

**THE HONGKONG & SHANGHAI BANKING CORPORATION,  
PLAINTIFF AND APPELLEE VS. ALDECOA & CO., IN  
LIQUIDATION, JOAQUIN IBAÑEZ DE ALDECOA Y PALET, ZOILO  
IBAÑEZ DE ALDECOA Y PALET, CECIL...**

*G.R. No. 8437. March 23, 1915*

Ponente: TRENT, J.

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**TRENT, J.:**

This action was brought on January 31, 1911, by the plaintiff bank against the above-named defendant, Aldecoa & Co., an amount current with the plaintiff, and to enforce the subsidiary liability of the other defendants for the payment of this indebtedness, as partners of Aldecoa & Co., and to foreclose certain mortgages executed by the defendants to secure the indebtedness sued upon.

Judgment was entered on the 10th of August, 1912, in favor of the plaintiff and against the defendants for the sum of P344,924.23, together with interest thereon at the rate of 7 percent per annum from the date of the judgment until paid, and for costs, and for the foreclosure of the mortgages. The court decreed that in the event of there being a deficiency, after the foreclosure of the mortgages, the plaintiff must resort to and exhaust the property of the principal defendants held to be liable in solidum with the principal defendant, but subsidiarily. Judgment was also entered denying the relief sought by the intervener. All of the defendants and the intervener have appealed.

The defendants, Joaquin Ibañez de Aldecoa, Zoilo Ibanez de Aldecoa, and Cecilia Ibañez the Philippine Islands on March 27, 1884, July 4, 1885, and \* \* \*, 1887, respectively, the legitimate children of Zoilo Ibañez de Aldecoa and the defendant, Isabel Palet. Both parents were natives of Spain. The father's domicile was in Manila, and he died here on October 4, 1895. The widow, still remaining her Manila domicile, left the Philippine Islands and went to Spain in 1897 because of her health, and did not return until the latter part of 1902. The firm of Aldecoa & Co., of which Zoilo Ibañez de Aldecoa, deceased, had been a member and managing director, was reorganized in December, 1896, and the widow became one of the general or "capitalistic" partners of the firm. The three children, above mentioned, appear in the articles of agreement as industrial partners.

On July 31, 1903, Isabel Palet, the widowed mother of Joaquin Ibañez de Aldecoa and Zoilo Ibañez de Aldecoa, who were then over the age of 18 years, went before a notary public and executed two instruments (Exhibits T and U), wherein and whereby she emancipated her two sons, with their consent and acceptance. No guardian of the person or property of these two sons had ever been applied for or appointed under or by virtue of the provisions of the Code of Civil Procedure since the promulgation of that Code in 1901. After the execution of Exhibit T and U, both Joaquin Ibañez de Aldecoa and Zoilo Ibañez de Aldecoa participated in the management of Aldecoa & Co. as partners by being present and voting at meetings of the partners of the company upon matters connected with its affairs.

On the 23d day of February, 1906, the defendant firm of Aldecoa & Co. obtained from the bank a credit in account current up to the sum of P450,000 upon the terms and conditions set forth in the instrument executed on

that date (Exhibit A). Later it was agreed that the defendants, Isabel Palet and her two sons, Joaquin and Zoilo, should mortgage, in addition to certain securities of Aldecoa & Co., as set forth in Exhibit A, certain of their real properties as additional security for the obligations of Aldecoa & Co. So, on March 23, 1906, the mortgage, Exhibit B, was executed wherein certain corrections in the description of some of the real property mortgaged to the bank by Exhibit A were made and the amount for which each of the mortgaged properties should be liable was set forth. These two mortgages, Exhibits A and B, were duly recorded in the registry of property of the city of Manila on March 23, 1906.

On the 31st day of December, 1906, the firm of Aldecoa & Co. went into liquidation on account of the expiration of the term for which it had been organized, and the intervener, Urquhart, was duly elected by the parties as liquidator, and by resolution dated January 24, 1907, he was granted the authority expressed in that resolution (Exhibit G).

On June 30, 1907, Aldecoa & Co. in liquidation, for the purposes of certain litigation about to be commenced in its behalf, required an injunction bond in the sum of 50,000, which was furnished by the bank upon the condition that any liability incurred on the part of the bank upon this injunction bond would be covered by the mortgage of February 23, 1906. An agreement to this effect was executed by Aldecoa & Co. in liquidation, by Isabel Palet, by Joaquin Ibañez de Aldecoa, who had then attained his full majority, and by Zoilo Ibanez de Aldecoa, who was not yet twenty-three years of age. In 1908, Joaquin Ibañez de Aldecoa, Zoilo Ibañez de Aldecoa, and Cecilia Ibañez de Aldecoa commenced an action against their mother, Isabel Palet, and Aldecoa & Co., in which the bank was not a party, and in September of that year procured a judgment of the Court of First Instance annulling the articles of copartnership of Aldecoa & Co., in so far as they were concerned, and decreeing that they were creditors and not partners of that firm.

The real property of the defendant Isabel Palet, mortgaged to the plaintiff corporation by the instrument of March 23, 1906 (Exhibit B), was, at the instance of the defendant, registered under the provisions of the Land Registration Act, subject to the mortgage thereon in favor of the plaintiff, by decree of the land court dated March 8, 1907.

