

R. Y. HANLON, PLAINTIFF AND APPELLEE, VS. JOHN W. HAUSSERMANN AND A. W. BEAM, DEFENDANTS AND APPELLANTS. GEORGE C. SELLNER, INTERVENER.

G.R. No. 14617. February 18, 1920

Ponente: STREET, J.

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STREET, J.:

This action was originally instituted by R. Y. Hanlon to compel the defendants, John W. Haussermann and A. W. Beam, to account for a share of the profits gained by them in rehabilitating the plant of the Benguet Consolidated Mining Company and in particular to compel them to surrender to the plaintiff 50,000 shares of the stock of said company, with dividends paid thereon. A few days after the action was begun G. C. Sellner was permitted to intervene in like interest with Hanlon and to the same extent. Thereafter the case was conducted in all respects as if Hanlon and Sellner had been co-plaintiffs from the beginning. At the hearing judgment was rendered requiring the defendants to surrender to Hanlon and Sellner respectively 24,000 shares each of the stock of said company, and to pay the dividends declared and paid on said stock for the years 1916 and 1917. From this judgment the defendants appealed.

The controlling features of this controversy are disclosed in documentary evidence, and the other facts necessary to a proper understanding of the case are stated in the narrative part of the opinion of the trial judge. As both parties to the appeal agree that his statement of facts is substantially correct, we adopt his findings of fact as the basis of our own statement, with such transposition, omissions, and additions as seen desirable for the easier comprehension of the case.

The Benguet Consolidated Mining Company is a corporation which was organized in 1903 with an authorized capital stock of one million dollars, of the par value of one dollar per share, of which stock 499,000 shares had been issued prior to November 1913, and 501,000 shares then remained in the treasury as unissued stock. The par value of the shares was changed to one peso per share after the organization of the corporation.

In the year 1909 the milling plant of said company, situated near Baguio in the subprovince of Benguet, Philippine Islands upon a partially developed quartz mine, was badly damaged and partly destroyed by high water, and in 1911 it was completely destroyed by like causes. The company was thereafter without working capital, and without credit, and therefore unable to rebuild the plant.

In October and November 1913, and for a long time prior thereto, the defendant John W. Haussermann and A. W. Beam were shareholders in said mining company and members of its board of directors, and were at said time vice president and secretary-treasurer, respectively, of said company.

In October, 1913, the plaintiff R. Y. Hanlon, an experienced mining engineer, upon the solicitation of the defendant Beam, presented to the board of directors of the Benguet Consolidated Mining Company a proposition for the rehabilitation of the company, and asked an option for thirty days within which to thoroughly examine the property; which proposition, with certain amendments, was finally accepted by said company; and thereafter, on

November 6, 1913, within the option period, the terms of that proposition and acceptance were incorporated in a written contract between the plaintiff and the company, in which the said company acted by and through the defendant John W. Haussermann as vice-President and the defendant A. W. Beam as secretary. In this contract it appears that for and in consideration of the issuance and delivery to said Hanlon or to his order of the 501,000 shares of the unissued capital stock of said mining company, the said Hanlon undertook, promised, and agreed to do or cause to be done sufficient development work on the mining properties of said company to enable the company to mine and take out not less than sixty tons of ore per day, and to give an extraction of not less than 85 per cent of the gold content of the ore; and the terms and conditions upon which said undertaking was based may be briefly stated as follows: (1) said Hanlon was to pay into the treasury of the mining company the sum of P75,000 in cash within six months from that date; (2) upon the payment of said P75,000 in cash there was to be issued and delivered to said Hanlon or to his order 250,000 shares of said unissued stock; (3) prescribing the purposes for which said P75,000 should be disbursed by said mining company upon the order of said Hanlon; (4) providing for raising an additional sum of P75,000 by obtaining a loan in the name of said mining company upon the security of its properties and assets, such additional indebtedness to be paid and discharged within eighteen months from date of said agreement; (5) providing for the payment of the then indebtedness of said mining company amounting to P13,105.08; (6) providing for the distribution of the net earnings after the payment of the indebtedness mentioned in paragraphs 4 and 5; (7) providing that, for the purpose of securing and guaranteeing the faithful performance of each and every undertaking in said agreement mentioned to be fulfilled by said Hanlon, 250,000 of said 501,000 shares should remain on deposit with said mining company, to be released, surrendered and delivered to said Hanlon or to his order, as follows: "151,000 shares to be released, surrendered and delivered to the said party of the first part, or his order, when said milling plant shall have been duly completed and the operation thereof commenced; the balance of said shares, to wit: 100,000, shall remain on deposit with the party of the second part until the above mentioned loan to be secured by the assets of the company shall have been fully paid and discharged, in which event said shares shall be re leased, surrendered and delivered to the party of the first part, or his order;" (8) providing that in the event the earnings of the company should be insufficient to pay all indebtedness within the time provided in paragraphs 4 and 6, the balance remaining due thereon was to be paid by said Hanlon, and if he neglected to pay off and discharge the balance due, then the said mining company was to have the right and authority to sell and dispose of the 100,000 shares of stock remaining in its possession at public or private sale at the prevailing market price, or as many of said shares as might be necessary to fully liquidate and discharge the balance of said indebtedness remaining unpaid; (9) providing for taking out insurance by said mining company for the protection of said Hanlon, to cover the full value of said plant during its erection and after the completion thereof for a period of not less than eighteen months after the same shall have been placed in operation.

