

**EDUARDO CUAYCONG ET AL., PLAINTIFFS AND APPELLEES, VS.
RAMONA BENEDICTO ET AL., DEFENDANTS AND APPELLANTS.***G.R. No. 9989. March 13, 1918*

Ponente: FISHER, J.

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The issues in this case relate to the right of plaintiffs to make use of two roads existing on the Hacienda Toreno, a tract of land in the municipality of Victorias, Negros Occidental, the property of the defendants, Blasa Benedicto and Ramona Benedicto. One of these roads is referred to in the proceedings as the Nanca-Victorias road and the other as the Dacuman-Toreno road. The Court of First Instance held that those of the plaintiffs who claimed to be entitled to make use of the Dacuman-Toreno road had failed to establish the asserted right, and dismissed the action as to them. From this decision they appealed to this court but, their brief not having been filed within the time prescribed by the rules, their appeal was dismissed, on motion of defendants, by resolution dated February 14, 1916. Consequently, the issues presented on this appeal are limited to those which relate to the rights of the parties with respect to the Nanca-Victorias road, and the determination of the correctness of the decision of the court concerning that part of the controversy submitted to its decision.

The allegations in the complaint with respect to the Nanca-Victorias road are that the appellees, Eduardo Cuaycong, Lino Cuaycong, and Eulalio Dolor, are the owners of a group of haciendas situated between the southern boundary of the Hacienda Toreno and the barrio of Nanca, of the municipality of Saravia, and that the appellees Silverio Ginoo, Gervasio Ascalon, and Juan Ledesma, are the lessees of part of said haciendas; that for more than twenty years the appellees and their predecessors in interest have made use of the Nanca-Victorias road which crosses the Hacienda Toreno, openly, publicly, and continuously, with the knowledge of the owners of the said hacienda, for the purpose of conveying the products of their haciendas to the town of Victorias and to the landing place there situated, and for the purpose of transporting supplies from those points to their haciendas, making use of the said road by means of carts, carabaos, and other usual means of transportation; that there is no outlet to a public road from the hacienda occupied by these plaintiffs, the only road and way by which the products of the plaintiffs' property can be taken to the town of Victorias and to the landing place there being across the Hacienda Toreno by the road marked on the plan attached to the complaint; that on the fifteenth day of November, 1912, the defendants closed the road in question at the point at which it crosses the Hacienda Toreno, and refused to permit plaintiffs to continue using it; that plaintiffs were about to commence to grind their crop of sugar cane, and that, if prevented from transporting their sugar across the Hacienda Toreno to their point of embarkation, would suffer damages difficult to estimate. Upon these averments of fact the plaintiffs prayed for a judgment that they are entitled to use the road in question as they have been using it in the past, and that a perpetual injunction be issued against plaintiffs restraining them from impeding such use. Upon the filing of the complaint, plaintiffs moved the court to issue a preliminary injunction restraining defendants from interfering with the use of the road during the pendency of the suit, which motion was granted by the court.

Defendants in their answer put in issue all the special averments of the complaint, as above set forth, and by way

of counterclaim and special defense, averred that the road crossing the Hacienda Toreno, over which plaintiffs claim the right of passage, is the private property of defendants; and, further, that they have not refused plaintiffs permission to pass over this road but have required them to pay toll for the privilege of doing so. Defendants also claimed damages for the use of the road by plaintiffs during the pendency of the suit, alleging that the preliminary injunction had been improvidently issued upon false statements contained in the verified complaint filed by plaintiffs.

The case was tried in July, 1913. The court on December 8, 1913, rendered judgment, dismissing the complaint with respect to the plaintiffs Felix Suarez, Probo Jereza, Enrique Azcona, and Melecio Pido, these being the plaintiffs who claimed the right to use the Dacuman-Toreno road. With respect to the Nanca-Victorias road, the court held that it was a public highway over which the public had acquired a right of use by immemorial prescription, and ordered the issuance of a perpetual injunction against plaintiffs, restraining them from interfering in any manner with the use of the said road.

