

**P. D. COLBERT, PLAINTIFF AND APPELLEE, VS. E. M. BACHRACH,
DEFENDANT AND APPELLANT.**

G.R. No. 4607. November 18, 1908

Ponente: CARSON, J.

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CARSON, J.:

The appellant having failed to make the testimony of the witnesses taken in the trial court a part of the record brought here on appeal, we are precluded from a review of the testimony for the purpose of determining whether the findings of fact by the trial judge are or are not supported by the weight of the evidence.

Counsel for appellant contend that the trial court erred in giving judgment in favor of the plaintiff and against the defendant for the sum of P1,000 which the court found that the defendant promised to pay the plaintiff. The basis of this contention is counsel's allegation that this promise was a "special promise to answer for the debt, default or miscarriage of another," unenforceable under the provisions of section 335 of the Code of Civil Procedure, because not made in writing subscribed by the promisor or his agent.

The language used by the trial court in its decision is to the effect that the defendant obligated himself to pay the money in question, and there is nothing in this language, unaided by the evidence taken at the trial, which would justify us in holding that the promise was not made in writing and therefore not binding on the defendant. The trial court having found that the defendant obligated himself to pay this money, we must presume that the obligation was in legal form and binding upon the defendant, unless it appears from the record brought here on appeal, that there was some defect in the execution of the obligation which invalidated it.

Furthermore, and aside from mere questions of form and practice, the judgment in this regard must be sustained upon the merits as they appear to us from an examination of the facts as developed by the pleadings and the judgment in the court below. It appears from an examination of the judgment that the promise to pay by the defendant was not a special promise to answer for the debt, default, or miscarriage of another, but a promise to pay a balance due by the defendant on account of property purchased by him from the plaintiff, the trial court being of opinion, and so holding, that the record disclosed that, notwithstanding the fact that the amount promised was a balance due on the purchase price of certain property bought from the plaintiff by a third person who was acting for the defendant, and on whose behalf the promise was made by him; nevertheless, the defendant was the real purchaser, and the promise to pay was in fact made on his own behalf, the third person who formally appeared as the purchaser having acted merely as his agent and representative. Counsel for appellant also contend that the trial court erred in giving judgment in favor of the plaintiff for 527, one-half the face value of certain so-called "chits" or promises to pay, which defendant held in his possession for collection for the benefit of a partnership in which plaintiff and defendant were equal partners. It is not denied that the defendant and appellant held the "chits" in question for collection, but it is urged that, since it does not appear that he collected more than 302 on account of these "chits," he should be held responsible to his partners for no more than 151, one-half the amount actually collected.

The trial court held that the defendant was responsible to the plaintiff, his partner, for one-half of the face value of all the "chits" in his hands for collection, because, in the language of the opinion, "he has not rendered a definite and concrete accounting of each of the 'chits' that he has not collected," and it must be admitted that this language is subject to more than one construction. It may be construed to mean either that the defendant failed to make an accounting of the "chits" in his hands for collection and declined to produce or surrender the "chits" which he alleged he had been unable to collect," or it may be construed so as to mean that he failed to explain satisfactorily the reason for his failure to recover the total amount due on the "chits" in his "hands for collection. If this finding be given the latter construction, the contention of the appellant should be sustained, because the "chits" being in the hands of the defendant merely for collection, his failure so to do in no wise burdened him with the obligation of paying over their face value to the partnership, unless it affirmatively appeared that his failure to recover such face value was due to some fault or neglect on his part; and if at or prior to the trial he had turned over for the benefit of the partnership the uncollected "chits" together with the amount of cash collected on account of those actually paid, he could not properly be held to any further responsibility. But if the first, and as it seems to us, the more reasonable construction, be put upon the language of the trial court, the failure of the defendant to account for and produce the "chits" which he alleged he had been unable to collect, rendered him responsible to the partnership for the full amount of the face value of such "chits," and judgment was properly rendered against him for one-half of the total amount of the "chits" which came into his possession. The evidence of record not being before us, it is impossible for us to say that this is not the proper construction which should be put upon the language used by the trial court; and we do not think that we would be justified in reversing the judgment of the court below on the ground that there is error in its conclusions if a possible construction be given the language used in its decision, when a reasonable construction of the language used fully sustains the conclusions of the court and the judgment based thereon. If the appellant was not satisfied with the findings of fact by the trial judge, it was his duty to bring the evidence here on appeal in order that erroneous findings might be reviewed and corrected.

The judgment of the trial court should be and is hereby affirmed with the costs of this instance against the appellant. So ordered.

Arellano, C. J., Torres, Mapa, Willard, and Tracey, JJ., concur.

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