

EL BANCO ESPAÑOL-FILIPINO, PLAINTIFF AND APPELLEE, VS. MCKAY & ZOELLER, DEFENDANTS AND APPELLANTS.

G.R. No. 7790. March 19, 1914

Ponente: TRENT, J.

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TRENT, J.:

An appeal from a judgment upon the pleadings condemning the defendants to pay the plaintiff the sum of P4,600 with interest and costs.

The note which forms the basis of this action and which is copied in the complaint is as follows:

"APRIL 10, 1911.

"Three months and five days after date, for value received, I promise to pay to Levy Hermanos or order four thousand and -six hundred pesos, Philippine currency (P4,600.00). Due July 15, 1911.

"McKAY & ZOELLER,

"G. McKAY,

"Member of the firm."

The third paragraph of the complaint reads: "That on July 7, 1911, the said Levy Hermanos, in whose favor the promissory note was made, indorsed and transferred to the plaintiff, for value received, the said promissory note; and that the present plaintiff is at this time the owner and holder of the said promissory note."

The defendants, in their answer, admit paragraph one of the complaint, in which are alleged the personality and residence of the parties, and deny each and every other allegation; and as a special defense allege that the note in question is not a negotiable one; that the payees are the real parties in interest in the collection of said note, they having transferred it to the plaintiff for collection only; that said note was given in part payment for a certain number of diamonds purchased from the payees; that the payees stated and guaranteed that said diamonds were genuine, first-class, blue-water diamonds, when, as a matter of fact, they were not; that it was through these false representations that the defendants were induced to purchase the diamonds, paying therefor P9,200 of which P4,600 was paid in cash and the balance secured by the execution and delivery of the note in question; and that they have offered to return the diamonds and are now ready and willing to return them, but the payees refuse to accept them. The defendants ask in their counterclaim that the payees be made parties to this action; that judgment be rendered against the plaintiff and the payees for the sum of P4,600; for the rescission of the contract of sale of the diamonds; for the cancellation of the note; and for the costs of the cause.

The plaintiff demurred to the answer on the ground that the allegations in the same were not sufficient to constitute a defense. The demurrer was sustained and upon the defendants' refusing to amend their answer

judgment was rendered in favor of the plaintiff, without the introduction of any evidence.

Counsel for the defendants insists that the court erred (1) in holding that the note in question is a negotiable instrument; (2) in sustaining the plaintiff's demurrer; and (3) in rendering judgment against the defendants.

The note being copied into and made a part of the complaint, and the defendants having failed to deny the execution of the note under oath, its genuineness and due execution are admitted, without the need of proof on the part of the plaintiff. (Sec. 103, Code Civ. Proc, and *Chamber of Commerce vs. Pua Te Ching*, 14 Phil. Rep., 222, where the cases are collected.) This is not, however, true of the indorsement: *Heinszen & Co. vs. Jones* (5 Phil. Rep., 27), where this court said:

"It is claimed by the appellees that section 103 of the Code of Civil Procedure applies not only to the note itself, but also to the indorsement thereon, inasmuch as the indorsement was not denied by the defendant under oath, its genuineness is admitted. We cannot agree with this contention. The instrument upon which this action was brought is the promissory note. The action was not brought upon the indorsement. That imposed no liability upon the defendant, and while it was the duty of the latter to deny execution of the note under oath, it was not his duty to do this with reference to the indorsement. The reason for this is plain. The defendant is supposed to know whether he signed the note or not, but in a great majority of cases there is no reason for saying that he is supposed to know whether the payee has or has not indorsed the note to a third person."

And again, in *Lim-Chingco vs. Terariray* (5 Phil. Rep., 120), it is said:

"Reasonably construed, the purpose of the enactment (sec.103) appears to have been to relieve a party of the trouble and expense of proving in the first instance an alleged fact, the existence or nonexistence of which is necessarily within the knowledge of the adverse party, and of the necessity (to his opponent's case) of establishing which such adverse party is notified by his opponent's pleading."

It is further contended that the note is defective because it does not comply with the sixth requisite of article 531 of the Code of Commerce by designating the place of payment. In *Compania General de Tabacos vs. Molina* (5 Phil. Rep., 142), it is held that this provision is not strictly applicable to promissory notes drawn to order, and that such omission does not in any event destroy their commercial character.

Nor is the objection that the instrument is defective in not containing its specific name as provided by the first paragraph of article 531 a valid one. The words "I promise to pay" sufficiently identify its character. (*Rodriguez vs. Lasala*, 5 Phil. Rep., 357.)

The note does not show that it arose from commercial transactions. Counsel for the appellants contends that its failure to do so is fatal and quotes extensively from *Banco Espanol-Filipino vs. Tan-Tongco* (13 Phil. Rep., 628), to support this contention. It may be well to review the former decisions of this court on the point in question. In *Compania General de Tabacos vs. Molina* (5 Phil. Rep., 142), the note under consideration read as follows:

"Three months after date I promise to pay to the order of the Compania General de Tabacos de Filipinas three thousand three hundred and nineteen pesos and seventy-four cents, value received in merchandise to my entire satisfaction."

