2 Phil. 732

[G.R. No. 1449. November 30, 1903]

VICENTE GOMEZ GARCIA ET. AL., PLAINTIFFS AND APPELLANTS, VS. JACINTA HIPOLITO ET AL., DEFENDANTS AND APPELLEES.

D E C I S I O N

WILLARD, J.:

This is a motion to dismiss the bill of exceptions. Judgment was rendered for the defendants, on May 1, 1903. The plaintiffs were notified thereof on May 21. On May 28 they excepted to the judgment and presented a motion for a new trial. This motion was denied on July 23. On July 28 the plaintiffs presented their proposed bill of exceptions which, on August 5, was allowed and signed by the court. The term of the court at which the case was tried expired on May 30.

1. The first ground of the motion is, that the bill of exceptions was allowed after the time therefor had expired. Section 143 of the Code of Civil Procedure provides that the defeated party shall notify the judge before the ending of the term that lie "desires to prosecute a bill of exceptions." It is alleged by the appellees that such notice was not given in this case. No evidence was presented, however, at the hearing to prove this allegation. In the absence of such evidence, we can not presume that it was not done. The presumption would rather be to tmf contrary. And, in this case, it is strengthened by the fact that, when the appellees were notified of the presentation of the bill of exceptions on July 28, they made no objection to it on this ground, and by the further fact that the court allowed it on August 5 without suggesting that such allowance was improper for the reason stated.

Within ten days after the notification above mentioned said section 143 requires the appellant to present to the judge his proposed bill of exceptions. There is nothing in the section which requires that this should be done during the term at which the case was tried. If the ten days should expire after the expiration of the term, the appellant would

nevertheless have the undoubted right to present his proposed bill on the tenth day. It appears, however, that in this case the bill of exceptions "was not presented for more than six weeks after the term ended and, therefore, long after the expiration of ten days from the notification, assuming that such notice was given during the term. It is said that this term of ten days is not an extendible one, and that a bill of exceptions must in all cases be presented within that period. It' appears that, while the motion for a new trial was made on May 23, it was not decided until July 21, and the appellant claims that, as he must necessarily insert in his bill of exceptions his exception to the order denying the motion for a new trial, the ten days did not commence to run until such order was made. There is force in this suggestion, but we do not find it necessary to decide the question.

The part of the section in question is as follows:

> "The party desiring to prosecute the bill of exceptions shall so inform the court at the time of the rendition of final judgment, or as soon thereafter as may be practicable and before the ending of the term of the court at which final judgment is rendered, and the judge shall enter a memorandum to that effect upon his minutes and order a like memorandum to be made by the clerk upon the docket of the court, among the other entries relating to the action. Within ten days after the entry of the memorandum aforesaid, the excepting party shall cause to be presented to the judge a brief statement of the facts of the case sufficient to show the bearing of the rulings, orders, or judgments excepted to, and a specific statement of each ruling, order, or judgment that has been excepted to, for allowance by the judge. The judge shall thereupon, after reasonable notice to both parties and within five days from the presentation of the bill of exceptions to him, restate the facts if need be. * * *"

The question is one of construction. Did the Commission intend to say that the parties might consent to or the judge order an extension of this period of ten days, or did they intend to have it read is if there had been inserted after the words "allowance by the judge" the following clause: "And the judge shall have no power for any cause whatever to extend this period of ten days, and any agreement of the parties to that effect shall be void?" It will be noticed that this period of ten days, as well as the subsequent period of five days, has to do with what may be called the mechanical part of the appeal, the preparation of the papers for transmission to, the Supreme Court. The rights of the parties as to the removal itself have

already been fixed by the notice of the intention to prepare a bill of exceptions, which notice must be entered of record in the clerk's office. If the period for the performance of that act corresponds to the time for appeal, or for suing out a writ of error found in most other laws of American origin, it of course can not be extended by order of court or consent of parties. But that period is entirely distinct from this period of ten days allowed for preparing the papers, after the right to remove the case has been secured. It can not, therefore, be said that an extension of this time is an extension of the time to appeal.

