

COMMERCIAL LAW: 1953

EFREN I. PLANA *
JUAN C. REYES, JR. **
LEONIDES T. CADAY ***

In the workaday world of businessmen, a reasonable degree of stability in law is required, more perhaps than is demanded in other fields of human activity. Businessmen may speculate as to facts, and frequently do so, but they can ill-afford to be in doubt as to the rules of law which govern their transactions which daily transpire. Otherwise, commercial activity will be retarded, men presently engaged therein will be tempted to withdraw to other ventures, for men are not wont nor inclined to stake large fortunes upon the unhinged sway of luck or chance.

It is perhaps with the realization of this necessity that the Supreme Court decided commercial law cases in the year 1953. The bulk of these cases merely reiterate previous legal doctrines. And except for three cases in Corporation Law¹ and one in Warehouse Receipts Law,² the domain of commercial law, during the period under review, stands unadorned by legal novelties.

By and large, therefore, it may be remarked that the pace of mercantile law is slow, corollary to the factual observation that judicial decisions thereon trickle in scantiness. Yet, it goes without saying that with every ruling laid down by the Supreme Court, substantial interests are affected.

I. NEGOTIABLE INSTRUMENTS LAW

Acceptance is the act by which the person on whom a bill of exchange is drawn, called the drawee, assents to the request of the drawer to pay it, or in other words, engages, or makes himself liable, to pay it when due.³ The Negotiable Instruments Law provides that

* LL.B., U.P. (1954); formerly Chairman, Student Editorial Board, Philippine Law Journal.

** LL.B., U.P. (1954); formerly Staff Member, Philippine Law Journal.

*** LL.B., U.P. (1954); formerly Staff Member, Philippine Law Journal.

¹ *Lingayen Gulf Electric Power Co., Inc. v. Baltazar*, G. R. Nos. L-4842 and L-6344, prom. June 30, 1953; *Financing Corporation of the Philippines v. Teodoro*, G. R. No. L-4900, prom. August 31, 1953; *People v. Quasha*, G. R. No. L-6055, prom. June 12, 1953.

² *Martinez v. Philippine National Bank*, G. R. No. L-4080, prom. September 21, 1953.

³ Act No. 2031, Sec. 32. See also *Hunt v. Security State Bank*, 91 Or. 362, 179 P. 248, 251 (1919); *Bell-Wayland Co. v. Bank of Sugden*, 95 Okl. 67, 218 P. 705, 707 (1923).

presentment must be made to the drawee for acceptance where there is an express stipulation to that effect, where such presentment is necessary to fix the maturity of the instrument or where the bill is drawn elsewhere than at the residence or place of business of the drawee.⁴ Such presentment, as a general rule, must be made within a reasonable time, otherwise the drawer and all indorsers are discharged.⁵ As to what constitutes a reasonable time within which to present a bill for acceptance, no hard and fast rule can be laid down. It is a maxim of English law that "how long a 'reasonable time' ought to be is not defined in law, but is left to the discretion of the judges."⁶ In general, however, it may be defined as such length of time as may fairly, properly, and reasonably be allowed or required, having regard to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the facts of the particular case.⁷

In *N. O. Behn, Meyer and Co. v. Hongkong and Shanghai Banking Corporation*,⁸ the Supreme Court held that a lapse of one month and five days, without valid excuse, from the date the holder's agent received the bill of exchange for transmission to the drawee to the date when the same was actually delivered to the latter, constitutes an unreasonable delay in the delivery of the bill of exchange to the drawee for acceptance. The fact that there was a declaration of war between England and Germany is not a sufficient excuse, it having been shown that the airmail and steamer services between New York, where the holder's agent was, and Amsterdam, the place of acceptance, did not cease to operate.⁹

Where an instrument is duly presented for acceptance or payment and acceptance or payment cannot be obtained, or where presentment has been excused and the instrument is overdue and un-

⁴ Act No. 2031, Sec. 143.

⁵ *Id.*, Sec. 144.

⁶ Co. Litt. 50, cited in *Black's Law Dict.*, 4th Ed. (1951), p. 1653.

⁷ Act No. 2031, Sec. 193. See also *Twin Lick Oil Co. v. Marbury*, 91 U.S. 591, 23, L. Ed. 328, 331 (1876); *Hearne v. Fischer Lime & Cement Co.*, 220 Ky. 791, 295 S.W. 1012, 1013 (1927); *Lumbermen's Reciprocal Assn. v. Warren*, 272 S.W. 826, 827 (1925); *Simmons v. Western Indemnity Co.*, 210 S.W. 713, 715 (1919).

⁸ G. R. No. L-5537, prom. May 29, 1953.

⁹ The Court pointed out: "••• It should be noted that, notwithstanding the declaration of war between England and Germany, the airmail and steamer services between New York, London and Amsterdam, were then in operation. Had the documents been delivered in due course, the drawee could have no excuse for refusing acceptance, and could have taken the steps he may deem proper regarding the disposition of the cargo as contemplated in the circular. Defendant-appellant has assumed the task of taking action on the cargo as called for in the circular and must consequently assume the corresponding risk and responsibility."

paid, it is said to be dishonored.¹⁰ It then becomes necessary for the holder in order to hold those secondarily liable on the instrument, to give them either oral or written notice of such dishonor.¹¹ In order to prove that the regular legal steps have been taken by the holder to fix liability upon the parties secondarily liable, it is necessary, in case of a foreign bill of exchange, and frequently desirable, in case of an inland bill or note, to have the testimony of some responsible person, usually a notary, that the proper procedure has been followed, otherwise the drawer and indorsers are discharged. This is called a protest.¹² Thus, in the same case of *Behn, Meyer Co. v. Hongkong and Shanghai Banking Corporation*,¹³ the Supreme Court ruled that the failure of the holder of the foreign bill of exchange to make the necessary protest after the drawee had refused acceptance was fatal to his right of recourse against the drawer.

II. PUBLIC SERVICE LAW

A. NATURE OF PUBLIC SERVICE

Public service is the term applied in modern usage to the objects and enterprises of certain kinds of corporations, which specially serve the needs of the general public or conduce to the comfort and convenience of an entire community, such as railroad, gas, water, and electric light companies, and companies furnishing motor vehicle transportation.¹⁴

Under the law as amended,¹⁵ to constitute public service, it is not necessary that the use be offered to the indefinite public generally and indiscriminately. If the operator deals only with a portion of the public or a limited clientele, the service is still public service, provided it is done for general business purposes.¹⁶ The devotion to public use must be of such character that the public generally, or that part of it which has been served and which has accepted the service, has the legal right to demand that that service shall be conducted, so long as it is continued, with reasonable effi-

¹⁰ Act No. 2031, Secs. 148, 149, 150, and 83.

¹¹ *Id.*, Secs. 89 and 96.

¹² *Id.*, Sec. 152. See also *Mauzy v. Winlock and Toledo Logging & R. Co.*, 148, Wash. 572, 269 P. 815, 817 (1928).

¹³ G. R. No. L-5537, prom. May 29, 1953.

¹⁴ *Black's Law Dict.*, 4th Ed. (1951), p. 1394, citing *Harrison v. Big Four Bus Lines*, 217 Ky. 119, 288 S.W. 1049.

¹⁵ Com. Act No. 146, as amended by Com. Act No. 454.

¹⁶ *Id.*, Sec. 13(b). *Luzon Stevedoring Co. v. Public Service Commission*, G. R. No. L-5458, prom. September 16, 1953.

ciency under reasonable charges.¹⁷ The right to enjoy the use must be by right and not only by permission.¹⁸

However, incidental service devoid of public character and interest is to be excluded. This was the import of the statement by the Supreme Court in *Luzon Stevedoring Co. v. Public Service Commission*,¹⁹ in which it stated:

“*** The transportation service which was the subject of the complaint was not casual or incidental. It has been carried on regularly for years at almost uniform rates of charges. Although the number of petitioners' customers was limited, the value of the goods transported was not inconsiderable. Petitioners did not have the same customers all the time embraced in the complaint, and there was no reason to believe that they would not accept, and there was nothing to prevent them from accepting new customers that might be willing to avail of their service to the extent of their capacity.”

As to what will constitute incidental service as distinguished from public service, there is no fixed rule. As observed by the court, the demarcation line is not susceptible of exact description or definition, each case being governed by circumstances peculiar to it, the question involved depending on such factors as the extent of the service,²⁰ whether such person or company has held himself or itself out as ready to serve the public or a portion of the public generally,²¹ or in other ways conducted himself or itself as a public utility.²²

B. PURPOSE OF THE LAW

The facts of *Luzon Stevedoring Co. v. Public Service Commission*,²³ briefly, are as follows: Petitioners, aside from stevedoring and harbor towage business, engaged in the interisland service of hauling cargoes. The cargoes were loaded on their barges and towed

¹⁷ *Richardson v. Railroad Commission of California*, 191 Cal. 716, 218 P. 418, 420 (1923).

¹⁸ *U.S. v. Tan Piaco*, 40 Phil. 853 (1920); *Iloilo Ice and Cold Storage Co. v. Public Utility Board*, 44 Phil. 551 (1923).

¹⁹ G. R. No. L-5458, prom. September 16, 1953, *supra*.

