

## **TIMOTEO BERMUDEZ, PETITIONER, VS. THE COURT OP FIRST INSTANCE OF TAYABAS ET AL., RESPONDENTS.**

*G.R. No. 12281. February 28, 1917*

Ponente: TRENT, J.

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### **TRENT, J.:**

This is an original action in the Supreme Court, the object of which is to compel the respondent judge, by mandamus, to reinstate a certain election contest and to proceed with the trial thereof.

The demurrer to the petition having been overruled in a minute order dated November 7, 1916, and the respondents having filed their answer, the case was submitted, after argument, upon the merits. The facts are these:

At the general election held on June 6, 1916, Timoteo Bermudez, Leoncio Sena, and Severino Martinez were opposing candidates for the office of municipal president of Pagbilao, Province of Tayabas. Sena was proclaimed elected by the municipal board of canvassers on June 7, 1916. Bermudez filed his motion contesting the election on June 21, 1916, and duly notified Sena and Martinez thereof on the 26th and 28th of that month, respectively. Sena alone appeared, and by written motion, dated July 1, 1916, moved the court to dismiss the contest for the following reasons;

"(2) That the motion of protest was not served on this respondent or on the other candidate voted for, either before or at the time it was presented or within the two weeks' period allowed by law for its presentation, and such notification was only served on the respondent on June 26, 1916, and on the other candidate, long afterwards.

"(3) That, furthermore, the said motion of protest was not entered in the registry of the clerk of the court within the period of two weeks subsequent to the canvass made by the municipal board."

Paragraph (1) of the motion to dismiss, refers to the promulgation of the canvassing board's proclamation, and paragraph (4) contains the prayer for the relief sought.

The trial court's decision upon the motion reads:

"After a consideration of the motion to dismiss, filed in this case by the respondent, it appears that, according to the notice of protest, the municipal board of canvassers, on June 7, 1916, proclaimed the respondent Sena elected to the office of municipal president of Pagbilao, and that the notice of protest was not served by the petitioner on the respondent until June 28th, that is, until five days after the expiration of the legal period of two weeks.

"In view of the preceding facts disclosed by the record, the court holds that it has not acquired jurisdiction in the case, as the notice of protest was served after the expiration of the legal period. The question at issue has been extensively discussed by learned counsel on both sides, but in the opinion of the court it is already clearly and positively decided in favor of the herein respondent, by the Honorable Supreme Court in its decision in the case of Navarro vs. Veloso (23 Phil. Rep., 625).

"Therefore, without further necessity of a ruling on the additional motion for alleged failure to serve notice, of the protest on all the candidates voted for, this case is hereby dismissed for lack of jurisdiction of the court. The costs shall be assessed against the petitioner, Timoteo Bermudez. So ordered.

"Given in Lucena, Tayabas, this 25th day of July, 1916." The additional motion, mentioned in the last paragraph of the decision, does not form a part of the record in the case under consideration.

From the motion and the decision it will be seen that three questions, all relating to the jurisdiction of the court, were-submitted for determination. These questions were: (1) Were the notices which were served upon Sena and Martinez on the 26th and 28th of June, respectively, whereby they were notified of the filing of the contest, a compliance with the provision of the Election Law? (2) Was the motion of contest filed in court within the time required by law? And (3) were all the candidates voted for notified? (Additional motion.)

During the hearing of the demurrer and also the hearing of the case upon the merits, counsel for the respondents further urged that the lower court was without jurisdiction to proceed with the contest, because the notices served upon Sena and Martinez did not fix a day for the hearing of the case as required by section 27 of Act No. 1582, as amended by section 2 of Act No. 2170, effective February 1, 1912, and sections 576 and 578 of the Administrative Code, effective July 1, 1916.

As to the second question, it is sufficient to say that the motion of contest was filed within two weeks (excluding the 7th and including the 21st) after the promulgation of the municipal canvassing board's proclamation. The first question and the one raised in this court relate to the nature and character of the notice which must be served upon all candidates voted for. The solution of these questions requires an examination of the statutory provisions governing judicial election contests. Section 27 of Act No. 1582, as amended by section 2 of Act No. 2170 reads:

"Election contests.—The Assembly shall be the judge of the elections, returns, and qualifications of its members. The time for the filing of (the contests, the notification thereof, and the expenses, costs, and bonds shall be fixed by resolution of the Assembly which shall be effective until repealed. Contests in all elections for the determination of which provision has not been made otherwise shall be heard by the Court of First Instance having jurisdiction in the judicial district in which the election was held, upon motion, by any candidate voted for at such election. The contests shall be filed with the court within two weeks after the election and shall be decided by the same as soon as possible after the hearing of the contest. Such court shall have exclusive and final jurisdiction, except as hereinafter provided, and shall forthwith cause the registry lists and all ballots used at such election to be brought before it and examined, and to appoint the necessary officers therefor and to fix their compensation, which shall be payable in the first instance out of the provincial treasury, and to issue its mandamus directed to the board of canvassers to correct its canvass in accordance with the facts as found. If in any case the court shall determine that no person was lawfully elected it shall forthwith so certify to the Governor-General, who shall order a special election to fill the office or offices in question as herein before provided: Provided, however, That an appeal may be taken to the Supreme Court, within ten days, from any final decision rendered by the Court of First Instance on contests of elections for provincial governors, for the review, amendment, repeal, or confirmation of such decision, and the procedure thereon shall be the same as in a criminal cause.

