

CHOA TEK HEE, PLAINTIFF AND APPELLANT, VS. PHILIPPINE PUBLISHING COMPANY, DEFENDANT AND APPELLEE.

G.R. No. 10264. March 28, 1916

Ponente: TRENT, J.

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TRENT, J.:

This appeal brings up for review a judgment of the Court of First Instance of Manila absolving the defendant in an action for damages alleged to have been sustained by the plaintiff on account of the publication of a certain article in a newspaper known as "The Manila Times."

Counsel for the appellant urges that the trial court erred (1) in holding that the article was not an unreasonable publication of a judicial proceeding; (2) in holding that the article is only untrue in the heading, which states: "Charged P193,000 was spent in administering P200,000;" (3) in holding that the article was a report of a "judicial proceeding;" and (4) in not awarding both actual and punitive damages in favor of the plaintiff.

A preliminary question touching the power of this court to review the evidence has arisen which must be disposed of at the outset. The facts are these: A motion for a new trial was made in accordance with the second paragraph of section 497 of the Code of Civil Procedure and exception was taken to the order of the court overruling such motion. The testimony of the witnesses duly certified by the official stenographer was sent up with the bill of exceptions, but there is no statement in the bill that such testimony is made a part thereof. A great portion of the plaintiff's printed brief is devoted to an examination of the evidence with the view to have this court reverse the findings of fact made by the trial court upon the material issues, and after the point was raised by the defendant, the plaintiff filed another printed brief in which he cites certain authorities and urges us to review the evidence. So it is clear that the plaintiff has not abandoned his desire and intention to have this court retry the case on the record. In the case of *Sotto vs. Harvey* (31 Phil. Rep., 289), we held that when the appellant has laid the proper foundation, "a transcript of the stenographic notes becomes an essential part of the bill of exceptions for the purpose of reviewing the evidence by this court."

Section 500 of the Code of Civil Procedure provides in part as follows:

"* * * But no such dismissal (of bills of exceptions) shall be made for purely formal defects not affecting the rights of the parties, nor for any defect which can be retimed as may be necessary to remove such defect, if it can be removed. * * *"

The omission to expressly make the evidence a part of the bill of exceptions by reference was a mere formal defect which has in no way prejudiced the defendant and which can be cured under the above quoted provisions of section 500. We will, without further delay and upon the authority of *Bowler vs. Alcazar* (13 Phil. Rep., 282), consider the bill of exceptions as amended by inserting the proper clause therein and proceed with the case.

The first, second, and third alleged errors may be considered together, and raise two questions: (a) Was the publication privileged and (b) is the article complained of libelous per se?

- The article was taken from a complaint on file in the office of the clerk of the Court of First Instance in an action commenced by Uy Soo Lim against the herein plaintiff for an accounting and was published before any judicial action had been taken upon that complaint. The privilege set forth in section 7 of Act No. 277 does not, therefore, extend to the defendant. (*Barretto vs. Philippine Publishing Co.*, 30 Phil. Rep., 88.)

- The headlines of the publication, which appear in large type on the front page of the paper, read: "Charge P193,000 was spent in administering P200,000. Chinese of Cebu files complaint against wealthy Manila merchant." And in the body of the article it is said:

"That the administration of properties worth nearly P200,000 cost all except P7,000 of that sum is the story told in a complaint filed this morning with Jose McMicking, clerk of the Court of First Instance. * * *

"The complaint further states that immediately upon coming into the administrationship of the property, the defendant had disposed of the salable estate at a ruinous loss, in order to convert into actual cash all property which could be realized upon, and that the memorandum rendered by him had stated that the administration of the estate had cost such an amount that P7,000 was all that was left of the estate."

No ambiguities appear on the face of the article. Words of common and ordinary import are used. The name of the plaintiff is plainly stated. By fair inferences and deductions from the article, taken as a whole, there can be no question but that the plaintiff is charged with having "disposed of the salable estate at a ruinous loss, in order to convert into actual cash all property which could be realized upon," so that he could use the money for his own personal benefit, thereby committing a serious crime. The article is, therefore, libelous per se.

