

F. W. PRISING, PLAINTIFF AND APPELLEE, VS. MILTON E. SPRINGER, EXECUTOR OF THE ESTATE OF JOHN KERNAN, DEFENDANT AND APPELLANT.

G.R. No. 4861. March 20, 1909

Ponente: CARSON, J.

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CARSON, J.:

This is an appeal from a judgment of the Court of First Instance of Manila, reversing the findings of the commissioners appointed to pass upon claims against the estate of John Kernan, deceased, as to two separate claims persented by F. W. Prising, plaintiff and appellee.

These claims, numbered three and four in the report of the commissioners, were reported upon by them as follows:

"Claim No. 3.-F. W. Prising, claimant.

"This is a claim amounting to P7,443.91 composed of various items of cash advanced personally to the deceased and bills paid for his account as shown by claims attached. These various items are supported by the signature of the deceased as to part of them and as to the remainder by vouchers which seem to be genuine and unquestionable. (See vouchers attached to claim.) Your commissioners, therefore, allow the claim of F. W. Prising for P7,443.91, subject to offset hereinafter mentioned.

"Mr. M. E. Springer, the executor of this estate, presents to your commissioners as an offset to the claim of F. W. Prising last above allowed, two claims in favor of the estate and against said F. W. Prising as follows:

"The first claim is a promissory note payable to John Kernan, signed by F. W. Prising at Manila, March 19, 1906, for the sum of P7,278.85, with legal interest after maturity, due one year after date-interest thereon amounting to P266.89, or a total due the estate of P7,545.74. The genuineness of this note is admitted. There are two indorsements appearing on the note of payments thereon-one under date of March 29, 1906, for 4,490.64, which your commissioners find to be the identical sum composed of the first three items of the account presented by Mr. Prising against the estate, and one credit indorsement under date of April 20, 1906, of P350 which your commissioners find to be the identical sum constituting the fourth item of Mr. Prising's claim against the estate. Your commissioners, therefore, ignore said two credit indorsements, and allow the estate on said promissory note P7,545.74 against said Prising as an offset against the claim presented by him and allowed in his favor in this report. (See note, Exhibit A.)

"The second claim exhibited and presented by the executor against said Prising is a claim for a shortage in property, moneys and credits of the firm of Prising & Kernan and amounts to P13,315.41-one-half of which, or P6,657.70 is due the above estate. This claim arises from the following circumstances:

"The deceased, Kernan, and claimant Prising are partners in an unregistered partnership, having for its object the carrying on of live-stock business. On March 16, 1906, a balance sheet was made and signed by both partners. (See Exhibit B.) This balance sheet showed stock on hand, cash and bills receivable aggregating a

considerable sum. On March 20, 1907, Mr. Prising rendered a statement to the executor (Exhibit C), which statement showed a reduction in stock, cash on hand and bills receivable of P13,315.41 as shown in detail by statement of differences (Exhibit D). This shortage is unexplained. We, therefore, charge one-half thereof, or P6,657.70 against said Prising and allow the claim of the estate as an offset for said amount.

"In order to make clear the findings of the commissioners as to the Prising claim and offsets, we make the following-

"RESUME'.

First offset presented by executor, promissory note Prising to Kernan, Exhibit A, allowed

P7,545.74

Second offset exhibited by executor, shortage in assets Prising-Kernan, Exhibits B, C, and D, allowed

6,657.70

Total claims of estate allowed against Prising

14,103.44

Less claim of F. W. Prising allowed against this estate ..

7,443.91

Balance due the estate from F. W Prising

6,659.53

"The executor did not exhibit nor did the committee consider the liability of F. W. Prising to the estate for the balance of the property and assets of the partnership of Prising & Kernan which do not appear by Prising's statement to have been realized.

"Mr. Prising has made no satisfactory explanation or showing to the executor or commissioners of the shortage above referred to and which is allowed against him.