On the 6th of November, 1906, the defendants, Isabel Palet and her three children, Joaquin Ibañez de Aldecoa, Zoilo Ibañez de Aldecoa, and Cecilia Ibañez de Aldecoa, applied to the land court for the registration of their title to the real property described in paragraph 4 of the instrument of March 23, 1906 (Exhibit B), in which application they stated that the undivided three-fourths of said properties belonging to the defendants, Isabel Palet, Joaquin Ibañez de Aldecoa, and Zoilo Ibañez de Aldecoa, were subject to the mortgage in favor of the plaintiff to secure the sum of P203,985.97 under the terms of the instrument dated March 22, 1906. Pursuant to this petition the Court of Land Registration, by decree dated September 8, 1907, registered the title of the applicants to that property subject, with respect to the undivided three-fourths interest therein pertaining to the defendants, Isabel Palet and her two sons, Joaquin and Zoilo, to the mortgage in favor of the plaintiff to secure the sum of P203,985.97.

On December 22, 1906, Aldecoa & Co., by a public instrument executed before a notary public, as additional security for the performance of the obligations in favor of the plaintiff under the terms of the contracts Exhibits A and B, mortgaged to the bank the right of mortgage pertaining to Aldecoa & Co. upon certain real property in the Province of Albay, mortgaged to said company by one Zubeldia to secure an indebtedness to that firm. Subsequent to the execution of this instrument, Zubeldia caused his title to the mortgaged property to be registered under the provisions of the Land Registration Act, subject to a mortgage of Aldecoa & Co. to secure the sum of P103,943.84 and to the mortgage of the mortgage right of Aldecoa & Co. to the plaintiff.

As the result of the litigation between Aldecoa & Co. and A. S. Macleod, wherein the injunction bond of P50,000 was made by the bank in the manner and for the purpose above set forth, Aldecoa & Co. became the owner, through a compromise agreement executed in Manila on the 14th of August, 1907, of the shares of the Pasay Estate Company Limited (referred to in the contract of March 13, 1907, Exhibit V), and on the 30th day of August of that year Urquhart, as liquidator, under the authority vested in him as such, and in compliance with the terms of the contract of June 13, 1907, mortgaged to the plaintiff, by way of additional security for the performance of the obligations set forth in Exhibits A and B, the 312 shares of the Pasay Estate Company, Limited, acquired by Aldecoa & Co.

On the 31st day of March, 1907, Aldecoa & Co. mortgaged, as additional security for the performance of those obligations, to the plaintiff the right of mortgage, pertaining to the firm of Aldecoa & Co., upon certain real estate in the Province of Ambos Camarines, mortgaged to Aldecoa & Co. by one Andres Garchitorea to secure a balance of indebtedness to that firm of the sum of P20,280.19. The mortgage thus created in favor of the bank was duly recorded in the registry of deeds of that province. On the 31st day of March, 1907, Aldecoa & Co. mortgaged as further additional security for the performance of the obligations set forth in Exhibits A and B, the right of mortgage pertaining to the firm of Aldecoa & Co. upon other real property in the same province, mortgaged by the firm of Tremoya Hermanos and Liborio Tremoya, to secure the indebtedness of that firm to the firm of Aldecoa & Co. of P43,117.40 and the personal debt of the latter of P75,463.54. The mortgage thus created in favor of the bank was filed for record with the registrar of deeds of that province.

On the 30th day of January, 1907, Aldecoa & Co. duly authorized the bank to collect from certain persons and firms, named in the instrument granting this authority, any and all debts owing by them to Aldecoa & Co. and to apply all amounts so collected to the satisfaction, pro tanto, of any indebtedness of Aldecoa & Co. to the bank.

By a public instrument dated February 18, 1907, Aldecoa & Co. acknowledged an indebtedness to Joaquin Ibanez de Aldecoa in the sum of P154,589.20, a like indebtedness to Zoilo Ibañez de Aldecoa, and an indebtedness in favor of Cecilia Ibañez de Aldecoa in the sum of P89,177.07. On September 30, 1908, Joaquin, Zoilo, and Cecilia recovered a judgment in the Court of First Instance of Manila for the payment to them of the sum of P155,127.31, as the balance due them upon the indebtedness acknowledged in the public instrument dated February 18, 1907.

On November 30, 1907, Joaquin, Zoilo, and Cecilia instituted an action in the Court of First Instance of the city of Manila against the plaintiff bank for the purpose of obtaining a judicial declaration to the effect that the contract whereby Aldecoa & Co. mortgaged to the bank the shares of the Pasay Estate Company recovered from Alejandro S. Macleod, was null and void, and for a judgment that these shares be sold and applied to the satisfaction of their judgment obtained on September 30, 1908. Judgment was rendered by the lower court in favor of the plaintiffs in that action in accordance with their prayer, but upon appeal this court reversed that judgment and declared that the mortgage of the shares of stock in the Pasay Estate Co. to the bank was valid.

In October, 1908, Joaquin and Zoilo Ibañez de Aldecoa instituted an action against the plaintiff bank for the purpose of obtaining a judgment annulling the mortgages created by them upon their interest in the properties described in Exhibits A and B, upon the ground that the emancipation by their mother was void and of no effect, and that, therefore, they were minors incapable of creating a valid mortgage upon their real property. The Court of First Instance dismissed the complaint as to Joaquin upon the ground that he had ratified those mortgages after becoming of age, but entered a judgment annulling said mortgages with respect to Zoilo. Both parties appealed from this decision and the case was given registry No. 6889 in the Supreme Court.[1]

On the 31st day of December, 1906, on which date the defendant Aldecoa & Co. went into liquidation, the amount of indebtedness to the bank upon the overdraft created by the terms of the contract, Exhibit A, was

