

**LOURDES DEL PRADO DE ALEGRE, PLAINTIFF AND APPELLEE VS.
MANUEL GONZALES Y IBARRA ET AL., DEFENDANTS***G.R. No. L-3933. May 28, 1952*

Ponente: TUASON, J.

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This is an appeal by one of two defendants in the above-entitled case from two orders of the Court of First Instance of Pangasinan respectively dated May 9, 1949, and March 23, 1950. The first order overruled a motion to dismiss, which was premised on the grounds that the complaint did not state facts sufficient to constitute a cause of action and that the court had no Jurisdiction over a portion of the subject matter of the action. The second order did dismiss the case, on motion of appellants attorney, but on another ground, and the dismissal was without prejudice and without pronouncement as to costs. It was from the last part of the second order that this appeal was taken, it being contended that the dismissal should have been with prejudice and with costs against the plaintiff.

The objections to the sufficiency of the complaint and the jurisdiction of the court have become moot by reason of the subsequent dismissal of the case. Granting the first ground of the motion to dismiss - failure of the complaint to allege sufficient cause of action - to have been well founded, the most that the appellant could expect from his appeal would be an amendment of the complaint. Such amendment could lead to no useful purpose, assuming that the court could still make an order to this effect, after the whole case has been eliminated from the docket. The objection that the court had no jurisdiction adds to the inconsistency and uselessness of reversing or modifying the order denying the motion to dismiss the complaint.

The appeal from the order of May 9, 1949, seems therefore out of order.

On the dismissal of the case without prejudice and costs, the facts are set out in the order. Among other things, the court stated that the case being called for trial, counsel for plaintiff appeared and "manifested to the court, that, for reasons that he could not just now explain, neither Senator Vicente Sotto, his principal witness, nor his client Lourdes Del Prado, arrived, and consequently, he is not prepared to enter into trial." The court did not consider this explanation sufficient cause for postponing the hearing.

The dismissal under consideration is controlled by Section 3 of Rule 30, which provides that, "When the plaintiff fails to appear at the time of the trial, or to prosecute his action for an unreasonable length of time, x x x x, the action may be dismissed upon motion of the defendant or upon the court's own motion," and that "this dismissal shall have the effect of an adjudication upon the merits, unless otherwise provided by the court."

Failure to appear at the time of the trial and unreadiness to go into trial are failure to prosecute the action. There is failure to prosecute when the plaintiff, being present, is unwilling to proceed with the scheduled trial as when he or his attorney made no appearance at all. The fact that the reasons alleged for the plaintiff's inability or refusal to go to trial are insufficient, only confirms the basic idea of failure to prosecute.

Upon the facts stated in the order of dismissal, considered together with the averments of the complaint, we do not

believe that the court a quo abused its discretion in reserving to the plaintiff the right to bring a new action upon the same subject matter. Indeed, the court would not have abused its discretion had it granted the motion for adjournment instead of dismissing the case, in which case, the appellant would be in no better position than where he now finds himself.

Similarly, the courts have ample discretion to tax or not to tax costs. Section 1 of Rule 131 states that, "Unless otherwise provided in these rules, costs shall be allowed the prevailing party as a matter of course, but the court shall have power, for special reasons, to adjudge that either party shall pay the costs of an action, or that the same shall be divided, as may be equitable." Applying this rule, this Court in *Roque et al. vs. Vda. de Cogan*, 40 Off. Gaz. (10th Supp.) 55, ruled "that payment of costs is a matter that rests entirely upon the discretion of the court." The same considerations which impelled the court to leave the door open for the renewal of the action apply with equal or greater force to the taxing of costs. It may be added that there is no clear showing that there was a deliberate attempt on the part of the plaintiff to delay the trial, or that the suit was frivolous.

The appeal from the order of May 9, 1949, is dismissed and the order of March 23, 1950, is affirmed, with costs of this appeal against the appellant.

Paras, Feria, Pablo, Bengzon, Montemayor, Bautista Angelo, and Labrador, JJ., concur.

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