The fourth assignment of error calls for an examination of the evidence in order to ascertain the amount of damages, if any, to which the plaintiff is entitled. Here it is insisted that the plaintiff is entitled "to both actual and punitive damages." From a strict interpretation of this phrase it might be said that the word "actual" only includes "the actual pecuniary damages sustained" and not "damages for injury to his feelings and reputation." (Sec. 11, Act No. 277.) But an examination of appellant's brief discloses beyond question that both are included. Section 11, just mentioned, authorizes recovery in civil actions for libel upon the three grounds set forth therein, and the plaintiff in the instant case is entitled to such damages, based upon one or more of those grounds, as the record will sustain. After setting forth briefly all the material evidence, we will proceed to determine separately the grounds upon which the plaintiff bases his claim for damages.

The plaintiff testified that he had been doing a general wholesale business in Manila for fourteen years, handling more than P100,000 worth of goods per annum and about a half a million pesos worth of merchandise when business is good; that his business and profits decreased as a result of the publication of the article which forms the basis of this action, resulting in an actual loss of P50,842 made up in this manner: 4,800 cases of wire nails, price P1.55 per case, selling price P8.20 per case in the local market, profit P7,440; 320 cases of plain galvanized-iron sheets, each case averaging 72 sheets, selling price P2 per sheet, profit 65 cents per sheet, total profits P14,976; 320 cases of galvanized corrugated iron sheets, each case averaging 62 sheets, selling price P1.80 per sheet, profit 40 cents per sheet, total profit P7,936; 4,000 cases of tin plates, selling price P9.30 per case, profit P1.50 per case, total profit P6,000; 4,160 rolls of barbed wire, selling price P5.17 per small roll, P5.60 per large roll, average price per roll 60 cents, total profit P2,496; loss of profits on 80 cases of aniline dyes, P1,088; on 80 cases of "Hank" brand carpenter edges, P1,360; on 60 Manila hose, P540; on 240 cases of enameled marble plates, P2,016; on 2,400 cases of steel, P2,640; on 32 casks of brass wires from 1 to 24 gauge, P3,200; on 10 cases of brass wires, P1,150; grand total, P50,842. The plaintiff further testified that the above-specified losses of profits were due to the failure of the American and European firms to ship those goods when ordered; that the American orders were placed before the publication and the European after; that after the publication he received no more shipments from that source (American houses) because of the injury to his credit; that the European

orders were not filled because they quoted unreasonably high prices, so that they could not be accepted; that the dates of the orders placed with the American houses are as follows: January 29, February 27, March 8, April 8, July 12, August 1, August 13, August 15, November 22, and December 15, 1913; January 11, February 24, March 17, April 8, June 28, August 11, and September 15 (year not stated). "Almost all of these orders have not been filled. I did not get any of the goods mentioned in my direct examination. I did not place the orders for the 2,800 rolls of barbed wire, upon which I claim a profit of P2,496, because I could not get a reasonable price." With reference to the status of his business and the injury to his credit, the plaintiff testified that for the last twelve months business of every kind had been a little slow, with the exception of hardware; that his net profits last year were very low on account of his credit being injured; that he could not state how much his profits were from March last year to the present time (February 12, 1914), but they were less than P10,000 according to his guess; that in connection with his European importations he dealt with the Chartered Bank of India, Australia and China, with which he had a credit of £2,000; that after the publication this credit was discontinued; that the European sellers informed him that they could not make immediate shipments of the goods; that he had been doing a DA business with a certain firm in the United States, which, after the publication, was changed to DP; and that his credit of P20,000 with the International Bank was continued after he had made an explanation, with reference to the publication, to the manager. The plaintiff then gave the dates of certain letters, copies of which were introduced in evidence and which refer "to goods on which I have suffered loss of profits."