"Before the court shall entertain any such motion or admit an appeal, the party making the motion or filing the appeal shall give bond in an amount fixed by the court with two sureties satisfactory to it, conditioned that he shall pay all expenses and costs incident to such motion or appeal, or shall deposit cash in court in lieu of such bond. If the party paying such expenses and costs shall be successful they shall be taxed by the court and entered and be collectible as a judgment against the defeated party.

"All proceedings under this section shall be upon motion with notice of not to exceed twenty days to all candidates voted for and not upon pleadings or by action, and shall be heard and determined by the court in the judicial district in which the election was held regardless of whether said court be at the time holding a regular or stated term. In such proceedings the registry list as finally corrected by the board of inspectors shall be conclusive as to who was entitled to vote at such election.

"The clerk of the court in which any such contest is instituted shall give immediate notice of its institution and also of the determination thereof to the Executive Secretary."

Acts Nos. 1582 and 2170 were repealed by Act No. 2657, known as the Administrative Code. Sections 576 and 578 of this Code read as follows:

"Sec. 576. Contested election to office in general.—Contests in all elections for the determination of which provision has not been made otherwise shall be heard by the Court of First Instance having jurisdiction in the judicial district in which the election was held, upon motion by any candidate voted for at such election. The contests shall be filed with the court within two weeks after the election and shall be decided by the same as soon as possible after the hearing of the contest. Such court shall have exclusive and final jurisdiction, except as hereinafter provided, and shall forthwith cause the registration lists and all ballots used at such election to be brought before it and examined, and to appoint the necessary officers therefor and to fix their compensation, which shall be payable in the first instance out of the provincial treasury, and to issue its mandamus directed to the board of canvassers to correct its canvass in accordance with the facts as found.

"Sec. 578. Mode of procedure in court cases.—Proceedings for the judicial contest of an election shall be upon motion with notice of not to exceed twenty days to all candidates voted for and not upon pleadings or by action, and shall be heard and determined by the court in the judicial district in which the election was held regardless of whether said court be at the time holding a regular or stated term. In such proceedings the registration list as finally corrected by the board of inspectors shall be conclusive as to who was entitled to vote at such election.

"The clerk of the court in which any such contest is instituted shall give immediate notice of its institution and also of the determination thereof to the Executive Secretary."

Section 27 of Act No. 1582, as originally enacted, provided that:

"Contests in all elections for the determination of which provision has not been made otherwise shall be heard by the Court of First Instance having jurisdiction in the judicial district in which the election was held, upon motion by any candidate voted for at such election, which motion must be made within two weeks after the election. \* \*

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While the question whether the court acquired jurisdiction of the persons of the contestees, Sena and Martinez, must be determined in accordance with section 27 of Act No. 1582, as amended, and not under the provision of sections 576 and 578 of Act No. 2657, because the latter were not in force at the time, yet the provision of both are essentially the same.

The "motion" of contest when filed within the time required by the Acts, gives the court jurisdiction of the subject-matter of the proceedings, provided the necessary jurisdictional facts are alleged. The statute is silent as to the form which the motion shall take, and the fullness and particularity of its averments. It should state, of course, in a legal, logical form the facts constituting the grounds of complaint, with the name of the court wherein it is to be filed, the fact that the contestant is one of the candidates voted for, and that the contestee, or one of them, was declared elected, otherwise it is demurrable (*Navarro vs. Veloso*, 23 Phil. Rep., 625). Again, the statute is silent as

to whether the contestees must answer the motion of contest in writing. That they have a right to and should do so, cannot be doubted. This is the established practice in this jurisdiction in case a demurrer is not interposed. The result is that judicial election contests are, and must necessarily be, what the term implies—adversary proceedings by which the matters in controversy may be settled upon issues joined. The "motion" which institutes the contest is not one of those motions made to the court in ordinary practice by a party to a case for the purpose of obtaining some rule or order. It is the contestant's statement of facts or combination of facts which gives rise to his right of contest and which, as we have stated, institutes the proceedings. All the proceedings must be upon this motion. There can be no contest without it. It serves the purpose of a complaint in an ordinary civil action.

