COMMERCIAL LAW

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CORPORATIONS

"TRANSACTING BUSINESS" REDEFINED

Under the Corporation Law [1] a foreign corporation or corporation formed, organized, or existing under any laws other than those of the Philippines cannot transact business in the Philippines or maintain by itself or assignee any suit for the recovery of any debt, claim, or demand whatever, until it shall have obtained the necessary license prescribed by law. So that where the foreign corporation does not in fact, as this is determined by the courts, transact business in the Philippines, it may, like any other domestic corporation avail of judicial redress to enforce obligations owing to it.[2] The important point of inquiry centers therefore on the signification of the term "transaction of business." The Supreme Court has invariably taken this term to signify a continuity of business activities [3] and has accordingly laid down the general rule that a foreign corporation transacts business in a state if it carries on a substantial part of its ordinary business there.[4] Thus, even if a foreign corporation pursues within a state a particular business activity which is part of the general business engaged in by such corporation, the particular business activity cannot be considered as a "transaction of business" if it is in fact a single or isolated act performed in the state by the foreign corporation. Because here, there is no continuity and substantiality of business operations.[5]

There is, however, an exception to this rule, that is, notwithstanding the fact that a business transaction by a foreign corporation in a state is single and isolated, such transaction may still come within the term "transaction of business" if it shows an intent on the part of the corporation to engage in business in the

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* Notes and Comments Editor, *Philippine Law Journal*, 1962-63.

[1] Sec. 69, Act No. 1459.

[2] Marshall-Wells Co. v. Elser and Co., Inc., 46 Phil. 71.

[3] Whitaker v. Rafferty, 38 Phil. 508.

[4] This rule rests on a long line of American decisions, notably in Wood v. Ball, 190 N.Y. 217, 83 N.E. 21; General R. Signal Co. v. Virginia, 246 U.S. 500, 38 S. Ct. 360; and Bullfrog Goldfield v. Jordan, 174 Cal. 342, 163, p. 40.

[5] Cooper Mfg. Co. v. Ferguson, 113 U.S. 727, 5 S. Ct. 739, 28 L. Ed. 1137; Pacific Micronisian Line v. N. Baens del Rosario, G.R. No. L-7154, Oct. 23, 1954.

state.[6] This, it has been observed, is the true test in determining whether or not a foreign corporation is "transacting business" within a state.[7]

This year, this test was applied by the Supreme Court in a case[8] involving a domestic corporation, the Far East International Import and Export Corporation, and a Japanese corporation, the Nankai Kogo, Inc. Ltd. The contract between the parties stipulated that the Far East would sell to the Nankai some 5,000 metric tons of steel scrap and that the Nankai would open a Letter of Credit with the China Banking Corporation, a domestic bank, to secure the payment. The parties agreed that the China Bank would pay the Far East the purchase price for the scrap only upon the presentation by the Far East of the bill of lading evidencing the fact of shipment to the Nankai. All these negotiations, including the final signing of the contract, took place in Manila, the Nankai being represented by two of its officers. Thereafter, the Far East began to ship the steel scrap on board the Everret Steamship Co., and the Nankai opened in the China Bank the Letter of Credit. The Far East, however, failed to deliver the whole of the 5,000 metric tons of scrap owing to the death of Magsaysay and the succession to the presidency of Garcia who terminated the license of the Far East to export steel scrap. The Far East was therefore able to ship only 1,058.6 metric tons. When it demanded from the Everret Steamship Co. a set of the bill of lading evidencing the shipment of the 1,058.6 metric tons of scrap so that payment thereof may be effected against the China Bank, the Everret refused, so the Far East filed an action for Specific Performance, damages, a writ of preliminary mandatory injunction directed against the Nankai, to maintain the Letter of Credit, and the shipping company, to issue the bill of lading. By Special Appearance, the Nankai filed a Motion to Dismiss on grounds of lack of jurisdiction over the person of the defendant and over the subject matter, failure to state a cause of action and failure on the part of the Court to serve it with summons.

The plaintiff alleged, on the other hand, that the court had jurisdiction over the defendant corporation since the latter was doing business in the Philippines with office address at the Luneta Hotel where the two officers of the defendant resided and were served with summons.

