

**THE BANK OF THE PHILIPPINE ISLANDS, PLAINTIFF AND
APPELLANT, VS. GABRIELA ANDREA DE COSTER Y ROXAS ET AL.,
DEFENDANTS. GABRIELA ANDREA DE COSTER Y ROXAS, APPELLEE.**

G.R. Nos. 25642 and 25643. November 12, 1926

Ponente: JOHNS, J.

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JOHNS, J.:

STATEMENT

The original complaint in this case was filed on March 10, 1924, to recover P292,000 evidenced by a promissory note dated December 29, 1921, payable one year after date, with interest at 9 per cent per annum. The note was secured by a chattel mortgage on the steamers Roger Poizat and Gabrielle Poizat, with the machinery and materials and certain merchandise belonging to the Poizat Vegetable Oil Mills. Also a certain real mortgage on property in the City of Manila then subject to a prior mortgage in favor of the Dominican Fathers, which was made a party defendant. The mortgages in question were executed and acknowledged on the date of the note.

April 24, 1924, the Dominican Fathers appeared and asked to have it mortgage foreclose. In that action Gabriela Andrea de Coster y Roxas and her husband, J. M. Poizat, were made defendants, and on May 3, 1924, they were declared in default, and judgment was rendered against them for want of an answer.

For the first time, and on August 26, 1924, Gabriela Andrea de Coster y Roxas, to whom we will hereafter refer as the appellee, personally appeared and filed a motion, setting out certain alleged facts in which she asked to have the default and judgment against her set aside and vacated, with a right to appear and defend the cause of action alleged in the complaint on the merits. Her motion was denied by the lower court, and on appeal, this court reversed that decision, with leave for her to file an answer, and to have the case tried on its merits, and for such and further proceedings as are not inconsistent with the opinion of this court. On that appeal, the case was known here as G. R. No. 23181, and the decision, which was the majority opinion, was promulgated on March 16, 1925.[1]

Upon the return of the case to the lower court, the appellee here then filed her answer, to which the plaintiff filed a further and separate defense, in which it was alleged that the appellee and her attorney, Mr. Antonio M. Opisso, ratified and confirmed the execution by J. M. Poizat, as the agent of the appellee in the execution, of the note and mortgages sued on in this case, and that they recognized the obligations arising therefrom, and that said ratification, confirmation and acknowledgment were made by the appellee and her attorney with full and accurate knowledge of the facts which gave rise to the execution of the note and mortgages and the rendition of the judgment. To such allegations, the appellee made a general and specific denial.

A trial was then had in the lower court based upon the issues made in the original and amended complaint, the answer filed by the appellee, and plaintiff's further and separate defense to such answer, and the appellee's reply thereto, and the lower court rendered judgment in favor of the appellee, and absolved her from all liability arising

from, or growing out of, the note and mortgages in question.

From that decision, the plaintiff made and perfected its appeal, and assigns the following errors:

"I. The trial court erred in declaring that the defendant and her counsel, Antonio M. Opisso, did not have full knowledge of facts when they ratified and confirmed the promissory note and mortgage here involved.

"II The trial court erred in declaring that the promissory note here involved does not evidence a loan to the defendant.

"III. The trial court erred in declaring that the power of attorney, Exhibit D, does not authorize the agent to lend his principal's credit to a partnership wherein both principal and agent are equally interested.

"IV. The trial court erred in declaring null and void as to the defendant Gabriela Andrea de Coster y Roxas the promissory note and mortgage executed in favor of the plaintiff bank"

JOHNS, J.:

