

MAXIMA GARCIA LIM TOCO, PLAINTIFF AND APPELLANT, VS. GO FAY, DEFENDANT AND APPELLEE.

G.R. No. L-1423. January 31, 1948

Ponente: FERIA, J.

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FERIA, J.:

The question for us to determine is whether or not a defendant declared in default in the lower court, has the right to be heard or to file brief or memoranda in this Court on appeal.

We are of the opinion, and so hold that a defendant in default is not entitled to notice of the proceedings until the final termination of the case, and therefore he has no right to be heard or file brief or memoranda on appeal. Section 9, Rule 27, provides that "no service of papers shall be necessary on a party in default, except when he files a motion to set aside the order of default in which event he is entitled to notice of all further proceedings." And this provision is made applicable to the proceedings in appellate court by section 1, Rule 51, which says that "pleadings, motions, filing of service of papers and proof thereof, except as otherwise provided, shall be governed by Rules 15, 26, and 27 in so far as they are not inconsistent with the provisions of these Rules."

A defendant in default loses his standing in or is considered out of court, and consequently can not appear in court; adduce evidence; and be heard, and for that reason he is not entitled to notice. If he is not entitled to notice of the proceedings in the case and to be heard, he can not appeal from the judgment rendered by the court on the merits, because he can not file a notice of appeal, and file an appeal bond and the record on appeal, for approval by the court. The only exception provided by law is when the defendant in default files a motion to set aside the order of default on the grounds stated in Rule 38 "in which event he is entitled to notice of all further proceedings." That a defendant in default can not be heard in the suit, not only in the trial court but also in the final hearing, that is, on appeal which is a part of the proceedings in a suit, is the ruling laid down for guidance of courts and practitioners by this Court in the case of *Velez vs. Ramos*, 40 Phil., 787, in which it was held:

"The action of the trial court in absolving the defendant Roberto Quirante, although he had made no defense, was correct and is worthy of some comment as embodying a point of practice which should be called to the attention of courts and practitioners. The rule is this: * * * The defaulting defendant merely loses his standing in court, he not being entitled to the service of notices in the cause, nor to appear in the suit in any way. He cannot adduce evidence; nor can he be heard at the final hearing.

The reason why the defaulting defendant is not entitled to notice is because it would be useless or of no purpose to do so, since the defendant can not appear and be heard in the suit in any way. If the defendant in default has the right to appear and be heard on appeal, there would be no reason why he should not be given notice of the proceedings in order that he may have exercise said right as appellant or appellee. There is absolutely no reason for denying a defaulted defendant the right to be heard before, and granting him that right after, the judgment on the merits. If he is out of or has no standing in court before judgment on the merits, he can not be considered as no longer in default after said judgment. And if he can not appear and be heard in the suit he can not appeal as appellant nor appear and be heard as appellee, because an appeal is a continuation of the same case or suit

commenced in the lower court. The jurisdiction of the latter is, by appeal, transferred to the appellate court. The rendition of the judgment by the trial court and the appeal therefrom by the adverse party does not confer upon any of them more right than he had before the judgment in so far as their standing in court or intervention in the proceeding is concerned. "Where a person duly called has defaulted, and does not ask the court to relieve him against the default, he is precluded from moving for a new trial, and has no right to except to the conclusions of law and join in an appeal." (Bell v. Corbin, 36 Northeastern Reporter, p. 23).

