6 Phil. 594

[G.R. No. 1794. November 06, 1906]

FAUSTINO LICHAUCO, PLAINTIFF AND APPELLANT, VS. FRANCISCO MARTINEZ, DEFENDANT AND APPELLEE.

D E C I S I O N

WILLARD, J.:

The defendant, Martinez, lost 22,000 pesos at *monte* and *burro* in the house of one Maria Elson, in Ermita, Manila, in one day's playing in the month of August. At the termination of the game he made a promissory note for 22,000 pesos, payable to Mateo Alba, one of the players, and delivered the same to him. Oh the 6th of August, 1902, Martinez executed a document before a notary public in which he stated:

> "Primero. Que necesitando el exponente determinada suma de dinero para ciertos fines que no son del caso consignar, el mismo acudio al otro compareciente en solicitud de que se la facilitara en calidad de prgstamo; con el fin de que ello conste de modo fehaciente formaliza la presente escritura en cuya virtud solemnemente otorga: Que declara y reconoce ser en deber a D. Mateo Alba y Tañag la cantidad de veintid6s mil pesos mejicanos, que con anterioridad a este otorgamiento ha recibido de dicho sefior, en calidad de prestamo simple, y en efectivo metalico contado a su entera satisfaccion; por cuya suma formaliza a su favor, la carta de pago mas firme y eficaz que a su derecho y seguridad convenga. Segundo. Que la indicada cantidad prestada no devenga interns alguno y obligandose el otorgante a devolver o reintegrar el citado capital prestado al nombrado D. Mateo Alba dentro del tlrmino de seis meses contados desde esta fecha."

This document was delivered to Mateo Alba and the *pagare* which had been given by

Martinez on the night of the playing was destroyed by the notary. The notarial document was executed to take the place of the *pagare* and the only consideration therefor was the money lost in the game aforesaid.

On the 12th of August, 1902, the defendant, Martinez, lost 16,000 pesos playing *burro* and *monte* in the house of Dr. Bustamante in Manila. When the game was terminated he executed and delivered to Mateo Alba a document of which the following is a copy:

> "Por $16,000.
>
> "*Pagare* en virtud del presente en Manila a seis meses de la fecha a la ordende D. Mateo Alba la cantidad de *diez y seis mil pesos mex* valor recibido en efectivo del mismo, sin ningun interns para operaciones de Comercio. Manila 12 de Agosto de 1902.—Francisco Martinez. Rubricado."

This *pagare* was given for the amount of money so lost as aforesaid.

Prior to the 12th day of June, 1903, Martinez paid to Alba on two different occasions 150 pesos on account of this indebtedness, and on each occasion received from Alba a receipt for 3,000 pesos. On the said 12th day of June, 1903, Mateo Alba, by an instrument in writing, assigned and transferred to the plaintiff, Faustino Lichauco, the two documents above referred to and all his interest therein, stating that there had been paid thereon 6,000 pesos. Five days thereafter—that is to say, on the 17th of June, 1903—plainiff commenced this action against Martinez to recover the amount due on said two obligations with the interest thereon. The defendant answered, alleging that the documents were given for money lost at gaming and that the amount thereof could not be recovered. Judgment was entered in favor of the defendant, the plaintiff moved for a new trial on the ground that the evidence was not sufficient to justify the decision and, his motion having been denied, he brought the case here by bill of exceptions.

It is the settled doctrine of this court that money lost at a prohibited game can not be recovered, although the loser executes and delivers to the winner his promissory note therefor. (Palma vs. Cafiizares, 1 Phil. Rep., 602; Escalante vs. Francisco, 2 Phil. Rep., 650; De la Rama vs. Lacson,[1] 2 Off. Gaz., 469.)

It is claimed by the plaintiff and appellant that he can recover, although his assignor could not. Our attention has not been called to any provision of the Spanish law which allows this.

The decisions cited from the courts of the United States relate to cases in which a negotiable instrument was transferred before maturity. Of the two documents in this case, one was not a negotiable instrument and both of them were acquired by the plaintiff after they became due.

It is also claimed by the appellant that of the two games played on these two occasions, *burro* is not prohibited and that a recovery can be had of money won at that game. That *burro* is not a game of *suerte, envite, o azar* has been decided by this court in the case of Reyes vs. Martinez,[(1)] No. 1724, decided December 11,1905. *Monte* is, however, a prohibited game. In order that the appellant can recover for the amount won at *burro*, it must appear what that amount was. Article 1276 of the Civil Code provides as follows;

> "The statement of a false consideration in contracts shall render them void, unless it be proven that they were based on another real and licit one."