Under section 27, *supra*, the Court of First Instance was authorized to hear and determine all questions touching the legality of the election and that authority was continued by the enactment of sections 576 and 578 of Act No. 2657. But before the court could exercise such power it must have acquired jurisdiction of the subject-matter of the proceedings and of the persons of all the candidates voted for. The former is acquired in the manner above indicated, and the latter can only be acquired by giving the candidates due and timely notice of the motion of contest. That this is the character of the notice, there can be little room for doubt. The words "with notice" refer to the "motion" upon which all the proceedings are based. To hold that the "notice" is one whereby the contestant fixes a definite date for the hearing of the contest would be contrary to the clear intent of the legislature and the established practice in all civil adversary proceedings wherein important rights are determined. The date for the hearing of the contest cannot be fixed before the necessary parties are brought into court and are given an opportunity to prepare their defense. And furthermore, the fixing of the date for the hearing of the contest in the "notice" would, in many instances, be a useless procedure because the judge of the district might then be holding court in some other part of the province or subprovince, or in an entirely different province, as in the instant case, where section 5 of Act No. 2347 requires that the terms of court for the Fourteenth District shall be as follows: "At Lucena, Province of Tayabas, on the first Tuesday of January, July, and November of each year. At Boac, subprovince of Marinduque, on the second Tuesday of March and August of each year." Notwithstanding the fact that the court is required to hear and determine the contest in the judicial district in which the election was held regardless of whether it be at the time holding a regular or stated term, yet no one will contend that the judge must adjourn court in the province or subprovince and go to another for the sole purpose of hearing a municipal election contest on a date fixed by one of the parties. The creation of such a condition of affairs cannot be attributed to the Legislature. The "notice" must, therefore, necessarily be a notification of the motion of contest and serves the purpose of a citation or summons. When the motion is filed and the notice is thus given, the contest is then in court and must be determined as soon as possible, consistent with the due administration of justice and in accordance with the ordinary rules of practice.

It is further contended that if it be held that the notice serves the purpose of a citation and not the fixing of a date for the hearing of the contest, still the court was without jurisdiction for the reason that Martinez was not notified until the 28th of June, which was on the twenty-first day after the promulgation of the proclamation. If the twenty days began to run on the 8th, then the contention of counsel is well founded. But we are of the opinion that the true date from which the twenty days start, is the date of the filing of the motion in court. All the proceedings must be upon the motion with notice of not to exceed twenty days to the candidates. The notice, which must be accompanied by a copy of the motion, or which, at least must contain the essential allegations in the motion, cannot be served until it is prepared, and while the motion is a step in the proceedings, no judicial action can be had thereon until it is filed in court. The contestant is given two full weeks from the date of the promulgation of the canvassing board's proclamation within which to file in court his motion of contest. He is within the time if he files it on the last day of the two weeks. The whole of the two weeks may be required in order to make the necessary investigations, to reach the capital of the province, employ counsel, and prepare and file the motion.

The motion in the instant case having been filed on the last day, there remained only six days to notify the contestees, if the twenty days began to run on the 8th. It is practically impossible to reach some of the municipalities from the provincial capitals in six days. It would be going too far to hold that the Legislature, after conferring a right upon a citizen, made the exercise of it impossible. That the Legislature did not intend to do such a thing appears from the wording of the statute, which provides, as above indicated, that "all (judicial) proceedings" must be upon the motion, with notice of not to exceed twenty days. We, therefore, see no reason for reversing our former holding to the effect that the court acquired jurisdiction of the contestees, Sena and Martinez, by virtue of the notices served -upon them at the times stated.

The question whether all the candidates voted for were notified of the motion of contest is one of fact which the trial court did not decide. We have frequently held in cases of this character that where a dispute arises in the Court of First Instance as to whether certain persons, who receive a few votes, were in fact candidates for that particular office, must be determined from the evidence which the parties may offer. The petitioner must be given an opportunity to prove, if he can, that the other parties were not candidates for the office of president of Pagbilao. The trial court is the proper place for the determination of this question.

For the foregoing reasons, it is hereby ordered that a writ of mandamus issue to the respondent judge, directing him to reinstate the contest and to proceed with the hearing thereof in accordance with this opinion, with costs against the respondents, Leoncio Sena and Severino Martinez. So ordered.

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

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Moreland, J., concurring and dissenting:

I agree to the result reached by the court, the return of the case for further proceedings; but I do not agree to the grounds upon which the decision is based. The position of the court with regard to the nature of the motion by which an election contest is begun and heard is that it is not a motion at all but, in effect, a complaint in an action; and that the contest is to proceed not as upon a motion but as if it was an ordinary action. That this is the position of the court is clear.

The court holds that the motion is not adequate for the purpose in hand. It is too limited in its scope and the procedure attendant upon it is not adapted to secure the results desired. With this conception in the foreground the court proceeds to an interpretation and construction of the pertinent provisions of the Election Law which slowly but surely eliminate the motion and substitute the action. It begins with the statement, harmless in itself, as, broadly speaking, it is true, that: "It (the motion) serves the purpose of a complaint in an ordinary civil action." It then makes the assertion, equally true, that: "Judicial election contests are, and must necessarily be, what the term implies—adversary proceedings by which the matters in controversy may be settled upon issues joined." From this it proceeds to a statement, not quite so completely or harmlessly true as the two previous statements, that: "The 'motion' which institutes the contest is not one of those motions made to the court in ordinary practice by a party to a case for the purpose of obtaining some rule or order." The purpose of the first two statements is to point out the analogy between the beginning of a proceeding by motion and the beginning of an action by service of summons so that the fangs of the opposition may be drawn when the third statement is made, and particularly when the conclusion at which the court desires to arrive is declared in its final decision.