The contention that a defaulting defendant is entitled to be notified of the judgment against him and to appeal therefrom is not born out by the decision of this Court in Diaz and Rubillos vs. Mendezona and De Poli, 43 Phil. 472, cited in its support. The ruling in said decision is in conformity with the provision of Sec. 9, Rule 27, that it is not necessary to serve on a party in default papers, such as motions, notices, orders and judgment and other papers required to be served by Secs. 2 and 7 of Rule 27, except when the defendant files a motion to set aside the order of default in which case he is entitled to notice of all further proceedings, and consequently of the judgment, and he may therefore appeal; and specially with Sec. 257 of the old Code of Civil Procedure, from which Sec. 2, Rule 70 was taken, which requires the service of the order or judgment upon the defendant in order to sell the mortgaged property if he fails to pay the judgment within the period not less than ninety days fixed in the order or judgment from the date of the service thereof. In that case this Court said:

"* * * However, after he had submitted to the jurisdiction of the court on February 10 by asking the annulment of the order of default and that he be permitted to answer and take part in the proceedings, he had the right to the notice provided by section 257 of the Code of Civil Procedure. The sheriff's telegram of May 12 was only a notice to the defendant that the ninety-day period for the satisfaction of the judgment had expired—but it must be borne in mind that the defendant had not been notified of the judgment." (Diaz and Rubillos vs. Mendezona and De Poli, 43 Phil. 472, 477).

The rule in the United States, as stated in 34 C.J., p. 177, is that "Unless there is a statutory provision permitting him to do so, or unless the default has been set aside, he cannot, after the entry of default, filed pleadings contesting plaintiff's allegations, move for a new trial, or take or participate in any further proceedings in the cause affecting plaintiff's right of action, * * *." (34 Corpus Juris, p. 177). And the only case to the contrary found and cited by the dissenters is that of Hallock v. Jaudin, 34 Cal., 161, 172, decided in 1867, or about a century ago, in which it was held that a judgment by default is a final judgment, and therefore appealable, because there is no distinction between judgment by default and judgment after issue found and a trial. It is evident that the ratio decidendi of said decision which is also the reason advanced by dissenters based on Sec. 2 of Rule 41 which provides that all final judgments are appealable, and on Sec. 12 of Rule 48 which requires appellant to serve copies of his brief upon the appellee, would be correct, were there no special provisions of law applicable to parties in default. But there being such special provisions, the latter must be taken as intended to constitute an exception to the general provisions of said section 2 of Rule 27 and section 5 of Rule 48, since the legislative body is not presumed to have intended a conflict. The principle is expressed in the maxim "generalia specialibus no derogant."

Besides, the very decision in said case of Hallock vs. Jaudin admits that the ruling laid down therein was contrary to the theory adopted in the cases cited or quoted in support of the respondent's contention, but just because of the above-mentioned reasoning set forth in the decision, the latter did not have to respect them. That decision reads in part as follows:

"* * * We do not hesitate to declare that all cases which are to the contrary are unsupported by any provision of the law by which the jurisdiction and practice of this Court is regulated. To hold otherwise would be to create a distinction where the law has not, which we have no power to do. There are some cases, no doubt, which support the theory of the learned counsel for the respondents, but we have no respect for them. Some of

them go upon the ground that a defaulting defendant has six months in which to seek relief from the judgment in the court below, and therefore he has no occasion to appeal." (Hallock vs. Jaudin, 34 California Reports, pp. 167, 172.)

The reason on which the cases supporting the theory of the respondents in the above mentioned case of Hallock vs. Jaudin, to the effect that the defendant had six months in which to seek relief from the judgment in the court below, and therefore he had no occasion to appeal, is well founded. The provisions of sections 2 and 3 of Rule 38, substantially taken from section 113 of the old Code of Civil Procedure, which was in turn substantially copied from section 473 of the Civil Code of California, show or corroborate our conclusion that a party in default is not entitled to notice of the order of and judgment by default. Because otherwise, or if he is entitled to it, there would be no reason for granting him six months time, from the date he becomes aware of such order or judgment, within which to file a motion to set them aside.

The decision in Frow vs. De le Vega, 15 Wall [W] 552, cited in the dissenting opinion, in which the appellant was allowed to appeal from the decree on the merits of the lower court, is also in favor of our conclusion, because the defendant in that case filed a motion to set aside the default and be allowed to answer the complaint. The decision states that "the appellant's answer having been delayed, as he insist, by misunderstanding, sickness and other accidents, a decree pro confesso [in default] was taken against him * * * and notwithstanding he afterwards prepared his answer and asked leave to file it (the same as the answer of the other defendants), yet the court afterwards * * * made a final decree absolute against him.