²⁰ Any agency, instrumentality, business industry or service which is used or conducted in such manner as to affect the community at large, and which is not limited or restricted to any particular class of the community is a public utility. See *State Public Utilities Commission v. Monarch Refrigerating Co.*, 267 Ill. 528, 108 N. E. 716, Ann. Cas. 1916A, 528 (1915).

²¹ The test for determining if a concern is a public utility is whether it has held itself out as ready, able and willing to serve the public. See *Humbird Lumber Co. v. Public Utilities Commission*, 39 Idaho 505, 228 P. 271 (1924).

²² A business or service which is engaged in regularly supplying the public with some commodity or service which is of public consequence and need, such as electricity, gas, water, transportation, or telephone or telegraph service, is a public utility. See *Gulf States Utilities Co. v. State*, Tex. Civ. App., 46 S.W. 2d 1018, 1021 (1932).

²³ G. R. No. L-5458, prom. September 16, 1953.

by tugboats. For this service, the petitioners charged freightage. On the complaint by an association of shipowners that they were engaged in the transportation of cargo for hire without previous authority by the Public Service Commission, the latter issued an order restraining the petitioners from further engaging in such service until the rates they propose to charge are approved by the Commission. This is a petition for review of such order.

The petitioners contend that the Public Service Law should be read as to embrace only persons and companies that are in fact engaged in public service with a corresponding qualification of an offer to serve indiscriminately the public and not those which cater to a limited portion of the public under private agreements.

The Supreme Court disposed of this contention as devoid of merit, stating that the purpose of the law is to protect the public against poor, inefficient and inadequate service and unreasonable charges, and to prevent ruinous competition. To the extent, therefore, that private agreements may tend to wreck or impair the financial stability and efficiency of public utilities who do offer service to the public in general, they are affected with public interest and fall within the police power of the State to regulate.²⁴

C. LEASE DISTINGUISHED FROM HIRE

In the same case,²⁵ the Supreme Court distinguished lease from hire as follows:

"* * * The contracts between petitioners and the owners of the cargo were ordinary contracts of transportation and not of lease. Petitioners' watercraft were manned by crews in their employ and payroll, and the operation of the said craft was under their direction and control, the customers assuming no responsibility for the goods handled on the barges. Petitioners' lighters and tugboats were therefore not leased. They were hired, hired in the sense that the shippers did not have direction, control, and maintenance over them, which is a characteristic feature of lease."

D. PRIOR OPERATORS VS. EMERGENCY OPERATORS

The prior operator rule may be stated thus: "So long as the first licensee keeps and performs the terms and conditions of its license and complies with the reasonable rules and regulations of the

²⁴ Such a commission is a legal, administrative body, provided for the administration of certain matters within the police power, with power to make regulations as to certain matters when required for the existing laws shall operate. See *People ex rel. New York Telephone Co. v. Public Service Commission*, 2nd Dist., 141 N.Y.S. 1018, 1022, 157 App. Div. 156 (1913). Also, *Batangas Transportation Co. v. Orlanes*, 52 Phil. 455 (1928).

²⁵ *Luzon Stevedoring Co. v. Public Service Commission*, *supra*.

Commission and meets the reasonable demands of the public, it should have more or less a vested and preferential right over a person who seeks to acquire another and a later license over the same route."²⁶

In *Interprovincial Autobus Co. Inc. v. Mabanag*,²⁷ decided in 1951, there was a departure from the rule with regards to provisional permit holders immediately after liberation. The court justified its stand on the ground of encouragement and protection to those persons and entities who stepped into the breach caused by the war, when the equipment of the old operators and common carriers were lost and destroyed and their service paralyzed, and helped in the rehabilitation of the transportation business. This view was reiterated in the subsequent cases of *Malate Taxicab and Garage Co. v. Public Service Commission*,²⁸ and *Manila Yellow Taxicab et al. v. Public Service Commission*,²⁹ not only on the ground of public necessity, but also on equity and justice. Under the *Orlanes*³⁰ case, a recognized exception to the prior operator rule is when the old operator would not be able to render adequate service even if given an opportunity to do so. In the case of *Interprovincial Bus Co. v. Labaton*,³¹ the Supreme Court went further. Here, although the old operator was willing to improve and increase his service, the Supreme Court still allowed the second operator to continue. The departure was so sweeping in extent that the opinion was entertained that the "first operator rule has been overruled."³²

The year 1953 saw the reaffirmance of the prior operator rule. In *Fernando v. Gallardo*,³³ the Supreme Court, in setting aside an order of the Public Service Commission giving to a new bus operator certificates of public convenience over the routes of the old operators, stated:

"* * * Being old operators, unquestionably able and ready to increase their units, the petitioners are entitled to protection and priority as against new operators."

²⁶ *Batangas Transportation Co. v. Orlanes*, 52 Phil. 455, 466 (1928), and applied in *Batangas Transportation Co. v. Ochoa*, G.R. No. 29154, prom. Dec. 20, 1928, not reported; *Bohol Land Transportation v. Jalandoni*, 53 Phil. 560; *Gilles v. Halili*, 63 Phil. 738; *Manila Electric Co. v. Mateo*, 66 Phil. 19.

²⁷ G. R. No. L-3302, prom. January 11, 1951.

²⁸ G. R. No. L-2877, prom. April 26, 1951.

²⁹ G. R. No. L-2875 and G. R. No. L-3114 to 3208, prom. Oct. 31, 1951.

³⁰ *Batangas Transportation Co. v. Orlanes*, *supra*.

³¹ G. R. No. L-3622, prom. July 26, 1951.

³² Scope note in the *Case Digest*, 1951 of the case of *Interprovincial Bus Co. v. Labaton*, *supra*. See Mendoza and Samonte: *Commercial Law*, 27 Phil. Law Journal, 2 (April, 1952), p. 271, footnote 42.

³³ G. R. No. L-4860, prom. September 8, 1953.

However, it must not be construed to mean that the policy heretofore followed of stabilizing the operation of those who risked their capital in order to fill a public need at a time when the old operators were unable or unwilling to do so has been taken away. It will still control when demanded by public convenience and necessity,³⁴ and equity and justice.³⁵

E. PUBLIC SERVICE COMMISSION: POWER TO ALTER ESTABLISHED ROUTES

Under the law,³⁶ the Public Service Commission is given the power, after due notice and hearing, to amend, modify or revoke at any time any certificate issued whenever the facts and circumstances on the strength of which said certificate was issued have been misrepresented or materially changed.³⁷ Thus, the power of amendment may be validly exercised in a case where the purpose of the restrictions imposed in the certificate of public convenience no longer exists so that there is no more necessity for the same.³⁸

Can the Public Service Commission, to correct an error it has made, order *motu proprio* the alteration of a certain route originally granted in the certificate of public convenience of a bus operator on the ground that said route was not in accordance with the evidence submitted at the hearing granting said certificate? In *Halili v. Public Service Commission and CAM Transit Co. Inc.*,³⁹ the Supreme Court held that it could not as such a procedure is repugnant to the constitutional mandate that no person shall be deprived of a right without due process of law, especially where, as in the instant case, the change would clearly affect and prejudice the right and privilege of another operator on the same route. As observed by the Court, the due process of law clause of the Constitution binds not only the Government of the Philippines but also each and every one of its branches and agencies. In addition to jurisdiction, procedural due process implies a fair hearing before some impartial tribunal, with due notice to the parties to be affected, an opportunity to be heard

³⁴ *Javellana v. Bariles*, G. R. No. L-4347, prom. January 31, 1953; *Interprovincial Autobus Co., Inc. v. Mabanag*, *supra*; *Interprovincial Bus Co., v. Lubaton*, *supra*.

³⁵ *Malate Taxicab and Garage Co. v. Public Service Commission*, *supra*; *Manila Yellow Taxicab et al. v. Public Service Commission*, *supra*.

³⁶ Com. Act No. 146 as amended.

³⁷ *Id.*, Sec. 16(m).

³⁸ *Pampanga Bus Co., Inc. and Bulacan Bus Inc. v. Fernando*, S. C. G. R. No. 45734; *Manila Electric Co. v. Enriquez and Manila Electric Co. v. Diaz*, S. C. G. R. Nos. 46082 and 46083, as cited in TOLENTINO: COMMERCIAL LAWS OF THE PHILIPPINES, Vol. I, 6th Ed., pp. 479-480.

³⁹ G. R. No. L-5948, prom. April 29, 1953.

and a trial based on some orderly course of proceedings.⁴⁰ Consequently, the issuance of the order without proper notice to the petitioner and opportunity on his part to be heard is a violation of his right not to be deprived of his property without due process of law.⁴¹ This case reasserts the doctrine of due process in administrative proceedings of quasi-judicial character enunciated by Justice Laurel in the case of *Ang Tibay v. Court of Industrial Relations*.⁴²

One month and a half later, in *Halili v. Public Service Commission and Heras*,⁴³ the Supreme Court had occasion to affirm and explain its stand in the previous case. In this later case, it declared that although the Commission has the power to amend, by itself alone, errors of the pen, it must be an amendment which does not prejudice any of the parties and which does not change the essence of the decision.

Stating the reason for the rule, the court said:

"That the decision is not in conformity with the evidence presented in the case does not justify its amendment by the Commission *motu proprio*; such procedure could give rise to great injustice. In utmost good faith, the Commission could cause great prejudice to some operators and favor others, and abrogate rights acquired in favor of others."