The court said: "In order to bring the document within the Code of Commerce it must appear that it had its origin in commercial operations. It seems to be the contention of the appellant that this fact must appear in the note itself. This, in our opinion, can not be sustained. If the requirements of article 531 are complied with, and, nevertheless, it does not appear from the note itself that it had its origin in commercial operations, this fact can be proved by other evidence. In other words, if the origin and nature of the consideration is stated, and that statement does not show that the note proceeded from commercial operations, the document, nevertheless, is a commercial

document, if it can be proved by other evidence that it did proceed from such operations."

In *Noel vs. Lasala* (5 Phil. Rep., 260), two promissory notes were in question, reading as follows:

"I acknowledge to have received from Juan Noel the sum of seven thousand pesos which I promise to pay to him or to his order within two years from this date, together with interest at the rate of ten per cent per annum."

"I acknowledge to have received from Juan Noel the sum of two thousand pesos which I promise to pay to him or to his order within two years from date, with interest at the rate of ten per cent per annum."

The defendant claimed that those notes were negotiable under, the Code of Commerce. As to this, the court said:

"Promissory notes payable to order and drawn as prescribed in article 531 of the Code of Commerce shall be considered mercantile instruments when they arise from mercantile transactions as required in article 532, and not otherwise. There is nothing in the notes indicating that such was the case in this particular instance, nor has any evidence been introduced on this point. For this reason they can not be considered mercantile instruments, and the provisions of article 950 of the Code of Commerce are not applicable thereto."

(The phrase, "nor has any evidence been introduced on this point," was omitted from the English translation.)

The notes themselves were the sole evidence before the court, and as they showed no indication of a commercial origin, they were properly held not to have arisen from commercial transactions.

In *Rodriguez vs. Lasala* (5 Phil. Rep., 357), the note read:

"I have in my possession the sum of six thousand pesos in cash, received of Da. Vicenta Rodriguez, which I will pay (pagare) to said lady or to her order, within two years from date, with interest at the rate of ten per cent per annum."

The court said: "It does not appear upon the face of the pagare in question that it had its origin in commercial operations, and therefore the burden of proof as to this point is on the defendant, who alleges that it is a commercial instrument. * * * The defendant having failed to establish this point affirmatively, his contention that the pagare is a mercantile instrument can not be sustained, and plaintiff is entitled to judgment."

The result is that this court has up to this time firmly established by an unbroken line of decisions: (1) that in order to bring promissory notes made payable to order within the Code of Commerce it must appear that they had their origin in commercial operations; (2) that if this fact does not appear in the notes themselves it can be proved by other evidence; and (3) that in such cases the burden of proof is on the person who alleges that the notes are commercial instruments. Does the case of *Banco Espanol-Filipino vs. Tan-Tongco* (13 Phil. Rep., 628), change or materially modify this doctrine ?

The note in the case last mentioned reads as follows:

"Three months from this date I hereby promise to pay, in Manila, to the order of D. Geronimo Jose, the sum of three thousand six hundred pesos, Mexican currency, value received in cash for commercial transactions.

"Manila, 21st of July, 1902.

(Signed) "FULGENCIO TAN-TONGCO.

"Pay to the order of the Banco Espanol-Filipino for value received from the same in cash.

(Signed) "GERONIMO JOSE."

Counsels' quotation, referred to above, is as follows:

"According to the language of article 532, which states that 'drafts payable to order between merchants, and bills or promissory notes, likewise payable to order, which arise from commercial transactions, shall produce the same obligations and effects as bills of exchange, except with regard to acceptance, which is a quality of the latter only/ it would seem (1) that drafts payable to order between parties who are not merchants have not a mercantile character; (2) that a promissory note made payable to order, even though it were made by a person who is not a merchant, provided it arose from commercial transactions, has the character of a mercantile document.

"On the second point, the majority holds that it is not necessary to show, either judicially or extra judicially, that the note herein arose from commercial transactions; it need not be shown judicially, because the defendant has not offered any denial in his answer to the complaint. On the contrary, the parties have submitted the document, as executed, to the courts for a decision as to whether, in accordance with the law, it is a mercantile document or not. It need not be shown extrajudicially, because it would be absolutely contrary to the idea of mercantile transactions and to the nature of contracts and commercial legislation, that a bank, every time a promissory note was presented, drawn in terms similar to those of the one at bar, should require the drawer and the indorser to produce books and other evidence to establish the fact, and to show that the note arose from commercial transactions as, for example, from the dissolution of a commercial copartnership, from a current account, from the balancing of accounts of a commission agent, from the liability resulting from a commercial deposit, etc., and to make sure of all these proofs against the contingency of a litigation.