P516,517.98. Neither the defendant Aldecoa & Co., nor any of the defendants herein, have paid or caused to be paid to the bank the yearly partial payments due under the terms of the contract, Exhibit A. But from time to time the bank has collected and received from provincial debtors of Aldecoa & Co. the various sums shown in Exhibit Q, all of which sums so received have been placed to the credit of Aldecoa & Co. and notice duly given. Also, the bank, from time to time, since the date upon which Aldecoa & Co. went into liquidation, has received various other sums from, or for the account of, Aldecoa & Co., all of which have been duly placed to the credit of that firm, including the sum of P22,552.63, the amount of the credit against one Achaval, assigned to the bank by Aldecoa & Co. The balance to the credit of the bank on the 31st day of December, 1911, as shown on the books of Aldecoa & Co., was for the sum of P416,853.46. It appeared that an error had been committed by the bank in liquidating the interest charged to Aldecoa & Co., and this error was corrected so that the actual amount of the indebtedness of Aldecoa & Co. to the plaintiff on the 15th of February, 1912, with interest to December 31, 1911, was the sum of P378,212.52, and on August 10, 1912, the date of the judgment, the amount was P344,924.23.

The trial court found that there was no competent evidence that the bank induced, or attempted to induce, any customer of Aldecoa & Co. to discontinue business relations with that company. The court further found that Urquhart had failed to show that he had any legal interest in the matter in litigation between plaintiff and defendants, or in the success of either of the parties, or an interest against both, as required by section 121 of the Code of Civil Procedure. No further findings, with respect to the facts alleged in the complaint of the intervener, were made.

Aldecoa & Co. insist that the court erred:

"1. In overruling the defendant's demurrer based upon the alleged ambiguity and vagueness of the complaint.

"2. In ruling that there was no competent evidence that the plaintiff had induced Aldecoa & Co.'s provincial debtors to cease making consignments to that firm.

"3. In rendering a judgment in a special proceeding for the foreclosure of a mortgage, Aldecoa & Co. not having mortgaged any real estate of any kind within the jurisdiction of the trial court, and the obligation of the persons who had signed the contract of suretyship in favor of the bank having been extinguished by operation of law."

The argument on behalf of defendant in support of its first assignment of error is based upon the claim that inasmuch as it appears from the complaint that Aldecoa & Co. authorized the plaintiff bank, by the instrument Exhibit G, to make collections on behalf of this defendant, and that the complaint failed to specify the amount obtained by the bank in the exercise of the authority conferred upon it, the complaint was thereby rendered vague and indefinite. Upon this point it is sufficient to say that the complaint alleges that a certain specific amount was due from the defendant firm as a balance of its indebtedness to the plaintiff, and this necessarily implies that there were no credits in favor of the defendant firm of any kind whatsoever which had not already been deducted from the original obligation.

With respect to the contention set forth in the second assignment of error to the effect that the bank has prejudiced Aldecoa & Co. by having induced customers of the latter to cease their commercial relations with this defendant, the ruling of the court that there is no evidence to show that there was any such inducement is fully supported by the record. It may be possible that some of Aldecoa & Co.'s customers ceased doing business with that firm after it went into liquidation. This is the ordinary effect of a commercial firm going into liquidation. This is especially true in the case under consideration, for the reason that it was a well known fact that Aldecoa & Co. was insolvent. It is hardly probable that the bank, with so large a claim against Aldecoa & Co. and with unsatisfactory security for the payment of its claim, would have taken any action whatever which might have had the effect of

diminishing Aldecoa & Co.'s ability to discharge their claim. The contention that the customers of Aldecoa & Co. included in the list of debtors ceased to make consignments to the firm because they had been advised by the bank that Aldecoa & Co. had authorized the bank to collect these credits, if true, would not justify a holding that the bank was thereby liable for any damages which had been suffered by the defendant firm by reason of such customers ceasing to do business, for the reason that the bank had been expressly authorized by the defendant firm to collect these credits from the defendant's provincial customers and apply the amounts so collected to the partial discharge of the indebtedness of the defendant to the bank. Furthermore, the bank was expressly empowered to take any steps which might be necessary, judicially or extra judicially, for the collection of these credits. The real reason which caused the defendant's provincial customers to cease making shipments was due to the fact that the defendant, being out of funds, could not give its customers any further credit. It is therefore clear that the bank, having exercised the authority conferred upon it by the company in a legal manner, is not responsible for any damages which might have resulted from the failure of the defendant's provincial customers to continue doing business with that firm.

In the third assignment of errors two propositions are insisted upon: (1) That in these foreclosure proceedings the court was without jurisdiction to render judgment against Aldecoa & Co. for the reason that that firm had mortgaged no real property within the city of Manila to the plaintiff; and (2) that the mortgages given by this defendant have been extinguished by reason of the fact that the bank extended the time within which the defendant's provincial debtors might make their payments.

We understand that the bank is not seeking to exercise its mortgage rights upon the mortgages which the defendant firm holds upon certain real properties in the Provinces of Albay and Ambos Camarines and to sell these properties at public auction in these proceedings. Nor do we understand that the judgment of the trial court directs that this be done. Before that property can be sold the original mortgagors will have to be made parties. The bank is not trying to foreclose, in this section, any mortgages on real property executed by Aldecoa & Co. It is true that the bank sought and obtained a money judgment against that firm, and at the same time and in the same action obtained a foreclosure judgment against the other defendants. If two or more persons are in solidum the debtors of a third person, and one or more of such debtors mortgage any of their real property situate in the jurisdiction of the court, the creditor, in case his obligation is not paid at maturity, may include all of the solidary debtors in the same suit and secure a joint and several judgment against them, as well as judgments of foreclosure upon the respective mortgages.