Desbien, a witness for the plaintiff and the local representative of Arkell & Douglass (head office in New York), testified that the plaintiff had been doing business with his firm, purchasing hardware, piece goods, and textiles; that after reading the article published in "The Manila Times," he cut it out and sent it to his New York office, and shortly thereafter he received a cable changing the terms from DA to DP; that the plaintiff had been doing a large business with him, receiving shipments two or three times a month; that after the publication some of the articles were not supplied; and that he quoted to the plaintiff very high prices because he did not know what would be the outcome of the publication.

McCall, another witness for the plaintiff and a local representative of Muller, Maclean & Co., of New York, testified that he had been doing a considerable business with the plaintiff; that when he read the article he cut it out and sent it to his New York office; that at that time the plaintiff had certain orders pending with his firm; that he wrote his house to delay shipment on account of the article; that thereafter he did not desire to do business with the plaintiff; and that the delayed shipments "came forward eventually."

Bennett, the local manager of the Chartered Bank of India, Australia and China, also a witness for the plaintiff, testified that up to the date of his letter (May 21, 1913) he had been giving up documents to the plaintiff on trust receipts; that after that date he discontinued giving up any more papers, but did not insist upon the payment of the ones then due; and that he suspended the plaintiff's credit on the advice of his lawyers.

Marshall, the manager of the International Bank and the only witness presented by the defendant, stated that the plaintiff had been doing business with his bank for a number of years; that this business was carried on after the publication of the article just the same as it was before; and that the plaintiff's credit in his bank had not been changed.

That the plaintiff sustained "actual pecuniary damages" on account of the publication of the article in "The Manila Times" is clearly established by the testimony above set forth, but the difficulty lies in determining the amount of such damages. The plaintiff's claim for actual pecuniary damages, amounting to P50,842, is based entirely upon loss of profits, P38,848 profits on wire nails, barbed wire, galvanized-iron sheets, etc., ordered from American houses, which were to cost P141,968, and P11,994 on dyes, etc., ordered from Europe, which orders were not filled "because they quoted unreasonably high prices so they could not be accepted." The "high prices" of all the

articles are not given. As to the goods ordered from America, the plaintiff makes no allowance for cost of shipping and insurance, nor for expenses in handling and selling the goods in the local market. Again the plaintiff says, "Almost all of these orders have not been filled. I did not get any of the goods mentioned in my direct examination." While McCall stated that the delayed shipments "came forward eventually," neither the plaintiff in his testimony nor counsel in his brief point out just what these shipments contained. Whether they contained all of the goods ordered from the American house, which McCall represented, is not known, but it might be inferred that they did, as McCall was testifying about the orders placed with his house. Neither are we able to determine from the record just what goods, upon which the plaintiff claims damages for loss of profits, were ordered through McCall. The plaintiff is certainly not entitled to damages for loss of profits on the goods which "came forward eventually." The plaintiff claims P2,496 loss of profits on 4,160 rolls of barbed wire; then he says, "I did not place the orders for the 2,800 rolls of barbed wire, upon which I claim a profit of P2,496, because I could not get a reasonable price." The number of rolls is different, but the amount claimed is the same.

According to the plaintiff, the volume of his yearly business was more than P100,000 and when business was good, about P500,000. Business was not good for the year following the publication of the libelous article. The plaintiff's net profits for that year were, according to his guess or estimate, less than P10,000. Nothing is stated about the volume of his business nor the amount of his gross or net profits for the previous year, but from his statement of losses of profits showing the selling price of some of the articles enumerated, with the profit he had anticipated if he had handled the goods, can be calculated the per cent of profit. The total cost of the American goods, as itemized, is P141,968; adding the profit claimed (P38,848), we have P180,816, the selling price. Upon this same basis, the cost of the European goods would amount to P44,422. Adding these two items (P11,994 and P44,442), to the selling price of the American goods, we have a total of P237,232, which is the volume of business claimed to have been lost through the inability to obtain the goods. These figures might be used to estimate the falling off in the plaintiff's business and to fix the amount of damages if the record were not so deficient concerning the details of the plaintiff's business. Whether he was able to buy goods elsewhere, or did, in fact, buy goods of other houses to take the place of those upon which he claims loss of profits, the record is silent. The record is also silent, as we have indicated, as to the volume of business done by the plaintiff for any year previous to the publication. The whole matter is so involved in uncertainties that it is impossible for us to formulate a basis for a calculation of anticipated profits. Such profits are so remote and speculative and depend so much on independent causes that our calculation would have to proceed upon conjectures and not upon facts.