"Beyond the fact that the question set up is purely one of law, and as both parties agree to the facts contained in the document, the point to be decided is whether or not a promissory note payable to order for a certain sum received in cash for commercial transactions, as it is worded, is a mercantile document.

"As to the third point, the decisions cited of the supreme court of Spain, its doctrine is as follows:

" 'It is not sufficient that a vale or promissory note, in order to be juridically valued as a commercial document, contain the conditions stated in article 571 of the Code of Commerce; it must, in addition, arise from commercial transactions as required by article 558 (of the code of 1829), and there is nothing whatever about the note in question to show that said essential requirement of the law had been fulfilled, because it is only stated therein that the borrower received the 5,000 pesetas for a business matter, and said isolated statement neither proves that the loan arose from a commercial transaction, as the law requires, nor can it possess legal value so long as the truth of the fact contained in said statement remains unproven, namely, that the borrower used the 5,000 pesetas for commercial purposes.' (Decision of April 10, 1894.)

"From the whole of this doctrine it would seem that the promissory note in question did not contain the form of article 387, to wit: 'for commercial transactions;' that with said statement the note would have appeared as a commercial loan; and that, being a commercial document, it would have then contained the necessary indication that it arose from commercial transactions. This is the important part of the decision: that a note arises from a commercial transaction if it is the outcome of a commercial loan, and the loan is a commercial one when the things loaned are for commercial operations or transactions."

The above quotation standing alone seems to support counsels' contention, but on examination of the entire opinion we think it will be found that the doctrine does not go that far. Both the maker and the indorser were sued. No proof whatever was presented except the note. The only question before the court was the liability of the indorser, and his liability depended upon the question whether or not the note was a mercantile instrument. It was so decided, the court holding that the words, "for commercial transactions," were sufficient to bring the note within the provisions of the Code of Commerce. The question whether the fact that a promissory note made payable to order had its origin in commercial operations could be proved by other evidence than the note itself was not an issue in the case. The note did not show that either the payor or payee was a merchant. Out of this fact

arose the principal issue before the court. It was during the consideration of this point that the court used the language above set forth. This case does not warrant the statement that it is authority for the doctrine that all promissory notes, in order to be negotiable, must bear the expression "for commercial transactions" or an equivalent, unless it were also authority for the statement that promissory notes made payable to order never arise from commercial transactions except as the result of loans of money. It need hardly be said that this latter proposition is clearly erroneous. Such notes often arise from the settlement of accounts between merchants, transactions of purchase and sale, etc., wherein no money is transferred at all. To require such a phrase (for commercial transactions) to be inserted would be paradoxical in the extreme, for the reason that there would be no funds to be devoted to commercial operations. Furthermore, the phrase, "for commercial transactions," used in connection with a loan of money implies future operations while a promissory note evidencing a purchase and sale, for example, obviously cannot refer to any future transactions. It is true that a promissory note made payable to order containing the words, "for commercial transactions," or an equivalent expression, sufficiently indicates its commercial character. But this test is only positive and inclusive and not negative and exclusive. We therefore conclude that because a promissory note made payable to order does not contain the words, "for commercial transactions," or some similar expression, it cannot be immediately concluded that it did not arise from commercial operations. In the absence of any such expression in the note itself other evidence is admissible to prove that fact.

We have examined the decisions of this court and restate the doctrine there announced for the purpose of disposing of the assignment of errors. But it might be said that this was unnecessary for the reason that the recitals in the note do not show that it is a negotiable instrument, nor are there any allegations in the complaint to the effect that the note had its origin in commercial operations. If it had been alleged and proved that the note arose from commercial transactions and had been duly indorsed for a valuable consideration, the plaintiff would have established its right to the collection of the note, unaffected by any equities the makers may have against the payees, but as this was not done the ruling of the court on the demurrer and the rendering of final judgment upon untried issues of fact were erroneous.

For the foregoing reasons the judgment appealed from is set aside and the case will be returned for further proceedings in accordance with this decision. Without costs.

Arellano, C. J., and Araullo, J., concur.

Carson, J. concurs in the result.

