

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. YU TEN, DEFENDANT AND APPELLANT. AND THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. JOSE FERNANDEZ, ALIAS YU CHIP, DEFENDANT AND A...

G.R. Nos. 11379 and 11380. January 03, 1916

Ponente: JOHNSON, J.

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JOHNSON, J.:

It appears from the record in each of said causes, that a complaint was presented by the Acting Attorney-General, in the Court of First Instance, of the city of Manila, on the 25th of June, 1915. In each complaint it was alleged that on or about the 22d of June, 1915, the said defendants and appellants were Chinese laborers, and were found within the Philippine Islands without having in their possession and without having acquired the certificate of residence required by Act No. 702 of the Philippine Commission.

On the same day (the 25th of June, 1915) a warrant for the arrest of each of said defendants was issued. On the 30th of June, 1915, the deputy sheriff of the city of Manila made his return on said warrant, in which he stated that— "The within warrant is returned unexecuted, the within named person having appeared in court and fixed bail."

The cause was brought on for trial and after hearing the respective parties, the Honorable James A. Ostrand, judge, on the 1st of November, 1915, rendered the following decision, in each of said causes, and ordered each of said defendants returned to the Collector of Customs for deportation:

"The complaint in the above entitled case (cases) alleges that the defendant Yu Ten (and Jose Fernandez, alias Yu Chip) is a Chinese laborer and was found within the Philippine Islands on or about the 22d of June, 1915, without having in his possession and without having acquired the certificate of residence required by Act No. 702 of the Philippine Commission.

"There is no answer to the complaint and the above allegations therefore stand admitted. The appearance of the defendant also clearly indicates that he (they) is a Chinese person and therefore should be provided with a certificate of residence.

"Wherefore, it is hereby ordered that the defendant Yu Ten (and Jose Fernandez, alias, Yu Chip) be remanded to the Insular Collector of Customs for deportation. So ordered."

On the 10th of November, 1915, each of said defendants appealed from said order to the Supreme Court. The said appeal in each of said cases was in the following language, with a note or memorandum thereon, that the attorney for the defendants had sent a copy of said appeal to the Attorney-General:

"Now comes the defendant in the above entitled case, by his undersigned attorney, and, being advised of the decision, of which he was notified yesterday, wherein the defendant was ordered to be remitted to or placed at the disposal of the Insular Collector of Customs for deportation, hereby excepts thereto and appeals therefrom

to the Honorable Supreme Court.

"He prays the court to take notice of this exception and appeal, for the purposes required."

The appeal was received in the Supreme Court on the 11th of November, 1915. On the 22d of November, 1915, the Attorney-General presented the following motion, and requested that an order be entered dismissing the appeal in each of said cases:

"The Attorney-General in his official capacity, in behalf of the appellee in the above entitled case (cases) hereby respectfully states:

"No appeal has been properly taken in the above entitled case (cases) in that the appellant has not served a copy of his notice of appeal 'upon the adverse party or his attorney,' as provided in section 45 of General Orders No. 58.

"Wherefore, it is respectfully requested that an order be entered, dismissing this appeal (appeals) and remanding the record (records) to the lower court, with costs against the appellant."

To that motion the attorney for the defendants-appellants presented the following answer or opposition:

"Now comes the defendant and appellant, by his undersigned attorney, and, in answer to the motion of the Honorable Attorney-General, praying for dismissal of the appeal, respectfully states:

"That, as shown at the foot of the notice of appeal, the undersigned attorney sent a copy of the said motion to the Attorney-General's Office. On the other hand, General Orders No. 58, invoked by the Attorney-General, is not applicable to the present case, as it is not a question of an appealed criminal cause, but of proceedings governed by the provisions of Code of Civil Procedure.

"He therefore prays the honorable court to overrule the motion of the Honorable Attorney-General.

"MANILA, November 26, 1915."

The theory of the Government is that, inasmuch as the appellants had not "served a copy of their appeal upon the adverse party, or his attorney," the appeal had not been perfected, and should therefore, for that reason, be dismissed.

The theory of the defense is that the action is a civil action and that the appeal is governed by the procedure in ordinary civil actions. The appellants have evidently changed their theory, since the time of their appeal in the lower court. In view of the fact that the appellants "sent a copy of their appeal to the Attorney-General," we are convinced that they then thought that their appeal was governed by the procedure in criminal actions. We are led to this conclusion for the reason that the notice of appeal in criminal actions must be served upon the opposite party, while in civil actions no such requirement is made. Evidently the appellants, at the time they made their appeal, believed that the action was a criminal action. We have decided in the case of *United States vs. Tan Yak* (25 Phil. Rep., 116), that while the procedure in deportation cases, under Act No. 702 is criminal in form, yet it is, nevertheless, a civil action. Deportation proceedings, under the provisions of Act No. 702, are not criminal in their nature, so as to give the defendants the rights and privileges of one accused of the commission of a crime. (*U. S. vs. Tan Yak*, supra; *U. S. vs. Ah Tung*, 26 Phil. Rep., 321, 327.)