The contention that the extensions granted to Aldecoa & Co.'s debtors, with the consent and authority of that firm itself, has resulted in extinguishment of the mortgages created by Aldecoa & Co. or of the mortgages created by partners of that company to secure its liabilities to the bank, is not tenable. The record shows that all the sureties were represented by Urquhart, the person elected by them as liquidator of the firm, when he agreed with the bank upon the extensions granted to those debtors. The authority to grant these extensions was conferred upon the bank by the liquidator, and he was given authority by all the sureties to authorize the bank to proceed in this manner.

With respect to the contention that the bank should be required to render an account of collections made under authority of Exhibit G, it is sufficient to say that the bank has properly accounted for all amounts collected from the defendant's debtors, and has applied all such amounts to the partial liquidation of the defendant's debt due to the bank. It is true that the sum for which judgment was rendered against Aldecoa & Co. is less than the amount originally demanded in the complaint, but this difference is due to the fact that certain amounts which had been collected from Aldecoa & Co.'s provincial debtors by the bank were credited to the latter between the date on which the complaint was filed and the date when the case came on for trial, and the further fact that it was necessary to correct an entry concerning one of the claims inasmuch as it appears that this claim had been

assigned to the bank absolutely, and not merely for the purposes of collection, as the bookkeeper of the bank supposed, the result being that instead of crediting Aldecoa & Co. with the full face value of this claim, the bookkeeper had merely credited from time to time the amounts collected from this debtor. We, therefore, find no error prejudicial to the rights of this defendant.

Doña Isabel Palet makes the following assignment of errors:

"1. That the court erred in failing to hold that her obligation as surety had been extinguished in accordance with the provisions of article 1851 of the Civil Code.

"2. That the court erred in refusing to order for the benefit of this appellant that the property of Aldecoa & Co. should be exhausted before the plaintiff firm should be entitled to have recourse to the property of this defendant and appellant for the satisfaction of its judgment."

This appellant does not contend that she is not personally liable in solidum with Aldecoa & Co. for the liability of the latter firm to the plaintiff in the event that the appeal taken by Aldecoa & Co. should be unsuccessful. We have just held that the judgment appealed from by Aldecoa & Co. should be affirmed. But Dona Isabel Palet does contend that her liability as a partner for the obligations of Aldecoa & Co., although solidary, is subsidiary, and that she is entitled to insist that the property of Aldecoa & Co. be first applied in its entirety to the satisfaction of the firms obligations before the bank shall proceed against her in the execution of its judgment.

The trial court directed that the mortgaged properties, including the properties mortgaged by this defendant, should be sold under foreclosure in the event that Aldecoa & Co. should fail to pay into court the amount of the judgment within the time designated for that purpose. The court recognized the subsidiary character of the personal liability of Doña Isabel Palet as a member of the firm of Aldecoa & Co. and decreed that as to any deficiency which might result after the sale of the mortgaged properties, execution should not issue against the properties of Doña Isabel Palet until all the property of Aldecoa & Co. shall have been exhausted. The properties mortgaged by Doña Isabel Palet were so mortgaged not merely as security for the performance of her own solidary subsidiary obligation as a partner bound for all the debts of Aldecoa & Co., but for the purpose of securing the direct obligation of the firm itself to the bank. We are, therefore, of the opinion that the trial court committed no error upon this point.

It is urged on behalf of Doña Isabel Palet that the mortgages executed by her upon her individual property have been canceled. The ground for this contention is that Aldecoa & Co. undertook by the contract of February 23, 1906, to discharge its liability to the plaintiff bank at the rate of not less than P50,000 per annum, and that therefore it was the duty of the bank to sue Aldecoa & Co. as soon as that firm failed to pay at maturity any one of the partial payments which it had promised to make, and to apply the proceeds from the sale of the property of Aldecoa & Co. to the satisfaction of this indebtedness, and that the fact that the bank failed to do so is equivalent to an extension of the term of the principal debtor, and that the effect of this extension has been to extinguish the obligation of this defendant as a surety of Aldecoa & Co. It is also contended that the bank expressly extended the term within which Aldecoa & Co. was to satisfy its obligation by allowing Aldecoa & Co. to furnish additional security. Dona Isabel Palet alleges that all these acts were done without her knowledge or consent.

The extension of the term which, in accordance with the provisions of article 1851 of the Civil Code produces the extinction of the liability of the surety must of necessity be based on some new agreement between the creditor and principal debtor, by virtue of which the creditor deprives himself of his right to immediately bring an action for the enforcement of his claim. The mere failure to bring an action upon a credit, as soon as the same or any part of it matures, does not constitute an extension of the term of the obligation.

Dona Isabel Palet is a personal debtor jointly and severally with Aldecoa & Co. for the whole indebtedness of the

latter firm to the bank, and not a mere surety for the performance of the obligations of Aldecoa & Co. without any solidary liability. It is true that certain additional deeds of mortgage and pledge were executed by Aldecoa & Co. in favor of the bank as additional security after Aldecoa & Co. had failed to meet its obligation to pay the first installment due under the agreement of February 23, 1906, but there is no stipulation whatever in any of these documents or deeds which can in any way be interpreted in the sense of constituting an extension which would bind the bank to wait for the expiration of any new term before suing upon its claim against Aldecoa & Co. We find nothing in the record showing either directly or indirectly that the bank at any time has granted any extension in favor of Aldecoa & Co. for the performance of its obligations. The liquidator of Aldecoa & Co. authorized the bank to grant certain extensions to some of the provincial debtors of Aldecoa & Co. whose debts were to be paid to the bank under the authority conferred upon the bank by Aldecoa & Co. There is a marked difference between the extension of time within which Aldecoa & Co.'s debtors might pay their respective debts, and the extension of time for the payment of Aldecoa & Co.'s own obligation to the bank. If the bank had brought suit on its credit against Aldecoa & Co., for the amount then due, on the day following the extension of the time of Aldecoa & Co.'s debtors for the payment of their debts, it is evident that the fact of such extension having been granted could not have served in any sense as a defense in favor of Aldecoa & Co. against the bank's action, although this extension would have been available to Aldecoa & Co.'s debtors if suit had been brought to enforce their liabilities to Aldecoa & Co. We must, therefore, conclude that the judgment appealed from, in so far as it relates to Dona Isabel Palet, must likewise be affirmed.