Having emphasized the elements which the motion and the action have in common, the court proceeds to touch on those characteristics which distinguish the motion from the action and to show that those are precisely the elements which make the motion impossible as a means of determining an election contest. In other words, the court looks upon the motion with indulgence so long as it keeps company with the action; but when it takes a

course impossible to the action, the characteristics which compel it to take that course are viewed askance and are made the reason for the rejection of the motion and the acceptance of the action as the only satisfactory means of a resolution of an election contest. The court holds that the contestant, that is, the moving party, is not only not required but is not permitted to accompany his moving papers with a notice to his adversary of the time when the motion will be presented to the court. The opinion says: "The words 'with notice' refer to the 'motion' upon which all the proceedings are based. To hold that the 'notice' is one whereby the contestant fixes a definite date for the hearing of the contest would be contrary to the clear intent of the legislature and the established practice in all civil adversary proceedings wherein important rights are determined." The court concludes that "the 'notice' must, therefore, necessarily be a notification of the motion of contest and serves the purpose of a citation or summons."

Upon the grounds thus stated the court holds that the election contest proceeds in courts substantially as an ordinary action. The complaint (motion) is filed in court as is the complaint in ordinary actions (Sec. 389, Code Civ. Proc.). A copy is then served upon each of the respondents as are the summons and complaint in an ordinary action (Sec. 394, Code Civ. Proc). The respondents then answer. The case is then brought on for trial, the decision does not say how or when, but we must -assume the court will continue the analogy to the ordinary action which it has all along asserted and that the contest will be brought on for trial as is an ordinary action.

What, then, has the court done in this case? If I am correct, it has prevented the Legislature from doing what it set out to do; indeed, it has done precisely what the Legislature said should not be done. It has ignored the word "motion," and has proceeded with the application of the statute exactly as if the word was not found in the Act. It has changed a motion into an action, moving papers into a summons and complaint, notice of the motion into a notice of trial and note of issue, and a hearing on a motion into a trial in an action. All this, it seems to me, in spite of the provision of section 27 of Act No. 1582 that: "All proceedings under this section shall be upon motion \* \* \* and not upon pleadings or by actions;" and in violation of the spirit of the provision in the same section that:

"All proceedings under this section \* \* \* shall be heard and determined by the court in the judicial district in which the election was held regardless of whether said court be at the time holding a regular or stated term." A proceeding which was intended by the Legislature to be summary and short this court has converted by its decision into the ordinary action in all its essential features.

Let us look for a moment at the reasons offered by the court to sustain its position.

The first reason given is that a motion is inadequate for the end in view, in that it is not an "adversary proceeding" or one in which issues can be joined; also that a motion is not a proceeding in which "important rights" can be "determined;" and that to determine such rights in a motion would be "contrary to \* \* \* the established practice in all civil adversary proceedings wherein important rights are determined."

Let us admit these statements to be true and these reasons sound; and still they prove nothing and get nowhere. Even though a motion has never before been so used, has not the Legislature power to say that it shall be so used in election contest? Does the mere fact, if it is a fact, that "important rights" have never before been determined on a motion, prohibit or prevent the Legislature from declaring that such rights shall henceforth be determined on a motion? The question is not the motion has been, but has the Legislature power to make the motion cover and include something it never covered or included before? It would seem to me that no one will deny power to the Legislature to do this. But if it has such power, the decision of the court is wrong for the Legislature has, by express and direct words, made the motion the proceeding by which election contests shall be determined. It says, Sec. 27 of Act 1582, that "all proceedings" in election contests "shall be upon motion \* \* \* and not upon pleadings or by action." Is this not plain language? Is it not direct language? Is it not strong language? Is it not conclusive language? Yet does the court follow it? As I view it, not at all; it says, in effect, that the motion has not

been so used before, that it is not the proper method for the trial of election contests, and that the Legislature, was wrong when it so acted and its decree should not be obeyed.

But are the statements of the court concerning the motion true and are its reasons sound? Let us see. Is it true that a contested motion is not an "adversary proceeding?" In my judgment, no. All contested motions are such. Is it true that no issues can be joined or framed in motion proceedings? I believe not. In all contested motions issues are joined; otherwise there would be no contest and nothing presented to the court for determination. Is it true that "important rights" are not "determined" on motion? In my opinion, no. Whether a person sentenced to be hanged shall have a new trial may depend on the result of a motion. Judgments involving thousands of dollars are suspended, opened, modified, vacated and set aside on motion. Appeals in actions involving life, liberty, and property are allowed, disallowed and dismissed on motion. Bail is granted or refused on motion. Injunctions and attachments are issued and receivers appointed on motion; and so on indefinitely. Is it true, then, that to permit an election contest to be decided on a motion "would be contrary to \* \* \* the established practice in all civil adversary proceedings wherein important rights are determined?" To my mind, clearly not.