CONCURRING AND DISSENTING

MORELAND, J.:

I think there can be no serious doubt that the note is not a negotiable instrument. It was made before the enactment of the new Negotiable Instruments Law, and therefore the nature of the contract, that is to say, whether or not it is a negotiable instrument, is determined by the Commercial Code. It is unquestioned both in this court and in the supreme court of Spain that, under the Commercial Code one of the necessities of a negotiable instrument was that it should arise from a commercial transaction. It is unnecessary to cite authorities to support this contention; it is admitted. Every decision of the supreme court of Spain touching the subject has said so and every decision of this court upon the question has been to the same effect. The only question raised, or about which there has been any dispute, or concerning which there is any controversy in the case before us, is whether or not the fact that the note arose from a commercial transaction must appear, in some form or manner, on the face of the note itself. Certain decisions of this court have given the impression that it is not necessary that it so appear, but that fact is

one which may be proved by evidence outside of the note itself. I do not believe that these cases can be considered authority for such a position. They do not warrant it in the present case. One of the decisions referred to is found in the case of *Rodriguez vs. Lasala* (5 Phil. Rep., 357), in which the instrument read:

"Number. \$6,000. I have in my possession the sum of six thousand pesos in cash, received of Da. Vicenta Rodriguez, which I will pay (pagare) to said lady or to her order, within two years from date, with interest at the rate of ten per centum per annum. Cebu, 22d of October, 1895. Mariano Lasala."

This instrument does not fulfill the requirements of the Code of Commerce because it does not contain a statement that it arose from a commercial transaction. This is admitted in the decision. It says: "In order that a pagare may 'have the effect' of a commercial instrument, it must appear that it* had its origin in 'commercial transactions.' (Article 632 of the Commercial Code.)"

In considering whether this case is an authority in point it must be noted that the action was between the original parties to the note; and the only question involved was whether the note was outlawed. The court said:

"The defendant admits the execution of this document and the receipt of the sum mentioned therein, and that neither the said sum nor any part thereof has been paid, and for his sole defense alleges that, when this action was instituted, the cause of action on the said pagare had prescribed under the provisions of article 950 of the Code of Commerce.

"It is admitted by both parties that, if the pagare is in fact a commercial instrument as defined in the Code of Commerce, the right of action had prescribed at the time when this action was instituted, whereas, if it is not such an instrument, it is a simple promise to pay, and the plaintiff is entitled to judgment thereon."

Where the action is between the original parties to a note the questions involved are quite different from those presented where the note is found in the hands of a third person who is a holder in due course. None of the questions arising out of such a relation were presented to or argued in the court in that case. The only question presented or argued was the application of the statute of limitations; and the action being between the original parties to the note, the only question decided was that, for such purpose alone, evidence was admissible on the trial to show that the note in fact arose out of a commercial transaction. The court was not informed on the general question.

It is clear that in the case under discussion no question on the law merchant was really involved and the effect of the decision on the commercial law was never considered.

We have precisely the same situation in the case of *Compania General de Tabacos vs. Molina* (5 Phil. Rep., 142). In that case the note read:

"For \$3,319.74. Three months after date I promise to pay to the order of the Compania General de Tabacos de Filipinas three thousand three hundred and nineteen pesos and seventy-four cents, value received in merchandise to my entire satisfaction. Manila, January 23, '96. S. Molina. There is a rubric. Surety, J. V. Molina. There is a rubric. There is a regulation stamp, cancelled, of the value of two pesos."

That case was an action between the original parties to the note, and the main question for the court to decide was whether or not the statute of limitations had run against the note. In that case the court said:

"Neither do we think that the contention of the plaintiff in regard to the seventh requisite can be sustained. The origin of the debt is sufficiently stated, for as the plaintiff itself says in its brief, the receipt of merchandise in exchange for money necessarily supposes a contract of purchase and sale. We think also the nature of the consideration is sufficiently stated. It was not necessary to insert in the document an inventory of the different articles that had been sold by the plaintiff to the said defendant, Sebastian. As the appellees say in their brief in this court, if this was required, an ordinary commercial note would be more extensive than a government

expediente. In order to bring the document within the Code of Commerce it must appear that it had its origin in commercial operations. It seems to be the contention of the appellant that this fact must appear in the note itself. This, in our opinion, can not be sustained. If the requirements of article 531 are complied with, and, nevertheless, it does not appear from the note itself that it had its origin in commercial operations, this fact can be proved by other evidence. In other words, if the origin and nature of the consideration is stated, and that statement does not show that the note proceeded from commercial operations, the document, nevertheless, is a commercial document, if it can be proved by other evidence that it did proceed from such operations. (Judgment of the supreme court of Spain of the 7th of November, 1870).

"We therefore hold that the action upon the note was barred by the statute of limitations in the Code of Commerce."

As will be seen, this seems to be a direct holding that it is not necessary that the requirements of article 531 shall appear upon the face of the instrument, but in considering whether this is such a holding or not we must take into consideration, in view of the overwhelming importance of the question involved, the facts and circumstances already stated with respect to the other cases cited and discussed.

But if these cases be considered authorities upon one side, the case of Noel vs. Lasala (5 Phil. Rep., 260) may be cited on the other. This case is like the one I have just been discussing. It was an action between the original parties to the notes and the only defense was the statute of limitations. The notes read:

"I acknowledge to have received from Juan Noel the sum of seven thousand pesos which I promise to pay to him or to his order within two years from this date, together with interest at the rate of ten per cent per annum."