As was at the time well known to all parties concerned herein the plaintiff Hanlon was personally without the financial resources necessary to enable him to contribute P75,000 towards the project indicated in the contract Exhibit B, above set forth; and in order to overcome this obstacle he was compelled to seek the assistance of others. Haussermann and Beam, being cognizant of this necessity, agreed to find P25,000 of the necessary capital, and for the remainder the plaintiff relied upon G. C. Sellner, a business man of the city of Manila, who, upon being approached, agreed to advance P50,000. A verbal understanding with reference to this matter had been attained by the four parties to this litigation before the contract Exhibit B between Hanlon and the mining company had been formally executed, and this agreement was in fact reduced to writing and signed on November 5, 1913, one day prior to the execution of the contract between Hanlon and the mining company.

In this contract of November 5, 1913, (Exhibit A), the four parties, to wit: Hanlon, Sellner, Haussermann, and Beam, agreed to collaborate in the flotation of the project outlined in the contract Exhibit B, and defined the

manner in which the necessary capital of P75,000 was to be raised. As this contract is absolutely vital in the present litigation its provisions are set out in full:

"Whereas, R. Y. Hanlon has submitted a proposition to the Benguet Consolidated Mining Co., a copy of which is hereto attached for reference; and

"Whereas, the Board of Directors of the Benguet Consolidated Mining Co., has accepted such proposition as amended; and

"Whereas, said parties have agreed to cooperate and assist the said Hanlon in the flotation of said proposition;

"Now, therefore, this agreement made by and between the undersigned as follows:

"I.

"It is mutually agreed by and between the parties hereto that each shall do all in his power to float said proposition and make the same a success.

"II.

"It is mutually agreed that said proposition shall be floated in the following manner, to wit:

"(a) That 301,000 shares of the Benguet Consolidated Mining Company shall be set aside and offered for sale for the purpose of raising the sum of P75,000 required to be paid to the Benguet Consolidated Mining Company in accordance with said proposition.

"(b) That of said sum of P75,000, the said George Sellner agrees and undertakes to secure and obtain subscriptions for the sum of P50,000.

"(c) That John W. Haussermann and A. W. Beam under take and agree to secure and obtain subscriptions for the sum of P25,000.

"(d) The said Sellner, Haussermann and Beam hereby guarantee that the subscriptions to be obtained by them as hereinabove stated shall be fully paid within six (6) months from the date of the acceptance on the part of the said Hanlon of the option granted by said company; it being understood and agreed that if for any cause the said Sellner shall fail to obtain subscriptions and payment thereof to the amount of P50,000 within the time herein specified, then and in that event the obligation of the said Haussermann and Beam shall be discharged; and, on the other hand, if for any cause said Haussermann and Beam shall fail to obtain subscriptions for the P25,000 and payment thereof within the time herein mentioned, then and in that event, the said Sellner shall be released from his obligation.

"It is mutually understood and agreed that each of the parties mentioned in this paragraph shall from time to time advise the other parties as to the number of subscriptions obtained and the amount of payments thereon.

"III.

"That out of the remaining 200,000 shares of the Benguet Consolidated Mining Co., to be issued under said proposition each of said parties hereto, that is to say: George Sellner, John W. Haussermann, A. W. Beam and R. Y. Hanlon shall be entitled to receive one-fourth thereof, or 50,000 shares, as compensation for the services rendered in the flotation of this proposition.

"IV.

"The necessary funds to cover preliminary expenses, such as expenses to examining the properties of the Benguet Consolidated Mining Co., freight charges and other charges on ore samples, cost of testing same, etc., shall be supplied by Messrs. Sellner, Haussermann and Beam, which said sum shall be reimbursed to said

parties out of the P75,000 fund raised by the sale of the P301,000 shares of stock herein above in Paragraph II, Subsection A, hereof, mentioned.

"V.

"Cash for the loan of P5,000 to the made to the Benguet Consolidated Mining Co., as. provided in the proposition of the said Hanlon, shall be furnished by Messrs. Sellner, Haussermann and Beam, in equal proportions as needed by the company.

"In witness whereof, the respective parties hereto have hereunto set their hands at Manila, P. I., this 5th day of November, 1913.

(Sgd.) "R. Y. HANLON,
(Sgd.) "GEORGE C. SELLNER,
(Sgd.) "JOHN W. HAUSSERMANN,
(Sgd.) "A. W. BEAM.

During the period which intervened between the making of the preliminary verbal agreement and the final execution of this contract, the plaintiff, Hanlon, at the expenses of the joint adventure went from Manila to the Benguet Consolidated mining properties, near Baguio, accompanied by the defendant Beam at the expense of said mining company, and said Hanlon made a preliminary investigation and examination of the properties, selected and surveyed a suitable mill site and took out about half a ton of ore samples which it had been agreed were to be forwarded to the United States for tests for use by him in the selection of the machinery best suited for the treatment of such ore; and said Hanlon reported to his coadventurers that it was a very feasible scheme, and that there was enough ore in sight to well repay the investment of P125,000, which was the sum estimated by said Hanlon to be necessary to equip the property.

Soon after the contract Exhibits B and A were made the plaintiff Hanlon departed for the United States, in Contemplation of which event he executed a special power of attorney, on November 10, 1913, constituting and appointing Beam his special agent and attorney in fact, for and in his name, to do and perform the following acts:

"To vote at the meetings of any company or companies, and otherwise to act as my proxy or representative, in respect of any shares of stock now held, or which may hereafter be acquired by me therein, and for that purpose to sign and execute any proxy or other instrument in my name and on my behalf;

"To secure subscriptions in my name for the shares of the Benguet Consolidated Mining Co., to be issued to me under and by virtue of an agreement entered into with said company on November 6, 1913, and to enter into the necessary agreements for the sale of said shares.

