

GUTIERREZ HERMANOS, PLAINTIFF AND APPELLANT, VS. ORIA HERMANOS & CO., DEFENDANT AND APPELLANT.*G.R. No. 8346. March 30, 1915*

Ponente: TORRES, J.

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On August 12, 1909, counsel for the mercantile firm of Gutierrez Hermanos of this city filed a written complaint in the Court of First Instance of Manila against the commercial concern of Oria Hermanos & Co. of Laoang, Province of Samar, alleging therein as a cause of action that between plaintiff and defendant there have existed commercial relations which gave rise to the opening of a mutual current account, at 8 per cent interest, under the name of Oria Hermanos & Co., on the books of the plaintiff Gutierrez Hermanos; that, on January 11, 1909, plaintiff transmitted to defendant an abstract of the latter's current account on December 31, 1908, which showed a balance in plaintiff's favor of P144,473.78 and which was approved by defendant, Oria Hermanos & Co., by a letter of March 9, 1909, which was copied literally in the complaint; that, on May 25, 1909, plaintiff notified defendant that the current account existing between them would be closed at the end of thirty days counting from that date, at the expiration of which period defendant should pay any debit balance that might be owing; that, on June 30 of the same year, Gutierrez Hermanos transmitted to the defendant, Oria Hermanos & Co., the statement of the latter's current account up to that date and, confirming its previous letter to the defendant of May 25, 1909, called attention to the necessity of paying the balance, which then amounted to P147,204.28; that the defendant firm, notwithstanding the said demands and others subsequently made, and without having made any objection whatever to the said statement of account, refused to pay the principal and interest owing on the said account.' Plaintiff's counsel therefore prayed that Oria Hermanos & Co. be sentenced to pay the sum of P147,204.28, besides the interest thereon at the rate of 8 per cent per annum from June 30, 1909, and the costs.

Defendant filed its answer on November 9, 1909, setting up four cross complaints and six counterclaims against the plaintiff, Gutierrez Hermanos, and specifically denied such of the allegations of the complaint as were not in agreement with its answer. Plaintiff demurred to certain paragraphs of the answer and as to the others thereof prayed the court to order defendant to make its allegations more specific. The court overruled this demurrer, but granted the petition that defendant should make its allegations more specific in the second, third, and fourth cross complaints and first counterclaim

In compliance with the said order, defendant, on May 4, 1910, filed an amended answer in which it specifically admitted paragraphs 1 and 2 of the complaint, and, as the first cross complaint, alleged that, by reason of mercantile relations and the opening of a mutual current account from May 1, 1900, the plaintiff had obligated itself periodically to send to the defendant firm a memorandum or statement of the current account, and further obligated itself, in case the said mercantile relations should be finally terminated, to present a general and complete account, duly supported by vouchers and other proofs; that plaintiff, Gutierrez Hermanos, had contented itself by sending to Oria Hermanos & Co. some memoranda or abstracts of account, accepted by defendant as such "abstracts of account," without the latter's having waived its right to demand the presentation, as agreed

upon, of the vouchers and other proofs upon the closing of the current account, a stipulation which Gutierrez Hermanos had failed to comply with. Defendant therefore prayed that the plaintiff, Gutierrez Hermanos, be sentenced to render and present the said final account, duly accompanied by vouchers, in conformity with the agreement made.

In the second cross complaint defendant alleged that, by virtue of a commission contract, Oria Hermanos & Co. had from the 1st of May, 1900, to the 7th of September, 1909, forwarded 65,119.66 piculs of copra, 70,420 bales of hemp, and 5,176.03 piculs of loose hemp to Gutierrez Hermanos for sale on commission; that the latter firm informed the defendant that it, the plaintiff, had sold the said products to third persons for the account of the defendant, Oria Hermanos & Co.; that by reason of said sale or sales Gutierrez Hermanos collected large and important sums for commission and brokerage and had turned in for the goods sold amounts less than what they were actually worth in Manila; that defendant, Oria Hermanos & Co., had recently received information that these lots of hemp and copra were purchased by the firm of Gutierrez Hermanos for itself, notwithstanding that the latter had stated to its principals, Oria Hermanos & Co., that they had been sold to third persons; that it collected by reason of such sale, commission and brokerage; acts which redound to the fraud, injury, and prejudice of the defendant, Oria Hermanos & Co. Therefore the latter prayed that Gutierrez Hermanos be sentenced to render a general and complete account of the amounts of hemp and copra received by it for sale on commission from the year 1900 to 1909, setting out the dates of the receipt of the said merchandise, dates of the sales, names of the purchasers, prices stipulated, discounts obtained, and commissions collected by Gutierrez Hermanos, etc.

Defendant alleged as the third cross complaint that, by virtue of the said commission contract, Gutierrez Hermanos sent to the firm of Oria Hermanos & Co., at different times according to the latter's request, from May 1, 1900, up to the date of the closing of the current account, 193,310 sacks of rice alleged to have been purchased from third persons, wherefore Oria Hermanos & Co. paid a certain stipulated percentage as commission or brokerage for the sales; but that now Oria Hermanos & Co. have received information which it believes to be true, and so alleges, that the rice so forwarded had not been purchased from third persons, but belonged to Gutierrez Hermanos who sold it directly to defendant, collecting from the latter excessive prices, advance payments, commission and interest, all to the fraud and injury of the defendant firm. Oria Hermanos & Co., therefore, prayed that Gutierrez Hermanos be sentenced to render an account, duly supported by vouchers, of all the lots of rice forwarded to Oria Hermanos, with a statement of the dates of the orders, amounts, dates of the purchases, names of purchasers, amounts charged to Oria Hermanos & Co., etc.

In the fourth cross complaint defendant related that, by reason of the same commission contract existing between the two firms, Gutierrez Hermanos had sent to Oria Hermanos & Co., from the 1st of May, 1900, up to the closing of the current account, various quantities of salt, petroleum, tobacco, groceries and beverages, and had collected a commission for the purchase thereof, that afterwards Oria Hermanos & Co. learned that the forwarding firm, the plaintiff, had set larger prices on the said goods than it had actually paid for them and had unduly charged such prices, before it had paid them, to the defendant's account, collecting for itself commission and interest thereon, to the fraud and prejudice of the defendant firm. Therefore the latter prayed that Gutierrez Hermanos be sentenced to render a complete account, accompanied by vouchers, of the shipments aforementioned.

In the first counterclaim filed by the defendant, Oria Hermanos & Co., petition was made that Gutierrez Hermanos be sentenced to pay it the sum of P13,894.60, as the amount of an overcharge of 3 per cent in interest collected from defendant, in a charge of 8 per cent interest per annum on a private debt of P47,649 drawing 5 per cent interest per annum, which latter amount Juan T. Molleda owed the firm of Gutierrez Hermanos and payment for which was assumed by Oria Hermanos & Co. upon its organization into a mercantile firm in May, 1900.

In the second counterclaim the defendant firm, Oria Hermanos & Co. set forth: That, on April 18, 1900, its

predecessor had ordered its consignee in Manila, Gutierrez Hermanos, to insure against all war risks the stocks of hemp and merchandise which the said firm possessed in the pueblo of Laoang, for P35,000, and likewise those it had in Catubig, for P32,000; that Gutierrez Hermanos did not comply with the said order, only insuring the stocks in Laoang for P67,000, leaving those of Catubig totally unprotected; that when, on May 10, 1900, this latter pueblo was destroyed by fire Oria Hermanos & Co. lost all its stocks there and could not collect the insurance of P32,000 on the said property, which, through the fault, negligence, and omission of Gutierrez Hermanos had not been insured. This amount last mentioned, added to the premiums, expenses, and interest paid by Oria Hermanos & Co. aggregates the sum of P63,700, payment of which defendant demanded of plaintiff.

As a third counterclaim it is alleged that, on May 18, 1900, the firm of Gutierrez Hermanos, complying with orders from Oria Hermanos, & Co., insured against all war risks, in a certain insurance company of London, England, whose agent in the Philippine Islands was Stevenson & Co., the stock of hemp which the defendant company had in the pueblo of Catarman, Samar, for 3,000 pounds sterling, and paid the premiums thereon at the rate of 10 per cent per quarter; that, during the first quarter for which the premiums had been so paid, all the insured tobacco belonging to Oria Hermanos & Co., in Catarman, was stolen by the insurgent forces; that then the underwriter refused to pay the amount of the insurance on the ground that Gutierrez Hermanos had made out the said insurance defectively, wherefore Oria Hermanos & Co. ordered its agent Gutierrez Hermanos to institute proceedings before the courts of these Islands for the collection of the amount of the said insurance; but that plaintiff instead brought suit for the purpose before the courts of England and by its negligence, indolence, and carelessness had, during a period of eight years, obliged the defendant firm to incur costly expenditures which, added to the amount of the insurance premiums paid, attorney's fees, costs, interest, etc., aggregated P67,000; that for this sum, together with legal interests thereon, it prayed that it be reimbursed by Gutierrez Hermanos.