After plaintiff's appeal was perfected, and on August 31, 1926, the plaintiff, as appellant, filed a motion for a new trial in this court upon the ground of newly discovered evidence based upon a written instrument executed and acknowledge on May 27, 1924, by Jean M. Poizat and Gabriela Andrea de Coster y Roxas, and acknowledged before A. M. Opisso, notary public, a copy of which is attached to, and made a part of, the motion. To the granting of this motion, objection was made by the appellee, because it does not comply with the provisions of section 497 of the Code of Civil Procedure, first; second, because the evidence offered is not newly discovered evidence; third, the document is inadmissible under section 346 of the Code of Civil Procedure, (a) Because it clearly shows upon its face that it is an offer of compromise, and (&) That the document was made at the instance of the then president of the bank as a condition precedent to the negotiations of the compromise, and (c) For the reason that the compromise offer was not accepted. Any admission made therein could not be used to the prejudice of the appellee, and (d) That at the time of its execution, the appellee was misled and deceived as to conditions existing, and did not have any knowledge of the actual facts; and, fourth, that she did not have any knowledge of the "facts and circumstances under which the mortgages and note were executed."

We will decide this motion first.

It appears upon the face of her original petition filed in the lower court on August 26, 1924, by the appellee, that she prayed for leave to vacate the judgment and to appear and defend upon the alleged ground that she was not legally liable for either the note or the mortgages given to secure it, and that she was not bound by the acts of her husband in the making of the note or the execution of the mortgages, and that it was not her act and deed.

It will be noted that the original complaint was filed on March 10, 1924; that the instrument in which the plaintiff now relies for a new trial was executed on May 27, 1924; that the petition for leave to appear and answer was filed on August 26, 1924; and that the present motion was filed in this court on August 31, 1926. The note for P292,000 and the chattel and real mortgages to secure it were executed on December 29, 1921, payable one year after date.

It appears from plaintiff's petition that on August 26, 1924, Mr. Nolting was the Manager of the Bank, and he continued in that position until he left the Islands on the 22nd day of February, 1925, just about six months after appellee filed her motion to set aside the judgment and for leave to appear and defend.

A corporation acts and speaks through its officers and agents, and is bound by them upon the same legal principle and in the same manner that a person or individual is bound. That is to say, that the Bank at least, through the personal knowledge of Mr. Nolting, as its General Manager, had both legal and constructive notice of the contents

and allegations which were made in appellee's petition to set aside and vacate the judgment in favor of the bank, and for leave to defend upon the merits.

It also appears from appellant's petition:

"That the said deed of trust attached hereto was only a few days ago discovered by Rafael Moreno, Vice-President of the Bank of the Philippine Islands, while he was examining one of the many folders of the Poizat people, and more particularly the folder in which the said deed of trust was kept, mixed with a big bundle of document and letters of the Poizat people.

"That the Bank of the Philippine Islands did not, however, accept the terms of the aforementioned deed of trust hereto attached."

That is to say, that it appears from the record that the instrument now in question was executed on May 27, 1924; that it was delivered to the bank about the time of its execution; and that ever since it has been and is now in the actual and physical possession of the document. It also appears from the record that after its execution, numerous conferences were had and held between the officers of the bank and the appellee and her Attorney Opisso, and that Mr. Nolting appointed a committee to investigate the matter, and to examine the properties and their value, to ascertain whether or not it was prudent and feasible for the bank to accept the trust deed upon its terms and conditions, and for the purposes therein specified. That finally, and on August 20, 1924, after a conference between the parties in interest, the bank declined to accept the offer or the trust. But the instrument in question was never returned, and was kept by the bank among what is known as the "Poizat papers." It also appears from the record that after the receipt of the notice from the bank that it declined to accept the trust, and on August 21, 1924, Opisso first obtained the knowledge and then came into possession of the six notes which were cancelled at the time the P292,000 note now in question was executed, and it was upon that date that the appellee and her attorney for the first time obtained any knowledge or knew of the actual consideration for the note. This information was promptly followed by filing the motion to set aside and vacate the judgment, and for leave to defend on the merits. In that motion, which appellee filed on August 26, 1924, the question was squarely presented that the only consideration for the P292,000 note was a preexisting debt, and that for such reason she was not liable. That is to say, on August 26, 1924, the bank had personal and legal knowledge of the nature and character of appellee's defense in the action which was then pending, and from that date to August 31, 1926, it had the instrument in its own possession, and remained silent.

