

[ G. R. No. 18699. March 08, 1922 ]

**TAN CHICO, PETITIONER, VS. HONORABLE PEDRO CONCEPCION, JUDGE OF FIRST INSTANCE OF MANILA, AND ASIA BANKING CORPORATION, RESPONDENTS.**

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

**OSTRAND, J.:**

This is a petition for a writ of certiorari. It appears from the record that in a civil action pending in the Court of First Instance of Manila, for the recovery of certain sums of money in which the herein respondent, the Asia Banking Corporation, is the plaintiff and the herein petitioner, Tan Chico, is the defendant, the plaintiff sought to take the deposition of the defendant under subsection 1 of section 355 of the Code of Civil Procedure. In response to a notice duly given and to a *subpoena*, issued by the Court of First Instance and addressed to the defendant, one Tan Tarn Ching appeared before the clerk of said court on the 4th of January, 1922, and stated that certain papers referred to in said *subpoena* had been delivered to Hartford Beaumont, the attorney of record for the defendant, who was holding them under a lien for unpaid attorneys' fees for services rendered or to be rendered in the pending case.

After another abortive attempt to procure the deposition of the defendant, the plaintiff, on the 10th of February, filed a notice of intent to take the depositions both of said defendant and of his attorney Hartford Beaumont on the 16th of the same month at 9 a. m. before Ricardo Summers, clerk of the Court of First Instance, in the Court House at Calle Postigo. The notice was supported by the following affidavit:

"A. D. Gibbs being first duly sworn deposes and says:

"That he is of legal age; that he is a member of the firm of Gibbs, McDonough & Johnson, appearing as attorneys for the plaintiff in the above entitled action; that

service of summons in the above entitled action has been made upon the defendant Tan Chico, and that said defendant has appeared in said action; that said Tan Chico is a party to said action being the defendant therein; that the said Hartford Beaumont is the attorney for the defendant in said action; that the defendant was regularly and duly cited to appear before the clerk of the Court of First Instance of the city of Manila on the 29th day of December, 1921, to give his deposition in said action and by *subpoena duces tecum* was required to bring before the said clerk of the court for the purpose of the examination of the said defendant, all documents and correspondence concerning the purchase of the merchandise in question in said action; that on the 29th day of December, the said defendant with said attorney, Hartford Beaumont, appeared before said clerk in response to said citation, but failed to bring with him the documents and correspondence referred to in said *subpoena duces tecum* and explained as the reason for his failure to produce them, that he had received the *subpoena duces tecum* the day before and had not consulted with his attorney with reference thereto until his arrival at the court house and that his attorney had the documents and correspondence referred to in his office and had not brought them with him to court; that thereupon by agreement between counsel for the plaintiff and the said Hartford Beaumont, attorney for the defendant the taking of said depositions was continued until Tuesday, the 3d of January, 1922; that on said 3d day of January, 1922, the said defendant and his said attorney, Hartford Beaumont, again appeared before the said clerk of the court and upon being duly sworn as a witness by said clerk of the court and examined by affiant as counsel for the plaintiff, defendant testified that he had not brought said documents and correspondence into court due to the fact that the said Hartford Beaumont as his attorney had possession of said documents and correspondence, and that although he, the defendant, requested the said Hartford Beaumont to deliver said documents and correspondence to him for the purpose of enabling him to comply with the *subpoena duces tecum*, the said Hartford Beaumont claimed that he had an attorney's lien on said documents and correspondence for the fees as attorney in said action and that he would not make delivery thereof unless the defendant first paid him a large sum of money; that the said defendant further testified that he had never employed the said Hartford Beaumont as his attorney in any other case; that he had no written or even verbal agreement with him as to how much his fees would be; that the said Hartford Beaumont did not advise him at the time of requesting the delivery of said documents and papers as to the amount of his

fees for which he claimed an attorney's lien and that he, the defendant, had at no time been informed by the said Hartford Beaumont as to how much he would charge him for his services, except that he, the defendant, believed that the said Hartford Beaumont wanted as much as P200 or P300 before he would make delivery of the documents and correspondence, and that he, the defendant, could not therefore obtain said documents and correspondence for production at the time of taking his deposition because he was unable to pay the fees demanded by said Hartford Beaumont; that the said defendant testified that he was very angry at his attorney for refusing to deliver to him said documents and correspondence, and at the same time smiled benignly at the said Hartford Beaumont as if to remind him that he was but carrying out their prearranged plan.

