2 Phil. 698

[G.R. No. 1471. November 21, 1903]

J. V. KNIGHT, PETITIONER, VS. J. MCMICKING, CLERK OF THE COURT OF FIRST INSTANCE OF MANILA, RESPONDENT.

D E C I S I O N

JOHNSON, J.:

This cause was submitted to the court for judgment upon the pleadings.

On March 31,1903, a judgment was rendered in the court of the justice of the peace of the city of Manila, in the cause of J. V. Knight vs. B. O. Eide, in favor of the plaintiff. On the 4th day of April following the defendant appealed from said judgment to the Court of First Instance of the city of Manila and gave a bond payable to the appellee conditioned for the payment of all such costs as may be awarded against him. Later, the justice of the peace duly forwarded the record of the said cause to the clerk of the said Court of First Instance. The said clerk refused and still refuses to place the said cause of J. V. Knight vs. Eide upon the docket of said Court of First Instance, for the reason that the fees provided for in section 788 of the new Code of Civil Procedure have not been paid. The plaintiff and appellee now petition this court to grant the writ of mandamus directed to the said clerk, commanding him to docket the said cause without first receiving his fees. The question submitted is, What construction shall be given to the statute regulating the collection of fees by officers of the court?

The appellee claims that section 78 of the Code of Civil Procedure makes it necessary for the clerk of the Court of First Instance to docket every appeal from the courts of justices of the peace, whenever the transcripts from said courts are duly filed with him. The appellee also claims that the bond, which the appellant is required to give in order to perfect his appeal, covers the fees of the clerk, who for this reason can not demand his fees in advance, but must rely upon the said bond for the collection of the same. It is also argued by appellee that unless the clerk is required to docket the said cause, the cause can never be heard on

appeal and that the appeal has the effect to defeat the judgment of the court below, for the reason that when an appeal is taken and perfected, from the judgment of the justice of the peace, the judgment of the justice is thereby vacated.

Section 78 of the new Code provides:

> "*Papers to be delivered to clerk of Court of First Instance*.—The justice of the peace from whose decision an appeal shall be taken shall, on or before the first day of the next term of the Court of First Instance for the province in which the same is returnable, transmit to the clerk of that court a certified copy of the record of proceedings, with all the original papers and process in the case, and the original appeal bond given by the appellant, and the clerk shall docket the same in the Court of First Instance, and shall be entitled to the same fees, upon such appeals, as for similar services in suits originating in said court. The justice shall at all times be allowed, and, in the interest of justice, may be required, by the Court of First Instance, to amend his return according to the facts."

The appellee claims that the phrase "and the clerk shall docket the same in the Court of First Instance" is mandatory. But it will be observed that the very next phrase states "and shall be entitled to the same fees, upon such appeals, as for similar services," etc.

Section 788 of the same Code provides what fees shall be collected in other cases. Section 60 of Act No. 136 of the Philippine Commission provides that "all fees charged by them (the clerks) shall belong to the Government."

Section 76 of the Code of Civil Procedure provides:

> "*Appeals, how perfected*.—Within five days after the rendition of a judgment by a justice of the peace, the party desiring to appeal may file with the justice a written statement that he appeals to the Court of First Instance, and shall, within said period of five days, give a bond with sufficient surety to be approved by said justice, payable to the opposite party, in the penal sum of |100, conditioned for the payment of all such costs in the action as finally may be awarded against him. The filing of such statement and giving of such bond shall perfect the appeal."

The appellee argues that the bond required by this section covers all fees and costs and that therefore the clerk must rely upon it for his fees. To this argument there are two objections: (1) The bond is given for the benefit of the opposite party and (2) it is conditioned to pay costs simply. A distinction must be made between costs and fees. The former includes the expenses incurred by a party in the prosecution of a suit; the latter are the compensation paid to an officer for services rendered in the progress of the cause. Every officer in civil causes is entitled to have his fees paid to him in advance, except in the case mentioned in section 550 of the Code of Civil Procedure in habeas corpus proceedings. When the fees have been paid, in the settlement of costs, they may then be regarded as costs, and a judgment may be rendered accordingly. The bond required is to cover costs. (O'Neil *vs.* Kansas City, etc., 31 Fed. Rep., 663.)

