

BERNABE FLORES, PROTESTANT AND APPELLANT, VS. JOSE ZURBITO ET AL., PROTESTEES. JOSE ZURBITO, APPELLEE.*G.R. No. 12890. March 08, 1918*

Ponente: JOHNSON, J.

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This is an appeal from an order dismissing an election protest. The only question presented is: Whether or not the protestees had been given legal notice of the protest presented by the protestant and appellant? If that question is answered in the affirmative, then the judgment of the lower court must be reversed and the cause remanded with direction to the lower court to reinstate the same and to proceed to a determination of the protest upon its merits. Upon the other hand, if said question is answered in the negative, then the judgment of the lower court must be affirmed.

This is the second time the parties hereto have been before this court in relation of the said election protest.[1] In their first appeal the present appellant alleged that the lower court had deprived him of the right to be heard by dismissing his protest upon the ground that the same had been signed by his attorney instead of by himself personally. This court, upon a consideration of the question presented in that appeal, following a decision theretofore rendered in the case of *De Castro vs. Salas and Santiago* (34 Phil. Rep.; 818), revoked the order of dismissal and ordered that the record be returned to the lower court with direction that said action be reinstated and that the lower court proceed to hear said protest upon its merits. The cause was remanded to the lower court in accordance with said order. It was reinstated, a time was set for trial and witnesses were subpoenaed. At the time fixed for the trial Jose Zurbito presented a motion for dismissal of the protest upon the ground that all of the candidates who had been voted for, for the office of governor, had not been given notice of said protest. Upon a consideration of that motion the lower court found that the said candidates had not been given legal notice of said protest and dismissed the same with costs against the protestant. From that order the protestant appealed to this court. The appellant contends that the notice required by law had been given and that his protest should have been heard upon its merits.

The facts pertinent to the question presented by the appellant are undenied and are as follows: That an election was held in the Province of Sorsogon on the 6th day of June, 1916, for the office of governor of said province; that at said election Bernabe Flores, Jose Zurbito, Antonio Rocha, and Rosendo Gabionsa were candidates for the office of governor; that at the close of said election the votes were canvassed and Jose Zurbito was proclaimed duly elected by the provincial board of canvassers on the 8th day of July, 1916; that the said Bernabe Flores on the 19th day of July, 1916, presented a protest in the Court of First Instance against said election, alleging that many frauds had been committed and prayed for a recanvass of the votes and an investigation of said frauds; that notice of said protest was given to Jose Zurbito, Antonio Rocha, and Rosendo Gabionsa by sending to each of them a copy of the same by registered mail (see pp. 93, 94 and 127 of record) which was received by each of them; that in addition to said notice by registered mail a copy of the protest was delivered to the appellee Jose Zurbito and received by him personally (Exhibit C, p. 95) ; that Antonio Rocha and Rosendo Gabionsa failed to

appear and answer or defend said protest in any manner whatsoever at any time during the pendency of the action in the court below; that a copy of said protest was delivered to Jose Zurbito and received by him personally on the 27th day of July, 1916, (Exhibit C, p. 95) ; that on the 25th-day of July, 1916, the said Jose Zurbito appeared in court and presented a motion in said protest relating to the custody of the ballot boxes during the pendency of said protest (p. 25), which motion was granted by the court on the same day (p. 26) ; that on the 27th day of July, 1916, Jose Zurbito again appeared in court, and without making any pretension whatever that he had not appeared in said court for the purpose of defending the protest, presented another motion praying that the same be dismissed for the reason that it was signed by the attorney for the protestant and not by the protestant himself (p. 30) ; that on the 7th day of August, 1916, after hearing the respective parties, Fernando Salas, judge, granted said motion and dismissed said protest with costs against the protestant; that from that order the protestant appealed to the Supreme Court and obtained a reversal of the same by a decision of the Supreme Court of the 27th day of December, 1916, (p. 107) ; that the cause was remanded to the lower court with direction that the protest be reinstated and that the court proceed to hear the same upon its merits; that at the time set for the trial after the reinstatement of the cause Jose Zurbito again appeared and presented another motion praying that the protest be dismissed because proper notice had not been given to the protestees, which motion was granted on the 16th day of March, 1917, and the present appeal was perfected from that order.

