

**SEVERO AMOR, PETITIONER, VS. GABRIEL FLORENTINO ET AL.,
RESPONDENTS.***G.R No. 48384. October 11, 1943*

Ponente: BOCOBO, J.

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The petitioner asks for the setting aside of the decision of the Court of Appeals which affirmed the judgment of the Court of First Instance of Ilocos Sur. The trial court declared that an easement of light and view had been established in favor of the property of the plaintiffs (respondents herein) and ordered the petitioner to remove within 30 days all obstruction to the windows of respondents' house, to abstain from constructing within three meters from the boundary line, and to pay P200.00 in damages.

It appears that over 50 years ago, Maria Florentino owned a house and a camarin or warehouse in Vigan, Ilocos Sur. The house had and still has, on the north side, three windows on the upper story, and a fourth one on the ground floor. Through these windows the house receives light and air from the lot where the camarin stands. On September 6, 1885, Maria Florentino made a will, devising the house and the land on which it is situated to Gabriel Florentino, one of the respondents herein, and to Jose Florentino, father of the other respondents. In said will, the testatrix also devised the warehouse and the lot where it is situated to Maria Encarnacion Florentino. Upon the death of the testatrix in 1892, nothing was said or done by the devisees in regard to the windows in question. On July 14, 1911, Maria Encarnacion Florentino sold her lot and the warehouse thereon to the petitioner, Severo Amor, the deed of sale stating that the vendor had inherited the property from her aunt, Maria Florentino. In January, 1938, petitioner destroyed the old warehouse and started to build instead a two-story house. On March 1st of that year, respondents filed an action to prohibit petitioner herein from building higher than the original structure and from executing any work which would shut off the light and air that had for many years been received through the four windows referred to. The Court of First Instance found on the 15th of the same month that the construction of the new house had almost been completed, so the court denied the writ of preliminary injunction.

I

Inasmuch as Maria Florentino died in 1892, according to the finding of fact of the Court of Appeals, Article 541 of the Civil Code governs this case. The facts above recited create the very situation provided for in said article, which reads as follows:

"Art. 541. La existencia de un signo aparente de servidumbre entre dos fincas, establecido por el propietario de ambas, se considerara, si se enajenare una, como titulo para que la servidumbre continúe activa y pasivamente, a no ser que, al tiempo de separarse la propiedad de las dos fincas, se exprese lo contrario en el titulo de enajenacion de cualquiera de ellas, o se haga desaparecer aquel signo antes del otorgamiento de la escritura."

"Art. 541. The existence of an apparent sign of easement between two estates, established by the proprietor of both, shall be considered, if one of them is alienated, as a title so that the easement will continue actively and

passively, unless at the time the ownership of the two estates is divided, the contrary is stated in the deed of alienation of either of them, or the sign is made to disappear before the instrument is executed."

When the original owner, Maria Florentino, died in 1892, the ownership of the house and its lot passed to respondents, while the dominion over the camarin and its lot was vested in Maria Encarnacion Florentino, from whom said property was later bought by petitioner. At the time the devisees took possession of their respective portions of the inheritance, neither the respondents nor Maria Encarnacion Florentino said or did anything with respect to the four windows of the respondents' house. The respondents did not renounce the use of the windows, either by stipulation or by actually closing them permanently. On the contrary, they exercised the right of receiving light and air through those windows. Neither did the petitioner's predecessor in interest, Maria Encarnacion Florentino, object to them or demand that they be closed. The easement was therefore created from the time of the death of the original owner of both estates, so when petitioner bought the land and the camarin thereon from Maria Encarnacion Florentino, the burden of this easement continued on the real property so acquired because according to Article 534, "easements are inseparable from the estate to which they actively or passively pertain."

An incidental question that arises at this juncture is whether or not Article 541 applies to a division of property by succession. The affirmative has been authoritatively declared. (Manresa, "Comentarios alCodigo Civil Espanol," vol. 4, p. 619; Sentence of the Supreme Tribunal of Spain, November 17, 1911).

Petitioner assigns as an error of the Court of Appeals the supposed failure of that tribunal to pass upon his motion to consider certain allegedly new evidence to prove that Maria Florentino, the original owner of the properties, died in 1885. Petitioner alleges that Maria Florentino died in 1885 and, therefore, the Law of the Partidas should be followed in this case and not the Civil Code. However, the petitioner's contention cannot be upheld without rejecting the finding of fact made by the Court of Appeals, as follows:

"Habiendo pasado la propiedad de la casa de manposteria a los demandantes, a la muerte de Maria Florentino, ocurrida en 1892, (el demandado sostiene que fue con anterioridad a 1889) no hay duda ninguna de que los demandantes adquirieron la servidumbre de luces y vistas sobre el camarin del demandado mediante titulo y por prescription (Art. 537)."

We cannot review the above finding of fact by the Court of Appeals that Maria Florentino died in 1892. The evidentiary fact from which the Court of Appeals drew the above finding is that Gregorio Florentino during the trial in 1938 testified to facts of his own personal knowledge, and he was then 58 years old, having been born in 1880. If Maria Florentino, as claimed by petitioner, had died in 1885, Gregorio Florentino would have been only 5 years of age at the time of Maria Florentino's death. The Court of Appeals therefore concluded that Maria Florentino died in 1892, when Gregorio Florentino was then 12 years of age. We do not believe we can disturb the finding of the Court of Appeals, because its deduction as to the date of Maria Florentino's death may be right or wrong, according to one's own reasoning. In other words, its conclusion of fact from Gregorio Florentino's testimony is not necessarily and unavoidably mistaken. On the contrary, it is reasonable to believe that a person 58 years old cannot remember facts of inheritance as far back as when he was only 5 years of age.

Furthermore, the burial certificate and the gravestone, whose copy and photograph, respectively, were offered by petitioner in a motion for new trial filed in the Court of Appeals, could have been discovered by petitioner before the trial in the Court of First Instance by the exercise of due diligence. There is no reason why this evidence could be found when the case was already before the Court of Appeals, but could not be found before the trial in the Court of First Instance. It was easy, before such trial, for the petitioner to inquire from the relatives of Maria Florentino as to when she died. And having ascertained the date, it was also easy to secure the burial certificate and a photograph of the gravestone, supposing them to be really of Maria Florentino. The fact is, petitioner never

tried to find out such date and never tried to secure the additional evidence till his counsel raised this issue for the first time before the Court of Appeals. That Court was therefore right in rejecting petitioner's claim that Maria Florentino died in 1885. (Sec. 497, Act 190). The petitioner's statement in his brief (p. 11) that the Court of Appeals neither passed upon his motion nor took the burial certificate and the gravestone into account is not true, because the very words of the Court of Appeals clearly show that the Court had in mind said motion and evidence when the decision was signed. The decision said: "a la muerte de Maria Florentino ocurrida en 1892 (el demandado sostiene que fue con anterioridad a 1889)" (*Italics supplied*).

