

ADMINISTRATOR OF THE TESTAMENTARY ESTATE OF JULIAN MONTILLA, FERNANDO MAPA, PLAINTIFF AND APPELLANT, VS. MARIA DEL PILAR CHAVES, DEFENDANT AND APPELLEE.

G.R. No. 6706. September 01, 1911

Ponente: CARSON, J.

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CARSON, J.:

The record of this case is admittedly defective in that the transcript of the stenographic notes of the testimony taken in the court below does not include the testimony of several witnesses taken at one of the hearings. Counsel for both appellant and appellee decline to go forward in this court upon the imperfect record.

Counsel for appellant moves for a new trial on the ground that notwithstanding the exercise of due diligence on this part he has found it impossible to procure a duly certified transcript of the stenographic notes of the missing testimony, because, as he alleges, the official stenographer who took these notes has severed his connection with the service, and his present whereabouts are unknown.

Counsel for appellee, on the other hand, moves for the dismissal of the appeal on the ground that appellant has failed to perfect the record within the time prescribed by the rules of court as extended by stipulation of counsel.

By express provision of law it is the duty of the appellant to make all the evidence submitted in the court below a part of the record brought here on appeal, in any case wherein he seeks to have this court review the evidence to determine whether it sustains the judgment of the court below. Accordingly, under our practice, in any case wherein the appellant willfully or negligently fails to bring a properly certified transcript of all the material evidence taken in the court below to this court on appeal, or to exercise the utmost diligence in an effort to perfect the record when it appears to be defective in this regard, this court declines to review the evidence or any part thereof taken in the court below or to retry the questions of fact, and limits itself to a determination of the questions of law raised by the bill of exceptions. In other words, we treat the record as though no motion for a new trial had been submitted in the court below on the ground that the judgment is not sustained by the weight of the evidence, and look only to the pleadings and the findings of fact by the trial judge in ascertaining whether the judgment is sustained by the facts proven at the trial. But when it is made to appear that without fault on the part of the appellant he has found it impossible by his own efforts and by the exercise of due diligence to perfect the record in this regard, we either lend him the necessary assistance to this end by issuing appropriate orders for the production of the evidence, including the transcript of the stenographic notes if they are in existence and can be procured, or grant a new trial to supply the missing testimony.

The appellant in this case appears to be unable to secure a certified copy of the stenographic notes of the missing testimony for reasons beyond his control (the absence of the stenographer), and under such circumstances we would ordinarily grant a new trial, he having moved for a new trial in the court below on the ground that the judgment is not sustained by the weight of the evidence. But he admits that he has in his possession an uncertified copy of the transcript of the official stenographic notes of the missing testimony, and it is not improbable that

were these notes submitted to counsel for appellee he would be willing to accept this copy as a correct transcript of the notes of the missing testimony. Indeed, the record discloses that counsel have already discussed the possibility of arriving at some such agreement, though they have thus far been unable to get together, apparently because each thinks that he has the other on the hip - the appellant hoping for a new trial, and the appellee for a dismissal of the appeal, as a result of the defect in the record. In the meantime, however, the appeal hangs fire in this court, and the course of justice in the disposition of the case is unduly delayed. Of course, if it can be avoided, neither party should be allowed to secure any undue advantage as a result of a defect in the record for which neither one is to blame, and to secure that end, and in the interests of justice, the following order will be entered.

For the present the motion for a new trial of counsel for appellant dated April 10, 1911, is denied, as is also the motion to dismiss submitted by counsel for appellee dated April 18, 1911.

Counsel for appellant is directed to file forthwith the "unsigned copy which is in the possession of plaintiff and appellant of the transcript of the stenographic notes," of the testimony which it is alleged is lacking in the record, and to which he refers in connection with his motion for a new trial, accompanied with his certificate setting forth how said copy came to his hands and whether it is or is not a true copy of all the missing portion of the record; at the same time he will furnish counsel for appellee with a copy thereof. Upon the filing of this copy of the missing portion of the record, counsel for appellee will forthwith inform the court in writing whether he is or is not willing to accept this copy of the missing portion of the record as a true and correct statement thereof.. Thereafter if the court is satisfied that appellant has done everything in his power to perfect the record, and is without fault in his failure or inability so to do to the satisfaction of the appellee, the appeal will not be dismissed and a new trial will be granted as prayed for by appellant; but if on the whole record the court is of opinion that there is any lack of diligence on the part of counsel for appellant in his effort to complete the record satisfactorily, a new trial will not be granted, and judgment will be rendered on the appeal as though no motion for a new trial had been submitted in the court below, this court declining to review the evidence taken in the court below or to retry questions of fact, and limiting itself to a determination of the questions of law raised by the bill of exceptions.

Further, the clerk of the Court of First Instance of Iloilo is directed to submit at once a full statement of the reasons for the delay and failure in the perfection of this record as far as known to him, including the name and present whereabouts of the stenographer who took the testimony, and also the names of all witnesses called throughout the course of the trial, together with a certified copy of such memoranda or record pertaining to this case as may be in the files of his office. So ordered.

Torres, Johnson, and Moreland, JJ., concur.

Case remanded for perfection of record.

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