The case was tried in the lower court upon appellee's motion to set aside and vacate the judgment, in which a decision was rendered against the appellee, and from which she appealed to this court where the decision of that court was reversed, and the case remanded to the lower court, with leave to the appellee to appear, file her answer and defend on the merits. After both parties had filed their respective pleadings, a trial was had in that court on the merits, and a decision was rendered in favor of the appellee. From that decision, the plaintiff appealed to this court. After the appeal was perfected and briefs were filed by respective counsel, and the case was ready to be heard in this court in its merits, the plaintiff, and for the first time, on August 31, 1926, filed its motion for a new trial in this Court upon the ground of newly discovered evidence.

Under all of the authorities, the instrument in question is not newly discovered evidence. At all times it was in the personal possession of the bank among the "Poizat papers."

If at any time after the filing of appellee's original petition in the lower court on August 26, 1924, any officer or agent of the bank had looked over or examined the "Poizat papers," they would have seen and found the instrument in question, and brought it to the attention of the court, if they had seen fit to do so. The stubborn fact remains that for more than two years after the filing of the appellee's motion in the lower court, the bank had the

personal, physical possession of the instrument in question, and that no effort whatever was made to find or produce it.

Legally speaking, the very most that can be claimed for it is that it is "forgotten evidence," which was in the actual possession of the plaintiff for more than two years before it was called to the attention of the court.

Section 497 of the Code of Civil Procedure, upon which the plaintiff relies, provides: * * *

"(2) If before the final determination of an action pending in the Supreme Court on bill of exceptions, new and material evidence be discovered by either party, which could not have been discovered before the trial in the court below, by the exercise of due diligence, and which is of such a character as probably to change the result, the Supreme Court may receive and consider such a new evidence, together with that adduced on the trial below, and may grant or refuse a new trial, or render such other judgment as ought, in view of the whole case, to be rendered, upon such terms as it may deem just. * * *"

Section 145 provides:

"New Trial—Within thirty days after notice of a decision rendered by a Court of First Instance, the judge thereof may at the petition of the party aggrieved, and after due notice to the adverse party, set aside the judgment and grant a new trial, provided the petition is based on any of the following causes materially affecting the legitimate rights of the petitioner:

"1. Accident or surprise which ordinary prudence could not have guarded against and by reason of which the party applying has probably been impaired in his rights.

"2. Newly discovered evidence, material to the party making the application, which he could not, with reasonable diligence, have discovered and produced as the trial."

* * * * *

Upon the undisputed facts, if at any time on and after August 26, 1924, any officer or agent of the Bank had gone through or examined what is known as the "Poizat papers," it would have found the instrument in question among its own files. Much importance is attached to the fact that Nolting left the bank and the Philippines without disclosing the existence of the document to any officer of the bank. But it appears from the record that he continued as Manager of the Bank until he did leave the Philippines on February 22, 1925, nearly six months after the appellee had filed her motion to set aside and vacate the judgment.

The record is conclusive that the negligence, if any, of Mr. Nolting on behalf of the bank continued to exist until the instrument in question was found by an examination of the "Poizat papers,"

There is no rule of law by which a litigant, who has had the personal, physical possession of a written instrument, which was among the papers of the "Poizat people" in which for two years no search was made among the papers involved in the litigation, or any attempt to find the instrument, can two years later make a search and find the instrument among those papers, and then obtain a new trial upon the ground of newly discovered evidence.

When the plaintiff was served with appellee's motion to set aside and vacate the judgment on August 26, 1924, together with the copy of the tendered answer, it was the legal duty of the plaintiff to prepare its defense to that motion, and offer any evidence which it might have to defeat it, and, in particular, any evidence which it had in its own personal possession among the papers of the "Poizat people." If it had done so, the instrument now in question would have been found two years ago, and offered in evidence at the original trial, and the appellee could then have offered any evidence which she might have to overcome it. There is no claim or pretense that during all of that time any search was made by the plaintiff among the papers of the "Poizat people" which were

in its own possession. It appears from the plaintiff's own showing that the instrument now in question "was only a few days ago discovered by Rafael Moreno, Vice-President of the Bank of the Philippine Islands, while he was examining one of the many folders of the Poizat people." This examination and discovery could have been made at any time after August 26, 1924, when the appellee filed her motion to vacate the judgment.

