

FELIPE G. CALDERON, PLAINTIFF, VS. JOSE MOMICKING, CLERK OF THE COURT OF FIRST INSTANCE OF THE CITY OF MANILA, DEFENDANT.

G.R. No. 4469. March 27, 1908

Ponente: WILLARD, J.

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WILLARD, J.:

A demurrer to the complaint in this case was overruled by a decision filed on the 29th of February, 1908.[1] The facts in the case appear in that decision. The defendant thereafter answered the complaint, setting up practically three defenses.

(1) He alleged that upon the making of the order of October 3, 1904, the defendant excepted thereto and filed a bond, the condition of which was that he should comply with the judgment of the appellate court in case the judgment of the Court of First Instance should be affirmed. The answer alleges that thereafter the plaintiff presented a bill of exceptions and asked that it be allowed for the purpose of removing the case to this court. The theory of the defendant apparently is that the proper way to bring the case here was by appeal and not by a bill of exceptions, and that, having elected the latter method, the plaintiff can not claim that he has appealed. Section 783, in connection with sections 781 and 782 of the Code of Civil Procedure, in speaking of the method of taking an appeal, requires simply that the party aggrieved present an application for an appeal. The statute does not indicate any particular form or words which must be used in making such application. Any words are sufficient which indicate that the person aggrieved is dissatisfied with the decision and intends to remove the case to the Supreme Court for the purpose of revision.

What the plaintiff did amply fulfills these requirements. He excepted to the order of the court, showing his dissatisfaction therewith. The condition of the bond then given by him clearly indicates his intention to take the case to the Supreme Court. That intention is also indicated by his preparation and presentation of the bill of exceptions, the only purpose of which could be to remove the case here for revision. The fact that he was mistaken in the remedy, thinking that a bill of exceptions was proper, does not prevent him now from claiming that what he actually did was sufficient as an appeal. The case is in many respects similar to that of Juana Moreno Francisco vs. Jose Manuel Gruet (1 Phil. Rep., 217).

(2) The condition contained in the bond follows strictly the provisions of section 240 of the Code of Civil Procedure, and it was therefore sufficient.

(3) It is alleged in the answer that on the 20th day of January, 1905, the defendant certified and transmitted to the Supreme Court the entire record in the matter of the estate of Francisco Hilario, and that that record remained in this court from the 20th day of January, 1905, to the 20th day of February, 1907, during which time the plaintiff might have availed himself of it for the "purpose of presenting the questions raised by his appeal from the order of October 3, 1904.

That record was sent here, not by reason of the appeal here in question, but for the purpose of determining the

questions presented by an order made by the Court of First Instance of Manila suspending the plaintiff, Calderon, from the practice of his profession as an attorney at law. (See *In re Calderon*, 7 Phil. Rep., 427.)

The demurrer to the answer is sustained and the defendant is given five days in which to amend his answer.

If no amended answer is filed within that time the clerk, without further order of this court, will enter a final judgment in this case in favor of the plaintiff and against the defendant, for the relief demanded in the complaint, with costs. So ordered.

Arellano, C. J., Torres, Mapa, Johnson, and Carson, JJ., concur.

Tracey, J., dissents.

[1] Page 261, *supra*.

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