

GERVASIO UNSON, PLAINTIFF AND APPELLEE, VS. SEGUNDO ABRERA, DEFENDANT AND APPELLANT.*G.R. No. 5165. September 15, 1909*

Ponente: TORRES, J.

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On the 25th of February, 1908, Gervasio Unson filed a complaint with the Court of First Instance of Tayabas setting forth that in the year 1897 he and Abrera formed a partnership for the purchase and sale of copra, Unson being the capitalist, and Abrera an industrial partner; that Unson engaged to furnish Abrera all the capital necessary to start the business on condition that Unson should receive two-thirds of the profits; that notwithstanding the fact that the business was a prosperous one and continued until 1899, it had to suspend operations on account of the war, although the partnership has not been dissolved up to the present day; that when the business ceased the plaintiff recovered the cashbook from the defendant, who kept the company's books, and the following entries appeared there-in under date of the 23d of December, 1898, to wit: debit P52,562.09; credit P48,135.97; balance on hand P4,426.12, in which were included bills receivable amounting to P2,884.63; it also appeared that up to January, 1899, Abrera had received from Unson merchandise to the value of P1,133.82, it having been agreed between them that no credit should be given to anyone except for account and under the guarantee of the defendant; that ever since that date the plaintiff has repeatedly, but thus far unsuccessfully, requested the defendant to liquidate the accounts in order to bring the partnership to a close; that the amounts stated above were advanced by the plaintiff as capital for the business, and are now in the possession of the defendant, who refuses to deliver the same to the plaintiff to whom said sums belong; the plaintiff therefore prayed the court to enter judgment against the defendant in the sum of P4,559.94, that being the capital of the business advanced by the plaintiff and now in the hands of the defendant, together with interest at the rate of 6 per cent and costs.

The demurrer presented by the defendant to the foregoing complaint, maintaining that the facts alleged in said complaint did not constitute a right of action, was overruled on the 28th of April, 1908, to which the defendant excepted.

On the 20th of May of the same year the plaintiff moved that the court declare the defendant in default, and fix a day whereon the plaintiff might produce evidence showing that the defendant had appeared for the hearing of the case on the 10th of April and demurred to the complaint on the 15th of said month, which demurrer was overruled on the 28th of said month, the defendant excepting; and although the court below had ordered the defendant to answer the complaint within the term fixed by the rules, he had not done so in spite of the fact that more than twelve days had elapsed.

The defendant, informed of the foregoing motion, in a writing dated May 25, answered: that the defendant's counsel had not been notified by the plaintiff of the over-ruling of the demurrer by the court, and that the term of five days granted to the defendant in which to answer the complaint, when a demurrer thereto is overruled, should count from the day after the day of the notification by the plaintiff of the order or ruling wherein said demurrer is

set aside, as provided by section 9 of the Rules of the Courts of First Instance; therefore, he moved that the request of the plaintiff in his previous writing be denied.

The matter having been set for hearing on the 5th of September, the defendant in a writing dated August 21, 1908, answering the complaint, stated: that the allegations contained in paragraph 1 of the complaint are true with the exception of the part which, according to the agreement between the partners, refers to the proportion of the net profits of the business that should accrue to the defendant; that the allegations contained in paragraph 2 of the complaint are also true, but not so those set forth in paragraphs 3, 4, and 5, which the defendant denies. As a special defense he alleged that whatever action the plaintiff may have had against the defendant by reason of the said partnership had expired by limitation; that the said commercial partnership had been satisfactorily liquidated between the parties thereto in January 1899, and that it was agreed between the plaintiff and the defendant that the latter should receive two-thirds of the net profits of the business, and for said reason he asked that judgment be entered in his favor absolving him of the complaint, and sentencing the plaintiff to pay the costs.

The question involved in this litigation is the recovery of the balance of certain accounts that existed between the parties by reason of a partnership which they had formed for the purchase and sale of copra.

In no document does there appear the contract of partnership, from which arose said accounts and balance, and aside from the book kept by the defendant and which was offered in evidence by the plaintiff, together with the testimony of the latter, the record fails to disclose sufficient evidence to permit of a decision allowing the plaintiff's claim.

Notwithstanding the fact that the items appearing in paragraph 3 of the complaint agree with the entries in said book, with the exception of the last one which must be a mistake and should read 133.82 instead of 1,133.82, as appears therein, nevertheless, as the defendant denies the plaintiff's contention that it had been agreed between them that no credits should be allowed to anyone except for account of and under the guaranty of the said defendant, the record fails to establish the plaintiff's claim inasmuch as the contract of partnership does not appear in writing, and the book offered in evidence originated with the defendant, nor has the plaintiff produced the books that he ought to have kept showing the transactions which must have taken place here in Manila, in connection with said business.

It should be noted that the credits amount to P2,884.63, and the value of the stock on hand, according to the complaint and the aforesaid book, amounts to only P1,541.49, and that as long as there appears no proper liquidation of the partnership accounts, all cash, stock on hand, and bills receivable belong to the partnership without prejudice to such responsibility as, from the evidence, one partner might be shown to have contracted in favor of the other.

In consequence of the foregoing, and by virtue of the provisions of section 496 of the Code of Civil Procedure, we believe that a new trial should be held and such evidence submitted as would, at the proper time, enable final judgment to be entered, based on the testimony and evidence presented by the litigants herein.

As to the last part of section 9 of the Rules of the Courts of First Instance, it should be remembered that the sole object of the provisions of the rule is the notification of the defendant in order that he may answer the complaint within five days, and once notified and informed that his demurrer has been overruled, the term fixed by the law commences, and the defendant is obliged to comply with the further provisions thereof.

Even admitting the argument erroneously advanced by the defendant, though it was based on the literal wording of said section 9 of the Rules, section 110 in connection with section 2 of the Code of Procedure authorizes the trial judge in his discretion, to permit an answer or other writing to be presented even after the time fixed for its

presentation by the general rules; and in view of the fact that a written answer to the complaint was filed in the first instance, and that the defendant excepted and submitted a bill of exceptions to the judgment appealed from, and in addition thereto presented a brief in this second instance, it is left to the discretion of the lower court to determine whether or not, upon a new trial being held, the defendant may appear therein to the end that justice may be done.

In view of the considerations above set forth the judgment appealed from is hereby set aside", and the case will be remanded to the court whence it came with a certified copy of this decision in order that a new trial may be held in accordance with the law and the terms indicated above, and that in due course such judgment be rendered as it may consider proper in view of the evidence already adduced, and of such additional evidence as may be forthcoming at the new trial. So ordered.

Arellano, C. J., Johnson, Carson, and Moreland. JJ., concur.

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