The court has, however, some other reasons for refusing to give the statute effect. Speaking of that characteristic of a motion which permits notice of the time of the presentation of the motion to the court to be served with the motion papers, the court urges as an argument against allowing the contest to proceed on motion, that "the date for the hearing of the contest cannot be fixed before the necessary parties are brought into court and are given an opportunity to prepare their defense." If this argument is sound why does it not apply to a motion for an injunction or the issuance of an attachment or the appointment of a receiver or for a new trial in a murder case based on newly discovered evidence, and to an infinitude of other motions? But the argument is, it seems to me, based on false grounds. The fact is that the filing and service of the moving papers and the notice of motion bring the parties into court and they are given the time elapsing between the service of the motion papers and notice of motion and the date set for the presentation of the motion to the court in which "to prepare their defense." It is in all essential respects what occurs in the service of a notice of trial, except that, in the latter case, the parties are already in court in one sense. The fact that in a motion the moving party serves his "complaint" and "notice of trial" at the same time does not destroy his opportunity or that of his adversary to prepare for trial. It is simply a question of time, of speed; and the evident purpose of the statute regulating election, contests is to secure quick action—a prompt determination of the controversy. In the same way, the fact that the respondent may file and serve his "answer" on the very day set for the presentation of the motion does not change the essential nature of the answer or of the proceeding or make the motion impossible. After the parties are in court questions arising from lack of sufficient notice, surprise, inability to prepare, pressure of court business preventing instant consideration, can be settled by the court after hearing the parties and consulting its own convenience. All essential rights are preserved and guarded as fully when the proceeding is by motion as when by action. Nothing is changed except time. Nothing is obliterated except formality, which can always yield to necessity.

The court continues the argument against allowing an election contest to proceed by motion instead of by action, as follows: "And furthermore, the fixing of the date for the hearing of the contest in the 'notice' would, in many instances, be a useless procedure because the judge of the district might then be holding court in some other part of the province or subprovince, or in an entirely different province, as in the instant case, where section 5 of Act No. 2347 requires that the terms of court for the Fourteenth District shall be as follows: 'At Lucena on the first Tuesday of January, July and November, and at Boac, subprovince of Marinduque, on the second Tuesday of March and August.' Notwithstanding the fact that the court is required to hear and determine the contest in the judicial district in which the election was held regardless of whether it be at the time holding a regular or stated term, yet no one will contend that the judge must adjourn court in the province or subprovince and go to another for the sole purpose of hearing a municipal election contest on a date fixed by one of the parties. The creation of

such a condition of affairs can not be attributed to the Legislature. The 'notice' must, therefore, necessarily be a notification of the motion of test and serves the purpose of a citation or summons."

This argument, it seems to me, involves several misconceptions both of law and fact and some confusion as to procedure and the manner of bringing on cases for hearing in Courts of First Instance. So far as I can see there can be no reason for asserting that, because a certain judicial district may comprise two provinces, it would be useless to serve the notice of motion with the moving papers. What possible connection is there or can there be between service of a notice of motion and the fact that a judicial district contains more than one province? Why should it "be a useless procedure" to serve a notice of the hearing of the motion with the motion papers "because the judge of the district might be holding court in some other province?" Suppose he is; cannot the moving party notice the motion anywhere in the judicial district? Section 27 provides expressly that he may. The fact that a contest occurs in a town in Marinduque does not prevent the trial of the contest in Batangas, the two provinces constituting one judicial district. Indeed, the purpose of the election law might well require it if circumstances demand the prompt resolution of the contest. A contest arising in Batangas in June would not have to be delayed till December, when it could be tried in Marinduque in August. Moreover, the contest may be heard at a special term of the court; and it would be well within the power of the court to suspend, and the public interests might demand it, a regular term of court in Batangas for a few days to hear an election contest in Marinduque.

The argument here offered by the court could be offered as effectively against the service of a notice of trial in an ordinary action. The two-province argument, and the argument that the "judge of the district might then be holding court in some other part of the province or subprovince," apply equally well to ordinary actions.

I cannot conclude this discussion of the argument of the court without adverting particularly to this statement found in the quotation from the court's opinion above set out: "Notwithstanding the fact that the court is required to hear and determine the contest in the judicial district in which the election was held regardless of whether it be at the time holding a regular or stated term, yet no one will contend that the judge must adjourn court in the province or subprovince and go to another for the sole purpose of hearing a municipal election contest on a date fixed by one of the parties. The creation of such a condition of affairs cannot be attributed to the Legislature." Just what "condition of affairs" is it that the court refers to here which cannot be "attributed to the Legislature?" Is it the fact that two provinces are put in one judicial district? But the Legislature indisputably did that. Is it the fact that the contest may arise in one part of the province while "the judge of the district might be holding court in some other part of the province?" But the Legislature as indisputably did that by providing that Courts of First Instance shall hold court only in the capital of the province, thus making it necessary that every case, of whatever nature, arising Outside of the capital, go to the capital to be heard. What argument can be deduced why this provision should not apply to election contest? Is "such a condition of affairs" due to the fact that, at the time the contest should be heard, the court might be holding a regular term of court in another province and that "he must adjourn court in the province or subprovince and go to another for the sole purpose of hearing a municipal election contest?" This condition, it seems to me, is essentially a creation of the imagination. There is nothing requiring the assumption that a court must adjourn court in one place and convene a session in another at the nod of a party to an election contest. If at the time the motion must be noticed for hearing the court is holding either a regular or special term in a province other than that in which the contest arises, but in the same judicial district, the moving party may notice the motion for the term then being held in the other province. If there are practical reasons why the hearing should be held in the province in which the contest arose the parties may agree or the court may require that the contest be heard in the province where it arose either at a regular or special term to be fixed by the court and held at a time convenient for the parties and conformable to the public interest. A careful practitioner would, if necessary, consult the court before noticing his motion and endeavor to make such arrangements as to the time and place of hearing as were agreeable to all parties interested.