"To demand, sue for, and receive all debts, moneys, securities for money, goods, chattels or other personal property of which I am now or may hereafter become entitled, or which are now or may become due, owing or payable to me from any person or persons whomsoever, and in my name to give effectual receipts and discharges for the same."

Prior to that time, on May 27, 1913, the plaintiff Han Ion had given one A. Gnant of the city of Manila a power of attorney with general and comprehensive powers, and "with full power of substitution and revocation;" and there after on March 14, 1914, said Gnant, owing to his intended departure from the Philippine Islands, executed a power of attorney in favor of said A. W. Beam, with the same general powers which had been conferred upon him, and Beam became Hanlon's sole agent in the Philippine Islands. Said original power of attorney had no special relation to the rehabilitation proposition, but both the original and the substitute specifically authorized the attorney in fact:

"To make, sign, execute and deliver any and all contracts, agreements, receipts and documents of any nature and kind whatsoever."

After the enumeration of other general and specific powers, Beam was finally authorized:

"To do any and all things necessary or proper for the due performance and execution of the foregoing powers."

By reference to the contract of November 5, 1913, (Exhibit A), it will be seen that 301,000 shares of the stock of the Benguet Consolidated Mining Company were to be used to raise the P75,000 which Hanlon was bound to supply to the mining company; and the contract contemplated that these shares should be disposed of at 25 centavos per share. As Sellner had agreed to raise P50,000, it resulted that 200,000 shares had to be allocated to him; while Haussermann and Beam had at their disposal 100,000 shares, with which to raise P25,000. Sellner, Haussermann, and Beam furthermore guaranteed that the subscriptions to be obtained by them should be fully paid within six months from the date of the acceptance by Hanlon of the contract with the mining company, that is, from November 6, 1913.

In prosecution of the common purpose, Haussermann and Beam proceeded, after the departure of Hanlon, to procure subscriptions upon the stock at their disposal, part being subscribed by themselves severally and part sold upon subscription to outsiders; and during the next two or three months the block of shares allotted to them was subscribed. As a consequence of this they were thereafter prepared to pay in, or to cause to be paid in, the entire amount which they were obligated to raise. Doubts, however, presently arose as to the ability of Sellner to obtain subscriptions or produce the P75,000, which he was obligated to bring in; and as early as in February of 1914, Beam cabled to Hanlon in America "Sellner unable to pay. Have you any instructions." Upon receipt of this cablegram, Hanlon cabled Sellner to use every effort to raise the money and also cabled Beam to obtain the money elsewhere if Sellner could not supply it. Furthermore, in order to be prepared against the contingency of Sellner's ultimate inability to respond, Hanlon attempted to enlist the interest of capitalists in San Francisco but in this was unsuccessful. It will be observed that, although by the exact letter of the contract, Sellner was obligated to obtain subscriptions for the sum of P50,000, he nevertheless desired to keep the entire 200,000 shares assigned to him exclusively for himself, and proceeding on the assumption that he had in effect underwritten a subscription for the whole block of shares, he made no effort to obtain subscriptions from anybody else for any part of these shares. Meanwhile Haussermann and Beam were in touch with Sellner, urging him to action but without avail, Sellner being in fact wholly unable to fulfill his undertaking. In this condition of affairs the period of six months specified in the contracts of November 5 and 6 for the raising of the sum of P75,000 passed.

Thereafter Haussermann and Beam assumed that they were absolved from the obligations of their contract of November 5, 1913, with Hanlon and Sellner, and that the mining company was no longer bound by its contract of November 6, 1913, with Hanlon. They therefore proceeded, as parties interested in the rehabilitation of the mining company, to make other arrangements for financing the project. They found it possible to effectuate this through the offices of Sendres of the Bank of the Philippine Islands, and in order to do so, a new contract was made between the mining company and Beam, with Haussermann as silent partner of the latter, whereby a bonus of 96,000 shares was conceded to the promoter instead of the 100,000 shares which would have accrued to Haussermann and Beam if the Hanlon project had gone through. As a result of this, the profits of each were reduced by the amount of 2,000 shares below what they might have realized under the Hanlon contract of November 5. Another feature of the new project was that some of those who had subscribed to the stock of the mining company through Beam under the Hanlon project were retained as stockholders in the new scheme of flotation. Some, however, dropped out, with the result that Haussermann and Beam were compelled to increase their subscriptions materially.

As preliminary to the new scheme of financing the corporation, the board of directors of the mining company,

composed of Haussermann Beam, and Sendres, saw fit at a special meeting on June 19, 1914, to adopt a resolution declaring the contract of November 6, 1913, between Hanlon and the company to be cancelled by reason of the failure of Hanlon to pay in the sum of P75,000 in cash on or before May 6, 1914.

Immediately after the adoption of this resolution, the new plan for financing the mining company was unfolded by Mr. Beam to the Board in a letter, addressed by him to the Directors. In its parts relating to financial arrangements said letter is as follows:

"MANILA, P. I., June 17, 1914.

"TO THE DIRECTORS OF THE BENGUET CONSOLIDATED MINING CO.,

"MANILA, P. I.

"GENTLEMEN:

"The undersigned hereby applies for an option for 30 days over 501,000 shares of unissued stock of your corporation. * * *

"I have canvassed the local field for capital and am reasonably assured that the required capital will be available as follows:

"405,000 shares have been subscribed for at 20 and 25 cents per share, making up a total of P86,000, which sums is payable to the company in four equal monthly installments commencing July 15, 1914. * * * Arrangements have been made whereby the Bank of Philippine Islands will grant the company an overdraft to the extent of P50,000, thus affording P136,000. * * *

"The balance of the 501,000 shares of unissued stock, or 96,000 shares, are to be issued to my order when the total sum of 86,000 subscribed as above stated shall have been paid to the company. The said shares are to be placed in the hands of the Bank of the Philippine Islands in escrow to be held by the said bank and delivered to my order as soon as the overdraft hereinbefore mentioned shall be fully paid and liquidated.