F. PUBLIC SERVICE COMMISSION: CONCLUSIVENESS OF FINDINGS

In *Javelana v. Barilea*,⁴⁴ the Supreme Court, once again, reiterated the rule laid down in previous cases⁴⁵ that the determinations of the Public Service Commission, in the absence of such whimsical and capricious exercise of discretion as to constitute abuse thereof, are conclusive. Under the law,⁴⁶ the Supreme Court is authorized to modify or set aside the decision of the Commission only in the cases where there was no evidence reasonably to support its conclusion, or that the same was contrary to law, or without its jurisdiction.⁴⁷ In all others, the court is not justified in interfering with the decision of the Commission. *Expressio unius est exclusio*

⁴⁰ *Banco-Español Filipino v. Palanca*, 37 Phil. 921, 934; *Dimke v. Kinke*, 209 Minn. 29, 295 N.W. 75, 80 (1940); *Pemoyer v. Neff*, 95 U.S. 733, 24 L. Ed. 565 (1878).

⁴¹ Constitution, Art. III, Sec. 1, cl. 1.

⁴² 40 O.G. (7th Supp.) 29, 35-38.

⁴³ G. R. No. L-5960, prom. June 17, 1953.

⁴⁴ G. R. No. L-4347, prom. January 31, 1953, *supra*.

⁴⁵ *Batangas Transportation Co. et al. v. Vera and Silva*, 40 O.G. 2 (1940); *Ice and Cold Storage v. Valero*, G. R. No. L-1871, prom. Nov. 18, 1949; *Ice and Cold Storage v. Isip*, G. R. No. L-2458, prom. January 28, 1950.

⁴⁶ Commonwealth Act No. 146, as amended.

⁴⁷ *Id.*, Sec. 35.

alterius. Neither is it authorized to weigh the conflicting evidence presented and substitute its conclusion for that of the Commission.⁴⁸

G. LEASE OF PUBLIC SERVICE PROPERTY

The owner of a public service cannot sell, lease, or otherwise encumber any of his property, rights, or privileges covered by his franchise without the prior approval of the Public Service Commission given after due notice to the public and after hearing the persons interested. The reason for the prohibition, as enunciated in *Montoya v. Ignacio*,⁴⁹ is that, since a franchise is personal in nature,⁵⁰ any transfer or lease thereof should be notified to the Commission that it may take proper safeguards to protect the public interest. The primary consideration is whether the public will be prejudiced or whether the service will fail to operate or function better for public convenience.⁵¹

Since the approval of the Public Service Commission is required as a condition precedent, a sale or lease of property covered by a franchise without such prior approval will not bind the Commission. Although the transaction is valid and effective as between the immediate parties, in contemplation of law and in relation to the public and the Commission, the lessor continues to be the owner and as such is responsible for all the consequences incident to its operation. Thus, where the owner of a jeepney leased the same without the prior approval of the Commission, he is responsible for the death of a passenger caused by its collision with a bus while in the hands of the lessee.⁵²

III. SECURITIES ACT

In *La Orden de PP. Benedictinos de las Islas Filipinas v. J. A. Stiver and Philippine Trust Co.*,⁵³ the Supreme Court had occasion to define the powers of the Securities and Exchange Commission.

The facts are: In 1928, the petitioner "La Orden" floated bonds maturing from two to fifteen years. The Philippine Trust Company was constituted as trustee. As security for the bonds, the corpora-

⁴⁸ *Ice and Cold Storage v. Valero, supra; Ice and Cold Storage v. Isip, supra; Javellana v. Bariles, supra.*

⁴⁹ G. R. No. L-5868, prom. December 29, 1953.

⁵⁰ A franchise is some special privilege conferred by the government on an individual, natural or artificial, which is not enjoyed by its citizens in general. See *State ex rel. Watkins v. Fernandez*, 106 Fla. 779, 86 A.L.R. 240 (1932), 143 So. 638, 639; *Elliott v. City of Eugene*, 135 Or. 108, 294 P. 358, 360 (1930).

⁵¹ *Aucal Autocaleras Co., Inc. v. Ablaza and de Castro*, 66 Phil. 24 (1938).

⁵² *Montoya v. Ignacio, supra.*

⁵³ G. R. No. L-4568, prom. June 16, 1953.

tion executed a first mortgage and deed of trust over certain parcels of land in the City of Manila. Just before the outbreak of the war, as most of the bonds had matured and remained unpaid, the trustee instituted proceedings for the sale of the property mortgaged to redeem the matured bonds. Receivers were appointed and the property was sold during the Japanese occupation. An amount in Japanese occupation currency, sufficient to redeem the entire bond issue, together with all accrued interests, was then turned over by the receivers to the trustee. The mortgage and trust deed was cancelled and the corporation was released from all obligations with respect to the bonds.

Upon receipt of the redemption money, the trustee notified the bond-holders, by publication, of its readiness to redeem the bonds. Some of the bondholders surrendered their bonds and were paid the value thereof in the currency then existing. Others failed and their bonds have not been redeemed.

J. A. Stiver was the owner of ten bonds, unredeemed, which were lost or destroyed during the battle for liberation of the City of Manila. After having established his ownership to the aforementioned bonds, according to law,⁵⁴ Stiver requested the issuer corporation to issue replacement bonds. Upon the refusal of the issuer corporation, he appealed to the Securities and Exchange Commission. The latter sustained Stiver and ordered "La Orden" to issue bonds to replace the lost ones. From this determination by the Commission, the issuer corporation appealed.

Petitioner contends that the order of the Securities and Exchange Commission was erroneous as the obligation represented by the bonds no longer exists because the bonds had been paid and the issuer thereof discharged from obligation thereon.

The court dismissed the argument as untenable, holding that the issuer, petitioner herein, was in duty bound to issue replacement bonds, as otherwise, the bondholders would not have anything to rely on if and when they claim payment of their bonds.

Touching on the powers of the Securities and Exchange Commission, the court said:

"Whether the payment made by the issuer of the bonds of the whole amount of the mortgage obligation or bonded indebtedness to the trustee who is still in possession of part of the said amount has discharged the issuer from its obligation to pay the bondholders, and whether the trustee after calling upon the bondholders to receive the amount due them upon their bonds has been discharged from liability to the bondholders who have

⁵⁴ Rep. Act No. 62.

not been paid because of their failure to call upon and receive from the trustee what is due them upon their bonds, are matters foreign to the functions of the Securities and Exchange Commission because they fall within the field of judicial determination and adjudication."

IV. WAREHOUSE RECEIPTS LAW

In *Martinez v. Philippine National Bank*,⁵⁵ the majority of the Supreme Court held that where a warehouse receipt or quedan is transferred or indorsed to a creditor only to secure the payment of a loan or debt, the transferee or indorsee does not automatically become the owner of the goods covered by the warehouse receipt or quedan. At most, the indorsee-pledgee only retains the right to keep and with the consent of the owner to sell them for the satisfaction of his credit. Consequently, any loss must be for the account of the debtor, who still remains the owner thereof.

On the other hand, the minority⁵⁶ was of the view that although the warehouse receipt or quedan was indorsed and delivered as a mere security for the payment of an existing indebtedness, this fact alone did not prevent the creditor from acquiring ownership since the only effect of the transfer is that the debtor can reacquire said ownership upon the payment of his obligation. As such, if any loss occurs, it should be borne by the indorsee-pledgee. In other words, the relation created, according to this opinion, is substantially analogous to that of a vendor and a vendee in a *pacto de retro* sale. The minority cites the provision of the Warehouse Receipts Act⁵⁷ which states that a person to whom a negotiable warehouse receipt has been duly negotiated acquire title to the goods covered by the receipt, as well as the possession of the goods, through the warehouseman, as if the latter had contracted directly with him; and the earlier cases of *Philippine Trust Co. v. Philippine National Bank*,⁵⁸ *Roman v. Asia Banking Corporation*,⁵⁹ *Bank of the Philippine Islands v. Herridge*,⁶⁰ and *Siy Cong Bieng & Co. Inc. v. Hongkong and Shanghai Banking Corporation*.⁶¹

It is submitted that the authorities cited by the minority are not directly applicable. From the facts of the instant case, it is evident that the indorsement and delivery of the quedans in question was not intended to transfer title. The provision of law aforesaid⁶²

⁵⁵ G. R. No. L-4080, prom. September 21, 1953.

⁵⁶ Chief Justice Paras and Justice Pablo dissenting.

⁵⁷ Act No. 2137, Sec. 41.

⁵⁸ 42 Phil. 413 (1921).

⁵⁹ 46 Phil. 705 (1922).

⁶⁰ 47 Phil. 57 (1924).

⁶¹ 56 Phil. 598 (1932).

⁶² Act No. 2137, Sec. 41, *supra*.

presupposes negotiation. Here, no such negotiation took place. Similarly, the cases cited do not stand on all fours with the present one. In both, the warehouse receipts were indorsed and delivered to secure an existing indebtedness. But while in the cases cited, the rights of innocent third persons intervened,⁶³ in the instant case, no such rights were involved. The doctrine that the indorsee-pledgee of a warehouse receipt becomes the owner of the goods covered thereby is still good law and should be observed whenever necessary for the protection of innocent third persons, but where, as in the present case, no rights of third persons are prejudiced, the rule loses its force and effect. *Mutata legis ratione mutatur et lex.*

V. CARRIAGE OF GOODS BY SEA ACT

This Act, essentially of American origin,⁶⁴ was by provision of law,⁶⁵ made applicable to the Philippines. At the time that this Act was enacted by the United States Congress, the political status of the Philippines was then a Commonwealth Government and a part of the territory of the United States. In *Benito Chua Kuy v. Everett Steamship Corporation*,⁶⁶ the Supreme Court passed upon the continuing applicability of this Act.