Lastly, the issue as to the date of Maria Florentino's death cannot be raised for the first time on appeal. Petitioner did not in the trial court allege or prove this point. He presented this issue for the first time in the Court of Appeals. (Sec. 497, Act 190).

Let us now consider Article 541 more closely in its application to the easement of light and view and to the easement not to build higher (*altius non tollendi*). These two easements necessarily go together because an easement of light and view requires that the owner of the servient estate shall not build to a height that will obstruct the window. They are, as it were, the two sides of the same coin. While an easement of light and view is positive, that of *altius non tollendi* is negative. Clemente de Diego states that when article 538 speaks of the time for the commencement of prescription for negative easements, "it refers to those negative easements which are the result and consequence of others that are positive, such as the easement not to build higher, or not to construct, which is indispensable to the easement of light." ("Se refiere a aquellas servidumbres negativas que son sucuela y consecuencia de otras positivas, como la de no levantar mas alto, o de no edificar, que es imprescindible para la servidumbre de luces.") ("Curso Elemental de Derecho Civil Español, Comun y Foral," vol. 3, p. 450). This relation of these two easements should be borne in mind in connection with the following discussion of (1) the modes of establishing and acquiring easements; (2) the meaning of article 541; and (3) the doctrine in the case of *Cortes vs. Yu-Tibo*.

First, as to the modes of establishing and acquiring easements. According to Article 536, easements are established by law or by will of the owners. Acquisition of easements is first by title or its equivalent and secondly by prescription. What acts take the place of title? They are mentioned in Articles 540 and 541, namely, (1) a deed of recognition by the owner of the servient estate; (2) a final judgment; and (3) an apparent sign between two estates, established by the owner of both, which is the case of article 541. Sanchez Roman calls such apparent sign under article 541 "supletoria del titulo constitutivo de la servidumbre." (Derecho Civil, vol. 3, p. 656). The same jurist says in regard to the ways of constituting easements:

"En resumen, segun el Codigo, las servidumbres reales se constituyen.:

"Las continuas y aparentes por titulo, por prescription de veinte anos y por la existencia de un signo aparente de servidumbre, en el supuesto y condiciones del art. 541.

"Las continuas no aparentes y las discontinuas, sean o no aparentes por titulo y por escritura del reconocimiento del dueno del predio sirviente o por sentencia firme, que se consideran como medios supletorios del titulo.

"Las aparentes, aunque sean discontinuas, se adquieren tambien por la existencia de un signo aparente en el supuesto y condiciones del articulo 541."

"To sum up, according to the Code, real easements are constituted:

"Continuous and apparent, by title, by prescription for twenty years and by the existence of an apparent sign of easement, in the case and under the conditions of Art. 541.

"Continuous non-apparent and discontinuous, whether apparent or not, by title and by deed of recognition by the owner of the servient estate or by final judgment, which are considered as suppletory means of title.

"Apparent easements, although discontinuous, are also acquired by the existence of an apparent sign in the case and under the conditions of Art. 541."

In the Sentence of the Supreme Tribunal of Spain dated November 7, 1911, it was held that under article 541 of the Civil Code, the visible and permanent sign of an easement "is the title that characterizes its existence" ("es el titulo caracteristico de su existencia.")

It will thus be seen that under article 541 the existence of the apparent sign in the instant case, to wit, the four windows under consideration, had for all legal purposes the same character and effect as a title of acquisition of the easement of light and view by the respondents upon the death of the original owner, Maria Florentino. Upon the establishment of that easement of light and view, the concomitant and concurrent easement of *altius non tollendi* was also constituted, the heir of the camarin and its lot, Maria Encarnacion Florentino, not having objected to the existence of the windows. The theory of article 541, of making the existence of the apparent sign equivalent to a title, when nothing to the contrary is said or done by the two owners, is sound and correct, because as it happens in this case, there is an implied contract between them that the easements in question should be constituted.

Analyzing article 541 further, it seems that its wording is not quite felicitous when it says that the easement should continue. Sound juridical thinking rejects such an idea because, properly speaking, the easement is not created till the division of the property, inasmuch as a predial or real easement is one of the rights in another's property, or *jura in re aliena* and nobody can have an easement over his own property, *nemini sua res servit*. In the instant case, therefore, when the original owner, Maria Florentino, opened the windows which received light and air from another lot belonging to her, she was merely exercising her right of dominion. Consequently, the moment of the constitution of the easement of light and view, together with that of *altius non tollendi*, was the time of the death of the original owner of both properties. At that point, the requisite that there must be two proprietors—one of the dominant estate and another of the servient estate— was fulfilled. (Article 530, Civil Code.)

Upon the question of the time when the easement in article 541 is created, Manresa presents a highly interesting theory, whether one may agree with it or not. He says:

"La servidumbre encubierta, digamoslo así, por la unidad de dueño, se hace ostensible, se revela con toda su verdadera importancia al separarse la propiedad de las fincas o porciones de finca que respectivamente deben representar el papel de predios sirviente y dominante."

"The concealed easement, as it were by the oneness of the owner, becomes visible, and is revealed in all its importance when the ownership of the estate or portions of the estate which respectively should play the role of servient and dominant estates is divided."

Such a view cannot be fully accepted because before the division of the estate there is only a service in fact but not an easement in the strictly juridical sense between the two buildings or parcels of land.

We come now to the case of *Cortes vs. Yu-Tibo*, 2 Phil., 24, decided in 1903, Mr. Justice, later Chief Justice, Mapa speaking for the Court. Counsel for petitioner contends that the doctrine in that case is controlling in the present one. If the essential facts of the two cases were the same, there is no doubt but that the early opinion would be decisive inasmuch as it is by its cogent reasoning one of the landmarks in Philippine jurisprudence. However, the facts and theories of both cases are fundamentally dissimilar. What is more, as will presently be explained, that very decision makes a distinction between that case and the situation provided for in article 541. In that case, Cortes sought an injunction to restrain Yu-Tibo from continuing the construction of certain buildings.

