COMMERCIAL LAW

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The year 1969 did not produce many decisions on commercial law. Nevertheless, it produced one decision on corporation law, which is of first impression in this jurisdiction.

MARGIN FEE ON SALE OF FOREIGN EXCHANGE

The case of *Vargas Plow Factory, Inc. v. Central Bank*,[1] raised the issue of when to impose the margin levy of 15% required by the Central Bank Circular No. 122 (issued on March 15, 1961) on sales of foreign exchange covering letters of credit applied for.

Vargas Plow Factory, Inc. applied to the Philippine National Bank for letters of credit to cover the cost of imported goods from Germany. The Philippine National Bank, in turn, applied to the Central Bank to purchase the "forward exchange" necessary to cover said letters of credit. The application having been approved, the Philippine National Bank and the Central Bank executed forward exchange contracts on December 15, 1961, December 26, 1961, and January 11, 1962.

On January 21, 1962, the Central Bank issued Circular No. 133 suspending the collection of margin fee on foreign exchange. The effect was that while the letters of credit in question opened by the Philippine National Bank and the contracts to purchase forward exchange were executed during the effectivity of the Central Bank Circular No. 122, the drafts against said letters of credit were drawn and accepted by the importer only on January 30, 1962, June 4, 1962, etc., or when the collection of the margin fee had already been suspended.

The issue was: When is the margin fee collectible: upon the *execution of the contract* to purchase the foreign exchange in 1961 as claimed by the Central Bank, or upon *payment to the creditor* by the correspondent bank in 1962.

The Supreme Court held in favor of the Central Bank, adhering to the decision in *Pacific Oxygen v. Central Bank*,[2] which reversed the doctrine enunciated in the case of *Belman Cia., Inc. v. Central Bank*,[3] holding that the

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1 G.R. No. 25732, February 27, 1969, 27 SCRA 84 (1969).

2 G.R. No. 21881, March 1, 1968, 22 SCRA 917 (1968).

3 104 Phil. 877 (1958).

true sale of foreign exchange took place when the forward contracts were executed in December 1961, that is, before the margin fee was suspended because Republic Act No. 2609 which empowered the Central Bank to collect a margin fee "in respect of all sales of foreign exchange by the Central Bank and its authorized agents banks" made no distinction between perfected and consummated or between executory and executed sales. Any way, said the Court, in honoring the drafts issued by the foreign exporter, the local bank did not sell dollars to said party, but merely cause the delivery to it of dollars previously sold to the appellee. (The *Belman* case previously held that there was no consummated sale of foreign exchange until payment of the amount in foreign currency of the creditor.)

The later decision is correct because the sale became effective when the application for letters of credit were approved prior to Central Bank Circular No. 133 suspending the imposition of the 15% margin fee. As was said by the Court:

> "Under our Civil and Commercial Codes, a sale comes into existence upon its perfection by mutual consent, (Arts. 1315, 1316, 1475, 1458, 1461, 1462, C. C.), even if the subject matter or the consideration has not been delivered (Kerr & Co. v. Collector, 70 Phil. 36, 40), barring law or stipulation to the contrary which in this case does not exist."

CORPORATION LAW

Investment of corporate funds in another corporation

De la Rama v. Ma-ao Sugar Central Co. Inc.,[4] involved an issue of first impression: whether an investment of corporate funds in another corporation requires the approval of the stockholders, or only of the Board of Directors.

The Ma-ao Sugar Central Co., Inc., through its President, J. Amado Araneta, subscribed for ₱300,000 worth of the capital stock of the Philippine Fiber Processing Co., Incorporated. Payments on the subscription were made on September 20, 1950 for ₱100,000, on April 30, 1951 for ₱50,000, and on March 6, 1952 for ₱100,000. At the time the first two payments were made there was no board resolution authorizing the investment, and it was only on November 26, 1951, that the President of Ma-ao Sugar Central was so authorized by the board of directors.

Plaintiff contended that even assuming, *arguendo*, that the Board Resolution was valid, the act was still illegal, because there was no approval by the stockholders holding shares representing at least 2/3 of the voting power as required by Section 17-1/2 of the Corporation Law.

