

FRANCISCO T. FIGUERAS, PLAINTIFF AND APPELLEE, VS. ROCHA & CO., SOCIEDAD EN COMANDITA, DEFENDANT AND APPELLANT.

G.R. No. 4394. April 26, 1909

Ponente: CARSON, J.

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CARSON, J.:

This is an appeal from a judgment of the Court of First Instance in Manila in an action brought to recover the amount which it is alleged plaintiff was entitled to withdraw from the firm of Carman & Co., upon the occasion of his retirement from that firm. Rocha & Co. was made defendant in this action, because soon after plaintiff's retirement from Carman & Co., and prior to the institution of these proceedings, Rocha & Co. took over the business of Carman & Co., and expressly assumed all its debts and obligations. Judgment was rendered in the lower court in favor of the plaintiff for the sum of P44,969.90, and from that judgment defendant company appealed, and brings the case here by its duly certified bill of exceptions.

There is no serious dispute as to the material facts in the case, the solution of the questions involved resting largely upon the proper construction of the articles of partnership under which Carman & Co. was organized.

On December 5, 1898, a partnership known as a "sociedad mercantil en comandita" was organized under the firm name of "Carman y Compañia" of which the socios colectivos y gerentes (directing partners) were Dickerson M. Carman, Francisco T. Figueras, and Jose Vidal (later substituted by one Felix Fanlo); and the comanditarios (unofficial partners) various persons whose names it is not necessary to set out. The only provisions of the articles of partnership which are of any importance in the discussion of this case are contained in the fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and thirteenth articles, which are as follows:

"Fifth. The capital of the company shall be seventy-nine thousand pesos, the estimated value of the property above described, contributed by the partners as follows: Dickerson Miller Carman, five thousand pesos; Jose" Vidal y Prat, ten thousand pesos; Francisco Testagorda Figueras, ten thousand pesos; Venancio Balbas y Ageo, twenty-seven thousand pesos; Robert Wemyss Brown, two thousand pesos; Harry Davis Campbell Jones, five thousand pesos; Felix Fanlo y Aznar, twelve thousand pesos; Archibald Stewart, two thousand pesos; John Kennedy, five thousand pesos; Walter A. Fitton, one thousand pesos.

"Sixth. The period of duration of the company shall be ten years from the date of execution of this instrument. Any partner shall have the right to withdraw from the company at any time, on six 'months' notice to the other partners, and from date of such notice his participation in the profits of the company shall cease his share in the capital (capital impuesto) of the company shall from that date bear interest only at the current market rate. The share (capital) of the Withdrawing partner shall be paid to him in the following manner: One-fourth upon his giving the aforesaid notice of withdrawal, one-fourth six months after said notice, one-fourth, twelve, and one-fourth eighteen months thereafter; but the company may at its option make such payments within shorter periods.

"Seventh. No partner shall have a right to transfer to a third person his interest in the company without the

approval and consent of the other partners; and such other partners shall in that event have a preferential right to, acquire the same.

"Eighth. For the purpose of ascertaining the financial condition of the company, a general balance of the business of the same shall be taken on the 30th day of June and on the 31st day of December of each year.

"Ninth. From the profits and earnings of the company ten per cent shall be set aside as a reserve fund, which said ten per cent shall be deposited or invested as may be determined by the partners at the meetings to be held for the purpose of approving the semi-annual balances.

"Tenth.-There shall also be set aside from the said profits and earnings a sum equal to ten per cent of the value of the property of the company, as a sinking fund for the depreciation of the property of the company, having for its object the preservation and renewal of said property.

"Eleventh.-The net profits and earnings of the company (after deducting the expenses of administration, allowance for depreciation of property, reserve fund and other general expenses) shall be distributed among the partners in proportion to the capital contributed by them respectively. Should the net profits to be distributed among the limited partners exceed twenty-five per cent of the value of the capital of the company, any amount in excess thereof shall be distributed among the directing and unofficial partners as follows: One-half among the directing partners, share and share alike, and the other half among the directing and unofficial partners in accordance with the amounts of capital contributed by them respectively.

* * * * *

"Thirteenth. There shall be considered as general expenses such as relate to the administration of the company and as may be incurred in and for the exclusive benefit of the business of the same."

The company purchased the lighterage business of Dominguez & Co. paying the vendor, in addition to the price set upon its vessels, a further sum of 20,000 pesos for the good will of its business. The business for which the company was organized was carried on at a large profit by Carman & Co., until it was taken over by the defendant company on or about the 14th of February, 1904, the new company assuming all the obligations of the old. New vessels were purchased during this period, and extensive repairs and improvements were placed on the old vessels purchased of Dominguez & Co., and at the close of each semester the accounts of the company were balanced, and profits distributed among the partners, by crediting their respective shares to their individual accounts.

