

THE ESTATE OF JUAN N. CORDOBA AND VICENTA ZARATE, PETITIONERS AND APPELLEES, VS. GREGORIO ALABADO, DEFENDANT AND APPELLANT.

G.R. No. 12049. September 16, 1916

Ponente: JOHNSON, J.

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JOHNSON, J.:

This is an appeal from the Court of Land Registration. The appellees now seek, by a motion, to have the appeal dismissed upon the ground that it was not perfected within the time prescribed by law.

The facts upon which said motion is based are as follows:

First. The decision of the lower court was rendered upon the 24th of February, 1916.

Second. Notice of said decision was sent by mail to the attorneys of the appellant, as well as to the appellant himself, on the 26th of February, 1916.

Third. While the record does not show upon what date notice of the decision was received by the appellant in answer to the motion presented now, he admits that he received said notice upon the 1st of March, 1916.

Fourth. That on the 28th of March, 1916, the appellant presented a motion for a new trial which v/as set down for hearing on the 8th of April, 1916.

Fifth. That on the 8th of April, 1916, said motion for a new trial was denied by the Honorable Percy M. Moir, judge.

Sixth. That while the record does not show exactly upon what date notice of the order of the judge denying the motion for a new trial was received by the appellant, the record does show that on the 14th of April, 1916, he excepted to the order of the judge denying said motion and also announced his intention to appeal to the Supreme Court. We must therefore assume that he received notice of the denial of said motion for a new trial as early as the 14th of April, 1916.

Seventh. Nothing further seems to have occurred in the prosecution of the appeal until the 25th of April, 1916, when the appellant presented a motion asking that he be given leave to perfect his bill of exceptions at the next regular term of court. The record does not show that that motion was acted upon.

Eighth. On the 28th of April, 1916, the appellee opposed the motion of the appellant asking for an extension of the time within which to perfect his bill of exceptions.

Ninth. While the record does not show the exact date upon which the bill of exceptions was presented for approval, it does show that on the 3d of May, 1916, notice was given to the respective parties that the hearing for the approval of said bill of exceptions was fixed for the 9th of May, 1916. We must assume, therefore, in the absence of other proof, that the bill of exceptions was presented on or about the 3d of May, 1916.

Tenth. That on the 10th of May, 1916, the attorneys for the appellees opposed the approval of said bill of exceptions for the reason that it had not been presented within the time prescribed by law.

Eleventh. That apparently, by reason of the opposition of the appellees to the approval of said bill of exceptions, another day was fixed (June 12, 1916) for the purpose of considering the question whether or not said bill of exceptions should be approved.

Twelfth. That on the 13th of June, 1916, the Honorable Percy M. Moir, judge, approved said bill of exceptions.

From the foregoing statement of facts, the following conclusions may be drawn:

That notice of the decision was received by the appellant on the 1st of March, 1916; that the motion for a rehearing was presented upon the 28th of March, 1916; that there elapsed between the notice of the decision and the motion for a new trial twenty-seven days; that notice of the denial of the motion for a new trial was received on the 14th of April, 1916; that the bill of exceptions was presented on the 3d of May, 1916; that between the notice of the order of the court denying a new trial (April 14) and the presentation of the bill of exceptions (May 3) there elapsed nineteen days; that between the time of the receipt of the notice of the decision and the presentation of the bill of exceptions, there elapsed twenty-seven days plus nineteen days or a total of forty-six days, after eliminating the time between the presentation of the motion for a rehearing and the notice of the order of the court denying the same. Section 26 of Act No. 2347 provides:

"That the period within which the litigating parties must file their appeals and bills of exceptions against the final judgment in land registration cases shall be thirty days, counting from the date on which the party received a copy of the decision."

Therefore, in accordance with said provision of Act No. 2347 and the following decisions of this court, heretofore announced (Roman Catholic Bishop of Tuguegarao vs. Director of Lands, ante, p. 623, and Lavitoria vs. Judge of First Instance of Tayabas and Director of Lands, 32 Phil. Rep., 204), and for the reason that the bill of exceptions was not presented within the time prescribed by law, the motion to dismiss the appeal is hereby granted, with costs against the appellant. So ordered.

