8 Phil. 197

[G.R. No. 3544. March 27, 1907]

CARMEN AYALA DE ROXAS, PETITIONER AND APPELLEE, VS. EDWIN CASE, RESPONDENT AND APPELLANT.

D E C I S I O N

TRACEY, J.:

This appeal from the Court of Land Registration involves a right of way claimed by the appellant, Edwin Case, through a passage along the westerly side of the property of Carmen Ayala de Roxas, in the city of Manila, which is bounded on the north by the Escolta and on the east by the Estero de Sibacon. The appellant owns the two adjoining properties to the south and west, that to the south lying in the rear of appellee's premises, and being the dominant tenement, for the benefit of which the easement is claimed. It also adjoins the rear of that to the west, which faces on the Escolta, but it was formerly owned by another and was occupied as a hotel, to which the only ingress appears to have been at that time through this passageway.

The claim of the appellant is not that the right of way exists by necessity, growing out of the peculiarities of the location, but simply that it arises by prescription, founded not on any written instrument but on immemorial use alone. In regard to the nature of this servitude as apparent and discontinuous, its inadmissibility under the provisions of the existing Civil Code, demanding a formal title, as well as the applicability thereto of the antecedent *Partidas* and their requirement of an immemorial prescription in order to establish an easement, nothing need be added to the very full exposition of the law in the decision of the judge of the Court of Land Registration.

The appellant, however, here makes the additional point that since the passage of the Code of Civil Procedure in these Islands an immemorial prescription does not call for the same proof as under the Spanish procedure. The third *Partida* in title 31, law 15, after stating the various definite periods applicable to continuous servitudes, says that discontinuous

servitudes have no fixed periods, but must be proved by usage or a term so long that men can not remember its commencement. “Tanto tiempo de que non se pueden accordar los omes, quanto ha que lo commencaron a usar.”

In many judgments the supreme court of Spain has refused to accept proof of any definite number of years as a satisfaction of this requirement of the law. In the judgment of the 11th of February, 1895, it was said that the court should consider the testimony and number of witnesses over 60 years of age who were acquainted with the servitude during their lives and who also had heard it spoken of in the same way by their elders.

With the first of these requirements the appellant has complied, having produced at least one witness over 60 years of age and two of 59, familiar with the property, by whom the use of the right of way was described as existing in the year 1859, the passage running then between walls not apparently new. The way was about 3.75 meters in width, with an entrance of 2.61 meters on the Escolta, a narrow door on the left, about two-thirds of the way down, leading into the property of the appellee, a wider door toward the end into that of the appellant, and seems to have been used for the benefit of both properties, the servient as well as the dominant tenement, a circumstance which renders doubtful the character of the easement by destroying its exclusiveness.

With the second requirement, that of the declarations of persons older than the memory of the witnesses, the appellant has not complied, urging the inadmissibility of such testimony as hearsay under the present Code of Civil Procedure. Had a question been put calling for such declarations, it would have raised the point whether the right to make use of such proof was saved under paragraph 6 of section 795 of the Code of Civil Procedure, providing “that nothing in this act contained shall be so construed as to divest or injuriously affect any property right that has already become vested under existing law.”

We have heretofore held that there is no vested right in a mere rule of evidence. (Aldeguer *vs*. Hoskyn, 2 Phil. Rep., 500.) But the point would be whether this requirement of the Spanish law is not substantive rather than evidential in its nature, so as to survive the repeal. If substantive, then the appellant has failed to comply with it; if not substantive, but merely a matter of procedure, then it must be taken to be replaced by the corresponding provisions of our new code. We find therein no equivalent provision, other than subsection 11 of section 334, establishing as a disputable presumption “that a person is the owner of property from exercising acts of ownership over it or from common reputation of his ownership.” The use of the passage proved in this case can not be held to constitute acts of

ownership for the reason that it is quite consistent with a mere license to pass, informal in its origin and revocable in its nature. It seems, however, that under the clause quoted, common reputation of ownership of the right of way was open to proof and on this theory of the case such testimony, if available, should have been offered.

We are of the opinion that in order to establish a right of prescription something more is required than the memory of living witnesses. Whether this something should be the declaration of persons long dead, repeated by those who testify, as exacted by the Spanish law, or should be the common reputation of ownership recognized by the Code of Procedure, it is unnecessary for us to decide. On either theory the appellant has failed in his proof and the judgment must be affirmed with the costs of this instance.

After the expiration of twenty days let judgment be entered in accordance herewith and ten days thereafter the case remanded to the court from whence it came for proper action. So ordered.

Arellano, C. J., Torres, and *Mapa, JJ.,* concur.
Johnson, J., dissents.

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