But, at the most, these are questions of mere convenience, the settlement of which does not require the conversion of a motion into an action or justify the virtual repeal of an act of the Legislature which controls the subject in a direct, clear, and specified manner; for, to change a motion into an action under a statute which provides, as does sec. 27 of Act No. 1582, that election contests "shall be upon motion \* \* \* and not upon pleadings or by action," is to repeal the statute in effect.

It would seem that the court, when it made the argument of convenience and asserted that it would be impossible for a notice of motion to be served with the moving papers and that, for that reason among others, the motion was impossible in election contests and that they must, as a necessary consequence, proceed by action, overlooked several important provisions of statute. Under Act No. 2347 the Court of First Instance of every judicial district is open for the trial of cases substantially every working day of the year (sec. 5). No cause need wait for lack of a court in which to be heard. While some causes must wait on others of necessity, as not all can be heard at once, that does not mean that an election contest cannot be heard as a motion but must proceed substantially as an ordinary action. It does not mean that the notice of motion cannot be served with the moving papers as the court argues. It means the precise contrary. If courts are open the year around there can be no difficulty in noticing a contest for a hearing at any time.

It would seem that the court has overlooked also that provision of the election law under which this court has held election contests to be preferred causes which are, therefore, entitled to be heard in advance of the ordinary case (sec. 27, Act No. 1582, as amended). If this be so, why cannot the motion be noticed for any day? The case is a preferred one and the statute declares that it "shall be heard and determined by the court in the judicial district (not province) in which the election was held regardless of whether said court be at the time holding a regular or stated term;" and that "the contest shall be filed with the court within two weeks after the election and shall be decided by the same as soon as possible after the hearing of the contests" (sec. 27, Act No. 1582, as amended). The court seems to have confused the noticing of the motion with the fixing of a specific date for a hearing. The two are synonymous only when the convenience of the court permits it. The notice of motion states when the motion will be presented to the court not when the court will hear it. It will be heard on the date mentioned in the notice of motion or, if not on that day, "as soon thereafter as counsel can be heard," that is, the court will, if circumstances require, set the hearing for a later day.

The court has also overlooked another provision of the election law which, in my opinion, is quite decisive of the matter in hand if language is to have meaning. Section 27 of Act No. 1582, as amended, provides, as we have seen, that "all proceedings under this section shall be upon motion with notice of not to exceed twenty days to all candidates voted for \* \* \*." The motion mentioned in the statute is a motion with notice. There is no necessary interim between the motion and the notice. The statute marches rapidly. The contest must be filed within two weeks. Notice of motion must be served with the moving papers. The notice to the respondents cannot exceed twenty days. It may be only one day; but in no event can it exceed twenty. The purpose of the statute is clear—the prompt determination of the contest. Now, if the contest may be considered as a complaint in an action, and the notice of motion a notice of trial and note of issue combined, we can readily see how the intention of the Legislature will be frustrated. The case will proceed as an ordinary action with the delays which may accompany that most formal of all court proceedings.

The court saw, of course, this difficulty and sought to overcome it in what is to me a strange way. It must be remembered that the court destroys the motion and with it the notice of motion which is served with the moving papers and substitutes in its place what it still calls a "motion of contest" but which it says is in all essential respects a complaint in an action. From this it results that the contest, which must be filed within two weeks after election, is not what the statute expressly makes it, the moving papers in a motion, but a complaint which must be