Cortes' wife owned a house in Manila which had windows that had been in existence since 1843. The defendant, who occupied a house on the adjoining lot, commenced to raise the roof of the house in such a manner that one-half of the windows in the house owned by plaintiff's wife had been covered. This Court, in affirming the judgment of the lower court which dissolved the preliminary injunction, held that the opening of windows through one's own wall does not in itself create an easement, because it is merely tolerated by the owner of the adjoining lot, who may freely build upon his land to the extent of covering the windows, under article 581, and that this kind of easement is negative which can be acquired through prescription by counting the time from the date when the owner of the dominant estate in a formal manner forbids the owner of the servient estate from obstructing the light, which had not been done by the plaintiff in this case.

It will thus be clear that one of the essential differences between that case and the present is that while the Yu-Tibo case involved acquisition of easement by prescription, in the present action the question is the acquisition of easement by title, or its equivalent, under article 541. Therefore, while a formal prohibition was necessary in the former case in order to start the period of prescription, no such act is necessary here because the existence of the apparent sign when Maria Florentino died was sufficient title in itself to create the easement.

Another difference is that while in the Yu-Tibo case, there were two different owners of two separate houses from the beginning, in the present case there was only one original owner of the two structures. Each proprietor in the Yu-Tibo case was merely exercising his rights of dominion, while in the instant case, the existence of the apparent sign upon the death of the original owner ipso facto burdened the land belonging to petitioner's predecessor in interest, with the easements of light and view and *altius non tollendi* in virtue of article 541.

The very decision in Cortes vs. Yu-Tibo distinguishes that case from the situation foreseen in article 541. Said this Court in that case:

"It is true that the Supreme Court of Spain, in its decisions of February 7 and May 5, 1896, has classified as positive easements of light which were the object of the suits in which these decisions were rendered in cassation, and from these it might be believed at first glance, that the former holdings of the supreme court upon this subject had been overruled. But this is not so, as a matter of fact, inasmuch as there is no conflict between these decisions and the former decisions above cited.

"In the first of the suits referred to, the question turned upon two houses which had formerly belonged to the same owner, who established a service of light on one of them for the benefit of the other. These properties were subsequently conveyed to two different persons, but at the time of the separation of the property nothing was said as to the discontinuance of the easement, nor were the windows which constituted the visible sign thereof removed. The new owner of the house subject to the easement endeavored to free it from the incumbrance, notwithstanding the fact that the easement had been in existence for thirty-five years, and alleged that the owner of the dominant estate had not performed any act of opposition which might serve as a starting point for the acquisition of a prescriptive title. The supreme court, in deciding this case, on the 7th of February, 1896, held that the easement in this particular case was positive, because it consisted in the active enjoyment of the light. This doctrine is doubtless based upon article 541 of the Code, which is of the following tenor: The existence of apparent sign of an easement between two tenements, established by the owner of both of them, shall be considered, should one be sold, as a title for the active and passive continuance of the easement, unless, at the time of the division of the ownership of both tenements, the contrary should be expressed in the deed of conveyance of either of them, or such sign is taken away before the execution of such deed.'

"The word 'active' used in the decision quoted in classifying the particular enjoyment of light referred to therein, presupposes on the part of the owner of the dominant estate a right to such enjoyment arising, in the particular cases passed upon by that decision, from the voluntary act of the original owner of the two houses, by which he imposed upon one of them an easement for the benefit of the other. It is well known that

easements are established, among other cases, by the will of the owners. (Article 536 of the Code.) It was Jan act which was, in fact, respected and acquiesced in by the new owner of the servient estate, since he purchased it without making any stipulation against the easement existing thereon, but, on the contrary, acquiesced in the continuance of the apparent si;n thereof. As is stated in the decision itself, 'It is a principle of law that upon a division of a tenement among various persons—in the absence of any mention in the contract of a mode of enjoyment different from that to which the former owner was accustomed—such easements as may be necessary for the continuation of such enjoyment are understood to subsist.' It will be seen, then, that the phrase 'active enjoyment' involves an idea directly opposed to the enjoyment which is the result of a mere tolerance on the part of the adjacent owner, and which, as it is not based upon an absolute, enforceable right, may be considered as of a merely passive character." (2 Phil., 29-31).

Finally, the Yu-Tibo case was decided upon the theory of the negative easement of *altius now tollendi*, while the instant case is predicated on the idea of the positive easement of light and view under article 541. On this point, suffice it to quote from Manresa's work. He says:

"Que en las servidumbres cuyo aspecto positivo aparece enlazado al rnegativo, asi como al efecto de la prescription ha de considerarse preferente el aspecto negativo, al efecto del art. 541 basta atender al aspecto positivo, y asi la existencia de huecos o ventanas entre dos fincas que fueron de un mismo dueno es bastante para considerar establecidas, al separarse la propiedad de esas fincas, las servidumbres de luces o vistas, y con ellas las de no edificar o no levantar mas alto, porque sin estas no podrian existir aquellas."

"That in easements whose positive aspect appears tied up with the negative aspect, just as for the purposes of prescription the negative aspect has to be considered preferential, so for the purposes of Article 541 it is sufficient to view the positive aspect, and therefore the existence of openings or windows between two estates which belonged to the same owner is sufficient to establish, when the ownership of these estates is divided, the easements of light or view, and with them the easements of *altius non tollendi* because without the latter, the former cannot exist."

There are several "decisions of the Supreme Court of Spain which have applied Article 541. Some of them are those of February 7, 1896; February 6, 1904; May 29, 1911; and November 17, 1911.

The sentence of February 7, 1896, dealt with windows established in one house by the original owner of two houses. When he died, the two houses were adjudicated to different heirs. The court held that there was an easement of light.

"Considerando que, segun lo establecido por este Supremo Tribunal en repetidas sentencias, y consignado, muy principalmente, en la dictada en 21 de Octubre de 1892, lo preceptuado en la ley 14, titulo 31 de la Partida 3.a, al tratar del modo de constituirse las servidumbres, no esta en oposicion con el principio mediante el que, dividida una finca entre diver sas personas, sin que en el contra to se mencione cosa alguna acerca de un modo de aprovechamiento distinto del que usaba el primitivo dueno de ella, se entienden subsistentes las servidumbres necesarias para que aquel pueda tener lugar.

"Considerando que ese principio y jurisprudencia han obtenido nueva sancion, puesto que a ellos obedece el concepto claro y concreto del articulo 541 del Codigo Civil, aplicable al caso, * * *" (Riuz, Codigo Civil, Vol. V, pp. 349-350).

