

5 Phil. 383

[ G.R. No. 2965. December 05, 1905 ]

**JOAQUIN MA. HERRER, PLAINTIFF VS. ARSENIO CRUZ HERRERA, DEFENDANT.**

**D E C I S I O N**

**CARSON, J.:**

This is an application under the provisions of section 499 of Act No. 190 for a mandamus to compel the Hon. John C. Sweeney, judge of the Court of First Instance of Manila, who presided as judge in the case of *Herrer vs. Herrera*, to sign and certify the bill of exceptions presented to him by the defendant, Arsenio Cruz Herrera.

It appears that the said judge refused to sign the bill of exceptions when presented because it appeared therein that an exception had been taken to the ruling of the court denying a motion for a new trial in the said case, and he was of opinion that such exception had not been presented in manner and form as set out in the bill of exceptions.

Ariston Estrada, attorney for applicant, declares positively under oath that he submitted said motion, and when the same was denied, there and then excepted to the ruling of the court, and his statement is supported by the statement of R. Heras, deputy clerk of the court, who also under oath positively declares that he remembers that the said motion was submitted to the court, and that when overruled, the said attorney, Estrada, excepted to the ruling of the court, and that thereupon he immediately noted the exception in a book which, as acting clerk, he kept for that purpose, which book, with the note duly entered, was submitted for examination.

In view of the fact that the honorable judge who presided in the case does not state positively in his answer that the said exception was not submitted, and merely confines himself to the statement that he has no note to that effect, and does not remember the presentation of the alleged exception, we think that the positive statements of counsel and of the acting clerk of the court, supported, as they are, by a written memorandum noted at the time the exception was presented, are sufficient to support the contention of the applicant, that the bill of exceptions, as submitted by him, should be certified to this court.

The writ of mandamus prayed for should issue forthwith in accordance with the prayer of the complaint and the provisions of section 499 of Act No. 190. So ordered.

*Arellano, C. J., Torres, Mapa, Johnson, and Willard, concur.*

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