

**LEOGARIO RONQUILLO, ET AL., PLAINTIFFS AND APPELLANTS, VS.
JOSE ROCO, AS ADMINISTRATOR OF VICENTE ROCO Y DOMINGUEZ,
ET AL., DEFENDANTS AND APPELLEES.**

G.R. No. L-10619. February 28, 1958

Ponente: MONTEMAYOR, J.

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MONTEMAYOR, J.:

Involving as it does only a question of law, the present appeal from the order of the Court of First Instance of Camarines Sur, dated March 6, 1955, dismissing the amended and supplemental complaint of plaintiffs on motion of defendants that it did not state a cause of action, was taken directly to this Court.

The facts and the issue involved in the appeal are well and correctly stated in the appealed order, the pertinent portion of which we are reproducing and making our own:

"The amended and supplemental complaint alleges that the plaintiffs have been in the continuous and uninterrupted use of a road or passage way which traversed the land of the defendants and their predecessors in interest, in going to Igualdad Street and the market place of Naga City, from their residential land and back, for more than 20 years; that the defendants and the tenants of Vicente Roco, the predecessors in interest of the said defendants have long recognized and respected the private legal easement of road right of way of said plaintiffs; that on May 12, 1953, the defendants Jose Roco thru his co-defendants, Raymundo Martinez and their men with malice aforethought and with a view to obstructing the plaintiffs' private legal easement over the property of the late Vicente Roco, started constructing a chapel in the middle of the said right of way construction actually impeded, obstructed and disturbed the continuous exercise of the rights of the plaintiffs over said right of way; that on July 10, 1954 the new defendants Natividad Roco and Gregorio Miras, Jr. with the approval of the defendant, Jose Roco and with the help of their men and laborers, by means of force, intimidation, and threats, illegally and violently planted wooden posts, fenced with barbed wire and closed hermitically the road passage way and their right of way in question against their protests and opposition, thereby preventing them from going to or coming from their homes to Igualdad Street and the public market of the City of Naga.

"It is very clear from the allegations of the plaintiffs in their amended and supplemental complaint, that they claim to have acquired the easement of right of way over the land of the defendants and the latter's predecessors in interest, Vicente Roco, thru prescription by their continuous and uninterrupted use of a narrow strip of land of the defendants as passage way or road in going to Igualdad Street and the public market of Naga City, from their residential land or houses, and return.

"The only question therefore to be determined in this case, is whether an easement of right of way can be acquired thru prescription."

The dismissal was based on the ground that an easement of right of way though it may be apparent is, nevertheless, discontinuous or intermittent and, therefore, cannot be acquired through prescription, but only by virtue of a title. Under the Old as well as the New Civil Code, easements may be continuous or discontinuous

(intermittent) , apparent or non-apparent, discontinuous being those used at more or less long intervals and which depend upon acts of man (Articles 532 and 615 of the Old and New Civil Codes, respectively). Continuous and apparent easements are acquired either by title or prescription, continuous non-apparent easements and discontinuous ones whether apparent or not, may be acquired only by virtue of a title (Articles 537 and 539, and 620 and 622 of the Old and New Civil Codes, respectively).

Both Manresa and Sanchez Roman are of the opinion that the easement of right of way is a discontinuous one:

"En cambio, las servidumbres discontinuas se ejercitan por un hecho del hombre, y precisamente por eso son y tienen que ser discontinuas, porque es imposible fisicamente que su uso sea incesante. Asi, la servidumbre de paso es discontinua, porque no es posible que el hombre este pasando continuamente por el camino, vereda o senda de que se trate." (4 Manresa, *Codigo Civil Espanol*, 5th ed., p. 529).

* * * "5º Por razon de los modos de disfrutar las servidumbres, en continuas y discontinuas (1). Las continuas son aquellas cuyo uso es puede ser incesante, sin la intervencion de ningun hecho del hombre, como son las de luces y otras de la misma especie; y las discontinuas, las que se usan a intervalos, mas o menos largos, y dependen de actos del hombre, como las de senda, carrera y otras de esta clase," (3 Sanchez Roman, *Derecho Civil*, p. 488).

Under the provisions of the Civil Code, old and new, particularly the articles thereof aforesaid, it would therefore appear that the easement of right of way may not be acquired through prescription. Even Article 1959 of the Old Civil Code providing for prescription of ownership and other real rights in real property, excludes therefrom the exception established by Article 539, referring to discontinuous easements, such as, easement of right of way. (*Bargayo vs. Camumot*, 40 Phil., 857, 867).

In the case of *Cuayong vs. Benedicto*, 37 Phil., 781 where the point in issue was whether or not vested rights in a right of way can be acquired through user from time immemorial, this Court said:

"It is evident, therefore, that no vested right by user from time immemorial had been acquired by plaintiffs at the time the Civil Code took effect. Under that Code (Article 539) no discontinuous easement could be acquired by prescription in any event."