The facts of this case are essentially as follows: Prior to January 6, 1947, plaintiff placed an order, through the indenter Gumberco and Sons, for 500 cases of evaporated milk of 96 babies with the Columbia Pacific Distributing Co. of Portland, Oregon. Plaintiff paid the purchase price including the freight charges therefor to said company through the China Banking Corporation of Manila. On January 6, 1947, the goods were loaded at the port of Portland, Oregon, U.S.A., consigned to the order of the China Banking Corporation and the Min Sheng Trading, Manila. The goods arrived in Manila on February 21, 1947 and when the contents were unpacked, plaintiff discovered that there was a shortage in the cargo delivered. Plaintiff immediately gave notice to the defendant, local agents of the shipping company, of the shortage and later on filed with the latter a formal claim for the loss amounting to almost three thousand pesos. Amicable settlement negotiations having failed, this action was instituted on May 7, 1948.

Defendant denies liability on the ground that under the Carriage of Goods By Sea Act,⁶⁷ the action of the plaintiff had already

⁶³ See Notes on Recent Decisions: Balajadia, *Commercial Law*, 28 Phil. Law Journal (December, 1953) p. 931, footnote 20.

⁶⁴ Public Act No. 521, 74th Congress.

⁶⁵ Commonwealth Act No. 65, which took effect on October 22, 1936.

⁶⁶ G. R. No. L-5554, prom. May 27, 1953.

⁶⁷ Public Act No. 521, 74th U.S. Congress, accepted and made applicable to the Philippines by Commonwealth Act No. 65, *supra*.

prescribed. The latter, however, contends that the law applicable is the Code of Commerce and not the Carriage of Goods by Sea Act,⁶⁸ as the latter applies only to contracts of carriage of goods by sea to or from ports of the United States in foreign trade;⁶⁹ and since the Philippines was not a foreign country at the time of its enactment, it does not come within the purview of the Act unless proper amendment is previously made in the law.

In disposing this contention and holding that the Act is applicable, the court stated:

"Granting *arguendo* that the Philippines was a territory or possession of the U.S. for the purposes of said Act, a different situation obtained after it had become an independent state on July 4, 1946. If before its declaration of independence the trade relations between the Philippines and the United States could only be considered in a domestic sense, after it had become independent, said trade relations must have of necessity acquired the character of foreign within the meaning of said Act. There is no need for an express legislation to have the provisions of said Act applicable to the Philippines upon the advent of independence (as claimed by petitioner) for our legislature, in enacting Commonwealth Act No. 65, already provided therein that said provisions should be made applicable "to all contracts for the carriage of goods by sea to and from Philippine ports in foreign trade." This proviso clearly paves the way for the application of the Carriage of Goods By Sea Act to all contracts from Philippine ports to other foreign countries, including the United States."

Although the Act⁷⁰ itself provides that its provisions shall not repeal or limit the provisions of the Code of Commerce, it is the opinion that when the matter involved is the carriage of goods by sea in foreign trade, the Code of Commerce provisions must give way to those of the Carriage of Goods by Sea Act. This is in consonance with the rule in statutory construction that in case of conflict between a special law and a general law, the special law should prevail.⁷¹ Thus, the prescriptive period provided for by the Act,⁷² and not that embodied in the Code of Civil Procedure, applies.⁷³

⁶⁸ Com. Act No. 65.

⁶⁹ *Id.*, Sec. 13.

⁷⁰ *Id.*, Sec. 1.

⁷¹ See TOLENTINO: COMMERCIAL LAWS OF THE PHILIPPINES, Vol. I, 6th ed., p. 439.

⁷² Com. Act No. 65, Sec. 3(6).

⁷³ The Court stated: "The claim that the prescriptive period of the Code of Civil Procedure should apply is untenable for the simple reason that this is a general law which applies only to cases not covered by any special act. The transaction under consideration is covered by the Carriage of Goods By Sea Act, and since this is a special act, its provisions must of necessity limit or restrict a law of general application. To hold otherwise would be to render nugatory the prescriptive provision contained in that special act."

VI. LAW ON TRADEMARKS, TRADENAMES, AND UNFAIR COMPETITION

A trademark or tradename, as a general rule, may consist of any symbol or any form of words, but as its office is to point out distinctively the origin or ownership of the articles to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trademark or tradename which, from the nature of the fact conveyed by its primary meaning, others may employ with equal truth and with equal right for the same purpose.⁷⁴ Names ordinarily regarded as common property, are, therefore, excluded. Among these are those which are "primarily geographically descriptive" or "primarily descriptive of a surname"⁷⁵ and those which are "merely descriptive" of the merchandise upon which they are used.⁷⁶ An example of the first would be "Wellington,"⁷⁷ and of the second, "Leather Shoes."⁷⁸ The term "Cosmopolite," however, not being descriptive of the canned fish for which it is used, may be registered as a trademark. As held by the Supreme Court in *Masso Hermanos v. Director of Patents*:⁷⁹

"* * * it does not give the name, quality, or description of the canned fish for which it is used. It does not even describe the places of origin, for it does not indicate the country or place where the canned fish is manufactured. It is a very general term which does not give the kind or quality of the goods." †

The rule with regard to names primarily geographical, however, is not rigid and inflexible. In an earlier case,⁸⁰ the Supreme Court held that when a geographical name is used in a fictitious sense merely to indicate ownership, independent of location, it is a good trademark or tradename.

The law⁸¹ affords protection to trademarks and tradenames. Thus, the person prejudiced may recover damages for infringement, and upon proper showing, may also obtain injunction for the protection of his right.⁸² Before he may do so, however, he must show

⁷⁴ *Jantzen Knitting Mills v. West Coast Knitting Mills*, 46 F. 2d 182, 184 (1931), citing *Elgin National Watch Co. v. Illinois Watch Case Co.*, 179 U.S. 665, 21 S. Ct. 270, 273, 45 L. Ed. 365.

⁷⁵ Rep. Act No. 166, Sec. 4(c).

⁷⁶ *Ibid.*

⁷⁷ *Ang Si Heng and Salustiana Dee v. Wellington Department Store, Inc. et al.*, G. R. No. L-4531, prom. January 10, 1953.

⁷⁸ *Masso Hermanos v. Director of Patents*, G. R. No. L-3952, prom. December 29, 1953.

⁷⁹ *Ibid.*

⁸⁰ *E. Spinner and Co. v. Neuss Hesslein Corp.*, 54 Phil. 224 (1930).

⁸¹ Rep. Act No. 166.

⁸² *Id.*, Sec. 23.

that his trademark or tradename is one which is appropriable as such, one to the exclusive use of which he is entitled.⁸³

Unfair competition is also discouraged.⁸⁴ What will constitute unfair competition will depend upon the facts of each particular case.⁸⁵ The test is not whether distinction between two competing products can be recognized when placed alongside each other, but whether, when the two products are not viewed together, a purchaser of ordinary prudence would be induced by reason of the marked resemblance in general effect to mistake one for the other despite differences in matters of detail.⁸⁶ In *Ang Si Heng and Salustiana Dee v. Wellington Department Store, Inc. et al.*,⁸⁷ the Supreme Court laid down several factors to be considered in determining whether unfair competition exists or not. These are the identity or similarity of names, the identity or similarity of the business involved, how far the names are a true description of the kind and quality of the articles manufactured or the business carried on, the extent of the confusion which may be created or produced, the distance between the place of business of one and the other, and others of similar nature.

In the *Ang Si Heng Case*,⁸⁸ both the parties involved dealt in similar articles of merchandise. And on the authority of the case of *Ng Khe v. Lover Bros. Co.*⁸⁹ it would seem that appellee would be guilty of unfair competition. According to the Court, the principle enunciated in that case is not directly applicable because,

“••• it is not ••• competition that the law seeks to prevent, but unfair competition wherein a newcomer in business tries to grab or steal away the reputation or goodwill of the business of another •••”⁹⁰

and in the present case,

⁸³ *Ang Si Heng and Salustiana Dee v. Wellington Department Store, Inc. et al.*, G. R. No. L-4531, prom. January 10, 1953; *Oguro v. Chua et al.*, 59 Phil. 271 (1934); Rep. Act No. 166, Sec. 23.

⁸⁴ *Alhambra Cigar and Cigarette Co. v. Mojica*, 27 Phil. 266, 271 (1914).

⁸⁵ *Ibid.*

⁸⁶ *Ralston Purina Co. v. Checker Food Products Co.*, 80 S.W. 2d 717, 719, 720 (1935).

⁸⁷ G. R. No. L-4531, prom. January 10, 1953, *supra*.

⁸⁸ *Ibid.*

⁸⁹ G. R. No. 46817, prom. April 18, 1941. This case held that it is not necessary that the articles of the petitioner be exactly similar to those handled by respondents in order that unfair competition may be said to arise. It is sufficient if the articles fall under the same general category of toilet articles.