Having reached the conclusion that the procedure or proceedings in an action to deport Chinese laborers, under Act No. 702, is criminal in form, the question presents itself, whether or not the appellants in the present case have complied therewith and perfected their appeal, in accordance with the requirements. Section 45 of General Orders No. 58 provides that:

"An appeal shall be taken by filing with the clerk of the court in which the judgment or order was rendered, or

with such court, a notice stating the appeal, and by serving a copy thereof upon the adverse party or his attorney." Nowhere in the record do the appellants attempt to show, by affidavit or otherwise, that they "served a copy of their appeal upon the adverse party or his attorney." They do not assert more than the fact that they sent a copy to the Attorney-General. Even in this court, when their attention is called to the necessity of serving a copy of their appeal upon the adverse party, or his attorney, they do not attempt to do more than to say that they "sent a copy to the adverse party." They do not attempt to show that they "served a copy." They practically admit that they did not "serve a copy upon the adverse party," when they attempt to show that it was not necessary; that the procedure was civil in form, and that therefore it was unnecessary to serve a copy.

Section 1240 of the Penal Code of California is practically identical with said section 45 of General Orders No. 58. The supreme court of California, in discussing the provisions of said section (1240), relating to the necessity of serving a copy of the appeal upon the adverse party, has said in numerous cases, that: "Transcripts on appeal must show service of notice of appeal on the attorney of adverse party, or appeal will be dismissed." (People vs. Clark, 49 Cal., 455; People vs. Bell, 70 Cal., 33, 34; People vs. Colon, 119 Cal., 668, 669.)

In the case of People vs. Brown (148 Cal., 743, 744), the supreme court of California said: "It will be concluded that no service was made and that court is without jurisdiction to hear appeal, where record does not show service of notice, and omission was called to attention of appellant and no effort was made to cure such omission."

That the legislature intended to require actual service of a copy of the notice of appeal upon the adverse party, under section 45, is reenforced by the provisions of section 46 of General Orders No. 58. Section 46 provides that if such personal service of a copy of the notice of appeal can not be made, the court shall order a publication of the notice in some newspaper having a general circulation, etc. etc.

Section 940 of the code of procedure in civil actions of the State of California also requires that a notice of the appeal must be served on the adverse party, or his attorney. The supreme court of California, in discussing the provisions of said section, has said that—"service of notice of appeal is a jurisdictional fact, and if such service has not been made within the statutory time, and according to the requirements of the statute, the appellate court derives no jurisdiction in the case." (Dalzell vs. Superior Court, 67 Cal., 453.)

"The right to an appeal is and always has been statutory, and does not exist in common law. It is a remedy which the legislature may in its discretion grant or take away, and it may prescribe in what cases, and under what circumstances, and from what courts, appeals may be taken; and unless the statute expressly or by plain implication provides for an appeal from a judgment of a court of inferior jurisdiction, none can be taken. (Sullivan vs. Haug, 82 Mich., 548, 555.)" (Pavon vs. Philippine Islands Telephone and Telegraph Co., 9 Phil. Rep., 247, 249.)

"Furthermore, the right to appeal from a judicial decision is a privilege established by the positive laws, which, upon authorizing the filing of the same, point out the cases in which it is proper to present it, the procedure to be observed, and the courts a quo, and those by which the appeal is to be proceeded with and resolved." (Aragon vs. Araullo, 11 Phil. Rep., 7; Lamb vs. Phipps, 22 Phil. Rep., 456, 490-491; Resolution of the Supreme Court, November 25th, 1907.)

"The right of appeal is a purely statutory right; it is not an inherent right. The right to appeal was not at common law, and is not now a necessary element of due process of law. (McKane vs. Durston, 153 U. S., 684, 687; Reetz vs. Michigan, 188 U. S., 505, 508)" (U. S. vs. Gomez Jesus, 31 Phil. Rep., 218.)

The procedure for perfecting the appeal is also statutory. The appeal can only be perfected by following the statute. When the appeal is not perfected in accordance with the statutory procedure, it will be dismissed, upon a motion for that purpose.

The Attorney-General, in his argument in support of his motion, stated positively that no service of a copy of the

appeal in the present case had been made upon him. Neither does the record show that any service of copy of said appeal had been made upon the prosecuting attorney of the city of Manila. In view, therefore of the fact that the appellants have not served a copy of their appeal upon the adverse party, or his attorney, they have not perfected their appeal, in accordance with the requirements of the procedure in criminal cases, and their appeal must therefore be dismissed. Therefore the motion of the Attorney-General presented in each of said cases, is hereby granted, with costs against the appellants, and it is hereby ordered and decreed that the record in each of said cases be returned to the court whence it came, for execution of the judgment heretofore rendered by the court a quo. So ordered.

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

Moreland, J., concurs and agrees that notice of appeal in a criminal case must be served on the attorney for the Government who conducted the case for and on its behalf.

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