Torres, Trent, and Araullo, JJ., concur.

Moreland, J., see dissenting opinion.

DISSENTING OPINION

MORELAND, J.:

The question ultimately decided by the decision of this court is that a motion for a new trial made to the trial court after the entry of judgment against the moving party does not operate to prevent the running of the period of thirty days within which he must present his bill of exceptions for approval.

The appellant was notified of the entry of judgment against him on the 1st day of March. By virtue of section 145 he had thirty days after notice of the decision to move to set aside the judgment and to grant a new trial upon the grounds stated in that section. He made that motion on the 28th of March, twenty-seven days after he had received notice of the entry of judgment. It should be noted here that the Supreme Court in its decision in this case counts these twenty-seven days as a part of the thirty days within which the aggrieved party must file his bill of exceptions. The losing party in the trial court did not receive notice of the order denying his motion for a new trial until the 14th of April. He presented his bill of exceptions on the 3d day of May, nineteen days after he had been notified of the order denying his motion for a new trial. The Supreme Court also counts this time, nineteen days,

against the moving party as a part of the time, thirty days, within which he must present his bill of exceptions. The court says:

"Between the notice of the order of the court denying a new trial (April 14) and the presentation of the bill of exceptions (March 3) there elapsed nineteen days; that between the time of the receipt of the notice of the decision and the presentation of the bill of exceptions, there elapsed twenty-seven days plus nineteen days or a total of forty-six days, after eliminating the time between the presentation of the motion for a rehearing and the notice of the order of the court denying the same."

Taking these forty-six days as a basis the court, after stating that section 26 of Act No. 2347 provides that the period within which the litigating party must file his appeal or bill of exceptions against a final judgment in land registration cases shall be thirty days counting from the date on which the party receives a copy of the decision, the court concludes:

"Therefore, in accordance with said provisions of Act No. 2347 * * * and for the reason that the bill of exceptions was not presented within the time prescribed by law, the motion to dismiss the appeal is hereby granted."

As will be seen from these quotations, the court counts as a part of the thirty days the time which elapsed between the date when the losing party was notified of the entry of judgment against him and the date when he made a motion to set aside the judgment and for a new trial under section 145 of the Code of Civil Procedure. This is the error upon which I base my dissent in this case. I am of the opinion that the correct rule is that, if a motion or a petition for a rehearing is made or presented in season and entertained by the court, the time limited for a bill of exceptions or an appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purpose of the bill of exceptions or appeal. If the thirty days does not begin to run until the motion for a new trial has been disposed of, then it is erroneous to count the time which transpires between the notice of entry of the judgment and the date on which the motion is made and entertained.

In the case of *Northern Pacific Railroad vs. Holmes* (155 U. S., 137) the court said:

"It is well settled that if a motion or petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal. (*Aspen Mining and Smelting Co. vs. Billings*, 150 U. S., 31, 36; *Voorhees vs. Noye Mfg. Co.*, 151 U. S., 135.)"

In the case of *Aspen Mining & Smelting Co. vs. Billings* (150 U. S., 31) the court said at page 36:

"The decree dismissing complainants' bill was entered on October 20, 1890, but an application for a rehearing was made shortly thereafter and during the same term, but not disposed of until May 5, 1891.

"The rule is that if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal. (*Brockett vs. Brockett*, 2 How., 238, 249; *Texas & Pacific Railway vs. Murphy*, 11 U. S., 488; *Memphis vs. Brown*, 94 U. S., 715.)

"If the case falls within that category, then the six months within which the appeal had to be taken under section 11 of the Judiciary Act of March 3, 1891, did not commence to run until May 5, 1891, and the appeal was in time.

