

**MARTA FONTANILLA, ASSISTED BY HER HUSBAND JOSE GABRIEL,
PLAINTIFF AND APPELLEE, VS. GREGORIO CASTILLO AND HIS WIFE
JUANA SALACUP, DEFENDANTS AND APPELLANTS.**

G. R. No. 18030. December 10, 1921

Ponente: JOHNSON, J.

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JOHNSON, J.:

In this case the appellee presented a motion asking for the dismissal of the appeal upon the ground that the bill of exceptions had not been presented "within ten day³ from the date of notice of the order denying the motion for a new trial."

It appears from the record that the decision was rendered by the lower court on the 28th day of February, 1921. On the 5th day of March, 1921, the defendants received notice of said decision and, on the same day, presented a motion for a reconsideration upon the ground that the decision was contrary to the weight of the proof adduced during the trial of the cause; and at the same time, and in said motion, stated that, if the same should be denied, he then announced his intention to appeal to the Supreme Court by means of a bill of exceptions. On the 11th day of March, 1921, the lower court denied said motion and the defendants were duly notified of said denial on the 18th day of March. On the 23d day of March the defendants duly excepted to the order of the judge denying their motion for a new trial. The bill of exceptions was presented on the 31st day of March, 1921.

The contention of the appellee is that, inasmuch as the defendants announced in their motion for a reconsideration their intention to appeal in case said motion was denied, the bill of exceptions should have been presented within ten days after notice of the order denying the said motion. In support of that contention the appellee cites the case of *Cabusao vs. Sheriff of Pampanga* (38 Phil. 631). Whatever was said in that case upon the effect of an "announcement of the intention to appeal" in the motion for a reconsideration, was more obiter dictum. It was not necessary to the decision in that case. That being so, and inasmuch as it is contrary to the general rule established by this court in the case of *Layda vs. Legazpi* (39 Phil., 83), we have no hesitancy in refusing to follow it—our reason being, that the appellant has a right to have the evidence examined by this court, and in order to do that, he must present an exception to the order of the court denying his motion for a new trial. (Subsection 2, section 497, of Act No. 190, as amended by Act No. 1596.) Under the rule laid down in said case and others, the appellant has five days within which to except and announce his intention to appeal after notice of the order denying his motion for a new trial, and then, ten days thereafter within which to present his bill of exceptions. That rule is well established and has been followed in literally hundreds of cases. The rule is so well established and has been followed so consistently that we cannot allow it to be annulled, especially by a mere obiter dictum, and especially when the obiter dictum recognizes that the rule announced is not a good practice. We think the rule announced in the case of *Layda vs. Legazpi*, *supra*, stated above, is the better practice and should not be disturbed.

Therefore, the motion to dismiss the appeal for the reasons given therein should be and is hereby denied. So ordered.

Araullo, C. J., Street, Avancena, Villamor, and Romualdez, JJ., concur.

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