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[6] Woiser Land Co. v. Bohrer, 78 Or. 202, 152 P. 869.
[7] Guevara, *The Corporation Law* (1957), p. 164.
[8] Far East International Import and Export Corp. v. Nankai Kogo Ltd., *et al.*, G.R. No. L-8164, December 29, 1962.

The Supreme Court, in sustaining the plaintiff, held, among others,[9] that the defendant was within the jurisdiction of the court inasmuch as it was doing business in the Philippines. "It is difficult," the Court said, "to lay down any rule of universal application to determine when a foreign corporation is doing business in the Philippines. Each case must turn upon its own peculiar facts and upon the language of the statute applicable. But from the proven facts obtaining in this case, the appellant's defense of lack of jurisdiction appears unavailing . . . The testimony of Atty. Ocampo, that appellant was doing business in the Philippines was corroborated by no less than (one of the appellant's officers) that he was sent to the Philippines by his company to look into the operation of mines, *thereby revealing the appellant's desire to continue engaging in business here, after receiving the shipment of the scrap iron, making the Philippines a base thereof.*

"The rule that the doing of a single act does not constitute business within the meaning of statutes prescribing the conditions to be complied with by foreign corporations must be qualified to the extent that *a single act may bring the corporation within the purview of the Statute where it is an act of the ordinary business of the corporation. In such case, the single act or transaction is not merely incidental or casual, but is of such a character as distinctly to indicate a purpose on the part of the foreign corporation to do other business in the state*, and to make the state a basis of operations for the conduct of a part of the corporation's ordinary business." (Emphasis supplied).

CREDITOR MAY FOLLOW ASSETS OF DISSOLVED CORPORATION

The Corporation Law does not provide for it, but it is law nonetheless, that a corporation may not evade its liability to its creditors by the simple expedient of effecting its dissolution and distributing its assets to the stockholders. In *Tan Tong Bio v. Commissioner of Internal Revenue*[10] where the Commissioner, who sought to slap at the defendant corporation its tax liability, found that the corporation had been earlier dissolved and its assets distributed to the stockholders. The Commissioner brought action against the stockholders to recover said assets for the satisfaction of the corporation's tax liability, and the Court sustained him, holding that the creditor of a dissolved corporation may follow its assets once they have

[9] Lack of jurisdiction was only one of the issues involved. The Court also discussed principles pertaining to the fields of Conflict of Laws and Procedure.

[10] Tan Tong Bio v. Commissioner of Internal Revenue, G.R. No. L-15778, April 25, 1962.

passed into the hands of the stockholders. The dissolution of a corporation, the Court said, does not extinguish the debts due or owing to it since a creditor may follow its assets as in the nature of a trust fund into the hands of the stockholders. "The hands of the government cannot, of course, collect taxes from a defunct corporation but it does not lose thereby any of its rights to assess taxes which had been due from the corporation and to collect them from persons who by reason of transactions with the corporation, hold property against which the tax can be enforced."

PIERCING THE VEIL OF CORPORATE ENTITY

Just as a corporation cannot escape its debts through dissolution, so can the stockholders not avoid their liability by claiming that they are what they are: sheer stockholders of a corporation whose personality is distinct and separate from theirs. For while a corporation once formed indeed assumes a juridical personality which is considered distinct and separate from the persons composing it, this legal fiction cannot be used to cover up some policy that is not recognized by law.[11] So that, as happened in *Gregorio Palacio, et al. v. Fely Transportation Co.*,[12] a person cannot make an exit from his subsidiary civil liability resulting from the conviction of his driver by forming a corporation which he presents to be the operator of the vehicle that caused the injury. Invoking an earlier decision,[13] the Court found the defendant in the Palacio case liable, the plaintiff having shown that the defendant incorporated the Fely Transportation with himself, his wife, his son and his daughters as the stockholders, evidently to avoid his subsidiary civil liability. This is one case, said the Court, where the corporation cannot be heard to say that it has a personality distinct and separate from that of its members when to allow it to do so would be to sanction the use of fiction of corporate entity as a shield to further an end subversive of justice.

WHEN DOES A STOCK CORPORATION EXIST?

Section 3 of Act 1459 distinguishes between a stock and a non-stock corporation. This distinction acquires special relevance in the matter of tax payments. The law defines stock corporations as those which have a capital stock divided into shares and are author-

[11] Laguna Transportation Co. Inc. v. Social Security System, G.R. No. L-14606, April 28, 1960.