"I acknowledge to have received from Juan Noel the sum of two thousand pesos which I promise to pay to him or to his order within two years from date, with interest at the rate of ten per cent per annum."

These notes, as is seen, contain no statement that they arose from commercial transactions, as required by the Code of Commerce. In (discussing the question whether these notes were negotiable instruments the court said:

"Promissory notes payable to order and drawn as prescribed in article 531 of the Code of Commerce shall be considered mercantile instruments when they arise from mercantile transactions as required in article 532, and not otherwise. There is nothing in the notes indicating that such was the case in this particular instance. For this reason they cannot be considered mercantile instruments, and the provisions of article 950 of the Code of Commerce are not applicable thereto."

This is very close to a direct holding in favor of my contention, provided the action and questions raised therein were such as would reasonably permit one to say that the case is, under all the circumstances, an authority. The notes were held to be non-negotiable for the sole reason that they did not contain a statement showing that they arose from commercial transactions.

Precisely the same conditions existed in the case of Miller vs. Jones (9 Phil. Rep., 648), where both the cases just referred to were cited. The only reference in this case to the question before us is as follows:

"Without discussing other objections which might be urged to the claim of the defendant that this document is a mercantile obligation, it is sufficient to say that it nowhere appears that it arose from mercantile transactions as required in article 550 [532] of the Code of Commerce. (Noel vs. Lasala, 5 Phil. Rep., 260.) Nor does the evidence introduced at the trial show that fact. (Rodriguez vs. Lasala, 5 Phil. Rep., 357.) The mere purchase of personal property even by one merchant of another does not make the transaction a mercantile one. (Arts. 825, 326, Code of Commerce.) Article 950 of the Code of Commerce not being applicable to these obligations, the rule of prescription which governs them is that of the Civil Code, and it is admitted that in accordance with such provision the notes are not barred."

In the case of *Faelnar vs. Escano* (11 Phil. Rep., 92), the action was between the original parties to the note. The questions raised and discussed were (1) whether defendant actually executed the note, and (2) whether the note was indorsed. The only reference by the court to this question of the negotiability of the note is the following:

"The third error assigned relates to the protest of the note. In order to keep alive the obligation of the defendant, it was not necessary that this instrument should be protested. (*Pyle vs. Johnson*, 9 Phil. Rep., 249.)

"The claim that the instrument is a commercial document cannot be sustained. The following statement occurs there in : 'Value received from said gentlemen in cash to my entire satisfaction and as a loan to meet my requirements.'

"The evidence shows that the parties thereto were not merchants and there was no evidence that the money was actually used in commercial operations. (Arts. 311 and 532 of the Code of Commerce; *Noel vs. Lasala*, 5 Phil. Rep., 260; *Rodriguez vs. Lasala*, 5 Phil. Rep., 357; *Miller vs. Jones*, 9 Phil. Rep., 648.)"

On the other hand the conduct of the court in other cases where the question of the negotiability of the note was directly in question leads one naturally to the conclusion that the statement of the court in *Noel vs. Lasala*, above, is a statement of the true doctrine. In several cases where the note contained a statement, "for mercantile transactions" or an equivalent expression, the court has seriously and solemnly discussed the question whether such an expression was a compliance with articles 531 and 532 and other articles of the Code of Commerce in order to determine whether they were sufficient to make the note, under said articles, a commercial instrument. It would seem that if it was the doctrine of the court that no such expression was required to make the instrument negotiable, the discussion as to whether such expression was sufficient would have been vain and idle. If a note is negotiable without any statement at all relative to its arising from commercial transactions, what is the purpose of discussing the sufficiency of any particular expression? Yet this court has, time and again, considered the sufficiency of the expression, "from commercial transactions" or an equivalent expression, to make the note negotiable under the Code of Commerce, and, after such consideration, has held that such expression was sufficient to make the instrument negotiable under the Code of Commerce. This was done in the cases of *Banco Español-Filipino vs. Tan-Tongco* (13 Phil. Rep., 628), and *Lichauco vs. Limjoco* (19 Phil. Rep., 12). In the former case the phrase used was "for commercial transactions" and in the latter "for commercial operations." Again I say, if no expression or statement relative to this matter is required to make a note negotiable under the Code of Commerce, but that the note is as perfectly negotiable if it contains no declaration whatever, why did the court solemnly and seriously deliberate upon and decide the question of the sufficiency of the statements in two later cases?

We see, then, that the cases, so far as we have gone, do not consistently support the proposition that a note may still be negotiable under the Code of Commerce although it contains no statement that it arose from a commercial transaction, for the reason (1) that in those cases the action arose between the original parties to the note, (2) that the only question raised, argued, or decided in those cases was the application of the statute of limitations, (3) that no question of the negotiability of the notes, that is, of the rights of the maker, or his creditor, or of an indorser, arose in any of the cases, and that the court did not have the question of the right of third persons, holders in due course, presented to or argued before it. Therefore these cases have never determined effectually and effectively that a note may be negotiable without showing, upon its face, that it arose from a commercial transaction, and that it was or was not negotiable may be proved as against a holder in due course.

