

**INTESTATE ESTATE OF JOSE B. BANZON, REPRESENTED BY
TRINIDAD GONZALEZ, JUDICIAL ADMINISTRATRIX, PLAINTIFF AND
APPELLANT, VS. MARIANO B. BANZON ET AL., DEFENDANTS AND
APPELLEES.**

G.R. No. 27296. October 08, 1927

Ponente: VILLA-REAL J.

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VILLA-REAL J.:

This is an appeal taken by Trinidad Gonzalez, as judicial administratrix of the intestate estate of Jose B. Banzon, from a judgment of the Court of First Instance of Bataan absolving the defendants from the complaint, with the exception of Mariano B. Banzon, who was ordered to indemnify the plaintiff in the sum of P36.72, with the costs of the action.

In support of her appeal, appellant assigns five alleged errors as committed by the trial court in its decision, which we shall consider later.

This controversy deals with two irrigation canals crossing a tract of land belonging to the said intestate estate of Jose B. Banzon.

Plaintiff alleges in her complaint that in the month of April, 1919, defendants Mariano B. Banzon, Ursula Banzon and the latter's husband, Alberto Aquino, without her knowledge or consent, opened a canal 1,000 meters long, 2 meters wide, and 2 meters deep across said land from east, to west, for the purpose of drawing water from the Talisay River to irrigate their lands; that in December, 1922, the same defendants, without her knowledge or consent, opened another canal almost parallel to the former, 1,000 meters long, 3 meters wide, and 2 meters deep, on the same land on the north side of the former one, to irrigate said defendants' lands with water from the aforesaid Talisay River; that in consequence of the opening of said canals she has suffered damages from loss of crops, disintegration and unleveling of land, and therefore prays that the said defendants be ordered to close and refill said canals and to indemnify her for damages.

In answer, the defendants denied generally and specifically all the allegations of the complaint, and set up the special defense that Jose B. Banzon had aided in the construction of the first canal in the year 1905, as well as in the maintenance of the same, as an integral part of an irrigation system connected with conduit No. 9, and that he benefited therefrom during his life; that after Jose B. Banzon's death, his children, together with the plaintiff also benefited from the said canal; that the second canal was built by defendant Mariano B. Banzon, brother of Jose B. Banzon, with the knowledge and consent of the latter and his wife; and by way of counterclaim the said defendant Mariano B. Banzon alleges that the second is built in the most convenient and least prejudicial place for third persons, and that there is no other place combining these advantages; wherefore, the aforementioned defendants pray that they be absolved from the complaint and that the defendant Mariano B. Banzon be awarded the right to maintain and preserve the aforesaid second canal, upon paying the proper indemnity.

The plaintiff, answering the counterclaim, denied each and every one of the allegations therein contained.

The preponderance of the probatory facts shows that the first canal in question, with conduit No. 9, was built in 1905, as part of an irrigation system for the use of the water of the Talisay River for the benefit of the owners of the adjacent lands; that from that time to the present many landowners have made use of said water through said system for the watering of their respective lands, including the deceased Jose B. Banzon during his life, and his heirs after his death; that in September, 1918, the defendant Mariano B. Banzon, with the knowledge and consent of his brother Jose B. Banzon, and after having applied to the Director of Public Works for permission to use the water of the Talisay River, opened the second canal in question, through a place that was most convenient and least onerous to third parties; that in the plan Exhibit B of the cadastral survey of the lands of the municipality of Pilar, Province of Bataan, commenced in 1916 and completed in 1917, there is no irrigation canal on the land in question; that upon commencement of cadastral proceeding No. 164 (G. L. R. O. Record No. 166) of the said municipality and province, the deceased Jose B. Banzon claimed lot No. 362 as his property and applied for its registration under the Torrens system; that no opposition was entered to said claim and application by any one, not even Mariano B. Banzon, nor did he claim to have any easement of aqueduct thereon, notwithstanding that the said defendant, Mariano B. Banzon, was aware of said claim and in fact testified at the hearing; neither does the original certificate No. 2502 of Torrens title, issued on January 24, 1923, to lot No. 362, in favor of the heirs of Jose B. Banzon, show the existence of any easement of aqueduct in favor of any person.

The plaintiff-appellant argues, in support of the first assignment of error, that inasmuch as the two canals in question do not appear in the original certificate of Torrens title No. 2502 to lot No. 362, said lot is free of said easements and the defendants have no right to continue using them.

