

[G.R. No. 1403. October 27, 1905]

**JOSE E. ALEMANY AND ANDREA ATAYDE, PLAINTIFFS AND APPELLANTS, VS.
JUANA MORENO, DEFENDANT AND APPELLEE.**

D E C I S I O N

MAPA, J.:

On the 2d day of April, 1903, the appellants in this case brought an action against the defendant, Juana Moreno, the mother, guardian, and administratrix of the minor children Leandro Gruet and Maria de la Paz Gruet, asking that she be removed from office on the ground that she was physically incapable of discharging the duties of her trust and that Andrea Atayde and Jose Alemany, as their nearest relatives, be appointed in her place as guardian and administrator, respectively, of said children and their estate.

By an order entered on the 6th day of April of the same year, the court removed the said Juana Moreno from her said office, and appointed Andrea Atayde guardian of the said minors and Jose Alemany administrator of their property, said appointments to take effect upon the filing of a sufficient bond in the amount of 25,000 pesos, Mexican. The reason given by the court in the said order for the removal of Juana Moreno was that on account of her ill health she was incapable of continuing to discharge the duties of her said office as guardian of the said minors and administratrix of their property.

The bond required by the court having been filed on the 7th of April, the necessary appointments were issued to the said Andrea Atayde and Jose Alemany, as directed in the order of the court dated the day before.

On the 7th of April Juana Moreno died, and it was therefore impossible for the sheriff to serve upon her on that date the order requiring her to appear in this action.

On motion by attorney Herrero, on behalf of the estate of the said Juana Moreno, an order was made and entered on the same date, to wit, the 7th of April, setting aside the order of the court entered the day before, whereby plaintiffs in this action were appointed guardian and administrator, respectively, of the said children and their estate, and ordering them to appear on the 14th of said month and show cause why their appointments theretofore issued should not be vacated.

After hearing the parties, the judge rendered a decision on the 16th of April vacating the appointments made in favor of the plaintiffs, and ordered the bond filed by Jose Alemany canceled, and thereupon appointed Carlos Rastrollo and Miguel Velasco guardian and administrator, respectively, pending the probate of the will of Juana Moreno. From this judgment the plaintiffs appealed to this court.

The legal effect of the order appealed from has already been determined by a decision of this court rendered on the 31st of October, 1903, in the case of Jose E. Alemany et al. vs. John C. Sweeney,^[1] which was an action for mandamus to compel the said judge to allow an appeal in this case. It was therein decided that the said order “vacating the said appointment (in favor of the appellants) should be considered *as a judicial order removing them from office;*” and it must be so considered because the appointments had already taken effect, the bond required by the court had been filed, and the appointments had been actually issued in due form. The guardianship of the minors had been, as a matter of fact and law, conferred upon the appellants, and the setting aside of such appointments (it matters not for what reason) was practically equivalent to a removal from their respective offices. The terms of the order appealed from can not alter the fact that the appellants in this case were actually removed from office. Such was undoubtedly the immediate effect of the order, and it should be considered an order removing them from office.

Section 574 of the Code of Civil Procedure provides as follows:

“Removal and resignation of guardian.—When a guardian, appointed either by the testator or a court or judge, becomes insane or otherwise incapable of discharging his trust or unsuitable therefor, or has wasted or mismanaged the estate, or failed for thirty days to render an account or make a return, the judge or court may, upon such notice to the guardian as the judge or court may require, remove him, and compel him to surrender the estate of the ward to the person found to be lawfully entitled thereto.”

Such are the causes for which a guardian may be legally removed. None of those enumerated in the above section existed for the removal of these appellants. The order appealed from is not based upon any of the grounds of removal contained in said section, and it does not appear from the bill of exceptions before us that either of the appellants came within the provisions of the said section. Therefore, their removal was absolutely unwarranted, and the vacating of their respective appointments, in so far as it tended to cause their removal as a necessary and immediate effect, is unjust and illegal, and can not be sustained under the law.

Neither the death of Juana Moreno nor the will left by her could have justified the court in vacating the appointments made in favor of the appellants, as the said court seems to have believed, judging from certain statements contained in the order appealed from. In regard to this point the following was said by this court in its judgment of the 31st of October, 1903, above cited:

“If it (the death of the guardian Juana Moreno) preceded that appointment (of the appellants) the question of her removal disappeared, the guardianship became vacant, and the court had a right to fill it. If it followed the appointment, she had a right to appeal from the order removing her. But this right terminated with her

death.”

The order appealed from is reversed, and the appointments made in favor of Andrea Atayde and Jose E. Alemany, as guardian and administrator, respectively, of the said minors Leandro Gruet and Maria de la Paz Gruet, and their estate, are hereby held to be valid and in full force and effect, in accordance with the order entered by the trial court on the 6th of April, 1903; and it is ordered and adjudged that they be given possession of the said offices upon filing a bond in the sum of P25,000, as required in said order, without costs. After the expiration of ten days from the date hereof let judgment be entered accordingly and the case remanded to the trial court for execution thereof. So ordered.

Arellano, C.J., Torres, Johnson, and Carson, JJ., concur.
Willard, J., did not sit in this case.

^[1] 2 Phil. Rep., 654.