Section 497 of the Code of Civil Procedure provides that a new trial may be granted in this court for "new and material evidence be discovered by either party, which could not have been discovered before the trial in the court below, by the exercise of due diligence."

The instrument in question is not new evidence within the meaning of that section.

On the former appeal, this case was given careful and exhaustive consideration, and the majority opinion covers twenty-two typewritten pages, and the important question involved was the legal liability of the appellee arising from, and growing out of, the power of attorney which she gave her husband, and the question was then raised and presented that she was estopped by her own conduct to deny her liability, and upon the record then before us, it was held that she was not.

Section 497 of the Code of Civil Procedure upon which plaintiff relies provides that a new trial may be granted if, before the case is finally decided in the Supreme Court, "new and material evidence be discovered by either party, which could not have been discovered before the trial in the court below, by the exercise of due diligence." Under this law, it is not sufficient that the evidence is material, it must also be new evidence, and it must "be discovered by either party."

Assuming that in the instant case the evidence is "material," it is not "new" evidence, neither was it "discovered" evidence within the meaning of the law. It was old evidence in the possession of the plaintiff which was overlooked and "forgotten" at the time of the trial.

Among the numerous authorities on that question, see the cases of Hendy vs. Desmond (62 Cal., 260); Bond vs. Cutler (7 Mass., 205); Gregory vs. Gregory (129 111. App., 96); Gaulden vs. Lawrence (33 Ga., 159); Shields vs. State (45 Conn., 266); and Rand vs. Kipp (27 Mont., 138).

That section also provides that such new and material evidence could not have been discovered before the trial "by the exercise of due diligence."

In the instant case, no diligence whatever was exercised by the bank, and it appears that the finding of the instrument now in question two years later was more or less of an accident, and that, if the bank had exercised even ordinary diligence, it would have found the instrument now in question two years ago. It also appears from the showing made that the instrument in question was executed at the suggestion of the bank and for certain specific purposes, for which the bank was made the trustee, and that after negotiations between all of the parties in interest, including the bank, covering a period of about three months, it declined to accept the trust.

We are clearly of the opinion that there is no merit in the motion for a new trial upon the ground of newly discovered evidence, and the motion is denied.

OPINION ON THE MERITS

There are two cases involved on this appeal, one of which, known here as G. R. No. 25643, is an action by the plaintiff against the defendants, Jean M. Poizat, Gabriela Andrea de Coster y Roxas, his wife, and J. M. Poizat & Company, to recover judgment against them, jointly and severally, for P292,000, with interest thereon at the rate of 9 per cent per annum, on an alleged promissory note dated at Manila on December 29, 1921, and the further sum of P10,000 as attorney's fees and costs, in which a true and correct copy of the note is attached to the

complaint, marked Exhibit A. The other is known here as case G. R. No. 25642 in which the same allegations are made as to the note for P292,000, and it is further alleged that at the time of its execution, the note was secured by a real mortgage executed to, and in favor of, the bank by Jean M. Poizat and Gabriela Andrea de Coster y Roxas, his wife, and the bank prays for a decree for the amount of the note and the foreclosure of the mortgage given to secure its payment, and the sale of the property mortgaged to satisfy the decree.

In each complaint, it is alleged that Jean M. Poizat and Gabriela Andrea de Coster y Roxas are husband and wife, and "that the defendant J. M. Poizat & Company was and is a duly registered partnership having its principal office and place of business in the City of Manila."

Upon the former appeal in which the case was reversed and remanded, this court held in legal effect that the facts alleged in the answer of the appellee stated a good and meritorious defense to both of plaintiff's causes of action.

Upon a trial in the lower court founded upon the majority opinion of this court, and upon the new and amended pleadings, both parties introduced evidence to sustain their respective pleas.

In a well-written and exhaustive opinion, the lower court rendered judgment for the appellee in both cases, and absolved her from all liability.