[12] G.R. No. L-15121, August 31, 1962.

[13] La Campana Coffee Factory, *et al.* v. Kaisahan ng Mga Manggawa, *et al.*, G.R. No. L-5677, May 25, 1953.

ized to distribute to the holders of such shares dividends or allotments of the surplus profits on the basis of the shares held. These then are the requisites for the existence of stock corporations: First, there must be a capital stock divided into shares; Second, there must be an authority to distribute to the holders of such shares dividends or allotment of the surplus profits. Where these requisites are absent, a corporation cannot be considered as a stock corporation and, accordingly, the Bureau of Internal Revenue cannot impose the tax pertaining to stock corporations. This rule holds true even if the entity possesses a corporate form or is engaged in an undertaking that is commercial in nature. For the actual purpose of a corporation is not determined by these standards. Extrinsic evidence, including the by-laws and the method of operation of the corporation, may be shown to prove that it is in truth non-stock. Hence, since the two aforementioned requisites were not present in *Collector v. Club Filipino, Inc.*[14] the Club was declared by the Court as non-stock and free from the Collector's assessment.

LIQUIDATION OF ASSETS OF DEFUNCT CORPORATION MAY BE CONSIDERED AS A CONVEYANCE OF PROPERTY TO STOCKHOLDERS

A corporation is a juridical person distinct from the members composing it. Necessarily, properties registered in the name of the corporation are owned by it as an entity separate and distinct from its members. But shares of stock, while they constitute personal property, do not represent property of the corporation for the corporation has property of its own consisting chiefly of real estate.[15] A share of stock only typifies an aliquot part of the corporation's property, or the right to share in its proceeds to that extent when distributed according to law and equity;[16] but its holder is not the owner of any part of the capital of the corporation.[17] Nor is the stockholder entitled to the possession of any definite portion of its assets.[18] The stockholder is not a co-owner or tenant in common of the corporate property.[19]

On these bases, the Court, in the case of *Stockholders of F. Guanzon and Sons, Inc. v. Register of Deeds*,[20] held that the certificate of liquidation of the appellant corporation was not merely a

[14] G.R. No. L-12719, May 31, 1962.
[15] Nelson v. Owen, 113 Ala. 372, 21 So. 75; Morrow v. Gould, 145 Iowa I, 123 N.W. 743.
[16] Hall and Faley v. Alabama Terminal, 173 Ala. 398, 56 So. 235.
[17] Bradley v. Bauder, 36 Ohio St. 28.
[18] Gottfried v. Miller, 104 U.S. 521; Jones v. Davis, 35 Ohio St. 474.
[19] Harton v. Honston, 166 Ala. 317, 51 So. 992.
[20] G.R. No. L-18216, Oct. 30, 1962.

distribution of the corporation assets but actually a conveyance or transfer of property from the corporation to the stockholders, and, therefore, the corresponding documentary stamps amounting to ₱940.45 and registration fees amounting to ₱430.00, should have been paid as prerequisite to the registration of the certificate of liquidation.

The certificate of liquidation in question was executed by five stockholders of the appellant corporation by virtue of a resolution of the stockholders dissolving the corporation. It proportionally distributed among the stockholders, as liquidating dividends, the assets of said corporation. The Register of Deeds of Manila, however, refused to register said certificate on the ground that since the certificate of liquidation represented a transfer of assets from the corporation to the stockholders, the registration fees should have been paid and the documentary stamps affixed on the certificate. The appellants contended that inasmuch as the certificate of liquidation was merely a distribution of the assets of the corporation which had ceased to exist, it did not have to contain an intricate statement of the properties involved, the documentary stamps to be affixed thereon should only be ₱0.30 and no registration fees should be required.

The Court held for the Register of Deeds, stating that "the act of liquidation made by the appellants of the corporation's assets is not and cannot be considered a partition of community property, but rather a transfer or conveyance of the title of its assets to the individual stockholders, since the purpose of the liquidation, as well as the distribution of the assets of the corporation, is to transfer their title from the corporation to the stockholders in proportion to their shareholdings,—and this is in effect the purpose which they seek to obtain from the Register of Deeds,—the transfer cannot be effected without the corresponding deed of conveyance from the corporation to the stockholders."