With respect to the fourth counterclaim, the defendant firm set forth that, under the commission contract and the current account contract existing between both companies, Gutierrez Hermanos bound itself to acquire for and forward to Oria Hermanos & Co. such rice and other effects, including cash, as defendant might order from plaintiff; but that, since the beginning of 1904, the firm of Gutierrez Hermanos maliciously failed to make the consignments of rice and other effects, under the false pretext that there were no such articles in the market, thereby preventing the said firm of Oria Hermanos & Co. from obtaining a profit of not less than P25,000 and, besides, injuring its fame, credit, and mercantile reputation in the Island of Samar to the extent of approximately P50,000. Therefore defendant prayed that Gutierrez Hermanos be sentenced to pay it the sum of P75,000 as the amount of such losses and damages occasioned it.

As the fifth counterclaim defendant alleged that, for a period of twenty-two months, from the month of May, 1900, it chartered several of its boats to the American military government; that the charter parties aggregated a value of P400,000; that these contracts were executed and the amounts thereof collected by Messrs. Oria & Fuster, members of the defendant company, who turned the said amounts into the current account they had with the firm of Gutierrez Hermanos; but that plaintiff charged in the current account, appropriated to itself, and collected from the funds of Oria Hermanos & Co. which it had in its possession, 2½ per cent of the amount collected by reason of the said charter parties for commission and brokerage, there being no stipulation whatever relative to the collection of this commission; that Gutierrez Hermanos, moreover, charged against the said amount collected by it 8 per cent compound interest; and that the sum in such wise improperly charged and appropriated amounted, together with the accumulated interest, to P15,000, which defendant prayed be returned to it by Gutierrez Hermanos.

The object of the sixth counterclaim is the recovery of P31,000, in which amount defendant, Oria Hermanos & Co., alleged it was injured by Gutierrez Hermanos having arbitrarily charged in the current account compound

interest at the rate of 8 per cent per semester from the year 1900 up to the time of the closing of the said current account, while the agreement made between both firms upon opening the said account was that the latter should bear a mutual interest of 8 per cent per annum only.

On May 14, 1910, counsel for Gutierrez Hermanos filed a written answer to the foregoing countercomplaints and counterclaims, and prayed that plaintiff be absolved therefrom.

On August 1, 1910, this case came up for hearing and was continued on the following days until on April 24, 1912, the Honorable S. del Rosario, judge, rendering judgment therein, the dispositive part of which is as follows: "Messrs. Oria Hermanos & Co. are sentenced to pay to Messrs. Gutierrez Hermanos the sum of P147,204.28, with interest thereon at the rate of 8 per cent per annum from the 30th of June, 1909, after deduction of all the sums that result as balances, in favor of the former, from the accounts that shall be rendered by the latter, in conformity with the cross complaints and counterclaims that have been admitted.

"Messrs. Gutierrez Hermanos are sentenced:

"(a) With respect to the first cross complaint, to render to Messrs. Oria Hermanos & Co. accounts, supported by vouchers, only of those articles in the acquisition of which fraud, deceit, or error has been proven and to which the following pronouncements refer.

"(b) As regards the second cross complaint, to return to Messrs. Oria Hermanos & Co., after due settlement of the accounts, all the sums collected as internal-revenue tax and referred to in the invoices of rice, salt, petroleum, lime, rattan, flour, aniseed spirit, cigarettes, and other articles mentioned in their respective places in the record, unless plaintiff shows in a satisfactory manner that it did actually pay to the Bureau of Internal Revenue, the contents of Exhibit 178 notwithstanding, the sums which, for the reason aforesaid, were debited to defendant, in which case the latter may bring an action against the said Bureau of Internal Revenue.

"(c) With respect to the third cross complaint, plaintiff must render to defendant an account, supported by vouchers, of the shipments of rice concerned in the invoices examined in which fraud or error was discovered, and said account shall embrace the 153 invoices referred to by the litigants in this suit (page 324 of the transcript of the stenographic notes, session of November 29, 1910).

"(d) With regard to the fourth cross complaint, plaintiff shall render an account, supported by vouchers, of all the purchases it made of petroleum for Messrs. Oria Hermanos & Co., and in connection with the invoices held in the latter's possession and referred to on page 391 of the transcript of the stenographic notes of the session of November 29, 1910.

"(e) In the matter of the second counterclaim, plaintiff shall return to Messrs. Oria Hermanos & Co. the sum of P1,812 with interest thereon at the rate of 8 per cent per annum from the 5th of May, 1910, to the date of payment. The interest due shall be compounded after each semester, reckoning from June 1, 1900, and both the principal and the interest so compounded shall bear the same interest of 8 per cent per annum.

"Messrs. Gutierrez Hermanos are absolved, in the first place, from the second cross complaint in so far as concerns the demand therein made for a rendition of accounts in connection with the hemp and copra; and in the second place, from the first, third, fourth, fifth, and sixth counter-claims.

"Without special finding as to costs."

The parties, upon their notification of this judgment, duly excepted thereto and by written motion prayed for a reopening of the case and a new trial. These motions were overruled, with exception by the appellants, and the proper bills of exceptions having been filed, the same were approved and forwarded to the clerk of this court.

This action was brought to recover the sum of P147,204.28, the balance of a current account opened on May 1,

1900, between Gutierrez Hermanos and the commercial firm of Oria Hermanos & Co., at the rate 8 per cent mutual interest up to June 30, 1909, which sum was found to be owing by Oria Hermanos & Co. to the commercial firm of Gutierrez Hermanos.

Other subject matters of the present suit are the rendition of accounts by Gutierrez Hermanos, as commission agent, to Oria Hermanos & Co., as principal, and the collection of various sums demanded by the latter in the cross complaints and counterclaims filed, during the trial, by its counsel against the claim made by Gutierrez Hermanos for the payment of the amount specified in the preceding paragraph.

To prove the propriety and justice of its complaint, Gutierrez Hermanos, the plaintiff, alleged: That, in accordance with the agreement made, it sent semi annually a general account that comprised a statement of the business transacted during the preceding six months, to Oria Hermanos & Co. who, after examining the account with its specification and vouchers, sometimes approved the same without comment of any kind, and at others, after some objections, but that, in the latter cases, upon explanations being subsequently given by Gutierrez Hermanos, the defendant firm used at last to accept the account rendered; that such was the procedure followed during the nine years approximately that both firms maintained commercial relations, and that the record showed that during the said nine years Oria Hermanos & Co. had given in favor of Gutierrez Hermanos 17 agreements or approvals of account, the last of which, transcribed in the complaint, is of the following tenor:

"LAOANG, March 9, 1909.

"Messrs. GUTIERREZ HERMANOS, Manila.

"DEAR SIRS: In our possession, your very esteemed letter dated December 31 last, from which we have withdrawn the extract of our current account with your firm, closed the same day, showing a balance in your favor of P144,473.78, which extract meets with our approval.

"We remain, "Yours, very respectfully,

"ORIA HERMANOS & Co."

That, on May 25, 1909, the plaintiff firm notified the defendant firm that it could not continue to do business with the latter and therefore the current account stipulated between both parties would be closed within a period of thirty days; plaintiff therefore transmitted to defendant a general detailed account that comprised the period from January, 1909, to June 30 of the same year, with the warning that after that date (May 25, 1909) defendant would to pay the debit balance, inasmuch as, although the said last account had not been approved, no objection whatever had been made thereto by Oria Hermanos & Co. Therefore, in the said letter of May 25, plaintiff demanded of defendant the payment of the sum mentioned of P147,204.28 which the latter had not paid in spite of plaintiff's demands and notwithstanding the fact that defendant had made no objection whatever to the last account rendered.

Counsel for defendant, Oria Hermanos & Co., after a denial of the facts that had not been admitted prayed in special defense and in four cross complaints that the plaintiff, Gutierrez Hermanos, be compelled to present a general account, duly verified and supported by vouchers, of all the shipments of hemp, copra, rice and other effects specifically mentioned, and to render a final account in conformity with the agreement made between both parties and converging the details mentioned in the said cross complaints.

Notwithstanding the proof shown in the record of the certainty and reality of the debt as a balance resulting from the current account kept between the parties, it is of course impossible to determine the net amount, the object of the claim presented by plaintiff, until there shall have first been decided whether there should or not be rendered a general account, accompanied by vouchers, comprehensive of the business transacted in connection with the

different commercial articles dealt in, and of the mercantile relations between both firms from May 1, 1900, to June 30, 1909, and also whether Gutierrez Hermanos is indebted to Oria Hermanos & Co. and what is the amount of the debt.