Mandamus is an extraordinary remedy and is never granted when the party has another adequate legal remedy. In this case the appellee has another adequate remedy. He may pay the required fee and have his case docketed. The bond protects him. The clerk can not be required to docket civil cases until he has been paid the fee required by law.

The application for mandamus is denied.

Arellano, C. J., Torres, Willard, Mapa, and *McDonough, JJ.,* concur.

DISSENTING

COOPER, J.:

The question presented for decision is whether the clerk of the Court of First Instance may require the payment of his fees in advance before docketing an appeal from the justice court

While there is a difference between costs and fees, identity exists in the mode of collection. "Originally, fees were in strictness demandable at the instant at which the service was rendered, but an uninterrupted course of indulgence at length ripened into a custom, which has received the sanction of judicial decision, that the party for whose benefit they were rendered shall not be called on until after the determination of the case, when, to avoid the vexation of an original suit for a trifling demand, it became the practice to include them in the execution as if they were a part of the successful party's cost. (Musser *vs.* Good, 11 S. and R., Pa., 247.)

Ordinarily, the payment of costs may not be enforced until final judgment has been rendered and costs have been taxed and inserted therein. (5 Enc. PI. and Pr., 254.)

Costs are usually paid to the clerk of the court or collected by the sheriff for the benefit of those entitled to them. "The costs, being accessory to the judgment, may be enforced like it by execution, which is by far the most common remedy for their collection." (5 Enc. Pl. and Pr., 256.)

The ordinary rule that the payment of costs may not be enforced until final judgment has been rendered has been expressly changed by section 787 of the Code of Civil Procedure with reference to the fees of the clerk of the Supreme Court. It is provided in this section that "if the fees are not paid, the court may refuse to proceed with the action until they are paid and may dismiss the bill of exceptions or appeal for failure to prosecute if the fees are not paid within a reasonable time and after reasonable notice."

This provision has been omitted from the next section (788), which relates to the fees of the clerk of the Court of First Instance.

It is to be inferred that, in the absence of the provision requiring the payment of the fees in advance to the clerk of the Supreme Court, the clerk of the Supreme Court would not have had the right to demand their payment; otherwise this provision would be unnecessary, and the failure to enact such a provision in the succeeding section furnishes a strong inference that it was not intended that the clerk of the Court of First Instance should have the right to demand the payment of his fees in advance.

By the provisions of section 76 of the Code of Civil Procedure the party desiring to appeal from a decision of the justice of the peace is required to file a written statement with the justice that he appeals to the Court of First Instance, and shall within the period of five days give a bond with sufficient surety, to be approved by the said justice, payable to the opposite party, in the penal sum of $100, "conditioned for the payment of all such costs in the action as finally may be awarded against him; the filing of such a statement, and giving of such bond shall perfect the appeal."

By the provisions of section 75, a perfected appeal operates to vacate the judgment of the justice of the peace.

By section 78 "the justice of the peace from whose decision an appeal shall be taken shall, on or before the first day of the next term of the Court of First Instance for the province in

which the same is returnable, transmit to the clerk of that court a certified copy of the record of proceedings, with all the original papers and process in the case and the original appeal bond given by the appellant and the clerk shall docket the same in the Court of First Instance."

It results from these provisions of the Code of Civil Procedure that the filing of the written statement and the appeal bond perfects the appeal, and that a perfected appeal operates to vacate the judgment of the justice of the peace.

The parties appealing have no duty to perform further than giving the notice of appeal and filing the appeal bond, and then the duty devolves upon the justice of the peace to transmit the record to the clerk, who shall docket the same in the Court of First Instance. This requirement is unconditional and mandatory, and the clerk must perform it, and if he refuses to do so, may be compelled by mandamus.

For the reasons above stated, I dissent from the majority decision.

Date created: April 15, 2014