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[4] G.R. Nos. 17504 & 17506, February 28, 1969, 27 SCRA 247 (1969).

On the other hand, under Section 13, paragraph 10 of the Corporation Law, the corporation may acquire shares of any domestic corporation in order to accomplish its purpose upon the approval of its board of directors alone.

The question, therefore, is whether the investment (or subscription) in the case at bar falls under the general powers of the Board of Directors under Section 13, paragraph 10, or under Section 17-1/2 of the Corporation Law which requires the additional approval of the stockholders.

As was said, this question is of first impression in this jurisdiction. However, the Supreme Court resolved this question by quoting extensively from the work of this author on Corporation Law, particularly the following portions:

> "A private corporation, in order to accomplish its purpose as stated in its articles of incorporation, and subject to the limitations imposed by the Corporation Law, has the power to acquire, hold, mortgage, pledge or dispose of shares, bonds, securities, and other evidences of indebtedness of any domestic or foreign corporation. *Such an act, if done in pursuance of the corporate purpose, does not need the approval of the stockholder; but when the purchase of shares of another corporation is done solely for investment and not to accomplish the purpose of its incorporation, the vote of approval of the stockholders is necessary. In any case, the purchase of such shares or securities must be subject to the limitations established by the Corporation Law;*"
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> "A private corporation has the power to invest its corporate funds in any other corporation or business, or for any other corporation or business, or for any purpose other than the main purpose for which it was organized, provided that its board of directors has been authorized in a resolution by the affirmative vote of stockholders holding shares in the corporation entitling them to exercise at least 2/3 of the voting power on such a proposal at a stockholders' meeting called for the purpose, x x x *When the investment is necessary to accomplish its purpose or purposes as stated in its articles of incorporation, the approval of the stockholders is not necessary.*"

"We agree with Professor Guevara," the Supreme Court concluded.

Lifting the corporate veil

The case of *Ramirez Telephone Corporation v. Bank of America*[5] involved the doctrine of disregard of corporate fiction to prevent evasion of a valid obligation incurred by the controlling stockholder.

The facts of the case are: E.F. Herbosa leased his building to one, Ruben T. Ramirez, who was also the President and General Manager of the Ramirez Telephone Corporation. Ruben Ramirez and his wife owned 75% of the stocks of the corporation. The shop of the corporation was transferred to the leased building, although its main office was located in another place. For failure to pay rent, Herbosa filed an ejectment case against Ramirez, and in execution of the judgment for rents due, a garnishment was sought

[5] G.R. No. 22614, August 29, 1969, 29 SCRA 191 (1969).

to be enforced against the money deposited in the Bank of America in the name not only of Ramirez but in the name of Ramirez Telephone Corporation.

The issue, therefore, was whether a garnishment could be enforced against the funds of Ramirez Telephone Corporation deposited in the Bank of America for a claim against Ruben Ramirez, who was the President and General Manager of the corporation. The corporation contended that its funds as a corporation cannot be garnished to satisfy the debts of a principal stockholder.

The Supreme Court held that "while respect for the corporate personality as such is the general rule, there are exceptions. In appropriate cases, the veil of corporate fiction may be pierced. From the facts as found which must remain undisturbed, this is such a case."

This decision on the doctrine of lifting the corporate veil in some instances is merely a reiteration of the doctrine enunciated in a line of cases.[6]

The ACCFA (or ACA) is a government entity performing governmental function.

Government offices or corporations have the same right to enter into collective bargaining agreements with their employees like private corporations, *unless such government office or corporation performs governmental function.* When is a government corporation deemed to be performing governmental functions?

In 1961, a collective bargaining agreement was entered into between the Agricultural Credit and Cooperative Financing Administration (ACCFA) and the Confederation of Unions in Government Corporations and Offices (CUGCO), effective for one year. On October 30, 1962, the CUGCO filed a complaint with the CIR against the ACCFA for unfair labor practice and violation of the collective bargaining agreement. The ACCFA interposed as defense among others the illegality of the bargaining contract. The CIR decided against the ACCFA.