In its first assignment of error, the appellant contends that the trial court erred in declaring that defendant and her counsel did not have full knowledge of all the facts when they ratified and confirmed the promissory note and mortgage here involved.

Upon that question the trial court says:

"For the purpose of proving the admission and ratification alleged by the plaintiff bank, plaintiff's counsel presented the deposition of its Vice-President, Mr. J. F. Marias, and Exhibit A thereof, which is a letter written by Mr. Opisso to the President of the Bank, Mr. Nolting, proposing a settlement of the case. From this declaration, which has been contradicted in detail by Mr. Opisso and by the defendant Gabriela Andrea de Coster, the court cannot draw the conclusion that there has ever been any admission or ratification of the act of Mr. Poizat, whether express or implied.

"It is not enough to prove that a void obligation was considered valid, but it is necessary to prove first conclusively that at the time of admitting the same as valid or ratifying it, the principals have full knowledge of all the circumstances which had surrounded the act performed by the agent in excess of his powers. And this conclusive evidence does not exist in the record, on the contrary all the facts tend to corroborate the proposition that it did not exist.

"Exhibit A of the deposition of Mr. Marias does not prove anything. It is a letter wherein the attorney for the defendant Gabriela Poizat proposes a settlement, and there is nothing in it from which it may be deduced or inferred that the defendant Gabriela Poizat or her attorney had any knowledge of the facts which preceded the execution of the note in question.

"The court is of the opinion, and so holds, that there is no evidence in the record of any of the facts alleged by the plaintiff bank in the paragraphs of its counterclaim above-mentioned."

Although the evidence of Mr. Marias, the Vice-President of the plaintiff, might be construed as tending to show that Opisso, as attorney for the appellee, did have personal knowledge of the actual facts at and before the time that he wrote the letter of July 23, 1924, his testimony upon that point is flatly contradicted by Opisso, who testified that he first obtained any knowledge of the true consideration for the note when he received the six cancelled notes from Galang on August 21, 1924, and the record shows that upon the receipt of those notes, he promptly took action to obtain relief.

We are clearly of the opinion that the evidence upon that point not only sustains the findings of the trial court, but that the preponderance of the evidence is in favor of the defendant.

An extended analysis of the evidence upon this point would not serve any useful purpose. Suffice it to say that it sustains the findings of the trial court, and that even the weight of the evidence is with the appellee.

In its second assignment of error, appellant contends that the court erred "in declaring that the promissory note here involved does not evidence a loan to the defendant."

That is the real question in this case.

In the lower court, the parties entered into a stipulation of facts from which it appears that on July 25, 1921, the plaintiff held a promissory note of Jean M. Poizat & Company for P25,000, known as Exhibit 3, one on the same date for P35,000, known as Exhibit 4, one of that date for P50,000, known as Exhibit 5, another for P50,000, known as Exhibit 6, and one for P50,000, known as Exhibit 7, and another for P98,458.58, known as Exhibit 8, all of date July 25, 1921. No. 3 was made due and payable August 31, 1921, No. 4 September 30, 1921, No. 5 October 31, 1921, No. 6 November 30, 1921, No. 7 December 29, 1921, and No. 8 January 31, 1922. Under the head of "remarks," it appears on each exhibit that each of the six promissory notes is a part of the total amount of P308,458.58 "to cancel the overdraft," and that each note is secured by steamers and merchandise as per deed dated July 25, 1921. It also appears upon the face of each note that all of them were "cancelled" by the bank on January 14, 1922. That is to say, on July 25, 1921, the bank held the six notes of Jean M. Poizat & Company for the total amount of P308,458.58 which were then secured by two steamers and merchandise, and that on the 14th of January, 1922, all of those notes were "cancelled." It also appears from the stipulation, and from what is known in the record as Exhibit 9, that on the 16th of November, 1921, P16,180 was paid on account of the overdraft, and the further sum of P278.58 on December 29, 1921, thus leaving a balance on December 29, 1921, of P292,000, upon which date the note in question was executed and signed in the following manner;

"Per pro. Gabriela Andrea de Coster y Roxas

(Sgd.) "JEAN M. POIZAT

"JEAN M. POIZAT

"J. M. POIZAT & COMPANY

"By (Sgd.) JEAN M. POIZAT

"Member of the Firm"

It is agreed that the power of attorney which the appellee gave her husband was then in full force and effect, and the question now involved is whether, under the existing facts, the making of the note was a valid exercise of the power conferred by the wife upon the husband.