Even upon the supposition that the plaintiff, Gutierrez Hermanos, is obliged to make a general rendition of accounts comprehensive of the business transacted between both firms within the dates mentioned, it is evident that, until it be known whether plaintiff is or is not indebted to Oria Hermanos & Co. and what is the amount owing as disclosed by the account rendered, it cannot be decided whether plaintiff is or is not entitled to collect the whole amount claimed in the complaint, for only in view of the result of the rendition of accounts requested by plaintiff can it be lawfully established whether Gutierrez Hermanos is a creditor of Oria Hermanos & Co. and what amount is owing to it by the latter. All this is referred to in the first error alleged by defendant.

In case it should be held that the law does not allow the rendition of accounts requested by the defendant, Oria Hermanos & Co., and that this latter is not a creditor of Gutierrez Hermanos, it is evident of course that plaintiff would be unquestionably entitled to collect the amount specified in the complaint, or some other amount duly proved at trial to be owing it by defendant. It is therefore incumbent upon us to elucidate hereinafter the propriety or impropriety of the contentions made by defendant in its four cross complaints.

Defendant's counsel in his first cross-complaint and special defense prayed that the plaintiff, Gutierrez Hermanos, be compelled to render and present a general, final, complete and verified account, pursuant to the agreement made between both parties, inasmuch as plaintiff bound itself to send periodically to defendant a note or numerical extract of the current account, and in case the mercantile relations between both firms should come to an end or be finally closed, Gutierrez Hermanos bound itself to present a general and complete account, duly supported by vouchers, and defendant, in accepting and approving the semiannual accounts rendered by plaintiff, did not waive its right to demand the general account agreed upon, at the time of the final closing of the said current account, the obligation to furnish which was not complied with by the plaintiff, Gutierrez Hermanos.

The latter denied in its answer the allegations made by Oria Hermanos & Co. in its cross-complaint, and set forth that, in consequence of the mutual current account opened between the parties from the year 1900, plaintiff transmitted weekly or fortnightly, according to circumstances, a specific statement of the transactions effected, as well as, semiannually, a general account of the business done during the six months last elapsed, and that defendant, after an examination of such semiannual account together with its details and vouchers, and after some objections thereto had been explained, was accustomed to approve the same. This was the procedure carried on for more than nine years during which Oria Hermanos & Co. from time to time approved each one of the 17 accounts that were presented to it, and upon Gutierrez Hermanos closing the current account from January to June, 1909, it also presented to defendant a general detailed account, which, notwithstanding that no objection whatever was made to it, was not approved. Therefore the complaint was filed that initiated this litigation.

Had the agreement between the parties been recorded with all its conditions in some instrument, it would have appeared whether Gutierrez Hermanos actually bound itself to present to Oria Hermanos & Co., besides the semiannual accounts rendered, a general account comprising all the business undertaken between 1900 and June, 1909, on which latter date it was considered by Gutierrez Hermanos as terminated. The allegation made by defendant relative to this point has not been substantiated by any evidence whatever, and therefore there is no reason nor legal ground whereby plaintiff could be compelled to present that general account requested in the first cross-complaint.

It is, in our opinion, appropriate to insert hereinafter what the trial court, in the judgment rendered, says with respect to this matter: "If commission agents be obliged to render to their principals itemized accounts, supported

by vouchers, of the sums they collect as commission and of the transactions effected by them in relation with their principals, as often as the latter may desire, in cases where there arises some trouble, some difference of opinion or a conflict of interests, or where the commission agents close the account, as occurs in the case at bar, because the principals did not pay what they were owing or because, instead of the debt being diminished, it was increased, the commission contract would become an inexhaustible and never-ending source of litigation and of claims without number, a formidable arm for spiteful principals against which it would be insufficient to oppose an arsenal of vouchers such as might be treasured by the most prescient commission agent, because there could be avoided neither the bother resulting from their necessary examination, nor the heavy expenses and loss of time that are the inevitable accompaniment of this class of work."

When an account has been presented or rendered and has been approved by the party whom it concerns or interests, it is not proper to revise it, unless it should be proved that in its approval there was deceit, fraud, or error seriously prejudicial to the party who gave such approval. (Arts. 1265 and 1266, Civil Code.)

In the decision rendered in the case of Pastor vs. Nicasio, (6 Phil. Rep., 152), the following doctrine was laid down:

"When accounts of the agent to the principal are once approved by the principal, the latter has no right to ask afterwards for a revision of the same or for a detailed account of the business, unless he can show that there was fraud, deceit, error or mistake in the approval of the accounts—facts not proven in this case."

The record does not show it to have been duly proven that upon Oria Hermanos & Co. giving its approval to the 17 accounts presented by Gutierrez Hermanos there was deceit, fraud, or mistake prejudicial to the former's interests. For the sole reason that Gutierrez Hermanos, upon closing the current account with Oria Hermanos & Co. was obliged, certainly an unwarranted obligation, to render a general account comprehensive of all the business transacted between both parties during more than nine years, and there being no proof of the alleged agreement between them, it would be improper to hold that plaintiff is obliged to render and present a general account in the sense requested by Oria Hermanos & Co. in its first cross-complaint.

With respect to the second cross-complaint, relative to the sale on commission of lots of hemp and copra by defendant to plaintiff during the period from May, 1900, until the close of the mercantile relations between both firms, it was alleged that for such sale or sales on commission Gutierrez Hermanos collected a large and important commission of many thousands of pesos and credited defendant in the current account with lesser prices than those obtained, and that defendant received information that these lots of hemp and copra which were said to have been sold to third persons were afterwards found to have been purchased by the firm of Gutierrez Hermanos itself, to the fraud, injury, and prejudice of the defendant, Oria Hermanos & Co.; wherefore the latter prayed that plaintiff should present a general and complete account, duly verified by vouchers and with the details specified, of each and all of the shipments of hemp and copra forwarded to plaintiff from May, 1900, to 1909. These facts were denied by plaintiff, and the court, in view of the evidence adduced by both parties, held that the record showed absolutely no proof that plaintiff, Gutierrez Hermanos, had committed any fraud or error prejudicial to defendant.

In fact it was not proved that Gutierrez Hermanos credited in the current account a lesser price than that obtained from the sale on commission of the lots of hemp and copra sent to it by Oria Hermanos & Co., for from the documentary evidence consisting of accounts transmitted by plaintiff to the commercial firms of Stevenson & Co. and Warner, Barnes & Co. (Limited), in collection of the price of hemp and copra acquired by these houses, it appears that the prices fixed at sale to the latter are the same and agree with those specified in the statements transmitted by plaintiff to defendant, Oria Hermanos & Co., and that the hemp and copra shipped by the defendant were sold on commission to third persons—that is, to the aforesaid commercial firms.

The charge laid against plaintiff, that it did not disclose the name of the commercial firm or concern from whom the hemp that it sold had come, does not, although it may have concealed this fact, constitute a fraudulent act, nor one originating civil liability, inasmuch as plaintiff realized on the lots of hemp under the marks of Oria Hermanos & Co. which they bore from their point of origin and by which they were known both in Manila and abroad (Exhibit DD) and not only in the invoices, but also in the accounts presented by Gutierrez Hermanos upon its collecting the price of such hemp sold on commission, there appeared the marks stamped by Oria Hermanos & Co. on their lots of hemp, and therefore it cannot be affirmed that Gutierrez Hermanos superseded Oria Hermanos & Co. as the owner of the hemp that plaintiff sold on commission and that came from defendant during the more than nine years in which the former was a commission agent of the latter.

With respect to the fact of Gutierrez Hermanos not having disclosed the name of the concern to which the hemp belonged, in the cases where plaintiff sold it in its own name, plaintiff's procedure cannot be qualified as deceitful or fraudulent, inasmuch as article 245 of the Code of Commerce authorized it to act as it did, to contract on its own account without need of disclosing the name of its principal, in which case Gutierrez Hermanos was liable to the person or concern with whom it contracted, as if the business were its own. So, then, the purchaser has no right of action against the principal, nor the latter against the former, without prejudice to the actions which lie respectively in behalf of the principal and the commission agent, pursuant to the provisions of article 246 of the Civil Code.

With regard to the lots of copra, notwithstanding the allegations made in this cross-complaint, defendant has not produced any proof whatever of the facts charged, in face of plaintiff's denial in its answer. Therefore, in consideration of the reasons set forth with respect to the lots of hemp, the judgment of the lower court disallowing defendant's petition that plaintiff render accounts relative to the sales of hemp and copra is held to be in accordance with law.