When we take into consideration the condition of things in the Archipelago at the time this law was adopted, it seems impossible to believe that the Commission intended to deprive the court and the parties of the power to extend this term. They must have known that in many cases it would be a physical impossibility to comply with it. In a case tried in Zambales, it might easily happen that the judge would close his term of court and depart for the Province of Union or Benguet during the running of the ten days, where it would be impossible for the appellant to reach him within that period. In fact, in view of the lack of means of easy and frequent communication between different parts of the Islands, a departure of a judge from one province to another, almost anywhere in the Archipelago except upon the line of railroad between Manila and Dagupan, would make it impossible for the appellant to reach him within ten days. In addition to this, even in Manila, it would probably happen, in a majority of cases, that the stenographer would not be able to furnish the appellant a transcript of his notes within ten days, or that the appellant would be unable to prepare the bill within that time.

And, besides all this, there is no apparent reason why the parties should not have a right to agree that these papers might be presented in twenty days instead of ten. No one is interested except themselves, and no question of public policy is involved. We hold, therefore, that this period of ten days is not nonextendible and that it can be extended by the order of the court or the consent of the parties.

In this case the judge did not, by an order made before the expiration of the ten days, extend the time. But statutes frequently confer upon courts the power to permit certain acts to be done after the time prescribed therefor has expired. There is the same reason for holding in this case that such power has been conferred as for holding that the statute gives the court power to enlarge the time. There would, in many cases, exist the same physical impossibility of securing such an order from the judge as in presenting to him the bill of exceptions. The judge, by signing the bill of exceptions, on August 5, consented that the time should be extended. It moreover was stated in the written document presented by the

appellant at the hearing, and not denied by the appellee, that the proposed bill of exceptions was served upon the appellee on July 28, and that he made no objection to its being allowed. This was a waiver by him of the objection that it had been presented too late.

Authorities holding that orders of this kind must be made within the term have no bearing on this case, because, (1) as we have seen, this act of presenting the bill of exceptions need not be done within the term, and (2) the theory of the common law of England, that the court could only act within a term, has been entirely abolished by the provisions of section 53 of Act No. 136, which provides that "Courts of First Instance shall be always open, legal holidays and nonjudicial days excepted." At the common law, nothing can be done outside of the term unless the statute authorizes it. Under our law anything can be done outside of the term unless the statute prohibits it.

2. The appellees asked, also, that the bill of exceptions be dismissed because it did not contain all the evidence received at the trial. This allegation they proved by a certificate from the clerk of the court below. It appears, however, that the plaintiffs excepted to the judgment. This, under the repeated rulings of this court, enabled them to argue here the question as to whether the findings of fact stated by the judge in his decision, with the facts admitted by the pleadings, support the judgment which has been ordered. For the purposes of such exception, it was neither necessary nor proper to incorporate the evidence into the bill of exceptions. There being enough in the record to present this question, the appeal can not be dismissed on this ground. It appears, however, that the question whirl) the appellants chiefly desire to present is whether or not the findings of fact are supported by the evidence. As said by counsel for appellees in his argument here, this court can not determine this question unless it has before it. what the court below had before it when the decision was rendered. It must appear from the bill of exceptions, in some way, that it contains all the evidence bearing upon the point in dispute. The appellants say that when they prepared the bill of exceptions they included therein all the evidence then in the record, and, by a certificate of the clerk of the court below, they proved that the testimony of the witnesses, claimed by the appellees to be wanting, was delivered to said clerk on the 25th day of September by one of the lawyers for the appellees.

We can not agree with counsel for the appellant in his claim that it was the duty of the appellees to have objected, on this ground, to the bill of exceptions before it was signed. Such would have been their duty had there been in the proposed bill a statement that it contained all the evidence. In the absence of such a statement, they were not bound to

presume that the appellants proposed to pursue both their exception to the judgment and also their exception to the order denying their motion for a new trial.