The evidence is conclusive that the amounts of the original six notes of Jean M. Poizat & Company, and the notes themselves, were merged in the note for P292,000 of December 29, 1921. Those notes were the notes of Jean M. Poizat & Company, and neither of them was signed by the appellee in any form, or by her husband in any other way than as Jean M. Poizat & Company. It also appears that each of the six original notes was secured by chattel mortgage on the two steamers and merchandise executed on July 25, 1921, the date of each note. The evidence is conclusive that the appellee was not a member of the partnership Jean M. Poizat & Company; that she was not a party to it in any manner, shape or form; and that she never claimed any interest in the partnership, and that she was a complete stranger to all the transactions between the bank and the partnership up to the time that her husband signed her name to the note in question. The evidence is conclusive that the only consideration for the note here in question was the amount of the six original notes of Jean M. Poizat & Company which were surrendered and cancelled at the time of the execution of the note for P292,000. That is to say, at the time of the

execution of the note now in question, the bank never parted with or loaned a centavo to any one, and that the only consideration for the note was the preexisting debt of the registered partnership Jean M. Poizat & Company, evidenced by, and substituted for, the six cancelled notes of that company. Upon that question the evidence is conclusive from the stipulation of facts and the bank's own records.

On the former appeal, this court said:

"The note and mortgage in question show upon their face that at the time they were executed, the husband was attorney in fact for the defendant wife, and the bank knew or should have known the nature and extent of his authority and the limitations upon his power.

"You will search the terms and provisions of the power of attorney in vain to find any authority for the husband to make his wife liable as a surety for the payment of the preexisting debt of a third person,"

After analysing the terms and provisions of the power of attorney in question, the court further said:

"It will be noted that there is no provision in either of them which authorizes or empowers him to sign anything or to do anything which would make his wife liable as a surety for a preexisting debt.

"It is fundamental rule of construction that where in an instrument powers and duties are specified and defined, that all of such powers and duties are limited and confined to those which are specified and defined, and that all other powers and duties are excluded.

"It is very apparent from the face of the instrument that the whole purpose and intent of the power of attorney was to empower and authorize the husband to look after and protect the interests of the wife and for her and in her name to transact any and all of her business. But nowhere does it provide or authorize him to make her liable as a surety for the payment of the preexisting debt of a third person."

We also said that if the bank "had made an actual loan of P292,000 at the time the note was executed, another and a different question would be presented."

There is no evidence that the bank parted with any money at the time of the execution of the note, or that the appellee ever had or received any part of the consideration of the note.

In its third assignment of error, appellant contends that the court erred in declaring that the power of attorney "does not authorize the agent to lend his principal's credit to a partnership wherein both principal and agent are equally interested." If it be a fact that "both principal and agent are equally interested" in the partnership, there might be some merit in that contention. But, as stated, there is no evidence that the appellee ever had or claimed to have any interest in the partnership of Jean M. Poizat & Company. Neither is there any evidence "that Mrs. Poizat ever lent her credit to the business partnership of J. M. Poizat & Co."

Upon that point, the trial court, in its opinion, says:

"An examination of the fifth clause of the power conferred by the defendant in favor of her husband, does not show that there is anything in it by which the latter is authorized to lend his principal's credit. The court understands that the one who lends his credit is but a guarantor, and to constitute the principal into a guarantor, it is necessary that the agent be expressly empowered to do so."

On legal principle, all of the remaining questions were decided adversely to the appellant on the former appeal.

In the trial of the case on the merits, as to all legal questions involved, the court below followed the opinion of this court on the former appeal, and it found all of the material questions of fact in favor of the appellee, and all of its findings of fact are amply sustained by the evidence.