In this part of the judgment of the trial court consideration was also given to the fact of plaintiff's having debited against defendant in the account rendered it the payment of the internal-revenue tax of one-third of 1 per cent.

With respect to the tax paid on the price of the hemp and copra sold by the plaintiff in the name and for the account of the defendant, the procedure of the plaintiff is perfectly legal, in accordance with the provisions of section 139 of the Internal Revenue Law, in laying upon Oria Hermanos & Co. the obligation to pay the said tax as the owner of the hemp and copra sold, and, therefore, the claim made by defendant against the account drawn up by Gutierrez Hermanos is unreasonable and unfounded.

As regards the tax of one-third of 1 per cent which, according to accounts presented by Gutierrez Hermanos to Oria Hermanos & Co., plaintiff had paid on the price of the rice, salt, kerosene, lime, mats, rattan, flour, anise-seed spirits, and cigarettes, inasmuch as the said section of the above cited Act obliges the vendors and not the purchasers of these articles to pay the said tax, it is undeniable that the firm of Gutierrez Hermanos that had acquired the said articles which were forwarded to Oria Hermanos & Co. should neither have paid the tax in question, nor should have charged it for payment against defendant, since it had already been paid to the Government by the owners of the articles sold to plaintiff.

In view of the provisions of law contained in the aforesaid section 139, it is not understood how Gutierrez Hermanos could have been compelled to pay the said tax on the rice, salt, petroleum, lime, mats, rattan, flour, anise-seed spirit, and cigarettes, nor on the price of the beer, on the supposition that plaintiff acquired these articles from third persons in this city. In the case of the rice imported from abroad, the payment of the tax thereon pertains to the importer who sells it to third persons.

If Gutierrez Hermanos made a mistake, notwithstanding the clear phraseology of the said section, said mistake

should not prejudice defendant who, in July, 1905, had already stated that it did not agree with plaintiff's action in the matter for, in the letter Exhibit FF, defendant demanded that plaintiff investigate the case in order to avoid a double payment of the tax.

For the foregoing reasons the plaintiff, Gutierrez Hermanos, after liquidation of the sums paid as a tax of one-third of 1 per cent on the price of the rice acquired in this city and of the salt, kerosene, lime, mats, flour, anise-seed spirit, cigarettes, and beer, referred to in the second counter-complaint, must pay to Oria Hermanos & Co. the amount shown by said liquidation to be owing.

As regards the third cross-complaint, wherein it is alleged that fraud, deceit, or error was committed or incurred by Gutierrez Hermanos in connection with the accounts for the rice forwarded to Oria Hermanos & Co., a fact denied by plaintiff, the trial judge, in view of the evidence introduced at the hearing of the case, established the following conclusion:

"Justice, therefore, demands that Messrs. Gutierrez Hermanos render a new account of the lots of rice which they shipped to Messrs. Oria Hermanos & Co., inasmuch as they, as proved in the verification of some of the lots, committed the fraud of having collected a commission of 2 per cent for the purchase of the rice, as commission agents, in addition to a profit in reference to the said lots, in their capacity of merchants, on the price of the rice imported by them from Saigon.

"If they acted as commission agents, they should have contented themselves with the 2 per cent commission and should not have charged any extra price. If, as commission agents, it was more advantageous for them to reap the profits from the rice they imported from Saigon, they should neither have charged nor collected the 2 per cent commission. The commission agent is obliged to acquire the articles or effects for which he has received an order from his principal in the most advantageous and less onerous conditions for the latter. Such an obligation, prescribed by article 258 of the Code of Commerce, was not fulfilled by the procedure observed by plaintiff in the matter of the verified invoices of rice, in some of which, as has been proved, there appears to have been charged a larger amount than the cost price."

This court reserves its opinion, until at such proper time it shall have seen the result, shown by the new accounts to be presented by plaintiff, as to whether, in the rice accounts rendered by it to defendant, there was fraud or only error susceptible of correction, for plaintiff alleges in turn, as shown in the letter Exhibit ÑÑ, that Oria Hermanos & Co. required plaintiff to increase the price in the invoices of rice, anise-seed spirit, petroleum, etc., by 25 per cent of the cost of these articles. Therefore plaintiff shall render an account, verified by vouchers, to Oria Hermanos of all the shipments of rice concerned, not only in the invoices examined, but also in those that have not been examined, up to No. 153, which invoices are those mentioned on page 324 of the transcript of the stenographic notes of the session of November 29, 1910.

The approval and agreement given by defendant to the 17 semiannual accounts presented by plaintiff is no impediment to a revision of the same, once it shall have been shown that there was fraud, error, or serious incorrection prejudicial to the party who accepted the said accounts. The law which protects him who acts in good faith cannot permit any considerable prejudice to be caused to the rights and interests of a third party who had neither the occasion nor the opportunity to acquaint himself with the truth of the facts which he had admitted as true in such manner as they were presented to him.

Oria Hermanos & Co., upon its accepting and approving the accounts which were presented to it by Gutierrez Hermanos, as transcripts or copies from the latter's books, did not have an opportunity to make the required verification of the entries of rice contained in the said accounts or of the invoices of this article in all their details, and whenever it has discovered that Gutierrez Hermanos, as commission agent, has made overcharges or placed extra prices in addition to the 2 per cent commission, it has a right to demand reimbursement of the excess in price

which it had erroneously paid as principal. The judgment of the lower court must, therefore, be affirmed with respect to the entries of rice made in the 170 invoices referred to in the accounts presented by plaintiff, by means of a revision of the accounts presented in connection with the said article of the Code of Commerce.

With respect to the fourth cross-complaint relative to Gutierrez Hermanos having entered in the invoices transmitted to Oria Hermanos & Co. higher prices than those paid for the salt, beverages, tobacco, wine, beer, and groceries, in spite of the allegations made by plaintiff the record of the proceedings shows no proof of the truth of the act charged to plaintiff. The fact of not having recorded in the invoices of the said effects shipped to defendant the names of the persons who had acquired them does not constitute proof nor even a presumption of illegal procedure on the part of Gutierrez Hermanos. Neither is plaintiff obliged by any law to state the names of the owners of such articles, nor does the omission thereof show bad faith on the part of the commission agents.

As regards the petroleum, it is undeniable that in the invoices to which the fourth cross-complaint refers higher prices were given than those it actually cost. Moreover, Oria Hermanos & Co. is entitled to the discount obtained by the commission house from the commercial firm which sold the petroleum.

The trial judge, as grounds for his finding, says the following: "It is therefore evident that, according to the proofs submitted, Messrs. Gutierrez Hermanos committed fraud in the purchase and shipments of the said article, not only because they kept the discount allowed by the selling firm by which their principals, for whom they purchased the petroleum should have profited, and not the commission agents who acted for them simply in the capacity of agents; but also because in one of the invoices they charged, besides, a greater price than they paid to the vendors, and then collected a commission of 2 per cent on all the invoices. It is the obligation of commission agents to make the purchases for their principals on the most advantageous terms. For this they are paid the rate of commission stipulated. They have no right to keep the discount allowed by the vendors on the price of the articles they purchase for their principals, even less to increase, to their benefit, the price charged them."

In consideration, then, of the evidence introduced relative to the purchase of the petroleum shipped to defendant, referred to in the fourth cross-complaint, plaintiff must render an account, verified by vouchers, of the price of all the petroleum that it acquired for Oria Hermanos & Co. and which is covered by the invoices mentioned on page 391 of the transcript of the stenographic notes taken of the session of December 28, 1910.

The judgment of the lower court treats of the fact that Gutierrez Hermanos charged interest on the value of the articles which it had purchased for Oria Hermanos & Co., before even having paid the vendors the price of the articles acquired. Defendant has complained against this procedure on the part of plaintiff and qualifies as improper and illegal the collection of the 8 per cent interest on the price of the effects forwarded to Oria Hermanos & Co. from the date of their shipment, when actual payment of such purchases was made many days afterwards.

The accounts presented by Gutierrez Hermanos, wherein note was made of the collection of interest at the rate of 8 per cent on the price of the effects acquired by plaintiff for Oria Hermanos & Co. and shipped to defendant for its disposal, notwithstanding that they were not paid for until many days afterwards, were approved and accepted by plaintiff without any objection thereto whatever and with no protest against the notation of the interest on the price of the articles purchased. Therefore, aside from the reasons given by the lower court in his judgment and relative to this point, it can not be held that there was either fraud or error in the procedure observed by Gutierrez Hermanos in charging in its account the stipulated interest from the date when it acquired the effects, afterwards shipped to the defendant, Oria Hermanos & Co., because Gutierrez Hermanos could have paid cash for the articles purchased. Even though payment might have been delayed for a few days more it is certain that Gutierrez Hermanos as commission agent was obliged to pay the price of the articles acquired and, consequently, said price

began to draw interest chargeable to the consignee who, as owner of such articles, could dispose of them freely. For these reasons defendant's claim can not be sustained.