At the argument of this motion the appellant's lawyer did state that such was his intention. To enable this to be done it will be necessary to correct the record. Our power to do this is ample. Section 500 of the Code of Civil Procedure provides: "But no such dismissal shaH be made for purely formal defects not affecting the rights of the parties, nor for any defect which can be removed, and the Supreme Court shall give such reasonable time as may be necessary to remove such defect, if it can be removed. * * * Nor shall such dismissal be granted where, by an amendment to the bill of exceptions, which is hereby declared to be lawful and allowable, and imperfections or omissions of necessary and proper allegations could be corrected from the record in the case."

Section 501 is as follows:

> "*Incomplete record, how corrected*.—If at any time when a case is called for trial, or during the trial, or afterwards, while the Supreme Court may have the same under consideration, it is discovered that the record is so incomplete that justice requires the case to be postponed until the record can be made complete, the court shall postpone the further consideration of the same and make such order as may be proper and necessary to complete the record, in the interests of justice. But the court may dismiss a bill of exceptions for failure of the excepting party within a reasonable time to comply with the orders made for the perfection of the bill of exceptions."

Under these sections, the appellants have the right to complete the record by having incorporated into the bill of exceptions that part of the evidence which has been omitted.

The motion of the appellees to dismiss the bill of exceptions is denied. The appellants are hereby allowed thirty days, from the date of this order, in which to file in this court a certified copy of all the evidence received at the trial of said cause which is not already embodied in the bill of exceptions, with a certificate from the judge of the court below that said additional evidence, together with the evidence already contained in the bill of exceptions, is all the evidence received at the trial of said cause. Upon the receipt of said copies, the clerk shall cause them to be printed at the expense of the appellants, distributed to the parties, and attached to the printed record. The time for tlie presentation of the

appellant's brief shall comiiiwive to run from the term of such distribution.

Arellano, C. J., Mapa and *McDonough, JJ.,* concur.

DISSENTING

JOHNSON, J., with whom concurs **COOPER, J.:**

In this case judgment was rendered on the 1st day of May, 1903. The appellant was given notice of the judgment on the 21st day of May. On the 23d day of May the appellant moved for a new trial. The term of the court expired on the 5th day of June. The judge denied the motion for a new trial on the 23d day of July. On the 28th day of July the appellant presented his bill of exceptions. On the 5th day of August the judge signed said bill of exceptions.

On the 30th day of September, 1903, the appellee made a motion in this court asking that the said bill of exceptions be dismissed, among others, for the following reasons, to wit:

1. That the appellant had not informed the court, before the ending of the term at which final judgment was rendered, "of his desire to prosecute a bill of exceptions."
2. That the bill of exceptions was presented to and allowed by the trial judge after the time fixed by the statute had elapsed.

Section 143 of the new Code of Civil Procedure provides how a bill of exceptions may be perfected. It provides *the only method of perfecting an appeal in ordinary civil actions.* Its provisions are as follows :

> "The party desiring to prosecute a bill of exceptions shall so inform the court at the time of the rendition of final judgment, or as soon thereafter as may be practicable and *before the ending of the term of court at which final judgment is rendered.* The judge shall enter a memorandum to that effect upon his minutes and order a like memorandum to be made upon the docket of the court among the other entries relating to the action. Within ten days after the entry of the memorandum aforesaid, the excepting party shall cause to be presented to the judge a brief statement of the facts of the case sufficient to show the bearing of the rulings, orders of judgment excepted to, and a specific statement of each ruling, order, or judgment that has been excepted to, for allowance by the judge.

> The judge shall thereupon, after reasonable notice to both parties and within five days from the presentation of the bill of exceptions to him, restate the facts if need be and the exceptions, so that the questions of law therein involved and their relevancy shall all be made clear, and when the bill of exceptions has been perfected and allowed by the judge, he shall certify that it has been so allowed and the bill of exceptions shall be filed with the other papers in the action and the same shall thereupon be transferred to the Supreme Court for determination of the questions of law involved."