On January 25 and 29, 1904, plaintiff gave notice in writing of his intention and desire to avail, himself of the privilege of retiring from the company as authorized in the sixth clause of the articles of partnership; and on February 4, 1904, in reply to a letter received from Carman & Co., he agreed to accept payment of the amount due him on severing his connection with the company in four equal installments, the first payable on the first day of the following July, the remaining installments at intervals of six months thereafter, the total amount to bear interest at the rate of 6 per cent until paid, on condition that his separation from the company be agreed to have taken effect as of January 31, 1904, and that he be relieved of all responsibility for the operations of the company thereafter; the company to make an inventory as of that date for the determination of the amount which he was entitled to withdraw. To this proposition the company acceded, and this action has its origin in the dispute which thereafter arose as to the amount which plaintiff was entitled to receive on the date of his withdrawal.

On March 29, 1904, Carman & Co. furnished the plaintiff with the following extract from an inventory purporting to show the condition of the business on the 31st day of January, 1904:

Special inventory, January 31, 1904.

ASSETS.

Cash on hand this date

\$776.49

Lighterage plant

123,444.36

Transportation material.....

880.00

Office furniture:

1,278.00

Premium on business (good will).....

20,000.00

Amortization of shares, balance in our favor..

21,500.00

Varadero (dry dock) of Malabon

8,000.00

Outstanding credits: accounts pending collection, including 2 per cent, \$5,623.71

16,699.14

Suspense account, balance in our favor.....

16,026.49

Spanish Filipino Bank, balance in our favor.....

2,455.00

Hongkong Bank, balance in our favor

7,108.46

Collector of Customs, balance in our favor

10,772.28

Repairs-material in stock

1,500.00

\$230,440.22

Special inventory, January 31, 1904-Continued.

LIABILITIES

V. Balbas, account-current (as directing partner),
balance in his favor

\$25,000.00

F. Fanlo, account-current (as directing partner),
balance in his favor.....

12,000.00

F. T. Figueras, account-current (as directing partner),
balance in his favor.....

12,000.00

T. Kennedy, account-current, balance in his
favor

5,000.00

Reserve fund, credit balance

31,700.00

Amortization of material, credit balance

50,630.73

V. Balbas, account-current, earnings, balance
in his favor.....

33,659.50

F. Fanlo, account-current, earnings, balance in his favor.....	
16,158.03	
F. T. Figueras, account-current, earnings, balance in his favor.....	
16,158.03	
T. Kennedy, account-current, earnings, balance in his favor.....	
6,731.90	
F. Fanlo, account-current, balance in his favor	
7,724.73	
A. Torres, account-current (as directing partner), balance in his favor	
6,000.00	
A. Torres, account-current, earnings, balance in his favor.....	
4,114.54	
Outstanding obligations	
4,695.85	
F. T. Figueras, account-current, balance in his favor.....	
363.94	
Profit and loss (2.33 per cent).....:	
\$1,397.03	

231,887.25

231,837.25

At the trial below, both plaintiff and defendant company undertook to ascertain the amount the plaintiff was entitled to withdraw from the company from this statement of the condition of the company at the date of his withdrawal. Plaintiff contends that he was entitled to receive the sum of 12,000 pesos appearing therein, which represents the amount of capital he brought into the business; 16,158.03 pesos, the amount of his share of the earnings of the company as shown by the statement; 363.94 pesos, the amount to the credit of his account-current and further his proportionate share of the amounts which appear in the statement as "reserve fund" and "amortization of material" fund.

Defendant company denies the claim of plaintiff to any share in the "reserve fund" or the "amortization of material" fund, and contends that plaintiff was entitled to withdraw no more than the amount of his capital, profits, and credit on account-current, as shown in the statement, after deducting therefrom his proportionate share of the amounts which appear in the list of assets as "premium on business (good will)" and "amortization of shares."

The evidence of record discloses that the item of 123,444.46 pesos against the words "lighterage plant" includes the original cost price (with a small percentage added by agreement of the parties) of the lighterage vessels purchased from Dominguez & Co., to which is added the cost price of various vessels purchased since that date and the cost price of improvements put upon these vessels; that the item of 20,000 pesos against the words "premium on business (good will)" is the amount paid by the company to Dominguez & Co. for the good will of their business; that the item 21,500 pesos against the words "amortization of shares" is the amount paid by the company out of funds of the company for certain shares of some of the original partners who withdrew from the company; that the items set out after the names of the various partners, with the words "account-current (as directing partner)" added, represent the amount of capital originally invested in the company by the respective partners; that the items set out after the names of the partners, with the word "earnings" added, represent the estimated earnings which the respective partners were entitled to have credited to their accounts on the 31st of January, 1904; that the item of 50,630.73 pesos against the words "amortization of material" represents the estimated accumulations in the amortization fund provided for in clause 10 of the articles of agreement; and that the item of 31,700 pesos against the words "reserve fund" represents the estimated accumulations in that fund provided for in clause 9. The other items contained in the statement explain themselves and need not be examined separately.