"Considering that, according to what has been established by this Supreme Tribunal in repeated sentences, and principally declared in the sentence promulgated on October 21, 1892, the provision of law 14, title 31 of Partida 3 in treating of the mode of constituting easements, is not contrary to the principle that when an estate is divided between different persons, and in the contract nothing is said about a mode of enjoyment different from that used by the original owner thereof, the necessary easements for said mode of enjoyment are understood to be subsisting;

"Considering that such principle and jurisprudence have obtained a new sanction, for due to them is the clear and concrete concept of Article 541 applicable to the case * * *."

Therefore, considering that Maria Florentino died in 1892, according to a finding of fact by the Court of Appeals, there is an easement of light and view in favor of the respondents' property under article 541 of the Civil Code.

II

But granting, arguendo, that Maria Florentino died in 1885, as contended by petitioner, nevertheless the same principle enunciated in article 541 of the Spanish Civil Code was already an integral part of the Spanish law before the promulgation of the Civil Code in 1889, and, therefore, even if the case should be governed by the Spanish law prior to the Civil Code, the easement in question would also have to be upheld. That the law before the Civil Code was the same as at present is shown by the following:

- Under Law 14, Title 31, Partida 3, this easement was constituted by an implied contract among the heirs of Maria Florentino.
- Granting for the sake of argument that this easement was not created through an implied contract according to Law 14, Title 31, Partida 3, yet that provision of the Partidas was not inconsistent with the principle in question, so that there was a gap in the Partidas which the Supreme Court of Spain filled up from the Roman Law and modern civil codes, by recognizing the existence of this kind of easement.
- Law 17, Title 31, Partida 3 regarding the extinguishment of an easement did not prohibit the easement in the instant case. Therefore, we should adhere to the decisions of the Supreme Court of Spain which maintain this easement under the Spanish law prior to the Civil Code.
- Other considerations show that the principle of apparent sign as announced by the Supreme Tribunal of Spain is not incompatible with, the Partidas.

First, as to the implied contract. Law 14, Title 31, Partida 3 provided that easements were acquired by contract, by will and by prescription. Upon the death of the original owner, Maria Florentino, the four windows under consideration already existed and were visible. One of the heirs, Maria Encarnacion Florentino, to whom the camarin and its lot had been devised, having failed to object to the same, knowingly consented to their continuance. Nor did Gabriel and Jose Florentino (devisees of the house that had the four windows) permanently close the windows. There was consequently an implied agreement between her and the devisees of the house with the four windows to the effect that the service of these windows would continue, thus creating the easement of light and view and the concomitant easement of *altius non tollendi*. Hence, the easement in question was acquired by Gabriel and Jose Florentino through contract under. Law 14, Title 31, Partida 3.

Secondly, with respect to the doctrine of the Supreme Tribunal of Spain. In a series of decisions of that court, it was held that Law 14, Title 31, Partida 3 was not opposed to the easement under review. One of those decisions is that of November 7, 1883, which held:

"Considerando que, segun la doctrina establecida por este Tribunal Supremo, lo dispuesto en la ley 14, tit. 31, Partida 3", que trata de como se constituyen las servidumbres, no se opone al principio de que dividido un predio entre dos diferentes personas, sin que se establezca en el contrato un modo de disfrute diferente del que usaba el primitivo dueno de la totalidad, se entienden subsistentes las servidumbres necesarias para verificarlo, y que el signo aparente de ellas es un titulo para que continuen si al tiempo de la division de la propiedad no se expresa lo contrario, que es lo que acontece en el presente caso, puesto que la finca adjudicada en pago a Juan Perez Charueco, objeto de este pleito, al fallecimiento de aquel se dividió entre sus hijos Juan y Maria Francisca, sin establecerse novedad alguna respecto a la manera de su disfrute, * * *"

Other decisions of the Supreme Tribunal of Spain to the same effect are those of September 14, 1867 and June 7, 1883. (See Scaevola, "Codigo Civil Comentado" vol. 10, pp. 272-274.)

So that, granting for the sake of argument, that the easement was not created through an implied contract according to Law 14, Title 31, Partida 3, yet that provision of the Partidas, according to decisions of the Supreme Tribunal of Spain, was not inconsistent with the principle in question. The problem in this case not having been foreseen in Law 14, Title 31, Partida 3, there was a gap in the old legislation, which the Supreme Tribunal of Spain filled up from the Roman Law and from modern Civil Codes.

The principle in question was deeply rooted in the Roman Law. It is from the Roman Law that the Supreme Tribunal of Spain obtained this principle, in order to solve a question not provided for by the Partidas, whose main source was also the Roman law. In other words, the Partidas being silent on the point under consideration, the Supreme Tribunal of Spain resorted to the authoritative voice of the Roman law from which the Law of the Partidas had derived its inspiration.

The following quotations from the Spanish version of the Roman Law Digest will prove the assertions just made:

"Si te vendiere una cierta parte de mi fundo, te correspondera tambien el derecho de acueducto (4), aunque muchas veces la conduccion sea a causa de la otra parte del mismo fundo." (Digesto.—Lib. VIII, Tit. III, Ley XXV.)

"Aquel que tenia dos casas bajo un mismo techo corrido, lego entrambas a diversos sujetos. Respondi que en razon a que el techo puede pertenecer a dos de suerte tal que sean cada uno ciertas y determinadas partes de el; no tenian accion reciproca para prohibir que las vigas de las unas casas estuvieren dentro de las otras." (Digesto.—Lib. VIII, Tit. II, Ley XXXVI, p. 246).

"Una testadora tenia unas casas unidas a un fundo que lego; se pregunto: si estas no siguieren al fundo legado, y el legatario vindicase este: ¿tal fundo debiera alguna servidumbre a las casas? 6 bien si el legatario reclamare que se le diere el fundo en virtud de fideicomiso a su favor, ¿deberan acaso los herederos reservar alguna servidumbre a favor de las casas? Respondi que debian hacerlo." (Digesto.— Lib. VIII, Tit. V, Ley XX, p. 256).

Among the modern civil codes which contain the rule in question are those of France, Belgium, Holland, Portugal, Mexico and Chile. It is presumed that the Supreme Tribunal of Spain had also in mind at least one of them when it decided cases involving this principle before the promulgation of the Spanish Civil Code.

