

**BEHN, MEYER &#038; CO., H. MIJ., PLAINTIFF, VS. CARL ANTHOLTZ, DEFENDANT.***G.R. No. 29562. July 30, 1928*

Ponente: MALCOLM, J.

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This is a petition for a writ of mandamus under section 499 of the Code of Civil Procedure directed to the Judge of the court below presiding over the Second Branch of the Court of First Instance of Manila, commanding him to sign and certify the bill of exceptions presented by the defendant in the case of Behn, Meyer & Co., H. Mij. vs. Carl Antholtz.

The undisputed facts are the following: An ordinary civil action was commenced in the Court of First Instance on August 10, 1927. On December 31, 1927, the attorneys for the defendant received notice of the rendition of judgment in favor of the plaintiff. On January 26, 1928, defendant filed an exception to said judgment and a motion for a new trial. On February 14, 1928, the attorneys for the defendant were notified of the order of the court denying the motion for a new trial. On February 23, 1928, the bill of exceptions was filed in court.

The disputed fact is whether or not defendant's exception and notice of appeal was filed on February 20, 1928, or on February 23, 1928. After a careful investigation, the latter date was held the correct one by the trial judge. The conclusion of the presiding judge should be respected here. Mandamus cannot be used to review the action of an inferior tribunal in any matter involving the examination of evidence and the decision of questions of fact since such duties are *noti ministerial* in nature.

Accepting, therefore, the result of the investigation conducted by the trial court, we have this fact: The exception and notice of appeal was tendered by defendant nine days after receiving notice of the order of the court overruling the motion for a new trial. Planted thereon, the defendant advances the proposition that even if defendant had not presented any exception and notice of appeal, the presentation by him of a bill of exceptions within ten days from the date he received notice of the order of the court denying his motion for a new trial was a sufficient compliance with the requirements of the law in the premises. Plaintiff on the other hand relies on the well known case of *Layda vs. Legazpi* [1918], 39 Phil., 83).

In *Layda vs. Legazpi*, *supra*, this court announced certain rules relating to the periods within which bills of exceptions must be presented. It was said as to ordinary civil actions that "the aggrieved party has (a) thirty days within which to present a motion for a new trial; (b) that after notice of the ruling" upon his motion, he has five days within which to present 'notice of his intention to present a bill of exceptions;' (c) that after the presentation of 'notice of his intention to present a bill of exceptions' he has ten days within which to present his bill of exceptions (*Lim vs Singian and Soler*, *supra*); (d) that failure to comply with any of the foregoing requirements, within the various periods mentioned, will cause the judgment to become final, upon which a writ of execution may issue, and the presentation of a bill of exceptions thereafter will not give the appellate court jurisdiction; and (e) that each and all of said periods may be extended, by order of the court upon application made prior to the

expiration of the original period." The case of *Layda vs. Legazpi*, supra, has often been cited and followed.

For a correct understanding of the rules announced in *Layda vs. Legazpi*, supra, there should, however, be considered one prior and one later decision of this court. In *Luengo & Martinez vs. Herrero* ([1910], 17 Phil., 29), it was said that "the presentation of a bill of exceptions for approval, in due time, is equivalent to or involves an announcement of an intention to appeal." In *Pampolina and Vistal vs. Suiza and Osuna* ([1921], 42 Phil., 99) written by the same justice who was the author of *Layda vs. Legazpi*, supra, after making mention of the decision in *Layda vs. Legazpi*, supra, it was said: "If the party does not desire to have the evidence examined by the Supreme Court, then it is not necessary to present a motion for a new trial nor to make any exception to the ruling of the court thereon. In view of that fact, the courts, in many cases, have held that even though the defeated party presented a motion for a new trial, and even though he did not except to the order of the court, nor announce his intention to appeal, the Supreme Court would take jurisdiction over the appeal, providing the bill of exceptions was presented within ten days from the time of the notice of the order of the court denying the motion for a new trial, but that, in such a case, this court would not be justified in making an examination of the evidence." The clerk of the court has informed us that the expression used in *Layda vs. Legazpi*, supra, to the effect that failure to comply with any of the requirements, within the various periods mentioned, will cause the judgment to become final, upon which a writ of execution may issue, and the presentation of a bill of exceptions thereafter will not give the appellate court jurisdiction, has not been followed in practice in all of its strictness, as can well be understood by the observations made in *Pampolina and Vistal vs. Suiza and Osuna*, supra.

