

**FELICIANO RUPEREZ, PLAINTIFF AND APPELLEE, VS.
BUENAVENTURA DIMAGUILA ET AL., DEFENDANTS AND
APPELLANTS.***G.R. No. 4003. September 29, 1908*

Ponente: MAPA, J.

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The plaintiff seeks the restitution of two parcels of land described in the complaint, alleging that they belong to him and are at the present time held by the defendants, who took possession of the same in the month of May, 1904, without any title thereto, and without his consent. In reply, the defendants denied the facts alleged by the plaintiff, and also presented a cross complaint. Upon the evidence, the court below ordered the defendants to make restitution of the land to the plaintiff, and dismissed the cross complaint, from which decision the defendants took exception. Upon perfecting their appeal the latter did not point out any error, nor did they make any petition with reference to the cross complaint, for which reason it must be considered as abandoned in the present instance.

The plaintiff was the owner of several parcels of land, seven of which he disposed of in favor of Mariano Buenaventura on the 4th of May, 1892. After the death of the latter, the said seven parcels of land were inherited by his son, Emilio, who in turn sold them to the defendants herein in the month of June, 1903. These facts have been admitted by both parties to the suit and are, therefore, beyond all discussion. The defendants base their defense on the purchases and sales above referred to.

The present question hinges upon two other parcels of land, also owned by the plaintiff, and which adjoin three of the aforesaid parcels sold to Buenaventura. It would seem that the defendants by their answer admit that the said two parcels of land were included in the sale made by the plaintiff to Mariano Buenaventura, and consequently included in that afterwards made by the heir of the latter to the said defendants; but, as the trial judge rightly states in his decision:

"The defendant Buenaventura Dimaguila, when testifying in his own behalf, admitted that the parcels in question were not included in the contract of purchase and sale by virtue of which he and his brother had acquired the adjoining parcels; but declared that the plaintiff had voluntarily delivered them in the presence of the surveyor who measured the land, because it resulted from the survey that the land acquired from Buenaventura did not have the area attributed in the title deeds; and, inasmuch as the said land originally came from the plaintiff, he agreed to complete the portion that was lacking to the extent of the lands then delivered."

In accordance with this, and as a clear and express corroboration of the admission made by the defendants, that the land in controversy had not been included in the sale above referred to, the said defendants state, on page 3 of their brief, that the plaintiff offered them the land in question adjoining the second of the seven parcels sold to Buenaventura in compensation for the land of a certain Eugenio Mistica improperly included among the title deeds delivered by the plaintiff to the said Buenaventura. And, on page 5, they further state as follows; This

evidence means nothing against the defendants, in the first place, because, as the plaintiff assigned the lands in question to the defendants subsequently to the execution of the instruments (of sale), it is useless to discuss whether or not the land in controversy was included in the disposal made by the plaintiff in favor of Mariano Buenaventura;" and said defendants say in addition, on page 5 of their brief, that the assignment was made by the plaintiff "in compensation for the land of Eugenio Mistica, which should have been handed over to the defendants in accordance with the title of the plaintiff."

The question being thus presented, the defendants attempted to establish as a fact demonstrating the alleged assignment made by the plaintiff in their favor, that the plaintiff in pointing out to them the boundaries of the seven parcels sold to Mariano Buenaventura, included therein the lands now in controversy. In connection with this point it has been proven that the plaintiff continued in possession as lessee of the land sold to Buenaventura without the latter ever having taken, up to the time of his death, material possession of the same; that, when the plaintiff's lease expired, the successor of the former, a person named Emilio, leased the said lands to a certain Toribio Eguaras, without he himself ever having taken possession of them at any time; that the said Emilio afterwards sold the lands to the defendants herein who, it appears, demanded that they be surveyed and the boundaries marked, and that the plaintiff be present at the time of their delivery. It is set forth, at any rate, that Emilio Buenaventura wrote to the latter asking him to point out the boundaries to the defendants, and in view of all the evidence we believe that they were located, as a matter of fact, when they went to measure the land accompanied by a surveyor. It so appears from the testimony given by the plaintiff in a previous action brought by him against the defendants for the restitution of possession.

In the said testimony, which has been offered as evidence in this action, the former clearly and positively stated that he pointed out to the defendants the boundaries above alluded to, and that on that occasion they had a surveyor with them. It should be noted, however, that this declaration of the plaintiff refers exclusively to the boundaries of the seven parcels sold to Mariano Buenaventura, and that the lands in question constitute separate and distinct parcels not included in the sale of the former ones. For this reason, the fact that the plaintiff pointed out the boundaries, of the aforesaid seven parcels does not imply that lie included therein the lands at issue herein; and, as a matter of fact, there is nothing in his testimony that indicates in any manner the reality and certainty of such inclusion.

True it is, that in the plan, Exhibit 3 of the defendants, the lands in controversy appear to be included as an integral part of the second of the seven parcels sold to Buenaventura; but it has not been shown that such inclusion was made at the indication or with the consent of the plaintiff. The testimony of the surveyor who made the plan would have been of great importance in connection with this matter, but it was not presented by the defendants at the trial. In lieu thereof, they presented a witness, Sisenando Joya, who assisted the surveyor in surveying the lands. This witness asserts that it was the plaintiff himself who indicated the boundaries of the second parcel which comprises the property claimed in the complaint, and that, while he was pointing them out, "the surveyor—the witness added—ordered us to run the tape, and we passed it along the lines indicated to us by Don Feliciano, and so we continued the operation, running the tape along the boundaries, the surveyor at the same time taking the measurement." It does not appear, however, that the above-mentioned plan was shown to this witness while he was testifying, and it does not appear therefrom whether or not the boundaries and the area stated in the plan are the same that had been pointed out by the plaintiff to the defendants and to the surveyor. Furthermore, it appears that the part taken by this witness in the measurement of the land consisted, according to his own statement, in carrying along the end of the tape used in the operation, which was about 15 varas in length, and that for this reason he was always at such a distance that he did not and could not hear the conversation. Inasmuch as he was not aware of what had been agreed upon between the parties at the time, his testimony must necessarily be of little value in proving the pretended assignment of the land in controversy by the plaintiff to the defendants,

supposed to have been made when the aforesaid survey was taking place: Such an assignment can not be concluded from the mere fact testified by the witness, that the tape was run along the lands in question, because, as the trial judge remarked in his decision, such fact might simply be due to the necessity of running the tape around the whole of the three parcels sold to Buenaventura and which surround the lands in controversy, and not to the assignment or delivery thereof to the defendants. No other evidence having been offered in proof of the said assignment, beyond the testimony of one of the defendants that was positively contradicted by the plaintiff, it can not be said that the trial judge acted contrary to the weight of the evidence in not considering as proven the assignment or cession on which the defendants base their defense.

The two parcels of land in question are situated in the barrio of Malabo, and both of them are cocoanut groves; the title deeds presented by the plaintiff in support of his complaint refer, one of them to the land situated in the barrio of Calantucan, and the other to a rice field, although situated in the barrio of Malabo; in view thereof the defendants contend that the said titles do not refer to the lands in litigation, and hence that the plaintiff has not proven his right of ownership, as he alleges in the complaint. Nevertheless, it is a fact that the defendants admitted at the trial that said lands were owned by the plaintiff until the year 1904, when they suppose that, the alleged transfer was made which forms the basis for their exception or defense. Such recognition prevents them from now denying the right of ownership of the plaintiff, inasmuch as they have failed to prove the pretended transfer.

The judgment appealed from is hereby affirmed with the costs of this instance against the appellants. So ordered.

Arellano, C. J., Torres, Carson, Willard, and Tracey, JJ., concur.

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