SECURITIES AND EXCHANGE COMMISSION

COURT OF FIRST INSTANCE CANNOT REVIEW DECISION OF SECURITIES AND EXCHANGE COMMISSION

The Rules of Court [21] expressly grants a party aggrieved by a decision of the Securities and Exchange Commission the remedy of appeal to the Supreme Court, thus: Within thirty days from the notice of an order or decision issued by the . . . Securities and Ex-

[21] Sec. 1, Rule 43.

change Commission, any party aggrieved thereby may file in the Supreme Court a written petition for review of such order or decision. Similarly, under Sec. 35 of the Securities Act,[22] any person aggrieved by an order issued by the Commission in a proceeding under the Act to which such person is a party or who may be affected thereby may obtain a review of such order in the Supreme Court by filing in such Court within 30 days after entry of the order a written petition . . .

The law is clear and a judge of the Court of First Instance cannot take upon himself the power to review the Securities and Exchange Commission's decision. This was the ruling of the Court in *Pineda v. Hon. Gregorio Lantin* [23] where an action was brought in the Manila Court of First Instance to restrain the Securities and Exchange Commission from proceeding with the investigation of an alleged anomaly committed by the President of a corporation. The Court upheld the jurisdiction of the Securities and Exchange Commission as exclusive of the appellate power of the Court of First Instance.

BANKING

A COMMERCIAL BANK CANNOT ACQUIRE REAL ESTATE FROM A PERSON CIVILLY LIABLE TO THE BANK

The Constitution [24] prohibits any individual, corporation or association not qualified to acquire or hold lands of the public domain from owning, except in cases of hereditary succession, private agricultural land.

The General Banking Act [25] however, allows any commercial bank to purchase, hold and convey real estate, among others, if such real estate is conveyed to it in satisfaction of debts previously contracted in the course of its dealings. But in no case can the bank hold the possession of such real estate for a period longer than five years.

The question is, what is the scope of the word "debts"? In the case of *Register of Deeds v. China Banking*,[26] the defendant Bank acquired certain real properties from a person who was civilly liable to it. The Court, in holding that such acquisition cannot be made, stated that the term "debts" referred to in section 25 of the Banking

[22] Com. Act No. 83, as amended by Rep. Act No. 635.
[23] G.R. No. L-16114, Nov. 29, 1962.
[24] Sec. 5, Title XIII.
[25] Sec. 25, par. C, Rep. Act No. 337.
[26] G.R. No. L-1194, April 28, 1962.

Act, refers only to those resulting from previous loans and other similar transactions made or entered into by a commercial bank in the ordinary course of its business as such. The term does not encompass a person's civil liability to a bank, for this is not, properly speaking, a debt. Invoking its decision in a previous case,[27] the Court further stated that "the terms of the Constitution are absolute against the transfer of dominion over the land, i.e., the ownership over land, even for a limited period of time."

CENTRAL BANK IS DISTINCT AND SEPARATE FROM GOVERNMENT

The Central Bank of the Philippines is an entity with a personality distinct and separate from that of the Government. As such, it has power and authority to hire a lawyer to assist in the prosecution of claims in favor of the Central Bank and, consequently, make disbursements for attorney's fees.[28]

MARITIME LAW

WHEN SHIPPING CONTRACT COMES WITHIN MARITIME JURISDICTION

Among the cases classified by the Judiciary Act of 1948[29] as coming within the original jurisdiction of Courts of First Instance, are those actions in admiralty and maritime jurisdiction, irrespective of the value of the property controversy or the amount of the demand. What must be determined therefore is whether an action is one that can be properly considered as coming within admiralty and maritime jurisdiction.

If, for instance, an insurance company brings an action against an arrastre operator to recover the loss of certain goods shipped from New York to Manila and which the importer insured with the insurance company, and the amount of loss does not exceed five thousand pesos, is the action within the admiralty jurisdiction of the Court of First Instance? Or is it, by reason of the amount involved, within the jurisdiction of the Municipal Court?

The Supreme Court, in *Insurance Co. of North Ameirca v. Delgado*,[30] ruled that such a case does not deal with any maritime matter or with the administration and application of any maritime law, hence, it comes within the jurisdiction of the Municipal Court

[27] Ong Sui Si Temple v. Register of Deeds, G.R. No. L-6776, May 21, 1955.
[28] Guevara v. Gimenez, G.R. No. L-17115, November 30, 1962.
[29] Sec. 44(d), Rep. Act No. 296, as amended.
[30] G.R. No. L-151556, March 30, 1962.