One of the issues relevant to corporation law is whether the ACCFA exercises "governmental" or "proprietary" functions, because employees employed in entities governmental functions may not strike for the purpose of securing changes or modifications in their terms and conditions of employ-

[6] Albert v. CFI, G.R. No. 26364, May 29, 1968, 65 O.G. 6839 (July, 1969), 23 SCRA 948 (1968); Arnold v. Willitz, 44 Phil. 634 (1922); Koppel (Phil.), Inc. v. Yatco, 77 Phil. 496 (1964); La Campana Coffee Factory, Inc. v. Kaisahan Ng Mga Manggagawa sa La Campana, 93 Phil. 160 (1953); Marvel Bldg. Corp. v. David, 94 Phil. 376 (1954); Madrigal Shipping Co., Inc. v. Ogilvie, 104 Phil. 748 (1958); Laguna Trans. Co., Inc. v. S.S.S., 107 Phil. 833 (1960); McConnel v. Court of Appeals, G.R. No. 10510, March 17, 1961, 59 O.G. 3925 (June, 1963); Liddel & Co., Inc. v. Internal Revenue Commissioner, G.R. No. 9687, June 30, 1961; Palacio v. Fely Trans. Co., G.R. No. 15121, August 31, 1962.

ment. (During the pendency of the case, the ACCFA was subsequently reorganized and its name changed to Agricultural Credit Administration (ACA) as an instrumentality of the Land Reform Program.)[7]

The Supreme Court held that the ACA or the ACCFA is a government agency engaged in "governmental", not "proprietary" functions, thereby implying that the employees of said office have no right to bargain collectively.[8]

The decision gave no reason for holding that the Agricultural Credit Administration performs governmental functions, nor did it clearly state the distinction between "governmental" and "proprietary" functions of a government corporation. Instead it (and the concurring opinion) dwelt lengthily on the distinction between the Wilsonian classification of governmental function into "constituent" and "ministrant" which the Court rejected as no longer true. In other words, the Court did not definitely define the distinction between "governmental" and "proprietary" functions as provided for in Section 11 of the Industrial Peace Act (R.A. No. 875) for future guidance.

If we shall be forced to make the distinction between the two terms, as gathered from the wide range covered by the decision, we may state that "governmental" functions are those that are *compulsory* which must be done by the Government in the exercise, and as an attribute, of sovereignty, while "proprietary" functions are those that are merely *optional* on the part of the Government to do as may be needed for the general welfare, social and economic. But when the Court refused to recognize the validity of this classification, then we are at a loss as to when to apply Section 11 of Republic Act No. 875 when it used the terms "governmental" and "proprietary" functions of government corporations.

PARTNERSHIP

In *Deluao v. Casteel*,[9] Nicanor Casteel filed his fishpond application on May 27, 1947. On November 17, 1948, Felipe Deluao filed his own fishpond application for the area covered by Casteel's application. Casteel, pending approval of his application by the Director of Fisheries, introduced improvements on the area applied for, with money borrowed from Felipe Deluao. On November 25, 1949, Inocencia Deluao, wife of Felipe Deluao, entered into a "contract of service" with Casteel, whereby Inocencia Deluao employed Casteel as Manager and sole buyer of all the fish produced from said fishpond. In short, there seemed to be an intent to be partners on the fishpond applied for by Casteel and Deluao, whereby Casteel was the industrial partner and Deluao the capitalist and administrator. The application filed by Casteel was first disapproved on November 17, 1948, but was later ap-

[7] Rep. Act No. 3844 (1963).

[8] Agricultural Credit and Cooperative Financing Administration v. Confederation of Unions in Government Corporations and Offices, G.R. No. 21484, November 29, 1969, 30 SCRA 649 (1969).

[9] G.R. No. 21906, December 24, 1968, 26 SCRA 475 (1968).

proved after some delay. The application of Deluao was then withdrawn. So, in January 1951, Casteel forbade Inocencia Deluao from further administering the fishpond. Inocencia Deluao alleged violation of the "contract of service" and filed an action for specific performance and damages against Casteel.