The case which came the nearest to presenting that question is that of *Banco Español-Filipino vs. Tan-Tongco*, above cited. The note in controversy there read as follows:

"Three months from this date I hereby promise to pay, in Manila, to the order of D. Geronimo Jose, the sum of three thousand six hundred pesos, Mexican currency, Value received in cash for commercial transactions.

"Manila, 21st of July, 1902.

(Signed) "FULGENCIO TAN-TONGCO.

"Pay to the order of the Banco Espanol-Filipino for value received from the same in cash.

(Signed) "GERONIMO JOSE."

Relative to the question involved and the manner of its presentation the court said:

"As the obligation was not paid at maturity a protest was entered, and on the 3d of February, 1904, the maker and the indorser, respectively, were sued for payment.

"Judgment was entered against Tan-Tongco, but levy of execution by the sheriff of Manila proved ineffectual; this fact is admitted.

"On the 13th of February, 1906, the indorser Geronimo Jose, answered the complaint admitting all the facts stated therein, and as special defense set forth: 'That previous to, and at the time of the issuance of the note attached to the complaint, the party whom he represented had had no mercantile relations with the maker of the note, nor does the note arise from a mercantile transaction, nor is it the result and outcome of any such transactions, but of money delivered in cash.'

"Subsequently, however, the attorneys for the plaintiff and the defendant Geronimo Jose, agreed in behalf of their clients 'that the special defense put forward by defendant Geronimo Jose be withdrawn and in lieu thereof said defendant accepts each and all of the facts stated in the complaint, as drawn; they further agree to submit the question of law to the court after the filing of written arguments by both parties.'"

Judgment was rendered against the indorser, Geronimo Jose, who appealed, assigning errors as follows:

"I. In holding that the promissory note, which is the subject of this controversy, arose from mercantile transactions.

"II. In entering judgment against the defendant Geronimo Jose, and compelling him to pay the plaintiff, the Banco Espanol-Filipino, the sum of P3,775.50, Philippine currency."

Relative to these errors the court said:

"In connection with the first error assigned, the appellant's brief reads:

" 'The promissory note, as it stands, is the only document by, and the only evidence from which the conclusion that it is the result of commercial operations must be drawn. In the whole wording of the note we do not find a clear expression that it originated from mercantile transactions, nor do we find an expression determining that a previous mercantile transaction existed between the interested parties; but on the contrary, we find that it contains the words "value received in cash for commercial transactions." The foregoing words "value received in cash for commercial transactions," leave no room for any doubt whatever, and the actual significance and literal meaning of each of them lead us to understand that the money was to be used strictly for commercial operations, an act which is subsequent to the execution of the promissory note, while the Code of Commerce requires exactly the contrary in order that a note may be considered as a commercial document; that is to say, that the commercial act shall precede the execution of the note. Therefore, the foregoing words in their true meaning neither establish the fact nor permit the presumption of a commercial transaction prior to the date of the note.'

"The second assignment of error is based on the supposition that the note in question is not a commercial document; that the original contract between Tan-Tongco and Jose was either an ordinary loan or a mercantile promise to pay; and that in either case, whether an ordinary loan, or a mercantile promise to pay, it was not legally indorsable but simply a transmission of ownership whereby the defendant, Geronimo Jose, incurred no

liability for payment, he being only responsible for the authenticity of the document and the legitimacy of the credit, or at most, for the previous and public insolvency of the debtor. (Art. 1529, Civil Code, and art. 548, Code of Commerce.)

"Hence, the conclusions of the appeal are:

"That the promissory note in question, in the form in which it was drawn up, is not a commercial note.

"That not being such, it cannot legally be indorsed.

"That, not being legally indorsable, the indorsement thereon is simply an assignment of credit.

"That an assignment of credit does not produce the obligation to pay, and that in consequence thereof, the indorser, Geronimo Jose, should be absolved of the complaint.

"The form of the note in controversy was, and still is, that habitually used between merchants, and it may be stated, as a notoriously public fact, that printed promissory notes with the corresponding stamp affixed thereon and in the identical language of the one in question, were sold at the offices maintained by the Spanish Government for the sale of stamped articles."

And on page 637 the court said:

"Beyond the fact that the question set up is purely one of law and as both parties agree to the facts contained in the document, the point to be decided is whether or not a promissory note payable to order for a certain sum received in cash for commercial transactions, as it is worded, is a mercantile document."