(or the Justice of the Peace Court, as the case may be) the amount involved being less than five thousand pesos.[31] It was, said the Court, the duty of the arrastre operator, as custodian of the goods, to take good care of said goods and to turn them over to the parties entitled to them, so that the only real issues were: whether or not the operator had fully discharged such duty and, if not, to what extent could the operator be held liable? The determination of the questions, according to the Court, does not require the application of any maritime law and cannot affect either navigation or maritime commerce. And the foreign origin of goods is immaterial. "To give admiralty jurisdiction over a contract as maritime such contract must relate to the trade and business of the sea; it must be essentially and fully maritime in character; it must provide for maritime services, maritime transactions or maritime casualties."

The same observation was made by the Court in the similar case of *Atlantic Mutual Insurance Co. v. Manila Port Terminal, et al.*[32] In both these cases, it must be noted however, that the goods were lost *while the same were in the possession of the arrastre contractor. Where the goods are lost while in transit,* the case becomes one in admiralty jurisdiction. This was impliedly held by the Court in the case of *Stevens v. Lloyd* [33] which will be touched on presently.

CARRIERS

ACTION IN MUNICIPAL COURT SUSPENDS ONE-YEAR PRESCRIPTIVE PERIOD IN COM. ACT NO. 65

The one-year period under Commonwealth Act No. 65 in relation to the Carriage of Goods by Sea Act, within which the liability of carriers, based upon a contract of carriage of goods by sea, may be enforced by suit, was held by the Court in *Stevens v. Lloyd* [34] as interrupted by a complaint erroneously filed in the Municipal Court by the plaintiff. In this case, an action was brought by the plaintiff in the Municipal Court of Manila to recover from the defendant the value of certain missing goods shipped from Hamburg to Manila, on April 27, 1960. On June 13, 1960, however, the Municipal Court

[31] Under Sec. 88 of the Judiciary Act of 1948, in all civil actions, . . . arising in his municipality or city, and not exclusively cognizable by the CFI, the justice of the peace and the judge of a municipal court shall have exclusive original jurisdiction where the value of the subject matter or amount of the demand does not exceed five thousand pesos, exclusive of interests and costs . . .

[32] G.R. No. L-17047, April 28, 1962. See also: Insurance Co. of North America v. Manila Port Service, *et al.*, G.R. No. L-16573, November 29, 1961; Macondray and Co. Inc. v. Delgado Bros., G.R. No. L-13116, April 28, 1960.

[33] G.R. No. L-17730, Sept. 29, 1962.

[34] *Supra.*

dismissed the plaintiff's action on the ground that it involved a maritime matter. On June 24, 1960, the plaintiff filed an action in the Manila Court of First Instance and the defendant interposed the defense of prescription since the plaintiff was notified by the defendant of the arrival of the imported goods on May 21, 1959, or more than a year before the action in the Manila Court of First Instance was instituted. The Court held that the position of the defendant was untenable not only because under Article 1155 of the Civil Code, the prescription of actions is interrupted when they are filed before the court, but because the provisions of Section 49 of Act No 190 are clear to the effect that "if in an action commenced, in due time, a judgment for the plaintiff be reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action has, at the date of such reversal or failure, expired, the plaintiff . . . may commence an action within one year after such date . . ." In this case, the action commenced by the plaintiff in the Municipal Court on April 27, 1960 was dismissed on June 13, 1960 or over 20 days after the expiration of the period of one year, beginning from May 21, 1959, within which plaintiff's action could be brought pursuant to Commonwealth Act No. 65, in relation to the Carriage of Goods by Sea Act. Under such section, the period within which the plaintiff could initiate the present case was renewed, therefore, for another year beginning from June 14, 1960.

SHIPPER BOUND BY STIPULATION IN CONTRACTOR'S MANAGEMENT CONTRACT

Ordinarily, an arrastre operator is liable to the full extent of the value of the goods lost while they were in his custody where such goods have been declared by the shipper and the corresponding charges have been paid for by him. So that if, as was the case in *Domestic Insurance Co. v. Manila Port Service*,[35] a shipper ships from abroad to Manila certain goods some of which are lost while they are in the custody of the arrastre contractor, he cannot recover from said contractor the full amount of the loss where the Delivery Permit contained a proviso to the effect that the liability of the contractor is limited to a certain amount per package unless the actual value of the goods is otherwise specified and the corresponding charges are paid. The acceptance by the shipper of the Delivery Permit signifies his acceptance of the terms, and he is bound by such terms.