"It is true that equity rule 88 provides that 'no rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court;' but if this petition for

rehearing was filed in season and entertained by the court, then the decree, although entered in form, did not discharge the parties from their attendance in the cause, and they were bound to follow the petition thus pending to the next term. The suit was thereby prolonged until the application was disposed of in the regular course of proceeding. This is expressly so ruled in *Goddard vs. Ordway* (supra).

"In *Giant Powder Co. vs. California Vigorit Powder Co.* (5 Fed. Rep., 197; S. C., 6 Sawyer, 508), it was said by Mr. Justice Field that equity rule 88 applies only where no petition is presented during the term, and the numerous cases in which it has been held that the time limited for an appeal does not begin to run until a petition for rehearing properly presented has been disposed of, sustain that view. The decree does not in legal effect remain final while the petition is pending, and the prescription of rule 88 must be construed to mean that a rehearing cannot be granted after the lapse of the term unless application is made therefor during the term, and being entertained, the decree is thereby prevented from passing beyond the control of the court. The entertaining of the petition keeps the jurisdiction alive, and the granting of the rehearing may be made absolute, or denied thereafter, as the court may determine.

"But it is said this cannot be the result, under either statute or rule, of the mere filing of a motion or petition for rehearing, and that it does not affirmatively appear in this case that the motion or petition was entertained by the court. But we should be inclined to hold, if a decision in that regard were called for, that, since the application was passed upon as having been duly made, the presumption must be indulged that it was entertained by the court in the first instance and during the term at which the decree was pronounced."

From these decisions it is perfectly clear that the court, in the case at bar, should not have counted the twenty-seven days elapsing between the notice of the entry of judgment and the date when the motion for the new trial was presented and entertained by the court. The decision cited held specifically that the time within which a bill of exceptions or an appeal must be taken shall not begin to run until after the motion for a new trial has been disposed of. This does not mean that the period begins to run from the notice of entry of judgment and that the motion for a new trial will suspend it, and that, after the motion is disposed of, the period will begin to run again, thereby permitting the time which expired before the motion to be added to the time which expired after the motion and before the bill of exceptions was presented or the appeal taken, the sum of those two determining whether the period has expired or not. The decisions cited are directly to the point that the period does not begin to run until the motion has been disposed of. Under the rule which they lay down the thirty days did not begin to run in the case at bar until the 14th day of April, from which date the losing party had thirty days within which to present his bill of exceptions. He presented the bill, as shown by the court's own statement, on the 3d day of May, that is, nineteen days after he had been notified of the entry of the order denying his motion for a new trial. The bill of exceptions was, therefore, presented in time as the thirty days would not have expired until the 14th of May.

This is the rule of the Federal courts and, it appears to me to be in accordance with reason. If the appellant has a right to make a motion to set aside the judgment and for a new trial within thirty days after the notice of entry of judgment against him, that motion can be made on the very last one of the thirty days, and, indeed, during the very last hour or moment of the last session of the court on that day. If the judgment inevitably becomes final at the end of the thirtieth day, that is, at the very moment when the motion for a new trial is presented, then the court would have no time to consider the motion or to dispose of it, and if it did do so it would be too late to be of any benefit to the appellant. I repeat that the rule laid down by the court in this case is illogical and impossible of operation for the reason that it deprives the appellant of a right conferred by statute which is that he may make a motion for a new trial on any one of the thirty days next succeeding the date on which he is notified of the entry of judgment against him; and such motion is as legally made if presented on the last of the thirty days as it would be if it were presented on the first of those days. The rule laid down by this court, however, deprives the appellant of the right conceded by statute to make the motion during the last hour of the last session of the court on the

thirtieth day; for, if he makes the motion at that time, it is of no value to him. By this rule the trial court is denied the authority to exercise the power expressly conferred upon it by statute, as it is unable, under the rule laid down by this court, to pass on a motion for a new trial admittedly made on time and within the law. A decision laying down such a rule must necessarily be wrong as it contradicts the conceded right to make the motion for a new trial at any time during the thirty days and is, therefore, a denial of the right granted by section 26 of Act No. 2347.

For these reasons I think the motion to dismiss the appeal should be denied.

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