"Claim No. 4.-F. W. Prising, claimant

"This claim consists of a draft drawn by J. Kernan on F. W. Prising in favor of Said Hashim, dated October 17, 1904, for the sum of P4,000. It is evident to your commissioners that this is not a valid claim. In the first place, from 1904 down to the date of his death, Mr. Kernan was in affluent circumstances, engaged in extensive business in Manila and during said time usually had a considerable amount of ready money on hand. Again, Mr. Kernan, during said period, invested the sum of P22,847.78 of capital in the firm of Prising & Kernan (see Exhibit B), to which firm it does not appear that Prising contributed any capital whatever. Further it appears from Exhibit B, that on March 19, 1906, a balance was struck between Mr. Prising and Mr. Kernan, and the sum of P7,278.85 was found to be due Mr. Kernan, for which sum Prising gave his promissory note, Exhibit A. Where was Mr. Prising's draft for P4,000 at the time he gave said note? Why, if the draft remained unpaid, was it not offset against the amount shown to be due Mr. Kernan by said balance of account? The commissioners answer these two questions for themselves by finding that the draft had been paid. More than this, the will of the deceased Kernan, dated March 15, 1906, states that there has been a complete settlement between the deceased and Prising. It is true that the draft was found in the possession of claimant, but this fact is easily explainable in several ways. It is probable that the draft was drawn against Mr. Prising to be paid out of funds

of Mr. Kernan in the Prising-Kernan partnership, and that it was as a matter of fact so paid and probably constituted a part of the charge of P15,568.93 shown against the deceased in the settlement of March 16, 1906 (Exhibit B). Again, the draft may have been paid by Mr. Kernan and taken into his possession and left by him among his other papers and effects in the possession of Mr. Prising when the deceased left Manila in 1906-Mr. Prising being left in charge of his affairs under power of attorney. The mere fact of the possession of the instrument by the claimant being explainable upon several probable and reasonable grounds, your commissioners can not permit such mere fact of possession to outweigh the other facts and circumstances related which to our minds demonstrate conclusively the payment of the draft, and, therefore, the claim of F. W. Prising for P4,000 is disallowed.

(Signed) "HENRY M. JONES,

(Signed) "S. FELDSTEIN,

"Committee."

The claimant Prising appealed from the findings of the commissioners to the Court of First Instance, and obtained a judgment for P4,165.06, the balance which the court found due the plaintiff after deducting the amount of plaintiff's promissory note in favor of the deceased from the aggregate amount of the payment which the commissioners found had been made to Kernan by Prising after the date of the settlement referred to in the commissioners' report together with the amount of the draft for P4,000, as to which the trial court reversed the findings of the commissioners.

In the course of the proceedings in the Court of First Instance, the defendant executor waived his claim to a set-off on account of the alleged shortage of partnership property, reserving the right to institute a separate action for any balance which may be found due the estate after a liquidation of the accounts, and the winding up of the affairs of the partnership; defendant executor insisted, however, that without relying upon the set-off allowed by the commissioners on account of the alleged unexplained shortage in the partnership assets, judgment should be rendered against the plaintiff for the sum of P101.63, that being the difference between the aggregate amount of the claims of F. W. Prising allowed against the estate by the commissioners, on account of payments made Kernan and his estate, and the amount of Prising's promissory note in favor of the deceased, together with interest from its date until the date of the commissioners' report. The trial court declined to allow the interest claimed upon Prising's promissory note, which was made payable one year after its date and without interest until maturity, it appearing that before the note arrived at maturity, the plaintiff had paid to the deceased various sums amounting to P7,443.91, which the court held to have been an overpayment of the amount of the note, by the sum of P165.06, which plaintiff is entitled to recover from the estate. On appeal to this court from the decision of the court below the defendant executor assigns no error based on the action of the court in this regard, and limits himself to a discussion of his assignment of error based upon the action of the court in reversing the findings of the commissioners as to the claim evidenced by the draft for P4,000.

The trial court was of opinion that the presumption of nonpayment by Kernan of the amount advanced upon the draft, which is raised by the fact that the draft in question was in the possession of the plaintiff and by him produced before the commissioners, was not overcome by the evidence of payment relied upon by the commissioners nor by the evidence of payment introduced at the trial. We can not agree with this finding, and in the language of the commissioners, "we can not permit such mere fact of possession to outweigh the other facts and circumstances" established by the evidence of record, "which to our minds, demonstrate conclusively the payment of the draft."