served not as a notice of motion but as complaint. Time must, as the court admits, be given, therefore, to answer or demur and, after the case is at issue, it must be noticed for trial in the regular way. This procedure, of course, follows that in actions and the expedition which is one of the prime objects of the Election Law is lost. To remedy this the court does the strange thing to which I have already adverted. It holds that the contest, i. e., the complaint, must be served on all of the respondents within twenty days from the filing of the contest in the Court of First Instance. It justifies its conclusion by citing that provision of section 27, already so often referred to, which declares that "all proceedings under this section shall be upon motion with notice of not to exceed twenty days to all candidates voted for \* \* \*." This provision of the court is construed to be a limitation upon the contestant of the same nature as the limitation of two weeks within which the contest must be filed, with the result that, if service of the contest, i. e., the complaint, is not made within that time on all the persons voted for, the court is without authority to proceed and the contest must be dismissed for lack of jurisdiction. This construction is incomprehensible to me. It is entirely clear to me that the notice of not to exceed twenty days is a privilege extended or right granted to the person served which gives him his opportunity to prepare. It is not a limitation on the contestant but a privilege to the contestee. It is true that it limits the length of the notice to twenty days; but that limitation applies to the respondent and not to the contestant. In other words, the provision does not require the contestant to serve within not to exceed twenty days, but, rather, requires the respondent to answer within not to exceed twenty days. It is no more a limitation on the contestant's time to serve than is the requirement in the ordinary summons that the defendant appear and answer within twenty days a limitation on plaintiff's time to serve the summons. The provision under consideration simply means that when the contestant gives notice to the respondent it shall not exceed twenty days; but it does not mean that he must give notice within twenty days after filing his contest on pain of dismissal of his contest. A rule or statute to the effect that a motion may be made to a court on a notice of ten days to the adverse party states a perfectly plain requirement thoroughly understood by every court and lawyer. The election law says that a motion can be made to a court on not to exceed twenty days notice to the adverse party. Is this not equally plain? And can it be held to be statute of limitations affecting the moving party? To hold that the provision of section 27 above quoted requires the contestant to serve his contest on the other persons voted for within twenty days after he files his contest on pain of having his contest dismissed, is, it seems to me, a perversion of the plainest language.

I believe, also, that the court is confused as to when and how the court acquires jurisdiction of the subject-matter in an election contest. The court says: "The 'motion' of contest when filed within the time required by the Acts, gives the court jurisdiction of the subject-matter of the proceedings, provided the necessary jurisdictional facts are alleged." In the discussion of this statement, it must be remembered that this court has heretofore held many times that the words "contest/\* "motion," "motion-contest," and "motion of contest," as used in the Election Law and by courts and lawyers, are synonymous; and that it is the practice of the bar to denominate the contest a "motion-contest." It must also be remembered that this is the first decision to divorce the motion and the notice of motion and to hold that a motion can exist effectively and proceed as such without a notice of motion and be treated the same in all essential respects as a complaint in an ordinary action. It should also be kept in mind that this decision holds that the contest must be filed and served and the respondent must answer before any notice can be served on him advising him of the contestant's intention or requiring him to appear or answer. Keeping these things in mind, let us return to the quotation. How does the filing of the "motion of contest" give the court jurisdiction of anything? Merely filing a statement of facts with a clerk of a court means nothing. Before jurisdiction over a given action or proceeding can be acquired such action or proceeding must be begun in the manner provided by law. It is the beginning of an action or proceeding which confers jurisdiction. An election contest is not begun by filing the contest (moving papers or complaint) with the court; but "upon motion with notice of not to exceed twenty days to all candidates voted for." The proceeding is not commenced until the statute has been complied with in every essential particular; and this court has held again and again that failure to

notify any one of the "candidates voted for" prevents the jurisdiction of the court from attaching even as to those actually served and the contest must be dismissed as to all as there is no power in the court to proceed. The mere filing of the contest, therefore, signifies nothing so far as the beginning of the proceeding and the jurisdiction of the court are concerned. Nevertheless, the court holds in this case that this is the act which begins the contest and confers jurisdiction of the subject-matter. This must be so for, inasmuch as jurisdiction does not attach in a particular action or proceeding until that action or proceeding has been commenced, it must follow that the court holds that the filing of the contest is the commencement of the contest. This conclusion is in conflict with the prior decisions of this court already referred to which hold uniformly that jurisdiction does not attach until all the candidates voted for are served as required by the statute. It is true that Courts of First Instance have jurisdiction by statute over election contests; but this does not mean that a particular Court of First Instance has by virtue of the statute jurisdiction over a particular contest. That is acquired only by virtue of beginning a particular contest in a particular court in the manner prescribed by the statute. There is no contest until one is begun; and until there is a contest no court can have jurisdiction over it.

I believe, also, that there is confusion in the mind of the court when it discusses the jurisdiction of the Court of First Instance over the person. After stating the manner in which jurisdiction over the subject-matter is conferred on the court, the opinion of the court continues: "The latter (jurisdiction of the person) can only be acquired by giving the candidates due and timely notice of the motion of contest." Later in the opinion we find this: "The 'notice' must, therefore, necessarily be a notification of the motion of contest and serves the purpose of a citation or summons. When the motion is filed and the notice is thus given, the contest is then in court \* \* \*." What is this notice, its nature and character, and where is authority for it found in the law? In the short space of the sentences quoted the court, intending to refer and evidently thinking it did refer to the same notice, has described two separate and distinct notices instead of one, each being of a nature and having a purpose wholly different from the other. "A notification of the motion of contest" is a different thing from "a citation or summons," particularly when, as the court holds, no day can be set for the presentation of the motion, nor can the respondent be commanded to do anything by such notice, nor can he suffer anything by a refusal to heed it. "A notification of the motion of contest" does not notify the adverse party of what the contestant proposes to do, of when he proposes to do it, nor does it command or require or notify the respondent that he does something either within or without a specified time on pain of being in default or of loss of rights. "A notification of a motion of contest," therefore, consists simply of a statement of the contestant to the respondent something like this: "Please take notice that I have this day filed with the court of First Instance of the \_\_\_\_\_th. judicial district an election contest with a copy of which you are herewith served." Such a notice means nothing to the person on whom it is served, places on him no obligation to act, produces no effect as to his rights, and leaves the contest right where it was before the notice was served. It is impossible to conceive that such a notice "serves the purpose of a citation or summons." Every citation or summons commands or requires the person to whom it is directed to do something, and to do that something within a time specified in the process on pain of being declared in default. The "notification of the motion of contest" does none of these things. What duty does such a notice lay on the adverse party? What is there in it which he must obey? What will or can be done to him or to his rights if he pays no attention to it? If upon such a notice any action should be taken prejudicial to his rights such action would be void as having been taken without due process of law. A summons requires the defendant "to appear or answer within twenty days, etc." and states that, on failure to do so, "judgment will be taken by default for the relief demanded in the complaint," A "citation" is in all essential respects the same. Does either of them bear the slightest resemblance to the "notification of the motion of contest" created by the court and heralded by it as the process by which the respondent is "brought into court?"