In the present case the consideration expressed in each one of these documents is false. Article 1276 is, therefore, applicable, but this did not by the terms of said articles prevent the presentation of proof showing that there was a lawful consideration. There is no doubt that by the terms of this article 1276 the burden of proof was upon the plaintiff to show that there was a lawful consideration, and to show what part of these amounts was won at the game of *burro*. He did not do this. Martinez, the defendant, testified that he could not say how much he lost at each one of these games. As to the game played in Ermita, the only other witness was Mariano Romero. He testified that more time was spent playing *burro* than playing mowte; that he believed that Martinez lost much in *burro* and perhaps little at *monte*, but he could not state approximately, but even this testimony is destroyed by his further statement that he left the house about 4 in the afternoon, long before the game was finished. As to the game in the house of Dr. Bustamante, the only witness who testified to the amount won or lost in either of the games was Sisenando Lanuza, who testified as follows:

> "P. Ese dinero se perdio en los juegos de *monte* y *burro* con Mateo Alba, no es asi?—R. Sf Sr. perdio la mayor parte de esa cantidad jugando *burro*."

But in cross-examination he testified as follows:

> "P. Segtin sus calculos, sabe V. cuanto de ese dinero fue perdido al *monte* y cuanto al *burro*?—R. No recuerdo, no puedo recordar eso.
>
> "P. Aproximadamente?—No, Señor."

This evidence is entirely insufficient to base thereon a conclusion that any particular sum of money was lost at *burro*.

It is also claimed by the appellant that recovery can be had in this case because Martinez did not lose this money to Alba but to other players and that Alba loaned the money to Martinez with which to pay them. We have held in the case of Vasquez vs. Florence,[{1}] No. 2353, decided October 28, 1905, that money loaned for the purpose of being used in play can be recovered, but the facts in this case do hot bring it within the rule laid down in that case. That Alba was a player in both games is undoubted, but he, testifying at the trial, said that '"I promised the other players that I would be responsible for the debts of Martinez" and that he had charge of the chips with which the game was played and was responsible for everything. He also testified that it was agreed before the game commenced that "in case Martinez lost that he would pay his debts and that he would execute a document acknowledging that he owed me the amount lost." There is no evidence that Alba on this occasion loaned Martinez any money whatever. In fact, Martinez testified that he had no money ajxd that he played on credit. There is no evidence that Alba paid the other players who might have won anything from Martinez. Moreover, the owner of the house in Ermita, Maria Elson, testified that no money had to be paid for the chips.

The evidence is entirely sufficient to justify the conclusion that instead of a loan of money being made by Alba to Martfoez with which to pay the other players the amounts he had lost to them, the other players assigned and transferred to Alba their claims against Martinez, and one document was executed by Martinez evidencing this indebtedness. Under such circumstances, Alba was in no better condition than the persons who had won the money and who had assigned their claims to him.

The judgment of the court below is affirmed, with the costs of this instance against the appellant. After the expiration of twenty days let judgment be entered in accordance herewith and ten days thereafter the record be remanded to the court below for proper action. So ordered.

Johnson and *Carson, JJ.,* concur.

CONCURRING

ARELLANO, C.J.:

Notwithstanding my discordant opinion which I base upon the cases cited in the opinion written by Mr. Justice Willard in this case and it appearing by the testimony of the creditor himself in whose favor the notarial document and the negotiable promissory note which are the basis of the complaint were executed that the money which the debtor himself admitted to have received as a loan was not received as such but that it was lost at prohibited games, to wit, *monte* and *burro*, I am of the opinion that against the contents of the said document there stands a confession which makes any other proof unnecessary, that the consideration therein stated is not only false but the real consideration is unlawful, and that the money which the plaintiff seeks to recover can not, therefore, be claimed in an action in court under article 1798 of the Civil Code. I concur with the aforesaid opinion.

CONCURRING

TRACEY, J.:

I concur in the opinion of Mr. Justice Willard, except that I think that the case of Reyes vs. Martinez was not well decided and that its doctrine should be reexamined.

DISSENTING

TORRES, J.:

The undersigned, assuming that a part of the amount claimed from: the defendant, Francisco Martinez, was lost at the game of *burro*, and considering that this is not one of the games prohibited by law because it is not one of chance, as was held by this court in the case of Alejandro Reyes vs. Francisco Martinez, No. 1724, decided December 11, 1905, is of the opinion that the mere failure to prove how much of that sum was lost at the game of *burro* is not sufficient to relieve the debtor of the payment of his indebtedness, where such indebtedness has been satisfactorily established. I think that the judgment of the trial court should be set aside and thai the case should be remanded with directions that a new trial be

had, so that the parties may have an opportunity to prove how much of the amount claimed was lost at the said game of *burro*, and that judgment be entered by the trial court upon the new evidence thus presented.

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[1] 3 Phil. Rep., 618.

(1) 5 Phil. Rep., 402.

{1} 5 Phil. Rep., 183.

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