

IN RE WILL OF JOSE AVILA, DECEASED. ENCARNACION NEYRA, PETITIONER AND APPELLEE, VS. JOSE G. DE OCAMPO AND MAGDALENA GOMEZ, SURETIES AND APPELLANTS.

G.R. No. 43936. August 23, 1935

Ponente: VILLA-REAL, J.

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VILLA-REAL, J.:

This is a motion filed by Encarnacion Neyra to dismiss the appeal taken by Jose G. de Ocampo and Magdalena Gomez, sureties of Ana Gomez Vda. de Avila, administratrix of the estate of the deceased Jose Avila, from the order of the Court of First Instance of Manila of February 6, 1935, entered in civil case No. 27039, entitled "In re will of Jose Avila, deceased", directing the confiscation of the bond filed by the administratrix Ana Gomez Vda. de Avila, and from the order of April 2, 1935, directing the attachment of said bond, on the ground that the appellants did not include in their application for an appeal any petition to the court to fix the amount of the appeal bond nor did they present said bond to the court a quo for approval, as required by section 780 of the Code of Civil procedure and in pursuance of the doctrine laid down by this court in the case of Buenaventura and Del Rosario vs. Ramos (42 Phil., 490).

This appeal, sought to be dismissed, is provided for in section 783 of the Code of Civil Procedure, which reads as follows:

"Sec. 783. Appeals allowed in other cases affecting settlement of estates.—Any person legally interested in any other order, decree, or judgment of a Court of First Instance in the exercise of its jurisdiction in special proceedings in the settlement of the estates of the deceased persons, or the administration of guardians and trustees, may appeal to the Supreme Court from such order, decree, or judgment, when such order, decree, or judgment constitutes a final determination of the rights of the parties so appealing, and the appeal shall be effected in the manner provided in the two preceding sections: Provided, That no appeal shall be allowed from the appointment of a special administrator."

The first of the two sections referred to in the abovequoted section, which is pertinent to the case as to the manner of perfecting the appeal, is section 781 which reads as follows:

"Sec. 781. Appeal in case of allowance or disallowance of wills,—Any person interested in the allowance or disallowance of a will by a Court of First Instance, may appeal to the Supreme Court from such allowance or disallowance, by filing with the Court of First Instance an application for an appeal, within twenty-five (twenty) days after the entry of the judgment allowing or disallowing the will, and by the execution and filing of a bond such as is provided in the preceding section. Upon the filing of such appeal and bond, it shall be the duty of the clerk forthwith to transmit to the Supreme Court a certified copy of the will, and of all the evidence taken upon the trial, and of the judgment of the court thereon, and also the original will itself, in case any question of the handwriting is involved in the controversy. In case the original will is transmitted to the Supreme Court, the clerk of the Court of First Instance shall retain in his files a certified copy thereof."

Section 780, referred to in the section just quoted, reads as follows:

"Sec. 780. Bond for appeal.—Before an appeal is allowed the person appealing under the two preceding sections shall give a satisfactory bond to the court, conditioned that he will prosecute the appeal to effect and pay the intervening damages and costs occasioned by such appeal."

It is inferred from the above-quoted legal provisions that in order that an appeal from an order entered in special proceedings affecting the settlement of the estate of a deceased person may be allowed, it is necessary that the person appealing give a satisfactory bond to the court having jurisdiction thereof, conditioned that he will prosecute the appeal to effect and pay the intervening damages and costs occasioned by such appeal.

In the case of *Abello vs. Kock de Monasterio* (2 Phil., 188, decided on May 6, 1903), citing the case of *Hernaez vs. Norris* (2 Phil., 83, decided March 31, 1903), this court, through Justice Ladd, laid down the following doctrine:

"SPECIAL PROCEEDINGS; APPEAL BOND; SETTLEMENT OF ADMINISTRATOR'S ACCOUNT.—The law does not fix the time for filing a bond on appeal from an order settling an administrator's account, and where the lower court has not done so the appeal will not be dismissed, but an order will be made by the Supreme Court allowing time for the filing thereof." In the case of *Buenaventura and Del Rosario vs. Ramos* (42 Phil., 490, decided December 8, 1921), this court through Justice Johnson, laid down the following doctrine:

