

3 Phil. 684

[ G.R. No. 1492. April 15, 1904 ]

**TAN MACHAN, PLAINTIFF AND APPELLEE, VS. MARIA GAN AYA DE LA TRINIDAD ET AL., DEFENDANTS AND APPELLANTS.**

**D E C I S I O N**

**COOPER, J.:**

This action was brought by the plaintiff, Tan Machan, against Maria Gan Aya de la Trinidad, wife of Manuel Gay; Filomena Gan Aya de la Trinidad, wife of Benito Sanchez; Catalina Gan Aya de la Trinidad, wife of Esteban de la Cruz, Emilia Gan Aya de la Trinidad, wife of Jose Abello; and Carmen Cañete, wife of Antonio Navarro.

The suit was against the defendants as the heirs and legal representatives of Senora Ruperta Gualinco, except Dona Carmen Cañete, who is sued under the allegation that she has a contract with the heirs for the purchase of the hacienda, the property of Seiora Gualinco, deceased, and upon it is sought to establish a lien for the satisfaction of the claim the subject of the complaint.

It is alleged in the complaint that Senora Ruperta Gualinco, the deceased, executed a certain promissory note in the sum of \$9,000, on the 9th day of August, 1894, payable to the order of Don Clemente Zulueta; that the plaintiff, Tan Machan, and one Lim Ponson signed said note as sureties; that the said Señora Ruperta Gualinco failing to pay the same, the plaintiff was obliged to pay said debt; that by reason of the payment of said debt by the plaintiff, he became subrogated to all the rights of Don Clemente Zulueta, and the plaintiff asks that judgment be rendered in his favor for the sum of \$7,361.03 (the amount due him after deducting payments made to him), together with interest

at the rate of 6 per annum from the 27th day of April, 1895, the date of the payment of the debt by the plaintiff; and that the property of Señora Gualinco, deceased, mortgaged to secure the payment of the debt, be subjected to the claim of the plaintiff in satisfaction of the debt.

Doña Carmen Cañete failed to answer and judgment by default was rendered against her, subjecting the property to the debt as to any claim which she might assert against it.

The defendants, the heirs of Señora ,Gualinco, denied in their answer that the plaintiff, Tan Machan, and Lim Ponson signed as sureties and allege that they were principals in the making of the obligation and as such were liable for their proportionate part of the debt.

Judgment was rendered by the court in favor of the plaintiff against the defendants as the heirs and legal representatives of Dona Ruperta Gualinco, for the sum of \$7,301.03, principal, with \$3,569.08, interest, and subjecting the hacienda, machinery, and other articles appurtenant to the same to the payment of the debt.

The errors assigned by the defendants are:

(1) The court erred in admitting proof at the trial to show that the plaintiff and Lim Ponson signed the note as sureties.

(2) That the court erred in admitting the books of account kept by the plaintiff, Tan Machan, in which books said note was entered as a bill payable given as security for Doña Ruperta Gualinco for \$9,000, the payment to Zulueta by the plaintiff, Tan Machan, on the 9th day of February, 1895, of the sum of \$5,000 and on the 28th day of February of \$4,000.

(3) That the court erred in holding that the note was signed by plaintiff and Lim Ponson as sureties and not as principals and in not giving due weight to the testimony of the defendants to the effect that the note was made by the plaintiff and Dona Ruperta Gualinco and Lim Ponson jointly, and that the money received on said loan was equally

divided between the said makers of the note.

The question raised by the last assignment of error can not be considered.

No motion having been made for a new trial, this court can not review the evidence taken in the court below, nor retry the questions of fact. (Sec. 497, Code of Civil Procedure.) We will state, however, that an examination of the evidence contained in the record only discloses a conflict of testimony with the preponderance of evidence in favor of the plaintiff and the finding of the court in this particular must have been sustained.

The Court of First Instance did not err in admitting testimony to show that the plaintiff and Lim Ponson signed the note as sureties for Senora Ruperta Gualinco. The admission of such proof is not a violation of the rule which prohibits the admission of oral evidence to contradict a written instrument. The transaction between the sureties does not purport to be covered by the document. It was a collateral agreement which could be proven by evidence outside of the instrument itself. (McKelvey on Evidence, 368; Brandt on Suretyship, sec. 30.)

The remaining assignment of error to be considered is as to the admission of the books of account kept by the plaintiff.

The objection to the admission of the books in evidence was "that the books were not kept in accordance with the provisions of the Code of Commerce." There is no statement made in the bill of exceptions as to whether the books "were kept in accordance with the Code of Commerce or not.

Section 143 of the Code of Civil Procedure requires that the party excepting shall cause to be presented to the judge a brief statement of the facts of the case, sufficient to show the bearing of the rulings, orders, or judgments excepted to. 'A statement should have been made in the bill of exceptions as to the particulars in which the books were deficient.

If such was the fact, it should, have been stated in the bill of

exceptions that the books received in evidence were not certified by the municipal judge of the district, nor were the pages of the books stamped with the seal of the municipal judge or justice of the peace.

The statement contained in the brief of the appellants that such was the case can not be considered. It should have appeared in the bill of exceptions.

Under section 338 of the Code of Civil Procedure a witness may be allowed to refresh his memory respecting the fact by anything written by himself or under his direction at the time when the fact occurred, or immediately thereafter, or at any other time Avhen the fact was fresh in his memory and he knew the same was correctly stated in the writing.

And under section 328, the entries and other writings of a deceased person, made at or near the time of the transaction, and in a position to know the facts stated, may be read as *prima facie* evidence of the facts therein stated when they were made in the course of the ordinary and regular duty of the person making the entry.

Books of account, when they come within the provisions of sections 328 or 338, Code of Civil Procedure, are admissible without regard to the provisions of the Code of Commerce.

We can not consider the additional objection made in the brief of counsel—that is, that the books were not admissible under the provisions of article 1228 of the Civil Code.

The rule is that, in examining the question as to whether the ruling of the court below on an objection to the evidence was correct or not, the appellate court will not consider any other ground of objection than that raised in the court below. (8 Enc. PL and Pr., 223.)

There was no objection made at the time the books were admitted in evidence that they were not admissible under the provisions of article 1228 of the Civil Code and we therefore can not consider this objection.

The judgment of the Court of First Instance is affirmed, and the cost of appeal is adjudged against the defendants.

*Arellano, C. J., Torres, Mapa, McDonough, and Johnson, JJ., concur.*

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