However, in the case of *Municipality of Dumangas vs. Bishop of Jaro*, 34 Phil., 545, this same Tribunal held that the continued use by the public of a path over land adjoining the Catholic church in going to and from said church through its side door, has given the church the right to such use by prescription, and that because of said use by the public, an easement of right of way over said land has been acquired by prescription, not only by the church, but also by the public, which without objection or protest on the part of the owner of said land, had continually availed itself of the easement.

The minority of which the writer of this opinion is a part, believes that the easement of right of way may now be acquired through prescription, at least since the introduction into this jurisdiction of the special law on prescription through the Old Code of Civil Procedure, Act No. 190. Said law, particularly, Section 41 thereof, makes no distinction as to the real rights which are subject to prescription, and there would appear to be no valid reason, at least to the writer of this opinion, why the continued use of a path or a road or right of way by the party, specially by the public, for ten years or more, not by mere tolerance of the owner of the land, but through adverse use of it, cannot give said party a vested right to such right of way through prescription.

"The uninterrupted and continuous enjoyment of a right of way necessary to constitute adverse possession does not require the use thereof every day for the statutory period, but simply the exercise of the right more or less frequently according to the nature of the use. (17 Am. Jur. 972)"

Even under the case of *Cuayong vs. Benedicto* (supra), this Tribunal insinuated that the rule that no

discontinuous easement, like an easement of right of "way, may, under Article 539 of the Old Civil Code, be acquired, might possibly have been changed by the provisions of the Code of Civil Procedure relative to prescription.

* * * "Assuming, without deciding, that this rule has been changed by the provisions of the present Code of Civil Procedure relating to prescription, and that since its enactment discontinuous easement may be acquired by prescription, it is clear that this would not avail plaintiffs. The Code of Civil Procedure went into effect on October 1, 1901. The term of prescription for the acquisition of rights in real estate is fixed by the Code (section 41) at ten years. The evidence shows that in February, 1911, before the expiration of the term of ten years since the time the Code of Civil Procedure took effect, the defendants Interrupted the use of the road by plaintiffs by constructing and maintaining a toll gate on it and collecting toll from persons making use of it with carts and continued to do so until they were enjoined by the granting of the preliminary injunction by the trial court in December 1912." * * * (Cuaycong vs. Benedicto, 37 Phil., 781,796).

Professor Tolentino in his Commentaries and Jurisprudence on the Civil Code, Vol. I, p. 340, would appear to be of the opinion that under the provisions of the Code of Civil Procedure relative to prescription, even discontinuous easements, like the easement of right of way, may be acquired through prescription:

* * * "It is submitted that under Act No. 190, even discontinuous servitudes can be acquired by prescription, provided it can be shown that the servitude was 'actual, open, public, continuous, under a claim of title exclusive of any other right and adverse to all other claimants'."

However, the opinion of the majority must prevail, and it is held that under the present law, particularly, the provisions of the Civil Code, old and new, unless and until the same is changed or clarified, the easement of right of way may not be acquired through prescription.

In view of the foregoing, the order appealed from is hereby affirmed. No costs.

Bengzon, Bautista Angelo, Labrador, Concepcion, Endencia, and Felix, JJ., concur.

Padilla, J., concurs in the result.

CONCURRING

REYES, J. B. L., J.,

I would like to elaborate my reasons for concurring with the majority in declaring the easement of right of way not acquirable by prescription.

The essence of this easement ("servidumbre de paso") lies in the power of the dominant owner to cross or traverse the servient tenement without being prevented or disturbed by its "owner. As a servitude, it is a limitation on the servient owner's rights of ownership, because it restricts his right to exclude others from his property. But such limitation exists only when the dominant owner actually crosses or passes over the servient estate; because when he does not, the servient owner's right of exclusion is perfect and undisturbed. Since the dominant owner can not be continually and uninterruptedly crossing the servieit estate, but can do so only at intervals, the easement is

necessarily of an intermittent or discontinuous nature.

Because possession of a right consists in the enjoyment of that right (old Civil Code, Art. 430; Art. 423, new Civil Code) and to enjoy a right is to exercise it, it follows that the possession (enjoyment or exercise) of a right of way is intermittent and discontinuous. From this premise, it is inevitable to conclude, with Manresa and Sanchez Roman, that such easement can not be acquired by acquisitive prescription (adverse possession) because the latter requires that the possession be continuous or uninterrupted (old Civil Code, Art. 1941; new Civil Code, Art. 1118),

The Code of Civil Procedure (Act 190) did not change the situation. Observe that its section 41, in conferring prescriptive title upon "ten years adverse possession" qualifies it by the succeeding words "uninterruptedly continued for ten years", which is the same condition of continuity that is exacted by the Civil Code.