When, therefore, Maria Florentino died (supposing she died in 1885), the status of the Spanish law was in favor of the doctrine in question. We cannot change it because it was in full force at the time of the alleged date of Maria Florentino's death. We cannot reject a doctrine established by the Spanish Supreme Tribunal as an integral part of the Spanish law before the promulgation of the Civil Code in 1889. And we know that jurisprudence—in the sense of court decisions—is one of the sources of the law. Thirdly, concerning Law 17, Title 31, Partida 3. It is true that the eminent jurist, Manresa, is of the opinion that "el precepto del art. 541 no solo no existia en nuestra antigua legislacion, sino que podia deducirse claramente lo contrario de la ley 17, tit. 31, Partida 3.a * * *." However, a careful reading of this provision of the Partidas reveals that the same did not militate against the creation of an easement by an apparent sign if nothing was said or done when the property is divided. Law 17, Title 31, Partida 3, reads as follows:

"Partida 3.a tit XXXI, ley 17,—Perderse podrian aun las servidumbres en dos maneras, sin aquellas que de susodichos. La una es, quitandola el senor de aquella cosa, a quien debian la servidumbre, si fuere toda suya: mas si la casa o heredad de muchos debiesen la servidumbre, no la puede el uno quitar tan solamente, sin otorgamiento de los otros. La otra manera por que se pierde, es esta: asi como cuando aquel cuya es la cosa que debe la servidumbre, comprala otra en que la habia ganada. Que por razon de la compra, que se ayunta la una

cosa con la otra de su seiiorio, pierdese la servidumbre. Y maguer la enajene despues o la tenga para si, de alii adelante nunca debe ser demandada, ni es obligada la cosa que asi es comprada a aquella servidumbre. Fuera ende, si despues de eso fuese puesta nuevamente." (Scaevola,Codigo Civil, Tomo X, p. 326).

This law regulates the extinguishment of an easement by merger of the dominant and the servient estates. Speaking of this law of the Partidas and of article 546, par. 1, of the Civil Code, both of which refer to merger of the two estates, Scaevola says: (p. 319, vol. 10)

"Si el fundo gravado pasa a ser propiedad del dueño del dominante 6 viceversa, la servidumbre cesa ipso facto, por no haber ya dualidad de predios, por no ser necesario el uso 6 la prohibicion, en cuanto como propietario de ambos predios puede su dueno servirse de ellos en tal concepto."

Inasmuch as through merger, the easement is ipso facto extinguished, there is nothing strange or extraordinary in the provision of the law 17 that "de alli adelante nunca debe ser demandada, ni es obligada la cosa que asi es comprada a aquella servidumbre. Fuera ende si despues de est> fuese puesta nuevamente."

But there is a world of difference between extinguishment of an easement by merger of the two estates and the constitution of an easement by an apparent sign when nothing is done or said upon the division of the property. Law 17, title 31, Partida 3, having in mind only the modes of extinguishment, the legislator did not intend to cover the question involved in the present case, which refers to the creation of an easement.

What, then, are the differences between the extinguishment of an easement by merger under Law 17, title 31, Partida 3, and the constitution of an easement in this case, both before and after the Civil Code went into effect?

First, in merger under Law 17, Title 31, Partida 3, there were from the very beginning, already two separate estates, the dominant and the servient estates, whereas in this case, there was only one estate.

Second, in merger under said Law 17, there were already two owners, whereas in this case, there was only one owner, Maria Florentino,

Third, in merger under Law 17, there was already an easement in the legal sense, whereas in the instant case, there was only a service between the two lots, (while Maria Florentine) was living) but there was as yet no easement from the juridical viewpoint.

4. Other considerations prove that the principle of apparent sign as enunciated by the Supreme Tribunal of Spain is not inconsistent with the Partidas. These considerations are:

- Article 537, Civil Code, provides that continuous and apparent easements are acquired by title, or by prescription. However, side by side with that article is article 541 which contemplates an easement upon division of an estate, unless a stipulation to the contrary is agreed upon, or the sign is destroyed. Bearing in mind that "title" includes a contract, our view is that if Article 537 and 541 of the Civil Code can stand together, there is no reason why Law 14, title 31, Partida 3, whereby easements are acquired by contract, by will and by prescription should be considered incompatible with the easement under review.

- Article 546, par. 1 of the Civil Code ordains that by merger of the two estates in the same owner an easement is extinguished. Yet, coexistent with such provision is that of article 541 regarding the apparent sign which is a title for the easement. If these two principles can and do stand together under the Civil Code, the doctrine laid down by the Supreme Tribunal of Spain—before the Civil Code was in force— about the effect of an apparent sign can also stand together with Law 17, title 31, Partida 3 declaring the extinguishment of an easement by merger.

- Under article 546, par. 1 of the Civil Code, merger extinguishes an easement. So in case the estate is again divided by purchase, etc., the easement is not, under the Civil Code automatically revived. That is the same

provision of law 17, title 31, Partida 3, which does not reject the principle in question, just as article 546, par. 1 of the Civil Code does not reject article 541 about an apparent sign.

III.

Aside from the foregoing reasons that support the easement under consideration, the same has been acquired by respondents through prescription.

The easement involved in this case is of two aspects: light and view and *altius non tollendi*. These two aspects necessarily go together because an easement of light and view prevents the owner of the servient estate from building to a height that will obstruct the windows. This court in *Cortes vs. Yu-Tibo*, *supra*, held that the easement concerned when there is an apparent sign established by the owner of two estates is positive. *Manresa* is of the same opinion, *supra*. This being so, and inasmuch as the original heirs of Maria Florentino succeeded to these two estates either in 1885 or in 1892 and as petitioner bought one of the lots in 1911, the prescriptive period under any legislation that may be applied—the *Partidas*, Civil Code or Code of Civil Procedure—has elapsed without the necessity of formal prohibition on the owner of the servient estate. The respondent's action was brought in 1938, The prescriptive period under the *Partidas* was 10 years between persons who were present, and 20 years between absentees. (4 *Manresa*, 605). According to article 537 of the Civil Code, continuous and apparent easements may be acquired by prescription for 20 years. Under sections 40 and 41 of the Code of Civil Procedure, the period is 10 years.

IV.

