

**FRANCISCO VILLAESTAR, PETITIONER, VS. ADOLPH WISLIZENUS,
JUDGE OF FIRST INSTANCE OF THE TWENTIETH JUDICIAL
DISTRICT, RESPONDENT.***G.R. No. 12122. March 30, 1917*

Ponente: MORELAND, J.

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This is an action of mandamus to compel the Court of First Instance of Cebu to hear an election contest touching the office of municipal president which the court had dismissed on motion of one of the respondents.

The plaintiff was contesting the election of Teofilo Libre. During the progress of the proceeding the latter moved to dismiss the proceeding on the ground that he had not been properly and duly notified of the contest as required by section 578 of the Administrative Code. Upon the hearing of the motion the court found as the facts of the case that Teofilo Libre was duly proclaimed elected municipal president of Toledo, Cebu, at the elections held on the 5th of June, 1916. Thereupon the defeated candidate, Francisco Villaestar, plaintiff in this action, proceeded to contest the election of Libre in the regular way. The contest was filed on the 17th day of June, 1916. The notice of the hearing of the motion bears date the 14th of June, 1916. Notice of the contest was given to Libre, and he acknowledged service of the same, on the 16th day of June, 1916.

From these facts it will be observed that, while notice of the contest was served on the respondent Libre on the 16th day of June, the contest was not filed in the Court of First Instance until the following day, the 17th of June; and that the notice served on the respondent bears date the 14th of June. The court dismissed the proceeding on the motion of Libre based upon these facts, upon the ground that at the time the notice was served on the respondent there was no contest pending; in other words, that no contest had been instituted as required by law and that, accordingly, the notice was not a notice of or in a pending proceeding. The court argued that the notice was merely a notice of something which contestant proposed to do, of a proceeding which he intended to institute in the future; and that, it being impossible under the election Law to give notice of the pendency of a contest to be filed in the future, the notice to the respondent produced no legal effect and the court acquired no jurisdiction to proceed with the contest.

We doubt the correctness of the decision of the trial court. While the reasoning of the court has some elements of merit we do not believe that it is conclusive. We do not believe that the failure to file the contest prior to the giving of the notice vitiates the notice of contest and the service thereof provided the contest is actually filed within a reasonable time after the service of the notice. It is true, as the trial court argues, that a contestant ought not to be permitted to give notice of a contest not yet filed, with all of the resulting effects on the respondent naturally flowing therefrom, as such a proceeding might permit a supposed contestant to cause the person elected to the office contested a good deal of trouble and expense without himself incurring the responsibilities which, under the law, accompany the filing of an election contest. But where, as a matter of fact, the contest is filed immediately after the service of the notice of contest, or within such time as shows the good faith of the contestant

and produces no prejudice to the respondent, we do not believe the reasoning would apply. Of course, it is always best to follow the steps required to be taken in an election contest logically and in sequence; but when a slight departure is made therefrom and no prejudice results to the respondent thereby we do not believe that such departure is fatal to the rights of the contestant.

The contest having been erroneously dismissed on a preliminary objection, and the contestant having, accordingly, been deprived of his day in court without sanction of law, he is entitled to a mandamus to compel the court to take cognizance of and go forward with the contest.

It is therefore adjudged that the plaintiff is entitled to the relief demanded in the complaint; and it is hereby adjudged that a writ of mandamus issue from this court directed to the Court of First Instance of the Province of Cebu requiring it to take cognizance of and proceed with the election contest referred to in the complaint in this action and entitled Francisco Villaestar vs. Teofilo Libre and others, formerly pending in that court. No costs. So ordered.

Torres, and Araullo, JJ., concur.

Trent, J., concurs in the result.

CARSON, J.:

I reserve my vote.

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