Relying on the statement found in the decision in Macondray & Co. vs. Eustaquio, 61 Phil., 446, that "such a judgment [by default] does not imply a waiver of rights, except of being heard and of presenting evidence," some of the dissenters, argue that, by its very location in the sentence quoted "the phrase 'that of being heard' which comes before the phrase 'that of presenting evidence' [the right waived] can only be the right to be heard before the judgment on the merits and not after." And they add that "if said phrase 'that of being heard' should be construed to include the right to be heard after the default judgment, it would entirely nullify even the right to ask that said judgment be set aside upon equitable grounds under Rule 38."

To contend that, because the phrase "that of being heard" precedes the phrase "and of presenting evidence," the defendant has the right to be heard after the presentation of evidence, is to rely on the mere location of phrases used in an obiter dictum without any support or basis on reason and logic, because the presentation of evidence is the most important means of being heard, and for that reason it has expressly been mentioned to emphasize it. As this Court said in the case of Velez vs. Ramos, supra, the defaulting defendant "can not adduce evidence; nor can he be heard at the final hearing." Following the reasoning of the dissenters, the above quoted ruling in the case of Velez vs. Ramos should be construed to mean that the defaulting defendant would be entitled to be heard after the presentation of evidence and not before, contrary to the ruling in Macondray vs. Eustaquio; and in order to conclude that he is not entitled to be heard at all the stages of the case, it would have been necessary for the court in said case of Macondray vs. Eustaquio to awkwardly say that the defendant waives his right "to be heard and present evidence and to be heard."

The argument that if "said phrase that of being heard, as used in Macondray vs. Eustaquio, supra, should be construed to include the right to be heard after the default judgment, it would entirely nullify even the right to ask that said judgment be set aside upon the equitable grounds under Rule 38," is without any foundation. Because this right is expressly granted by section 2 of Rule 38 where the order of or judgment by default was rendered under any of the circumstances therein provided. And section 9, Rule 27, expressly prescribes that a defendant is entitled to notice of and hence be heard in all further proceedings when he files a motion to set aside the order of default" under said section 2 of Rule 38. Had the filing of such motion not been expressly granted as an exception

or taken out of the effect of default provided in the enactment clause of said section 9, Rule 27, the defendant in default could not present a motion to set aside the order of default which carries with it, if granted, the nullity of the judgment on the merits.

The philosophy or fundamental reason underlying the law on the effects of default is that the failure to answer on the part of a defendant who receives a summons and knows that he is being sued, may be due to one of these two causes: (1) either to his resolution not to oppose to the plaintiff's allegations and relief demanded in the complaint, and willingness to abide by the judgment granting said relief after the presentation of evidence by the plaintiff, or (2) to fraud, accident, mistake or excusable negligence without which he should have filed his answer in time for he has a good defense. Were his failure due to fraud, etc., he may resort to the relief provided for in Rule 38, that is, he may file "a motion to set aside the order of default, in which event he is entitled to notice of all further proceedings" according to section 9, Rule 27, and therefore to be heard on appeal; and if he does not do so, knowing as he ought to know that a case was filed against him for he was served with a summons, it is because, it may be presumed, he has no defense to the plaintiff's demand. Inexcusable negligence amounts to voluntary failure to answer, and it has the same effect; for defendant can not successfully invoke the equitable remedy provided in said section 2, Rule 38. The rule in the United States is that "a judgment rendered on default is tantamount to an admission that the plaintiff is entitled to a judgment as prayed for." (31 Am. Jur., p. 137.)