The question was whether the "contract of service" at bar created a contract of partnership.

The Supreme Court looked upon the contract as one of partnership, divided into two parts — namely, a contract of partnership to exploit the fishpond *pending its award* to either Felipe Deluao or Nicanor Casteel, and a contract of partnership to divide the fishpond between them *after such award.* The Court said that the first is valid, the second illegal. Why illegal? Because under the law, a lessee of public lands shall not assign, encumber or subject his rights without the consent of the Secretary of Agriculture and Commerce. Consequently, it was held that:

> "Since the partnership had for its object the division into two equal parts of the fishpond between the parties after it shall have been awarded to one of them, therefore upon the unauthorized transfer of ½ thereof to parties other than the applicant Casteel, it was dissolved by the approval of the application and the award of the fishpond to Casteel. The approval was an event which made it unlawful for the business of the partnership to be carried on or for the members to carry on its partnership."

In the subsequent resolution for Deluao's Motion for Reconsideration,[10] Deluao argued that the "contract of service" is not by itself a transfer or sublease but merely an agreement to divide the fishpond. Even so, the court held that the contract of partnership to divide the fishpond between them after such award to Casteel became illegal because it is in conflict with several prohibitory laws. It is an elementary rule, said the court, that a partnership cannot be formed for an illegal purpose or one contrary to public policy, and where the object of the partnership is the prosecution of an illegal business or one which is contrary to public policy, the partnership is void. And since the contract is null and void, Casteel is not bound to execute a formal transfer of one-half of the fishpond and to secure official approval of the same.

In other words, a fishpond of the public domain, being incapable of private ownership, cannot be the object of a partnership.

As to the correctness of this doctrine under the proven facts, we ask: May not an individual apply for lease of a public fishpond and take in another person in partnership for the exploitation of the leased fishpond? Are not real rights the proper subject of partnership under Article 1771 of the Civil Code irrespective of who owns the property?

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[10] August 29, 1969, 29 SCRA 350 (1969).

The right to divide the fishpond after an award has been made may be illegal, but may not a partnership be created with respect to real rights in the said property as subject matter? In other words, the right to divide the fishpond may be illegal, but the right to administer the fishpond in partnership with another seems unquestionable. The "contract of service", carefully examined, never intended to divide the fishpond between two parties but merely to create a partnership for the exploitation of the property; the partnership seems to be valid, whether it was created before or after the award.

Moreover, when the court said that "A fishpond of the public domain can never be considered a specific partnership property because only its use and enjoyment — never its title or ownership, — is granted to specific private persons," does this also mean that the use or enjoyment of specific property, like the use of a fishpond (of the public domain) can never be the object of partnership?

Article 1783 of the Civil Code expressly provides that "A particular partnership has for its object determinate things, *their use of fruits*, or a specific undertaking, or the exercise of a profession or vocation."

While public land (e.g. a fishpond) cannot be transferred or assigned by the lawful permittee or lessee, or be given in partnership with a stranger, yet may not the benefits or fruits derived therefrom be the object of partnership by the permittee or lessee with another person?

Article 1767, Civil Code, provides:

> "By the contract of partnership two or more persons bind themselves to contribute money, property, or *industry* to a common fund, with the intention of dividing the profits among themselves."

The "contract of service" at bar, while not perfectly drafted, conveys the intent of a partnership not to divide the fishpond but it is one whereby Deluao furnished the sum of ₱27,000.00 to be used by Casteel in constructing the fishpond, and "to buy all the fish raised therefrom." Such an agreement cannot be deemed void by the mere fact that Casteel became the official permittee or lessee of the fishpond. This is not a contract to divide the fishpond after the award but merely to compel Casteel to honor his agreement to buy all the fish raised in the fishpond. So long as the lessee does not lease or transfer the fishpond to another, he can lawfully execute a contract of partnership with another person as regards its produce or fruits.

Public Service Law

The case of *Bureau of Telecommunications v. Public Service Commission*[11] involved the question whether the Bureau of Telecommunications of the Government is subject to the jurisdiction of the Public Service Commission.

[11] G.R. No. 27412, October 28, 1969, 29 SCRA 751 (1969).

