

JOSE ANTONIO GASCON ENRIQUEZ, PLAINTIFF AND APPELLANT, VS. A. D. GIBBS, DEFENDANT AND APPELLEE.

G.R. No. 9006. March 14, 1914

Ponente: CARSON, J.

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CARSON, J.:

This case is pending on the motion of the defendant and appellee to dismiss the appeal for failure of the plaintiff and appellant to perfect his appeal in the manner and within the time prescribed by the Code of Civil Procedure.

The essential facts upon which this motion must be decided are as follows:

On December 13, 1912, judgment in this case was rendered by the Court of First Instance in favor of the defendant.

On March 17, 1913, a motion for new trial was granted for the purpose of allowing plaintiff to present additional evidence.

On March 24, 1913, the new trial was had, and additional evidence presented by plaintiff.

On April 15, 1913, final judgment was rendered, affirming the former judgment in favor of the defendant.

On April 22, 1913, plaintiff moved for a new trial on the ground (1) that the judgment is contrary to the weight of the evidence; and (2) that it is contrary to law.

On April 26, 1913, this motion for a new trial was over ruled.

On April 30, 1913, counsel for plaintiff received notice of the order overruling his motion for a new trial.

On May 22, 1913, counsel for plaintiff excepted to the order overruling the motion for a new trial and announced his intention to appeal, at the same time submitting his bill of exceptions.

On May 26, 1913, defendant objected to the approval of the bill of exceptions, and excepted to the order of the lower court approving it.

Immediately after the filing of the bill of exceptions in this court, and before the plaintiff and appellant had incurred any expense in connection therewith other than the payment of the required filing fee, defendant and appellee filed his motion praying for the dismissal of the appeal which is now under consideration.

From the foregoing statement it will be seen that seven days elapsed from the date when final judgment was entered (April 15, 1913) until the date when plaintiff moved for a new trial (April 22, 1913); and that twenty-two days elapsed from the date when plaintiff received notice of the order overruling that motion (April 30, 1913) until the date when he filed his exception thereto, and announced his intention to appeal, submitting, at the same time, his bill of exceptions (May 22, 1913).

Defendant insists that the appeal should be dismissed because, as he contends, plaintiff did not perfect his appeal

within the time prescribed by law.

The statute (section 143 of Act No. 190) prescribes that a party desiring to prosecute a bill of exceptions shall so inform the court at the time of the rendition of final judgment or as soon thereafter as may be practicable; and that within ten days from the entry of the memorandum to that effect the excepting party shall submit his bill of exceptions for allowance by the judge.

The questions raised on this motion are, whether plaintiff and appellant complied with these statutory provisions touching the perfection of his appeal; and, if not, whether the explanation and excuses offered by him for his failure so to do are such that this court should, nevertheless, decline to dismiss the bill of exceptions allowed in the court below.

We have frequently had occasion to consider the provisions of the above-cited section of the code, and especially those touching the time within which the various steps must be taken looking to the perfection of a bill of exceptions.

The result is set forth in numerous reported opinions, and in scores of unreported minute orders. The decisions themselves disclose a not infrequent lack of unanimity in the body of the court as to the application of these statutory provisions to the diverse and varying facts in the different cases, but it will be found, nevertheless, that we have uniformly and steadfastly maintained that the right of appeal from final judgments, orders, or decrees entered in ordinary actions in Courts of First Instance is lost and absolutely cut off, unless the aggrieved party gives notice of his intention to appeal/ as required by the statute, as soon as practicable after the receipt of notice of the rendition of such judgment, order, or decree. The difficulty, however, that has always confronted us in these cases, has arisen in construing and applying the phrase, "as soon as practicable;" and it needs but little consideration to make it clear that this is a difficulty which cannot be met by any general rule covering all the multitude of varying facts and circumstances which may possibly arise in the different cases which may present themselves. Peculiar circumstances and exceptional conditions may render it impracticable to give notice of intention to appeal in some cases within a period of time which would be far in excess of that required in ordinary cases, and such cases must, in the very nature of things, be judged upon the special facts by which they are governed.

It is possible, however, to determine, as we did in the case of *Santillan vs. Almonte* (24 Phil. Rep., 227), that "where more than twenty days elapse from the date when a party has received notice of the entry of judgment, without his taking any steps whatever looking to the perfecting of a bill of exceptions, and it appears that he has failed to inform the court that he desires to prosecute a bill of exceptions, such party (in the absence of satisfactory proof that for some sufficient reason it was 'impracticable' to so inform the court that he desired to prosecute his bill of exceptions prior to the time when he does in fact do so) loses his right under the provisions of section 143 to perfect a bill of exceptions to the judgment. (*De la Rosa vs. Revita*, 6 Phil. Rep., 112; *Yturralde vs. Santos*, 5 Phil. Rep., 485; *Bryan-Landon Co. vs. American Bank*, 5 Phil. Rep., 672.)"