"It is further understood that the bank shall have full power and authority to vote said shares until such time as said overdraft is repaid to the company.

"For the payment of the overdraft guaranteed by the Bank of the Philippine Islands, it is understood that the total net earning of the company shall be used, and the term 'net earnings' shall be understood to mean the gross value of gold recovered less actual operation expense.

"Trusting that the foregoing may meet with your approval and acceptance, I am

"Yours very truly,

(Sgd.) "A. W. BEAM."

Upon motion of Sendres, the proposition of Beam was accepted; Sendres and Haussermann voting in favor of the same. At the same special meeting it was moved and seconded and unanimously carried that a meeting of the share holders of the company be called for the purpose of passing upon the action of the directors in accepting the proposition made by Beam. At this special meeting of the shareholders, held at 4:30 p. m., June 29, 1914, there were 310,405 shares of the 499,000 shares of issued stock represented at the meeting. The stockholders personally present were A. W. Beam, E. Sendres, and O. M. Shuman; and various other shareholders were represented by Beam as proxy, and the Bank of the Philippine Islands was represented by Sendres as proxy. It appears from the minutes of said special meeting that Beam's proposition, which had been accepted by the board of directors, as above stated, was submitted to the meeting and after being read was ordered to be attached to the minutes. After

due discussion by the shareholders present, Shuman moved that the action of the board of directors accepting Beam's proposition be approved, and this motion was duly seconded and unanimously carried.

The Beam project was carried out, and the mining company was brought to a dividend-paying basis, paying a quarterly dividend of five per cent; and at the time of the trial of this case the shares of stock in the market had risen from twenty centavos to P1.50 or higher. The defendants about 1916 received 48,000 shares each as their profits. It is stated in the appellants' brief, without denial from the appellee, that said shares have appreciated subsequently to the trial below to the value of 92 each. The trial court held that the plaintiffs, as coadventurers with the defendants in the project for the rehabilitation of the mining company, are each entitled to recover the one-fourth part of the 96,000 shares obtained from the mining company by the defendants, or 24,000 shares, with dividends paid, and to be paid beginning with the year 1916. It is thus apparent that the value of the interest awarded to each of the plaintiffs is considerably in excess of \$25,000 (U. S. currency).

So far as Beam's material scheme for the improvement of the mining property is concerned it followed the same lines and embodied the same ideas as had been entertained while the Hanlon project was in course of promotion; and it is contended for the plaintiffs that there was an unfair appropriation by Beam of the labors and ideas of Hanlon. This is denied by the defendants, whose testimony tends to minimize the extent of Hanlon's contribution to the project in labor and ideas. We believe it unnecessary to enter into the merits of this contention, as in our opinion the solution of the case must be determined by other considerations.

An examination of the rights of the parties to this litigation must begin with the interpretation of the contract of November 5, 1913. Some discussion is indulged in the briefs of counsel upon the question whether that contract constitutes a partnership among the four signatories or a mere enterprise upon joint account (*cuenta en participacion*) under the Code of Commerce. This question seems to us of academy rather than practical importance; for whatever be the character of the relation thus created, each party was undoubtedly bound to use good faith towards the other, so long as the relation subsisted.

In paragraph I of said contract each party obligates him self to do all in his power to "float" the Hanlon proposition, i. e., as indicated in the contract of November 6, between Hanlon and the mining company. This means of course that each was to do what he could to make that project for the rehabilitation of the mining company a success. The word flotation, however, points more particularly to the effort to raise money, since, as all man know, it takes capital to make any enterprise of this kind go. In paragraph II of the same contract the manner in which the flotation is to be effected is described, namely, that Sellner is to obtain subscriptions for P50,000 and Haussermann and Beam for P25,000. This involved, as we have already stated, the allocation of 200,000 shares to Sellner and 100,000 to Hanlon and Beam.

Now the two paragraphs of the contract to which reference has been made must be construed together, and it is entirely clear that the general language used in the first paragraph is limited by that used in the second paragraph. In other words, though in the first paragraph the parties agree to help float the project, they are tied up, in regard to the manner of effecting the flotation, to the method agreed upon in the second. We can by no means lend our assent to the proposition that the first paragraph created an obligation, independent of the provisions of paragraph II, which continued to subsist after the method of flotation described in paragraph II became impossible of fulfillment. It is a rudimentary canon of interpretation that all parts of a writing are to be construed together (6 R. C. L., p. 837) and that the particular controls the general. (Art. 1283, Civ. Code; 13 C. J., p. 537.)

It seems too plain for argument that so long as that contract was in force, Sellner did not have any right to intermeddle with the 100,000 shares allotted to Haussermann and Beam. Neither could the latter dispose of the 200,000 shares allotted to Sellner. Indeed, Sellner, by reserving to himself all of these 200,000 shares and sitting

tightly, as he did, on this block of stock, made it impossible for Haussermann, Beam, or anybody else, to raise money by selling those shares within the period fixed as the limit of his guaranty. There was absolutely, as everybody knew, no other means to raise money except by the sale of stock; and when Hanlon cabled to Beam in February to obtain the money elsewhere if Sellner could not supply it, he was directing the impossible, unless Sellner should release the block of shares as signed to him, which he never did. As a matter of fact it appears that this quantity of the stock of the mining company Gould not then have been sold at 25 cents per share in the Manila market to anybody; and in the end in order to get Sendres and the Bank of the Philippine Islands to take part in the Beam project 260,000 shares had to go at 20 centavos per share.