There is, therefore, no reason in law or equity for permitting a defaulting defendant, after judgment on the merits, to appear and be heard either in the trial court or on appeal. If the defendant is presumed, as above stated, to have decided not to oppose to the plaintiff's claim and be willing to abide by the judgment granting the relief prayed for in the complaint after plaintiff has been heard, what would be the purpose of hearing him as appellant or as appellee? There would be no injustice done to him if the trial or the appellate court grants the plaintiff the relief demanded without hearing the defendant in the lower or in the court of appeal, because he is presumed to be agreeable to it. If the trial court errs in not granting the relief applied for in the complaint, there would be no reason to allow a defaulting defendant to defend, on appeal, the error of the lower court of which he himself is conscious and convinced. And if the lower court has not erred in deciding the case in defendant's favor and the plaintiff appeals, it is to be expected that the appellate court will affirm it without necessity of the defaulting defendant's intervention as appellee.

It is true that the trial court may render a decision in violation of section 9 of Rule 35. This provides that a judgment entered after defendant has been declared in default shall not exceed the amount or be different in kind from that alleged and prayed for in the demand for judgment; and the reason underlying this provision is that it may be presumed that were the relief demanded by plaintiff greater or different in kind from that claimed in the complaint, defendant would not have let himself, declared in default and should have filed his answer on time opposing the plaintiff's demand. But in such case the defendant in default may have the judgment set aside, not by appeal because he can not appeal, but through certiorari proceeding, on the ground that the court exceeded its jurisdiction in so doing. For it is well known principle in procedure that courts of justice have no jurisdiction or power to decide a question not in issue, and the issue in case of default is limited to the plaintiff's claim such as it is demanded in the complaint, for although the defendant in default has not filed an answer the plaintiff has to present evidence to prove his allegations. (1 Freeman on Judgments, 5th ed., pp. 738, 739.)

Moran, C.J., Pablo, Bengzon, Briones, Padilla, and Tuason, JJ., concur.

DISSENTING OPINION

PERFECTO, J.:

Is a defendant in default in the lower court entitled to be heard on appeal? Our answer is yes. In the present case with more emphasis because the defaulted defendant was awarded a favorable decision by the lower court and the defeated plaintiff appealed against said decision. Is there any provision of law or of the rules depriving a defaulted defendant of the right to be heard on appeal? There is none. The pertinent provision is section 6 of Rule 35 which reads as follows:

"Judgment by default.—If the defendant fails to answer within the time specified in these rules, the court shall, upon motion of the plaintiff, order judgment against the defendant by default, and thereupon the court shall proceed to receive the plaintiff's evidence and render judgment granting him such relief as the complaint and the facts proven may warrant. This provision applies where no answer is made, within the period provided in these rules, to a counterclaim, cross-claim, or third-party complaint."

To deprive a defaulted defendant of the right to be heard on appeal is to commit a grave injustice and to deprive him of the right which is expressly recognized by the rules. Rules 40, 41, and 42 deal on appeals. No provision has been pointed and can be pointed in them depriving a defaulted defendant of the right of appeal. Furthermore, the Constitution mentions five groups of cases in which the right of appeal to the Supreme Court is impliedly guaranteed. Section 2 of Article VIII of the fundamental law provides:

"The Congress shall have the power to define, prescribe, and apportion the jurisdiction of the various courts, but may not deprive the Supreme Court of its original jurisdiction over cases affecting ambassadors, other public ministers, and consuls, nor of its jurisdiction to review, revise, reverse, modify, or affirm on appeal, certiorari, or writ of error, as the law or the rules of court may provide, final judgments and decrees of inferior courts in—

"(1) All cases in which the constitutionality or validity of any treaty, law, ordinance, or executive order or regulation is in question.

"(2) All cases involving the legality of any tax, impost, assessment, or toll, or any penalty imposed in relation thereto.

"(3) All cases in which the jurisdiction of any trial court is in issue.

"(4) All criminal cases in which the penalty imposed is death or life imprisonment.

"(5) All cases in which an error or question of law is involved."