The pertinent part of section 39 of Act No. 496, as amended by Act No. 2011, reads as follows:

"ART. 39. Todo solicitante que reciba el certificado de titulo expedido por virtud de un decreto de registro, y todo comprador subsiguiente que acepte por causa onerosa y de buena fe un certificado de titulo, gozara de dicho titulo, libre de toda carga y gravamen, con excepcion de los que consten por el certificado y de cualquiera de los que a continuacion se expresan, y que puedan subsistir:

* * * * *

"Tercero. Las carreteras, los caminos publicos o particulares establecidos por la ley, o los canales de riego y sus ramificaciones, cuando en el certificado del titulo no aparezca que se han determinado sus limites.

"Si hubiere derechos de servidumbre u otros pertenecientes a una parcela de terreno registrado, que por cualquier motivo no se hayan inscrito, continuaran subsistentes y se considerara que se trasladan con el titulo de dominio, hasta que se rescindan o se extingan por virtud de la inscripcion del predio sirviente, o de cualquier otro modo."

The English text of the same section reads:

"SEC. 39. Every applicant receiving a certificate of title in pursuance of a decree of registration, and every subsequent purchaser of registered land who takes a certificate of title for value in good faith shall hold the same free of all incumbrance except those noted on said certificate, and any of the following incumbrances which may be subsisting, namely:

* * * * *

"Third. Any public highway, way, private way established by law, or any Government irrigation canal or lateral thereof, where the certificate of title does not state that the boundaries of such highway, way, or irrigation canal or lateral thereof, have been determined.

"But if there are easements or other rights appurtenant to a parcel of registered land which for any reason have

failed to be registered, such easements or rights shall remain so appurtenant notwithstanding such failure, and shall be held to pass with the land until cut off or extinguished by the registration of the servient estate, or in any other manner."

According to the legal provision just quoted, the registration of a servient estate under the Torrens system extinguishes all easements to which it is subject and which have not been noted on the certificate of title issued in accordance with the proper decree of registration.

It will be noted that the law makes no distinction as to the kind of easement and it is well known that there are two kinds of easements—legal and voluntary (art. 536, Civil Code). Now then, which of these two kinds of easements is meant by the legal text just quoted?

Section 70 of the said Act No. 496, in relation to this matter, says:

"SEC. 70. * * * Nothing contained in this Act shall in any way be construed to * * * change or affect in any other way any other rights or liabilities created by law and applicable to unregistered land, except as otherwise expressly provided in this Act or in the amendments hereof."

If the provisions of Act No. 496 do not affect rights created by law, the easements meant by section 39 of said Act No. 496 above cited cannot be other than voluntary and not legal easements duly constituted.

The two canals in question were opened by the defendants across Jose B. Banzon's land with his knowledge and consent, and are therefore voluntary easements. And as their existence does not appear in the original certificate of Torrens title No. 2502 to lot No. 362, in conformity with the provisions of the aforesaid section 39 of Act No. 496, these easements were extinguished and the defendants have lost their right to the use of said canals.

But as to the second canal, however, the defendant Mariano B. Banzon has filed a counterclaim alleging that he has obtained from the Director of Public Works a grant to use 50 liters of water per second from the Talisay River to irrigate his lands, and, in accordance with the provision of article 557 in connection with article 558 of the Civil Code, he asks that he be authorized to open, maintain and preserve a canal similar to the second one mentioned on plaintiff's land upon payment of the proper indemnity to the plaintiff, alleging that the place where said canal passes is the most convenient and least onerous to third parties, and that there is no other place more appropriate and less prejudicial.

The text of article 557 of the Civil Code is as follows:

"ART. 557. Any person who wishes to use upon his own land any water of which he may have the control is entitled to take it through the intervening estates, subject to the obligation of indemnifying the owners thereof, as well as the owners of any lower estates upon which the water may filter or descend."

The defendant Mariano B. Banzon undoubtedly has a right to a compulsory easement of aqueduct, upon payment of indemnity, since, although he is not the owner of the waters of the Talisay River, he can dispose of 50 liters of the same per second, by virtue of the grant from the Director of Public Works. This may be inferred from the provision of article 125 of the Law of Waters of August 3, 1866, which authorizes the owner of the land on which it is sought to impose the compulsory easement of aqueduct, to object when the applicant is not the owner or grantee of the water.