We now take up the fifth special defense, or the first counterclaim presented by defendant against plaintiff, wherein it is prayed that the latter be sentenced to pay to the former the sum of P13,894.60, together with the legal interest thereon, which sum is the difference between the 5 per cent which was all Oria Hermanos & Co. should have paid and the 8 per cent which was unduly charged them on the sum of P47,649, the debt contracted by Juan T. Molleda in favor of Gutierrez Hermanos and transferred to Oria Hermanos & Co. who assumed its payment instead of Molleda.

The reasons, set forth in the judgment appealed from and based on documentary evidence, are so clear and conclusive that they could not be rejected by defendant, nor invalidated at trial by other evidence in rebuttal. Consequently, we are constrained to admit them as decisive of the point in controversy and as duly showing that the interest stipulated on the amount which Juan T. Molleda owed Gutierrez Hermanos and which was transferred to Oria Hermanos & Co. is 8 per cent and not 5 per cent as defendant claims. Therefore the sum of P13,894.60 claimed cannot be recovered, and it is held that the finding made by the trial judge in respect to the first counterclaim filed by defendant is in accord with the law and the evidence. This finding is based on the following grounds: "If the firm of Molleda & Oria as well as that of Oria Hermanos & Co., of which latter Mr. Tomas Oria is manager, both consented to Messrs. Gutierrez Hermanos charging in all the extracts of current account sent to them an interest of 8 per cent on the sum of P47,649.56; and if they willingly and constantly acquiesced in the payment of a particular rate of interest instead of that of 5 per cent, during nine years without raising any objection whatever, they are not entitled to obtain restitution for the difference paid of 3 per cent, nor have they any right to consider as unlawfully collected the 8 per cent interest on the sum above mentioned. The record shows no proof of the existence of any of the vices which, according to law, might invalidate the consent given by defendant to the collection from it of the interest of 8 per cent, which must be that stipulated, nor was such a vice alleged by Oria Hermanos & Co." Moreover, against this finding in plaintiff's favor no error whatever has been alleged by defendant.

In the second counterclaim, the sixth special defense, defendant prays that Gutierrez Hermanos be sentenced to the payment of P63,700, with legal interest thereon from the date of the presentation of this counterclaim, and alleges; that the firm of Gutierrez Hermanos, disregarding the instructions of Molleda & Oria, the predecessor of Oria Hermanos & Co., merely insured the stocks of hemp and merchandise which the latter had in Laoang, for an imaginary value of P67,000, leaving totally unprotected the stocks of hemp and merchandise in Catubig, valued at P32,000; that such failure to comply with the said instructions caused Oria Hermanos & Co., by reason of the fire that occurred in Catubig, to lose the sum of P63,700, including the premiums, expenses, and interest paid, and that defendant, immediately upon discovery of the loss by plaintiff's fault and negligence, filed claim therefor and protested against the same.

In answer Gutierrez Hermanos alleged that in the letter from Oria Hermanos & Co., of the date of April 28, 1900, the latter stated that it recommended to plaintiff the question of the insurance of the warehouses in Laoang and of the houses in Catubig, and advised that if the stocks of hemp and merchandise therein were insured, as defendant believed they were, plaintiff should endeavor to increase the insurance thereon; and that in another letter of the same date Don Tomas Oria, after relating the fact that the insurgents had attacked the pueblo of Catubig and killed the troops there garrisoned, stated that he earnestly recommended to Gutierrez the matter of the insurance in order that it might be made as soon as possible in the manner explained in the official letter of the same date.

Gutierrez Hermanos, supposing that Catubig might already have been burned and destroyed as a result of the occurrences related by Oria in his letter, judging by the news published in the newspapers of this city on May 2,

1900, deemed that it would be a useless expense to increase the insurance of the merchandise held in stock in the said pueblo under ordinary fire insurance which was that taken out by the firm of Molleda & Oria, for the reason that the insurance companies would refuse to pay the amount of the insurance in case the damage was caused by war, invasion, riot, military force, etc. As Gutierrez Hermanos then had no means whereby it might communicate with Molleda & Oria to request specific instructions from this latter firm in regard to the insurance ordered, which was ordinary and not war insurance, it had to consult Don Casimiro Oria, a partner of Oria Hermanos & Co., and this gentleman, with a full knowledge of the state of affairs in Catubig, advised that no further attempt be made to increase the ordinary fire insurance on the goods in Catubig, because it would be a useless expense and because there were well-founded reasons for supposing that at that date the pueblo had already been completely destroyed, together with the buildings and stocks of merchandise which it was proposed to insure. But after taking into account the importance of the buildings and the large stocks of goods stored in Laoang, which pueblo, according to a letter from Oria to Gutierrez Hermanos, was also in danger of being attacked by the insurgents, plaintiff proceeded to insure them against war risks for three months for £7,000 sterling, a transaction which was communicated by plaintiff to Molleda & Oria by a letter of May 5, 1900, and which this latter firm acknowledged without making any objection whatever to the war insurance placed; that, since the 2d of June of the same year, neither was any claim or protest made by the firm of Oria Hermanos & Co. against the insurance taken out by Gutierrez Hermanos, but, on the contrary, Oria Hermanos & Co. applied to the Government of the United States claiming an indemnity of P90,000 Philippine currency for the burning of the buildings and goods in the pueblo of Catubig—a claim still pending decision by the Government.

The judge of the Court of First Instance, deciding the question raised in this counterclaim, set forth among others the following considerations: "If Messrs. Gutierrez Hermanos had taken steps to insure the stocks of merchandise in Catubig and had declared to any officer of the insuring company the truth about the terrible slaughter which had just taken place, it would have been impossible to obtain a war insurance on the said merchandise; and if, instead of declaring the truth, plaintiff had omitted it, the insurance if obtained could not have been collected. The insurance company would have learned of the circumstances which had not been stated and had been omitted in the application and would have refused to pay the insurance, as it did in the case of the Catarman insurance, as will be seen further on. And if plaintiff had applied to the English courts, as it did in the case referred to, the result would have been the same."

Even though Gutierrez Hermanos had increased the value of the insurance on the hemp and merchandise in Catubig through means of ordinary fire insurance, pursuant to the instructions given by Molleda & Oria, the predecessors of Oria Hermanos & Co. and whose rights this latter firm represents, the same result would have followed, inasmuch as in this class of insurance the insuring company does not assume risks for fires and damages caused by war, riot, and military force; and as in the official letter aforementioned plaintiff was not authorized to increase the insurance through means of a war insurance policy, it is unquestionable that plaintiff, in not increasing the ordinary insurance, proceeded in a prudent and reasonable manner and for the benefit of the defendant by saving the latter from uselessly paying an important premium for an insurance which it afterwards could not have collected. Furthermore, the news was already disseminated in Manila that the pueblo of Catubig had been completely burned to the ground. Not only, therefore, would it have been impossible to obtain the increase of an ordinary insurance, but even a war insurance, though offering to pay a large and excessive premium.

In the letter of the date of May 24, 1900, Exhibit 5, page 190 of the first file of the record, Gutierrez Hermanos informed Oria Hermanos & Co. that the insurance firm refused to pay the amount of the insurance on the merchandise in Catubig, for the reason that the cases of fire caused through military force, etc., were excluded from the policy. So that even though Gutierrez Hermanos had, in compliance with orders from Oria Hermanos &

Co., increased the amount of the insurance on the stock of merchandise stored in Catubig, Oria Hermanos & Co. would not have been benefited thereby, because the insurance company would have refused to pay the increase, just as it did not pay the amount of the original insurance for the reason, aforementioned. 'Furthermore, as we have already stated, the order to increase the insurance only refers to ordinary insurance against fire, and not to extraordinary insurance against war risks.

With respect to the war insurance placed on the stocks of goods in Laoang, the trial court could not in accordance with law hold plaintiff to be liable for the payment of the sum of P1,812, with interest at 8 per cent for the reason that Oria Hermanos & Co. did not protest nor object in any wise against the placing of the said war insurance on the merchandise in Laoang, and also because in the second counterclaim no petition or demand whatever was made in connection with this transaction. For these reasons therefore, Gutierrez Hermanos must be absolved of the second counterclaim.