But counsel for the appellant in his brief urges the allowance of the pecuniary damages claimed by the appellant on the ground that in their nature they cannot be proved. He suggests that this court has wide discretion in awarding such damages in cases like the one under consideration. He cites in support of this view cases in tort where the injury is clearly proved, but not the exact amount of damages. The very nature of the injuries in those cases was such that they could not be fully compensated by money damages. Pecuniary damages for the loss of anticipated profits are not only capable of proof, but must be proved with a reasonable degree of certainty. The well settled rules upon this point are stated in Ruling Case Law as follows:

"The damages recoverable in any case must be susceptible of ascertainment with a reasonable degree of certainty, or, as the rule is sometimes stated, must be certain both in their nature and in respect to the cause from which they proceed. Therefore, uncertain, contingent, or speculative damages cannot be recovered, either in actions ex contract, or in actions ex delicate." (8 R. C. L., 438.)

"It may therefore be said that lost profits are a proper element of damage when such loss is the direct and necessary result of the defendant's acts, or where, in cases involving a breach of contract, the loss of profits may reasonably be supposed to have been within the contemplation of the parties when the contract was made, as the probable result of its violation, and where, in both classes of cases, such profits can be shown with a

reasonable degree of certainty." (8 R. C. L., 601.)

"While, as a general rule, no recovery can be had for loss of profits which are uncertain, contingent, conjectural, or speculative, it must be borne in mind that since profits are prospective they must, to some extent, be uncertain and problematical, and so, on that account or on account of the difficulties in the way of proof, a person complaining of breach of contract cannot be deprived of all remedy." (8 R. C. L., 503.)

In a note (52 L. R. A., 42), after stating general rules substantially the same as those above quoted, it is said:

"The recovery of profits lost through trespasses against the person, such as assault and battery, libel and slander, and wrongful arrest and imprisonment, is governed by the general rules above given with reference to proximity or remoteness and certainty or uncertainty."

Kentucky Heating Co. vs. Hood (133 KY., 383; 134 Am. St Rep., 457) is a case which states how loss of profits may be shown both as to proximity to the injury and certainty as to the amount. The workmen of the appellant company tortuously removed some gas pipe of another heating company, whereby the plaintiff's house could not be heated. The plaintiff was engaged in letting rooms. Her renters left because they were not able to remain in their rooms unheated. After discovery of the wrong, it took several days to get the appellant company to repair the injury to the pipes and then they charged \$6 for that service. Suit was brought and \$500 damages were assessed by the jury. The court said relative to recovery of loss of profits:

"In the case before us the loss sustained by appellate, aside from personal inconvenience and discomfort, was not only the sum she paid out for having the fixtures replaced, but the loss she suffered in being deprived of the profit she had the right to expect would be received from the renters. This profit was not uncertain or speculative. It was as reasonably sure as any kind of business profit that depends upon the development of happenings in the future; and, furthermore, it was capable of reasonable ascertainment by a jury. The appellee, when her tenants left, was receiving from them a fixed sum. This income she lost when they withdrew from her premises, and the loss of this source of income was the proximate result of the wrongful act complained of."