The petitioner maintains that he is an innocent purchaser for value of the lot and *camarin* thereon, and that he was not bound to know the existence of the easement because the mere opening of windows on one's own wall does not *ipso facto* create an easement of light. Such contention might perhaps be in point if the estates had not originally belonged to the same owner, who opened the windows. But the petitioner was in duty bound to inquire into the significance of the windows, particularly because in the deed of sale, it was stated that the seller had inherited the property from her aunt, Maria Florentine Referring to the Sentence of the Supreme Court of Spain dated February 7, 1896, which applied Article 541, this Court in the case of *Cortes vs. Yu-Tibo* already cited, said that the establishment of the easement "was an act which was in fact respected and acquiesced in by the new owner of the servient estate, since he purchased it without making any stipulation against the easement existing thereon, but on the contrary, acquiesced in the continuance of the apparent sign thereof." (p. 31). Moreover, it has been held that purchasers of lands burdened with apparent easements do not enjoy the rights of third persons who acquire property, though the burden is not recorded. (Sentence of the Supreme Tribunal of Spain, April 5, 1898).

V.

Let us now discuss the case from the standpoint of justice and public policy.

First—When Maria Encarnacion Florentino, as one of the devisees, accepted the *camarin* and the lot, she could not in fairness receive the benefit without assuming the burden of the legacy. That burden consisted of the service in fact during the lifetime of the original owner, which service became a true easement upon her death.

Second.—According to Scaevola, the reason for the principle in question is that there is a tacit contract. He says in vol. 10, p. 277:

"Aun hay mas: hay, en nuestro entender, no solo presuncion de voluntad del enajeriante, 6 sea del dueño de las fincas que estuvieren confundidas, sino convention, siquiera sea tacita, entre el vendedor y al adquirente de la finca vendida. Puesto que pudiendo estipular la no existencia de la servidumbre, nada dicen 6 nada hacen,

fuerza es presumir que el segundo (comprador) acepta el estado juridico creado por el primero (vendedor)"

It is not just to allow Maria Encarnacion Florentino or her successor in interest to repudiate her own undertaking, implied, it is true, but binding nevertheless. This easement is therefore a burden which Maria Encarnacion Florentino and her successor in interest willingly accepted. They cannot now murmur against any inconvenience consequent upon their own agreement.

Third. During the construction of the new house by the petitioner, the respondents filed an action to stop the work. But petitioner continued the construction, so that when the Court of First Instance was ready to pass upon the preliminary injunction, the work had almost been finished. Petitioner, therefore, cannot complain if he is now ordered to tear down part of the new structure so as not to shut off the light from respondents' windows.

Fourth. When petitioner bought this lot from the original coheir, Maria Encarnacion Florentino, the windows on respondents' house were visible. It was petitioner's duty to inquire into the significance of those windows. Having failed to do so, he cannot now question the easement against the property which he purchased.

Fifth. No enlightened concept of ownership can shut out the idea of restrictions thereon, such as easements. Absolute and unlimited dominion is unthinkable because it would destroy and defeat itself, inasmuch as proper enjoyment of property requires mutual service and forbearance among the adjoining estates. It is thus that easements, whether created by law or established by will of the parties, must perforce exist side by side with ownership. As Sanchez Roman, says, "Estos derechos restrictivos del dominio, como pudieramos llamar a las servidumbres, aparecen en el orden juridico por razones de necesidad y utilidad o comodidad, y tienen su causa, unas veces en el mismo derecho de propiedad, por la voluntad del propietario, que impone, en uso de su derecho, esas restricciones a sus cosas, o en motivos de interes publico, que las hacen necesarias a los fines colectivos." (Vol. 3, p. 484). This idea of easements can never become obsolete in the face of modern progress. On the contrary, its need is all the more pressing and evident, considering that this mutual assistance and giving way among estates is demanded by the complexities of modern conditions, such as those which obtain in large cities where buildings, large and small, are so close together.

VI.

Recapitulating, we believe the easement of light and view has been established in favor of the property of respondents, for these reasons:

- Maria Florentino having died in 1892, according to a finding of fact of the Court of Appeals, which we cannot review, Article 541 of the Civil Code is applicable to this case.
- Granting, arguendo, that Maria Florentino died in 1885, nevertheless the same principle embodied in article 541 of the Civil Code was already an integral part of the Spanish law before the promulgation of the Civil Code in 1889, and therefore, even if the instant case should be governed by the Spanish law prior to the Civil Code, the easement in question would also have to be upheld.
- The easement under review has been acquired by respondents through prescription.
- The petitioner was not an innocent purchaser, as he was in duty bound to inquire into the significance of the windows.
- Justice and public policy are on the side of the respondents.

Wherefore, the judgment appealed from should be and is hereby affirmed, with costs against the petitioner. So ordered.

Yulo, C. J., Moran Imperial,[1] and Hantiveras,[1] JJ., concur.

[1] By special designation.

DISSENTING

OZAETA, J.,

I regret to say that the omnibus opinion of the majority is a straddle over the baseless finding that Maria Florentino died in 1892 and the assumption that she died in 1885. Since she could not have died twice—and the date of her demise was properly raised as an issue in this case—the equivocal position thus taken rests on no solid factual foundation. Straddling and tottering as it is on shaky ground, the opinion as a whole appears to me untenable and its validity questionable. Did Maria Florentino pass away in 1892? or in 1885? If she died in 1892, then Part II of the opinion based on the assumption that she died in 1885 is a mere obiter dictum; and if she died in 1885, then Part I of the opinion based on the assumption that she died in 1892 is likewise a mere obiter dictum. Thus it is not permissible for the Court to straddle the issue.

There is absolutely no basis in the evidence for the finding that Maria Florentino died in 1892. Indeed in its findings of fact the Court of Appeals made no mention of the date of Maria Florentine's demise, but in its conclusion of law the year she died was incidentally mentioned in the following manner:

"* * * Habiendo pasado la propiedad de la casa de mamposterla a los demandantes, a la muerte de Maria Florentino, ocurrida en 1892 (el demandado sostiene que fue con anterioridad a 1889), no hay duda ninguna de que los demandantes adquirieron la servidumbre de luces y vistas sobre el camarín del demandado mediante título y por prescripción (Art. 537)."

The indirect statement to the effect that Maria Florentino died in 1892 was not based on any evidence but solely on the conjecture indulged in by counsel for the respondents in his brief: that she must have died in the year 1892 because the respondent Gabriel Florentino testified during the trial as to facts of his own personal knowledge, and since he was fifty-eight years old when he testified in 1938, it must be presumed that he was at least twelve years old when his aunt Maria Florentino died, and that therefore the death of the latter must have occurred in the year 1892. Such deductions were absurd on their face and the Court of Appeals clearly committed an error of law in adopting them. A finding of fact must be based on competent proofs—not on a mere conjecture.