In any of the cases mentioned in the Constitution, as above stated, the parties are entitled to be heard on appeal by the Supreme Court.

All sense of fairness revolts against the idea of depriving a defaulted defendant of the right of appeal or to be heard on appeal. The theory as enunciated by the other members of this Court, would deprive relief to the defaulted defendant even against the most erroneous decision that may be rendered. A glaring error of law, a clear violation of legal mandates may be completely ignored only because the defaulted defendant is deprived of the opportunity to seek relief by appeal. Under the theory, it seems that default is a green light for the court to do as it pleases provided plaintiff is served. Is a declaration of default a decree of civil death?

We vote to reject such an unfounded, and fundamentally wrong theory. We concur in the reasons adduced in the dissenting opinion of Mr. Justice Hilado.

DISSENTING OPINION

HILADO, J.:

I am constrained to dissent from the resolution denying the motion of counsel for appellee asking to be allowed thirty days to file a memorandum in lieu of oral argument. My reasons are briefly these:

1. Said appellee won the case in the trial court despite the fact that he was declared in default before the hearing on the merits. That default, while depriving him of all standing in the trial court and of the right to be heard and to present evidence, did not imply a waiver of his rights in the stages of the case after the default judgment. Such loss of rights was limited to those stages in the prosecution of the case which terminated with and included the judgment of the trial court on the merits. This is clearly to be deduced from the very terms of the summons which served as the basis for the default order and judgment, terms which conclude thus: "If you fail to do so (to file and serve the answer to the complaint within 15 days after service of summons), judgment by default will be taken against you for the relief demanded in the complaint" (Form No. 2—Summons, Appendix of Forms to Rules of Court). Upon the happening of the default, Rule 35, section 6 authorizes the court, upon motion of the plaintiff, counter-claimant, cross-claimant, or third-party claimant, to order judgment against the party by default, as also warned in the summons, but neither said rule nor the summons provides that the defaulting party shall also lose his right to appeal if the judgment should be against him, nor any of his rights as appellant, much less that he shall lose any of his rights as appellee if the judgment should be in his favor.

"SEC. 6. Judgment by default.—If the defendant fails to answer within the time specified in these rules, the court shall, upon motion of the plaintiff, order judgment against the defendant by default, and thereupon the court shall proceed to receive the plaintiff's evidence and render judgment granting him such relief as the complaint and the facts proven may warrant. This provision applies where no answer is made, within the period provided in these rules, to a counterclaim, cross-claim, or third-party complaint." (Rule 35, Rules of Court.)

2. To hold that an order of default or a judgment by default by a Court of First Instance deprives the defaulting party of the right to be served with the notices which the Rules require in prescribing the procedure in the appellate court, and relieves the appellant, in case such judgment should be in favor of the defaulting party as happened here, of the duty imposed upon him by Rule 48, section 12, of serving five copies of his brief upon the appellee, or the appellee (in case the judgment should be against the defaulting party) from the duty imposed upon him by the same Rule, section 13, of serving five copies of his brief upon the appellant, would give rise to the inadmissible consequence that the trial court has the power by its default order or judgment to interfere with or pro tanto control the procedure in the appellate court. As to whether or not either party should serve copies of his brief upon the other, the question should obviously not be decided by any order or judgment, of or by default or otherwise, of the trial court, but by the appellate court, and the latter will, of course, be governed and guided by said sections 12 and 13 of Rule 48.

3. In *Macondray vs. Eustaquio*, 64 Phil., 446, 449, it was held that "such a judgment does not imply a waiver of rights, except that of being heard and of presenting evidence." The presentation of evidence thus referred to, of course, has to precede the judgment, and by its very location in the sentence quoted, the phrase "that of being heard," which comes before the phrase "of presenting evidence," can only be the right to be heard before the judgment on the merits and not after. If said phrase "that of being heard" thus used in *Macondray vs. Eustaquio*, supra, should be construed to include the right to be heard after the default judgment, it would entirely nullify even the right to ask that said judgment be set aside upon equitable grounds under Rule 38. And if this last right is

not lost, why should the right to be heard on appeal from the default judgment as it is be lost?