⁹⁰ Fraudulent intent is a necessary ingredient of unfair competition. See *Queen Mfg. Co. v. Isaac Ginsberg and Bros.*, C. C. A. M., 25 F. 2d 284, 288 (1928).

“* * * although appellants' business appears to have been established a few years before the war and appellees' after liberation, yet it seems that appellees' business and goodwill are the products of their own individual initiative, not wrested by unfair competition from appellants' business and goodwill.”

VII. PRIVATE CORPORATIONS

A. DISREGARDING CORPORATE FICTION

In contemplation of law, a corporation is a juridical person distinct and separate from the personality of the members composing it.⁹¹ But this “statutory privilege” introduced for purposes of convenience, should be used for legitimate ends and to subserve the ends of justice.⁹² This concept, therefore, could not be extended to a point beyond its reason and policy. Thus, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, shield violation of law or contract, avoid taxation, or defend crime, the law will disregard the legal fiction of a juridical being and will regard the corporation as an association of persons.⁹³

In the case of *La Campana Coffee Factory Inc. v. Kaisahan*,⁹⁴ the Supreme Court disregarded the juridical personality of the La Campana Coffee Factory to thwart a design to defeat the ends of the law governing the relations of labor and capital.⁹⁵ The respondent association counting on sixty-six (66) members, all of whom are workers of the La Campana Gaugau and La Campana Coffee Factory, presented a demand for higher wages and more privileges. This demand was addressed to the “La Campana Starch and Coffee Factory,” by which name they sought to designate the La Campana Gaugau Packing and the La Campana Coffee Factory.⁹⁶ Upon denial of said demands, the dispute was certified to the Court of Indus-

⁹¹ *Wise & Co. v. Man Sun Lung*, S. C. G. R. No. 46997, Off. Gaz. Sup., Sept. 6, 1941, p. 10; see also *Butten v. Hoffman*, 61 Wis. 20, 20 NW 667 (1884); *Hall's Safe Co. v. Herring-Hall-Marvin Safe Co.*, 146 Fed. 37, 14 LRA (NS) 1182 (1906); *People's Pleasure Park Co. v. U.S. Emergency Fleet Corp.*, 258 U.S. 549, 66 Law Ed. 762 (1922); *Arnold v. Willits & Patterson*, 44 Phil. 634 (1923); *Manila Gas Corp. v. Collector*, IV LJ 785 (1936); *Walter Smith Co., Inc. v. Ford*, V LJ 124 (1937).

⁹² *Farmer's Loan and Trust Co. v. Pierson*, 130 Mis. 110, 222 NY Supp. 532 (1927), quoting Erland O. Erickson, writing in 13 Calif. Law Rev. 235.

⁹³ *Koppel v. Yatco*, Off. Gaz., Nov. 1947, p. 4604; *Cagayan Fishing Dev. v. Sandiko*, 36 Off. Gaz. 1118, May 1938; *U.S. v. Milwaukee Refrigerator*, 142 Fed. 247; see also I FLETCHER CYC. CORP., (Perm. ed. 1931), pp. 85-88.

⁹⁴ G. R. No. L-5677, prom. May 25, 1953.

⁹⁵ C. A. No. 103.

⁹⁶ Petitioner Tan Tong had been engaged since 1932 in the business of buying and selling gaugau under the trade name of “La Campana Packing”. In 1950, Tan Tong organized a family corporation known as “La Campana Coffee Factory Co. Inc.”, with himself and members of his family as sole incorporators and stockholders.

trial Relations. The petitioner moved to dismiss the action on the ground that the action was directed against two different entities with distinct personalities.⁹⁷ The Court of Industrial Relations denied the motion holding that while the coffee corporation is a family corporation, the "La Campana Gaugau Packing" is merely a business name; and furthermore, "there is only one management for the business of gaugau and coffee with whom the laborers are dealing regarding their work."⁹⁸

On appeal, the Supreme Court affirmed the order of the Court of Industrial Relations thus:

"* * * True, the coffee factory is a corporation and by legal fiction an entity existing separate and apart from the persons composing it, Tan Tong and his family. But it is settled that this fiction of law, which has been introduced as a matter of convenience to subsarve the ends of justice cannot be invoked to further an end subversive of that purpose * * *.

"Tan Tong appears to be the owner of the gaugau factory. And the coffee factory, though an incorporated business, is in reality owned exclusively by Tan Tong and his family. * * * In view of all these, the attempt to make the two factories appear as two separate business, when in reality they are but one, is but a device to defeat the ends of the law, and should not be allowed to prevail."⁹⁹

B. FRANCHISES

Franchises of corporations are of two kinds, namely, the corporate or general franchise and the special or secondary franchise. The former is the franchise to be or exist as a corporation, while the latter is generally understood to refer to those rights and privileges conferred upon existing corporations to use public property for their

⁹⁷ Petitioner wanted to point out that the La Campana Gaugau Packing and the La Campana Coffee Factory were two distinct juridical persons.

⁹⁸ As found by the Court of Industrial Relations, the two factories have but one Office, one management and one payroll, except after July 17, the day the present case was certified to the Court of Industrial Relations, when the person who was discharging the office of cashier for both branches of the business began preparing separate payrolls for the two. And above all, it should not be overlooked that, as also found by the industrial court, the laborers of the gaugau factory and the coffee factory were interchangeable, that is, the laborers from the gaugau factory were sometimes transferred to the coffee factory and vice-versa. So also, the ground floor and second floor of the gaugau factory contained hundreds of sacks of raw coffee piled behind the gaugau sacks and cans to be used as coffee containers. The delivery trucks were used for both coffee and gaugau.

⁹⁹ "In an appropriate case and in the furtherance of the ends of justice, a corporation and the individual or individuals owning all its stock and assets will be treated as identical, the corporate entity being disregarded where used as a cloak or cover for fraud or illegality. (13 Am. Jur. 160-161)" Cited in *La Campana Case*.

private business.¹⁰⁰ In the case of *People v. Quasha*,¹⁰¹ the Supreme Court had occasion to state that the constitutional provision—

“No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or other entities organized under the laws of the Philippines * * *.”¹⁰²

refers to the granting of a secondary franchise to an existing corporation.

The Court said:

“* * * Contrary to the lower court’s assumption, the Constitution does not prohibit the mere formation of a public utility corporation without the required proportion of Filipino capital. What it does prohibit is the granting of a franchise or other form of authorization for the operation of a public utility to a corporation already in existence but without the requisite proportion of Filipino capital. This is obvious from the context, for the constitutional provision in question qualifies the terms ‘franchise’, ‘certificate’, or ‘any other form of authorization’ with the phrase ‘for the operation of a public utility’, thereby making it clear that the franchise meant is not the ‘primary franchise’ that invests a body of men with corporate existence but the ‘secondary franchise’ or the privilege to operate as a public utility after the corporation has already come into being.”

C. SUBSCRIPTION TO STOCK

A conditional subscription is one which, by its express or implied terms, does not take effect so as to make the subscriber a stockholder, or confer or impose any rights or liabilities, until the fulfillment or performance of some condition.¹⁰³ In the case of *Trillana v. Quezon Colleges*,¹⁰⁴ the Supreme Court held that an action to enforce a subscription to stock must be predicated on the absolute acceptance by the prospective stockholder of the corporation’s offer to sell stock, and that, where a corporation offers its stock for subscription on the terms stated in its form letters and a prospective subscriber applies for subscription fixing her own plan of payment, attaching a condition before it could be enforced, the subscription contract can not ripen into an enforceable contract.¹⁰⁵

¹⁰⁰ *Gulf Refining Co. v. Cleveland Trust Co.*, (Miss.) 108 So. 158 (1926).

¹⁰¹ G. R. No. L-6055, June 12, 1953.

¹⁰² Art. XIII, Sec. 8, Constitution of the Philippines.

¹⁰³ See FISHER, F. C., *THE PHILIPPINE LAW OF STOCK CORPORATIONS*, (1929) pp. 90-93; See also IV FLETCHER, *op. cit. supra* note 91, p. 498.

¹⁰⁴ G. R. No. L-5003, prom. June 27, 1953.

¹⁰⁵ For similar rulings see *Lusk v. Stevens* (1937) index of unpublished decisions, 64 Phil. 1053; *Bank of P. I. v. Rigor*, 36 O. G. 295 (1937).