The notice of intention to present a bill of exceptions was not presented within five days in defiance of the threat contained in *Layda vs. Legazpi*, supra, as to what would happen to the excepting party in such a case. However, this defect was partially or totally cured by the tender of the bill of exceptions within ten days from the receipt of the notice of the order of the court denying the motion for a new trial. As mathematics will readily demonstrate in excepting, giving notice of intention to appeal, and presenting the bill of exceptions nine days after the denial of the motion for a new trial, the moving party aided rather than obstructed the speedy administration of justice. He had five days within which to announce his intention to appeal and ten days more within which to file his bill of exceptions, or a total of fifteen days. Instead of consuming this period, he used only nine days. As the purpose of the law is to provide a means to facilitate appeals, no rule however well intended should be permitted to override the spirit of the law to resurrect a technicality.

The rules promulgated in *Layda vs. Legazpi*, supra, are adhered to, with the qualification, that if the aggrieved party files the bill of exceptions within ten days from the time of the notice denying the motion for a new trial, the presentation of the bill of exceptions for approval is tantamount to an announcement of an intention to appeal, and the requirements of the law are substantially fulfilled. Accordingly, the bill of exceptions should have been received in the trial court for approval.

The question next suggests itself, if the failure of the losing party to except to the denial of the motion for a new trial for a period of nine days after receipt of notice, deprives the party appealing of the right to ask the Supreme Court to review the evidence adduced by the parties at the trial. It is true that the discussion of this aspect of the case could be avoided. Nevertheless, it would prove highly embarrassing to the parties in the preparation of their briefs not to know if they could raise and argue questions of fact. The question may as well be confronted now as later.

The Code of Civil Procedure provides in its section 142 that "the party excepting to the ruling, order, or judgment shall forthwith inform the court that he excepts to the ruling, order, or judgment, \* \* \*" On the doubtful assumption that this portion of the code is applicable, then it remains to be said that the expression "forthwith" is one which cannot be scientifically circumscribed. The term is elastic in nature. It is a relative one. Its meaning

varies with every case.

In this jurisdiction, "forthwith" has been held to mean within a reasonable time, which varies according to the circumstances (*Fischer vs. Ambler* [1902], 1 Phil., 508). In the cited case, this court avoided a definite ruling of whether a delay of thirteen days was unreasonable, this question being left for determination, if necessary, upon a motion to dismiss. In the same case, Mr. Justice Cooper, concurring, pointed out with what appears to be good reason that section 142 of the Code of Civil Procedure does not apply to an exception taken after trial to a final judgment, but was intended to apply to rulings made by the court in the progress of the trial. However, the learned Justice said: "If this section is not applicable there has been no particular time prescribed by a statute for the taking of the exception to the judgment, and in the absence of a fixed time the exception should be made within a reasonable time, which, in this character of case, would probably be held to mean at some time after the judgment and before the preparation and presentation of the bill of exceptions to the judge for his approval and signature."

Attached to the conceded fact that the exception to the denial of the motion for a new trial was made at the same time that the bill of exceptions was presented for approval within a period of nine days, under a liberal construction of the law if it be applicable, and under general principles if no law be applicable, we are unable to say that the exception was not made within a reasonable time.

The questions here involved were once described by a member of the court as "vexatious." That is putting it mildly. This court has solemnly deliberated on five occasions on a case which, if the law had been in any manner plain, could have been disposed of immediately without difficulty. Legislation amendatory of our adjective law is imperative to simplify and clarify procedure.

Writ granted as prayed without costs.

Avanceña, C. J., Villamor, Ostrand, Romualdez, and Villa-Real, JJ., concur.

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[1] On the same date motions to dismiss in cases of *Kui Pai & Go. vs. Dollar Steamship Line*, G. R. No. 30019, and *E. M. Bachrach vs. E. H. Teal and Teal Motor Co., Inc.*, Ohnick & McFie, attorneys for Theodore G. Davis, receiver, G. R. No. 30033, were denied.

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## CONCURRING

**STREET, J.:**

I concur since the majority of the court, apart from myself, agree in the conclusion reached. The point involved is one of practice, and I recognize the fact that the provisions of law applicable thereto are indefinite and obscure and really incapable of intelligent and precise application.

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