"That on the morning of the said 3d day of January, affiant met the said Hartford Beaumont in the court house and reminded him of the fact that the deposition of the defendant was to be taken in the afternoon of that day, and the said Hartford Beaumont then and there stated to the affiant in substance that he did not approve of fishing expeditions in the form of taking depositions and affiant realized what the said Beaumont's statement signified for the first time when the defendant testified that said Beaumont had refused to deliver over the said documents and correspondence for production at the taking of the depositions by reason of a pretended attorney's lien thereon. That at the time the said defendant testified as above set forth, affiant called upon the said Beaumont to state whether or not it was true that he refused to deliver the documents and correspondence on the ground that he held an attorney's lien thereon and the said Beaumont then and there replied that he was not on the witness stand and refused to answer affiant's question.

"That a transcript of the testimony of the said Tan Chico is hereto attached as a part of this affidavit.

"That affiant believes and therefore alleges the fact to be that the alleged refusal of the said Beaumont to deliver said papers and correspondence to his client is but a miserable pretext to obstruct the administration of justice, concocted by the said Hartford Beaumont and prearranged with his client previous to the time set for the taking of said depositions.

"That in the fourth special defense set forth in defendant's answer it is alleged

that subsequent to the placing of the order for the merchandise in question by the defendant, that said order was 'cancelled in part and afterwards cancelled completely, and that the F. A. Thompson Commercial Company confirmed the said cancellations of said order in writing;' that due to said special defense all correspondence and writings of every nature between the said F. A. Thompson Commercial Company and the said defendant are material to the issue joined in said action and an inspection of said correspondence and writings by counsel for the plaintiff and an examination of the defendant with reference thereto are necessary as a basis for the proper preparation of plaintiff's case for trial.

"That based upon the allegations above set forth, affiant alleges that the said Hartford Beaumont is the only witness by whom the fact or facts contained in or disclosed by said documents, correspondence or writings in his possession, can be established."

Upon the filing of the notice and affidavit the court issued a *subpoena duces tecum* requiring the defendant and his attorney to appear at the time and place fixed in the notice and to bring with him or them the following documents:

"All correspondence between the F. A. Thompson Commercial Co. and the said Tan Chico and all documents and writings of every nature with relation to the order for the merchandise which is the subject of this action, and especially the confirmation in writing by the F. A. Thompson Commercial Co. of the cancellation of said order referred to by the defendant in the fourth special defense."

The petitioner alleges that the issuance of this *subpoena* is beyond the jurisdiction of the court from which it issued for the following reasons:

"(a) It does not specify any particular papers which it is intended should be brought, does not identify the papers in sufficient detail to permit of a compliance therewith.

"(b) That the proceedings are a mere 'fishing expedition,' requiring the defendant to bring to court all of his defenses and exhibit the same to the plaintiff prior to the trial of the case, in order that the plaintiff may be fully aware of said

defenses, while the defendant is still ignorant of the details of the evidence which the plaintiff intends to offer, the intention being thus to take an unfair advantage of the defendant, an advantage which is not contemplated by the provisions of Act No. 190 (the Code of Civil Procedure).