It has frequently been suggested that a very much less period of time than twenty days should be sufficient in all cases for the preparation and presentation of notice of intention to appeal. It is said that since the preparation of such a notice does not necessarily involve more than three minutes' labor, there is no sufficient reason for the extension of the time within which it may be filed, beyond the time necessary for its transmission to the court wherein the judgment was rendered. But this contention overlooks the fact that a litigant should always have time to make up his mind whether or not it is advisable to prosecute an appeal from a judgment with which he is dissatisfied. The determination of this question may and usually should involve consultation with counsel, and in many cases the employment of new or additional counsel; and even after the litigant has concluded that it would

be advisable for him to appeal, it may well happen that his final decision in this regard will turn on his ability to find the funds necessary for the prosecution of the appeal. Manifestly, a reasonable time should be allowed the litigant in which to decide a question of this nature, and while this court has held that, in the absence of satisfactory proof to the contrary, twenty days is a sufficient time for this purpose, we have never dismissed an appeal for lack of due notice of intention to appeal, where it appeared that such notice had been filed within a period of twenty days after notice of rendition of judgment.

In the case at bar, on appellant's own showing, more than twenty days elapsed from the date of notice, not merely of the rendition of judgment, but also from the date of the receipt of notice of the order overruling his motion for a new trial, before he filed his notice of intention to appeal, and it is manifest, therefore, that it came too late, unless accompanied by satisfactory proof that it was impracticable to file it within twenty days.

Although the approval of his bill of exceptions was opposed in the court below, counsel at that time offered no explanation or excuse for the delay. His explanation submitted in this court is based on three grounds: First, that he was absent from Manila for three days while the period was running within which his notice should have been filed; second, that during that period the office of the clerk of the court was open during the forenoon only, which made it inconvenient for counsel to examine the records in the case; and third, that the bill of exceptions consisted of 44 pages and needed considerable time for its preparation.

Having in mind the object for which a reasonable time is allowed for the presentation of notice of intention to appeal, it is very clear that the excuses offered by counsel are wholly insufficient. The mere preparation of such a notice requires but a very few minutes of counsel's time, "and his absence from his office for three or four days on other business, by no means excuses or explains his failure to prepare and file the notice while he was in his office and able to attend to the matter. His attempt to excuse himself because of the fact that the clerk's office was closed in the afternoon is also unworthy of serious consideration.

The office stood open every legal working day for at least five hours, and there is nothing in the record which would suggest that an inspection of that record of one-half hour's duration would not readily have disclosed any information which counsel might have desired in order to advise his client whether he should or should not take an appeal. Indeed it was asserted by counsel for appellee, and was not contradicted by counsel for appellant, that the latter had in his office at that time copies of all the pleadings and other writings in the record necessary for the preparation of his bill of exceptions. As to counsel's excuses based on the size of the record, it is sufficient to say that the size of the record had and could have little to do with the question of filing notice of his intention to appeal, and that as a matter of fact, the record is not so large as to justify any claim that it is very exceptional in this regard.

The truth of the matter is, as it seems to us, that counsel in this case must have known, and did know, all that was necessary for him to know in regard to the case and as to his client's wishes as to the taking of an appeal, long before the expiration of the twenty days which we have set as the utmost limit of time within which, in ordinary cases, notice of intention to appeal should be filed, in order to give the appellant the right to prosecute his appeal. The somewhat exceptional conditions under which the original judgment in this case was set aside, and a new trial granted wherein the original judgment was affirmed, must have served to put both counsel and his client on their guard, so that they must have anticipated the possibility and even the probability of an adverse decision several months prior to the date of entry of the first judgment; and while neither the time between the running of the original judgment and the final judgment confirming it (four months), nor the time during which the formal motion for a new trial was pending (eight days), can be included in our estimate in applying the rule of practice as adopted by this court, nevertheless, we think that the lapse of all this time under all the circumstances of this case serves at least to emphasize the flimsy character of the excuses and explanations offered by counsel for the delay

in filing his notice of intention to appeal. In the light of all the circumstances as disclosed by the record we are satisfied that the delay in filing the appeal must be attributed to inexcusable negligence or to the fact that it was not the intention of plaintiff to appeal until he changed his mind for some unknown reason, after the time had elapsed within which he had the right so to do. We conclude that his right to appeal was "lost and absolutely cut off" by his failure to present his notice to appeal "as soon as practicable" after he received notice of the rendition of judgment in his case.