We now come to the third counterclaim, the seventh special defense presented by defendant, wherein petition was made that the firm of Gutierrez Hermanos be compelled to pay to Oria Hermanos the sum of P67,000, besides the legal interest thereon since the filing of this claim, which sum was the amount of the insurance, premiums paid, fees, costs, interest, and charges for telegrams, etc., alleged to have been expended and lost through the inattention, negligence, improvidence, and carelessness of the plaintiff, Gutierrez Hermanos, without defendant's being able to collect the amount of the insurance on the stock of hemp in Catarman, Samar.

In a letter of May 10, 1900, addressed by Oria Hermanos & Co. to Gutierrez Hermanos, the former commissioned the latter to try to insure against war risks some 1,400 piculs of hemp that Oria Hermanos & Co. had in the pueblo of Catarman which had been evacuated by the American troops; and in another letter of the same date Tomas Oria said to Gutierrez Hermanos that Catarman had been evacuated by the troops three days after the departure of the steamer Santander which was unable to load about 3,000 piculs of hemp that his firm had there, and, as he knew that the said pueblo had not been burned, he wished to have insurance taken out on the value of about 1,400 piculs of hemp stored in the Delgado warehouse. Gutierrez Hermanos had Stevenson & Co., of Manila, cable to the latter's head office in London for the desired insurance, and as soon as it was obtained Gutierrez Hermanos wrote to Oria Hermanos & Co. informing defendant that plaintiff had insured against war risks 1,400 piculs of hemp deposited in the Delgado warehouse in Catarman, for three months from the 18th of May, 1900.

A few days subsequent to the placing of this insurance, Oria Hermanos & Co. ordered Gutierrez Hermanos to collect the amount of the insurance, for the reason that all the stock of hemp in Catarman had been stolen by the insurgents. The representative of the underwriter refused, however, to pay the amount of the insurance because Oria Hermanos & Co. had concealed certain facts which, had they been known to the underwriter, would have deterred the company from issuing a policy for the hemp, and all the steps taken for the purpose of obtaining the collection of the £3,000 sterling for which the hemp had been insured, resulted in failure.

Therefore, on petition of the firm of Oria Hermanos & Co. through the firm of Stevenson & Co., suit was duly brought before the English courts in London. The prosecution of this suit was commended to English attorneys to whom Oria Hermanos & Co. furnished, through Gutierrez Hermanos, all the documents and data conducive to a successful issue. Notwithstanding, the claim of Oria Hermanos & Co. was rejected by the London courts. No liability attached to Gutierrez Hermanos for the failure of the suit in London.

The firm of Gutierrez Hermanos merely complied with the orders of Oria Hermanos & Co. to insure the stock of hemp in Catarman, with an insurance company established in London, through Stevenson & Co. of Manila, in view of the fact that there was no insurance company in this city which would issue policies against war risks. For this purpose, by a letter of October 17, 1905, Exhibit F-2, Oria Hermanos & Co. transmitted to Gutierrez

Hermanos the power of attorney and the letter for Messrs. Horsley, Kibble & Co. for the purpose of the latter's negotiating with the underwriters for some honorable settlement of the matter, during the time required for the receipt of all the documents that had been requested. In another letter of January 25, 1906, Oria Hermanos & Co. stated to Stevenson & Co. that it took pleasure in replying to the latter's favor of the 19th instant, addressed to Mr. Oria; that Delgado's letter to Oria of the date of October 19, 1901, was forwarded in the original to London, through Messrs. Gutierrez Hermanos, to Stevenson & Co., on July 16, 1904; that defendant inclosed a copy of Delgado's declaration before the municipal judge of Catarman, transmitted to Stevenson & Co. on November 21, 1903; and that the two letters to Gutierrez Hermanos, of May 28, 1903, and October 2, 1901, as well as the memorandum of the values of the goods, had been transmitted to Gutierrez Hermanos with a telegraphic order to said firm to deliver them to Stevenson & Co. If the amount of the insurance could not afterwards be collected, it was not through fault of Gutierrez Hermanos, who acted in the matter in accordance with instructions from Oria Hermanos & Co.

So that the firm of Gutierrez Hermanos was a mere conductor through which the stock of hemp in Catarman was insured by a firm in London through mediation of Messrs. Stevenson & Co., for the firm of Oria Hermanos & Co. had to grant a power of attorney in behalf of the said Messrs. Horsley, Kibble & Co. in order that the latter might represent the former before the courts in England. If afterwards the representatives of Oria Hermanos & Co. did not obtain a favorable decision in those courts, the loss of the suit cannot be ascribed to either the fault or the negligence of Gutierrez Hermanos, inasmuch as this plaintiff merely complied with the orders of the defendant, Oria Hermanos & Co., to bring suit in the English courts, not against Stevenson & Co. of these Islands, but against the insurance company of London.

The firm of Gutierrez Hermanos, in executing orders and charges of Oria Hermanos & Co., became, by virtue of an implied agency, an agent of the latter and, in the fulfilment of the orders of the principal, adjusted its action to the instructions of Oria Hermanos & Co. The record does not show that in so doing it proceeded with negligence or with deceit. Therefore there is no reason nor legal ground whereby plaintiff should be compelled to pay the sum demanded in the third counterclaim for the causes therein stated. (Arts. 1710, 1719 and 1726 of the Civil Code.) Consequently Gutierrez Hermanos should be absolved from the third counterclaim filed by defendant.

In the fourth counterclaim, the eighth special defense, defendant, Oria Hermanos & Co., prays that plaintiff, Gutierrez Hermanos, be sentenced to pay P75,000 for losses and damages, with interest, inasmuch as by reason of a contract executed between both parties, plaintiff bound itself to acquire for and to transmit to defendant rice and other articles, including coin, which Oria Hermanos & Co. might request at Laoang, Samar, and so plaintiff did; but since 1904, the fifth year of their mercantile relations, plaintiff failed repeatedly to comply with its obligation to send the rice and other articles requested by defendant, totally sometimes and at other times partially limiting the shipment of the effects ordered and excusing itself from remitting money on the pretext that it could not obtain insurance for the shipment of cash; that defendant afterwards discovered that there were in this city large stocks of rice and other effects which plaintiff [defendant] had requested, and could surely have been sold in Laoang and the pueblos of the coast of Samar, as Oria Hermanos & Co. was the only importing firm in that island; and had defendant received from plaintiff the rice and the other effects the former had requested to be shipped to it, defendant would have obtained a profit of not less than P25,000 whereupon it could have bought large quantities of hemp which would have brought it great profit. Defendant further alleged that such failure on the part of plaintiff to comply with the agreement made caused injury to the reputation and mercantile credit of Oria Hermanos & Co., in Samar, and losses and damages of the value of about P50,000, the total of the losses and damages suffered on both accounts amounting to a sum of not less than P75,000; and that the motive of such procedure on the part of Gutierrez Hermanos was to injure and destroy defendant's credit in Laoang and on the entire coast of Samar, because plaintiff planned to establish there a business of its own like that of Oria Hermanos

& Co.

Plaintiff, Gutierrez Hermanos, specifically denied the facts alleged by defendant in its counterclaim and set forth that the evidence introduced relative to such facts showed that since 1904 plaintiff had been reducing the shipments of rice, wine, and other effects to such extent that in 1906 and 1907 cases occurred where the order shipped was reduced to one-third, and in 1908 also where the steamer Serantes was sent without any cargo whatever, for the reason that the debit balance in defendant's current account amounted, in 1905, to P321,000 and because Oria Hermanos & Co. did not send a quantity of hemp and copra sufficient in value to cover the value of the remittances of money and of the shipments of the effects requested; that defendant, instead of sending hemp to plaintiff for the gradual payment of its debt, sent it to Cebu; that therefore Oria Hermanos & Co. had no well-founded grounds whereupon to claim indemnity for losses and damages, especially since, according to the stipulations of the agreement and as shown by the evidence, the part of the credit utilized by defendant was to be covered and paid for with the price of the hemp, copra and other effects which Oria Hermanos & Co. should have to send to Gutierrez Hermanos; and that, if the debtor balance of the current account continued to increase instead of decreasing, it must be concluded that the procedure of Gutierrez Hermanos in reducing the amount of the shipments of the orders was due to the conduct of Oria Hermanos & Co. who did not endeavor by the shipment of copra, hemp, and other effects gradually to pay even a part of the credit opened, notwithstanding that the rights and obligations established in the contract should have been mutual.

If defendant, without concerning itself with diminishing its debtor balance, did no more than order goods for sale and remit drafts to be paid by Gutierrez Hermanos, not sending in exchange to plaintiff hemp, copra, and other effects, plaintiff, Gutierrez Hermanos, in refusing discretionally to furnish certain effects to defendant and to pay drafts drawn by the latter, did not violate the obligations it assumed in the contract.