It was admitted that the Bureau of Telecommunications is operating its telephone service within the City of Manila and other areas in the Philippines without having submitted to the Public Service Commission for approval the rates actually being charged by it; that the Bureau had inaugurated a long distance telephone service between the cities of Iloilo, Bacolod, Cebu, Davao and Manila, charging rates very much lower than those authorized by the Commission for the Philippine Long Distance Telephone Company. Hence, the Philippine Long Distance Telephone Company filed a complaint with the Public Service Commission, praying that the Bureau be required to show cause why no disciplinary action should be taken against it for enforcing rates unauthorized by the Commission, and to submit for approval the schedule of rates of the Bureau in connection with its long distance services, and that the Bureau be restrained from engaging in long distance service until such time as the Commission shall have approved its schedule of rates, or, should the Bureau be allowed to continue rendering said long distance service, that it be required "to adopt, charge and follow the rates schedule authorized" for the Philippine Long Distance Telephone Company.

The issue is whether or not the Bureau is a "public service" as the term is issued in the Public Service Act, as amended by Republic Act No. 2677.

Section 13(b) of the Public Service Act defines "public service" as one that "owns, operates, or controls in the Philippines, for hire or compensation, with general or limited clientele, whether permanent, occasional or accidental, and *done for general business purposes,* any common carrier, railroad, x x x wire or wireless communications system, wire or wireless broadcasting stations, and other similar public services x x x." (Emphasis by the Supreme Court.)

Section 13(a) gives the Public Service Commission jurisdiction over such "public services" as defined by law; "provided, that, public services owned or operated by government entities or government-owned or controlled corporations shall be regulated by the Commission in the same way as privately-owned public services, but certificates of public convenience or certificates of public convenience and necessity shall not be required of such entities or corporation. x x x"

The Supreme Court, basing its opinion in the above-cited provisions of the Public Service Law, held that the Bureau of Telecommunications is not engaged in telecommunication for the purpose of gain or profit, citing the case of *Collector of Internal Revenue v. Manila Lodge,*[12] that "the plain, ordinary meaning of business is restricted to activities or affairs *where profit is the purpose, or livelihood is the motive.*" It also held that the Bureau has no corporate existence and it is admittedly "discharging a governmental or state responsibility" or function, which, as such, "is not business."

[12] 105 Phil. 983 (1959).

And notwithstanding the fact that "20% to 30% of its telephone subscribers are private subscribers", the Supreme Court nevertheless disregarded the complaint of the Philippine Long Distance Telephone Company by saying that "the services given thereto are merely incidental to its governmental function, to meet the telecommunication needs of the Government and the people."[13]

While it may be admitted that the Bureau of Telecommunications is not engaged in business or that it has no separate corporate personality, yet insofar as government-owned or operated public services are concerned, such public services (which are presumed not to be operated for profit) "shall be regulated by the *Commission* in the same way as privately-owned public services" as clearly provided in Section 13(a), Republic Act No. 2677. For purposes of being subject to regulation by the Commission, the element of "business" or "corporate existence" are immaterial. The purpose of regulation by the Public Service Commission is not merely to protect the public but also to protect a public utility from unfair competition.

The Supreme Court seemed to have overlooked that other portion of the Public Service Law, as amended by Republic Act No. 2677 which, we repeat, provides:

> "That public services owned or operated by government entities or government-owned or controlled corporations *shall be regulated by the Commission in the same way as privately-owned public services,* but certificates of public convenience or certificates of public convenience and necessity shall not be required of such entities or corporation."

It is submitted that for purposes of the above regulation, neither is it necessary that the public service should possess juridical personality, nor is it necessary that it be engaged for private business or profit, because as a government entity it is not supposed to make profit.

At least, the rates charged to the "20% to 30% of its telephone subscribers", who are private subscribers, should be regulated "in the same way as privately-owned public services", to prevent unfair competition.

Common Carriers

Obligation to observe extraordinary diligence

The case of *Nocum v. Laguna Tayabas Bus Co.*,[14] involved the question as to when a common carrier could be deemed guilty of failure to exercise "extraordinary diligence" required by law.