[35] G.R. No. L-13439, Jan. 31, 1962.

Similarly, in the case of *Atlantic Mutual Insurance Co. v. Manila Port Service*,[36] the shipper was held to be bound by the provision in the Management Contract between the Manila Port Service and the Bureau of Customs, reciting that "the Contractor shall be relieved and released of any and all responsibility or liability for loss or damage . . . unless suit is brought within one year from the date of the arrival of the goods, or from the date when the claim for the value of such goods has been rejected or denied by the Contractor, in the proper court, provided that such claim shall have been filed with the Contractor within fifteen days from the date of discharge of the last package from the carrying vessel . . . This, notwithstanding the fact that the Management Contract was between the arrastre operator and the Bureau of Customs only, since it appeared that the Delivery Permit, which contained the Management Contract, and the gate passes, which the shipper used to take the cargo out of the pier, were issued in the name of the Collector of Customs, a fact which the shipper never repudiated.

CARRIER IS LIABLE WHERE DEFECTIVELY PACKED GOODS ARE ACCEPTED BY HIM FOR SHIPMENT

Under Article 361 of the Code of Commerce, the merchandise shall be transported at the risk of the shipper, if the contrary has not been expressly stipulated. Consequently, all the losses and deteriorations which the goods may suffer during the transportation by reason of fortuitous event, force majeur, or the inherent nature and defect of the goods, shall be for the account and risk of the shipper; although proof of these accidents is incumbent upon the carrier.

Under Article 362 of the same Code, however, the carrier is liable for the losses and damages resulting from the causes mentioned in Article 361 if it is proved, as against him, that they arose through his negligence or by reason of his having failed to take the precautions which usage has established among careful persons, unless the shipper has committed fraud in the bill of lading, representing the goods to be of a kind or quality different from what they really were.

Under Article 361, therefore, the carrier, in order to escape liability, is only obliged to prove that the damages suffered by the goods were "by virtue of the nature or defect of the articles," while under Article 362, the shipper, in order to hold the carrier liable, must prove that the damages to the goods by virtue of their nature,

[36] G.R. No. L-16789, Oct. 29, 1962.

occurred on account of the carrier's negligence or because the defendant did not take the precaution adopted by careful persons.[37] Thus, in the case of *Southern Lines, Inc. v. Court of Appeals* [38] the City of Iloilo, in an action to recover from the Southern Lines the excess payment for the 1,726 sacks of rice it requisitioned from the NARIC, 41 sacks of which were not delivered by the shipper, was awarded the amount since it was shown that at the time the rice was loaded on board the Southern Lines in Manila, the fact of improper and defective packing of the rice was known to the carrier or his servants, and moreover, was apparent upon ordinary observation, and that, notwithstanding such condition of the goods, the carrier accepted the same for shipment. The carrier was, in other words, guilty of negligence.

WHEN DOES THE 24-HOUR PERIOD IN ARTICLE 366 OF THE CODE OF COMMERCE FOR CLAIMS AGAINST A CARRIER APPLY?

In the same case of *Southern Lines*, the carrier also defended on the ground that even assuming its liability, the shipper was still barred from filing an action on account of its failure to present a claim within 24 hours from receipt of the shipment, as held in *Government v. Ynchausti* [39] and *Triton Insurance Co. v. Jose.*[40] The Court, in overruling the carrier's contention, distinguished the *Ynchausti* and *Triton* cases from the instant case, thus: In the first case, the plaintiff never presented any claim at all, and in the Triton case, there was the payment of the transportation charges which, under Article 366 of the Code of Commerce, precludes the presentation of any claim against the carrier. The weight of authority, the Court said, "sustains the view that such a stipulation (the filing of the claim within the specified time) is more in the nature of a limitation upon the owner's right to recovery, and that the burden of proof is accordingly on the carrier to show that the limitation was reasonable and in proper form or within the time stated." And since here the carrier failed to plead and prove the defense of prescription in its answer to the shipper's complaint, the same is deemed waived under Section 10, Rule 9, of the Rules of Court. Moreover, said the Court, the case at bar involves an action for the *refund of money paid in excess*, not for damages or the recovery of the undelivered sacks of rice. Consequently, the 24-hour prescriptive period in the bill of lading cannot apply.