In that case, one Crisostomo applied for subscription to 200 shares of stock of the defendant. The application was written on a general form indicating that the applicant will enclose an amount as initial payment and will pay the balance in accordance with law and the rules and regulations of the college. In the letter actually sent by Crisostomo, she not only did not enclose any initial payment, but stated that she would pay for all her shares after she had caused fish to be caught (*Babayaran kong lahat pagkatapos na ako ay makapagpahuli ng isda*). Nothing shows that the defendant ever accepted the term of payment suggested, or if there was, that it ever came to Crisostomo's knowledge. On the claim against the applicant's estate for the subscription price, the Supreme Court said:

“* * * As the application of Damasa Crisostomo is obviously at variance with the terms evidenced in the form letters issued by the Quezon Colleges Inc., there was absolute necessity on the part of the College to express its agreement to Damasa Crisostomo's offer in order to bind the latter. Conversely, said acceptance was essential, because it would be unfair to immediately oblige the Quezon Colleges Inc., under Damasa's promise to pay the price of the subscription after she had caused fish to be caught. In other words, the relation between Damasa Crisostomo and the Quezon Colleges Inc., had only thus reached the preliminary stage whereby the latter offered its stocks for subscription on the same terms stated in the form letters, and Damasa applied for subscription fixing her own plan of payment,—a relation, in the absence, as in the present case, of acceptance by the Quezon Colleges Inc. of the counter-offer of Damasa Crisostomo, that had not ripened into an enforceable contract.”¹⁰⁶

D. REQUISITES FOR A VALID CALL

There are two alternative remedies under the Corporation Law for the enforcement of unpaid subscriptions. The first remedy is the institution and prosecution of delinquency proceedings,¹⁰⁷ while the second is resort to the courts.¹⁰⁸ It will be noted that personal notice and publication of the notice of call is expressly prescribed in the former.¹⁰⁹ On the other hand, no such requirement appears with respect to the latter. In view of this, the question may be asked: Is publication of call necessary only when the first remedy is pursued and not so required under the second? The Supreme Court had

¹⁰⁶ On other grounds, citing the case of *Taylor v. Uy Teng Piao*, 43 Phil. 873, 879 (1929), the Supreme Court held the proposal of Crisostomo to pay the value of the subscription after she had harvested fish, a facultative condition, in that it is dependent upon her sole will, therefore, a void obligation under Art. 1115 of the Civil Code (now Art. 1182, New Civil Code).

¹⁰⁷ See Sections 39 to 48, Act No. 1459.

¹⁰⁸ See Sec. 49, *id.*

¹⁰⁹ Sec. 40, *id.* “* * * The notice must also be published once a week for four consecutive weeks in some newspaper of general circulation * * *.”

occasion to resolve this question in *Lingayen Gulf Electric Power Co., Inc. v. Baltazar*.¹¹⁰ In that case, the Board of Directors of the plaintiff corporation held a meeting and adopted a resolution calling 50% of the unpaid subscription payable within 60 days after the receipt of the notice of call. Notice was given to the defendant-stockholder by registered mail demanding payment of the unpaid balance of his subscriptions according to the tenor of the resolution of the Board. However, no publication of the call was made in any newspaper. The defendant ignored the call and refused to pay. So, the corporation brought an ordinary action to collect the unpaid balance. In sustaining the contention of the defendant that the action was premature, the Supreme Court held that the requirement of publication is indispensable to a valid call for the payment of unpaid subscriptions by a solvent corporation, regardless of whether recourse is had through delinquency proceedings or enforcement of payment by ordinary suit. The Supreme Court explained its ruling thus:

"It will be noted that Sec. 40 is mandatory as regards publication, using the word 'must'. As correctly stated by the trial court, the reason for the mandatory provision is not only to assure notice to all subscribers, but also to assure equality and uniformity in the assessment on stockholders."¹¹¹

E. RELEASE OF STOCKHOLDERS FROM LIABILITY ON SUBSCRIPTION

The following questions could be asked on the release of stockholders from their liabilities on subscriptions of shares of stock. Does the corporation have the power to effect the release? If so, by what body? And what is the percentage of vote necessary?

The weight of authorities seems to imply that where a corporation is insolvent, it cannot release an original subscriber to its capital stock from the obligation of paying for his shares without a valuable consideration for such release.¹¹² The reason for this rule is that where the corporation is insolvent, subscriptions to the capital stock of the corporation constitute a fund to which creditors have a right to look for the satisfaction of their claims.¹¹³ However, if the corporation is solvent, the corporation may validly release stockholders wholly or partially from liability upon their unpaid subscriptions,

¹¹⁰ G. R. Nos. L-4842 and 6344, prom. June 30, 1953.

¹¹¹ See 5 THOMPSON ON CORPORATIONS (3d ed.) pp. 588-590.

¹¹² *Poizat v. Velasco*, 37 Phil. 802, 807 (1918): "It is now well settled that when the corporation becomes insolvent, with proceedings instituted by the creditors to wind up and distribute its assets, no call or assessment is necessary before the institution of suits to collect unpaid balance on subscriptions." See also *Lumanlan v. Cura*, 59 Phil. 746 (1934).

¹¹³ *Lumanlan v. Cura*, *supra*; *Poizat v. Velasco*, *supra*.

even as against creditors who became such after the release had been effected and those creditors at the time of the release who acquiesced thereto unless expressly forbidden from doing so by the terms of the statute or the charter of the corporation.¹¹⁴

The authorities are also to the effect that stockholders of a corporation may by appropriate resolution, when so authorized by the governing law or by valid provision of a corporate charter or by-laws, release themselves from the unpaid balance of their subscriptions.¹¹⁵

On the last question, the rule seems to be that where the law, by express terms or as construed by the courts permits stockholders, as a body, to make a valid release of their liability upon their subscriptions, unanimous vote of the stockholders is required.¹¹⁶

The same answers were arrived at in the *Lingayen Gulf* case. In the first place, the corporation in that case was a going and solvent concern.¹¹⁷ On the second question, while the court made no categorical statement in this regard, it proceeded on the assumption that the stockholders may validly effect a binding release. On the last point, the court adopted the rule of unanimity.¹¹⁸ The stockholders' resolution whereby release is attempted must have the concurrence of all stockholders of the corporation, except in particular circumstances, as where release is given pursuant to a bona fide compromise, or to a set off to a debt due from the corporation, in which case, the release will be effectual as against dissenting stockholders and subsequent and existing creditors.¹¹⁹

¹¹⁴ *Harvey v. Weitzenkorn*, 81 A. 447 (1911); *Great Eastern Tel. Co. v. Parry*, 162 U.S. 329 (1896); *Potts v. Wallace*, 146 U.S. 698 (1892); *Vercouere v. Golden State Land Co.*, 48 P. 375 (1897); *Anglo-American Land Mortg. Co. v. Dyer*, 64 NE 416 (1902).

¹¹⁵ See IV FLETCHER, *CYC. ON CORP.*, sec. 1743, p. 457; 2 THOMPSON ON CORPORATIONS (3d ed.) pp. 192-194.

¹¹⁶ See note 13; 18 C. J. 874, cited in the *Lingayen Gulf* case: "The general rule is that a valid and binding subscription for stocks of a corporation cannot be cancelled so as to release the subscriber from liability thereon without the consent of all the stockholders. Furthermore, subscription cannot be cancelled by the company, even under a secret or collateral agreement for cancellation made with the subscriber at the time of the subscription, as against persons who subsequently subscribed or purchased without notice of such agreement. * * * However, in particular circumstances, as where it is given pursuant to a bona fide compromise, or to set off a debt due from the corporation, a release, supported by consideration, will be effectual as against dissenting stockholders and subsequent and existing creditors."

¹¹⁷ This emphasis is made because an insolvent corporation may not validly effectuate a release.

¹¹⁸ See note 114.

¹¹⁹ In the *Lingayen Gulf* case, there could be no valid release because at least seven stockholders were absent from the meeting at which the resolution was adopted.

F. MINORITY STOCKHOLDERS' RIGHT TO DISSOLVE CORPORATION

While the right of the majority of the stockholders to maintain and prosecute an action for the dissolution of a private corporation should be conceded in view of the express provisions of the Corporation Law ¹²⁰ and the Rules of Court,¹²¹ nowhere in the provisions of said laws could be found a grant of similar right in favor of the minority stockholders. In the case of *Financing Corporation of the Philippines v. Teodoro*,¹²² the Supreme Court, however, held that although the prevailing rule is to deny to minority stockholders the right to maintain an action for the dissolution of the corporation, under certain circumstances, they are competent to bring the action.¹²³

In that case, a minority of the stockholders filed a complaint against the corporation and its president asking for the dissolution of the corporation due to alleged gross mismanagement and fraudulent conduct of corporate affairs by its officers. Pending trial, said minority stockholders asked that a receiver be appointed to take possession of its records and assets preparatory to the final settlement and distribution of its assets, which prayer was granted over defendant's objection. Defendant, therefore, applied for certiorari with preliminary injunction to set aside the order of appointment of a receiver. The contention was that the lower court had no authority to appoint a receiver because receivership is only an ancillary re-

¹²⁰ Sec. 62, Act No. 1459 provides: "In case the dissolution of a corporation does not affect the rights of any creditor having a claim against such corporation, then such dissolution may be effected by a resolution duly adopted by the affirmative vote of two-thirds of the members or of the stockholders owning at least two-thirds of the capital stock outstanding at a meeting to be held on the call of the directors after publishing notice of the time, place and object of the meeting for six consecutive weeks in some newspaper published in the place where said corporation is located, and if no newspaper is published in the place, then in some newspaper of general circulation in the Philippines, by registered mail at least thirty days prior to said meeting. * * *"

¹²¹ Rule 104, Sec. 1, Rules of Court provides: "The Court of First Instance of the province where the principal office of the corporation is situated may dissolve it upon the filing of a petition therefor signed by a majority of its board of directors or other officers having the management of its affairs, verified by its president or secretary or one of its directors, and setting forth all claims and demands against it, and that at a meeting of its members or stockholders called for that purpose its dissolution was resolved upon by a majority of the members, or, if a stock corporation, by the affirmative vote of the stockholders representing two-thirds of all shares of stock issued or subscribed."

¹²² G. R. No. L-4900, prom. August 31, 1953.