The plaintiff, a passenger in a bus was injured, together with several other passengers, by the explosion of firecrackers contained in a box brought

[13] See Bureau of Printing v. Bureau of Printing Employees Association, G.R. No. 15751, January 28, 1961.

[14] G.R. No. 23733, October 31, 1969, 30 SCRA 69 (1969).

into the bus by another passenger. The owner of the box, when asked as to its contents, informed the conductor that it contained only clothes and miscellaneous items. The firecrackers exploded while in transit. Could the bus company be held liable for the injury of the plaintiff and several other passengers?

The lower court was of the opinion that the bus is liable, because its employees should have made the proper inspection of all the baggage carried by the passengers. But the Supreme Court, on appeal, reversed the decision and dismissed the complainant for damages, holding that Article 1733 and Article 1755 of the Civil Code impose no obligation on common carriers to go to such extent. The employees of the bus have a right to rely on the representation of the passenger as to the contents of his baggage, in the absence of evidence "outwardly perceptible" that such representation was not true. The negligence of the common carrier could only be predicated on its failure to act in the face of such "outwardly perceptible" evidence.

The Court quoted with approval the holding of American state courts, cited in 37 L.R.A. (N.S.) 725, that "a carrier is ordinarily not liable for injuries to passengers for fires or explosions caused by articles brought into its conveyances by other passengers, in the absence of evidence that the carrier, through its employees, was aware of the nature of the article or had any reason to anticipate danger therefrom."

The decision of the Supreme Court is justified by the language of Article 1733 of the Civil Code which requires the common carrier "to observe extraordinary diligence x x x *according to all circumstances of each case.*"

Liability of registered and unregistered operators.

The case of *Zamboanga Transportation Co., Inc. v. Court of Appeals,*[15] involved the issue as to who shall be liable for the death or injury to a passenger, together with the driver: the registered operator, the unregistered operator, or both?

The Court of Appeals held that the three — the registered owner, the unregistered owner, and the driver shall be liable jointly and severally. Reason: "It is for the better protection of the public that both the owner of record and the actual operator should be adjudged jointly and severally liable with the driver," on the principle of the case of *Dizon v. Octavio.*[16]

While it is true that the Supreme Court in the case at bar affirmed the statement of the Court of Appeals as quoted above, yet it appears that the Supreme Court held the registered owner, the unregistered owner, and the

[15] G.R. No. 25292, November 29, 1969, 30 SCRA 717 (1969).

[16] C.A.-G.R. No. 11441-R, February 4, 1955. 51 O.G. (Aug., 1955). See also Monʻoya v. Ignacio, 94 Phil. 182 (1953); Medina v. Crecencia, 99 Phil. 506 (1956); Flores v. Miranda, 105 Phil. 266 (1959).

driver liable, not on the assumed policy of the law to protect the public, but because they (the registered and unregistered operators) both admitted separately that "they are the owners of the bus involved in the incident in question and that Valeriano Marcos, the driver of said bus, at the time of said incident, was in their employ."

It is submitted that the rule making both the registered and the unregistered operators liable in any case should not be made absolute, regardless of the reason or cause of non-registration of the transfer. Suppose the deed of sale had in fact been filed with the Public Service Commission, but pending approval, the mishap occurred, being actually operated by the unregistered purchaser: should the registered operator, who is not guilty of any fraud or negligence, be also held in liable? In such situation, only the actual unregistered operator and the driver should be held jointly and severally liable. In other words, the basis for liability for damages is not only to protect the public but to punish those who failed to comply with the law, fraudulenty or negligently, in the absence of provisions of law to the contrary, or unless both operators admitted to be the owners of the public service, as what happened in the case at bar.

In plain language, where the non-registration of the transfer was not imputable to the fault or fraud of the registered operator, the latter should be exempt from liability. It is not good to enunciate the absolute rule that "it is for the better protection of the public that both the owner of record and the actual operator should be adjudged jointly and severally liable with the driver" in all cases, in the absence of express provision of law on the matter and regardless of the circumstances of each case.