To enjoy the right granted by the above quoted article 557 of the Civil Code, the requisites established in article 558 of the same Code must be complied with, which are as follows:

"ART. 558. Any person desiring to make use of the right granted in the foregoing article shall be obliged—

"1. To prove that he has a right to dispose of the water, and that it is sufficient for the use to which it is

destined;

"2. To show that the right of way he requests is the most convenient and least onerous to third persons;

"3. To indemnify the owner of the servient estate in the manner prescribed by the laws and regulations."

Mariano B. Banzon has complied with these requirements. It has been proved that he was granted the use of 50 liters of water per second from the Talisay River, a sufficient amount to irrigate his land; that the passage opened by him is the most convenient and least onerous to third parties, and that he is willing to indemnify the intestate estate of Jose B. Banzon, owner of the servient estate, as the courts may determine.

The trial court has fixed the sum of P36.72 as the indemnity to be paid by the defendant Mariano B. Banzon to the intestate estate of Jose B. Banzon.

As to the counterclaim of Mariano B. Banzon, then, we find that he has the right, after paying the proper indemnity, to conduct water from the Talisay River through the land known as lot No. 362 herein involved, belonging to the intestate estate of Jose B. Banzon, by opening up a canal similar to the second one here in question.

But it does not appear that the first canal was opened in accordance with the provisions of article 558 in connection with article 557 of the Civil Code above quoted, and of article 118 of the Law of Waters of August 3, 1866. Nor has a counterclaim been filed with respect to it.

In virtue whereof, the judgment appealed from is reversed with respect to the first canal, and we find that the right of voluntary easement of aqueduct existing in lot No. 362 in favor of the defendants before its registration under the Torrens system has been extinguished by such registration, without prejudice to the rights said defendants might have under article 557 in connection with article 558 of the Civil Code or article 118 of the Law of Waters of August 3, 1866; and said judgment is affirmed as regards the second canal, without special pronouncement as to costs. So ordered.

Avanceña, C. J., Johnson, Street, and Villamor, JJ., concur.

JOHNS and MALCOLM, JJ., dissenting:

We are conscious of the fact that our time is wasted in the writing of dissenting opinions. Be that as it may, we are again forced to dissent.

We do not question the legal force and effect of a Torrens title, but the question of plaintiff's title is not involved in this case, and defendants do not question plaintiff's title. Neither do they claim any right, title or interest in his lands. Their claim is confined and limited to the right to the use of the lands to carry waters across his lands to their own lands for irrigation purposes by means of ditches which were constructed across plaintiff's lands with his knowledge, consent and approval, and which have been used many years for that purpose. The right to the use of those ditches for that purpose does not in the least destroy or defeat plaintiff's registered title under the Torrens system.

The majority opinion quotes from section 39 of Act No. 496, as amended by Act No. 2011, which is as follows:

"* * * But if there are easements or other rights appurtenant to a parcel of registered land which for any reason have failed to be registered, such easements or rights shall remain so appurtenant notwithstanding such failure, and shall be held to pass with the land until cut off or extinguished by the registration of the servient estate, or in any other manner."

In the instant case, there are no "easements or other rights appurtenant" to the registered lands of the plaintiff under the Torrens system. The "easements or other rights" are appurtenant to the lands of the defendants and not to those of the plaintiff, and there is no claim or pretense that there has been any "registration of the servient estate." Defendants do not and never have questioned plaintiff's title. Their claim is based solely upon the right to the use of plaintiff's lands to convey waters upon their own lands for irrigation purposes. The ditches in question were constructed with plaintiff's knowledge, consent and approval, and they have been used for that purpose, and have not been used for any other or different purpose, and the use of such ditches for that purpose does not in the least challenge, destroy or defeat any title which plaintiff acquired by registration. Not having or claiming any right or title in or to plaintiff's lands, the defendants were not called upon or required to appear and assert any claim in the registration proceedings for the purpose of defeating plaintiff's title and asserting their own title, for the simple reason that the defendants do not claim or assert any title in or to plaintiff's lands. Defendants never did and do not now claim or assert any right or title in or to plaintiff's lands. Their claim is solely for the right to convey waters for irrigation purposes on their own lands through ditches constructed on plaintiff's lands by and with his knowledge, consent and approval, and that right is not lost and defeated by the registration of plaintiff's lands under the Torrens System.

For such reasons, we dissent.

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