

LUIS SAN JOSE ET AL., PLAINTIFFS AND APPELLANTS, VS. EUSEBIO CASTILLO, DEFENDANT AND APPELLEE.*G.R. No. L-1873. October 31, 1949*

Ponente: BENGZON, J.

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In the justice of the peace court of Bocaue, Bulacan, plaintiffs filed on June 14, 1947 a complaint for ejectment against defendant Eusebio Castillo. In due time the latter interposed a written answer; and on July 12, 1947, he got a favorable decision. Plaintiffs appealed to the court of first instance. Later, i.e., on September 18, 1947, they submitted to that court a motion asking that defendant be declared to be in default, because—according to the motion—he having been notified by the clerk of the docketing of the appeal, he neglected to file within fifteen days a written answer in accordance with section 1, Rule 9 and section 7, Rule 40 of the Rules of Court.

Denial of such motion and of a subsequent motion to reconsider, gave rise to this appeal, which we find to be premature, the appealed order being interlocutory or incidental (sec. 2, Rule 41) because it leaves something to be done in the trial court with respect to the merits of the case.[1]

The trial judge opined that the answer submitted by the defendant in the justice of the peace court may be considered reproduced in the court of first instance, and denied the motion for default. Whether erroneous or not, the order did not dispose of the case. The next step was the hearing; and if after such hearing the plaintiffs found themselves on the losing end, they could then appeal, and assign as error the denial of the motion for default.

In *Corpus Juris Secundum*, Vol. 4, p. 252, it is stated that "except as it may be (specially) permitted by particular statutes, no appeal lies from an order refusing judgment by default". That text is supported by decisions from California, Ohio, Colorado, Arkansas, Iowa and Oregon. (See also notes in 1948 Cumulative Annual Pocket Part).

In *Brockway vs. W. & T. Smith Co.*, 66 Pac. 1073, the plaintiff appealed (by writ of error) to the Court of Appeals of Colorado from an order denying his motion to declare defendant in default. The appeal was dismissed, the court saying:

"But the cause is still pending below. While the court quashed the return of service, and denied the motion for a default, it entered no judgment against the plaintiff. All proceedings in the case stopped with the denial of the default. With that order, the record before us ends. Our statute permits the review in appellate courts of final judgments only. Sections 388, 406, 406d, Mills' Ann. Code. Let the writ of error be dismissed. "

In *Brown vs. Sterling Fixture Co.*, 166 Pac. 323, it was held:

"The appeal from the courts order refusing to enter defendant's default requires but the briefest notice. It is not an appealable order."

For the satisfaction of appellants it should be stated that before coursing this appeal, they applied to this Court for a writ of certiorari to review the order of denial of default, and that such petition, was summarily dismissed by a resolution saying "the proper remedy being by appeal". Apparently plaintiffs merely followed the course indicated

in our said resolution. But it must be clear that we meant an appeal at the right time—not an immediate appeal.[2]
Appeal dismissed. No costs.

Moran, C.J., Ozaeta, Paras, Feria, Padilla, Tuason, Reyes, and Torres, JJ., concur.

[1] See Moran, Comments on the Rules of Court, Vol. I, pp. 730, 731.

[2] Compare Olsen vs. Olsen, 48 Phil., 238.

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