The preceding four conditions constitute the method of perfecting an appeal from the judgment of the Court of First Instance to the Supreme Court in ordinary civil actions. Each of these steps or provisions must be complied with in order to perfect the appeal. The bill of exceptions, when completed, must show on its face that this statute has been complied with. No presumption can import a fact not therein made expressly to appear.

There is no statement or suggestion in the bill of exceptions presented in the above cause *that the appellant at any time gave the court notice of his desire to prosecute a bill of exceptions.* It is argued that no evidence was presented at the hearing to prove this allegation, and that in the absence of such proof we can not presume that it was not done. It is not the duty of this court to presume either that it was or was not done. The record must answer the question. The record fails to show that this notice was given. Nothing can be presumed which the record does not show. This failure on the part of the appellant to give this notice, unless he brings himself under some extraordinary circumstance, is fatal. No attempt is made here to explain or justify this failure.

Section 143 of the New Code of Civil Procedure provides the method by which the Supreme Court obtains jurisdiction of ordinary civil causes. No other method is provided for by the code. The Supreme Court acquires no jurisdiction unless these provisions are complied with. They are jurisdictional requirements and therefore must appear of record. None of them can be presumed. The statute is mandatory in its terms, and the Supreme Court ought not to take jurisdiction of a cause unless there has been a compliance therewith. Its provisions are plain and easily complied with.

The rule is well settled both under the decisions of the courts of the United States and of Spain, that when the time within which a notice of an appeal or an appeal shall be perfected is fixed by statute, it can not be extended by the court, and the appellate court obtains no

jurisdiction of the cause if these conditions are complied with beyond the statutory period. The time within which an appeal must be taken is fixed bv section 143 of the new Code of Civil Procedure, and the appeal must be taken within the time so designated. The Courts of First Instance have no authority to enlarge the time, nor can the parties extend it by agreement. If the appellant has failed to perfect his appeal within the time fixed by law, it is necessary for him to file a transcript in the appellate court with a verified petition showing the facts upon which he relies as excusing his failure to perfect his appeal within the statutory period. Upon proper notice to the adverse party the superior court may, under its general equitable powers, grant such relief as it may deem wise and proper under all the circumstances. The practice in such cases varies in different jurisdictions.

These statutes limiting the time to appeal from the decision of courts below are mandatory and jurisdictional. (Dooling *vs.* Moore, 20 Cal., 141.) Unless an appeal (or notice of an appeal) is taken within the statutory period, the court has no jurisdiction and the appeal is void for all purposes and will be dismissed on motion of appellee. The courts can not waive nor extend these statutory provisions, except where the statute so expressly authorizes. (Gardner *vs.* Ingraham, 82 Ala., 339; Caillot *vs.* Deetken, 113 U. S., 215; Fitzgerald *vs.* Brandt, 36 Nebr., 683.) If the time to perfect an appeal, as fixed by the law, is found, under the conditions existing in this Archipelago, to be too short, then it is the duty of the legislature to amend the law. The courts have no authority to amend the laws. The only reason why the parties can not extend time is because the law fixes the time within which the appeal must be perfected. An extension of the time without authority would be void, and the appeal would be without effect. (Smith *vs.* Smith, 48 Mo. App., 618.) This was the rule under the Spanish Code of Civil Procedure. Article 365 of that code provided that the appeal must be taken in five days. The courts have repeatedly held, under that article, that this provision was mandatory or improrogable. Don Jose Maria Manresa, in his commentaries on the Code of Civil Procedure (yol. 2, pp. 164-172), says: "The terms of this article are nonextcndible, and the time runs from the day following the notification."

Inasmuch as section 143 of the new Code of Civil Procedure provides the only method of perfecting an appeal in ordinary civil actions in the Philippines, the decisions of the courts in the United States on that question are germane.

