

6 Phil. 519

[G.R. No. 2934. October 26, 1906]

**JUAN MOLINA ADMINISTRATOR OF THE ESTATE OF ANASTASIO MORA,
PLAINTIFF AND APPELLANT, VS. LA ELECTRICISTA, DEFENDANT AND APPELLEE.**

D E C I S I O N

MAPA, J.:

The plaintiff in this case alleges that he is the administrator of the estate of Anastasio Mora. In his capacity as such he brought this action to recover from the defendant the sum of 6,000 pesos as damages for the death of the said Mora, who he claims was killed through the fault and negligence of the said defendant. The latter demurred to the complaint on the ground that it did not set out facts sufficient to constitute a cause of action. On the 24th of July, 1905, the court made an order sustaining the demurrer and directing that the case be dismissed. On the 28th of the said month of July the plaintiff excepted to this ruling of the court and at the same time asked that it be modified so as to permit him to amend his complaint, which petition he reiterated on the 17th of August, attaching thereto an amended complaint. This motion of the plaintiff was overruled on the 26th of August. He thereupon excepted to the order of the court overruling said motion and gave notice of his intention to prosecute a bill of exceptions, which he subsequently presented within the time prescribed by law.

Section 101 of the Code of Procedure in Civil Actions provides in part 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 * * *.”

Under the above-quoted provision when the demurrer in this case was sustained the court should have given the plaintiff an opportunity to amend his complaint, fixing a reasonable

time for this purpose instead of dismissing the action, because the right of the plaintiff to amend his complaint in such cases is expressly recognized by the provisions of the above section of the Code of Civil Procedure. That section provides that "the party whose pleading is thus adjudged defective *may amend* his pleading * * *. The ruling of the court below upon this point was obviously erroneous.

The question as to whether the demurrer was properly or improperly sustained it is not necessary for us to decide, because although the plaintiff excepted to the order of the 24th of July, 1905, sustaining the demurrer to the complaint, still we think he abandoned his exception when he reiterated his petition to the court that he be allowed to amend his complaint. This petition, in our judgment, necessarily implied that the plaintiff had no objection to the demurrer being sustained. If the court below had granted plaintiff's petition allowing him to amend his complaint, the case would have not been sent to this court on appeal, this being all that the said plaintiff apparently wished to do after the demurrer had been sustained. In such case he would have obtained what he sought by his motion, and consequently there would have been no ground for his appeal. The order of the court below made and entered on the 26th of August, 1905, is hereby reversed and the plaintiff is allowed five days within which to amend his complaint if he so desires. After the expiration of twenty days let judgment be entered in accordance herewith and ten days thereafter let the case be remanded to the court below for execution. So ordered.

Arellano, C. J., Torres, Johnson, Carson, Willard, and Tracey, JJ., concur.
