

**MANUEL MENDOZA, PETITIONER, VS. E. C. MCCULLOUGH & CO.
P. M. MOIR AND THE PROVINCIAL SHERIFF OF BULACAN,
RESPONDENTS.**

G.R. No. 10495. February 11, 1915

Ponente: MORELAND, J.

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MORELAND, J.:

This is an action for a writ of mandamus to compel the Court of First Instance of Bulacan to dismiss civil action No. 1301 pending in that court between E. C. McCullough & Co., plaintiff, and Manuel Mendoza, defendant.

It seems that on the 21st of October, 1913, E. C. McCullough & Co. began an action in the justice's court of San Miguel, Province of Bulacan, against the plaintiff in this case, Manuel Mendoza. The trial in that court resulted in a judgment for the defendant, the court dismissing the complaint on the merits after trial. The plaintiff appealed to the Court of First Instance. The plaintiff did not file a new complaint in the Court of First Instance but elected to stand on the complaint filed in the justice's court. The action was brought on for trial in the appellate court. The defendant did not answer, and a motion was made by plaintiff for a judgment by default. The defendant opposed this motion and asked that the action be dismissed on the ground that plaintiff had failed to file a complaint in the appellate court as required by Act No. 2111. The court denied the motion of defendant and, after repeated warnings to him to present his defense, all of which went unheeded, the court entered a judgment against defendant for the amount demanded in the complaint.

This action is brought, as we have said, to compel the Court of First Instance to undo what it has already done and to dismiss the action for the reason that no complaint was filed in the Court of First Instance.

The question before us arises on a demurrer to the complaint based on the ground that the complaint does not state facts sufficient to constitute a cause of action in that it does not allege or show that the Court of First Instance unlawfully neglected the performance of an act which the law specially enjoins as a duty resulting from his office or that he unlawfully excludes the plaintiff from the use and enjoyment of a right or office to which he is entitled.

Section 112 of the Code of Civil Procedure is as follows:

"Proceedings in cases of appeal from justice courts.— When a perfected appeal from a judgment of a justice of the peace has been duly entered in the Court of First Instance, new pleadings shall be filed in the action in that court, and the pleadings in such action shall be in all respects governed by the same rule as though the action had been originally commenced in the Court of First Instance. But the plaintiff may, if he so elects, rely upon his complaint as originally filed before the justice of the peace, instead of filing a new one."

Section 78 of the same Code, as amended by Act No. 2111, provides:

"Transmittal of record and disposition of the case by the appellate court when the plaintiff fails to prosecute the case.—The justice of the peace from whose decision an appeal is taken, shall within five days after the perfection of said appeal, transmit to the clerk of the Court of First Instance for the province a certified copy

of the docket entries, together with all the original papers and process in the case, and the original appeal bond or certificate of deposit in lieu thereof, together with the appellate court docket fee, upon receipt of all of which the clerk shall docket the cause in the Court of First Instance, and the same fees shall there after be charged upon such appeal as in suits originating in said court, and shall within ten days, so notify the parties. The plaintiff shall be obliged to file the complaint within a period of two months if he resides in the province, or of four months if he resides outside the province, counting from the date on which he received the notice. If the plaintiff shall fail to file the complaint within the above-mentioned period, the court shall dismiss the case if the appeal was taken by the defendant, or dismiss the appeal if it was taken by the plaintiff, and in such case the dismissal of the appeal shall revive the judgment of the lower court."

The plaintiff in this action contends that, under the section last quoted, the appellant from the justice's court should have filed a complaint in the appellate court within two months from the date on which he received the notice required to be given by that section; and that failing to do so, the appeal should have been dismissed as required by that section. In making this contention plaintiff overlooked section 112 above quoted, which provides, as we have seen, not only that the appellant may file a new complaint but he may, if he chooses, rely on the complaint in the justice's court. As appears from section 78, the Court of First Instance on appeal from a justice's court has always in its possession the pleadings on which the justice's court tried the cause. When they are sent to the appellate court, as they must be in all appealed cases, that court has them before it and it would seem to be quite unnecessary to ask the appellant to file another complaint exactly like the one already on file. This unnecessary proceeding is obviated by the provisions of section 112; and we see no repugnancy between that section and section 78. When the appellant receives notice of the fact that the record has been sent to the appellate court and duly docketed, he must make his election: He shall either file a new complaint or notify the court that he relies on the complaint filed in the justice's court and already in the possession of the appellate court.

From what has been said it is clear that no action for mandamus will lie. The lower court has not unlawfully neglected the performance of an act which the law specially enjoins as a duty resulting from his office nor has he unlawfully excluded plaintiff from the use and enjoyment of a right to which he is entitled. On the other hand, the court has acted legally in every respect and the judgment rendered against the defendant on default was legal and proper from every standpoint. The plaintiff in this action was not entitled under the law to require the appellant in the Court of First Instance to file a new complaint and he was at fault when he refused to go forward with his defense.

The demurrer to the complaint is sustained and the plaintiff is given five days within which to file an amended complaint, and if not so filed within that time the action will stand dismissed on the merits.

The plaintiff has amended his complaint by adding a paragraph which alleges, in effect, that, after the appeal was taken to the Court of First Instance, no summons was served on the defendant (appellee), he was in no way brought into court, and that the court, therefore, did not acquire jurisdiction of his person.

This allegation adds nothing of legal consequence to the complaint. The appeal itself gave the Court of First Instance jurisdiction of the persons of the parties to the action ; and there was no need that anything further be done that jurisdiction might attach. While the statute requires the filing of a new complaint in the appellate court or the declaration of the proper party that he relies on the complaint filed in the justice's court, such requirement is not for the purpose of giving the appellate court jurisdiction of the persons, but, rather, to put the cause at issue as a step preparatory to its trial and final disposition. For these reasons, the action is finally dismissed, with costs against the petitioner.

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

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