"CIVIL PROCEDURE; APPEAL IN SPECIAL PROCEEDINGS, WHEN AND HOW PERFECTED.—Appeals, in special proceedings, from judgments falling under sections 781, 782, and 783 of Act No. 190 must be perfected in the following manner : (a) The appellant must file with the Court of First Instance an application for an appeal within twenty days after the entry of the judgment appealed from. (Sec. 781, Act No. 190.) (b) The application for an appeal must contain a petition to the court to fix the amount of the appeal bond. (Sec. 780, Act No. 190.) The court should fix the amount of the bond at once, (c) After the amount of the appeal bond is fixed by the court, the appellant must present his appeal bond for the approval of the court, within a reasonable time thereafter, and not to exceed a period of five days. The court should act upon the bond at once, (d) After the approval of the appeal bond by the court, the appeal must be perfected in the manner provided for in section 783, in relation with sections 781 and 782 of Act No. 190, and Rule 16 (a) of the Court of First Instance, within a reasonable time, and not to exceed a period of ten days from the date of the approval of the appeal bond. (*Tindoc vs. Donato*, 40 Phil., 732.)"

In the body of the decision it is said: "

"* * * By virtue of section 783, in relation with section 781 of Act No. 190, the giving of a bond as a prerequisite to the perfection of the appeal. An appeal in cases like the present cannot be perfected without the giving of a bond to the satisfaction of the court (sec. 781). The bond cannot be given until the amount is fixed by the court, and the appeal cannot be perfected until the bond is approved."

It is clear, therefore, that under the doctrine laid down in the aforesaid case of *Abello vs. Kock de Monasterio* (2 Phil., 188, decided May 6, 1903), failure to file in the lower court an appeal bond in special proceedings, testate or intestate, and the approval of said appeal prior to the filing of the corresponding bond do not invalidate the appeal, but said bond may be filed within the period to be fixed by this court. About eighteen years later, or on December 8, 1921, it was held in the case of *Buenaventura and Del Rosario vs. Ramos* (42 Phil., 490), cited above, that the appellant, in his application for an appeal, must petition the court to fix the amount of the bond, and failure to file the same after its amount has been fixed prevents the perfection of the appeal. This latter doctrine, enunciated about fourteen years ago, has been followed invariably by this court in various cases, the most recent being the case of the Estate of John Northcott, deceased, G. R. No. 36868, wherein a motion to dismiss an appeal was filed on the ground that the appellant, in her application for an appeal, did not petition the court to fix the amount of the bond for the perfection of said appeal and said bond was not filed. This court, in granting said motion, entered the

following resolution: [1]

"Considering the motion of the attorney for the appellees in case G. R. No. 36868, E. C. Wells, etc. et al. vs. Petra R. Northcott, praying, for the reasons given, that the appeal interposed by the appellant, Petra R. Northcott, be dismissed; and considering the objection thereto interposed by the attorney for the appellant, and it appearing that the appellant failed! to ask the trial court to fix the amount of the appeal bond which had never been filed, and following the doctrine laid down in the case of Buenaventura and Del Rosario vs. Ramos (42 Phil., 490), motion to dismiss granted. After ten days let final judgment be entered dismissing the appeal with costs, and five days thereafter let the record be remanded to the court below,"

To change this latter doctrine and follow the former one now would introduce confusion into the jurisprudence to the prejudice of the interests of litigants who have followed it in their judicial cases for more than fourteen years.

For the foregoing considerations, and reiterating the doctrine laid down in the case of Buenaventura and Del Rosario vs. Ramos, *supra*, the motion is granted ordering the dismissal of the appeal interposed by the sureties Jose G. de Ocampo and Magdalena Gomez. So ordered.

Avanceña, C.J., Malcolm, Abad Santos, Hull, Vickers, Imperial, and Goddard, JJ., concur.

CONCURRING

RECTO, J.,

After full study of the legal question in issue, I have brought myself to subscribe to the majority view and to reconsider my former vote. The language of sections 783, 781 and 780 of the Code of Civil Procedure, which govern this particular case, is not hostile to the interpretation that the requisite appeal bond is not jurisdictional in nature and may be filed within the period fixed by the court a quo, or by the appellate court after the record has been transmitted to the latter. It was so held in early decisions of this court— in *Abello vs. Kock de Monasterio* (2 Phil., 188), and in *Hernaez vs. Norris* (2 Phil., 83). This interpretation finds authority in the above cited sections, wherein the legislator has fixed a definite period for the interposition of the appeal while it has prescribed none for the filing of the bond, making it plain thereby that the appeal is perfected by the timely filing of the application for an appeal even without giving a bond, subject however to the implied condition that the appeal will be deemed abandoned upon failure to file the bond within the period fixed by the court.