In the case of Muller vs. Ehlers (91 U. 8., 249), Waite, Chief Justice, said: "It does not appear that the bill of exceptions was filed, tendered for signature, or even prepared, before the adjournment of the court for the term at which the judgment was rendered. *No notice teas given to the plaintiff of any intention on the part of the defendant to ash for the hill of*

exceptions either during the term or after. Upon the adjournment of the term, the parties were out of court and the litigation there was at an end. The order of the (trial) court, therefore, made at the next term, directing that the bill of exceptions be filed in the cause as of April 28, 1873 (the date of the judgment), was a nullity. For this reason the bill of exceptions, though returned here, can not be considered as a part of the record."

Fuller, Chief Justice, in the cause of Hume *vs.* Bowie (148 U. S., 246), said, in discussing this same question: "The rule is unquestionably correctly laid down in Muller vs. Ehlers."

Chief Justice Fuller, in the cause of the United States *vs.* Jones (149 U. S., 263), again said: "Judgment was rendered in this cause July 18, the writ of error mied out and allowed Juty 23, and the court adjourned for the term July 80. So far as is disclosed by the record, the bill of exceptions was not tendered to the judge or signed by him until October 7, and no order was entered extending the time for its presentation. The bill of exceptions was, therefore, improvidcntly allowed," citing again Muller *vs.* Ehlers. (Note: The rules of the court in this case permitted the court to extend the time within which an appeal might be perfected.)

Chief Justice Fuller again, in the cause of Morse *vs.* Anderson (1.50 U. S., 156), said: "The judgment is affirmed for want of a bill of exceptions seasonably allowed, upon the authority of Muller vs. Ehlers, Hume vs. Bowie, and other cases cited."

Mr. Justice Shiras, in the case of Ward *vs.* Cochran (150 U. S., 597), said: "In the case of Muller *vs.* Ehlers this court held that, because the bill of exceptions had not been signed at or during the term at which the judgment was rendered, it could not be considered. The power to reduce exceptions taken at the trial to form and to have them signed and filed was, under ordinary circumstances, confined to a time not later than the term at which judgment was rendered. This, we think, is the true rule, and one to which there should be no exceptions, without an express order of the court during the term, or consent of the parties, save under very extraordinary circumstances. *In the present case we find no order of the court, no consent of the parties, and no such circumstances as will justify a departure from this rule."* (See, also, Eagle vs. Draper, 14 Blatchford, 334, Federal case No. 4234; Waldron *vs.* Waldron, 150 U. S., 361.)

This is also the case in Tennessee. In the case of Stagg *vs.* State (13 Humphrey, Tenn., 372), Justice Green said in substance: "The supreme court can not notice as a part of the record a bill of exceptions taken and sealed by the court at a term subsequent to that at which the cause was tried, even if it be a special term, for the law authorizing special terms

constitutes them distinct terms." To the same effect are the following Tennessee cases: Davis *vs.* Jones (3 Head, 603); Hill *vs.* Bowers (4 Heiskell, 272) ; Steel *vs.* Davis (5 Heiskell, 75); Garrett *vs.* Kogers (1 Heiskell, 321). In Sims *vs.* State (4 Lea, 357), Justice Cooper, said: "The settled rule in this State is that the bill of exceptions must be reduced to writing and signed during the term, nor can it be signed afterwards, although the signature was omitted by an inadvertence on the part of the judge."

In Vermont the statute (sec. 1626, compiled laws of 1894) provides that "exceptions to the opinion of the court shall be signed by the presiding judge and filed with the clerk within thirty days after the rising of the court." In commenting upon this statutory provision, Redfield, Chief Justice, said: "If exceptions taken in the county court are not filed in the clerk's office within thirty days from the rising of the court, as required by the statute, they can not be entertained or considered in the supreme court. If they are not actually filed within the thirty days, and if there is no fraud, misconduct, or agreement of the opposite party respecting them, they can not be thereafter filed *nunc pro tunc*, as of the date within thirty days." (Nixon vs. Phelps, 29 Vt., 196; Higbee *vs.* Sutton, 14 Vt., 555.)