The respondents themselves alleged under oath in their original as well as in their amended complaint (but were silent as to this in their second amended complaint) that the death of Maria Florentino occurred in the year 1888. No evidence was presented during the trial as to said date, but nevertheless the trial court applied the Civil Code. The petitioner as appellant before the Court of Appeals contended that the Partidas and not the Civil Code was the law applicable. It was then that respondents (appellees below) tried to show by deduction¹ and conjecture that Maria Florentino must have died in 1892. To rebut that, appellant and his attorney made inquiries as to the true date of Maria Florentine's demise and discovered from the church record of burials as well as from her gravestone that she died on September 7, 1885, and was buried on the following day, September 8, 1885. They alleged in their affidavit that they had been unable to ascertain that date before on account of the misleading allegation in appellees' complaint that Maria Florentino died in 1888. A certified copy of the partida de entierro as well as a photograph of the gravestone showing the inscription of the date of Maria Florentino's death, were offered by appellant in a motion for new trial filed in the Court of Appeals on March 4, 1940; and on March 14, 1940, the Court of Appeals ordered that said motion, together with the exhibits accompanying it, "be attached to the record

and brought to the attention of the Court when the case is considered on its merits." Nevertheless the Court of Appeals either ignored or overlooked said motion and the documentary evidence accompanying it when it considered and decided the case on the merits. Under section 2 of Rule 55, as well as under section 497 of Act No. 190, the court should have considered the new evidence together with that adduced in the trial below. Thus, I think it cannot be doubted that Maria Florentino died on September 7, 1885, more than four years before the Civil Code took effect.

The majority seem to feel bound by the conjecture indulged in by the respondents and adopted by the Court of Appeals that Maria Florentino died in 1892, considering it as a finding of fact by the Court of Appeals. I beg to differ. A statement of fact not based on any proof whatever should not be accepted by this Court, especially when, as in this case, it is indubitably shown to be contrary to the truth.

It is said that the church record of Maria Florentino's burial and the photograph of her gravestone showing the inscription:

"D. O. M.

AQUI YACEN LOS RESTOS MORTALES DE
D. BONIFACIO F. ANASTASIO
FALLECIÒ EN 26 DE OCTUBRE DE 1890
Y SU ESPOSA
Da MARIA FLORENTINO
QUE MURIÒ
EN 7 DE SETIEMBRE DE 1885.
RECUERDO DE
Da ENCARNACION FLORENTINO"

are not newly discovered evidence because they "could have been discovered by petitioner before the trial in the Court of First Instance by the exercise of due diligence." I disagree again. There was no incentive on the part of the petitioner to look for evidence of the exact date of Maria Florentino's demise while the case was being tried in the court below, for the respondents themselves alleged under oath in their original and amended complaints that she died in 1888, i.e., before the Civil Code took effect, and introduced no evidence whatever that she died after 1889. It was only when the respondents in their brief before the Court of Appeals tried to show by mental acrobaticism that she must have died in 1892 in order to justify the application of the Civil Code, that the petitioner became interested in finding out the exact date of her death in order to impugn that contention. Under the circumstances, I entertain no doubt that the proofs offered may be considered newly discovered within the purview of our procedural law. After all, the rules of evidence are but a means to an end—to help establish the truth. To illustrate the irrationality of applying the rules of evidence too rigidly, let us suppose that an accused has been convicted of murder and sentenced to death, but during the pendency of his appeal his counsel discovers that the alleged victim is living and in good health, and counsel offers to prove that fact and even presents the "murdered" man in person before the court. Should this Court reject the offer of proof and affirm the death sentence simply because the appellant could have discovered the existence of the alleged victim by the exercise of due diligence? Judging from the opinion of the majority in this case, it should. What a travesty on justice!

As a last argument on this point the majority say:

"Lastly, the issue as to the date of Maria Florentino's death cannot be raised for the first time on appeal. Petitioner did not in the trial court allege or prove this point. He presented this issue for the first time in the Court of Appeals. (Sec. 497, Act 190.)"

That is incorrect. Plaintiffs had the burden of proof. They are the ones who invoke the Civil Code. It was up to them to prove that the transaction took place after 1889. They realized that only during the appeal and, to supply their omission and even contradict their own sworn allegation, they resorted to amazing deductions from the age of one witness. So it was the respondents who "presented this issue for the first time in the Court of Appeals." The petitioner had the right to meet it then and there.

Since I cannot ignore the glaring fact that Maria Florentino died not in 1892 but in 1885, I cannot give my assent to the application of article 541 of the Civil Code to the controversy between the parties. I therefore regard all the profuse discussions of the law and citations of jurisprudence found in Part I of the majority opinion as purely academic.

Part II of the opinion is based on the assumption that Maria Florentino died in 1885. Here I agree with my esteemed colleagues on the factual basis but not on the legal conclusions.

The transitory provisions of the Civil Code, Rules 1 and 2, provide that "rights vested under the legislation prior to this Code by virtue of acts which transpired while it was in force, shall be governed by such prior legislation even if the code should otherwise provide with respect thereto, or should not recognize such rights"; and that "acts and contracts executed under the prior legislation, and which are valid in accordance therewith, shall produce all their effects as by such prior law provided, subject to the limitations established by these rules." The prior legislation referred to, insofar as this case is concerned, was none other than the Partidas.

How were easements acquired under the Partidas? In three ways only: By contract, by testament, or by prescription. (See law 14, title 31, Partida 3.) There was no provision in the Partidas similar to article 541 of the Civil Code regarding the creation or acquisition of an easement thru the establishment of an apparent sign thereof by the owner of two estates.

In their second alternative opinion the majority say that the easement in question was constituted by an implied contract among the heirs of Maria Florentino under law 14, title 31, Partida 3. The law cited mentions "contract" and not "implied contract." As a source of right or obligation, "contract" is entirely different from "implied contract" The former is based upon the mutual consent of the parties, supported by a lawful consideration, and with a definite subject matter, as, for instance, a contract of lease (articles 1254 and 1261, Civil Code) ; while the latter is merely imposed or implied by law from an act performed or committed by one of the parties without the consent and even against the will of the other, as, for instance, the obligation of an embezzler to indemnify his victim and the right of the latter to demand such idemnity. The mere fact that one has used the property of another by tolerance or implied consent of the latter can never give rise to an implied contract under which the former may assert and enforce a right to the continued use of that property against the owner.