So logical an interpretation is furthermore in line with the liberal spirit underlying section 500 of said Code of Civil Procedure which provides that "no such dismissal shall be made for purely formal defects not affecting the rights of the parties, nor for any defect which can be removed, and the Supreme Court shall give such reasonable time as may be necessary, to remove such defect, * * * nor for any want of technical conformity to the laws or rules regulating the practice of carrying cases to that court, * * *." It was likewise held in the case of *Garcia vs. Ambler and Sweeney* (4 Phil., 81), that "it is the general and constant practice of courts to give every opportunity to the parties to have exceptions and appeals from reviewable rulings and decisions taken before the superior court, unless such action is manifestly contrary to the law, bearing in mind the provisions of section 2 of the Code of Civil Procedure."

Furthermore, a goodly number of decisions of the Federal Supreme Court and of those of some States of the Union can be cited in support of said interpretation:

"By section 1000 of the Revised Statutes the justice or judge is required when he signs a citation to take good and sufficient security that the appellant shall prosecute his appeal to effect, and, if he fail to make his plea good, answer all costs. The failure to take such security is an irregularity, but it does not necessarily avoid the citation. The security is required, however, in the due prosecution of the appeal; and if the case is docketed

here in time it will not ordinarily be dismissed because of the neglect or omission of the justice or judge to require the security until the appellant has been afforded a reasonable opportunity of curing the defect. The taking of security is not jurisdictional in its character, and its omission affects only the regularity of the proceedings. Such being the case, permission to supply it here may properly be given in the furtherance of justice." (Brown vs. McConnell, 124 U. S., 489; 31 Law. ed., 495, 497.)

"The allowance of the appeal by the court while in session and acting judicially, at the term in which the decree was rendered, constituted a valid appeal, of which the appellee was bound in law to take notice. The docketing of the cause in time, perfected the jurisdiction of this court. The giving of the bond was not essential to the taking, though it was to the due prosecution, of the appeal. It was furnished and accepted in this case before the cause was docketed here. Had this not been done we would have given the appellants leave to supply the omission before dismissing the appeal. All this was decided, on full consideration, in Peugh vs. Davis (110 U. S., 227; 28 Law. ed., 127)." (Dodge vs. Knowles, 114 U. S., 436; 29 Law. ed., 296, 297.)

"The appellate jurisdiction of the supreme court, in the revision of final judgments and decrees of the inferior courts, is derived from the constitution, * * * and is not restricted by the statutory provisions regulating appeals : the appeal, bond or security for costs, and certificate, required by the Code * * * are not jurisdictional facts, but merely the prescribed means by which each particular case may be brought under the pre-existing jurisdiction of the court." (Thompson vs. Lea, 28 Ala. [N. S.], 453.)

"After a careful consideration of the question in an early case (Thompson vs. Lea, 28 Ala., 453), this court held that a statutory bond is not necessary to confer power upon it to exercise its constitutional function of hearing cases on appeal from the circuit court, and of exercising 'a general superintendence and control of inferior jurisdictions.' * * * Such a bond is a creature of the statute, and not essential to jurisdiction of the court over a cause on appeal. It was therefore held that the absence of a bond is an irregularity which the appellee may waive, and does waive if upon notice of the appeal he interposes no objection on account of the irregularity, * * *. (L. & N. R. Co. vs. Lile, 154 Ala., 556; 45 So., 699)." (Murphy vs. Freeman, 70 A. L. R., 381, 383.)

"* * * if * * * through mistake or accident, no bond or a defective bond, has been filed, this court would not dismiss the appeal, except on failure to comply with an order to give the proper security within such reasonable time as it might prescribe. (Brobst vs. Brobst, 2 Wall., 96.) What is essential to an appeal is allowance, citation to the appellees, or equivalent notice or waiver, * * *. Security for prosecution should be taken by the judge on signing the citation; but if this duty be omitted or defectively performed, a remedy can be applied here * * *." (Seymour vs. Freer, 7 Wall., 311; 18 Law. ed., 564.)

"None of the objections to this appeal are, in our opinion, well taken, except the one which relates to the approval of the bond. That, we think, must be sustained. The security required upon writs of error and appeals must be taken by the judge or justice * * *. The judge has never acted; but as the omission was undoubtedly caused by * * * the court, * * * the case is a proper one for the application of the rule by which this court * , * * refuses to dismiss appeals and writs of error, except on failure to comply with such terms as may be imposed for the purpose of supplying defects in the proceedings. (Martin vs. Hunter, 1 Wheat., 361; Dayton vs. Lash [ante, 33])." (O'Reilly vs. Edrington, 6 Otto, 724; 24 Law. ed., 659.)

