

**COSME CASTILLO ET AL., PLAINTIFFS AND APPELLANTS, VS.
ABRAHAM SEBULLINA AND JUANA DE TORRES, DEFENDANTS AND
APPELLEES.***G. R. No. 9181. September 29, 1915*

Ponente: CARSON, J.

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This action was instituted on August 1, 1910, and the case came on to be heard before the Honorable Mariano Cui, judge of the Seventh Judicial District, on April 11, 1911. After the evidence of the plaintiff had been submitted and the testimony of one of the witnesses for the defendants had been taken, the trial was suspended until the next session of the court because of the illness of one of the principal witnesses for the defendants. The case was again called on January 26, 1912, but in the absence of the judge who had heard the evidence already taken, it was continued until October 31, 1912, when for the same reason it was again continued until December 6th of that year. On that day counsel for the plaintiffs again prayed for a continuance because of the absence of Judge Cui, but this motion was denied and the case was set for hearing on January 8, 1913. On that day counsel for the plaintiff again asked for a continuance, which was denied on the ground that the case had been pending nearly two years awaiting the return of Judge Cui, and that the judge then sitting had reason to believe that Judge Cui was about to resign from the judiciary, and that in any event it was not likely that he would return at an early date to preside in the court in which the case was then pending.

The case having come on to be heard, the trial judge directed counsel for the plaintiffs to recall the witnesses whose testimony had already been taken at the former hearing; but this counsel declined to do, insisting on their right to rely upon the transcript of the notes of the testimony already taken. The trial judge refused to admit or to consider the transcript of this testimony unless these witnesses were recalled to the witness stand, and again directed counsel for plaintiffs to recall their witnesses, stating that he desired himself to hear the witnesses testify, to note their demeanor and conduct when testifying, and, if necessary, to cross-examine them. Counsel again declined to recall their witnesses or to offer any further evidence in support of the complaint, insisting on their right to rely upon the evidence already submitted, whereupon the trial judge advised counsel for the defendants that he would consider a motion for the dismissal of the complaint. Counsel for defendants then moved for a dismissal of the complaint, which was granted, at the cost of the plaintiffs.

Having excepted to the order of dismissal, and having brought the record here on their duly perfected bill of exceptions, counsel now contend that the trial judge erred, first, in declining to continue the hearing pending the return of Judge Cui; second in declining to accept the evidence already taken, and requiring the plaintiffs to submit their evidence anew[^]and third, in dismissing the complaint at the costs of the plaintiffs on their refusal to proceed.

There can be no question as to the right of the trial judge to refuse a continuance of the hearing in this case upon the ground indicated by him. The case had been pending for nearly two years, and had been continued from term

to term awaiting the return of Judge Cui. The return of Judge Cui was by no means certain, and the trial judge properly held that in any event the action should not be continued indefinitely awaiting his return. The defendants were present in court ready and anxious to defend the action. The court was open, and the judge then sitting was ready to hear the case, and the mere fact that another judge had already taken the testimony of some of the witnesses furnished no sufficient reason for the indefinite continuance of the case over the objection of the defendants. Section 130 of the Code of Civil Procedure provides that matters touching the conduct and trial of a case, such as the granting or denial of continuances or the like, are vested in the sound discretion of the trial judge, and are not subject to exception. The action of a trial judge in such matters is not therefore subject to review in this court unless it is made to appear that there has been an abuse of the discretion conferred upon him in such matters resulting in the denial of sortie substantial right of the appellant. We are of opinion not only that there was no abuse of the discretion in the case at bar, but that the motion for a continuance was properly denied under all the attending circumstances.

As to the order of the trial judge directing the plaintiffs to recall their witnesses, we are of opinion that he was well within his rights in its issuance. No one can doubt the power of a trial judge in the course of a proceeding pending before him to recall and reexamine a particular witness, if he deems it advisable so to do for the development of the truth as to the issues he is called upon to adjudicate; and of course upon such reexamination he may repeat any or all of the questions asked in the examination in chief. If he may recall one witness for this purpose, he may recall all who have testified in the course of the trial, and the only limit upon his power in this regard, other than the general rules touching the competence and admissibility of evidence, would seem to be the duty resting upon him not to subject the litigants or the witnesses to useless or unnecessary inconvenience, expense, or delay. We think the reasons assigned by the trial judge for recalling the witnesses in this case fully justified him in doing so. As it devolved upon him to decide the issues of fact as to which these witnesses testified, he properly desired an opportunity to see and hear them testify, and to judge of their credibility by their conduct and demeanor on the witness stand.

Under the express provisions of sections 147 and 505 of the Code of Civil Procedure, the recorded evidence taken upon a former trial, so far as the same is admissible and competent to establish the issues, may be used upon a new trial without the necessity for retaking it, and we have no doubt that plaintiffs had the right to have the testimony of the witnesses who had already testified in the case at bar retained in the record, and taken into consideration for what it was worth in the adjudication of the issues of fact in support of which it was submitted in so far as it was competent and admissible for that purpose. But that right in no wise limited the power of the court to require their recall for the purpose of subjecting them to further examination, in the course of which, as we have shown, he might properly direct that they answer anew any or all of the questions which had been propounded to them on the former examination—unless it was made to appear that it was impossible or impracticable to secure their presence as witnesses at the second trial. But counsel for plaintiffs did not suggest or intimate that the presence of these witnesses could not be secured, and declined to go forward with the trial, standing strictly upon their mistaken belief that they had a right to have the testimony of the witnesses who had been called to the witness stand at the former hearing taken into consideration in the adjudication of the issues of fact in support of which it was offered, without being subjected to the test of reexamination proposed by the court. Indeed, there are indications in the record that these witnesses were in fact present in attendance on the court at the time when the trial judge directed the retaking of their testimony.

Section 127 of the Code of Civil Procedure provides that:

"An action may be dismissed, with costs to the defendant in the following cases:

"1. * * *

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

"3. By the court, when the plaintiff fails, for an unreasonable length of time, to prosecute his action."

We think that under these provisions of the code the refusal of the plaintiff to proceed with the trial in accordance with the lawful orders of the court was a sufficient ground for the dismissal of the complaint. His refusal to proceed had substantially the same effect as a failure to appear at the time of the trial; and indeed it would seem to come within the purview of the provision which authorizes the court of its own motion to dismiss an action when the plaintiff fails for an unreasonable length of time to prosecute his action. The code does not specifically indicate what constitutes an unreasonable length of time in this connection, but where a case stands ready for trial, the failure or refusal of the plaintiff to go forward in accordance with the lawful orders of the court without unreasonable delay may well be treated as a failure for an unreasonable length of time to prosecute the action.

Section 127 expressly provides that the dismissal of an action under the provisions of either subsection 2 or 3 shall not be a bar to another action for the same cause. The trial judge as we hold, properly dismissed the action in this case but did not expressly reserve the right of plaintiffs to institute a new action. We think that although it was not, perhaps, absolutely necessary, it would have been proper and better for him to have done so.

We conclude that the judgment entered in the court below should be modified by adding thereto a provision expressly reserving to the plaintiffs the right to institute their action anew. Thus modified, the judgment entered in the court below should be affirmed, with the costs of this instance against the appellants. So ordered.

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

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