“(c) That the said *subpoena duces tecum* is invalid in that it does not show that Tan Chico can give any evidence whatever material to any issue in this case, the last paragraph of the affidavit merely showing that ‘*Hartford Beaumont* is the only witness by whom the fact or facts contained in or disclosed by said documents, correspondence or writings in his possession, can be established.’ Hence the affidavit is insufficient to warrant the issuance of any *subpoena* directed against Tan Chico; and no sufficient ground having been shown for the issuance of such a subpoena directed to Tan Chico, the issuance of a *subpoena duces tecum* addressed to Tan Chico under such circumstances is an act in excess of the jurisdiction and power of the Court of First Instance, and being” in excess of said jurisdiction, is null and void.

“(d) That, in so far as the said *subpoena* is an order addressed to the said Hartford Beaumont, the only purpose of said *subpoena* is one either to compel Hartford Beaumont, attorney of record for Tan Chico, to reveal the secrets of his client and to reveal the facts which have come to his knowledge in his professional capacity, or is an attempt to break the lien of said attorney by compelling him to surrender papers belonging to his client, which he holds under a claim of lien for unpaid attorney’s fees, and in either case, it is not alleged that the said Hartford Beaumont will not be present at the trial of the case, or that there is reason to fear or suspect that he will not, nor does it appear that the taking of the deposition of the said Hartford Beaumont is necessary, nor does the affidavit, so far as the showing as to the said Hartford Beaumont is concerned, conform to the provisions of Act No. 190, and that the *subpoena* based upon the said affidavit is null and void and beyond the jurisdiction of the court and its issuance and enforcement is in excess of the power and authority vested in the Honorable Pedro Concepcion as Judge of the Court of First Instance of the city of Manila.”

We can find but little merit in the petitioner’s contention. Section 355 of the Code of Civil Procedure reads:

*“Depositions of a witness within the Philippine Islands.—*The testimony of a witness in the Philippine Islands may be taken by deposition, in an action, any time after the service of the summons or the appearance of the defendant, and, in a special proceeding, after the question of fact has arisen therein, in the following cases:

“1. When the witness is a party to the action or proceeding, or an officer, or a member of a corporation which is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended;

“2. When the witness resides out of the province in which his testimony is to be used;

“3. When the witness is about to leave the province where the action is to be tried and will probably continue absent when the testimony is required;

“4. When the witness otherwise liable to attend the trial is nevertheless too ill or infirm to attend;

“5. When the testimony is required upon a motion, or in any other case, when the oral examination of a witness is not required;

“6. When the witness is the only one who can establish facts or a fact material to the issue: *Provided*, The deposition of such witness shall not be used if his presence can be procured at the time of the trial of the cause.”

That the petitioner may be required to give his testimony in the court below by deposition under subsection 1 of the section quoted is obvious and the question as to whether or not the deponent is available as a witness at the trial of the case appears to be immaterial in relation to depositions under that subsection. While classified in the code as the taking of a deposition, the proceeding is, in reality, analogous to a Bill of Discovery in Chancery and its purpose seems to be precisely to authorize such “fishing expeditions” as that complained of in the petition. Being a remedy particularly susceptible to abuse, its use may, perhaps, to some extent be controlled by the court, but we do not think that in the present instance the court below has abused such discretion as it may have had in the matter. And if the proceeding is authorized by law it follows that the petitioner’s attorney cannot defeat its purpose by refusing, under one pretext or another, to produce in court the documents which

have been delivered to him by his client and which appear necessary for the effective examination of the principal deponent. Of course, in the taking of the deposition the ordinary rules of evidence apply and communications privileged under subsection 4 of section 383 of the Code of Civil Procedure cannot be disclosed without the consent of the client, but the questions of privilege are for the trial court to determine and cannot be passed upon in advance by us in the present proceedings.

In issuing the *subpoena* in question the court below has, in our opinion, not exceeded its jurisdiction and the petition for a writ of certiorari is therefore denied.

The supplementary petition for an order directing the respondent judge to set down for trial the case pending in the Court of First Instance is also denied. So ordered.

*Araullo, C. J., Street, Malcolm, Avanceña, Villamor, Johns, and Romualdez, JJ., concur.*