The judgment of the lower court is affirmed, with costs. So ordered.

Johnson, Malcolm, Ostrand, and Romualdez, JJ., concur.

STREET, J., with whom concur AVANCEÑA, C, J., VILLAMOR and VILLA-REAL, JJ., dissenting;

On August 25, 1903, the appellee, Gabriela de Coster, wife of Jean M. Poizat, executed an unlimited general power of attorney in favor of her husband, Jean M. Poizat, authorizing him to administer her property, real and personal, and to enter into any kind of contract, whether civil or mercantile; and to borrow any sums of money or fungible things at the rate of interest and for the time and under the conditions which he might deem convenient. Such is the import of paragraphs 6 and 8 of the power of attorney. The eighth paragraph authorizes Poizat to draw, issue and negotiate any negotiable instruments, promissory notes, and other documents of value. In , the final clause of the contract, by way of summary, the author of the power confers on her attorney in fact ample and complete power, binding herself in the most solemn manner to recognize as existing and valid all that might be done by virtue of the power.

Gabriela de Coster, the author of this power, thereafter absented herself from the Philippine Islands and removed to Paris, France, where she continued to live during most of the years that have since passed and where she was living at the time of the transactions which gave rise to this litigation. During all these years Poizat has continued in the management of her properties, selling and mortgaging them as occasion has required; and only in 1924 was said power revoked.

Jean M. Poizat is the principal capitalist partner in the firm of J. M. Poizat & Co., an important mercantile entity doing business in the Philippine Islands. In the absence of any showing to the contrary, the legal presumption must be that Poizat's interest in this firm pertains to the conjugal partnership. His wife, Gabriela de Coster, is therefore entitled by law to an undivided half interest therein. (Art. 1407, Civil Code.)

On December 29, 1921, Jean M. Poizat executed the promissory note which constitutes the basis of the two actions with which we are here concerned, promising therein to pay at the end of one year to the Bank of the Philippine Islands the sum of P292,000, with interest at the rate of 9 per centum per annum, payable monthly. To this note Poizat affixed, first, the name of his wife, Gabriela de Coster, by himself as attorney in fact; secondly, his own name personally; and thirdly, the name of J. M. Poizat & Co., by himself as manager. Although bearing the date of December 29, 1921, this note was not negotiated at the Bank of the Philippine Islands until January 14, 1922, when the bank accepted the note for discount and applied the proceeds to six other notes already owing to the bank bearing the names of the partnership J. M. Poizat & Co. and J. M. Poizat. Upon said occasion said six notes were cancelled by the bank and surrendered to Poizat. In the prevailing opinion emphasis is placed upon the fact that the bank parted with no money at the time of the execution of the note; but as the six notes were surrendered, it is evident that the bank gave full value; and the circumstance that the proceeds of the note for P292,000 were applied by the bank to the satisfaction of the older notes, in conformity with the wishes of Poizat, and banking usage, is of no importance. In law the result is precisely the same as if the cashier of the bank had handed the money to Poizat and the latter had then applied it to the payment of the six notes.

The question of importance presented for decision in these cases is whether the appellee, Gabriela de Coster, is obligated by the promissory note for P292,000 executed in the manner and under the, conditions above stated. This question involves a most rudimentary problem and ought to be solved by the application of one of the first rules ever formulated by the incipient legal mind of rational man. That principle is embodied in the maxim, *Qui facit per apum facit per se*, he who acts through another, acts by himself. Applying this notion to the cases before us, we should say that, when the name of Gabriela de Coster was affixed by her attorney in fact to the promissory

note before us, the legal consequences were in all respects the same as if her name had been affixed by herself in person. It is as simple a case of the delegation of authority to make a contract as could possibly arise.