The code of Mississippi (edition of Thompson, Dillard & Campbell, 1892, sec. 735) provides that: "Bills of exception to any ruling of the court must be tendered and signed during the trial or during the term of the court." Justice Chalmers, in the case of Allen *vs.* Levy (59 Miss., 613), said: "Section 1718 of the Code of 1880 requires that such bills of exception must be made out and presented to the judge during the term or within ten days after adjournment, and the court has no power of its own motion to grant a longer time."

In Massachusetts there is a similar statute, and the rule there is that it must be strictly complied with. In the case of Doeherty *vs.* Lincoln (114 Mass., 362), Gray, Chief Justice (later a member of the Supreme Court of the United States), said: "The provisions of this statute requiring the exceptions to be filed with the clerk as well as presented to the court within the time prescribed are intended *for the benefit of the adverse party; and he is entitled to insist upon due proof of a strict compliance with them*, unless lie has done something to waive it. In the present case therv. is no evidence of such waiver, and the bill of exceptions does not appear by the docket or tiles of the court below to have been filed with the clerk or presented to the judge within the time prescribed. It must, therefore, be dismissed." (See, also, Pease *vs.* Whitney, 4 Mass., 507; Conway *vs.* Callahan, 121 Mass., 165.) In California there is a similar statute, with the same decisions by the courts.

Section 1365 the statutes of Texas provides that: "It shall be the duty of the party taking any

bill of exceptions to reduce the same to writing and present the same to the judge for his allowance and signaturiB during the term and within ten days after the conclusion of the trial." The courts of that State have repeatedly held that the terms of this statute must be strictly complied with. (Farrar *vs.* Bates, 55 Tex., 193; Blum *vs.* Schram, 58 Tex., 524; Tex., etc., Ky. Co. *vs.* McAllister, 59 Tex., 349.)

The rule laid down in the above cases of Muller *vs.* Elders, Michigan Bank *vs.* Eldred, and Hume *vs.* Bowie is quoted and approved in the case of New York, etc., Co. *vs.* Hyde (56 Federal Reporter, 188). See, also, Reliable Incubator Company *vs.* Stahl (102 Federal Rep., 590.)

This rule prevails also in Minnesota. Gilfillan, Chief Justice, in the case of Burns *vs.* Phinney (53 Minn., 431), said: "After the time to appeal has expired, there is no authority in the district court nor in this court to give a party a right to appeal after the right given him by the statute has elapsed by his failure to exercise it."

The same rule is enforced in Kentucky. See Johnson *vs.* Stevens (95 Ky., 128). The same rule prevails in Ohio, Illinois, Iowa, Colorado, and Indiana. (Hicks *vs.* Person, 19 Ohio, 426; Kinsey *vs.* Satterthwaite, 88 Indiana, 344; Wabash, etc., Ry. Co. *vs.* People, 106 111., 152; 43 Pacific Rep., Colo., 903.)

The bill of exceptions under this section constitutes the pleaamgs or statement of facts through which the issue is presented in the Supreme Court, The Supreme Court must rely upon the bill of exceptions for the statement of facts upon which to base its decision. The pleadings must show on their face that the court has jurisdiction.

It is urged that appellees waived their right to object to this bill of exceptions on the grounds urged here, because they did not make them when they were notified of the presentation of the bill of exceptions on July 28. They had a right to assume, for all purposes at that time, that the bill of exceptions was presented within the requirements of the law. Their mistake in that respect, however, did not alter the fact that during the term at which judgment was rendered *no notice teas given to the judge or to the opposite parties by the appellants of their desire* to present a bill of exceptions or to prosecute an appeal. The failure of the appellees to interpose an objection on that ground, at that time, did not place the appellant in a worse position. There is nothing here which shows or tends to show, even remotely, on the part of the appellee a purpose to waive his objection to the bill of exceptions.