With this explanation of the various items contained in the statement, its meaning may be expressed in language stripped of its bookkeeping form, as follows: The sum total of earnings of the company for distribution on the 31st of January, 1904 (which is the sum total of the various items on the list of liabilities set against the names of the various partners with the word "earnings" annexed), is the result obtained by deducting the total amount of the other so-called liabilities (consisting of debts due by the company represented by bills payable or on current account; the capital originally invested in the company, which was applied to the purchase of original plant and good will; and the estimated amount which under the articles of partnership it was agreed should be placed in the reserve fund and the fund for amortization of plant) from the total amount of the so-called assets (consisting of cash on hand and on deposit; debts due the company; the cost price of plant on hand at organization and of plant acquired since organization; the cost price of good will; and the cost price of stock of the company bought with the funds of the company).

Except as to one or two items, which need not be considered for the present, there is no genuine dispute as to the correctness of the amounts set out in the statement under the various subheads, and both parties appear to accept it as a full and complete statement of the condition of the company, upon which their respective claims may be adjudicated. It will be seen, however, that it does not furnish all the necessary information from which the real earnings of the company can be ascertained, because the value of plant and good will is shown at its cost price, notwithstanding the fact that in the very nature of things the real value of vessels and other plant used in a lighterage business and of the good will of such a business must, year after year, vary widely from the cost price. But in view of the acquiescence of the parties; and since the statement was furnished in the usual way by the company as a basis for the settlement of plaintiff's, claims at the request of plaintiff, who himself had been a member of the junta directiva (directing board) and well knew the method adopted by the company in preparing such statements; and since depreciation in the value of the property of the company appears to have been anticipated and provided for by the clauses of the articles of partnership directing the setting aside of a reserve

fund and a fund for the amortization of materials; we are of opinion that for the purpose of estimating the amount of earnings of the company to which the plaintiff was entitled on severing his connection with the company, the entry of the property of the company upon the statement at its cost price may be regarded as the method agreed upon by the parties under the terms of the articles of agreement. We shall, therefore, confine ourselves strictly to an examination of the respective contentions of the parties as to the propriety of entering certain specified items among the assets and liabilities of the company, in an inventory prepared for the purpose of ascertaining the profits available for distribution among the partners at the date of the preparation of the inventory.

The defendant company insists that the items entered in the list of assets under the head of *prima de negocio* (good will) and "amortization of shares" should be stricken out, because, as it is alleged, they represent imaginary and fictitious assets.

We can not agree with this contention. The "good will" of a business is frequently one of its most valuable assets. The business men who organized Carman & Co. did not hesitate to pay 20,000 pesos for the good will of the business they took over, and the magnificent return which that company was able to make on the money invested by its organizers conclusively demonstrated that the business which they bought was a most valuable one, and that far from being a loss, or an investment in an "imaginary and fictitious asset," the 20,000 pesos invested in the "good will" of that business was an extremely profitable transaction for the purchasers. It does not definitely appear from the record whether the good will of the business in the hands of Carman & Co. had increased or diminished in value on the date of the inventory, but this item is set down therein at its cost price, in the same manner as is the original cost price of the lighterage plant, and we think the same reasons which justify the entry of plant at its cost price justify the entry of "good will" at its cost price. In any event, the defendant company has no ground for complaint upon that score, for, if, as counsel for defendant company intimates, the "good will" of the company has depreciated, it was to cover just such losses that the reserve fund was created, and the defendant company, properly, as we believe, denies plaintiff's claim to any participation therein.

As to the item under the head of "amortization of shares," the contention of defendant company is clearly without foundation. This amount was paid out of funds of Carman & Co. for shares held in that company by various persons. If it had not been so expended, these funds would be available for distribution as profits. The company now holds these shares of their equivalent, and the semiannual dividends of each of the partners are proportionately increased by that fact. Manifestly the company is not entitled to retain for itself the benefits accruing from an investment of the earnings of the company, not specifically prescribed in the articles of partnership, and at the same time deny to the outgoing partner his share of the profits invested therein.

Plaintiff's claims to a share in the reserve fund and the fund for the amortization or depreciation of material present more difficulty. We think, however, that adopting, as we do, the construction which appears to have been placed upon the above-cited articles of partnership by the parties thereto, including the plaintiff himself prior to his withdrawal from the company, these claims must be denied.

In accordance with the terms of the articles of partnership, these funds were to be created from earnings or gross profits of the business, and plaintiff insists that, as such, he is entitled to share therein upon his withdrawal from the company. In our opinion, however, the above-cited articles of partnership limited the rights of a partner who withdraws prior to the termination of the ten-year limit therein set out to the withdrawal of his original capital (capital impuesto) and the profits to which at the time of his withdrawal he is entitled under the provisions of article 11, and that the exercise of his option to resign carries with it his surrender of all claims to such amount as is carried in these funds in conformity with the provisions of articles 9 and 10.