4. True, if the defaulting defendant should desire to be heard and present evidence in the trial court, or ask that court to reconsider or alter its judgment, he would have to show that he is entitled to have said judgment set aside before he can obtain what he desires, and in this case, naturally he will have to file a petition for the lifting of the default; but if he does not pretend to have the judgment set aside in the manner and for the purpose just alluded to, but merely desires to appeal therefrom, and seek the revocation or modification of the judgment as it is, and under the evidence already presented and the proceedings already taken, he does not need to ask for the lifting of the default, as the right to appeal conferred by Rule 41, section 3 is perfectly exercisable even by a party against whom a judgment by default has been entered. For his appeal would not involve nor necessitate the undoing of any thing which has been done up to and including the final judgment of the trial court; his appeal will simply be directed to showing that upon the facts therein found or the evidence presented and the proceedings taken in his absence, said judgment is still incorrect, totally or partially.

5. The majority opinion cites (p. 7) a passage on page 137 of 31 Am. Jur., stating that "A default, or the judgment rendered thereon, operates as an admission of the cause of action and of the truth of all the material allegations set forth in the complaint or declaration, and is tantamount to an admission that the plaintiff is entitled to a judgment as prayed for by him." The rule in this jurisdiction is radically different, as enunciated in *Macondray & Co. vs. Eustaquio*, 64 Phil., 446, 449, thus:

"Under section 128 of our Code of Civil Procedure (incorporated in its pertinent parts substantially in the same terms in Rule 35, section 6), the judgment by default against a defendant who has neither appeared nor filed his answer does not imply a waiver of rights except that of being heard and of presenting evidence in his favor. It does not imply admission by the defendant of the facts and causes of action of the plaintiff, because the codal section requires the latter to adduce his evidence in support of his allegations as an indispensable condition before final judgment could be given in his favor. Nor could it be interpreted as an admission by the defendant that the plaintiff's causes of action find support in the law or that the latter is entitled to the relief prayed for * *

*."

6. That default only produces the loss of certain rights of the defaulting defendant before judgment in the merits and not after, is also supported by the holding in *Diaz and Rubillos vs. Mendezona and De Poli*, 43 Phil., 472, that a defaulting defendant is entitled to be notified of the judgment against him, and to appeal therefrom. On page 476 of the cited volume it appears that the Court of First Instance, among other things, ordered the clerk of court to notify the defendants Secundino Mendezona (who had made default) and William de Poli of the Judgment in the manner prescribed by article 2 of the then Rules of the Courts of First Instance. On the same page the order of the said lower court of February 28 is inserted and in said order, among other things, it was directed that the sale of the mortgaged property be effected within 90 days after the defaulting defendant Secundino Mendezona "was notified of the decision rendered in this case." Said order was affirmed by this Court as appears on page 479 of the same volume, and not only this but this Court in its judgment decreed that the period of 90 days within which judgment must be satisfied shall begin to run "from the date of the notice of this decision." It will also be noted that the defaulting defendant Secundino Mendezona not only appears as appellant in the title of the case as reported, but also is so referred to in the body of this Court's decision, and that his contentions based upon the lack of notice upon him of the lower court's decision were upheld by this Court: and all of these, despite the fact that his petition for the setting aside of the default order against him was denied by the Court of First Instance (pp. 473-474 of cited volume), and that he therefore continued all the time to be a defaulting defendant. This Court did not hold that the lower court should have lifted the default, but that (without such lifting) the defendant was entitled to be notified of the judgment.