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[37] Government v. Ynchausti and Co., 40 Phil. 219, 223
[38] G.R. No. L-16629, Jan. 21, 1962.
[39] *Supra.*
[40] 33 Phil. 194.

CARRIER'S LIEN ON GOODS SUBSISTS WHERE CHARTERER HAS NOT PAID FREIGHT

Even where a consignee of goods has paid the price and the freight charges to the seller of the goods who chartered the ship, the carrier's lien on such goods will still remain if in fact the charterer has not paid to the carrier the corresponding charges. This principle[41] was applied by the Court in *Overseas Factors Inc. v. South Sea Shipping Co.*[42] Said the Court: The fact that the freight was already included in the purchase price paid by it the appellees did not free the cargo of rice from the carrier's lien provided for in Article 665 of the Code of Commerce, if the freight has not yet been fully paid for by the charterer.

NEGOTIABLE INSTRUMENTS

PAYEE OF PROMISSORY NOTE MAY SUE ANY OF THE SOLIDARY MAKERS

Under Section 17(g) of the Negotiable Instruments Law, when an instrument containing the words, "I promise to pay" is signed by two or more persons, the liability of such persons is joint and several. Accordingly, in the case of *PNB v. Concepcion Mining Co., et al.*,[43] the Court held the defendant liable for the full amount of the promissory note where the payee chose to seek recourse against him alone since the defendant was a joint and solidary co-maker.[44] In this case, the joint and solidary co-maker of the defendant had died and his estate was in the process of judicial determination. The defendant contended that the co-maker's estate must be made a party defendant, and be held equally liable. The Court held for the plaintiff, stating that since the promissory note was executed jointly and severally, the payee had the right to hold any one of the makers liable.[45]

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[41] See Naric v. Macadaeg, G.R. No. L-10030, Jan. 18, 1956.

[42] G.R. No. L-12138, Feb. 27, 1962.

[43] G.R. No. L-16968, July 31, 1962.

[44] Under Art. 1216 of the New Civil Code, the creditor may proceed against any one of the solidary debtors or some or all of them simultaneously. The demand made against one of them shall not be an obstacle to those which may subsequently be directed against the others, so long as the debt has not been fully collected.

[45] The remedy of the paying maker in this case, I think, is to file a claim against the estate of the deceased co-maker since other indorsers are *prima facie* liable to contribute their share to the paying indorser (Mcknown v. Silver, 128 S.E. 134).

INSURANCE

ARBITRATION AGREEMENT NOT A DEFENSE FOR REINSURER WHERE REQUISITES FOR ARBITRATION ARE ABSENT

The case of *Equitable Insurance Co. v. Rural Insurance and Surety Co.*,[46] applies the principle that an arbitration agreement can be invoked as a defense in an action only where the requisites provided for in the contract are present and necessitate the arbitration of the case before the court action. In this case, the plaintiff brought an action to recover from the defendant its proportional liability under a reciprocal facultative reinsurance agreement. The plaintiff had entered into two reinsurance agreements with the defendant over certain stocks originally insured by the plaintiff against fire. The stocks were burned but notwithstanding repeated demands from the plaintiff, the defendant failed to pay its proportional liability. In the action brought by the plaintiff, the defendant invoked the reinsurance agreement which provided *inter alia* that in case of dispute arising from the agreement, the same shall be submitted for decision to a panel of arbitrators. The Court held the defendant liable, stating that there is, in this case, no dispute between the parties as would necessitate arbitration, the defendant having admitted in the stipulation of facts that the plaintiff had paid the insured and that it (defendant) was liable as reinsurer under the Agreement to pay the plaintiff its proportional share, the amount of which the defendant never questioned. "In any event," the Court held, "if, in the course of the settlement of a loss, the action of the company amounts to a refusal to pay, the company shall be deemed to have waived the condition precedent with reference to arbitration, and a suit upon the policy will lie . . .

"The term 'facultative' is used in reinsurance contracts merely to define the right of the insurer to accept or not to accept participation in the risk insured. But once the share is accepted, the obligation is absolute and the liability assumed thereunder can be discharged by one and only way—payment of the share of the loss. There is no alternative nor substitute prestation."

[46] G.R. No. L-17436, Jan. 31, 1962.