The lower courts have no authority bv statute, or otherwise, to waive the provisions of section 143 of the Code of Civil Procedure. Neither has this court the right to waive1 the provisions of the said section. This court may, however, under very extraordinary circumstances, grant relief. These extraordinary circumstances must be made expressly to appear to the satisfaction of this court. These extraordinary circumstances must all be conditions over which the appellant has no control, and, even then, he must have done all within his power to comply with the provisions of the law before the court will grant him relief.

When the legislature provides by a plain statute that a particular thing *shall* be done in a particular way, it hardly seems necessary to ask the question whether or not they did not intend to say also that it might be done or might not be done in some other way, if some other way happened to suit the whim or convenience of some person or class of persons. It is hardly necessary in a statute so plain as section 143 of the new Code of Civil Procedure to read into it a provision which does not there exist.

Judge Elliot in his work on Appellate Procedure states "that the bill of exceptions must be filed within the time limited; the time can not be extended (sees. 128, 295, and 800). If a party may omit one step or delay one step until after the expiration of the time, he may omit or delay another, and another. To establish a rule which would tolerate such a practice would destroy all certainty and uniformity and *build up a deformed and distorted system of mere arbitrary instances.* A worse system than that or one more directly opposed to sound principle can scarcely be imagined." A strict compliance with section 143 of the Code of Civil Procedure is necessary to give this court jurisdiction. Neither this court nor the Court of First Instance has authority to extend the provisions of this statute. It may be said this rule is technical. Be it so.

The legislative branch of the Government has authority over that subject. The judicial branch of the Government has no right or authority to treat as technical, and therefore disregard it, a plain statutory provision.

It has been suggested that the legislature in enacting section 143 of the Code of Civil Procedure "must have known tbat in many cases it would be a physical impossibility to comply with its terms."

> The legislative branch of the Government in these Islands lias considered the conditions here and has legislated subsequently upon the same subject. Act No.

867 of the United States Philippine Commission of September 5, 1903, provides as follows:

"SEC. 14. *Time within which notice of appeal must be filed in cases under previous section*.—In every case in which judgment is entered in the Court of First Instance of a province by direction of a judge not in the province at the ¦time, under the provisions of section 13 hereof, it shall be the duty of the clerk of the court at once to notify the parties to the suit, or their counsel, of the nature of the judgment, by personal notice in writing or registered mail, and in such cases the time within which the parties shall be required to except to the said judgment, and to file notice of their desire to prosecute their bill of exceptions to the judgment, shall be extended to twenty days from the day of receipt of the notice from the clerk."

Section 13 of the said act, to which reference is made above, provides that "whenever a judge of the Court of First Instance or a justice of the Supreme Court shall hold a session, special or regular, of the Court of First Instance of any province and shall thereafter leave the province in which the court was held without having entered judgment in all the cases which were heard at such session, it shall be lawful for him if the case was heard and duly argued, or an opportunity given for an argument to the parties and their counsel, in the proper province, to prepare his judgment after he lias left the province and send the same back, properly signed, to the clerk of the court, to be entered in the court as of the day when the same was received by the clerk in the same manner as if the judge had been present in court to direct the entry of the judgment." Had the legislative branch of the Government considered that the time mentioned in section 143 was extendible, then why was it necessary for it to enact the provisions found in said section 14? If, as it has been contended, the time mentioned in section 143 is extendible by the courts, then certainly it was unnecessary for the legislative branch to enact further legislation upon that question.

From the foregoing provisions it appears that if there are impossible conditions existing here, the legislative branch of this Government will in due time take notice of the same and will enact such legislation as will be necessary to correct the evil. The judicial branch of the Government is governed by the laws enacted.