In *Frow vs. De la Vega*, 15 Wall. (U. S.) 552; 21 Law. ed., 60, which was cited as authority in *Velez vs. Ramas*,

40 Phil., 787, 792, Thomas J. Frow was one of fourteen defendants to a bill filed by the appellee in the court below, alleging a common cause of action against them all. Frow failed to timely file his answer and he was held to have made default by the lower court, which rendered a decree pro confesso against him. His later petition for leave to file his answer was unheeded by the court and the latter afterwards proceeded to make a final decree absolute against him. That default was never lifted, but Frow's appeal was allowed, and the Federal Supreme Court decided the case in his favor on the merits, and did not deem it necessary so much as to say whether the lower court erred in not lifting the default—it evidently considered this point immaterial. The case in the Federal Supreme Court was entitled—"Thomas J. Frow, app., versus Thomas De la Vega." In the very introductory paragraph of the court's decision Frow is referred to as the "appellant" and he is thus mentioned throughout the decision until the end.

In *Hallock vs. Jaudin*, 34 Cal., 167, 172, it was held by the Supreme Court of California that as to the right of appeal, there is no distinction between judgments by default and judgments after issue joined and a trial. The doctrine is stated in a condensed form in note 763, page 741 of Kerr's Cyc. Codes of California, Part I, in the following words and figures:

"763. Right of appeal—No distinction between judgments.—As to right of appeal, there is no distinction between judgments by default and judgments after issue joined and a trial. Former is as much final judgment as latter, and statute gives right to appeal from all final judgments without distinction. Under Practice Act No. 68, appeal could be taken from final judgment at any time within one year after its rendition, and courts had no right or power to make statute speak different language, or to say that one class of final judgments and not another was intended.—*Hallock vs. Jaudin*, 34 Cal., 167, 172."

7. Sections 2, 3, et seq. of Rule 41, clearly recognize the right of appeal even of a defaulted defendant. Section 3 can imply no other conclusion by stipulating that "Appeal may be taken by serving upon the adverse party * * * and filing with the trial court within thirty days from notice of order or judgment, a notice of appeal," etc. Who can be the party to appeal and to make such service upon the adverse litigant if it is not the party who lost? And this may be—and most commonly is—the defaulted party. Indeed, to the same conclusion inevitably leads the holding in *Macondray & Co. vs. Eustaquio*, supra, that the judgment by default could not be interpreted as an admission by the defendant that the plaintiff's causes of action find support in the law or that the latter is entitled to the relief prayed for. If this be so, it is only logical to recognize in such defaulting defendant the right to appeal from the default judgment in order to show, if he can, that the plaintiff's causes of action find no support in the law or that the latter is not entitled to the relief prayed for.

All of this goes to demonstrate that default does not, deprive the party of the right to be heard after the judgment is rendered without need of previously lifting it.

8. If the defendant here had lost the case instead of winning it as he has in the court below, he would have the rights in the appellate court, which I submit he has in the preceding paragraphs. I simply cannot perceive why he should be accorded lesser rights in the appellate court now that he has won the case in the trial court.

9. On the contrary, Rule 48, section 12, without any exception, requires the appellant ("it shall be his duty" are the words of the Rule) within 45 days from notice of the clerk to this effect, to file with the court thirty copies of his printed brief, together with a proof of service of five copies thereof upon the appellee.

In my opinion, therefore, the appellant here was not relieved of his duty to serve five copies of his brief upon the appellee as required by said section 12 of Rule 48 and that, strictly, the appellee is still entitled to be served with those copies and to the right to file his brief within the period granted by section 13 of the same Rule. And under Rule 50, section 7, he will, as a corollary, be entitled to file a memorandum in lieu of oral argument. In his present

motion he does not ask even to be allowed to file his brief but only a memorandum in lieu of oral argument, because he was unable to be present at the hearing set for August 6, 1947. It is my considered opinion that he is entitled to this not only under the Rules but also for reasons of justice and equity.

Paras and Perfecto, JJ., concur.

[1]See Decision promulgated July 20, 1948 (46 Off. Gaz., supp. to No. 1, p. 41).

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