The fact that the debtor balance accepted by Oria Hermanos & Co. on March 9, 1909, Exhibit A, was raised to P144,473.78, is the best proof of the good conduct observed by plaintiff during the nine years of mercantile relations between both parties, and is at the same time the most graphical demonstration that defendant's contention made in its fourth counterclaim is not based on any just or legal grounds.

Article 1100, last paragraph of subarticle 2, of the Civil Code prescribes: "In mutual obligations none of the persons bound shall incur default if the other does not fulfill or does not submit to properly fulfill what is incumbent upon him. From the time one of the persons obligated fulfills his obligation the default begins for the other party." Article 1124 of the same Code provides as follows: "The right to rescind the obligations is considered as implied in mutual ones, in case one of the obligated persons does not comply with what is incumbent upon him.

"The person prejudiced may choose between exacting the fulfillment of the obligation or its rescission, with indemnity for damages and payment of interest in either case. He may also demand the rescission, even after having requested its fulfillment, should the latter appear impossible." Under these grounds we hold that the absolatory finding contained in the judgment appealed from is in accordance with the law and the evidence.

In the fifth counterclaim, the ninth special defense, defendant, Oria Hermanos & Co., prayed that Gutierrez Hermanos be sentenced to pay the sum of P15,000, together with the legal interest thereon, inasmuch as plaintiff, Gutierrez Hermanos, charged in the current account, collected and appropriated to itself the funds which Oria Hermanos & Co. had in plaintiff's possession and assessed against the same compound interest at 8 per cent and 2 ½ per cent on the net amount of the collection made as charterage for the steamers Serantes and Laoang, the launches Comillas and Golondrina, and the cutter Remedios, as commission for said charterage, when all the steps for the collection of the same were taken personally by Messrs. Oria & Fuster, defendant's partners and there was

no contract whatever between the parties whereby Gutierrez Hermanos might collect, enter into the current account and appropriate to itself the said amount as commission through the collection of the aforesaid charterage.

Plaintiff's counsel merely denied the facts alleged, which certainly were not proved at the trial. It was, on the contrary, fully proven that Don Tomas Oria and the managers of Oria Hermanos & Co. knew, by reason of the accounts Gutierrez Hermanos had been sending them, that the plaintiff firm charged the 2 per cent commission on the amount of the charterages, for it is so recorded in the letter from Oria addressed to Gutierrez Hermanos under date of June 12, 1901, in which P690 appears annotated as the amount of plaintiff's 2 per cent commission for the charterage of the Laoang and the Serantes, and in another letter from Oria Hermanos & Co. of October 18, 1900, (Exhibit A-2, page 476 of the record) wherein demand was made for vouchera and a memorandum of the collections effected for the charterage of these steamers, the Laoang, and the Serantes. Furthermore, it appears in this same letter for it is stated that credit has been given in Gutierrez Hermanos' account for P272.50, as being the amount this firm was entitled to receive as 2 per cent commission on the P15,625 collected by it from the quartermaster for the charterage of the Serantes and for the transportation of eight passengers on the steamer Laoang; and it is also therein stated that Gutierrez Hermanos' account has been credited with the sum of P24, as the amount of 2 per cent commission on P1,200 collected for four days' charterage of the Laoang. These documents show that Gutierrez Hermanos has taken part in the collection of the said charterages and, therefore, was entitled to receive the amount agreed upon as commission for such collection. Oria's assertion that Gutierrez Hermanos did nothing for the collection of the P400,000, the amount of the charterage for the boats of Oria Hermanos & Co., is contradicted by several letters written by Oria himself to Gutierrez Hermanos relative to the collection of the charterages due for the launches Golondrina and Adela, and for this purpose he sent the proper vouchers for such collection. Consequently there is neither reason nor legal ground to prevent our holding as proper the finding established by the trial court that Oria Hermanos & Co. did, with due knowledge of the matter, approve the amount of the commissions collected by Gutierrez Hermanos on the sums it had collected as charterage for the defendant's boats, in accordance with the agreement made between the parties, which defendant can not repudiate, nor can its regret for the part it took therein avail it for the reimbursement sought in its fifth counterclaim. The finding of the trial judge in regard to the latter is, therefore, in conformity with the law.

The object of the sixth counterclaim is to obtain reimbursement of the sum of P31,000, the amount of the interest charged and compounded semiannually, instead of annually, at the rate of 8 per cent net interest. Oria Hermanos & Co. demands this sum from Gutierrez Hermanos, alleging that there was an agreement between the parties to the effect that a settlement of the interest should be made at the end of each year, and also that the interest due and unpaid should be capitalized annually.

The firm of Oria Hermanos & Co., Tomas Oria, one of the partners of the same, and the defendant's bookkeeper, a relative of the said Oria and also a partner of the firm, had been receiving extracts or copies of the semiannual accounts rendered by Gutierrez Hermanos, and, after a careful examination of the same, after offering objections thereto which sometimes delayed Oria Hermanos & Co.'s approval thereof for more than six months, after receiving the explanations requested and vouchers demanded of plaintiff, they concluded by admitting and agreeing to the accounts rendered and the amounts involved, and made neither objection nor protest whatever against the system or method employed by Gutierrez Hermanos in capitalizing at the end of each year the interest of the semiannual accounts rendered, nor against the interest charged on the capitalized interest, not only in defendant's debit, but also by reciprocation in the credit given it in the account of the receipts obtained from the price of the hemp, copra and other products shipped to Gutierrez Hermanos. All the foregoing facts appear on page 18 of the transcript of the stenographic notes taken of the hearing on July 14, 1914.

The transaction effected by Gutierrez Hermanos in the accounts it presented to defendant, Oria Hermanos & Co.,

is confirmed by some twenty letters signed, some of them, by Oria Hermanos & Co., others, the greater part of them, by Tomas Oria, and still others by Mr. Fuster, a partner of the latter firm. Therefore the semiannual capitalization made by plaintiff, Gutierrez Hermanos, was sanctioned and approved by defendant on the seventeen occasions that it approved the accounts presented by plaintiff, expressive of such capitalizations of the reciprocal interest stipulated between the contracting parties.

Article 1109 of the Civil Code prescribes as follows: "In terest due shall earn legal interest from the time it is judicially demanded, even if the obligation should have been silent on this point.

"In commercial transactions the provisions of the Code of Commerce shall be observed."

Article 317 of the Code of Commerce provides: "Interest which has fallen due and has not been paid shall not earn interest. The contracting parties may, however, capitalize the net interest which has not been paid, which, as new principal, shall earn interest."

Upon the execution of the contract which was the origin of the mercantile relations between Gutierrez Hermanos and Oria Hermanos & Co., the stipulations made between both parties were not set forth in any document, they being content with a verbal agreement in which it was stipulated that the rate of interest of the reciprocal current account to be kept between them should be 8 per cent, without determining whether such interest was to fall due annually, as affirmed by Tomas Oria, the manager of Oria Hermanos & Co., or semiannually, as contended by Gutierrez Hermanos. However, it is certain that in the seventeen accounts presented by plaintiff to defendant, at the end of each period of six months from 1900 to December 31, 1908, embracing nearly nine years, the interest due was liquidated every six months in the reciprocal current account between both firms, without opposition or protest on the part of Oria Hermanos & Co. In the absence of a written agreement defendant's procedure raises the presumption that such were the stipulations verbally made between the interested parties, and the verbal agreement was constantly maintained and confirmed without protest or objection whatever on the part of the managers of Oria Hermanos & Co. If Tomas Oria, changing his opinion, after the firm of which he is a principal member had approved the said seventeen accounts, believed that he was authorized to contradict his own acts and to allege another manner of computing and liquidating the 8 per cent interests stipulated by stating that it should have been collected annually, and not semiannually as was done and approved in the seventeen accounts rendered during a period of more than nine years, the rectification afterwards made of an assent and agreement repeatedly given has come too late to undo by his repentance what he himself did in agreement with defendant, since they were authorized to take such action by article 317 of the Code of Commerce. Therefore the ruling of the trial judge absolving plaintiff of the sixth counterclaim filed by defendant is in accordance with the law and with the evidence as disclosed by the record.

For all the reasons hereinabove set forth as grounds for the findings rendered in respect to the complaint and to each one of the cross-complaints and counterclaims presented by defendant, the errors assigned to the judgment appealed from and not admitted in this decision have been duly refuted.

Therefore, for the reasons assigned in this decision, we sentence the commercial firm of Oria Hermanos & Co. to the payment of the sum of P147,204.28 and of the stipulated interest at the rate of 8 per cent per annum from June 30, 1909, after deduction of all the sums which as balances in favor of defendant may result from the accounts to be rendered by Gutierrez Hermanos, in conformity with the findings made, especially in reference to the second, third, and fourth cross-complaints.

