NEMESIO CAMPOS, PETITIONER, VS. ADOLPH WISLIZENUS, JUDGE OF FIRST INSTANCE OF CEBU, AND TEODORO ALDANESE, RESPONDENTS.

G.R. No. 12083. November 27, 1916

Ponente: MORELAND, J.

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MORELAND, J.:

This is a petition for a writ of certiorari to be directed to the Court of First Instance of the Province of Cebu requiring it to forward to this court the proceedings had in a certain election contest between the petitioner Nemesio Campos and the respondent Teodoro Aldanese, to the end that such proceedings may be revised by this court and certain steps taken therein annulled on the ground that, in taking them, the court acted without or in excess of its jurisdiction.

The petition alleges that, upon the proclamation by the municipal board of inspectors of the municipality of Sibonga, Province of Cebu, declaring the respondent Teodoro Aldanese elected to the position of municipal president of said municipality, the petitioner filed a protest against the election. After the filing of the protest copies were duly made for service on the various persons receiving votes for the office of municipal president. The service of the notice of protest upon the respondent Teodoro Aldanese was made by delivering a copy thereof to one Isidoro Aldanese, a brother of the respondent Teodoro Aldanese, and who, it is claimed by the petitioner, was living in the house of the respondent Teodoro Aldanese at the time. Isidoro Aldanese acknowledged in writing on the back of the original notice of protest the fact that he had received it. A copy of the certificate of service was attached to the petition and made a part of it as Exhibit C. Thereafter, a motion was made to the court in which the election contest was pending for the dismissal of the proceedings on the ground that not all of the persons receiving votes for the office of municipal president were notified as required by law and therefore the court acquired no jurisdiction of the proceedings. The court, after hearing the parties with regard to the service of the notice of protest on the respondent Teodoro Aldanese, held that, under the facts submitted, no service of the protest had been made on the respondent Teodoro Aldanese in the manner required by law and that, therefore, the court acquired no jurisdiction of the proceedings and accordingly dismissed the protest.

The petition also sets out the history of the proceeding before the court had on the hearing of the motion to dismiss and alleges that, after the court had decided the motion and had begun to dictate his order to that effect, the attorney for the petitioner, observing that the court in its order found the existence of facts which he believed had not been proved, attempted to make an argument with respect thereto and the court refused to hear him. It is also alleged that, after the order had been dictated, counsel for the petitioner offered to present evidence that the notice was served in accordance with law but the court refused to hear the evidence. It is also alleged that the petitioner made a motion for a rehearing of said motion which the court denied.

Upon this showing the petitioner contends that the court exceeded its jurisdiction in dismissing the proceedings and that its action should be annulled and set aside and that the court should be ordered to proceed with the

contest.

The respondent filed a demurrer to the petition on the ground, among others, that it did not state facts sufficient to justify the issuance of the writ, and the question before us arises on that demurrer.

There are attached to the petition various exhibits which are made a part thereof. Among them are the orders of the court made on the motion to dismiss and also on other motions made by the petitioner.

The order made on the motion to dismiss is in part as follows:

> "From an examination of the records in this case it appears that, on the 20th day of June 1916, the attorney for the petitioner Nemesio Campos filed an election protest against Teodoro Aldanese, respondent. The required bond was filed on the 21st day of June 1916, which was approved by the court on that day. The notice of the protest appears in the record, signed by the attorney for the petitioner, and reads as follows: 'United States of America. Philippine Islands. In the Court of First Instance, Province of Cebu. Nemesio Campos, petitioner, versus Teodoro Aldanese, respondent. Case No. ..... To Mr. Teodoro Aldanese, greeting: You are notified that on the 20th day of June 1916, I have filed with the Court of First Instance of the Province of Cebu, in behalf of Mr. Nemesio Campos, a protest against your election to the office of municipal president of Sibonga, a copy of which is herewith inclosed; and you are hereby warned that you should appear before said court within the period fixed by law, or that which the court may fix, to answer the election protest, with the understanding that should you not do so, I will ask the court to grant the remedy prayed for in said protest. Cebu, Cebu, P. I., June 20, 1916. F. V. Arias, attorney for the petitioner. Received copy of the foregoing notice and the protest to which it refers: June....., 1916....., Respondent. I, ..., under oath declare: That on the.....day of June, 1916, at....., I left a copy of the above notice and the protest above entitled in the house of Mr. Teodoro Aldanese, in Sibonga, Cebu .....'
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> "On the back of said notice the following words written with lead pencil appear: 'Received copy of the protest to be delivered to Teodoro Aldanese as soon as he arrives from the hacienda. 23d of June 1916. I. Aldanese.' Immediately following said writing come the following words: 'Filed today, 26 of June, 1916. Carlos A. Salvador, clerk of court.' No other notice of the protest to the respondent Teodoro Aldanese appears in the record.
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> "The court said: No proof whatever as to who is 'I. Aldanese' has been presented. It does not appear who was the person who signed and under what authority he signed, not even whether he resides in the house of the respondent. The court, in the absence of proof, finds that the notice was insufficient. Furthermore, said notice was not made within the period fixed by law."