"* * * the prayer for the appeal, and the order allowing it, constituted a valid appeal. The bond was not essential to it. It could have been given here, and cases have been brought here where no bond was approved by the court below, and the court has permitted to the appellant to give bond in this court. (Ex parte Milwaukee R. R. Co., 5 Wall., 188; 72 U. S., XVIII, 676.) In the case of Seymour vs. Freer (5 Wall., 822; 72 U. S., XVIII, 564), the Chief Justice says, that if, through mistake or accident, no bond or a defective bond had been filed, this court would not dismiss the appeal, but would permit a bond to be given here * * * It is not, therefore, an indispensable part of an appeal that a bond should be filed; * * *." (Edmonson vs. Bloomshire, 7 Wall., 306; 19 Law. ed., 91, 92.)

"Another objection is, that it does not appear that the judge who granted the writ of error did, upon issuing the

citation, take the bond required by the 22nd section of the Judiciary Act.

"We consider that provision as merely directory to the judge; and that an omission does not avoid the writ of error. If any party be prejudiced by the omission, this court can grant him summary relief, by imposing such terms on the other party as, under all the circumstances, may be legal and proper." (*Martin vs. Hunter's Lessee*, 1 Wheaton, 304, 361.)

"Where the statute did not provide for filing the bond within any specified time and did not attach any consequences to a failure to file the bond, it was held that it was merely directory and did not go to the jurisdiction of the court." (3 C. J., 1108, citing *Rabe vs. Hamilton*, 15 Cal., 31.)

It appears, however, that section 780 of our Code of Civil Procedure, requiring the filing of a bond as an essential requisite to the allowance of an appeal in special proceedings, has been taken and literally copied, as almost all sections of said Code affecting inheritance, from the statutes of Vermont, corresponding exactly to section 2273 of the Revised Laws of said State; and it is an admitted principle of statutory construction that where a statute has been adopted from a foreign state which has placed a judicial construction thereon, it must be presumed that such construction has been adopted with the statute. (*Hernaez vs. Norris*, 2 Phil., 83; *Cerezo vs. Atlantic, Gulf & Pacific Co.*, 33 Phil., 425; *Tamayo vs. Gsell*, 35 Phil., 953; *Castle Bros., Wolf & Sons vs. Go-Juno*, 7 Phil., 144; *Cuyugan vs. Santos*, 34 Phil., 100; *Mitsui Bussan Kaisha vs. Hongkong & Shanghai Banking Corporation*, 36 Phil., 27; *Jocson vs. Soriano*, 45 Phil., 375; *U. S. vs. Dumandan*, 8 Phil., 61; *Hamilton vs. Russell*, 1 Cranch, 309; *Pennock and Sellers vs. Dialogue*, 2 Pet., 1; *Brown vs. Walker*, 161 U. S., 591; *Henrietta Min. & Mill, Co. vs. Gardner*, 173 U. S., 123; *Willis vs. Eastern Trust & Banking Co.*, 169 U. S., 295.) However, this rule is not applicable to the construction of the law by the courts of the State of origin after its adoption. (*Catheart's. Robinsonj* 5 Pet., 264; *Stutsmah County vs. Wallance*, 142 U. S., 293.)

Prior to the promulgation of our Code of Civil Procedure, there already existed in the State of Vermont a legal doctrine on the scope of section 2273 of the Revised Laws of said State, transplanted into our legislation as section 780 of said Code of Civil Procedure. Under the rule of statutory construction above cited, it is to be assumed, therefore, that the authors of our Code of Civil Procedure, in literally incorporating the provisions of the laws of Vermont on this particular matter into our legislation, had notice of the construction given thereto by the courts of said State, and that it was their intention to adopt the judicial construction thereon with the statute. In the case of *Lambert vs. Merrill* (56 Vt., 464, decided in 1884), the Supreme Court of Vermont, deciding a similar question, said:

"The statute sec. 2270, R. L., requires that an application for an appeal shall be in writing and filed with the register within twenty days from the date of the decision appealed from. Sec. 2273, requires that the person appealing shall, before the appeal is allowed, give a satisfactory bond to the court, with a condition that he will prosecute the appeal to effect and pay the intervening damages and costs occasioned by such appeal. The only right to an appeal is conferred and regulated by these two sections. It is now claimed by the appellant that, if the application is properly made and filed within the twenty days, the bond may be filed and appeal allowed at any subsequent time before the session of the court to which the appeal is made returnable.