The case of Hillsdale Coal & Coke Co. vs. Pa. R. R. Co. (229 Pa. St., 61; 140 Am. St. Rep., 700) is another case in which loss of profits were allowed as damages in a tort action. The action was for the purpose of recovering damages for wrongful discrimination against the plaintiff in not furnishing cars. There was satisfactory evidence of the discrimination as shown by the defendant's rating plaintiff's mines at 475 tons a day instead of 800 tons, their actual capacity. The court said:

"As we look at it, the only known method to get at date from which to estimate what a man is damaged by reason of discrimination in not furnishing cars or other facilities of transportation, is to give the shipper discriminated against what would have been a reasonably fair profit on whatever is shown to be the fairly probable output of the mine discriminated against, less what was actually shipped from such mine.' And it was upon that basis that the data of plaintiff was presented. We think the measure thus applied was reasonable and proper. If the defendant, a common carrier, wrongfully refused to transport the coal of the plaintiff, it ought to place the plaintiff in the same situation it would have been in had the carrier performed its duty. The actual loss suffered by the plaintiff by reason of the defendant's failure to discharge its duty is a fair measure of the damage. Loss of profits in such a case must of course be clearly shown, and the proof should not present merely a speculative basis for the claim. In that respect we think the evidence was satisfactory here."

In *Nightingale vs. Scannell* (18 Cal., 315), the court said:

"The object was to recover damages on account of the profits which the plaintiff might have realized upon a sale of the goods. There may be cases in which it would be proper to award damages upon the basis of a calculation of profits, but in this case there were no data for the calculation to proceed upon. The subject was

so involved in uncertainty that it was impossible for the jury to be informed of all the circumstances necessary to enable them to arrive at a correct conclusion. There was no criterion by which an estimate could be made, and the least that can be said is that the calculation must have proceeded upon conjectures and not upon facts."

Bradstreet Company vs. Oswald (96 Ga., 396) is a case in which a commercial reporting company made a false report concerning the appellee. He had recovered in the lower court. The Supreme Court, in reversing the judgment, said:

"The plaintiff alleged as an element of damage, amongst other things, that in consequence of the injury to his credit caused by the wrongful misrepresentations of the defendant, he was unable to obtain goods to be by him in turn sold to his customers in the conduct of his mercantile business, and that as the result of his inability to buy the goods, he lost profits that he might have earned otherwise. We think such damages are too remote and speculative, and are too much dependent upon other and independent causes, to be made the basis for a recovery. There are too many hazards and chances dependent upon the conduct of a mercantile business to allow prospective profits in the computation of damages. Of course, in a special mercantile transaction, where the anticipated profit is capable of exact ascertainment and the loss of it traceable directly to the wrongful act of the defendant, a recovery may be had * * *."

This court has held that judgments for damages, except in those cases where the law authorizes the imposition of punitive or exemplary damages, must rest upon satisfactory proof of the existence in reality of the damages alleged to have been suffered, and that the amount of such damages must be established with at least some degree of certainty. In *Marker vs. Garcia* (5 Phil. Rep., 557), we said:

"Except in those cases where the law authorizes the imposition of punitive or exemplary damages, the party claiming damages must establish by competent evidence the amount of such damages, and courts can not give judgment for a greater amount than those actually proven."

The same conclusions were reached in *Causin vs. Jakosalem* (5 Phil. Rep., 155), and *Macleod vs. Philippine Publishing Co.* (12 Phil. Rep., 427). The result is that the plaintiff cannot, under the testimony and authorities cited, recover in this action for actual pecuniary damages.

Punitive damages are allowed in the discretion of the court when there is ill will or express malice. The only evidence here upon which to base punitive damages is the fact of publication and that the article was libelous. There is no showing that the editor, owner, or reporter of the defendant knew the plaintiff. The article was published in the belief that it was privileged. The mistake of judgment cannot be said to be evil intent nor even reckless disregard' for the rights of others. The law concerning punitive damages is stated fully in *Eviston vs. Cramer* (57 Wia., 570):