Clearly, it was not the intention of the organizers of the company to permit one of its members to withdraw at his

pleasure, and force the company to a liquidation of its business and to the payment of such amount as the outgoing partner would be entitled to receive if the business of the company were wound up as of that date. Such a concession would have been fatal to its stability, and would have placed all of the partners at the mercy of any one partner who desired its dissolution. In section 6, which provides for the voluntary withdrawal of a partner, we find no provision for the payment to the withdrawing partner of anything but his original capital (capital impuesto), which is provided for with considerable detail, and yet the partners must have anticipated that at such time there would be in existence funds in which the retiring partner would be entitled to participate if he continued in the company until the end of the term for which it was organized. Without a clear and express agreement in the articles of partnership, authorizing a retiring partner to withdraw earnings which had gone into the reserve funds, we do not think we would be justified in reading into those articles authority so to do, for such a construction would go far to defeat the purpose for which it may be assumed these funds were set aside.

The object for which such funds are usually and properly set aside is to protect an enterprise against violent fluctuations in business, unanticipated and unavoidable losses and other untoward incidents of like character. To this end all the parties agree, that in those years wherein the business shows a profit they will lay aside a certain percentage to meet future contingencies, each partner waiving his individual right to receive his portion thereof, until the enterprise is completed. It is a sort of insurance against misfortune, and manifestly the purpose in view would be defeated in large measure were each member of the enterprise at liberty to withdraw at will, and take with him funds set aside in a season of prosperity to tide over possible seasons of adversity. Far from securing to the retiring partners the privilege so to do, the articles of partnership appear to have contemplated the withdrawal by such partners of no more than their original capital (capital impuesto) together with any profits which at the time of withdrawal they are entitled to have credited to their account, and clause 11 carefully provides against the distribution of profits without first laying aside the amounts which it was agreed should be placed in the funds in question.

But plaintiff contends that no such amount as that credited to the so-called fund for the "amortization of material" would be found therein, if it had been duly applied to the "preservation or renewal" (conservacion o renovacion) of the plant, in accordance with the provisions of clause 10 of the articles of partnership. It appears from the evidence of record that an amount even larger than that credited to this fund was expended in repairs upon the vessels and lighters used by Carman & Co., and plaintiff insists that had the amount credited to this fund been applied to these repairs, that amount would have been left free for distribution as profits. It must be admitted that the language of clause 10 of the articles of partnership, which provides for the creation of this fund, taken by itself, may be construed so as to furnish some ground for this contention. But we think, nevertheless, that construing this article together with the context, in the light of all the circumstances surrounding the execution of the instrument; and keeping in mind the construction given to the articles of partnership by the parties thereto, both at the time of its execution and throughout the period when Carman & Co. was engaged in business, it must be held that this fund (referred to in clause 11 as a discount on account of "depreciation of material" or plant) really represented the estimated depreciation in the cost price of the plant, and was intended to be used not for the purpose of keeping up ordinary repairs, but as a sort of sinking fund to balance the anticipated depreciation in the value of the plant.

Unlike the reserve fund, which could be deposited or invested in any way the majority of shareholders at the semiannual meetings might deem proper, this fund, set aside on account of the anticipated "depreciation of the property" of the company, had for its sole object the "preservation and renewal" thereof, and under the articles of partnership could properly be applied for that purpose and no other. There can be no doubt of the wisdom of this provision, for the business of the company was at all times subjected to partial or total disruption by the partial or total loss of its small fleet of vessels in one of the baguios which so frequently, play havoc with the shipping in

Manila Bay, or in some other unavoidable accident; and the plant was peculiarly subject to losses resulting from the depreciation of the value of the vessels as they became old and unseaworthy. But the expenditure of this fund on ordinary repairs would defeat the wise purpose for which it was originally intended, for in the common experience of men, the mere placing of repairs, as distinguished from improvements, on vessels such as those used by the company, could not preserve them against the depreciation resulting from the lapse of years, nor protect them from the risk of accident and loss to which they are exposed.

As a matter of fact the company does not appear to have kept these funds separate and intact as originally contemplated, but an amount of money greater than that which, under the articles, should have been placed in these funds, was invested in new plant and improvements, and the estimated amount of these funds entered on the books as a liability. The plaintiff has no complaint on that score, however, as he himself was a socio colectivo y gerente (directing partner) during practically the entire period of the operations of Carman & Co.; and indeed the investment in additional plant and improvements may in a certain sense be regarded, first, as such an investment of the reserve fund as was authorized under clause 9 of the articles, and, second, as an application of the "amortization of material" fund for the purpose of "preserving and renewing" the property of the company such as was contemplated in clause 10 of said articles. If the investment of funds, properly belonging to the "reserve" and "amortization of material" funds, in additional plant and improvements be treated as a substantial though informal compliance with the provisions of the articles, it is manifest that in the general statement of the affairs of the company, from which the profits for distribution are to be estimated, the estimated amount of such funds was properly entered as a liability of the company.