Next it is said: "Granting for the sake of argument that this easement was not created through an implied contract according to Law 14, Title 31, Partida 3, yet that provision of the Partidas was not inconsistent with the principle in question, so that there was a gap in the Partidas which the Supreme Court of Spain filled up from the Roman Law and modern codes by recognizing the existence of this kind of easement." (The principle referred to is that embodied in article 541 of the Civil Code.)

Under this alternative argument it is admitted that the Partidas (the pre-Civil Code legislation) contained no provision similar to article 541 of the Civil Code and hence it was necessary (?) to import a principle from the Roman Law in order to fill "a gap in the old legislation" as was done by the Supreme Court of Spain. In the last analysis, the alternative opinion applies to this case not the previous legislation as required by the Civil Code transitory provision but a principle of law imported from ancient Rome.

I disagree as to the necessity for such importation and "filling the gap" in order to do justice to the parties in this case. Let us consider the facts: Before Maria Florentino died on September 7, 1885, she owned a parcel of land in the commercial center of Vigan on which were built a house and a camarin. The camarin was one story and the house two stories high. Naturally, it was convenient for her to open windows on that side of the house overlooking the camarin so long as she did not decide to rebuild and raise the latter.

The pivotal question is, Did those windows constitute an apparent sign of easement of light and view in favor of the house and against the camarin under the legislation in force here at that time, so that upon the subsequent division of the two estates that sign would constitute a title of and create such an easement? The negative answer is inescapable because the *Partidas*, unlike the Civil Code, contained no provision supporting the affirmative. But my learned colleagues, emulating the Supreme Court of Spain in similar cases, apply a principle of the Roman Law to "fill the gap" and justify the affirmative. The practical result of such "filling the gap" is to give retroactive effect to article 541 of the Civil Code, in violation of the transitory provision. The laws of Spain did not *ex proprio vigore* apply to the Philippines. They had to be expressly extended here by Royal Decrees. Witness the Civil Code, the *Partidas*, etc. That being so, the opinions of the Supreme Court of Spain could not and did not have the force of law in the Philippines. For this reason, I cannot agree with what the majority say that "we cannot reject a doctrine established by the Spanish Supreme Tribunal as an integral part of the Spanish law before the promulgation of the Civil Code in 1889." I know of no Royal Decree making such doctrine an integral part of the Spanish law in the Philippines.

If we do not apply article 541 of the Civil Code—and we cannot apply it because Maria Florentino died in 1885—there is really a gap in the case for the respondents, but none in the case for the petitioner.[1] Under the *Partidas*, or rather in the absence of an express provision therein similar to article 541, the petitioner should win; and since the parties litigant herein are entitled to have their case decided in accordance with the pre-Civil Code legislation in force in the Philippines as provided in the transitory provisions, since that legislation without any "gap-filling" is in favor of the petitioner, and since to "fill the gap" would prejudice him and unduly favor the respondents, the Court should abstain from so doing as a matter of law and justice.

I repeat that as a matter of law and justice the Court should not go out of its way to "fill a gap in the *Partidas*" by resorting to a principle in the Roman Law which was not a part of the law of this country at the time the transactions involved took place, and for which reason it could not have been in the mind of the parties. How can we charge Maria Florentino with knowledge of that principle of the Roman Law, or even of the decisions of the Spanish Supreme Court, when she constructed the windows in question? How can we make that principle binding upon her heirs, or assume that they acted in accordance therewith, when they took possession of their respective hereditary portions upon her death on September 7, 1885? Who knows but that had they been apprised of such a principle of Roman Law and told that it would be held binding on them they would have closed the windows in question or made an agreement regarding its continuance as long as the camarin was not rebuilt?

It is argued that, as the Supreme Court of Spain has held, the principle in question is not inconsistent with the provisions of the *Partidas* regarding the modes of acquiring and extinguishing easements. To that I reply: Is the Court authorized to amend the law by adding thereto a provision not inconsistent therewith and, what is worse, make the amendment retroactive? The Supreme Court of Spain of the last century apparently thought so, but as I cannot agree with it I must disregard its voice and follow the light of my own reason in the premises. By adopting and following the doctrine of the Supreme Court of Spain the majority of this Court have, I fear, established here a pernicious precedent. Hereafter no one in this country can safely rely on our codes and statutes as enacted by our own legislature, for the court may at any time read into them any provision or principle of law of any other jurisdiction—even of ancient and archaic Rome—so long as such provision or principle is not inconsistent

therewith; altho, if we would stop and reflect for a moment, we should realize that, logically and legally speaking, any provision not included in the law must necessarily be considered inconsistent with the legislative will, for the legislature has not seen fit to incorporate it therein. "That is unfair! It is absurd! No court would do that!" you would protest. Then, I ask, "why do you do it in the instant case?"

As a third alternative opinion (Part III) the majority hold that the easement in question has been acquired by respondents thru prescription. This opinion, however, is predicated upon the assumption that the opening of the windows in question constituted an apparent sign of the positive easement of light and view, thus making the period of prescription run from the date of the demise of the original owner. But as we have seen, that assumption is wrong because it is promised upon the improper and unlawful application of either article 541 or its equivalent principle derived from the Roman Law and adopted by the Supreme Court of Spain. Without such assumption, the period of prescription in this case commenced to run only from January, 1938, when the petitioner began the construction of the new house and when it is supposed the respondents for the first time made a formal prohibition against the petitioner's raising his building and obstructing respondents' light and view, in accordance with the Yu-Tibo case cited in the majority opinion. Hence I think the prescription theory is also untenable.

"Filling the gap" is particularly unfortunate and disastrous in the present case because as a consequence the petitioner will be compelled to tear down a portion of his newly built strong-material house, which in the present emergency, for lack of building materials, he will be unable to repair or patch up, thus not only causing him unnecessary loss and hardship but also leaving the torn-off new building for the public to gape at and be scandalized with. The good Ilocanos would perhaps not be able to understand why, on top of wanton and horrible daily destructions by bombs now savagely going on in this war-torn world, the Court should find it necessary to add another without any apparent substantial or material benefit to anybody. "Verily," they would say, "this is a mad world!"

In this age of fluorescent lights and air conditioning devices, the concomitant easements of light and view and *altius non tollendi* would seem to be only a deterrent to economic progress and should not be considered established except when the law applicable clearly so justifies.

For the foregoing reasons I vote for the reversal of the judgment appealed from.

PARAS, J.:

I concur in the foregoing dissenting opinion of Mr. Justice Ozaeta.

[1] That is why respondents tried to show that Maria Florentino lived seven years longer than she did.

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