"SEC. 41. Title to Land by Prescription.-Ten years actual adverse possession by any person claiming to be the owner for that time of any land or interest in land, uninterruptedly continued for ten years by occupancy, descent, grants, or otherwise, in whatever way such occupancy may have commenced or continued, shall vest in every actual occupant or possessor of such land a full and complete title, saving to the persons under disabilities the rights secured by the next section. In order to constitute such title by prescription or adverse possession, the possession by the claimant or by the person under or through whom he claims must have been actual, open, public, continuous, under a claim of title exclusive of any other right and adverse to all other claimants. But failure to occupy or cultivate land solely by reason of war shall not be deemed to constitute an interruption of possession of the claimant, and his title by prescription shall be complete, if in other respects perfect, notwithstanding such failure to occupy or cultivate the land during the continuance of war."

The case of *Municipality of Dumangas vs. Bishop of Jaro*, 34 Phil. 541, does not, if properly analyzed, constitute authority to hold that the easement of right of way is acquirable by prescription or adverse possession.

The Court there said:

"The record shows that the church of the pueblo of Dumangas was constructed in or about the year 1887; that its wall on the southeast side adjoins the building lot in question; and that since the construction of the church there has been a side door in this wall through which the worshippers attending divine service enter and leave, they having to pass over and cross the land in question. It is therefore to be presumed that the use of said side door also carries with it the use by faithful Catholics of the municipal land over which they have had to pass in order to gain access to said place of worship, and, as this use of the land has been continuous, it is evident that the Church has acquired a right to such use by prescription, in view of the time that has elapsed since the church was built and dedicated to religious worship, during which period the municipality has not prohibited the passage over the land by the persons who attend services customarily held in said church.

The record does not disclose the date when the Government ceded to the Church the land on which the church building was afterwards erected, nor the date of the laying out of the adjacent square that is claimed by the municipality and on which the side door of the church, which is used as an entrance by the people who frequent this building, gives. There are good grounds for presuming that in apportioning lands at the time of the establishment of the pueblo of Dumangas and in designating the land adjacent to the church as a public square, this latter was impliedly encumbered with the easement of a right of way to allow the public to enter and leave the church—a case provided for by article 567 of the Civil Code—for the municipality has never erected any building or executed any work which would have obstructed the passage and access to the side door of the church, and the public has been enjoying the right of way over the land in question for an almost immemorable length of time. Therefore an easement of right of way over said land has been acquired by prescription, not only by the church, but also by the public which, without objection or protest, has continually availed itself of the easement in question." (34 Phil., pp. 545-546).

It will be seen that the ratio decidendi of that case lies in the application of Article 567 of the old Civil Code that provides as follows:

"ART. 567. When an estate acquired by purchase, exchange, or partition is enclosed by other estates of the vendor, exchanger, or co-owner, the latter shall be obliged to grant a right of way without indemnity, in the absence of an agreement to the contrary."

Bearing in mind the provisions of the article quoted in relation to the wording of the decision in the Dumangas case, it can be seen that what the court had in mind is that when the Spanish Crown apportioned the land occupied by the Church of Dumangas, it impliedly burdened the neighboring public square (which was also Crown property at the time) with an easement of right of way to allow the public to enter and leave the church, because without such easement the grant in favor of ecclesiastical authorities would be irrisory: what would be the use of constructing a church if no one could enter it? Now, if there was an implied grant of the right of way by the Spanish Crown, it was clearly unnecessary to justify the existence of the easement through prescriptive acquisition. Why then does the decision repeatedly speak of prescription? Plainly, the word "prescription" was used in the decision not in the sense of adverse possession for ten or thirty years, but in the sense of "immemorial usage" that under the law (interior to the Civil Code of 1889, was one of the ways in which the servitude of right of way could be acquired.[1] This view is confirmed by the fact that throughout the passages hereinabove quoted, the court's decision stresses that the people of Dumangas have been passing over the public square to go to church since the town was founded and the church was built, an "almost immemorable length of time." It would seem that the term "prescription" used in said case was merely a loose expression that is apt to mislead unless the court's reasoning is carefully analyzed.

Since 1889, however, the Civil Code repealed the prior legislation; and thereafter the right of way could only be acquired by title and not by adverse possession (usucapio), saving those servitudes already acquired before the Code came into effect (Decisions, Supreme Court of Spain, 27 Oct. 1900, 1st February 1912; 11 May 1927, and 7 January 1920).

Paras, C. J., and Reyes A., J., concur.

[1]In fact, the Siete Partidas. (law 25, Title 31, of the Third Partida), in treating of this servitude declared that to gain this servitude by lapse of time "ha menester que aya usado dellas-tanto tiempo de que non se puedan acordar los omes quanto ha quo lo comenzaron usar".

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