

GREGORIO LITUAÑA AND FABIAN CALICA, PLAINTIFFS AND APPELLANTS, VS. SEVERINO OLIVEROS, DEFENDANT AND APPELLEE.*G.R. No. 14289. September 23, 1918*

Ponente: FISHER, J.

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Defendant and appellee moves the court to dismiss the bill of exceptions in this case. In support of his motion he alleges, and it so appears from the bill of exceptions, that the judgment of the court below was rendered on September 20, 1917; that plaintiffs' motion for a new trial was denied October 20, 1917; that plaintiffs and appellants excepted to the order denying their motion for a new trial and gave written notice of their intention to appeal on October 25, 1917; that the bill of exceptions was presented to the lower court November 13, 1917. It does not appear, nor is it contended, that any extension of the term for the filing of the bill of exceptions was granted. The mere statement of these facts is sufficient to show that the motion must be granted. (*Lim vs. Singian and Soler*, 37 Phil. Rep., 817.)

There is no force in the contention of the appellant that inasmuch as it does not appear that the clerk made a memorandum of appellant's intention to file a bill of exceptions (section 143, Code of Civil Procedure), there is no basis upon which to compute the term of ten days for the filing of the bill of exceptions. If the appellant gives verbal notice only of his intention to prepare and tender a bill of exceptions, it is no doubt the duty of the clerk and of the judge to make the memorandum required by the section above cited.. When the appellant, as in the instant case, following the customary and correct practice, presents, in writing, notice of his intention to appeal, tftf filing of this notice by the clerk, together with his filing mark placed thereon, is equivalent to the memorandum, and from the date of the presentation of such written notice, the term for the presentation of the bill of exceptions commences to run.

As it clearly appears that the bill of exceptions was filed too late, and that the judgment had become final, the court below should have refused to allow and certify the bill of exceptions. It is true that in the case of *Fischer vs. Ambler* (1 Phil. Rep., 508), and the decisions in which the rule there laid down has been followed, it was said that it is the duty of the judge to allow and certify the bill of exceptions in every case, however tardy its presentation may have been. The reason upon which this rule rests is that it is incumbent upon this Court to determine in each case its own jurisdiction, and that to permit a judge of first instance to refuse to transmit a bill of exceptions would be equivalent to vesting in him the discretionary power to grant or deny an appeal. Beyond question it devolves upon this Court to determine finally whether its appellate jurisdiction has been invoked in due time and form; but to permit the judge of first instance to pass upon this question in the first place does not imply that this Court abdicates its authority, nor that the appellant is without remedy in the event of an erroneous or arbitrary ruling on the part of the judge of the lower court. Should the judge improperly refuse to allow and certify a bill of exceptions, the aggrieved party may make use of the remedy provided by section 499 of the Code of Civil Procedure.

In the majority of cases the determination of whether or not a bill of exceptions should be allowed involves nothing more than a computation of time, and when it appears, as in the present case, that the term within which the appeal may be taken has expired, we hold, expressly disapproving the contrary rule heretofore announced by this Court, that the judge of first instance may, in his discretion, refuse to allow or certify a bill of exceptions. Of course, whenever there is any doubt the better practice will be to allow and certify the bill of exceptions, stating therein the facts upon which the right to appeal depends (*Cabusao vs. Sheriff of Pampanga*, p. 631, post), but henceforth, subject to the provisions of article 499 of the Code of Civil Procedure, the allowance or disallowance of a bill of exceptions will depend, in the first place, upon the judgment of the lower court, with respect to the viability of the appeal.

The motion to dismiss is granted, appellant to pay the costs. So ordered.

Torres, Johnson, Street, Malcolm, and Avanceña, JJ., concur.

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