¹²³ The petition alleged as grounds for dissolution the following: (1) imminent danger of insolvency, (2) fraud and mismanagement, (3) violations of the corporation law and by-laws of the corporation, (4) failure to achieve fundamental purposes of the corporation, and (5) remaining assets are in danger of being further wasted, dissipated and lost.

medy; that the principal remedy sought was dissolution of the corporation; that a suit for dissolution of a corporation can be maintained only by the state through its legal counsel; that the minority stockholders have no right to maintain said action for dissolution; and that inasmuch as said action could not be maintained legally, the ancillary remedy for the appointment of a receiver has no basis.

In upholding the minority stockholders' right to maintain an action for dissolution and the validity of the appointment of a receiver pending trial, the Supreme Court held:

"* * * Although as a rule, minority stockholders of a corporation may not ask for its dissolution in a private suit, and that such action should be brought by the Government through its legal officer in a *quo warranto* case, at their instance and request, there might be exceptional cases where in the intervention of the state, for one reason or another, cannot be obtained, as when the state is not interested because the complaint is a matter between the stockholders and does not involve, in the opinion of the legal officer of the Government any of the acts or omissions warranting *quo warranto* proceedings, in which case minority stockholders are entitled to have such dissolution. When such action or private suit is brought by them, the trial court has jurisdiction and may or may not grant the prayer, depending upon the facts and circumstances attending to it * * *."

G. REMEDY ON REFUSAL TO CALL MEETING

The by-laws of a corporation may validly provide for the time and manner of calling and conducting regular or special meetings of its stockholders or members.¹²⁴ Meetings of stockholders or members of a corporation are important, because, unless the statute otherwise provides, they can act only in meetings properly convened and assembled.¹²⁵ Except in cases where the law expressly authorizes written assent, action by the stockholders or members individually, and not at a corporate meeting, is not an act of the corporation, and is void, even though a majority may concur, and even though their consent be expressed in writing, signed by them.¹²⁶ Ordinarily, an officer, such as the chairman of the board of directors or the president of the corporation, calls the meeting. The question may well then be posed: What would be the remedy in case the person authorized to call the meeting refuses to do so, or fails or neglects to call the meeting, or there is no person to call a meeting? The Supreme Court, in the case of *Ponce v. Encarnacion*,¹²⁷ held that in any of the foregoing events, any stockholder or member has the

¹²⁴ See Sec. 21, Act No. 1459.

¹²⁵ See FISHER, *op. cit.*, p. 191.

¹²⁶ *De la Vergne v. German Sav. Inst.*, 175 U.S. 40 (1899); *Pierce v. New Orleans*, 9 La. 397, cited in TOLENTINO, *COMMERCIAL LAWS OF THE PHILIPPINES*, Vol. II, 7th ed., p. 702.

¹²⁷ G. R. No. L-3883, prom. November 28, 1953.

right to call a meeting and to even preside at such meeting, upon application before the court, showing good cause therefor.¹²⁸

The court further stated that the requirement of "good cause" in the law is complied with "when the court is appraised of the fact that the by-laws of the corporation require the calling of a general meeting of the stockholders to elect the board of directors but the call for such a meeting has not been made." So also, the petition to call such a meeting need not be set for hearing with notice served upon the board of directors.¹²⁹

H. RIGHT OF DIRECTORS TO A HOLD-OVER

Under the Corporation Law, the first board of directors elected shall hold office for one year and until their successors are elected and qualified.¹³⁰ Thereafter, they are elected annually. The law, however, does not in express terms provide that the directors so elected may thereafter hold office until their successors are elected and qualified. According to Justice Fisher,¹³¹ the Corporation law inferentially allows the directors in office to hold-over by providing that, in the event of the failure to hold an election at the time specified by the by-laws, the directors may call a special meeting for the purpose.¹³² He is also of the opinion that notwithstanding the silence of the statute, such directors continue in office until their successors qualify and they are directors *de jure*.¹³³ In one case,¹³⁴ the Supreme Court also held that "upon failure of a quorum at any meeting, the directorate naturally holds over and continues to function until another directorate is chosen and qualified."

In the same *Ponce* case, however, it could be deduced from the opinion of the court that although the members of the board of directors have the right to continue as directors of the corporation after the expiration of the term for which they were elected, by virtue of a hold-over, they forfeit their right to said hold-over if the occasion was brought about by the failure to perform the duty incumbent upon them as in failure to call the meeting for election.¹³⁵

¹²⁸ Sec. 26, Act No. 1459 was applied by the court.

¹²⁹ The court stated that the order that is issued to call a meeting is likened to a writ of preliminary injunction or of attachment which may be issued *ex-parte*.

¹³⁰ See Sec. 29, Act. 1459.

¹³¹ FISHER, *op. cit.*, p. 227.

¹³² Justice Fisher cited Sec. 32 of Act No. 1459.

¹³³ Citing FLETCHER, *CYC. ON CORP.*, par. 808; 10 *Cyc.* 740; and THOMPSON ON CORPORATIONS, 2d ed, Sec. 1042.

¹³⁴ *Government v. El Hogar Filipino*, 50 Phil. 399 (1927).

¹³⁵ The court stated that the remedy in such a case is to resort to Sec. 26 of Act No. 1459.

VIII. CHATTEL MORTGAGE LAW

A. NATURE

A chattel mortgage is defined as a "conditional sale of personal property as security for the payment of a debt or the performance of some other obligation specified therein."¹³⁶ By virtue of this definition, it has thus been said that a chattel mortgage is a contract which purports to be, and in form is, a sale, but factually and intrinsically an accessory contract of security for the fulfillment of a principal obligation.¹³⁷ With the enactment of the new Civil Code, a definition was supplied which made it clear that a chattel mortgage, in form and substance, is not a sale but a mere contract of security which principally derives its vitality from another agreement the performance of which it secures.¹³⁸ To this end, the mortgage may be foreclosed upon the breach of the principal contract.

B. MANNER OF FORECLOSURE

A chattel mortgage may be foreclosed judicially or extra-judicially. Judicial foreclosure is not based on any particular provision of the Chattel Mortgage Law but rather upon general principles of law. But such foreclosure, so far as practicable, must conform with the provisions of the law.¹³⁹ On the other hand, extrajudicial foreclosure is specifically provided for in said law. The mortgagee, his executor, administrator or assign, may, after thirty days from the time the condition is broken, cause the mortgaged property, or any part thereof to be sold at public auction by a public officer at a public place in the municipality where the mortgagor resides, or where the property is situated, provided that at least ten days notice of the time, place and purpose of such sale has been posted at two or more public places in such municipality and the mortgagee, his executor, administrator or assign, shall notify the mortgagor or person holding under him and the persons holding subsequent mortgages of the time and place of sale, either by notice in writing direct to him, or left at his abode, if within the municipality, or sent by mail if he does not reside in such municipality at least ten days previous to the sale.¹⁴⁰

C. LANG V. PROVINCIAL SHERIFF OF SURIGAO

Obviously, the Supreme Court once said,¹⁴¹ the procedure provided by law for the foreclosure of a mortgage must be substantially

¹³⁶ Sec. 3, Act No. 1508.

¹³⁷ *Bachrach Motor Co. v. Summers*, 42 Phil. 3, 8 (1921).

¹³⁸ Art. 2140, Rep. Act No. 386.

¹³⁹ *Bachrach Motor Co. v. Summers*, *supra*.

¹⁴⁰ Sec. 14, Act No. 7508.

¹⁴¹ *Abuton v. Paler*, 54 Phil. 519 (1930).

carried out. It is no answer for a party to state that no objection on this score was interposed in the lower court. The question is one which goes to the jurisdiction of the court, and a question of this nature may be raised for the first time on appeal. The reason for this is apparent. The abiding interest of the law is the protection of property rights. Every deviation, therefore, from the procedure that the laws has devised and which substantially diminishes the protection of the rights of the persons for whose benefit the procedure was prescribed, is tainted with illegality and looked upon with disapproval.¹⁴² The Supreme Court has proved vigilant in this respect.

An illustrative example is furnished by the case of *Lang v. Provincial Sheriff of Surigao*.¹⁴³ In that case, after the failure of the mortgagor to pay the mortgage indebtedness, a notice of the extrajudicial foreclosure sale was posted by the sheriff on November 1, 1949. The sale of the mortgaged property took place on November 7, 1949, at which the highest bidder was L. F. Lang.¹⁴⁴ The mortgagee assailed the validity of the sale on the ground that the ten-day period of notice required by the Chattel Mortgage Law was not complied with. On the other hand, it was contended by L. F. Lang that the sale was valid because the notice required by the law was for the exclusive benefit of the mortgagor and the junior mortgagees and that, lack of notice cannot therefore be invoked by the senior mortgagee in seeking a declaration of nullity of the sale. Moreover, Lang argued, there was an express waiver of notice by the mortgagor in the deed of mortgage, which waiver impliedly bound the mortgagee for the reason that it was included in the mortgage deed at his instance. Both contentions were rejected by the Supreme Court.

It is true that in *Riosa v. Stilianopulos*,¹⁴⁵ the court held that the mortgagor may validly waive his right to have the foreclosure sale held at his place of residence or at the place where the mort-

¹⁴² *Bachrach v. Golingco*, 39 Phil. 138 (1918); *Mahoney v. Tuason*, 39 Phil. 952 (1919).

