

MARCELO FEANCISCO, PLAINTIFF AND APPELLANT, VS. TIMOTEO PAEZ AND RICARDO JABSON, DEFENDANTS AND APPELLEES.

G.R No. 31118. January 14, 1930

Ponente: ROMUALDEZ, J.

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ROMUALDEZ, J.:

In the complaint the plaintiff claims a right of way, upon payment of indemnity, across defendant Paez's land; that the latter recognize the plaintiff's ownership of a piece of land of 23.46 square meters, that he vacate it, and that the defendant indemnify him for the damages arising from said occupation.

Defendant Paez answered with a general denial and set up the special defense of prescription. Defendant Jabson, in turn, also answered with a general denial, and by way of special defense denied that the plaintiff has any right of way over his land, because outside of it there is another possible way to the street, which is shorter and less prejudicial.

After the judicial commissioner appointed for the purpose had taken the evidence and inspected the land, the Court of First Instance of Manila decided the case as follows:

"In view of the foregoing considerations, the complaint is dismissed with respect to the first cause of action. It is held that the plaintiff is the absolute owner of the piece of land mentioned in the second cause of action, with an area of 23.46 square meters and included within lot No. 13, block No. 2718 of the certificate of title issued in his favor, and he is entitled to the ownership of the small house built of strong materials by defendant Paez thereon, upon payment of its value, or to compel the defendant to purchase said land at twenty pesos (P20) per square meter. Should the plaintiff choose the first alternative, he shall pay the price to be agreed upon by and between himself and said defendant, and in default thereof, the value to be later determined by the court after hearing the evidence that might be presented in connection therewith. Defendant Paez shall pay the costs of this action. So ordered." (Pages 40 and 41, bill of exceptions.)

The plaintiff appealed from this judgment, and makes the following assignments of error:

"1. In holding that the plaintiff's action to enforce his right of way over defendant Paez's land is barred by the statute of limitations.

"2. In not holding that the action to enforce a right of way is imprescriptible.

"3. In denying the relief sought in the complaint, respecting the right of way through Timoteo Paez's land."

The question raised in this appeal, then, is whether the plaintiff's right of way over defendant Paez's land has

prescribed or is imprescriptible.

The trial court held the plaintiff's right to have been barred on the following grounds:

"It has been proved that the parcels of land now belonging to defendant Ricardo Jaibson originally belonged to a certain Paulino Castaneda y Francisco, married to Teodora del Mundo, who, on December 20, 1908 obtained decree No. 3138 in proceeding No. 4865, and subsequently, certificate of title No. 1449. On October 20, 1909, the parcel of land thus held by Paulino Castaneda y Francisco was subdivided by the latter into two parts, one containing 193.66 square meters, situated in the inner portion of the space between Padre Rada and Ilaya Streets, and the other containing 173.71 square meters, conterminous with said streets. The first of these parcels, that is, the interior portion, after successive transfers became the property of the plaintiff herein, and the second portion, after several transfers also, became the property of defendant Jabson. Therefore, from October 20, 1909, when the property was subdivided into the two aforesaid portions, there arose the right of the original owners of the interior parcel to claim a right of way over the adjacent land which was then the land abutting upon P. Rada and Ilaya Streets, through which was the nearest and shortest way to said streets. Notwithstanding the fact that from that date said right arose, none of the previous owners exercised said right until the plaintiff attempted to enforce it through the complaint filed on September 1, 1927, that is, after almost eighteen years had elapsed.

"Section 40 of the Code of Civil Procedure provides that the action to recover ownership or possession of real property, or an interest therein, may only be exercised within ten years after the cause of said action arises. Applying this legal provision to the facts established in this case, it is evident that the plaintiff cannot obtain the relief he seeks in his complaint because his action is barred by the statute of limitations, inasmuch as neither he nor his predecessors demanded the right of way within said limitation." (Pages 36, 37, and 38, bill of exceptions.)

The facts related by the court below are based upon the result of these proceedings. But we should not lose sight of the fact that although it is true that easements are extinguished by non-user for twenty years (article 546, No. 1, Civil Code), nevertheless, the case at bar does not deal with an easement which has been used, while the legal provision cited is only applicable to easements which being in use are later abandoned. Here is what Manresa says on this point: "Prescription affects all easements lawfully arisen although they may not have been used.. Nevertheless, the second paragraph of article 546, number 2, refers to an easement in use, for one cannot discontinue using what one has never used, and there can be no act, at least in all the cases, adverse to an inchoate easement." (4 Commentaries on the Civil Code, fourth edition, page 662.)

And in speakings of legal easements, such as the one in question, the same author observes:

"(c) Others, finally, may be extinguished by non-user, but only with respect to the actual form or manner in which they had been exercised, and the right or the power to claim the exercise of legal easement does not prescribe, as occurs especially in the case of the right of way and easement of aqueduct" (*Italics ours.*) (Ditto, pages 662 and 663.)

The appellee also cites in support of his appeal No. 5 of said article 546 which refers to extinction of easements by waiver. It should be noted that in the case of intermittent easements, such as the right of way, the waiver must be, if not formal and solemn, at least such as may be obviously gathered from positive acts, and the mere refraining

from claiming the right is not, to our mind, sufficient for the purpose. This seems to be the drift of the following commentaries made by Manresa:

There has also been some discussion as to whether the waiver should be express or implied. It may be that the act of walling up a window by the owner of the dominant estate is a plain act of implied waiver, and yet, this act does not of itself extinguish the easement, but only serves to mark the beginning of the prescription. In intermittent easements (like the one in question) the mere fact of leaving them seems to indicate a waiver, and yet, it is not sufficient to extinguish them. It seems then that as a general rule, an express waiver should be required, but without prejudice to having the courts decide in exceptional cases that there is an evident waiver, inferred from acts which reveal it beyond all doubt." (Ibid., pages 667, 668.) (Parenthesis ours.)

The mere fact that the plaintiff and his predecessors refrained from claiming the easement, without any positive act to imply a real waiver, does not, in our opinion, bring the case within the provision of the aforesaid article 546, No. 5, of the Civil Code. Our conclusion is that such a right of way, provided by the law for the benefit of private individuals, may be waived, for Manresa so declares:

"Legal easements established in the interest of private individuals may be waived, but not so those of public utility." (Opus, volume and edition as aforesaid, page 668.) But the court holds, for the reasons stated above, that said article 546, No. 5, Civil Code, is not applicable to the instant case, with reference to waiver, nor is No. 2 of the same article, regarding non-user; and therefore, the plaintiffs right of way cannot be deemed extinguished.

The judgment appealed from is modified and it is held that, upon payment of the proper indemnity, the plaintiff is entitled to a right of way through the shortest and least prejudicial portion of the servient estate, from plaintiff's lot designated No. 3 in the plan Exhibit A, through defendant Timoteo Paez's lot No. 12 according to said plan, to P. Rada Street, as provided in articles 564, 565 and concordant articles of the Civil Code.

Without express pronouncement of costs. So ordered.

Avanceña, C. J., Johnson, Street, Malcolm, Villamor, Ostrand, Johns and Villa-Real, JJ., concur.

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