The order made on the motion for reconsideration of the order dismissing the proceeding is, so far as material, as follows:

> "The order of this court of the 19th of July, 1916, was dictated on a motion to dismiss by the attorney for the respondent as appears in the record of this case. The attorneys for both parties argued the motion which was submitted to the court afterwards, without the attorney for the petitioner having asked permission or filed any motion, either oral or written, to amend the return of the notice which is attached to the record, or to offer evidence in support of that amendment. The sworn statement subscribed by Felix Flores which appears in the record was filed only on the 20th day of July, 1916. The court, therefore, in considering the motion to dismiss the case filed by the attorney for the respondent, had to base its resolution only on the record as it was on the above mentioned date, July 19, 1916.
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> "It is argued that, inasmuch as the Election Law in its article 27 has not specified the manner and form in which the notice to the candidates voted should be given, rules Nos. 12 and 14 of the Courts of First Instance promulgated by the Supreme Court are applicable; while it is maintained on the part of the respondent that, in the absence of a specific determination, the procedure provided for in the Code of Civil Procedure should

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govern. In any event, the notice to the respondent in this case, as it appears in the record of the same, is not in accordance with the provisions of the Code of Civil Procedure or of articles 12 and 14 of the Rules of Courts of First Instance. It is not in accordance with the provisions of the Code of Civil Procedure, for the person who made the service does not appear to be a person who by reason of his office is authorized by the Code of Civil Procedure to do so; and it does not appear that, being a private person, he has been, on the request of the interested party, duly authorized to make the service. Neither does it appear that the person who signed and acknowledged receipt of the notice is a member of the family of the respondent and resides in his house.

"As regards the rules of the Courts of First Instance, it does not appear that the service has been made in accordance therewith; for it does not appear that the person who signed and acknowledged receipt of the notice was residing in the house of the respondent and was in charge thereof.

"With regard to the question as to who should make the service of said notice, it is not necessary for the court in this case to express its definite criterion, in view of the fact that the service is not made in accordance with the Code of Civil Procedure or the rules of the Courts of First Instance. However, the court is willing to agree with the opinion expressed in articles 931 and 932 of Villamor's work on Elections, in which the criterion that said notice may be served in accordance with the provisions of the Code of Civil Procedure is maintained; and it is not going far to assume that the author desired not only to declare that said notice may be served in that manner, but that it must be served in accordance with the provisions of the Code of Civil Procedure.

"Nor does the court believe that it is obliged to express its opinion whether, at the time of the discussion of the motion to dismiss, the petition to amend the return of the service of notice so as to make it conform to the evidence offered in support of that petition can be made; for the reason that that petition was made after the motion to dismiss had been submitted to the court, without any petition having been made. It is true that, immediately after the rendition of the order of the court dismissing the proceeding, a verbal request to offer evidence and to prove the service of the notice was made in accordance with law, thus correcting the mistakes in the return. The court, however, is unwilling to believe that, the motion to dismiss having been definitely submitted to the court, without any petition for the amendment of the return having been made, the filing of said motion after the rendition of the resolution of the court in this case is timely and proper.

"For the reasons above stated, the court denies the motion to set aside the order of dismissal.

"It is stated, however, after the arguments of counsel for both parties on the motion were over and while the court was dictating its final order on said motion, Mr. Arias stood up with the intention (according to what he states now before the court) to ask the court to admit some evidence; but the court, in view of the fact that the case had already been submitted and of the further fact that the court was dictating the order, did not allow such interruption and continued dictating the order, the reversal of which is now asked."

While the petition has annexed to it as an exhibit an affidavit of service of the notice of protest on the respondent Teodoro Aldanese which shows that the notice was served in the manner required by law, that affidavit of service was not made or presented to the court until after the order had been made dismissing the proceedings. It was first presented to the court as a part of the moving papers on the motion for a reconsideration of the order dismissing the proceeding. The order of dismissal was made on the 19th of July, 1916, at which time the only evidence before the court as to the service of the notice was that stated in the order of the court above-quoted. The affidavit of service was made on the 20th of July on which date the motion for a reconsideration was presented.