The draft was drawn in Manila on the 17th day of October, 1904. At the time of the drawing of the draft, and for some time previous thereto, Prising and Kernan had been engaged as partners, under the firm name of "F. W.

Prising", in the importation of cattle into Manila. Kernan furnished all" the capital, some 22,000 odd pesos, Prising as industrial partner receiving one-half the profits. In 1906, Kernan having been stricken with what proved to be a fatal illness, was compelled to go to Europe for treatment. Both Kernan and Prising realizing the gravity of the sick man's condition, prepared a statement of accounts, a short time before Kernan's departure, dated March 16, 1906, from which it appears that, in accordance with the agreement under which they were operating, there had been returned to Kernan; P15,568.93 of the original capital of P22,847.78 advanced by him, leaving a balance still due of P7,278.85, payment of which it was agreed would place him and his partner on an equal basis as joint partners and owners of the business. On the 19th of March, Prising executed and delivered to Kernan his promissory note of P7,278.85 to cover the balance thus shown to be due to Kernan, and at the same time, Kernan made the following notation at the foot of the balance sheet: "Balance due John Kernan as per above account is covered by promissory note of F. W. Prising of this date, March 19, 1906. (Signed) J. Kernan." From the date of the execution of this promissory note until the death of the testator, which occurred some months later, Prising paid out certain sums on behalf of Kernan in Manila, and forwarded to him certain other sums while in Europe, aggregating in all a little more than sufficient to cancel the note. Before leaving Manila, Kernan executed his last will and testament; and on or about the same date, he executed a general power of attorney in favor of Prising giving him full power and authority to represent him during his absence from the Philippines in all his business and other interests.

The first question which presents itself is whether the draft was drawn on F. W. Prising, personally, or upon the partnership, operating under the firm name of F. W. Prising, and aside from the testimony of the plaintiff himself on his examination in chief, and the vague, indefinite, and uncertain testimony of his witnesses, A. T. Hashim and Said Hashim, and the fact that the name of the drawee appears in the draft as F. W. Prising, esq., all the other evidence of record strongly points to the conclusion that it was drawn upon and paid by the partnership, operating under the firm name of F. W. Prising.

The addition of the somewhat unusual title, esq., is explained by the testimony of the plaintiff's witness, A. T. Hashim, an East Indian, who states that Kernan had no knowledge of business methods, and asked the witness to prepare the draft. Hashim being accustomed to English methods, added the title esq. to the name of the drawee, and it must be admitted that the use of this title in the draft tends to support the claimant's contention that the draft was drawn on him personally; and that this inference is strengthened by the testimony of both the Hashims who testified that at the time of the execution of the draft Kernan informed him that he proposed to borrow money from Prising to invest in the business of Said Hashim. But in the light of the other evidence of record, we are not disposed to give much weight to the testimony of the Hashims; not merely because it is vague, unsatisfactory, and indefinite, but because it is very clear from their testimony that they knew nothing of the business relations existing between Kernan and Prising; and granting that they were endeavoring truthfully to relate their recollection of Kernan's statements in regard to the draft, it may be that, not being aware that the firm of Prising & Kernan operated under the firm name of F. W. Prising, and learning from Kernan that he expected to have the money he needed advanced by his partner, Prising, they erroneously inferred that Kernan's intention was to borrow that money from Prising, personally. Kernan, who appears to have known little or nothing as to the proper mode of executing a draft, may well be supposed to have attached no special significance to the insertion of the title after Prising's name; and in any event, in view of the loose and irregular methods under which the partnership business and the mutual transaction of the partners appear to have been conducted, the addition of the title would not necessarily prevent Prising from paying the draft out of the partnership funds, and can not be considered by any means decisive as to whether the draft was or was not thus paid, which is the real question at issue.

