

LUIS TORIBIO, PLAINTIFF AND APPELLANT, VS. JULIAN DECASA ET AL., DEFENDANTS AND APPELLEES.*G.R.No. 32629. December 20, 1930*

Ponente: JOHNS, J.

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body { font-family: Verdana, Geneva, Arial, helvetica, sans-serif; font-size:80%; background-color:#FFFFFF; margin:0 2% 0 2%; text-align: justify; } h1 { font-family:times; } h2 { background-color:#cccccc; padding:10px 0 10px 0; font-weight: bold; text-align: center; } h3 { font-weight: bold; text-transform: uppercase; text-align: center; } div#footer { font-size:9px; }

The judgment appealed from is a decision of an appeal taken by the plaintiff herein from the decision of the Director of Public Works, approved by the Secretary of Commerce and Communications, dated February 2, 1921, in favor of the defendants herein, with respect to a certain dam constructed at the intersection of the Iwahig and Binabaye Rivers at the place called Sierra-Bullones in the Province of Bohol.

The dispositive part of the trial court's decision is as follows:

"In conclusion, with the evidence of record adduced by both parties, the court:

"(a) Confirms the decision of the Director of Public Works, approved by the Secretary of Commerce and Communications, dated February 2, 1921.

" (b) Condemns the plaintiff to pay the defendants the following damages:

To Sotero Dante	P750.00
To Matias Item	900.00
To Rufino Decasa	1,350.00
To Ciriaco Dolotina	1,200.00
To Donato Busbos	450.00
To Julio Decasa	450.00
To Simeon Arig	900.00
To Julian Decasa	450.00
Total	6,450.00

" (c) Awards costs against the plaintiff.

"(d) And orders the destruction of plaintiff Luis Toribio's dam located at the intersection of the Iwahig and Binabaye Rivers, municipality of Sierra-Bullones, Bohol, marked No. 1 in Exhibit 1."

The plaintiff appealed from this judgment assigning the following alleged errors:

"1. The lower court erred in not allowing the plaintiff-appellant to bring forth proofs to show that he was not given due notice and hearing in the administrative proceedings that culminated in the decision rendered by the

Director of Public Works and confirmed by the Secretary of Commerce and Communications, and in not declaring said decision null, and void.

"2. The lower court erred in affirming the above-cited administrative decision.

"3. The lower court erred in finding that the dam in question was constructed only in the year 1914 after the passage of the Irrigation Act in 1912 and in not finding that it had been in existence long before the passage of said Act.

"4. The lower court erred in finding that the dam of the plaintiff injured the lands of the defendants and in awarding damages in the sum of P6,450 in favor of the defendants, plus the costs of the action."

While the cause was pending before this court, counsel for the plaintiff-appellant moved for a new trial on the ground of newly discovered evidence.

This petition was objected to by the party defendant.

Counsel for the defendants, in turn, subsequently asked, in writing, for the dismissal of the plaintiff's appeal, which was denied by the court.

As to the motion for a new trial, the evidence offered consists of documents, and witnesses intended to prove that Feliciano Litub had died on November 5, 1917, and hence could not be presented as witness at the hearing of the case; that Rufino Decasa in 1923 sold his land to Juan Espuelas and his brothers; that some years ago Simeon Arig, Felix Arig, and Sotero Dante left their respective lands; that Pedro Decasa sold his land to Jose Javier in 1925, and that the lands of Placida Decasa were sold to Macario Maiaran in the year 1923; that said owners of the lands have not suffered any damage by way of lessened crops, and that Sotero Dante, the heirs of Julio Decasa to whom the judgment appealed from awards damages, had already alienated their lands; and were not in possession thereof at the time the case was tried, and hence had no right to such damages.

The objection to this motion for a new trial is based upon the contention that the witnesses now offered by the appellant were already known even before this litigation; that since the hearing of this case was interrupted for over a year, the appellant had an opportunity to find said witnesses; that as to Simeon Arig, he testified at the trial, and was not interrogated by the appellant on this point. All this is true; the evidence which the appellant now offers to present could have been discovered and presented during the hearing of the case, and there is no sufficient reason for concluding that had the appellant exercised proper diligence, he would not have been able to discover said evidence.

We are of opinion and so hold, that the motion for a new trial must be, and it is hereby, denied.

Going now into the merits of the case, we find that the preponderance of the evidence shows that the dam designated No. 1 in Exhibit B, of the plaintiff, was only constructed by the latter in the year 1914, when Act No. 2152 was already in force, and it therefore constituted an illegal diversion of the waters of the Iwahig and Binabaye Rivers, causing damage to the defendants.

With respect to the errors assigned by the party appellant, dwelling upon the first two in particular, it must be noted that although the plaintiff alleges in his complaint that he had no opportunity to defend himself and to present evidence in his favor before the investigator appointed by the Bureau of Public Works, it, nevertheless, appears in the prayer of his complaint before the trial court, that he did not on that account ask for the annulment of the decision of the Director of Public Works confirmed by the Secretary of Commerce and Communications, and he confined himself to the prayer for a reversal of said decision, thereby admitting its validity by implication, although assailing its correctness. Unless special reasons exist, courts of appeal are not inclined to consider

questions raised for the first time before them where there was an opportunity to raise them in the court of origin. This constitutes a change of theory not permissible on appeal. (Williams vs. McMicking, 17 Phil., 408; Agoncillo and Marino vs. Javier, 38 Phil, 424.)

Furthermore, the case of Solis vs. Lujeda (42 Phil, 697) cited by counsel for the appellant is not applicable to the instant case. In the first place that case dealt with the exercise of a power granted by the Law of Waters, while the present case refers to a power granted by Act No. 2152. In the second place, be that as it may, if it were error on the part of the Director of Public Works that the plaintiff herein was not present, such error was corrected by the appeal to the Court of First Instance where the case was tried as if originally brought there (sec. 4, Act No. 2152, cited), and where the appellant, as plaintiff and appellant, was afforded a fair opportunity to allege and prove his supposed rights. The errors to be discussed in this second appeal are not those committed in the first original decision, but, if any, those of the court below, whose judgment is disputed in the present instance.

We find no merit in the first assignment of error.

Taking up the third and fourth assignments of error, the preponderance of the evidence supports the findings of the trial court which are assailed therein, and we find no sufficient reason of record for reversing said findings.

The judgment appealed from is affirmed with costs against the appellant. So ordered.

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

Johns, J., dissents.

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