The solution of the case of course depends principally upon the interpretation to be placed by the court upon the language used in the power of attorney. Justly interpreted, does that instrument place any restriction upon the use of the power? Is any limitation to be deduced therefrom to the effect that the powers therein granted cannot be used except for the direct benefit of the wife? In considering this point it is of some assistance to know that the document was made by the wife upon the eve of her taking up a permanent residence abroad; and the power was made in favor of her husband, upon whom she relied for the permanent pension necessary to sustain her in her future abode. Moreover, her husband was then the capitalist partner and manager of J. M. Poizat & Co., a business which pertained to both husband and wife alike. Is anything more natural than that the parties should have contemplated that the credit of the wife might be applied to the needs of the husband and of the firm which he was managing? Such is the natural presumption from the situation of the parties. But the case does not depend upon this, because it can be demonstrated with the utmost certainty, from the language used in the power, that it was the intention of the appellee, as donor of the power, to authorize the use of her credit for other purposes than to raise money directly for herself. In this connection it will be observed that the appellee is not a merchant or banker herself, nor has she at any time owned any mercantile enterprise as separate property. Nevertheless, it is interesting to note, the power of attorney authorizes her attorney in fact to enter into mercantile contracts and to draw, indorse, accept, issue and negotiate any drafts, bills of exchange, letters of credit, letters of payment, bills, vales, promissory notes and all kinds of documents representative of value. The exercise of these powers clearly extends beyond the requirements of the management of the appellee's separate estate; and the only rational interpretation to be placed upon the clauses mentioned is that the appellee intended that the power might be used in and about her husband's obligations and business.

The prevailing opinion seems to be planted mainly upon the proposition that none of the proceeds of the note came to the appellee's hands or were applied to her personal use. Those proceeds, however, were used to take up notes which were valid obligations both against Poizat and the firm of J. M. Poizat & Co. In view of this fact it is impossible to say that the money was not applied for her benefit. Any obligation created by the husband obligates the conjugal partnership; and the wife, as partner with the husband and as participant in his business enterprises, is of course a legal beneficiary in any fund that accrues to such business. It follows without any possibility of doubt that, when the proceeds of the note in question were applied to the obligations, of Poizat and J. M. Poizat & Co., they inured to the benefit of the wife. Whether the creation of the obligation was wise and whether the benefit that was expected to flow therefrom was commensurate with the value paid and the risk involved is a matter with which the court is not concerned, having been confided by the appellee to her husband as the sole judge thereof. It follows that the conclusion reached by the majority of the court is lacking in any just basis, even assuming that the power granted could only be legitimately used for the appellee's direct benefit. The case of *Muth vs. Goddard* (72 Pac, 621), decided in 1903 by the Supreme Court of Montana, involves a question very similar to that now before us. In that case an attorney in fact, who was authorized to sell, convey and mortgage the grantor's property, executed a trust deed conveying said property as security for a debt due from a firm in which the grantor was a partner. It was held that the power was properly exercised.

We do not question the proposition that the relation between the attorney in fact and his principal is of a highly fiduciary nature and that the attorney is bound to use the power for the purpose intended. But all competent persons should be bound by what they have deliberately written; and when a wife confides all her legal powers to the keeping of her husband by an unqualified power of attorney such as existed here, she, should be prepared to abide the consequences. In the case before us the plaintiff bank advanced its money, or the equivalent of money, upon the faith of such a power, and the obligation should be enforced although the consideration did not go

directly to the principal but to a business which pertained to the conjugal partnership of which she was a member.

In conclusion it should be pointed out that this case is a sequel to *Bank of the Philippine Islands vs. De Coster* (47 Phil., 594), where upon a former appeal in the same case the court ordered that the judgment previously entered in the court below should be opened in order that Gabriela de Coster might be permitted to come in and make defense. The opinion in that case, written by the member of the court who is now author of the prevailing opinion, states of course precisely the same doctrine as is now enunciated in the prevailing opinion. But an examination of the votes of the members of the court who participated in the earlier decision shows that three of the Justices did not commit themselves to the doctrine there stated. It follows that said decision cannot be considered binding upon the court upon the present appeal, even apart from the fact that it is vitiated, in the opinion of the undersigned, by the errors already criticized in this opinion.

The judgment which is the subject of this appeal should, in our opinion, be reversed.

[1]147 Phil., 594.

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