The plaintiff himself, whose testimony was admitted without objection, testified that the draft was drawn upon him personally and paid by him out of his personal funds, and that it had nothing whatever to do with the

partnership transactions between himself and Kernan. He was called upon to produce the books and other records of the partnership, for the purpose of verifying his statements, but this he said he could not do, because Kernan when he left the Philippines carried with him "all his documents." This explanation of his refusal to produce the books and records of the partnership business is, to our minds, wholly unsatisfactory. It will be noticed that the claimant did not expressly testify that Kernan carried away the books of the partnership, but limited himself to the mere statement that "he took all his documents with him," so that, even were this testimony true, it would not afford a satisfactory excuse for plaintiff's failure to produce the books of the partnership in open court when called upon so to do. And if it be admitted that the term "documents," as used by the witness, is wide enough to include all the books and records of the partnership, we think this testimony must be rejected as manifestly false in the light of the other facts in evidence. The witness himself apparently recognizing how incredible and improbable was the story he told, used the following language in this connection: "Strange to say, although John Kernan left me a power of attorney, he took all his documents with him; at least I never could find any of them after he left." It would indeed be strange if Kernan had carried away the books and records of the partnership business. In the first place, Prising was the managing partner, and as such the partner under whose control and in whose keeping we would naturally expect to find the books and records of the company. In the second place, Kernan was leaving the Islands suffering from a fatal illness which Prising, at least, well knew rendered it improbable that he should ever return; before leaving he made a general settlement of the affairs of the business with his partner, and together they signed the balance of accounts struck at that time, and formally reduced to writing the agreed status of the business as they then understood it; no reason has been suggested, nor are we able to imagine one which could have induced Kernan to carry off the books and records of the business under such circumstances, and we refuse to believe that, had he attempted to do so, the managing partner would have permitted it, without protest; being responsible for the continuance of the business, it would appear to have been absolutely essential that he should retain in his hands the books and papers pertaining thereto, and indeed it was clearly his duty so to do. Finally, if the facts already set out were not sufficient to render wholly incredible the testimony of the plaintiff as to the whereabouts of these books and records, the further consideration that Kernan executed a general power of attorney in favor of the plaintiff, whereby he placed in plaintiff's hands not merely the partnership interests which they held in common, but also all his personal affairs in these Islands, including stock in other companies, and various parcels of real estate, renders plaintiff's story so improbable that in the light of all the evidence of record we do not hesitate to stamp it as false, and manifestly fabricated for the purpose of defeating the efforts of the executor of his deceased friend and partner from ascertaining the true status of the partnership transactions. Under these circumstances, we are forced to the conclusion that plaintiff having declined to produce the books and records in his possession or which should be in his possession, willfully suppressed them; and that, if they had been produced, their contents would have been adverse to his claim, and would establish the fact that the draft in question was drawn upon and accepted by the partnership operating under the firm name of F. W. Prising and paid out of partnership funds. (Code of Civil Procedure, sec. 334, subsec. 5.)

We are confirmed in this conclusion by an examination of the circumstances under which the draft was drawn, as they appear from the record. At that time Prising was the working and managing member of the firm of Prising & Kernan, the latter having advanced all the capital, and in accordance with the agreement under which they operated, the business was to return to Kernan the capital advanced by him as rapidly as it could be spared. It appears that during the existence of the partnership a considerable sum, amounting to P15,568.93 was returned to Kernan, and in the ordinary course of business, and in the absence of proof to the contrary, we would expect to find that part of the money thus paid was evidenced by the draft. Plaintiff tells a highly improbable story of his transactions with Kernan in connection with this draft, and claims and pretends that Kernan offered him extraordinary inducements to make the loan, agreeing to give plaintiff a share in his interest in Hashim's business which would seem to be out of all proportion to the amount of the draft. No reason has been suggested nor does

any appear why Kernan should have felt himself under such urgent necessity to borrow this money from his partner personally, at a time when his partner was under an obligation, as manager of their joint business, to pay over the profits of the business as rapidly as they could be spared; and while it is not impossible that Prising might have had his own private capital from which he could have paid the draft, the evidence tends to indicate that he had no capital of his own, and that such money as he had in his control came from the business in which he and his partner were engaged. Furthermore, if Kernan, as alleged by plaintiff, had borrowed this money from his partner personally, and obligated himself to pay such exceptional remuneration for the accommodation, and if the alleged loan had been made by means of a draft, it is hardly credible that the parties would have let the matter stand without any other memorandum as to the terms of the transaction for nearly two years and until Kernan left the Islands without any definite expectation of returning. That it would be left in that condition, notwithstanding the settlement of accounts by the partners before Kernan's departure, and the execution of the note by Prising for the balance found due on that account, is wholly incredible and beyond belief.