In the resolution of the question before it the court said (referring to a doctrine established by the supreme court of Spain in a case under discussion) :

"From the whole of this doctrine it would seem that the promissory note in question did not contain the form of article 387, to wit: 'for commercial transactions;' that with said statement the note would have appeared as a commercial loan; and that, being a commercial document, it would have then contained the necessary indication that it arose from commercial transactions. This is the important part of the decision: that a note arises from a commercial transaction if it is the outcome of a commercial loan, and the loan is a commercial one when the things loaned are for commercial operations or transactions. * * *

"Thus far only does the doctrine repeatedly established by the supreme court of Spain extend, notwithstanding the fact that in its decision of January 29, 1859, it clearly indicates how the legal requirements of article 532 are considered as fulfilled so that a promissory note payable to order may produce the same effects and obligations as a bill of exchange, that is, when it contains a sufficient statement or indication from which it may appear that the same arose from a mercantile operation, such being the case when it contains the words for commercial transactions. * * *

"And in the first, as in the second case, in order that it may be known that it arose from a commercial loan, the form of a promissory note payable to order or to the bearer is no other than the usual one in business: for commercial transactions. A promissory note thus made out carries with it the indication that it arose from a commercial transaction, wherein either the lender carries out a commercial transaction, or the borrower intends to enter into a business speculation, and gives in exchange a negotiable document.

"If the defendant has admitted the fact stated in the promissory note, that the amount confessed to have been received was delivered in cash; if he has admitted the fact stated in the note that the maker bound himself to pay it; if said facts constitute essentially a contract of loan, and the fact that the amount delivered was received for commercial transactions was stated in the note, which fact was fully admitted by the defendant and which constitutes the specific character of a commercial loan, and in consequence, and as the result of all of said facts, the instrument of exchange consisting of a promissory note payable to order was executed, the inevitable

conclusion is that said note payable to order was the effect, or outcome, of a commercial transaction known as a mercantile loan.

"Therefore, the words 'value received in cash for commercial transactions' in their true sense determine and pre-suppose a commercial transaction prior to the date of the promissory note, namely, a mercantile loan. * ** *

"But as a promissory note payable to order was issued for value received in cash for commercial transactions, a commercial loan exists, by reason of these last words, and because it is payable to order, there is a contract of exchange, which renders it subject to indorsement and negotiation. * ** *

"The foregoing precepts are in accord with said article 532, which requires nothing more than that promissory notes shall be payable to order and arise from commercial transactions, not that they be issued between merchants as required by said article in reference to drafts, * ** *."

Justice Willard dissented from this decision on the ground that the note was not a negotiable instrument, because it was not proved "that either Tan-Tongco or Geronimo Jose was a merchant." He said: "* * * and although it appears that the money was to be used for commercial purposes, the transaction does not come within article 311 of the same code and cannot be called a mercantile loan. No evidence was offered to show that in fact the note proceeded from commercial operations."

This dissent presented the question of the negotiability of the note sharply. It reiterated the holdings that a note is negotiable even though no expression whatever as to its origin appears therein and that, therefore, if the evidence on the trial shows that it arose from a commercial transaction, it is negotiable. It also laid down the proposition that, although a note might have within itself evidence showing that it arose from a commercial transaction, nevertheless that was subject to being overcome by evidence on the trial showing the contrary. As a necessary consequence, no one could tell by looking at a note whether it was negotiable or not. A lawsuit was necessary to determine that question. It was decided with open eyes and after thorough consideration; and the court held that the note was negotiable by reason of its own words, notwithstanding the fact that it did not appear that either party thereto was a merchant and in spite of the claim that its negotiability could be finally determined only after a trial. Not only this but it intimated in the statements heretofore quoted that, to be negotiable it must contain the statement "for commercial operations" or an equivalent expression.

The court also held that, such statement being present in the note, it was not necessary to show that it arose from a commercial transaction, "because it would be absolutely contrary to the idea of mercantile transactions and to the nature of contracts and commercial legislation, that a bank, every time a promissory note was presented, drawn in terms similar to those of the one at bar, should require the drawer and the indorser to produce books and other evidence to establish the fact, and to show that the note arose from commercial transactions as, for example, from the dissolution of a commercial copartnership, from a current account, from the balancing of accounts of a commission agent, from the liability resulting from a commercial deposit, etc., and to make sure of all these proofs against the contingency of a litigation."

This last quotation touches the vital point. It is unquestioned anywhere that every element which is essential to make an instrument a negotiable one must appear upon the face of the instrument itself. As written contracts, bills and notes may not be varied by parol testimony, and in order that they may fulfill their purpose as a medium of exchange, and may circulate with readiness and safety, the certainty and scope of the contract in all material points, and the whole history of the title, must appear on the face of the instrument, and there should be no necessity for extrinsic inquiries on the part of one to whom such an instrument is tendered. Perhaps one of the ablest statements of the essential qualities going to make an instrument negotiable is that by Lord Chief Baron Eyre in the House of Lords, in the great case of *Gibson vs. Minet* (1 H. Bl., 605). The statement is in part as

follows:

