

AGRIPINO SEGOVIA, PLAINTIFF AND APPELLANT, VS. THE PROVINCIAL BOARD OF THE PROVINCE OF ALBAY ET AL., DEFENDANTS, AND APPELLEES.

G.R. No. 4799. March 27, 1909

Ponente: TORRES, J.

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TORRES, J.:

On March 31, 1908, an information was filed with the Court of First Instance of Albay by the attorneys for Agripino Segovia against the provincial board of that province and Lucio Navarro, alleging that in the elections held on February 11, 1908, for the offices of president, vice-president, and councilors of the newly organized municipality of Albay, with the plaintiff and said Lucio Navarro as candidates, the above-named provincial board, composed of Governor Chas. A. Reynolds, chairman, and Treasurer J. Q. A. Braden and Third Member Luis Thomas, sitting as a board of canvassers, in accordance with the provisions of Act No. 1582, in its meeting of February 17 above quoted, proceeded to a canvass of the votes cast in said elections, with the result that, the exponent Agripino Segovia received 340 votes for the office of president, while the other candidate Lucio Navarro also received 340 votes for the same office, according to the statements filed by the board of inspectors. The election thus resulted in a tie, and in the meeting held on the 18th of said month, the board decided the tie by lot in favor of Navarro, against the protest of plaintiff Segovia, and declared Navarro elected municipal president of Albay. Due protest was filed by Segovia with the Court of First Instance, and the latter, by an order dated March 14 of the same year, found that 333 votes were cast in favor of each candidate for the office of municipal president, and ordered the provincial board of canvassers to correct its canvass of the votes cast for the office of president of the newly organized municipality of Albay in accordance with the facts as proven. The plaintiff, on or about the 16th of March, requested the provincial board to advise him of the day and hour of the drawing of lots to decide the tie in accordance with the order of the court, in order that he, the plaintiff, might be present thereat. Said board, while it decided to correct the statements relating to the canvass of the votes cast in said election in accordance with the order of the court, nevertheless refused to draw lots to decide the tie, pursuant to the said ruling, it being the legal duty of the provincial board, as a board of canvassers, under the provisions of said law to draw lots to decide the tie between the candidates Segovia and Navarro, each of whom had received 333 valid and legal votes, and in the absence of appellate proceedings or a proper and speedy remedy to compel said provincial board to comply with the above-mentioned legal duty, the plaintiff prayed the court to issue a mandamus ordering the defendant members of the provincial board to draw lots as provided by the last paragraph of section 26, in its relation to sections 4 and 25 of the Election Law, in order to decide the tie between the contending candidates and to declare the successful candidate elected, with the costs and other legal expenses against the defendants.

The defendants having been summoned, counsel for Lucio Navarro demurred to the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action, nor show any unlawful noncompliance with duty on the part of the defendants, to which might be applied the special relief sought.

The provincial fiscal, on behalf of the provincial board of Albay, also demurred to the complaint on the ground

that the court had no jurisdiction of the proceedings, and that the complaint did not state facts sufficient to constitute a cause of action, it not being alleged, what duty pertaining to the office held by the defendants had not been complied with by them.

The court, under date of April 14, in passing upon the demurrers, issued an order to the effect that according to the allegations of the complaint it was not the duty of the provincial board to again decide the tie by lot, and sustained the demurrers as regards the second ground thereof, granting the plaintiff leave to amend his complaint, if he so wished, to conform to the provisions of law and to set forth facts sufficient to constitute a cause of action; and should the plaintiff fail to file an amended complaint within five days, reckoned from the date of the order of the court, the action would be dismissed with the costs against the plaintiff. The latter excepted to said ruling and gave notice of his intention to bring the case to this court by bill of exceptions, alleging that the order of the lower court was erroneous and contrary to law. The proper bill of exceptions having been certified, it was forwarded to the office of the clerk of this court.

This is an appeal by bill of exceptions brought before this court for a determination of the question of whether an exception by the plaintiff to the ruling of the lower court sustaining a demurrer, can be submitted to the appellate court by bill of exceptions, notwithstanding the provisions of section 123 of the Code of Civil Procedure. Section 101 of said code is as follows:

"When a demurrer to any pleading is, sustained, the party whose pleading is thus adjudged defective may amend his pleading within a time to be fixed by the court, with or without terms, as to the court shall seem just; but if the party fails to amend his pleading within the time limited or elects not to amend, the court shall render such judgment upon the subject-matter involved in the pleading and demurrer as the law and the facts of the case as set forth in the pleadings warrant. * * *"

When the demurrer to the complaint is sustained, the plaintiff may except to the order sustaining said demurrer, but he is not allowed by the law of procedure to take an appeal before the Supreme Court by means of bill of exceptions.

The said exception if taken in due time will be taken down in the course of the trial and will be made part of the bill of exceptions to be prepared and presented as a result of the exception or appeal taken against the final judgment rendered in the case. Section 123 of said code says:

"No interlocutory or incidental ruling, order, or judgment of the Court of First Instance shall stay the progress of an action or proceeding therein pending; but only such ruling, order, or judgment as finally determines the action or proceeding; nor shall any ruling, order, or judgment be the subject of appeal to the Supreme Court until final judgment is rendered for one party or the other."

Until the rendition of final judgment in the action it is not proper to bring the case before the Supreme Court by bill of exceptions for its determination in the second instance.

When the complaint is stayed by an order allowing and sustaining a demurrer, the plaintiff, having regard to his right to except to said order, is bound either to amend the complaint within the period designated in said order, or to give notice that he elects not to do so and insists upon his original complaint; and until the rendition of the final judgment of the court on the questions raised by said complaint and demurrer, he can not take an appeal by bill of exceptions, which must contain the exception taken against the order sustaining the demurrer.

The bill of exceptions shall be perfected in the form provided by section 143 of the Code of Civil Procedure, which among other things provides:

"Upon the rendition of final judgment disposing of the action, either party shall have the right to perfect a "bill

of exceptions, for a review by the Supreme Court of all rulings, orders, and judgments made in the action, to which the party has duly excepted at the time of making such ruling, order, or judgment. * * *."

Thus, the bill of exceptions shall contain all the exceptions taken in due time to all the rulings, orders and decrees made in the course of the trial, in order that they, together with the final judgment may be reviewed by the Supreme Court.

Inasmuch as the bill of exceptions in this case was presented as the result of an exception to an interlocutory order sustaining a demurrer, which, according to section 123, shall not stay the course of the proceeding, and as the court has not rendered final judgment in this action, it is therefore improper to present said bill of exceptions. (Following cases No. 3908, Serrano vs. Serrano, 9 Phil. Rep., 142, and No. 4489, Hontiveros vs. Abreu, 10 Phil. Rep., 213.)

For the above considerations, it is hereby held that the appeal taken before the Supreme Court by bill of exceptions can not be determined by this court. The costs are adjudged against the appellant, and the case, together with a certified copy of this decision, will be remanded to the lower court. So ordered.

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

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