The intervener, William Urquhart, assigns these errors:

"1. The court erred in holding that the proof fails to show a case for intervention within the meaning of section 121 of the Code of Civil Procedure.

"2. The court erred in failing to give preference to the credit of the liquidator Urquhart for his salary."

The trial court found, as we have said, that Urquhart had failed to show that he had any legal interest in the matter in litigation between the plaintiffs and the defendants, or in the success of any of the parties, or any interest against both. The proof upon this branch of the case consists of the following agreed statement of facts:

"Mr. Urquhart is a creditor of Aldecoa & Co. in the sum of P21,000 due him for money loaned by him to Aldecoa & Co. before they went into liquidation.

"Aldecoa & Co., in liquidation, owe Mr. Urquhart the liquidator P14,000 as salary."

Section 121 of the Code of Civil Procedure provides that:

"A person may, at any period of a trial, upon motion, be permitted by the court to intervene in an action or proceeding, if he has legal interest in the matter in litigation, or in the success of either of the parties, or an interest against both."

The intervener is seeking to have himself declared a preferred creditor over the bank. According to the abovequoted agreed statement of facts, he is a mere creditor of Aldecoa & Co. for the sum of P21,000, loaned that firm before it went into liquidation. This amount is not evidenced by a public document, or any document for that matter, nor secured by pledge or mortgage, while the amount due the bank appears in a public instrument and is also secured by pledges and mortgages on the property of Aldecoa & Co., out of which the intervener seeks to have his indebtedness satisfied. It is, therefore, clear that the intervener is not entitled to the relief sought, in so far as the P21,000 is concerned.

The bank insists that, as the intervener had been in the employ of Aldecoa & Co. for several years prior to the time that the latter went into liquidation, it cannot be determined what part of the P14,000 is for salary as such

employee and what part is for salary as liquidator. We find no trouble in reaching the conclusion that all of the P14,000 represents, Urquhart's salary as liquidator of the firm of Aldecoa & Co. The agreed statement of facts clearly supports this view. It is there stated that Aldecoa & Co. in liquidation owed the liquidator P14,000 as salary. The agreement does not say, nor can it be even inferred from the same, that Aldecoa & Co. owed Urquhart P14,000, or any other sum for salary as an employee of that firm before it went into liquidation. Under these facts, is the intervener a preferred creditor over the bank for this amount?

In support of his contention that he should be declared a preferred creditor over the bank for the P14,000, the appellant cites the decision of the supreme court of Spain of March 16, 1897, and quotes the following from the syllabus of that case:

"That the expense of maintenance of property is bound to affect such persons as have an interest therein, whether they be the owners or creditors of the property; therefore payment for this object has preference over any other debt, since such other debts are recoverable to the extent that the property is preserved and maintained."

There can be no question about the correctness of this ruling of the supreme court of Spain to the effect that the fees of a receiver, appointed by the court to preserve property in litigation, must be paid in preference to the claims of creditors. But this is not at all the case under consideration, for the reason that Urquhart was elected liquidator by the members of the firm of Aldecoa & Co. without the consent or approval of the bank or of any other creditor. He did not receive his employment by reason of any judicial act. Whatever may be due him for his services as liquidator is due under a contract of employment between himself and the members of the firm of Aldecoa & Co. Neither do we believe that the contention of the appellant can be sustained under article 1922 of the Civil Code, which provides that, with regard to specified personal property of the debtor, the following are preferred:

"1. Credits for the construction, repair, preservation, or for the amount of the sale of personal property which may be in the possession of the debtor to the extent of the value of the same."

The only personal property of Aldecoa & Co. is 16 shares of the stock of the Banco Español- Filipino; 450 shares of the stock of the Compania Maritima; 330 shares of the stock of the Pasay Estate Co., Ltd.; and certain claims against debtors of Aldecoa & Co., mentioned in Exhibit G.

The shares of stock in the Banco Espanol-Filipino and the Compañia Maritima were pledged to the bank before Aldecoa & Co. went into liquidation, so Urquhart had nothing to do with the preservation of these. The stock of the Pasay Estate Co., Ltd., was pledged to the bank on August 30, 1907, on the same day that it came into the possession of Aldecoa & Co. and by the terms of the pledge the bank was authorized to collect all dividends on the stock and apply the proceeds to the satisfaction of its claim against Aldecoa & Co. The credits set forth in Exhibit G were assigned to the bank on January 30, 1907, so, it will be seen, that the Pasay Estate shares were in the possession of Aldecoa & Co., or its liquidator, only one day. Urquhart had been liquidator twenty-eight days when the credits, mentioned in Exhibit G, were assigned to the bank. If it could be held that these two items bring him within the above quoted provisions of article 1922, he could not be declared a preferred creditor over the bank for the P14,000 salary for the reason that, according to his own showing, he had been paid for his services as liquidator up to January, 1910. It is the salary since that date which is now in question. The only property of Aldecoa & Co. which the liquidator had anything to do with after 1910 was the real estate mortgages mortgaged to the bank as additional security. These mortgages on real property cannot be regarded as personal property, and it is only of personal property that article 1922 speaks.