"Bills of exchange being of several kinds, the title to sue upon any one bill of exchange in particular will depend upon what kind of bill it is, and whether the holder claims title to it as the original payee, or as deriving from the original payee, or from the drawer, in the case of a bill drawn payable to the drawer's own order, who is in the nature of an original payee. The title of an original payee is immediate, and apparent on the face ipf the bill. The derivative title is a title by assignment, a title which the common law does not acknowledge, but which exists only by the custom of merchants. As it is by force of the custom of merchants that a bill of exchange is assignable at all, of necessity the custom must direct how it shall be assigned; and, in respect of bills payable to order, the custom has ejected that the assignment should be made by a writing on the bill, called an indorsement, appointing the contents of that bill to be paid to some third person; and, in respect of bills drawn payable to bearer, that the assignment should be constituted by delivery only. This is simple and obvious: every man who can read can discover whether the holder of a bill claims to be the assignee of it as indorsee or as bearer. If it should be questioned whether a bill payable to bearer passes by assignment, or whether every bearer is not an original payee, as being within the description in the bill itself of the original payee, it does not appear to me to be necessary to this argument that this question should be decided. I am content that it should be taken either way. In either case, the title of a bearer is self-evident, the title of an indorsee appears by the indorsement itself, the truth of which is guaranteed by the highest penal sanctions. Everything which is necessary to be known, in order that it may be seen whether a writing is a bill of exchange, and as such by the custom of merchants partakes of the nature of a specialty, and creates a debt or duty by its own proper force, whether by the same custom it be assignable, and how it shall be assigned, and whether it has in fact been assigned agreeable to the custom, appears at once by the bare inspection of the writing; with the circumstance, in the case of a bill payable to bearer, of that bill being in the possession of him who claims title to it. The wit of man cannot devise anything better calculated for circulation. The value of the writing, the assignable quality of it, and the particular mode of assigning it, are created and determined in the original frame and constitution of the instrument itself; and the party to whom such a bill of exchange is tendered has only to read it, need look no further, and has nothing to do with any private history that may belong to it. The policy which introduced this simple instrument demands that the simplicity of it should be protected, and that it never should be entangled in the infinitely complicated transactions of particular individuals into whose hands it may happen to come." (Am. and Eng. Encyc. of Law, vol. 4, p. 77, footnote.)

The instrument claimed to be negotiable stands or falls upon that basis as it is made. Except, perhaps, between the original parties to the, bill or note, no evidence can be introduced which will make a nonnegotiable bill negotiable or which will make a negotiable bill nonnegotiable. Such instruments partake so much of the nature of a medium of exchange and pass from hand to hand with such readiness in a business community that their essential form and nature cannot be left to the contingencies of a suit at law, nor can the rights of individuals holding them be affected by their history. They stand in the hands of a holder upon substantially the same footing as a piece of money whose value and efficacy can be impeached only by demonstrating that it is counterfeit. To hold that a nonnegotiable instrument maybe shown by parol testimony to be negotiable or that a negotiable instrument may be shown by parol testimony to be nonnegotiable is to shake to its foundations the whole fabric of the mercantile law. If an instrument is nonnegotiable upon its face, it cannot be made negotiable by proof; and, vice versa, if an instrument is negotiable upon its face, it cannot be made nonnegotiable by proof, when it has passed from the hands of the original holder. This is the doctrine of the Spanish law as it is of the law merchant.

In the case before us the demurrer to the answer searches the whole record and impinges upon the first pleading found to be defective. The note set out in the complaint in this case shows upon its face that under the Code of Commerce it is not a negotiable instrument, for the reason that it lacks one of the essential requirements of that code, in that it fails to show on its face that it arose from a commercial operation. This being so, the plaintiff bank took the instrument by assignment rather than by indorsement and therefore occupies the position of an assignee

at common law instead of an indorser under the law merchant. As a legal consequence the bank took the note subject to all of the equities which the makers thereof held against the payee, and the defense set up in the answer is upon its face a complete defense to the action.

But even if it should be held that the defect in the note could be supplied by evidence upon the trial and that it could be shown that the note arose from a commercial transaction, nevertheless, the complaint would still fail to show that the note was a promissory note because it contains no allegation that the note arose from a commercial transaction. The allegation in the complaint that the plaintiff and the defendant are commercial companies doing business in the city of Manila is not sufficient to cure this defect, for the reason that, under the doctrine assumed, the Code of Commerce requires that in addition to the fact that the parties to the note, or one of them, be merchants, or a merchant, it must also appear that the note in question arose from a commercial transaction. (Banco Espanol-Filipino vs. Tan-Tongco, above.)

In either case, therefore, the complaint shows that the action is based upon a common law instrument to which the facts set forth in the answer constitute, if satisfactorily proved, a complete defense. The demurrer should be overruled and the cause remanded for trial.

Judgment set aside; case remanded.

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