

**EPIFANIO ATIENZA WEE CHUCO, PLAINTIFF AND APPELLANT, VS.
CFFIILA MOLINA, AS ADMINISTRATRIX OF THE INTESTATE ESTATE
OF FRANCISCO ATIENZA WEE CHUCO ANA, DECEASED, DEFENDANT
AND AP...**

G.R. No. 22547. October 01, 1924

Ponente: ROMUALDEZ, J.

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ROMUALDEZ, J.:

This appeal is from an order of the Court of First Instance of Zamboanga, dismissing this case on the ground that the plaintiff has, according to said court, no right to bring this action after it was dismissed for failure of the plaintiff to appear on time. The action had been instituted by the plaintiff in due time as an appeal from a decision of the committee on claims and appraisal in the intestate proceeding for the settlement of the estate, rejecting his claim.

The case was submitted by the parties to the lower court upon the following stipulation of facts:

"That a claim was presented to the committee on claims and appraisal appointed in case No. 280 of this court, entitled Intestate Estate of Francisco Atienza Wee Chuco Ana, deceased, for the sum of P10,185.31, which claim was rejected by said committee on claims and appraisal, on the ground that there was no sufficient evidence to support said claim; that an appeal was then taken in due time to the Court of First Instance, and upon consideration thereof by the court, the Honorable Delfin Jaranilla, judge, ordered Epifanio Atienza, the herein plaintiff, to file a complaint, which was filed and docketed under No. 1167; that when the case No. 1167 came up for trial, it was dismissed on account of the plaintiff's failure to appear, and his attorney having arrived five minutes after it had been called for trial, without special finding as to costs, for which reason the same complaint in case No. 1167 was filed on the same day, which was docketed under No. 1183, and is now under the consideration of the court."

Two questions present themselves for our consideration, to wit, first, whether or not the order of dismissal of the first complaint is res judicata between the parties; and second, whether or not there was under the law any bar to the second complaint.

As to the first question, we take into account that this action is for the recovery of a debt owing from the intestate, brought originally before the committee on claims appointed in the proceeding for the settlement of the estate of said deceased, and appealed later from said committee to the competent Court of First Instance.

There is no question as to that appeal having been perfected according to law and in due time, whereby the case was taken to the Court of First Instance in order that it might be tried there "in the same manner as any other action" in said court (sec. 776, Code of Civil Procedure, and *Zaragoza vs. Estate of De Viademonte*, 10 Phil., 23), and "as an original action" (*In re Estate of Santos*, 18 Phil., 403).

If this kind of appeal is, under the law, on equal footing with any other action originally instituted in a Court of First Instance, we see no reason why the general rules governing the different proceedings in said court, contained

in Chapter VII of the Code of Civil Procedure (secs. 123152), should be applicable to it, there being no legal provision whatever to the contrary. Among such rules, is subsection 2, and paragraph 2 of subsection 3, of section 127, which says;

"Sec. 127. Dismissal of actions.—An action may be dismissed, with costs to the defendant, in the following cases:

* * * *

"2. By the court, when the plaintiff fails to appear at the time of trial, and the defendant appears and asks for the dismissal.

* * * *

"In either of these three cases a dismissal of the action shall not be a bar to another action for the same cause."

And there is no doubt that this action is upon the same cause as the one that had been dismissed.

Such a dismissal, therefore, was not *res judicata*, nor a bar to the action subsequently instituted.

Is there any other matter which would legally bar the subsequent action? This is the second question which we will now take up.

A difficulty seems to present itself, and that is that the Court of First Instance had no original, but only appellate, jurisdiction over the action first brought by the plaintiff in that court; and as said first complaint was dismissed, it now becomes necessary to determine whether the new complaint is also a complaint on appeal or an original one. If it is an original complaint, then it might be held to have been properly rejected, among other grounds, for lack of original jurisdiction of the Court of First Instance.

But the fact is that the new complaint cannot be regarded as an original one. It cannot be regarded an original one by its terms, for it is therein expressly alleged that it is a complaint on an appeal taken from the decision of the committee on claims. Neither can it be considered original in view of the incidents that took place before its filing, because such a complaint is but the exercise of the very right of action that the plaintiff had and had exercised by filing his first complaint.

The latter's dismissal was under such circumstances of so little an effect and importance under the provisions of the law, that, according to the very words of section 127 of the Code of Civil Procedure above cited, the plaintiff could bring another action for the same cause.

The cause of action which the plaintiff had and which was temporarily frustrated by the dismissal was, not to institute an original action in the Court of First Instance, but to prosecute his appeal in said court. And his second complaint, which was a repetition, authorized by the law, of his first complaint that had been dismissed, is not indeed, nor can it be considered, an original action.

Therefore, there was and is in law no bar to the action brought by the plaintiff, repeating the one formerly brought and dismissed.

Nor can prescription be invoked, for the new complaint was filed on the very day when the first was dismissed, it thus resulting that the plaintiff is fully protected by section 49 of the Code of Civil Procedure.

The judgment appealed from is reversed, and the record is ordered remanded to the trial court for further proceedings according to law, without special finding as to costs. So ordered.

Johnson, Street, Malcolm, Villamor, and Ostrand, JJ., concur.

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