The judgment appealed from, in so far as it relates to Urquhart, being in accordance with the law and the merits,

of the case, is hereby affirmed.

The appellants, Joaquin and Zoilo Ibañez de Aldecoa, make the following assignments of error:

"1. The court erred in not sustaining the plea of *lis pendens* with respect to the validity of mortgages claimed by the plaintiff, which plea was set up as a special defense by the defendants Joaquin and Zoilo Ibañez de Aldecoa, and in taking jurisdiction of the case and in deciding therein a matter already submitted for adjudication and not yet finally disposed of.

"2. The court erred in not sustaining the plea of *res adjudicata* set up as a special defense by these defendants with respect to the contention of plaintiff that these defendants are industrial and general partners of the firm of Aldecoa & Co.

"3. The court erred in holding that the defendants Joaquin and Zoilo Ibañez de Aldecoa were general partners (*socios colectivos*) of the firm of Aldecoa & Co., and in rendering judgment against them subsidiarily for the payment of the amount claimed in the complaint."

The basis of the first alleged error is the pendency of an action instituted by the appellants, Joaquin and Zoilo, in 1908, to have the mortgages which the bank seeks to foreclose in the present action annulled in so far as their liability thereon is concerned. That action was pending in this Supreme Court on appeal when the present action was instituted (1911), tried, and decided in the court below.

The principle upon which a plea of another action pending is sustained is that the latter action is deemed unnecessary and vexatious. (*Williams vs. Gaston*, 148 Ala., 214; 42 Sou., 552; 1 Cyc. 21; 1 R. C. L., sec. 1.) A statement of the rule to which the facts of the plea must conform in order to entitle the litigant to its benefits, and which has often met with approval, is found in *Watson vs. Jones* (13 Wall., 679, 715; 20 L. ed., 666) :

"But when the pendency of such a suit is set up to defeat another, the case must be the same. There must be the same parties, or at least such as represent the same interest, there must be the same rights asserted, and the same relief prayed for. This relief must be founded on the same facts, and the title or essential basis of the relief sought must be the same. The identity in these particulars should be such that if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties."

It will be noted that the cases must be identical in a number of ways. It will be conceded that in so far as the plea is concerned, the parties are the same in the case at bar as they were in the action to have the mortgages annulled. Their position is simply reversed, the defendants there being the plaintiffs here, and vice versa. This fact does not affect the application of the rule. The inquiry must therefore proceed to the other requisites demanded by the rule. Are the same rights asserted? Is the same relief prayed for?

The test of identity in these respects is thus stated in 1 Cyc, 28:

"A plea of the pendency of a prior action is not available unless the prior action is of such a character that, had a judgment been rendered therein on the merits, such a judgment would be conclusive between the parties and could be pleaded in bar of the second action."

This test has been approved, citing the quotation, in *Williams vs. Gaston* (148 Ala., 214; 42 Sou., 552); *Van Vleck vs. Anderson* (136 Iowa, 366; 113 N. W., 853) ; *Wetzstein vs. Mining Co.* (28 Mont., 451; 72 P., 865). It seems to us that unless the pending action, which the appellants refer to, can be shown to approach the action at bar to this extent, the plea ought to fail.

The former suit is one to annul the mortgages. The present suit is one for the foreclosure of the mortgages. It may be conceded that if the final judgment in the former action is that the mortgages be annulled, such an adjudication

will deny the right of the bank to foreclose the mortgages. But will a decree holding them valid prevent the bank from foreclosing them? Most certainly not. In such an event, the judgment would not be a bar to the prosecution of the present action. The rule is not predicated upon such a contingency. It is applicable, between the same parties, only when the judgment to be rendered in the action first instituted will be such that, regardless of which party is successful, it will amount to res adjudicata against the second action. It has often been held that a pending action upon an insurance policy to recover its value is not a bar to the commencement of an action to have the policy reformed. The effect is quite different after final judgment has been rendered in an action upon the policy. Such a judgment may be pleaded in bar to an action seeking to reform the policy. The cases are collected in the note to *National Fire Insurance Co. vs. Hughes* (12 L. R. A., [N. S.J., 907). So, it was held in the famous case of *Sharon vs. Hill* (26 Fed., 337), that the action brought by Miss Hill for the purpose of establishing the genuineness of a writing purporting to be a declaration of marriage and thereby establishing the relation of husband and wife between the parties could not be pleaded in abatement of Senator Sharon's action seeking to have the writing declared false and forged. The court said:

"This suit and the action of *Sharon vs. Sharon* are not brought on the same claim or demand. The subject matter and the relief sought are not identical. This suit is brought to cancel and annul an alleged false and forged writing, and enjoin the use of it by the defendant to the prejudice and injury of the plaintiff, while the other is brought to establish the validity of said writing as a declaration of marriage, as well as the marriage itself, and also to procure a dissolution thereof, and for a division of the common property, and for alimony."

Incidentally, it was held in this case that a judgment of the trial court declaring the writing genuine was not res adjudicata after an appeal had been taken from the judgment of the Supreme Court. So, in the case at bar, the fact that the trial court in the former action holds the mortgages invalid as to one of the herein appellants is not final by reason of the appeal entered by the bank from that judgment.

Cases are also numerous in which an action for separation has been held not to be a bar to an action for divorce or vice versa. (*Cook vs. Cook*, [N. C.], 40 L. R. A., [N. S.], 83, and cases collected in the note.) In *Cook vs. Cook* it was held that a pending action for absolute divorce was not a bar to the commencement of an action for separation. The above authorities are so analogous in principle to the case at bar that we deem the conclusion irresistible, that the pending action to annul the liability of the two appellant children on the mortgages cannot operate as a plea in abatement in the case in hand which seeks to foreclose these mortgages. The subject matter and the relief asked for are entirely different. The facts do not conform to the rule and it is therefore not applicable.