Speaking further of the notice the court says: "When the motion is filed and the notice thus given, the contest is

then in court \* \* \*." But where is the respondent? Is he "in court?" If so how did he get there? Who brought him in? It means little to say that the contest is in court. The question is: Is the respondent in court? Could a judgment by default be legally taken against him under the notice which the court says he shall have? Certainly not. He is not in court and a thousand notices of that sort could not bring him in.

All this confusion, misapprehension, and error is brought about by holding that an election contest must proceed by action instead of by motion; by a refusal to follow the statute when it said, and these words cannot be quoted too often, "all proceedings under this section shall be upon motion \* \* \* and not upon pleadings or by action." (Sec. 27, Act No. 1582, as amended.)

The procedure by motion is very simple and effective. The motion (contest), that is, the moving papers, are filed. They are immediately served by copy on the persons receiving votes for the office contested together with a notice stating when the motion will be presented to the court. Under the procedure in motions this is notice to the party that, if he does not appear on the day set the motion will proceed without him and that the contestant will, if he shows himself entitled thereto, obtain the relief sought in his moving papers. This notice gives the court power to proceed when its service is duly proved. This and not that described by the court is the notice which takes on some of the characteristics of a summons. It calls the respondent to appear and show cause or to answer on or before a certain day and tells him what the consequences will be if he does not do so.

Finally, I think the court has overlooked this very important feature of an election contest: It is, in real sense, a continuation of the election—at least of that part of the election which begins immediately on the closing of the polls. It is a continuation of the count. It must not be forgotten that, in election contests, the Court of First Instance is, in a very real and important sense, an election official and not a court in the broad acceptance of the term. That this is so is shown by the fact that this court has held that the election law declaring that the judgments of Courts of First Instance in election contest are final and unappealable is not in violation of the Act of Congress of July 1, 1902, giving appeals to this court from all judgments of Courts of First Instance in civil cases. On the other hand, this court has also held that a statute prohibiting appeals to this court from final judgments of Courts of First Instance in cases originating in justices' courts was void and of no effect as it was in violation of said Act of Congress giving appeals from all judgments of Courts of First Instance in civil cases. The ultimate basis of the decision holding the statute valid which prohibited appeals in election cases must be that stated in my concurring opinion in that case, namely, that the rights passed upon by a Court of First Instance in election cases do not belong to that class of rights which the Act of Congress of July 1, 1902, protected and safeguarded by providing for appeals to this court in actions wherein they were adjudicated; but that the method of adjudicating that class of rights was left to the local Legislature and that the courts were bound by its decrees. That this is so is evident from the fact that the Act of Congress granting the right of appeal to this court from the judgments of Courts of First Instance in all civil cases must be held to have referred to and covered not only the judgments which Courts of First Instance could then pronounce, but all judgments which they might, by future legislation, be authorized to pronounce, so long as, in pronouncing those judgments, they were acting as courts in strict sense. In election contests Courts of First Instance are not acting wholly as courts, but, in some aspects, as election officials. They are not dealing with that class of rights with which they were dealing at the time the Act of Congress was passed. The Collector of Customs administers the Chinese Exclusion Acts. If his powers and duties in that regard were turned over to the Court of First Instance of Manila, could it be successfully maintained that an order of that court denying the application of a Chinese alien for permission to enter the country would be appealable to the Supreme Court under the Act of Congress of July 1, 1902? No. While it acts as a court in name, in reality it exercises functions of an administrative officer. Thus, while in election contests the Court of First Instance acts as a court in name, and, in fact exercises some judicial functions, nevertheless, the real character of the part which it plays is administrative. The duties which the Court of First Instance performs could as well have been left to a clerk in the

executive department or to any other employee or official of the Government. Such is not the case, however, with regard to those duties imposed upon the courts by the Act of Congress of July 1, 1902. None but the court can perform those; and an attempt of the local Legislature to impose them on a member of another department of the Government would be futile.

The election contest being a continuation of the election, what more natural than a motion to bring the election up for review? Why an action? The proceeding is already in course and there is no need to begin another. A motion in the same proceeding is far more appropriate and useful.

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