We are convinced that the draft was drawn upon the partnership operating under the firm name of F. W. Prising and paid out of partnership funds, and that being a fact, there can be no reasonable doubt that the amount paid thereon was included in the credit of P1 5,568.93 allowed Prising in the statement of accounts signed by the partners just prior to Kernan's departure. The execution and delivery by Prising to Kernan of the note for P7,278.85, the balance due as shown by that statement of accounts, is prima facie evidence of the settlement and adjustment of all demands existing at that time between the parties arising out of their partnership transactions. Without some satisfactory explanation of the omission of the amount of the draft from the account stated, either by fraud, mistake, express agreement, or the like, the mere fact that the draft was found in the hands of the plaintiff at the time when he presented his claim is not sufficient to overcome this presumption. (Perry vs. Roberts, 17 Mo., 36; Allen vs. Bryson, 56 Am. Rep, 358; Levi vs. Carter, 21 La. Ann., 459; Alabama & M. R. R. Co. vs. Sanford, 36 Ala., 703; Daniel on Negotiable Instruments, Vol. I, sec. 71, and cases cited); and this especially in view of the fact that the possession of the draft by Prising, notwithstanding the fact that he had received credit therefor as managing partner of the firm of Prising & Kernan, is explainable either on the ground that as such manager, he retained it with the partnership records, which were in his charge, as a voucher evidencing its payment from partnership funds, or that having taken over all Kernan's effects under his power of attorney, the draft, if it had been delivered to Kernan at the time of the settlement of accounts, thus fell into Prising's hands.

No satisfactory explanation of the alleged fact that the amount of the draft was not included in the final statement of accounts between the partners was offered by the plaintiff, and indeed it is difficult to conceive of any reason which could have induced the parties to have omitted it, unless it were by mistake or inadvertence, and plaintiff swore that he spoke of the draft to Kernan on several occasions before he left, and thus impliedly admitted that, its alleged omission was not due to an oversight. Plaintiff attempted to explain the omission by claiming that the account was limited to partnership transactions and that the draft evidencing a personal loan was not included for that reason. As we have said, we are convinced that the draft represented a payment from partnership funds and not a personal loan; but we might add that, even on the assumption that the draft did represent a personal loan, plaintiff's claim that this loan has never been paid, and that it was not included in the final settlement with Kernan is in the highest degree improbable and incredible. That Prising would and did execute the note in favor of Kernan for P7,278.85, in settlement of a balance due on the purchase price of an interest in the partnership, without reducing the amount of the note by the amount due him on the loan, would be difficult to believe in the absence of proof of mistake or oversight, and his testimony to the effect that, although the loan was still outstanding, he did not insist or even ask for such reduction, is wholly incredible. At the time when the note was executed, Kernan was about to leave the Islands, probably never to return. Prising held no written evidence of the alleged loan or of

the conditions under which it was made other than the draft itself, which was nearly eighteen months old, and the reasons which induced the partners to make a final settlement of the partnership transactions and which led to the execution of the note for the balance shown due under that settlement, would seem to preclude the possibility that they would have neglected to include the alleged personal loan in the final settlement of their mutual transactions.

After twenty days let judgment be entered reversing the judgment of the trial court without costs in this instance, the costs in first instance to be against the plaintiff, and let judgment be entered in favor of the plaintiff for P165.06, and ten days thereafter let the record be returned to the court from whence it came. So ordered.

Arellano, C. J., Torres, Mapa, and Willard, JJ., concur.

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