

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. JOSE TENORIO, DEFENDANT AND APPELLANT.*G.R. No. 13107. October 13, 1917*

Ponente: JOHNSON, J.

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This is a motion to dismiss the appeal for the reason that the appellant did. not comply with the provisions of section 45 of General Orders No. 58, in that he failed to file his notice of appeal with the clerk of the court in which the judgment was rendered, or to give notice by serving a copy thereof upon the adverse party or his attorney.

We have held in numerous cases that the appeal in a criminal case must be perfected in the manner and form prescribed by said section 45 of General Orders No. 58. (U. S. vs. Flemister, 1 Phil. Rep., 317; U. S. vs. Perez, 1 Phil. Rep., 322; U. S. vs. Recano, 4 Phil. Rep., 91; U. S. vs. Torrero, 8 Phil. Rep., 88; U. S. vs. Rota, 9 Phil. Rep., 426; U. S. vs. Court of First Instance of Manila, 24 Phil. Rep., 321; U. S. vs. Enriquez, 36 Phil. Rep., 725.)

Said section 45 provides that "An appeal shall be taken by filing with the clerk of the court in which the judgment or order was rendered, or with such court, a notice stating the appeal, and by serving a copy thereof upon the adverse party or his attorney." Said section is almost an exact copy of section 1240 of the Penal Code of the State of California and was evidently taken from said Penal Code. Said section (1240) provides that "an appeal is taken by filing with the clerk of the court in which the judgment or order was entered, a notice stating the appeal from the same, and serving a copy thereof upon the attorney of the adverse party."

We have heretofore held that we were justified in following the interpretation given by the Supreme Court of the State from the statutes of which the provisions of our own laws were copied. (Castle Bros., Wolf & Sons vs. GoJuno, 7 Phil. Rep., 144; Compania General de Tabacos vs. Trinchera/7 Phil. Rep., 689.) Examining the interpretation given by the Supreme Court of California of said section 1240, we find that that court has held that the transcript on appeal should show that the notice of appeal has been both served and filed in accordance with the provisions of said section. (People vs. Phillips, 45 Cal., 44; People vs. Clark, 49 Cal., 455; People vs. Bell, 70 Cal., 33.)

A recital in the appeal that a notice of appeal has been served and filed is no evidence that an appeal has been taken. (People vs. Phillips, supra; People vs. Colon, 119 Cal., 668.)

The notice of appeal must be served and filed. (People vs. Ah Yute, 56 Cal., 119.)

When no notice of appeal is given, or no record that any was given appears to the Supreme Court, the cause will be stricken from the calendar, there being no appeal taken. (People vs. Pico, No. 3017, Supreme Court of California, decided in the year 1872.)

In the case of Hunter vs. Territory (36 Pac, 175), a motion was made by the Attorney-General to dismiss the appeal upon the ground that no notice of appeal, as required by the Penal Code, was filed in the court below. In

that case the record shows that a minute entry in the record was made reciting that the attorney for the appellant, in open court, gave notice of appeal to the Supreme Court of the territory of Arizona. The Penal Code of the Territory of Arizona (section 1866) provides that "An appeal (to the Supreme Court of the Territory) is taken by filing with the clerk of the court, in which the judgment or order appealed from is entered or filed, a notice stating the appeal from the same * * *." Said section was taken, according to said decision, from the Penal Code of California (1240). The court, in passing upon said motion, said:

"It is elementary law that where the statute points out a particular mode for taking an appeal that mode must be strictly adhered to in order to confer jurisdiction upon the appellate court. It is obvious that giving notice in open court that appellant intends taking an appeal is an essentially different proceeding from filing such notice with the clerk of the court. The word 'filing,' as used in the section quoted, can be construed only as requiring a placing or depositing with the clerk of a written notice of intention to take an appeal."

The motion to dismiss was granted. (May vs. Territory, 36 Pac, 175; Howard vs. Territory, 36 Pac, 175.)

In the present case an objection was made in the court below that the appellant had not complied with said section 45; and his attorney was given due notice of said objection. When the motion was presented in the Supreme Court to dismiss the appeal for the reasons above stated, the attorney for the defendant and appellant was again notified of the grounds upon which the said motion was based. Neither in the lower court, nor in this court, has the appellant attempted to show in any manner whatever that he complied with the provisions of said section (45).

Not having perfected the appeal in the manner prescribed by the law, the motion to dismiss the same is hereby granted, with costs. So ordered.

Arellano, C. J., Araullo, Street, and Malcolm, JJ., concur.

Motion granted.

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