Throughout the whole period of its existence, Carman & Co., of which the plaintiff was a socio colectivo y gerente (directing partner), appears to have treated the amount, which under the articles of partnership should have been placed in these funds, as a "liability" of the company; in making repairs, as distinguished from improvements, the company appears to have made use of its available funds on hand, treating repairs as necessary expenses incident to the management and conduct of the business; the amount of these repairs does not appear to have been charged against the fund for "amortization of material," and on the contrary, that fund seems to have been treated as in reality in the nature of an estimated offset for depreciation of cost price of plant and improvements, these items having been carried on the books of the company without variation throughout the period of its existence; and no objection appears to have been made to the company's system of bookkeeping until after plaintiff had withdrawn therefrom. It appears, furthermore, that other partners withdrew from the company prior to plaintiff's withdrawal (including D. M. Carman who gave his name to the company and who, like the plaintiff, was a socio colectivo y gerente), and that at the time of the withdrawal of these partners, the interest which they were permitted to withdraw was based on the books of the company, kept in accordance with the general plan above indicated, and that there was no recognition of a claim on the part of the former retiring partners of a share in the "reserve fund" or the fund for the "amortization of material." These facts are, of course, by no means conclusive, but they are strongly suggestive of the construction placed by the contracting parties themselves on the articles of partnership under which they were organized and of the intention of the parties in entering into the agreement.

We can not say that the articles of partnership are not capable of construction so as to give a different result from that at which we have arrived, but we think the construction we have given them best accords with the intention of the contracting parties, interpreting them more especially in accordance with the provisions of article 1282 of the Civil Code, which is as follows:

"ART. 1282. In order to judge as to the intention of the contracting parties, attention must principally be paid to their acts, contemporaneous and subsequent to the contract."

We conclude, therefore, that the plaintiff is entitled to the amounts set opposite his name on the list of liabilities of the company above set out, to wit, \$12,000, Mexican currency, original capital, \$16,158.03, Mexican currency, earnings, \$363.94, Mexican currency, account-current, and no more, and that he is entitled to judgment therefor, with interest at the rate of 6 per cent per annum from the 1st day of February, 1904, subject, however, to the following deductions:

First. A deduction of \$9,453.75, Mexican currency, paid August 2, 1904, together with the appropriate incidental deduction of interest charges.

Second. A further deduction of his admitted share of losses in December, 1903, and January, 1904, overlooked in the original statement, amounting to \$454.80, Mexican currency.

Third. A further deduction of P500, Philippine currency, to which, accepting the findings of the trial court in this regard, we hold the defendant company is entitled on account of damages resulting from the unlawful appointment of a receiver on the application of the plaintiff.

Twenty days from the date of this decision let judgment be entered reversing the judgment of the trial court without costs to either party in this instance, and ten days thereafter let the record be returned to the court below, where judgment will be entered for the equivalent in Philippine currency, at the rate of exchange on the day of such judgment, of the amount in Mexican currency to which plaintiff is entitled as above indicated. So ordered.

Torres and Mapa, JJ., concur. Willard, J., concurs in the result.

DISSENTING

ARELLANO, C. J.,

The doctrine established by the foregoing decision, and set out in the syllabus thereof, is that under the provisions of the articles of partnership of the defendant company a partner voluntarily withdrawing from the partnership that was organized in accordance with the said articles is not entitled to withdraw any part of the "reserve fund" or the fund for the "amortization of material."

I regret to have to differ from the conclusion that sets out such a doctrine, to wit: That in the event of a partial dissolution of a collective limited partnership which possesses, besides the capital contributed by the partners, an increase of capital accumulated in a reserve fund that was created by contributions from the partners, together with part of the profits due them at every balancing of accounts, which they put aside in order to increase the corporate capital, the partner who retires and moves a partial liquidation for the purposes of such dissolution is not entitled to recover such portions of the profits, if any there be, which he had periodically surrendered, in order to create said reserve fund, for the only reason that it is presumed that upon such surrender he waived his right thereto and assigned them to the partnership. In other words, that the reserve fund is corporate capital differing from that originally contributed by the partners; the latter recoverable, if existing, in the event of a partial dissolution of the partnership, while in similar case the former is not, even though such fund exists.

In my opinion, the reasons alleged in support of such a doctrine are not convincing. These reasons are: First, that the terms of the articles of partnership limit the right of the retiring partner to the withdrawal of his original capital and such profits as at the time of his withdrawal he is entitled. Second, that the exercise of this right carries with it the surrender, on the part of the retiring partner, of all claims to such amount as is carried in the reserve fund and that for the amortization of material. Third, that clearly it was not the intention of the organizers of the company to permit one of its members to withdraw at his pleasure, and force the company to liquidation of its business, and to the payment of such amount as the outgoing partner would be entitled to receive if the business of the company

were wound up as of that date, inasmuch as this would be fatal to the stability of the company. Fourth, that in accordance with clause 6, a retiring partner should not be paid anything but the capital he originally contributed; and, nevertheless, the partners must have foreseen that in such an event there would be funds in existence in which the retiring partner would be entitled to participate if he continued in the company until it was wound up. Fifth, that without an express stipulation in the articles of partnership authorizing a retiring partner to withdraw profits set apart to form the reserve fund, those articles must not be construed as authorizing such withdrawal, as that would frustrate the purpose for which said fund was set aside, that is, to meet contingencies and fluctuations in the business, and to serve as a sort of insurance against unforeseen accidents. "To this end all the parties agree, that in those years wherein the business shows a profit they will lay aside a certain percentage thereof to meet future contingencies, each partner waiving his individual right to receive his portion thereof, until the enterprise is terminated."