"If that construction of the statutes should prevail, the settlement of estates might be delayed for months without security for the damages that might be occasioned by such delay. The twenty days named, we think, was intended as a limitation of the time within which the probate judge shall decide upon the question of the allowance of an appeal, and within which the appellant has the right to perfect his appeal by giving the required bond. If that had not been the intention, it would seem that the security might as well be given after the appeal is entered as before.

"In *Arnold vs. State of Brooks et al.* (36 Vt, 204), it was held that the giving a bond was a peremptory requirement of the statute, and was indispensable; and that it was error to grant leave to file such a bond in the

County Court after a motion to dismiss had been interposed, alleging that no sufficient bond was filed at the time the appeal was granted. Much might be said in support of the construction we have given to the statutes under consideration, based upon the analogy between them and the statutes requiring bail to be entered in an appeal from the decision of a justice, and a recognizance to be entered into on mesne process, and the construction that has been given to those statutes; but we can hardly regard this as an open question. In the case of *George P. Sariborn, App't. vs. Orison Foster's Estate*, heard at the March Term, 1879, of Orange County Supreme Court and not reported, it appeared that the appellant presented a claim before the commissioners on Foster's Estate, which was disallowed. The report of the commissioners was returned to the Probate Court, accepted and ordered to be recorded on the 19th day of July, 1877. The appellant's application for an appeal was dated the 6th day of August, 1877, and the appeal was allowed. On the 4th day of December, and before the session of court to which the appeal was made returnable, the appellant filed his bond for appeal in the Probate Court, and the same was accepted and ordered to be recorded. At the December Term, 1877, of Orange County Court, the defendant moved to dismiss the appeal, 'for that at the time of applying for said appeal, nor at any other time within twenty days from the final return of said commissioner's report to the Probate Court, did the plaintiff, or any person on his behalf, file with said Probate Court a bond to prosecute said appeal to effect and pay all intervening damages and costs occasioned by such appeal.' The court pro forma overruled the motion, and the defendant excepted. The Supreme Court reversed the decision and dismissed the appeal. As we understand that case, the same question that is here presented as to the duty of an appellant to file his bond within the twenty days, was there decided."

The foregoing decision was later affirmed in the *Re Bodwell* (66 Vt., 231, 232), decided in 1894:

"The application for an appeal from this decree was made to the probate court within twenty days from the date of the decision appealed from, as required by R. L., s. 2270, but within the twenty days the appellant did not give a bond to the satisfaction of the probate court, conditioned that she would prosecute her appeal to effect, and pay the intervening damages and costs occasioned by the appeal. After the expiration of the twenty days she gave such a bond to that court. On motion, the court below dismissed the appeal. The appellant now assigns this action of the county court as error.

"This question was before this court in *Lambert vs. Merrill* (56 Vt., 464), and it was there held that under the provisions of R. L., s. 2270 and 2273, the requisite bond must be given within twenty days from the decision appealed from, or on motion the appeal would be dismissed in the county court. We think this is the correct construction of the statute. This appeal was, therefore, properly dismissed."

It will be seen that whereas in the two Vermont cases above cited a bond had been filed although outside the period fixed for the filing of the application for an appeal, none was filed herein.

The construction adopted in said Vermont decisions appears to be even more rigid than the one followed by this court in the case of *Buenaventura and Del Rosario vs. Ramos* (42 Phil., 490), which impliedly repealed the ruling laid down in the cases of *Abello vs. Kock de Monasterio* and *Hernaez vs. Norris*, *supra*. The Supreme Court of Vermont, as will be seen, interpreted the legal provision under consideration in the sense that the bond must be filed within the same period fixed for the interposition of the application for an appeal, while this court, in said case of *Buenaventura and Del Rosario vs. Ramos*, allows the filing of the bond outside said period provided the appellant's application for an appeal contains a petition to the court to fix the amount of the bond and the latter is presented to the court for approval within five days after its amount has been fixed. Inasmuch as the court has constantly abided by this ruling since 1921, we need not adopt the stricter Vermont doctrine. The stability and uniformity of legal doctrines demand the reiteration of the ruling of this court on this question since our decision in the case of *Buenaventura and Del Rosario vs. Ramos*.

Wherefore, without prejudice to appellants right to avail themselves of other special statutory remedies when an appeal does not lie, in order to repair the injury to them by reason of the appealed order, I am of the opinion that

the only jurisdiction of this court in the instant case is to dismiss the appeal, and I am in accord with the majority in so holding.

Butte, J.: I concur with Justice Recto.

Diaz, J.:

I concur in this concurring opinion of Justice Recto.

Motion granted and appeal dismissed.

[1] February 6, 1932.

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