Gutierrez Hermanos is absolved from the first cross-complaint, and also from the second, in which latter defendant prayed for an accounting of the hemp and copra business. Plaintiff is likewise absolved from the fourth cross-complaint, excepting the part thereof relative to the petroleum, and also from the first, second, third, fourth,

fifth, and sixth counterclaims filed by defendant.

Held: (1) That Gutierrez Hermanos, after liquidation of the sums paid as a one-third per cent tax on the price of the rice acquired in this city, of that of the salt, kerosene, lime, mats, rattan, flour, anisette, cigarettes, beer, and other articles, for which plaintiff paid said sums and charged them to defendant's account, must pay to Oria Hermanos & Co. the sum disclosed by the said liquidation, in conformity with the second cross-complaint.

(2) That Gutierrez Hermanos shall render to defendant an account, supported by vouchers, of the price, expenses, and all amounts paid for the shipments of rice covered by the invoices examined during the trial of this case, as well as the 153 invoices mentioned by the parties in the hearing of November 29, 1910.

(3) That plaintiff shall render an account, supported by vouchers, of all the petroleum it acquired for Oria Hermanos & Co., the invoices of which are mentioned in the transcript of the stenographic notes taken at the hearing of December 28, 1910.

The judgment appealed from is affirmed in so far as it is in accord with this decision and is reversed in so far as it is not, without special finding as to costs.

Arellano, C. J., and Johnson, J., concur.

Carson and Trent, JJ., concur in the result.

DISSENTING

MORELAND, J.,

I do not agree to the return of this case to the court below for the purpose of having the plaintiff "render accounts."

In the first place, there is no account to render, and the finding of the trial court and this court to the contrary is clearly erroneous.

In the second place, the parties offered, or had every opportunity to offer, all of their evidence relative to the sale and delivery of the merchandise described in the complaint and the payment of the purchase price. It is a plain case of a sale of goods by plaintiff to defendant. If there is evidence supporting the allegations of the complaint, plaintiff is entitled to a judgment. If not, the defendant wins. There is no reason for a return of the cause. The parties have already had every opportunity warranted by law. (*Hicks vs. Manila Hotel Co.*, 28 Phil. Rep., 325; *Gov. of Phil. Islands vs. Philippine Sugar Estates Development Co., Ltd.*, ante, p. 27.)

In the third place, if this court is correct in its ruling, the judgment appealed from is not final and we can do nothing but dismiss the appeal.

The judgment of the lower court is in part as follows:

"Judgment is, therefore, rendered against Oria Hermanos y Compania and in favor of Gutierrez Hermanos for the sum of one hundred and forty-seven thousand two hundred and four pesos and twenty-eight centavos (P147,204.28), with interest at eight per cent per annum from the 30th of June, 1909, but there must be deducted therefrom the sums which are found in favor of the said Oria Hermanos y Compania from the rendition of accounts by said Gutierrez Hermanos in accordance with the counterclaims and cross complaint which have heretofore been allowed."

The judgment further says: "(a) With reference to the first counterclaim, to render accounts duly vouchered to Oria Hermanos y Compania with reference to those articles as to which fraud or error has been proved and to

which the subsequent pronouncements herein made refer.

"(b) With reference to the second counterclaim, to restore to Oria Hermanos y Compañia after the proper rendering of accounts with reference thereto, all of the sums, etc.

* * * * *

"(d) With reference to the fourth counterclaim, to render vouchered accounts of all the purchases of petroleum which Oria Hermanos y Compañia have made from the plaintiffs, etc."

If we take this judgment at its face, then it is clear that it is not final, that something is necessary yet to be done before the sum due from defendant to plaintiff, if anything, can be determined. Where a judgment is not final, we have no authority to take jurisdiction for the purpose of determining the merits; and the determination of this court in the prevailing opinion of many of the questions which would have been presented if the judgment was final is without authority. This proposition has been so frequently held by this court that the contrary doctrine laid down by this case will come as a shock to both the bench and bar (Code of Civil Procedure, sections 123 and 143; *International Bank vs. Martinez*, 220 U. S., 214).

In the case of *Montemayor vs. Cunanan* (14 Phil. Rep., 454), it appeared that "M commenced an action in the Court of First Instance against C for divorce and also for a division of the marital property. The court, after hearing the evidence, entered a decree granting to M her divorce and appointed a commission to make an inventory of the marital property and report to the court for a division of the same. C duly excepted to the order decreeing the divorce and without waiting for a division of the marital property presented a bill of exceptions, which was duly allowed. After the bill of exceptions was received in the Supreme Court M presented a motion asking that the appeal of C be not allowed upon the ground that the judgment of the lower court was not final." In that case the court held "that said motion should be granted for the reason that the lower court had only resolved a part of the question presented to it and that the decree of the lower court did not finally determine the action or proceeding in said cause; that bills of exceptions should only be allowed upon final judgments which finally determine the action or proceeding in the lower court." In the opinion the court said: "We are of the opinion and so hold that it was the purpose of the Legislature in enacting the provisions of sections 123 and 143 of the Code of Procedure in Civil Actions to prohibit appeals except from decisions of the lower court which finally determine the action or proceeding." The opinion cites many cases from the Supreme Court of the United States and other American courts and also several decisions of this court. It is entirely in point with the case at bar and should be followed. No one has offered any explanation why it is not followed and I know of none.

In the case of *Toribio vs. Toribio* (7 Phil. Rep., 526), the judgment provided that "therefore, the court, after considering the facts proved and the law applicable thereto, orders that the defendants within sixty days submit for the consideration of the court an inventory of all of the goods and property of the deceased Narciso Natalio Lopez, and that they render accounts of administration of the same in order that the court may make the proper order for the protection of the respective rights of all the parties interested, reserving final decision of the cause until the proper time."

The opinion after citing sections 123 and 143 of the Code of Civil Procedure and decisions of the Supreme Court of the United States, held that the judgment was not final inasmuch as the court required the rendering of an account by the defendants. Many of the cases cited assert the proposition that, under laws such as are found in sections 123 and 143 of the Code of Civil Procedure, an appellate court has no jurisdiction in an appeal taken from a judgment which is not final. (*Guarantee Company vs. Mechanics' Savings Bank etc.*, 173 U. S. 582.)

In the case of *Ron vs. Mojica* (8 Phil. Rep., 328), it was held that "in a suit for the partition of property, brought in accordance with the provisions of the Code of Civil Procedure, the judicial order or resolution by virtue of which

the judge declares who are the parties who have a right to certain property belonging to several owners is not final, nor does it definitely close the case, and is subject to exception." (Araullo vs. Araullo, 3 Phil. Rep., 567.)

I am of the opinion that the cases cited fully dispose of the right of the parties to appeal in this case, as the judgment is not final by virtue of its very terms and the amount thereof cannot possibly be known, if we accept the decision of the court below and of this court, until the accountings required have been duly made and the amount fixed which one party owes to the other.

This court, in dealing with the merits of this cause, has definitely settled the liability of the defendant for many thousands of pesos. Will the judgment of this court as to this sum become final at the end of the time prescribed by law? If so, what will the situation be if, on the rendering of the accounts ordered by this decision, it shall be determined that the plaintiff owes to the defendant a sum sufficient to offset the amount already found to be due from the defendant to the plaintiff by the judgment of this court? Will the defendant be able to reduce the final judgment in favor of the plaintiff, rendered by this court, by the amount which is found due on the accounting? Or will it be obliged to offset the judgment of this court in favor of the plaintiff by the sums found due it on the accounting in a separate proceeding for that purpose? If there is a judgment in favor of the plaintiff and against the defendant for P100,000, how can the defendant get the benefit of subsequent accountings for P100,000 in its favor? This is not like an action of divorce or partition which can be divided into two parts, each separate and distinct from the other, and the judgment as to one part be, in a way, independent of the other. This is an action for a sum of money and the several amounts claimed by the plaintiff and defendant, respectively, must be aggregated and a balance struck before it can be determined how much one owes the other. The action cannot be divided into parts. It is one single action; it cannot be determined that the plaintiff is entitled to P100,000 on one cause of action, and that determination affirmed by this court, and then the cause be sent back for the determination of how much the plaintiff owes defendant on counterclaims. The determination necessary to be made in an action for a sum of money is the amount due from defendant to plaintiff. In the very nature of things, no final judgment can be rendered until the amount due is actually determined and fixed. No such determination has been made in this case.

For these reasons I dissent. The treatment of this case by the court is without precedent.

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