¹⁴³ G. R. No. L-4083, prom. August 31, 1953.

¹⁴⁴ This is the second sale. This case involves three auction sales. The first sale was on October 8, 1949. Award was made to the mortgagee. Due, however, to the disagreement between the sheriff and the vendee as to the properties covered by the sale, it was agreed between them to hold another sale on November 10, 1949. In violation of this agreement, the sheriff held the second sale on November 7. This sale was declared void by the provincial fiscal. Consequently, a third sale was made. In this decision, the Supreme Court for reasons above set forth declared the first and second sales fatally defective and upheld the validity of the third sale in favor of the mortgagee.

¹⁴⁵ 67 Phil. 422 (1939).

gaged property is situated.¹⁴⁶ Similarly, in *National Bank v. De Poli and Wise & Co.*,¹⁴⁷ the creditor was authorized by the deed of mortgage, in case of violation of the conditions of the contract, to sell the mortgaged goods or part thereof at a private sale without previous notice or advertisement of any kind, and without the intervention of the mortgagor, for the purpose of applying the proceeds of the sale to the payment of the debt. This stipulation was held valid under the Civil Code.¹⁴⁸ Again, in the case of *Peterson v. Azada*,¹⁴⁹ a similar stipulation was held to be within the authority granted by the aforesaid article to the contracting parties. In that case, to secure payment of a loan, the debtor turned over to his creditor certain jewels listed at the bottom of the document evidencing the loan, with a note to the effect that in case the debt was not paid on or before its maturity, the creditor was authorized to sell said jewels with the intervention of the debtor at the best obtainable price in the market. The court held that this stipulation was not contrary to law, morals, or public order, and was valid.

The principles enunciated in the above-cited cases are universally accepted principles in the law of chattel mortgages. But it is to be noted that they merely stand for the proposition that rights granted by law may be waived by the person for whose benefit they are intended, provided that such waiver is not contrary to public interest, or public order or prejudicial to a third person.¹⁵⁰ The waiver therefore operates only as to one's rights and cannot be made to prejudice another person who did not make any waiver.

In the *L. F. Lang* case, the plaintiff argued, and the lower court held, that the mortgagee waived his objection to the failure of the sheriff to give him sufficient notice in advance and opportunity to bid because the objection to the illegality was made only after learning that his request for postponement was not granted, and because

¹⁴⁶ Art. p. 426. "It is a general principle, also clearly provided by law, that a person may waive any right conferred on him by law, unless such waiver is prohibited or is not authorized by law because against public interest or prejudicial to a third person.

"After a thorough examination and analysis of the clauses of the mortgage executed by the petitioner, we failed to find in the waiver anything which might be against public interests or prejudicial to a third person.

"If the sale was effected in Legaspi where the respondent had its main office, and not in Tabaco where the petitioner resides, it was because the latter so expressly agreed and consented thereto."

¹⁴⁷ 44 Phil. 763 (1923).

¹⁴⁸ Art. 1255 (now Art. 1306) of the Civil Code provides: "The contracting parties may establish any pacts, clauses and conditions they may deem advisable, provided they are not contrary to law, morals, or public order."

¹⁴⁹ 8 Phil. 432 (1907).

¹⁵⁰ Art. 4, Civil Code (now Art. 6).

he entered a bid on November 1, 1949, the date agreed upon by him and the sheriff for the holding of the foreclosure sale. In arriving at this conclusion, the lower court reasoned that the mortgagee may not at the same time be allowed to attack the sale if his bid is rejected, and approve of it if his bid is accepted. On this point, the Supreme Court declared thus:

"The fallacy of the reasoning of the court in both arguments is evident. As to the first, the mortgagee did not expect, as he had no right to assume, that his request for postponement was to be denied, because he was not given sufficient opportunity to bid, and in all fairness, the sale should have been postponed. Of course, the attack against the validity of the sale could come only after he was advised of the denial of his request for postponement; he could not put the cart before the mule. To ask for the postponement of a sale is not to agree thereto on the date it actually took place, which was objectionable. If it may be considered a waiver of the objection at all, it is so only conditionally, i.e., that the proceedings already had been allowed to stand, but the mortgagee will not be denied the right to bid and will be granted the opportunity to do so.

"The same may be said of the submission of the mortgagee's bid on November 10, 1949. As it was agreed upon between him and the sheriff that the sale was to be bound by said agreement and still allow his bid to be considered, even if the sale had actually been made. If there was a waiver also, it was likewise a conditional one, i.e., that the sale continue but that his bid be considered presented on time; plaintiff, in effect, would want to accept the waiver only and reject the condition imposed in the waiver; he would want to eat his cake and still have it too. The claim of the plaintiff is clearly unfair and unjust and cannot be justifiable in law or equity."

And, speaking of waiver, the Court went further on to say:

"A waiver must be express. If it is to be implied from conduct merely, said conduct must be clearly indicative of a clear intent. Especially where, as in the case at bar, the mortgagee loses a very valuable right, such as the right to participate in a bid, in order to recover the loan that he has granted on the security of the mortgage, or as much thereof as is clear, positive waiver, made with the full knowledge of the circumstances, must be required. In the case at bar, the conduct from which the alleged waiver is implied is neither express, nor clear or positive, but implied from the request for postponement of the bid, and the presentation of such bid three days later. These two clearly imply an assertion that the right to bid still existed, not a waiver thereof. They may not be interpreted as a waiver of the objection to the illegality of the sale, but a re-assertion of the right to an opportunity to bid. And as the trial court clearly committed error in holding that the mortgagee had waived its objection, the sale, which was held without the ten days prior notice to the mortgagee, must be declared, as we hereby declare it to be, null and void."

It would seem clear, from the language of the Supreme Court, that the notice required by law is not merely for the benefit of the

mortgagor and the junior mortgagees, but for the benefit of the senior mortgagee as well. While ordinarily, the senior mortgagee ought to know the precise date of the extrajudicial foreclosure sale for the reason that it is he who fixes said date, yet, a case may arise, as in the case at bar, where the mortgagee may be uninformed as to the date of the sale, on account of the unilateral action of the sheriff in altering the date of foreclosure sale as previously determined by the mortgagee. In such case, the validity of the sale may be assailed by the mortgagee on the ground of premature sale. Equally efficacious, and more true to reason, would be an attack based on the principle of agency. Thus, in the same case of L. F. Lang, the plaintiff-appellee moved the Supreme Court to reconsider its decision, contending that the law on extrajudicial foreclosure sale contains no provision that notice of the sale be given by the executing mortgage creditor. In its resolution ¹⁵¹ upon the motion, the court explained the absence of a provision requiring notice to the mortgagee and ruled that the sheriff, in an extrajudicial foreclosure sale, acts merely as an agent of the mortgagee, thus:

"The absence of such provision is explained by the fact that it is the mortgagee who causes the mortgaged property to be sold, and the date of the sale is fixed upon his instructions because it is he who causes the sale and controls its details. That the creditor should fix the date of the sale is clearly to be inferred from the provision that it is he who is required by the law to give notice of the sale and its date to the mortgagor. When, as in the case at bar, the sheriff sets a date for the sale different from that fixed for it by the creditor, in violation of the orders of the latter or of the understanding he had with the creditor, the sheriff exceeds the limits of his authority, and the sale so executed is null and void."

Another point decided by the court in the *Lang* case refers to the perfection of the foreclosure sale. In such sale, just as in any ordinary contract of sale, there must be a specific subject. In addition, there must be a meeting of the minds with respect to the subject matter of the contract. In the absence of such understanding, no sale can be considered perfected. Accordingly, where the purchaser thought that his bid embraced all the properties included in the mortgage but the sheriff who conducted the sale merely intended the sale of a portion thereof, the sale is fatally defective, and the validity of the same cannot be successfully maintained in the judicial forum.

¹⁵¹ Prom. September 29, 1953.

IX. INSURANCE ACT

A person seeking to recover on an insurance policy must show that the risk from which the loss occurred is covered by the policy.

In the case of *Macondray and Co. Inc. v. The Connecticut Fire Insurance Co.*,¹⁵² a quantity of canned mackerel was loaded on a vessel in New York bound for the Philippines. An insurance policy was secured in favor of Banton Corporation, the shipper. This policy was indorsed by said shipper to Macondray and Co. Inc., the consignee. Some of the cargo were lost and the rest damaged in the voyage. The cause of the loss and damage was unknown.

The ocean cargo policy was by its terms made subject to the provisions of an open policy. The policy itself did not purport to cover all risks. On the contrary, it was there provided that "unless otherwise expressly stated herein, this insurance covers only the risk of breakage, leakage or rust when caused by stranding, sinking, burning or collision of the vessel." The open policy was not submitted in evidence. The defendant presented no evidence in support of its defense and submitted the case on the evidence presented by the plaintiff.

On the above facts, the Supreme Court, in denying recovery, ruled thus:

"The certificate of insurance is subject to the terms of the open policy. As the cause of the loss or damage was not established by the appellant and a copy of the open policy was not presented in evidence to show whether said loss or damage is receivable from the appellee under the contract of insurance, the appellant's claim cannot prosper. The express statement that the certificate was subject to the open policy would be meaningless if the terms of the latter may be entirely ignored."

¹⁵² G. R. No. L-5184, prom. May 29, 1953.