With reference to the second alleged error, it appears that a certified copy of the judgment entered in the former case, wherein it was declared that these two appellants, together with their sister Cecilia, were creditors and partners of *Aldecoa & Co.*, was offered in evidence and marked Exhibit 5. This evidence was objected to by the plaintiff on the ground that it was res inter alios acta and not competent evidence against the plaintiff or binding upon it in any way because it was not a party to that action. This objection was sustained and the proffered evidence excluded. If the evidence had been admitted, what would be its legal effect? That was an action in personam and the bank was not a party. The judgment is, therefore, binding only upon the parties to the suit and their successors in interest (sec. 306, Code of Civil Procedure, No. 2).

The question raised by the third assignment of errors will be dealt with in a separate opinion wherein the appeal of Cecilia Ibanez de Aldecoa will be disposed of.

The appellants whose appeals are herein determined will pay their respective portions of the cost. So ordered.

Arellano, C. J., Torres and Araullo, JJ., concur. Moreland, J., concurs in the result. Johnson, J., dissents. Judgment

affirmed in part.

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**TRENT, J.:**

In *Hongkong & Shanghai Banking Corporation vs. Aldecoa & Co. et al.*, R. G. No. 8437, just decided, we said that the correctness of the judgment declaring that the defendants, Joaquin, Zoilo, and Cecilia Ibañez de Aldecoa, are subsidiarily liable to the bank as industrial partners of Aldecoa & Co. for the debts of the latter, would be determined in a separate opinion.

The facts are these: Joaquin, Zoilo, and Cecilia Ibañez de Aldecoa were born in the Philippine Islands, being the legitimate children of Zoilo Ibañez de Aldecoa and Isabel Paleti Both parents were natives of Spain, but domiciled in Manila, where the father died in 1895. At the time of his death the father was a member and managing director of an ordinary general mercantile partnership known as Aldecoa & Co. In December, 1896, Isabel Palet, for herself and as the parent of her above-named three children, exercising the patria potestad, entered into a new contract with various persons whereby the property and good will, together with the liabilities of the firm of which her husband was a partner, were taken over. The new firm was also an ordinary general mercantile partnership and likewise denominated Aldecoa & Co. Although having the same name, the new firm was entirely distinct from the old one and was, in fact, a new enterprise. The widow entered into the new partnership as a capitalistic partner and caused her three children to appear in the articles of partnership as industrial partners. At the time of the execution of this new contract Joaquin was twelve years of age, Zoilo eleven, and Cecilia nine.

Clauses 9 and 12 of the new contract of partnership read:

"9. The industrial partners shall bear in proportion to the shares the losses which may result to the partnership from bad business, but only from the reserve fund which shall be established, as set forth in the 12th clause, and if the loss suffered shall exhaust said fund the balance shall fall exclusively upon the partners furnishing the capital."

"12. The industrial partner shall likewise contribute 50 per cent of his net profits to the formation of said reserve fund, but may freely dispose of the other 50 per cent."

The question is presented, Could the mother of the three children legally bind them as industrial partners of the firm of Aldecoa & Co. under the above facts? If so, are they liable jointly and severally with all their property, both real and personal, for the debts of the firm? That all industrial partners of an ordinary general mercantile partnership are liable with all their property, both personal and real, for all the debts of the firm owing to third parties precisely as a capitalistic partner has long since been definitely settled in this jurisdiction, notwithstanding provisions to the contrary in the articles of agreement. (*Compania Maritima vs. Munoz*, 9 Phil. Rep.f 326.)

There are various provisions of law, in force in 1896, which must be considered in determining whether or not the mother had the power to make her children industrial partners of the new firm of Aldecoa & Co.

Article 5 of the Code of Commerce reads:

"Persons under twenty-one years of age and incapacitated persons may continue, through their guardians, the commerce which their parents or persons from whom the right is derived may have been engaged in. If the guardians do not have legal capacity to trade, or have some incompatibility, they shall be under the obligation to appoint one or more factors who possess the legal qualifications, and who shall take their places in the trade."

As the firm of which it is claimed the children are industrial partners was not a continuation of the firm of which their deceased father was a member, but was a new partnership operating under its own articles of agreement, it is

clear that article 5, supra, does not sustain the mother's, power to bind her children as industrial partners of the new firm.

Article 4 of the Code of Commerce reads:

"The persons having the following conditions shall have legal capacity to customarily engage in commerce:

"1. Those who have reached the age of twenty-one years.

"2. Those who are not subject to the authority of a father or mother or to marital authority.

"3. Those who have the free disposition of their property."

The appellant children had not a single one of these qualifications in 1896 when the mother attempted to enter them as industrial partners of the firm of Aldecoa & Co.

It is claimed that the power of the mother to bind her children as industrial partners is within her parental authority as defined by the Civil Code. Articles 159 to 166 which compose chapter 3 of the Civil Code, entitled "Effect of parental authority with regard to the property of the children," define the extent of the parental authority over the property of minor children. Article 159 provides that the father, or, in his absence, the mother, is the legal administrator of the property of the children who are under their authority. Article 160 gives to such parent the administration and usufruct of property acquired by the child by its work or industry or for any good consideration. We take it that all the property possessed by the children at the time the contract of partnership was entered into in 1896 had been acquired by them either by their work or industry or for a good consideration. The children were at that time under the authority of their mother.

