

## JOSE TAN SUNCO, PLAINTIFF AND APPELLANT, VS. ALEJANDRO SANTOS, DEFENDANT AND APPELLEE.

*G.R. No. 3660. October 12, 1907*

Ponente: CARSON, J.

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### CARSON, J.:

This is an action to recover 420 pesos, the value of certain goods sold to the defendant in the months of August and November, 1904.

Judgment in favor of the plaintiff in the court of the justice of the peace of the city of Manila was reversed on appeal in the Court of First Instance of said city, where judgment was entered in favor of the defendant. From this judgment the plaintiff, after moving for a new trial on the ground that the findings of fact were plainly and manifestly contrary to the evidence, appealed to this court.

The defendant pleaded accord and satisfaction, alleging that on the 3d day of January, 1905, he gave to the plaintiff, in full satisfaction of his indebtedness, a claim for 480 pesos which he, the defendant, held against a Chinaman named Rafael Serrera; and that the plaintiff accepted the said claim against Serrera in full payment of the said indebtedness, and promised to pay the defendant the difference between the two accounts, which amounted to 60 pesos.

The plaintiff denied these allegations of the defendant and stated that at the time of the alleged payment he received from the defendant a check for the sum of 480 pesos, drawn by the said Chinaman, Kafeel Serrera, on the International Bank; that he, the plaintiff, agreed upon cashing said check to pay over to the defendant 60 pesos, the excess for which the check was drawn over the amount of defendant's indebtedness; that the bank returned the check unpaid, there being no funds on deposit to the credit of the drawer; that he, the plaintiff, had not been able to realize on said check and had returned it to the defendant. We think that the evidence of record sustains the allegations of the plaintiff; that the defendant's plea of accord and satisfaction can not be sustained; and that the delivery of the check did not have the effect of payment of the admitted indebtedness, because:

"The delivery of promissory notes to order or drafts or other commercial paper shall only produce the effects of payment when collected or when, by the fault of the creditor, their value has been affected.

"In the meantime the action arising from the original obligation shall be suspended." (Art. 1170, Civil Code.)

The evidence of record is conflicting, but we think that the testimony of the justice of the peace, who tried the original action in his court, demonstrates the unworthiness of the defendant as a witness testifying in his own behalf, and strongly tends to corroborate the truth of plaintiff's version of what occurred.

The justice of the peace swore at the trial in the Court of First Instance that the defendant, testifying as a witness in his court, "stated that he paid the debt with the check, which he delivered to his creditor, and that the check was returned to him because it had not been recovered, and that after the return of the check to him he gave a receipt in its place."

The allegations of the complaint and the testimony of the defendant at the trial in the Court of First Instance are in direct conflict with this testimony on the vital point of the defense as to the mode of the alleged payment. On the second trial the defendant stated that he did not give Serrera's check to the plaintiff; that he gave him the factura (account with vouchers) of his claim against Serrera; and that the plaintiff himself received the check in question directly from Serrera in settlement of the transferred account.

We believe that the statement of the defendant in the court of the justice of the peace is the true version of what occurred and that the change of the defendant's testimony in the Court of First Instance resulted from his discovery at the first trial that, under the provisions of the above-cited article of the code, his original allegation that he had paid his indebtedness with Serrera's check constituted no defense against the claim of the plaintiff. We are confirmed in our mistrust of the truth of the allegations of the defense by the fact that the only witness called by the defense, other than the defendant himself, swore that he had seen the plaintiff and talked with him in regard to the alleged balance of 60 pesos due the defendant, at a time when, as conclusively appears from the evidence, the plaintiff was absent in China.

Counsel for the defendant lays great stress upon the effect of a certain memorandum, attached by the agent of the plaintiff to the receipt given by the defendant for the check in question when it finally came into his possession. We do not think that this memorandum throws any light upon the question at issue, because its execution was not, in itself, inconsistent with the allegations of either the plaintiff or the defendant.

The judgment of the trial court is reversed, without costs to either party in this instance. So ordered.

Arellano, C. J., Torres and Johnson, JJ., concur.

Willard J., dissents.

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### **DISSENTING**

#### **TRACEY, J.:**

This case turns on the credibility of the witnesses and there is rarely presented to this court one in which, "giving due weight to the fact that the judge who tried the case saw the witnesses when they testified" (Act No. 1596), we may so fittingly accept his criterion and affirm his judgment. Therefore I dissent.

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