While the law provides that the mode of procedure, in election contest, shall be "upon motion with notice" (Sec. 27, Act No. 1582; sec. 2, Act No. 2170; sec. 578, Act No. 2657; sec. 481, Act No. 2711) it does not contain any provision as to the method of giving notice. And while it has been held, in order to more conveniently prove the fact that notice had been given, that the provisions of Act No. 190 (section 396) should be followed, it has never been held that the notice of the protest must be given in accordance with the provisions of said Act (No. 190). (Campos vs. Wislizenus and Aldanese, 35 Phil. Rep., 373.) While service of a copy of the protest and notice of the same is important and necessary, the receipt of the protest and the notice may be waived by the protestee. If he voluntarily appears, by a general appearance, without specifically and explicitly objecting to the lack of notice, etc., he thereby gives the court jurisdiction over his person, and an objection thereafter made upon the ground that no notice was received will not avail him. It is then made too late. He has given the court jurisdiction over his person.

A voluntary appearance is a waiver of the necessity of a formal notice. An appearance in whatever form, without expressly objecting to the jurisdiction of the court over the person, is a submission to the jurisdiction of the court over the person. While the formal method of entering an appearance in a cause pending in the courts is to deliver to the clerk a written direction ordering him to enter the appearance of the person who subscribes it, an appearance may be made by simply filing a formal motion, or plea or answer. This formal method of appearance is not necessary. He may appear without such formal appearance and thus submit himself to the jurisdiction of the court. He may appear by presenting a motion, for example, and unless by such appearance he specifically objects to the jurisdiction of the court, he thereby gives his assent to the jurisdiction of the court over his person. When the appearance is by motion objecting to the jurisdiction of the court over his person, it must be for the sole and separate purpose of objecting to the jurisdiction of the court. If his motion is for any other purpose than to object to the jurisdiction of the court over his person, he thereby submits himself to the jurisdiction of the court. (Handy vs. Insurance Co., 37 Ohio St., 366; Elliott vs. Lawhead, 43 Ohio St., 171; New Jersey vs. New York, 6 Peters [U. S.], 323; Livingston vs. Gibbons, 4 Johnson's Chancery [N. Y.], 94; Fitzgerald etc. Co. vs. Fitzgerald, 137 U. S., 98.) The taking of any proceedings on the part of the defendant, other than a special appearance or a motion or plea objecting to the jurisdiction of the court, is equivalent to a general appearance and is a submission of the defendant's person to the jurisdiction of the court. (New Jersey vs. New York, 6 Peters [U. S.], 323; Texas etc. Co. vs. Saunders, 151 U. S., 105:) An appearance in court, either in person or by counsel, for any purpose other than

to expressly object to the jurisdiction of the court over the person, waives want of process and service of notice. Such an appearance gives the court jurisdiction over the person. (Henderson vs. Carbondale: etc. Co., 140 U. S., 25; Rhode Island vs. Massachusetts, 12 Peters [U. S.], 657.) A special appearance by motion made for the purpose of objecting to the jurisdiction of the court over the person will be held to be a general appearance if the party in said motion should, for example, ask for a: dismissal of the action upon further ground that the court had no jurisdiction over the subject-matter. Elliott vs. Lawhead, 43 Ohio St., 171.) In the present case, Jose Zurbito appeared in court on three different occasions; first, to unake a motion relating to the custody of the ballot boxes during the pendency of the action; second, to make a motion to dismiss the protest upon the ground that the same had not boen signed by the protestant personally, and third, to dismiss the protest upon the ground that he had not been duly.notified of the same. Each of the first and second appearances were sufficient to give the court jurisdiction over his person and authority to decide the questions presented. With reference to his third appearance the record shows by Exhibit C that he had actually received notice of the protest together [with] a copy of the protest filed in court. His appearance without objecting to the jurisdiction of the court waived all objections to the form and manner of service of notice. (Provident etc. Association vs. Ford, 114 U. S., 635, 639.)

Considering", therefore, (a) that all of the candidates received actual notice of the protest as well as a copy of the protest, and (b) that Jose Zurbito not only received actual notice of the protest together with a copy of the same, but actually appeared in court and thereby gave the court jurisdiction over his person, it is hereby ordered and decreed that the judgment dismissing the protest be revoked and that the cause be remanded to tjie court whence it came with direction that said protest j be reinstated for the purpose of deciding the issues presented by the same upon their merits. And without any finding as to costs. So ordered.

Arellano, C. J., Torres, Carson, Araullo, Street, Malcolm, Avanceña, and Fisher, JJ., concur.

[1] R. G. No. 12166, decided December 27, 1916, not published.

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