It should here be stated that this suit is between a retiring partner and the company itself, and that there is no third party in interest as, for example, a creditor of the company; that no ulterior liabilities of the company were affected by the withdrawal of the said partner, because he was charged with all those that concerned him; and that his withdrawal was authorized by the articles of partnership, and did not appear, nor could it appear as improper to any of the partners.

It is also of importance to set forth certain incontestable facts which are hereinafter reproduced, taken from the statements made in the brief of the appellant company.

"On the 29th of March (1904) Sr. Felix Fanlo, the managing partner of 'Rocha & Co.' wrote a letter to the plaintiff which he signed 'Carman & Co.' and in which he inclosed a copy of the inventory and balance sheet which he said was that of the 31st of January, 1904. He added that the plaintiff's account stood as follows: His share of the capital, \$12,000; his share of the profits, \$15,878.62; reserve fund, \$6,339.60, and that the whole amount would be paid to him in four installments, to wit, the first one six months after his withdrawal, and the remaining installments to be paid at the end of successive periods of six months or before if possible, allowing him interest in the meantime at the rate of 6 per cent per annum.

"The plaintiff in reply stated that he did not agree to the amount set out in the said letter as being his interest in the firm of Carman & Co., because his share in the reserve fund and in the fund for the amortization of material was lacking and had not been taken into account for the purposes of the liquidation.

"On the 29th of July, the manager of Rocha & Co., sent the plaintiff a general statement of accounts and a copy of his account-current, requesting his conformity or comment. To this the plaintiff replied that he did not agree to the said account because the balance shown in it did not accord with that set out by Carman & Co. in their letter of March 29, 1904, in which the sum of \$34,218.22 was shown as standing to his credit; he further said that it was necessary to add to said account his share of the fund for the amortization of material which was 'the only point that remained to be cleared up.'

"To this Rocha & Co. replied by letter on August 1, informing the plaintiff among other things that what they had stated in their previous letter of July 29 was only an opinion, and that though the amounts expressed in the letter of March 29 had been taken from the books wherein the funds in question appeared, he should not be governed by that nor by what had been recently done, because it was neither legal nor just, and that in view of the fact that the first installment was due on that day the company was prepared to pay him 'an approximate amount while the doubtful points were being cleared up.'

"On the same date, August 1, the defendant wrote to the plaintiff, saying that 'on the supposition that he had an option on the balance of \$34,218.22, there should be deducted \$454.80 corresponding to the months of December and January, and in that case the amount payable at the first installment would be \$9,453.75, including interest, for which sum they requested him to send his receipt.' The plaintiff sent a receipt for the said

amount and collected it.

"As the second installment was about to become due, the defendant sent the plaintiff another statement of accounts which the latter did not accept, and he filed the complaint which gave rise to these proceedings."

As may be seen, the company did not object when its partner Figueras, exercising the faculty accorded him by clause 6, notified it of his intention to retire, and on the 29th of March it had already made the necessary liquidation of the company's capital with a view to the partial rescission of the contract caused by the withdrawal of the said partner, and he was allowed his share of the "reserve fund" which amounted to \$6,339.60. The company did not fear for the stability of its enterprise when it returned to Figueras his share of the capital, \$12,000-nor his share of the profits, \$15,872.62-nor his share in the profits held in reserve, that is, of the capital placed in the reserve fund. Consequently, the courts of justice have before them the evidence that the partners, in agreeing upon the contents of clause 6, had the intention, manifestly shown by their acts, upon the withdrawal of a partner before the time specified in the contract, to liquidate the business as though the company was to be wound up altogether, for the purpose of setting aside the portion corresponding to the outgoing partner in the corporate capital, that is to say, in the capital, the profits, and the reserve fund. The partners who imposed upon themselves this special law were well aware of what they were stipulating, and what is, on the other hand, provided by the general law, to wit, the Code of Commerce: that the partial rescission of a copartnership shall be preceded by a general liquidation of the whole business up to the time when the interest and responsibility of the outgoing partner ceases. This operation is not an unusual one, nor one that would disturb the regular course of the company's business, inasmuch as the rescission may be subordinated to one of the periodical balancings of accounts so that the participation in favor of and against the retiring partner may be fixed with precision. There is, therefore, no need to tax the mind with interpreting what requires no interpretation, at least from the moment that the acts of the contracting parties themselves clearly demonstrate their intention.

