

JOSE ACOSTA ET AL., PLAINTIFFS AND APPELLANTS, VS. ANDRES DOMINGO ET AL., DEFENDANTS AND APPELLEES.*G.R. No. 3738. December 03, 1907*

Ponente: WILLARD, J.

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The plaintiffs brought this action in the Court of First Instance of the Province of Ilocos Norte, asking for a permanent injunction against the defendants, prohibiting them from cutting off water which irrigated the lands of the plaintiffs. Judgment was entered in the court below in favor of the defendants and the plaintiffs have appealed.

Litigation, arose prior to 1874 between the grantors of the plaintiffs and the grantors of the defendants over the right to use the water here in question. A final judgment in one of those cases was entered on the 11th day of September, 1874. It was therein decided that the defendants in that case, who were the grantors of the plaintiffs in this case, had a right to irrigate their lands in Padong by means of the opening made, or which ought to be made, in the dam belonging to the then plaintiffs who were the grantors of the present defendants, with the obligation on the part of the then defendants to assist in all the work which was necessary in order to confine the waters in the channel from the principal branch of the river to the dam in question. The appellees on page 33 of their brief, in speaking of this judgment, make the following statement:

"It is true that according to the decision of September, 11, 1874, Exhibit A of the defense, the appellants are entitled to water their land in Padong by means of an opening made in the ditch belonging to Bonoan and Valdes and their respective wives, toward the sitio of Rengat, such as they were doing in former years before their separation in 1902; but this right depends always upon a condition which consists in the plaintiffs' sharing in the work stated above, an obligation which the aforesaid judgment imposed on them. Therefore, it having been proven herein that since 1902 the plaintiffs and their tenants had voluntarily desisted and without any reason known to the defendants and their companions, had taken no part in the work of maintaining and conducting the water of the Rivers Burnay and Maliblibeg for the irrigation of the land in Padong, they have forthwith lost said right because they failed to comply with said condition or obligation."

The plaintiffs allege, and as is seen the defendants admit, that this judgment determined the rights of the parties in respect to the use of the waters here in question. It gave the present plaintiffs the right to take the water, but imposed upon them the duty of assisting in the work necessary to bring the waters to the lands of both parties. It was said in the judgment of 1874 that the River Burnay had two branches, one which led to the lands of Agunit and the other to the lands in Padong, in which latter place are found the lands of both the plaintiffs and the defendants. The Rivers Burnay and Maliblibeg join at a place called Sinigpet, some 2,500 meters above the place where the plaintiffs took the water in Padong. After this union, the stream ran in places in two branches until it finally divided, as has been above stated, one branch leading toward Agunit and the other toward Padong. In order to prevent all of the water flowing toward Agunit it was necessary that the plaintiffs and defendants maintain dams and other defensive works upon that part of the river between Sinigpet and their property. The evidence in the case shows that these defensive works were swept away or damaged at every freshet or rise in the river, and

that it was necessary to repair them many times during the year. One witness testified that an examination was made of the upper course of the river twice a week. This is the work which is referred to in the decision above quoted, and is the work in which the plaintiffs by that decision were compelled to take part. They did so until 1902.

It is cleanly established by the evidence that in 1902 and 1903 the plaintiffs did nothing, toward the maintenance of these works, but took the water which they used during those years from another place.

The claim of the defendants, and the holding of the court below, was to the effect that by failing to take part in the work for 1902 and 1903 the plaintiffs forfeited their right to enjoy the water in the future, even if they did participate, or offer to, in the repair work for subsequent years, and the only question in the case is, What effect upon the rights of the plaintiffs did their failure to take part in the work for the years 1902 and 1903 produce?

There is considerable evidence in the case relating to the custom or agreement among the parties as to the penalty imposed for a failure to be present when the work was done. Most of the witnesses testified that there was imposed upon the person who was absent a fine of 25 centimos for each day of his absence. One witness testified, and his evidence seems reasonable, that if one of the party of the defendants was absent, his companions of the same party imposed the fine upon him and so, if one of the party of the plaintiffs was absent, his companions among the plaintiffs imposed the fine upon him. If all of the party of the plaintiffs or all the defendants failed to be present, then the other party deprived them of the use of the water for the day on which they were absent. There is no evidence whatever in the case to indicate that a failure of one person to assist in the work for one day, or for any length of time, deprived him perpetually of the use of the water, nor is there any evidence to show that if all of the plaintiffs failed to assist at any particular time they thereby forfeited forever their aforesaid rights.

It is to be presumed that during the years 1902 and 1903, when the plaintiffs were absent, they were deprived of the water. That the plaintiffs in 1904 offered to assist in the repair work of that year, and asked to be allowed to take the water as before, and that the defendants refused to permit them the use of the water and constructed the dam mentioned in the complaint in such a way as to cut the water off from the plaintiffs, are facts established by the evidence.

In our opinion it can "not be held that the failure of the plaintiffs in 1902 and 1903 to assist in the work of these years deprived them perpetually of the rights which they had enjoyed. When in 1904 they offered to take part in the necessary work of that year, it was the duty of the defendants to permit them to do so and to allow them the use of the water as they had used it since 1874.

It seems from the judgment of 1874 that the litigation in that case arose as it did in this, from the failure of one of the parties to take part in the necessary work of repair.

The plaintiffs made no allegation in the complaint as to the amount of damages which they have suffered, by the acts of the defendants. At the trial, however, they introduced some evidence upon this point. That evidence is not sufficient to warrant any recovery in this respect.

The judgment of the court below is reversed, and judgment is entered in favor of the plaintiffs and against the defendants, ordering that the defendants let the water flow, by removing the dam or such part thereof as obstructs the course of the same, with obligation on the part of the plaintiffs to assist in all the work which is necessary in order to confine the waters in the channel from the principal branch of the river to the dam in question, with the costs of the first instance. No costs will be allowed to either party in this court. So ordered.

Arellano, C. J., Torres, Johnson, Canon, and Tracey, JJ., concur.

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