There is also another very serious objection to the proceedings in this case, and that is, the fact that the judge decided the motion for a new trial after the close of the term in which the

judgment was made final. This is not authorized by the law. Motions for a new trial must be decided during the term in which the judgments become final. (See sec. 143 of Code of Civil Procedure.) If this practice is to be permitted, vexatious delays will be worked on parties in courts below. These rules are made in order that successful parties may not be defeated by mere delay. If this court may extend the time one day or a month, it may extend it indefinitely. Such a doctrine would have the effect, finally, of forever defeating the final settlement of causes—the very object of the law. If this court may extend the terms of the statutes, the Court of First Instance may, and then instead of having a uniform rule we would have a distorted practice1 where each case depended upon the particular notion of the particular judge—a practice of mere instances.

It is argued that the Courts of First Instance are always open. If that is so, then what did the Commission mean in providing different terms of the court? What is meant by the phrase in section 143 “and before the ending of the term of the court,” etc.? If the courts are always open and terms never close, then it would be safe for the defeated party to wait “forever and a day” before taking steps to appeal. We think that provision of the organic law has a very different signification.

There is another objection to that part of the order or decision of this court, by which certain papers are directed to be sent up to this court to be incorporated as a part of the bill of exceptions.

A bill of exceptions can not be amended except in accordance with the provisions of section 500 of the Code of Civil Procedure. This section provides that a dismissal shall not be granted “whereby an amendment to the bill of exceptions which is hereby declared to be lawful and allowable, any imperfections or omissions of necessary and proper allegations could be corrected from the record in the case.” This section is a literal copy of the provisions contained in section 5567 of the Code of Georgia. It has been held by the supreme court of that State in construing this provision that “record in the case” means record as contained in transcript sent up and duly certified by the clerk (79 Ga., 210). But even if the word “record” is construed to mean the record of the case in the Court of First Instance, and it is held that the papers which have been directed to be sent up to this court are, in fact, a part of the record of the Court of First Instance, still it is not contended that these papers were made a part of the bill of exceptions by the trial judge who approved it.

It is necessary that action should be taken in the Court of First Instance, by motion, to amend the bill of exceptions and this application must be made to the judge of the Court of

First Instance who tried the case and whose province it is to make up the bill of exceptions aiid approve the same. (Elliot's App. Pro., 825.)

Nor can the provisions of section 501 of the Code of Civil Procedure be invoked as authorizing the amendment of the bill of exceptions by this court. This section provides the mode for correcting an "incomplete" record and is to the effect that if it is discovered that the record is so incomplete that justice requires the case to be postponed until the record can be made complete, the court shall postpone the further consideration of the same and make such order as may be proper and necessary to complete the record in the interests of justice.

We do not understand by this provision of the law that it is contemplated that this court, when it finds that the bill of exceptions as prepared in the Court of First Instance is defective, shall postpone the further consideration of the case and make the amendment here, because all amendments to the record in the lower court must be made by that court. The higher court can not make an original entry for the trial court, nor perform an act which it is the right and duty of the trial court to perform. (Elliot's App. Pro., 205.)

This section 501 refers to the case where the record upon which the case is being tried in the Supreme Court is "incomplete," by reason of the fact that the bill of exceptions as signed and approved by the Court of First Instance is different and other than that of the record on which the case is being tried in the Supreme Court, and whenever this appears to be the case the court will, within the language of the statute, "complete the record."

The remedy here provided for is known in American practice as the suggestion of diminution of the record and prevails in the practice of these courts.

The section is taken almost literally from section 5575 of the Code of Georgia; and the citations of the decisions of the courts of that State, which are contained in the notes to this section, show that such was the purpose of the section. For instance, it has been held by the courts of that State, in construing this section, that where there is "no judgment appearing in the record, the case will be delayed until the same is sent up." (65 Ga., 600.) And where a motion for a new trial is material, and is referred to in the bill of exceptions not sent up, a dismissal follows if no time is asked to perfect the bill of exceptions. (74 Ga., 36.)

The motion to dismiss the bill of exceptions should be granted.

Torres, J., did not sit in this case.

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