Said liquidation, with the letter with which the same was forwarded (Exhibit H), showed a total of \$34,218.22 in favor of the outgoing partner, and it was stated in the letter that the payment of that sum would be made in four installments. The outgoing partner accepted the said liquidation, so that there was already the agreement necessary for a valid contract so far as the contents of the liquidation was concerned; but he found out that his share in the "amortization fund," amounting to \$50,630.73, had not been liquidated or adjudicated to him, and he set up a claim for it.

In the account-current of the 29th of July, which the company submitted to the outgoing partner, the same items were set out on the debit side, to wit: capital, profits, and reserve fund; but by reason of new deductions which the company thought fit to make, the balance of \$34,218.22 already accepted, was reduced to \$26,227.73. For this reason the account was objected to, and the previous objection regarding the participation that the outgoing partner had in the amortization fund was again put forward, this being the only point that remained to be cleared up.

On the 2d of August, 1904, the company paid the first installment in accordance with the liquidation of March 29 previous, and delivered \$9,458.75 to the outgoing partner, "in which amount the proportional share in the reserve fund was included." (B. of E., 24 and 25.)

It was only on the 25th of January, 1905, after all of the above acts had been consummated, that the company denied the right of the retiring partner to the "reserve fund" and to the fund for "amortization of material," and presented an account-current which showed only \$9,524.30 as balance, and it was then that the outgoing partner took the matter to the courts of justice.

The liquidation was effected on the 29th of March, 1904, and from that time an account-current was opened and a

statement of the same was sent to the creditor Figueras on the 29th of July, 1904, and the 25th of January, 1905.

In the light of these facts, which are incontestable, no longer is the share in the fund for the "amortization of material" the "only point that needs to be cleared up;" there is also the important question of the right to the "reserve fund."

That Figueras's right to a portion of his profits was extinguished by a presumed renunciation when the same went to form a part of the "reserve fund," is the most powerful reason given in the foregoing majority, decision.

It is not clear whether the renunciation is absolute or temporary; in the beginning of the argument it seems to be the former, but at the close it is said: "* * * each partner waiving his individual right to receive his portion thereof (the profits) until the enterprise is completed." But in either case, it can not be understood that there was a presumed renunciation, either as the means by which a person lost his dominion over a thing that was his own and that he has not in any way transmitted to another person, or as operating to prevent the disposal thereof until a given period. It is understood that, the question being between partners as stated in the beginning, no third party is interested therein.

The reserve fund in this case has been mistaken for the reserve fund which is characteristic of joint-stock companies.

In this case we have to deal with a copartnership which originally was a collective company under the style or firm name of "Carman & Company," that admitted various unofficial partners (comanditarios) and did not qualify itself as a sociedad en comandita as prescribed in the Code of Commerce. Dickerson M. Carman, Francisco T. Figueras, and Jose Vidal were the collective partners and managers. After the organization of the copartnership, one of the unofficial partners, Felix Fanlo, became a collective partner in substitution of Jose Vidal. It was stipulated by the partners in the articles of partnership that any of them could withdraw from the firm by giving notice to the others six months in advance. The collective partner Figueras gave notice on the 31st of January, 1904, of his desire to withdraw; hence the liquidation of March 29, 1904, and the successive accounts-current already mentioned. (Facts stated in the complaint and admitted in the answer.)

At the time when this firm was organized, December 5, 1898, the Code of Commerce was in full force, and in this code the differentiating characteristics of collective partnerships or sociedades en comandita, and joint-stock companies are very elemental. In the first-named, the personal element constitutes the essential thing, hence the necessity for a firm name, while in the latter the real element is essential, and for said reason a corporate name is sufficient; the former consist of an association of persons, and the latter of an association of capital.

With the former the element of credit is the name of the collective partners and managers: "all the members of the general copartnership, be they or be they not managing partners of the same, are personally and jointly liable with all their property for the results of the transactions made in the name and for the account of the partnership, under the signature of the latter, and by a person authorized to make use thereof." (Art. 127.)

With the latter the liability of the members for the obligations and losses shall be limited to the funds they contributed or bound themselves to contribute to the corporate capital. (Art. 153.) And although the responsibility of unofficial partners is equally limited, it is nevertheless essential in this class of copartnerships to respond for transactions conducted exclusively by others called collective partners who are personally and jointly liable with all their property just the same as in the case of general partnerships.

On this supposition, if there were collective partners of the firm of "Carman & Co." and these were liable with all their property, even with such as was not brought into the copartnership, a reserve fund agreed upon between its partners for particular uses or employment within the same, that is to say, a gradual increase of capital, can not

constitute a kind of insurance against unforeseen accidents, if outside of it and over and above the whole capital the property of the general partners was held as a reserve for joint liability.