Article 164 reads:

"The father, or the mother in a proper case, cannot alienate the real property of the child, the usufruct or administration of which belongs to them, nor encumber the same, except for sufficient reasons of utility or necessity, and after authorization from the judge of the domicile, upon hearing by the department of public prosecution, excepting the provisions which, with regard to the effects of transfers, the mortgage law establishes."

The mother did not secure judicial approval to enter into the contract of partnership on behalf of her children. Does membership in an ordinary general mercantile partnership alienate or encumber the real property of an industrial partner? Clearly a partner alienates what he contributes to the firm as capital by transferring its ownership to the firm. But this, in the case of an industrial partner, is nothing. An industrial partner does not alienate any portion of his property by becoming a member of such a firm. Therefore, the mother did not violate this prohibition of article 164 in attempting to make her children industrial partners. But the article in question also prohibited her from encumbering their real property. This undoubtedly prohibits formal encumbrances such as mortgages, voluntary easements, usufructuary rights, and others which create specific liens upon specific real property. It has been held to prohibit the creation of real rights, and especially registerable leases in favor of third persons. (Res., Aug. 30, 1893.) The same word is used in article 317 of the Civil Code in placing restrictions upon the capacity of a child emancipated by the concession of the parent to deal with his own property. In commenting on this latter article, Manresa asks the question, "To what encumbrances does the code refer in speaking of emancipated children?" and answers it as follows:

"The prohibition against encumbering real property is so explicit that we consider it unnecessary to enumerate what are the incumbrances to which the law refers. All that signifies a limitation upon property, such as the creation, modification, or extinction of the right of usufruct, use, habitation, emphyteusis, mortgages, annuities, easements, pensions affecting real property, bonds, etc., is, in an express manner, prohibited to emancipated

children without the express consent of the persons who are mentioned in the said article 317." (Vol. 2, p. 689.)

In commenting upon the same article, Sanchez Roman says practically the same thing. (Vol. 5, p. 1179.) Neither of these commentators refers to the right of an emancipated child to enter into a contract of partnership without the parent's consent. The question, in so far as we have been able to ascertain, does not appear to have ever been discussed, either by the courts or the commentators. It is significant, however, that a contract of surety is placed by both the above mentioned commentators among the prohibited contracts. The encumbrance placed upon the real property of a surety is precisely the same as the encumbrance placed upon the real property of an industrial partner. That is, prior to judgment, on the principal obligation or judgment against the partnership, the property is not specifically liable, and the creditor has no preferred lien thereon or right thereto by reason of the bond or partnership contract, as the case may be. After judgment, the property of the surety or of the industrial partner, both real and personal, is subsidiarily subject to execution. The evident purpose<sup>4</sup> of both article 164, prohibiting the parent from encumbering the real property of his child without judicial approval, and of article 317, placing the same prohibition upon the emancipated child in the absence of the parent's approval, is the same. It is desired that the child's real property shall not be frittered away by hasty and ill-advised contracts entered into by the one having the administration thereof. Both articles would fail of their purpose if the parent or the child, as the case might be, could do indirectly what could not be done directly. In other words, there would be little purpose in prohibiting a formal encumbrance by means of a mortgage, for instance, when a subsidiary liability by means of a bond or membership in a partnership could as effectually deprive the child of its real property. The mother cannot be permitted to do indirectly that which she cannot do directly. But it is said that the prohibition of article 164 extends to real property only and that, therefore, the children are subsidiarily liable as industrial partners to the extent of their personal property. This proposition rests upon the theory that the mother could have freely disposed of the child's personal property in 1896 and that the only recourse open to them would have been an action against their mother for the value of such property. If this theory be true, the result would not be changed for the reason that the children were either industrial partners or they were not. If they were, they are liable to the extent of both their real and personal property for the debts of the firm. If they were not, they are in no way liable. There can be only two kinds or classes of partners in a firm of this kind, capitalistic and industrial. Both are personally liable to third persons for the debts of such a firm. To say that the children are industrial partners, but liable only to the extent of their personal property, would be to place them in a different class of partners. As the mother did not secure judicial approval, the contract wherein she attempted to make her children industrial partners, with all the consequences flowing therefrom, was, therefore, defective and that act of itself in no way made the children liable for the debts of the new firm.

The question remains, Did any of the children validly ratify the contract after acquiring capacity to do so? Cecilia was never emancipated and there is no evidence indicating that she has ever ratified the contract by word or deed. She is, therefore, completely exonerated from liability for the debts of Aldecoa & Co.

The other two children, Joaquin and Zoilo, were emancipated by their mother after they had reached the age of eighteen and prior to seeking annulment of the contract of partnership had participated by vote and otherwise in the management of the firm, as is evidenced by Exhibits W, Y, and Z. These various acts sufficiently show a ratification of the partnership contract and would have the effect of making the two children industrial partners if they had been of age at that time. Ratification is in the nature of a contract. It is the adoption of, and assent to be bound by, the act of another. (Words and Phrases, vol. 7, p. 5930.) From the effect of emancipation it cannot be doubted that the two children had capacity, with their mother's consent, to enter into a contract of partnership, and, by so doing, make themselves industrial partners, thereby encumbering their property. Conceding that the children under these circumstances could enter into such a contract with their mother, her express consent to the ratification of the contract by the two children does not appear of record. The result flowing from the ratification

being the encumbrance of their property, their mother's express consent was necessary.

For the foregoing reasons the judgment appealed from, in so far as it holds the three children liable as industrial partners, is reversed, without costs in so far as this branch of the case is concerned. So ordered.

Arellano, C. J., Torres and Araullo, JJ., concur.

Moreland, J., concurs in the result.

Johnson, J., dissents.

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[1] Page 228, *supra*.

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