"This court and other courts have sanctioned punitive damages by way of punishment to the defendant and for a public example where the act complained of was characterized by a bad motive or a malicious intent. But what fact in the special verdict warrants such damages under that rule? The facts in the special verdict, as we have said, are that the article was false, and was published with intent to injure the plaintiff's feelings, and to degrade him in public estimation. But this is the implied malice which the law imputes to a charge made that is false and injurious to another, and where no proper motive appears for making it. 'In all ordinary cases, if the charge complained of is injurious and no justifiable motive for it is apparent, malice is inferred from the falsity of the charge. The law in such case does not impute malice not existing in fact, but presumes a malicious motive for making a charge which is both false and injurious where no other motive appears.' (Selden, J., in *Lewis vs. Chapman*, 16 N. Y., 372.) But ill will, bad motive, or malevolent intent are elements of the wrong where punitive damages are allowed. And these are something more than the implied malice or the malice which the law imputes to a false and injurious charge or accusation which is not privileged. In order, therefore, to justify punitive damages in this case, the question should have been submitted whether the evidence showed

that the defendants were prompted by special ill will or bad intent towards the plaintiff in making the publication."

In *Macleod vs. Philippine Publishing Co.* (supra), which was a civil action for libel, the court held that punitive damages cannot be recovered unless the tort is aggravated by evil motive, actual malice, deliberate violence or oppression. Punitive damages cannot, therefore, be allowed in the case at bar.

There remains to be considered the question of damages for injury to feelings and reputation. There are no fixed rules for determining the amount of such damages. Taking all the facts and circumstances into consideration and following the rule laid down by this court in *Jimenez vs. Reyes* (27 Phil. Rep., 52), and *Barretto vs. Philippine Publishing Co.* (30 Phil. Rep., 88), the plaintiff is allowed P300 for damages to his feelings and reputation. Judgment will be entered accordingly, without costs in this instance. So ordered.

Arellano, C. J., Torres, Johnson, and Araullo, JJ., concur.

Moreland, J., concurs in part and dissents in part. See concurring and dissenting opinion.

CONCURRING AND DISSENTING OPINION

MORELAND, J.:

The appellee contends in its brief that this court has no right to examine the evidence in this case as it is not made a part of the bill of exceptions and does not come to this court certified as required by law for a review by this court.

The court, in the determination of this case, considers what it calls the evidence taken in the case although it is not a part of the bill of exceptions and is therefore not certified as the evidence taken in the case nor does any official recognized by law certify that it is such evidence or that it is correct.

I cannot agree to the consideration by this court on appeal of anything which is not made a part of the bill of exceptions. Whatever is not a part of the bill of exceptions is foreign to the case. Section 143 of the Code of Civil Procedure provides as follows:

"Upon the rendition of final judgment disposing of the action, either party shall have the right to perfect a bill of exceptions for a review by the Supreme Court of all rulings, orders, and judgments made in the action, to which the party has duly excepted at the time of making such ruling, order, or judgment. The party desiring to prosecute the bill of exceptions shall so inform the court at the time of the rendition of final judgment, or as soon thereafter as may be practicable and before the ending of the term of court at which final judgment is rendered, and the judge shall enter a memorandum to that effect upon his minutes and order a like memorandum to be made by the clerk upon the docket of the court among the other entries relating to the action. Within ten days after the entry of the memorandum aforesaid, the excepting party shall cause to be presented to the judge a brief statement of the facts of the case sufficient to show the bearing of the rulings, orders, or judgments excepted to, and a specific statement of each ruling, order, or judgment that has been excepted to, for allowance by the judge. The judge shall thereupon, after reasonable notice to both parties and within five days from the presentation of the bill of exceptions to him, restate the facts if need be, and the exceptions, so that the questions of law therein involved, and their relevancy shall all be made clear, and when the bill of exceptions has been perfected and allowed by the judge, he shall certify that it has been so allowed and the bill of exceptions shall be filed with the other papers in the action, and the same shall thereupon be transferred to the Supreme Court for determination of the questions of law involved. A bill of exceptions may likewise be made to consist of the judge's findings of fact in his final judgment and a statement of all the exceptions reserved by the party desiring to prosecute the bill of exceptions, which shall be allowed and filed

by the judge as above in this section provided.

