

ELLSWORTH E. ZOOK, PLAINTIFF AND APPELLANT, VS. ROBERT COKER, DEFENDANT AND APPELLEE.

G.R. No. 8067. March 14, 1913

Ponente: MORELAND, J.

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MORELAND, J.:

This is an appeal from a judgment of the Court of First Instance of the city of Manila overruling a demurrer filed by the plaintiff against a special defense alleged in the answer.

On the 12th day of January, 1912, Ellsworth E. Zook, plaintiff, began an action in the Court of First Instance of Rizal against Robert Coker, defendant, for the recovery of a sum of money alleged to have been loaned by the plaintiff to the defendant. The trial was set for the 6th day of February, 1912. The plaintiff did not appear and the court dismissed the action, placing such dismissal expressly under paragraph 2, section 127 of the Code of Civil Procedure. A few days later the plaintiff paid the costs adjudged against him in the Court of First Instance of the Province of Rizal, and thereafter brought suit against the defendant in the Court of First Instance of the city of Manila for the recovery of the same sum of money which was the subject matter of the action in the Court of First Instance of the Province of Rizal. The answer was a general denial and contained the special defense that the judgment of dismissal by the Court of First Instance of Rizal was *res judicata* in the present action. The plea of estoppel and bar is as follows:

"That on the 6th day of February, 1912, in Pasig, Rizal Province, Philippine Islands, in an action then pending and numbered 878 in the Court of First Instance of Rizal, Fifth District, between the same plaintiff and the same defendant, entitled Ellsworth E. Zook, plaintiff, vs. Robert Coker, defendant, and for the same cause of action as is now set forth in this complaint, judgment was duly given by the court in favor of the present defendant, as follows: This cause is set for trial to-day in accordance with a previous application of the plaintiff, dated January 23 last, alleging that he would be ready to try the case during the first part of the present month. The case being called, the court finds in the record a motion of the plaintiff, dated the 5th and filed on the 6th, which alleges that by reason of the fact that the plaintiff and his partner are occupied in the trial of cases in the courts of the city of Manila, which cases are referred to and set forth in said motion, he asks a further adjournment of the trial of the case. The attorney for the defendant objects to the adjournment and asks for a dismissal of the case by reason of the great prejudice which would result to the defendant otherwise. The court, considering both motions, declines to adjourn the cause, for the reason that it has already been adjourned once and that the reasons set forth by the plaintiff are not sufficient to justify another adjournment. The plaintiff might have asked for the adjournment of the trials in Manila and tried the present cause, as to the time of which he has been informed since the 24th of January last; and for the further reason that the defendant is an officer in the United States Army who must sail from the Islands on the 14th of January, and inasmuch as the adjournment would cause him great prejudice, the court, making use of the authority conferred by paragraph 2 of section 127 of Act No. 190, dismisses the present action with costs against the plaintiff."

The plaintiff demurred to this special defense upon the ground that it did not state facts sufficient to constitute the defense of estoppel by *res judicata* or otherwise. The trial court overruled the demurrer. This appeal is taken from

that order.

A motion has been made to dismiss the appeal on the ground that it is not from a final judgment under section 123 of the Code of Civil Procedure and the decisions of this court thereunder. The motion is well founded. (*Segovia vs. Prov. Board of Albay et al.*, 13 Phil. Rep., 331; *Averia vs. Reboldera*, 10 Phil. Rep., 316; *Serrano et al. vs. Serrano*, 9 Phil. Rep., 142.) While this is true, nevertheless, for the purpose of preventing unnecessary litigation, trouble, and expense, we give our opinion upon the question raised by the appeal, it having been presented to and fully argued in this court before the motion to dismiss was made. (*Lichauco vs. Limjuco*, 19 Phil. Rep., 12.)

The learned trial court overruled the demurrer upon the authority of the case of *Yangco vs. De Asis*, 22 Phil. Rep., 201. In this the court erred. In the case of *Yangco vs. De Asis*, the action was originally brought against Luis R. Yangco to recover the value of certain medical services. After evidence relative to the rendition and value of the alleged services had been introduced and while the plaintiff was on the witness stand in his own behalf, "he stated that he was losing time in the trial of the case and that he wished to dismiss his complaint and make the defendant a present of his services," The court thereupon made the following order:

"This case this day came on for trial upon the complaint, answer, cross complaint, and proof, and while the plaintiff was on the witness stand, pending his examination, he stated that he was losing too much time in the trial of the case and that he wished to dismiss his complaint and make the defendant a present of his services: It is, therefore, ordered and adjudged by the court that this case be and the same is hereby dismissed, and that the defendant, Luis R. Yangco, recover of the plaintiff, Antonio de Asis, the costs of this case, for which execution may issue."

After the death of Luis R. Yangco, Antonio de Asis sought to present against his estate the same claim which had been the subject matter of the action taken against Yangco in his lifetime and which had been dismissed as heretofore stated. This court held that the claim could not be presented, as the judgment in the former action was *res judicata* and was a bar thereto.

Between the case at bar and the case cited by the trial court to sustain his opinion there exists, then, these differences: (1) In the *Yangco* case the plaintiff appeared personally at the trial. In the case at bar he did not. (2) In the *Yangco* case evidence was introduced and the plaintiff himself was on the stand as a witness when the action was dismissed. In the case at bar no evidence was introduced, the plaintiff was not even present in court nor was he represented by attorney who was present. (3) In the *Yangco* case the plaintiff himself requested a final and irrevocable dismissal of the action. In the case at bar nothing of that sort happened. (4) In the *Yangco* case the plaintiff by his own act, upon grounds sufficient unto himself, sought to destroy and wipe out completely the subject matter of his action, saying that by reason of the time he was spending in the collection of the claim he desired to terminate the matter finally and to that end to make a present of said claim to the defendant. In the case at bar nothing of the sort occurred. (5) In the *Yangco* case the court dismissed the action finally upon the evidence produced in the case and upon the definite, specific, and voluntary abandonment in open court by the plaintiff of any cause of action which he might have against the defendant, which abandonment was accepted by the court and parties and acted upon by the court by the entry of a final judgment thereon. In the case at bar nothing of the kind occurred. And finally, (6) in the case at bar the court, as is seen above, expressly placed his dismissal of the case under paragraph 2 of section 127 of the Code of Civil Procedure, which provides that an action may be dismissed "by the court, when the plaintiff fails to appear at the time of the trial, and the defendant appears and asks for the dismissal;" and which said, section also provides that in such case "a dismissal of the action shall not be a bar to another action for the same cause." In the *Yangco* case no such dismissal was made.

We, therefore, see that the two cases are different both superficially and fundamentally.

The appeal is dismissed and the cause remanded for trial. No costs. So ordered.

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

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