By referring to subsection (d) of paragraph II of the contract of November 5, 1913, it will be seen that the promises with reference to the obtaining of subscriptions are mutual concurrent conditions; and it is expressly declared in the contract that upon the default of either party the obligation of the other shall be discharged. From this it is clear that upon the happening of the condition which occurred in this case, i. e., the default of Sellner to pay to the mining company on or before May 6, 1914, the sum of money which he had undertaken to find, Haussermann and Beam were discharged.

This is a typical case of a resolutive condition under the civil law. The contract expressly provides that upon the happening of a future and uncertain negative event, the obligation created by the agreement shall cease to exist.

"In conditional obligations the acquisition of rights as well as the extinction of those already acquired shall depend upon the event constituting the condition." (Civ. Code, art. 1114.)

"If the condition consists in the happening of an event within a fixed period the obligation shall be extinguished from the time the period elapses or when it becomes certain that the event will not take place." (Civ. Code, art. 1117.)

The right of Hanlon to require any further aid or assistance from these defendants after May 6, 1914, was expressly subordinated to a resolutive condition, and the contract itself declares in precise language that the effect of the non-fulfillment of the condition shall be precisely the same as that which the statute attaches to it—the extinction of the obligation.

In the argument of the plaintiffs at this point a distinction is drawn between the discharge from the guaranty to raise money at the stated time and the discharge from the contract as an entirety; and it is insisted that while the defendants were discharged from liability to Sellner on their guaranty to have the money forthcoming on May 6, they were not discharged from their liability on the contract, considered in its broader features, and especially were not discharged with reference to their obligation to Hanlon. This argument proceeds on the erroneous assumption that the defendants were bound to discover some other method of flotation after the plan prescribed in the contract had become impossible of fulfillment and to proceed therewith for the benefit of all four of the parties. Furthermore, this conception of the case is apparently over-refined and not in harmony with the common-sense view of the situation as it must have presented itself to the contracting parties at the time. The obtaining of capital was fundamentally necessary before the project could be proceeded with; and it was obvious enough that, if the parties should fail to raise the money, the whole scheme must collapse like a stock of cards. The provisions relative to the getting in of capital are the principal features of the contract, other matters being of subordinate importance. In our opinion the contracting parties must have understood and intended that Haussermann and Beam would be discharged from the contract in its entirety by the failure of Sellner to comply with his obligation. This is the plainest, simplest, and most obvious meaning of which the words used are capable and we believe it to be their correct interpretation. We are not to suppose that either of the signatories intended for those words to operate as a trap for the others; and such would certainly be the effect of the provision in question if the words are to be understood as referring to a discharge from the guaranty merely, leaving the contract intact

in other respects.

It is insisted in behalf of the plaintiffs that Haussermann and Beam, as well as Sellner, defaulted in the performance of the contract of November 5, 1913, and that, not having performed their obligation to obtain subscriptions for the sum of P25,000 and to cause payment to be made into the company's treasury on or before May 6, 1914, they cannot take advantage of the similar default of Sellner. This suggestion is irrelevant to the fundamental issue. The question here is not whether Haussermann and Beam have a right of action for damages against Sellner. If they were suing him, it would be pertinent to say that they could not maintain the action because they themselves had not caused the money to be paid in which they had agreed to raise. The question here is different, namely, whether Haussermann and Beam have been discharged from the contract of November 5, 1913, by the default of Sellner; and this question must, under the contract, be answered by reference to the acts of Sellner. Upon this point it is irrelevant to say that the discharge was mutual as between the two parties and not merely one-sided.

The interpretation which we have placed upon the contract of November 5, 1913, exerts a decisive influence upon this litigation, and makes a reversal of the appealed judgment inevitable. There are, however, certain subordinate features of the case which, as disposed in the appellee's brief, appear to justify the conclusion of the trial judge; and we deem it desirable to say something with reference to the questions thus presented.

It will be noted that there is no resolutive provision in the contract of November 6, 1913, between Hanlon and the mining company, declaring that said contract would be discharged or abrogated upon the failure, of Hanlon to supply, within the period specified, the money which he had obligated himself to raise. In other words, time is not expressly made of the essence of this contract. From this it is argued for the plaintiffs that this contract remained in force after May 6, 1914, notwithstanding the failure of Hanlon to supply the funds which he had agreed to find, and indeed it is insisted upon the authority of *Ocejo, Perez & Co. vs. International Banking Corporation* (37 Phil. Rep., 631), that the mining company could not be relieved from that contract without obtaining a judicial rescission in an action specially brought for that purpose. The reply to this is two-fold.

In the first place the present action is not based upon the contract between Hanlon and the mining company; and it is clear that if Hanlon had sued the mining company, as for example, in an action seeking to recover damages for breach of its contract with him, he would have been confronted by the insuperable obstacle that he had never supplied, nor offered to supply, one penny of the P75,000, which he had obligated himself to bind, and which was absolutely necessary to the rehabilitation of the company. The benefits of a contract are not for him who has failed to comply with its obligations. It may be admitted that the resolution of the Board of Directors of the mining company, on June 19, 1914, declaring the contract of November 6, 1913, with Hanlon to be cancelled, considered alone, was without legal effect, since one party to a contract cannot absolve himself from its obligations without the consent of the other.