"Immediately upon the allowance of a bill of exceptions by the judge, it shall be the duty of the clerk to transmit to the clerk of the Supreme Court the original bill of exceptions and all documents which by the bill of exceptions are made a part of it. The cause shall be heard in the Supreme Court upon the bill of exceptions so transmitted, all duly certified by the clerk of the Court of First Instance."

Under this section the evidence is a part of the bill of exceptions in those cases where this court is required under section 497 to examine the evidence. This court has no authority under the code to consider anything but the bill of exceptions and those things which are made a part of it "all duly certified by the clerk of the Court of First Instance." If the evidence is not a part of the bill of exceptions then it would come to us absolutely uncertified and unidentified (except, perhaps, by the stenographer who took the evidence, who, to this court on appeal, is totally unknown), the clerk of the Court of First Instance being without authority to certify to this court anything but the bill of exceptions. That the legislature intended, as, of course, it necessarily must, that the evidence should be a part of the bill of exceptions is fully demonstrated by section 512 of the Code of Civil Procedure, as amended, which, in its original form, required the whole bill of exceptions to be printed, which, on the theory that the evidence is a part of the bill, would require the evidence to be printed also. But it being found that such a requirement would make appeals to the Supreme Court too expensive for the people of this country, that section was amended by Act No. 1123, which provided, in effect, that the evidence should not be printed but should come up in typewritten form but still as a part of the bill of exceptions and as such "duly certified by the clerk of the Court of First Instance." This shows beyond question that the legislature considered the evidence a part of the bill of exceptions.

Of course it stands to reason that, if the only known method of obtaining a review of a case by the Supreme Court is by bill of exceptions, and that is the only method in this country (except in special proceedings), then the Supreme Court can deal with nothing but the bill of exceptions; and anything outside of that is foreign and extraneous matter.

In the case at bar I do not know whether the evidence attached to the original record of the Court of First Instance is the evidence really taken in that case or not; and I have no means of determining. Nor do I know whether, if it is such evidence, it is correct as to substance or as to the exceptions which appear therein to have been taken during the trial. No one whom, under the law, I officially know has certified it. Neither the Court of First Instance nor its clerk has certified it in any manner and especially not as required by section 143 above quoted. It was not made a part of the bill of exceptions by the Court of First Instance or by the clerk, or by any other person whomsoever. It just came up here with other matter admittedly not a part of the bill of exceptions and to which we pay no attention.

Nor can I agree with the court when, to show its right to consider the questions and answers alleged to be the evidence in the case and to review the exceptions appearing as a part thereof, it cites and quotes section 500 of the Code of Civil Procedure. That section, as appears instantly on reading it, refers simply and solely to a dismissal of a bill of exceptions. No one has proposed a dismissal of the bill of exceptions in this case. The only question is, can the court, in the determination of the appeal, consider the evidence, uncertified and unidentified though it is and not forming a part of the bill of exceptions, or must it determine the appeal on questions of law alone? There is no question raised here as to the dismissal of the bill of exceptions; everybody is agreed that the court shall proceed to a determination of the case. Nor does any one claim that there is a defect in the bill of exceptions. The mere fact that the evidence is not made a part of the bill of exceptions and certified by the clerk and approved by the court as required by law does not demonstrate that there is a defect in the bill. Indeed this is not a defect as that word is defined by section 500 itself. It says:

"Bills of exception may be dismissed with costs, when it appears upon the face thereof that the Supreme Court has not jurisdiction, or that the action has not been properly brought to that court by bill of exceptions, or that the exceptions have not been allowed by the judge of the Court of First Instance, or for unreasonable failure to prosecute or perfect the bill of exceptions. * * *"

As to an amendment of the bill, no one has asked it. The court does not know whether the appellant wants the court to consider the evidence or not. He has done nothing in this court to indicate such a desire. While he took in the Court of First Instance certain of the steps necessary to have the facts reviewed by this court, he failed to take others equally important. This does not constitute a defect in the bill on which a dismissal could be based; and section 500 referring only to dismissals, it, of course, is not applicable as the question of dismissal has never been raised or even suggested by anybody.

If the evidence were reviewable I should agree with the judgment of the court.

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