We have frequently held that the court acquires no jurisdiction of an election protest unless the protestant shows to the court that a notice of protest has been served in the manner required by law upon all the candidates receiving votes for the office concerning: which the protest was filed and who were candidates for that office. (Hontiveros vs. Altavas, 24 Phil. Rep., 632; Navarro vs. Veloso, 23 Phil Rep., 625; Navarro vs. Jimenez, 23 Phil. Rep., 557; Gala vs. Cui and Rodriguez, 25 Phil. Rep., 522.) The absence of such proof is fatal to the petitioner

when the motion is dismissed on that ground. There is no doubt that the court would receive an affidavit of service or other evidence showing that the service referred to was made in accordance with law if such evidence were offered at any time before the motion was made and, probably, even after the motion was made but before the order of dismissal was entered. In this case, however, no evidence was offered establishing the fact of proper service until after the order dismissing the proceedings was entered, except the evidence referred to in the order of dismissal and the order denying the motion for a rehearing. The evidence referred to in such orders was insufficient to establish the service. In the absence of provisions in the Election Law stating how such service should be made the provisions of the Code of Civil Procedure relative to that matter control. Section 396, paragraph 6, provides in part that, "in all other cases, to the defendant personally, or by leaving a copy at his usual place of residence, in the hands of some person resident therein of sufficient discretion to receive the same." As found by the trial court the evidence which it had before it at the time the motion was made and the order entered in connection therewith did not establish service within the provisions of the section just quoted; and, accordingly, it was the duty of the court to dismiss the proceedings. (See cases cited.)

We said in the case of Navarro vs. Jimenez (23 Phil. Rep., 557):

> "After the entry of the judgment in favor of the defendant, a motion was made by the plaintiff to vacate and set aside said judgment and to dismiss the whole proceeding upon the ground that not all of said candidates had been notified of the protest as required by law. The motion was heard. The question was litigated. The evidence was discussed and considered. The arguments of counsel were presented. The court found from the evidence that all of the candidates had been notified of the protest and that the notice was in the form and served in the manner and within the time required by the statute. That question having been raised before the court below and passed upon there, we are unable to see at this moment how an action of quo warranto can be maintained, based upon the theory that such notice was lacking. That question having been determined in the court below, and the decision never having been questioned in the only manner in which such a decision can be, we must hold it conclusive in this action, quo warranto not being a method by which that decision can be reviewed. We are, therefore, of the opinion that the action must be dismissed."

In that case we also said:

> "We have to say, in amplification of our former opinion on this question, that the general rule is that, where the jurisdiction of the court depends upon the existence of facts, and the court judicially considers and adjudicates the question of its jurisdiction, and decides that the facts exist which are necessary to give it jurisdiction of the case, the finding is conclusive and cannot be controverted in a collateral proceeding."

The rule enunciated in the case just cited would apply to a case where the proper service of notice on the candidates voted for was challenged and the court determined upon the facts presented, after hearing the allegations of the parties and their arguments based thereon, that service had not been made as required by law. Such a determination involves a mixed question of law and fact; and it is a rule, as stated in the case cited, that, where the jurisdiction of the court depends upon the determination of a question of fact and that question has been determined by the court after a hearing, that determination is conclusive and can not be attacked collaterally. In the case before us evidence as to the fact of service was introduced by the petitioner and the sufficiency of that evidence was challenged by the respondent. The petitioner, did not take advantage of the opportunity given him by the challenge to present other and further evidence in relation to the service but stood squarely upon the facts already presented and accepted a decision of the court thereon. Under such circumstances there was nothing left for the court to do except to decide the question upon the facts as they were. The court did so; and although to say so is unnecessary to a decision of this case, we are of the opinion that its finding on the facts as they existed of record at the time was well founded. Certain it is that the evidence before the court did not establish the facts required by paragraph 6 of section 396 of the Code of Civil Procedure to show a legal service. Thereafter the

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court denied the motion for a rehearing and that denial cannot be held to have been made in excess of the jurisdiction of the court or outside of its powers and authority. Even though it be conceded that the court should have given the 'petitioner an opportunity to present further evidence on the question of service the fact that the court held that the petitioner had had his day in court with regard to that matter and that he was not entitled to another opportunity at the expense of the respondent and the delay which would necessarily follow does not go to the jurisdiction of the court and does not subject him to a revision of his orders on certiorari.

It may be added that the determination of a question of fact on which its jurisdiction depends does not of itself affect the court's jurisdiction. It has power to resolve the question of fact; and its decision is within its powers whichever way it may go. Such a finding cannot be attacked by certiorari (Navarro vs. Jimenez, above; Gala vs. Cui and Rodriguez, 25 Phil. Rep., 522).

This case is altogether different from those in which we have issued mandamus to compel the court of first instance to go forward with an election protest after having dismissed the same on a motion based on the ground that the protest had been signed by the attorney instead of the party.

The demurrer is sustained and the complaint will be dismissed on the merits, unless the petitioner within ten days files an amended complaint stating facts sufficient to warrant the issuance of the remedy. So ordered.

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

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