If during the year 1899, the first year of its operation, one of the partners had at the end of six months given notice of his intention to withdraw at the end of said year, and if his share in the profits amounted to 1,000 pesos, out of which 200 or 100 would have gone to the reserve fund if he had continued in the partnership, the delivery of the entire amount of his 1,000 pesos could not have been denied him, nor could he have been compelled to contribute to such reserve fund in which he would no longer take any interest; there was no longer any reason for him to care for the stability of the partnership once he had withdrawn from the same. Had it been stipulated between the partners that out of the capital contributed by each of them, 10 per cent was to be set aside as a reserve fund to be exclusively devoted to the purchase of vessels, upon any of them withdrawing from the copartnership before the expiration of the term agreed upon the said 10 per cent could not have been retained as a reserve fund. The reserve fund, which is an unusual thing in the case of collective copartnerships, does not mean an increase in the securities, inasmuch as the supreme security rests on all the property, even that which has not been brought into the business; it only means an increase of capital. The same thing would happen if some of the members, in addition to the capital contributed by them, loaned a certain amount to the company for the purpose of forming a reserve fund for some particular object; upon their retiring from the copartnership and withdrawing their capital, they would also withdraw the sums invested in objects in which they no longer had any interest, unless it had been stipulated that they would be kept by the firm as a loan for a fixed or specified period of time.

With respect to joint-stock companies, there was a time, previous to the enforcement of the present Code of Commerce, when by reason of a special law that governed them they were compelled to maintain a reserve fund which was strictly legal, over and above the will of the stockholders. It had to consist of not less than 10 per cent of the corporate capital. It was not constituted out of what the stock-holders paid into the company, but out of the profits that they did not receive, and in order to constitute the same it was necessary that there should be profits out of some transaction, as otherwise it could not be formed. It was not necessary to establish it at once, even though there should be sufficient profits therefor, but the portion designated in the articles of incorporation was set aside and gradually applied thereto. If after it had been formed there was a decrease, it was necessary to replace it at once; not gradually, in the manner in which it was formed, but by applying all of such portion of the profits as was required, without distributing anything to the stockholders until it was completed.

All the considerations set forth in the majority decision properly apply to the above legal reserve fund. The said legal reserve fund, that is to say, that imposed by law on all joint-stock companies subject to its provisions, had as its object an increase of the securities by adding to the capital a portion of the profits in order to meet with them also the fulfillment of corporate obligations. Although it was formed out of that portion of the profits which each stock-holder failed to receive it belonged to all in general; it was not disposed of privately, nor was it represented by shares as was the corporate capital. It lasted as long as did the company, and if at its expiration there was no need to apply it to the payment of debts it was divided up and distributed in the same proportion by which it had been formed.

But nothing of all this is applicable to a purely conventional reserve fund such as was agreed upon between the partners of this general copartnership or sociedad en comandita, one which is not divided up into shares, but with fixed capitals. There enters nothing that has been imposed by the law, nor is this a joint-stock company wherein the only liability and guaranty is the capital and the reserve fund.

Besides this legal consideration there is yet another, based on proven facts which are thus considered in the judgment appealed from: "Instead of using the amounts accumulated as a 'reserve fund' for the purchase or acquisition, of new vessels to continue the business, and other purposes devoted to this end, sums also taken from

the general profits resulting from the respective balances were applied to such purposes; such payments were charged to 'profit and loss,' that is, deducting said amounts from the earnings or from the profits that were periodically divided up between the partners, and in exchange the 'reserve fund' and the 'amortization fund' remained intact." (B. of E., 27.) Twice did the partners sacrifice their share of the profits, and neither of such profits can now be recovered by the outgoing partner.

In conclusion, it is my opinion that, besides the three amounts that are adjudicated to the plaintiff by the majority decision, to wit: \$12,000 as capital; \$16,158.03 as profits; and \$868.94 on his account-current, the following should be added:

For his share of the reserve fund..... \$6,339.60

For his share of the amortization fund..... 17,720.75

In addition to the three items contained in the decision, there should be deducted the sum of \$4,000, which the judgment appealed from deducts as the share of the appellee in the good will of the business (\$20,000).

With regard to the first item added, that of \$10,095 fixed in the judgment appealed from, although well founded on the contract, I do not consider acceptable, for the reason that in the appellee's answer to the letter which contained the liquidation of the 29th of March, 1904, he had already agreed to the item which, as his share in the "reserve fund," had been assigned to him in the said liquidation and set out in his account-current; this amount was fixed by the appellee in his complaint on the 26th of January, 1906. (B. of E., 4.)

With respect to the second item, that is, the share that according to the judgment appealed from is due to the appellee out of the "amortization fund," I consider that the reasons supporting the adjudication of the said sum to the appellee are in accordance with the law.

The further deduction of \$4,000 is made in the judgment appealed from, and it has not been appealed from by the plaintiff.

Finally, as to the equivalence of Mexican pesos to Philippine pesos, I adhere to the decision of the majority.

With the foregoing modification, I vote for the affirmation of the judgment, without any special ruling as to the costs of this instance.

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