With reference to the second point, namely, that a judicial rescission was necessary to absolve the mining company from its obligations to Hanlon under the contract of December 6, 1913, we will say that we consider the doctrine of *Ocejo, Perez & Co. vs. International Banking Corporation* (37 Phil. Rep., 631), to be inapplicable. The contract there in question was one relating to a sale of goods, and it had been fully performed on the part of the vendor by delivery. This court held that delivery had the effect of passing title, and that while the failure of the purchaser to pay the price gave the seller a right to sue for a rescission of the contract, the failure of the buyer to pay the purchase price did not ipso facto produce a reversion of title to the vendor, or authorize him, upon his election to rescind, to treat the goods as his own property and retake them by writ of replevin. In the present case the contract between Hanlon and the mining company was executory as to both parties, and the obligation of the company to deliver the shares could not arise until Hanlon should pay or tender payment of the money. The

situation is similar to that which arises every day in business transactions in which the purchaser of goods upon an executory contract fails to take delivery and pay the purchase price. The vendor in such case is entitled to resell the goods. If he is obliged to sell for less than the contract price, he holds the buyer for the difference; if he sells for as much as or more than the contract price, the breach of the contract by the original buyer is *damnum absque injuria*. But it has never been held that there is any need of an action of rescission to authorize the vendor, who is still in possession, to dispose of the property where the buyer fails to pay the price and take delivery. Of course no judicial proceeding could be necessary to rescind a contract which, like that of November 5, 1913, contains a resolutive provision by virtue of which the obligation is already extinguished.

Much reliance is placed by counsel for the plaintiffs upon certain American decisions holding that partners, agents, joint adventurers, and other persons occupying similar fiduciary relations to one another, must not be allowed to obtain any undue advantage of their associates or to retain any profit which others do not share. We have no criticism to make against this salutary doctrine when properly applied and would be slow to assume that our civil law requires any less degree of good faith between parties so circumstanced than is required by the courts of equity in other countries. For instance, we feel quite sure that this Court would have no difficulty in subscribing to the doctrine which is stated in *Lind vs. Webber* (36 Nev., 623; 50 L. R. A. [N. S.], 1046), with reference to joint adventurers as follows:

"We further find that the law is well established that the relation between joint adventurers is fiduciary in its character and the utmost good faith is required of the trustee, to whom the deal or property may be intrusted, and such trustee will be held strictly to account to his co adventurers, and that he will not be permitted, by reason of the possession of the property or profits whichever the case may be to enjoy an unfair advantage, or have any greater rights in the property by reason of the fact that he is in possession of the property or profits as trustee, than his co-adventurers are entitled to. The mere fact that he is intrusted with the rights of his co-adventurers imposes upon him the sacred duty of guarding their rights equally with his own, and he is required to account strictly to his co-adventurers, and, if he is recreant to his trust, any rights they may be denied are recoverable."

In *Flagg vs. Mann* (9 Fed. Cas., 202; Fed. Case No. 4847), it appeared that Flagg and Mann had an agreement to purchase a tract of land on joint account. The court held that where parties are interested together by mutual agreement, and a purchase is made, agreeably thereto, neither party can exclude the other from what was intended to be for the common benefit; and any private benefit, touching the common right, which is secured by either party must be shared by both. Justice Story, acting as Circuit Justice, said that the doctrine in question was "a wholesome and equitable principle, which by declaring the sole purchase to be for the joint benefit, takes away the temptation to commit a dishonest act, founded in the desire of obtaining a selfish gain to the injury of a co-contractor, and thus adds strength to wavering virtue, by making good faith an essential ingredient in the validity of the purchase. There is not, therefore, any novelty in the doctrine of Mr. Cancellor Kent, notwithstanding the suggestion at the bar to the contrary; and it stands approved equally by ancient and modern authority, by the positive rule of the Roman Law, the general recognition of continental Europe, and the actual jurisprudence of England and America."

We deem it unnecessary to proceed to an elaborate analysis of the array of cases cited by the appellee as containing applications of the doctrine above stated. Suffice it to say that, upon examination, such of these decisions as have reference to joint adventures will be found to deal with the situation where the associates are not only joint adventurers but are joint adventurers' merely. In the present case Haussermann and Beam were stockholders and officials in the mining company from a time long anterior to the beginning of their relations with Hanlon. They were not merely co adventurers with Hanlon, but in addition were in a fiduciary relation with the mining company and its other shareholders, to whom they owed duties as well as to Hanlon. It does not appear

that the defendants acquired any special knowledge of the mine or of the feasibility of its reconstruction by reason of their relation with Hanlon which they did not already have; and they probably were in no better situation as regards the facts relating to the mine after the failure of the Hanlon contract than they were before. The fact of their having been formerly associated with Hanlon certainly did not preclude them from making use of the information which they possessed as stockholders and officers of the mining company long before they came into contact with him.

After the termination of an agency, partnership, or joint adventure, each of the parties is free to act in his own interest, provided he has done nothing during the continuance of the relation to lay a foundation for an undue advantage to himself. To act as agent for another does not necessarily imply the creation of a permanent disability in the agent to act for himself in regard to the same subject matter ; and certainly no case has been called to our attention in which the equitable doctrine above referred to has been so applied as to prevent an owner of property from doing what he pleased with his own after such a contract as that of November 5, 1913, between the parties to this lawsuit had lapsed.