This court has been extremely liberal in accepting excuses and explanations for failures of parties to take the various steps prescribed in the course of the prosecution of appeals within the time allowed therefor, after notice of the intention to appeal has been duly filed. This, because: First, in the very nature of things, unavoidable or excusable delays must be anticipated in the preparation of bills of exceptions, printed briefs, and the like, and in bringing the record up from the lower court; second, the record affirmatively disclosing that an appeal is pending, any interested party can compel the appellant to go forward without unnecessary delay, under penalty of having his appeal dismissed for failure to do so; and third, the record disclosing that an appeal is pending, there is no substantial danger that innocent third parties will suffer by such delays.

On the other hand no explanation or excuse for failure to file notice of intention to appeal within the period of twenty days can be accepted, which does not clearly disclose that in truth and in fact it was impracticable to file it sooner. In the first place it is of the utmost importance that there should be an end to litigation, and that the prevailing party should be advised as soon as practicable whether it is his adversary's intention to carry the matter further. In the second place, it is of the utmost importance, in the due administration of justice, that the record should clearly disclose the time when execution may issue "as of right/" to the end that the clerk may be advised as to the time when it becomes his duty to issue such execution at the request of the prevailing party. Upon the entry of final judgment in ordinary actions, execution does not properly issue (except by special order of the court) until the judgment becomes final in the sense that no appeal lies therefrom. But how is the clerk to satisfy himself upon this point? No difficulty presents itself where notice of intention to appeal has been filed, for in that event, the clerk must presume that the right exists until the record affirmatively discloses that the appeal has been abandoned or dismissed. But where the record discloses nothing as to the intention of the parties in this regard, there is no safe rule by which the clerk can be guided other than our holding that the right of appeal is lost and absolutely cut off unless the aggrieved party gives notice of his intention to appeal as soon as practicable after the receipt of notice of rendition of final judgment; and that where nothing to the contrary appears affirmatively in the record, the lapse of twenty days without the filing of such notice will have that effect. In the third place, it is to be observed that the strictest application of the statutory requirement as to the filing of notice of intention to appeal must be enforced to protect the rights of innocent third parties which are acquired in reliance upon the judgments entered in Courts of First Instance. Where record discloses that one of the litigants is asserting his right to appeal, third parties may fairly be required to abide the consequences of such appeal should they acquire an interest in the judgment despite the knowledge disclosed by the record that it is subject to reversal or modification on appeal. But where nothing appears in the record to indicate that one or other of the parties expects to assert a right of appeal, it is vitally important to the interests of innocent third parties that there should be no uncertainty as to the rule that cuts off the right to appeal unless notice of the intention to appeal be filed as soon as practicable after the rendition of judgment.

It has been suggested that, in the case at bar, the filing of a motion for a new trial eight days after the rendition of final judgment should be treated as a substantial compliance with the statutory provision requiring the filing of notice of intention to appeal; and that the delay of twenty-two days thereafter in filing the bill of exceptions should not be held to be fatal, under our liberal practice in this regard.

It is true that under our rulings in the cases of *De la Cruz vs. Garcia* (4 Phil. Rep., 680), and *Compania General de Tabacos vs. City of Manila* (6 Phil. Rep., 140), a motion for new trial, presented as soon as practicable after rendition of judgment, may be treated as an exception "to the judgment, being in its very nature a "formal protest against the justice and legality of the judgment." But, as clearly appears from the decision in *De la Cruz vs. Garcia*, it will only have the effect of relieving the party from the statutory requirement as to the filing of notice of intention to appeal when it may fairly be inferred that it was intended to have that effect. But that such was not counsel's intention in filing the motion for a new trial, affirmatively appears from the fact that twenty-two days after the motion was overruled he filed a formal notice of his intention to appeal. Furthermore, even were we to treat the motion for a new trial as equivalent to an exception to the judgment and a notice of intention to appeal, the subsequent delay of twenty two days in filing the bill of exceptions would be sufficient, under the circumstances of this case, to sustain an order to dismiss the appeal. The statute allows only ten days for that purpose, and though we have held this period to be extendible where reasonable necessity therefor arises, we are of opinion, in the first place, that no necessity therefor has been shown in this case, and, in the second place, that in view of the objection interposed to the approval and certification of the bill of exceptions in the court below, appellant lost his right to have such extension of time for the filing of his bill of exceptions by his failure either to ask for such extension in due time, or to offer any explanation for his delay to the trial judge upon which that judge might have based an order consenting to the extension of the time notwithstanding the failure to apply therefor before the expiration of the prescribed ten-day period. (*Garcia vs. Hipolito*, 2 Phil. Rep., 737.)

The motion praying for the dismissal of the appeal in this case should be granted, with the costs in this instance against the plaintiff. So ordered.

Arellano, C. J., Trent and Araullo, JJ., concur.

Moreland, J., dissents.

Motion granted; appeal dismissed.

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