he was in Europe, absent from Manila, in 1901.
- (3) That he is not liable for the debt contracted by Vicente Hernaez in favor of the firm of Ullmann & Co.
- (4) That he is not responsible for the value of the jewels misappropriated by Gertrudis Montinola and Grudalupe Torro.

In this manner the above four points were decided in the judgment of the lower court, from which appeal has been sustained by the plaintiff alone in this instance,

- (5) That the plaintiff is not responsible for the sum of P7,808.27, one-half of the amount misappropriated by the managing partner, Edmund Ullmann.
- (6) That upon accounts being previously made up and rendered by the defendants, of the profits obtained by the company from the 31st of March, 1905, to the 20th of January, 1906, the plaintiff be paid such sum as may result therefrom, at the rate of 10 per cent

Section 496 of the Code of Civil Procedure provides as follows:

"SEC. 496, General procedure in the Supreme Court.— The Supreme Court may, in the exercise of its appellate jurisdiction, affirm, reverse, or modify any final judgment, order, or decree of a Court of First Instance, regularly entered in the Supreme Court by bill of exceptions, or appeal, and may direct the proper judgment, order, or decree to be entered, or direct a new trial, or further proceedings to be had, and, if a new trial shall be granted, the court shall pass upon and determine all the questions of law involved in the case presented by such bill of exceptions and necessary for the final determination of the action."

For the liquidation and rendering of accounts referred to in point as enumerated above, it is not necessary to hold a new trial, inasmuch as, when the defendants present an account of the profits with a statement of the 10 per cent thereof, and when the same has been submitted to the plaintiff, who may offer such remarks as he may consider proper or assent to the same, the judge will be able to enter judgment in accordance with the six points indicated.

Therefore, by virtue of the foregoing, and accepting the considerations contained in the judgment appealed from, as far as the same agree with the terms of this decision, said judgment is hereby set aside without any special ruling as to costs in this instance. So ordered.

Arellano, C. J., Mapa, Johnson, Carson, Willard, and Tracey, JJ., concur.

[1] 8 Phil, Rep., 519.

[2] 8 Phil. Rep., 250.

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