In the present case so far as we can see, the defendants acted in good faith for the accomplishment of the common purpose and to the full extent of their obligation during the continuance of their contract; and if Sellner had not defaulted, or if Hanlon had been able to produce the necessary capital from some other source, during the time set for raising the money, the original project would undoubtedly have proceeded to its consummation. Certainly, no act of the defendants can be pointed to which prevented or retarded its realization; and we are of the opinion that, under the circumstances, nothing more could be required of the defendants than a full and honest compliance with their contract. As this had been discharged through the fault of another they can not be held liable upon it. Certainly, we cannot accede to the proposition that the defendants by making the contracts in question had incapacitated them selves and their company for an indefinite period from seeking other means of financing the company's necessities, save only upon the penalty of surrendering a share of their ultimate gain to the two adventurers who are plaintiffs in this action.

The power of attorney which Hanlon left, with Beam upon departing for America was executed chiefly to enable Haussermann and Beam to comply with their obligation to raise P25,000 by the sale of shares. This feature of the power of attorney was manifestly subordinate to the purpose of the joint agreement of November 5, 1913. Certainly, under that power, Beam could not have disposed of any of the stock allotted to Sellner; neither was he bound, or even authorized, after the joint agreement was at an end, to use the power for Hanlon's benefit, even supposing—contrary to the proven fact—that purchasers to the necessary extent could have been found for the shares at 25 centavos per share.

As we have already stated, some of the individuals who originally subscribed to the Hanlon project were carried as stockholders into the new project engineered by Beam, being credited with any payments previously made by them. In other words, the mining company honored these subscriptions, although the Hanlon project on which they were based had fallen through. This circumstance cannot in our opinion alter the fundamental features of the case. Taken all together these subscriptions were for only a part of the P25,000 which the defendants had undertaken to raise and were by no means sufficient to finance the Hanlon project without the assistance which Sellner had agreed to give. Of course if Beam, acting as attorney in fact of Hanlon, had obtained a sufficient number of subscriptions to finance the Hanlon project, and concealing this fact, had subsequently utilized the same subscriptions to finance his own scheme, the case would be different. But the revealed facts do not bear out this imputation.

It should be noted in this connection that the mining company had approved the subscriptions obtained by Haussermann and Beam and had, prior to May 6, 1914, accepted part payment of the amount due upon some of

them. It is not at all clear that, under these circumstances, the company could have repudiated these subscriptions, even if its officers had desired to do so; and if the mining company was bound either legally or morally to recognize them, it cannot be imputed to the defendants as an act of bad faith that such subscriptions were so recognized.

The trial court held that Haussermann, by reason of his interest in the Beam project, was disqualified to act as a director of the mining company upon the resolution accepting that project; and it was accordingly declared that said resolution was without legal effect. We are of the opinion that the circumstance referred to could at the most have had no further effect than to render the contract with Beam voidable and not void; and the irregularity involved in Haussermann's participation in that resolution was doubt less cured by the later ratification of the contract at a meeting of the stockholders. However this may be, the plaintiffs are not in a position to question the validity of the contract of the mining company with Beam since the purpose of the action is to secure a share in the gains acquired under that contract.

In the course of the preceding discussion we have already noted the fact that no resolutive provision contemplating the possible failure of Hanlon to supply the necessary capital within the period of six months is found in the contract of November 6, 1913, between Hanlon and the mining company. In other words, time was not expressly made of the essence of that contract. It should not be too hastily inferred from this that the mining company continued to be bound by that contract after Hanlon had defaulted in procuring the money which he had obligated himself to supply. Whether that contract continued to be binding after the date stated is a question which does not clearly appear to be necessary to the decision of this case, but the attorneys for Hanlon earnestly insist that said contract did in fact continue to be binding upon the mining company after May 6, 1914; and upon this assumption taken in connection with the power held by Beam as attorney in fact of Hanlon, it is argued that the right of action of Hanlon is complete, as against Beam and Haussermann, even without reference to the profit-sharing agreement of November 5. We consider this contention to be unsound; and the correctness of our position on this point can, we think, be clearly demonstrated by considering for a moment the question whether time was in fact of the essence of the contract of November 6, 1913, in other words, Was the mining company discharged by the default of Hanlon in the performance of that agreement?

Whether a party to a contract is impliedly discharged by the failure of the other to comply with a certain stipulation on or before the time set for performance, must be determined with reference to the intention of the parties as deduced from the contract itself in relation with the circumstances under which the contract was made.

Upon referring to the contract now in question—i. e., the contract of November 6, 1913—it will be seen that the leading stipulation following immediately after the general paragraph at the beginning of the contract, is that which relates to the raising of capital by Hanlon. It reads as follows:

"1. Said party of the first part agrees to pay into the treasury of the party of the second part the sum of Seventy five Thousand Pesos (P75,000) in cash within six (6) months from the date of this agreement."

Clearly, all the possibilities and potentialities of the situation with respect to the rehabilitation of the Benguet mining property, depended upon the fulfillment of that stipulation; and in fact nearly all the other subsequent provisions of the contract are concerned in one way or another with the acts and things that were contemplated to be done with that money after it should be paid into the company's treasury. Only in the event of such payment were shares to be issued to Hanlon, and it was stipulated that the money so to be paid in should be disbursed to pay the expenses of the very improvements which Hanlon had agreed to make. There can then be no doubt that compliance on the part of Hanlon with this stipulation was viewed by the parties as the pivotal fact in the whole scheme.

Again, it will be recalled that this contract (Exhibit B) between Hanlon and the mining company was not in fact executed until the day following that on which the profit sharing agreement (Exhibit A) was executed by the four parties to this lawsuit. In other words, Haussermann and Beam, as officials of the mining company, refrained from executing the company's contract until Hanlon had obligated himself by the profit-sharing agreement. Indeed, these two contracts should really be considered as constituting a single transaction; and it is obvious enough that the prime motive which induced Haussermann and Beam to place their signature upon the contract of November 6 was that they already had the profit-sharing agreement securely in their hands. Therefore, when the contract of November 6, between Hanlon and the mining company was signed, all the parties who participated therein acted with full knowledge of the provisions contained in the profit-sharing agreement; and in particular the minds of all must have been riveted upon the provisions of paragraph II of the profit-sharing agreement, wherein is described the manner in which the project to which the parties were then affixing their signatures should be financially realized ("floated"). In subsection (d) of the same paragraph II, as will be remembered, are found the words which declare that Haussermann and Beam would be discharged if Sellner should fail to pay into the company's treasury on or before the expiration of the prescribed period the money which he had agreed to raise. Under these conditions it is apparent enough that the parties to the later contract treated time as of the essence of the agreement and intended that the failure of Hanlon to supply the necessary capital within the time stated should put an end to the whole project. In view of the fact that an express resolatory provision had been inserted in the profit sharing agreement, it must have seemed superfluous to insert such express clause in the later contract. Any extension of time, therefore, that the mining company might have made after May 6, 1914, with respect to the date of performance by Hanlon would have been purely a matter of grace, and not demandable by Hanlon as of absolute right. It is needless to say in this connection that the default of Sellner was the default of Hanlon.

An examination of the decisions of the American and English courts reveals a great mass of material devoted to the discussion of the question whether in a given case time is of the essence of a contract. As presented in those courts, the question commonly arises where a contracting party, who has himself failed to comply with some agreement, tenders performance after the stipulated time has passed, and upon the refusal of the other party to accept the delayed performance the delinquent party resorts to the court of equity to compel the other party to proceed. The equitable doctrine there recognized as applicable in such situation is that if the contracting parties have treated time as of the essence of the contract, the delinquency will not be excused and specific performance will not be granted; but on the other hand, if it appears that time has not been made of the essence of the contract, equity will relieve from the delinquency and specific performance may be granted, due compensation being made for the damage caused by the delay. In such cases the courts take account of the difference between that which is matter of substance and that which is matter of mere form.

To illustrate: the rule has been firmly established from an early date in courts of equity that in agreements for the sale of land, time is not ordinarily of the essence of the contract; that is to say, acts which one of the parties has stipulated to perform on a given date may be performed at a later date. Delay in the payment of the purchase money, for instance, does not necessarily result in the forfeiture of the rights of the purchaser under the contract, since mere delay in the payment of money may be compensated by the allowance of interest. (36 Cyc., 707-708.) In discussing this subject, Pomeroy says: "Time may be essential. It is so whenever the intention of the parties is clear that the performance of its terms shall be accomplished exactly at the stipulated day. The intention must then govern. A delay cannot be excused. A performance at the time is essential; any default will defeat the right to specific enforcement." (4 Pomeroy Eq. Jur., 3rd ed., sec. 1408.) Again, says the same writer: "It is well settled that where the parties have so stipulated as to make the time of payment of the essence of the contract, within the view of equity as well as of the law, a court of equity cannot relieve a vendee who has made default. With respect to this rule there is no doubt; the only difficulty is in determining when time has thus been made essential. It is also

equally certain that when the contract is made to depend upon a condition precedent—in other words, when no right shall vest until certain acts have been done, as, for example, until the vendee has paid certain sums at certain specified times—then, also a court of equity will not relieve the vendee against the forfeiture incurred by a breach of such condition precedent." (1 Pomeroy Eq. Jur., 3rd ed., sec. 455.)

As has been determined in innumerable cases it is not necessary, in order to make time of the essence of a contract, that the contract should expressly so declare. Words of this import need not to be used. It is sufficient that the intention to this effect should appear; and there are certain situations wherein it is held, from the nature of the agreement itself, that time is of the essence of the contract.

"Time may be of the essence, without express stipulation to that effect, by implication from the nature of the contract itself, or of the subject-matter, or of the circumstances under which the contract is made." (36 Cyc., 709.)

In agreements which are executed in the form of options, time is always held to be of the essence of the contract; and it is well recognized that in such contracts acceptance of the option and payment of the purchase price constitute conditions precedent to specific enforcement. The same is true generally of all unilateral contracts. (36 Cyc., 711.) In mercantile contracts for the manufacture and sale of goods time is also held to be of the essence of the agreement. (13 C. J., 688.) Likewise, where the subject-matter of a contract is of speculative or fluctuating value it is held that the parties must have intended time to be of the essence (13 C. J., 688.) Most conspicuous among all the situations where time is presumed to be of the essence of a contract from the mere nature of the subject-matter is that where the contract relates to mining property. As has been well said by the Supreme Court of the United States, such property requires, and of all properties perhaps the most requires, the persons interested in it to be vigilant and active in asserting their rights. (Waterman vs. Banks, 144 U. S., 394; 36 L. ed., 479, 483.) Hence it is uniformly held that time is of the essence of the contract in the case of an option on mining property, or a contract for the sale thereof, even though there is no express stipulation to that effect. (27 Cyc., 675). The same idea is clearly applicable to a contract like that now under consideration which provides for the rehabilitation of a mining plant with funds to be supplied by the contractor within a limited period.

Under the doctrine, above expounded it is evident that Hanlon would be entitled to no relief against the mining company in an action of specific performance, even if he had been prepared and had offered, after May 6, 1914, to advance the requisite money and proceed with the performance of the contract. Much less can he be considered entitled to relief where he has remained in default through out and has at no time offered to comply with the obligations incumbent upon himself.

Our conclusion, upon a careful examination of the whole case, is that the action cannot be maintained. The judgment is accordingly reversed and the defendants are absolved from the complaint. No express pronouncement will be made as to costs of either instance.

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

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