The conclusion of the court with respect to the facts affecting the Nanca-Victorias road are as follows:

"Turning to a consideration of the evidence relative to the Nanca-Victorias road we find incontestable proof that it has been in existence for at least forty years. That the hacenderos located in the southwestern section of Victorias and the public generally passed over it freely and that it was used for all purposes of transportation of farm produce, animals, etc. and by pedestrians as well as carromatas and other conveyances without break or interruption until two or three years ago when the defendants announced that the road was private and that those who wished to pass over it with sugar carts would be obliged to pay a toll of ten centavos—all other vehicles, it appears, were permitted to pass free of charge. This arrangement seems to have existed during the years of 1911 and 1912 and part of 1913, the money being collected apparently from some hacenderos and not from others. There is some reason to believe from the evidence presented by defendants themselves that the practice of making these payments to hacienda Toreno¹ originated in an attempt to raise a fund for the repair of the road. There is no evidence that any other hacenderos between Nanca and Victorias or any other person made any attempt to close the road or to collect toll. On the contrary the road appears to have been repaired by the hacenderos when it needed repairing and everyone used it on equal terms until the defendants in 1910 or 1911 interposed the objection that the road in dispute was private. This we think is a fair deduction from the evidence and although it is asserted that toll was collected at an earlier date by the late Leon Montinola, brother of the defendant Ruperto Montinola, there is no tangible evidence that this was so and all the circumstances are strongly indicative of the fact that toll has been paid only during the years of 1911, 1912, and part of 1913."

The question presented by the assignment of error are in effect:

- (a) Is the Nanca-Victorias road at the point at which it traverses the Hacienda Toreno a public highway or not?
- (b) If it be held that the road in question is not a public highway, have plaintiffs proven their acquisition of an easement of way over the Hacienda Toreno at the point traversed by the road in question?

The trial judge, in holding that the road in question is public, bases his conclusion upon the fact, which he deems to have been proven, that the road has been in existence "from time immemorial," and had been "continuously used as a public road * * * and open to public as such for thirty or forty years * * * until * * * the defendants undertook to claim it as private and to collect toll for the passage of carts." (Bill of Exceptions, p. 56.) There is no doubt that for the past thirty or forty years a road has existed between the former site of the town of Victorias and the barrio of Nanca, of the municipality of Saravia, and that this road crosses defendants' hacienda. It is also true that during this period the plaintiffs and their predecessors in the ownership of the hacienda now held by them have made use of this road for the purpose of going and coming from their haciendas to the town of Victorias; but

the question is whether this use was limited to the plaintiffs, and their tenants and employees, or whether it was, as held by the lower court, a use enjoyed by the public in general. Plaintiffs produced only two witnesses, Segundo de Leon (stet. notes, pp. 21-22) and Eduardo Cuaycong, (stet. notes, pp. 27-33) to testify as regards the use of the Nanca-Victorias road. Several other witnesses testified on behalf of plaintiffs, but their testimony relates to the Dacuman-Toreno road, which is not involved in this appeal. We have carefully read the testimony of the witnesses Leon and Cuaycong, given upon their direct and cross examination, but we have been unable to find that either of them has testified that the road in question was ever used by the public in general. These witnesses testified with regard to the use of the road by the present and former owners and occupants of the estates of Bacayan, Esperanza, Alacaigan, Pusot, and Dolores for the transportation of the products of these estates to the town of Victorias, and of supplies and agricultural implements from Victorias to the haciendas, but neither of them testified expressly that any other use had been made of said road. Nevertheless, it may be reasonably inferred from the testimony of these witnesses that all persons having occasion to travel between Victorias and the haciendas of Bacayan, Esperanza, Alacaigan, Pusot, and Dolores, whether or not they were owners, tenants, or employees of said estates, made use of the road now in dispute, crossing the Hacienda Toreno, and to this limited extent it may be said that the public made use of the road, but there is nothing in the evidence to indicate that the so-called public use extended beyond this.

Apart from the fact that there is no direct evidence to support the finding of the court concerning the general public use of the road in dispute, the record contains data strongly tending to show that when the complaint was filed plaintiffs did not contend that the road was a public highway, but merely contended that they had acquired by prescription an easement of way across the Hacienda Toreno. For example, the action is entitled an "action concerning a right of way." (Bill of Exceptions, pp. 64 and 65.) It is not averred in the complaint that the road in question was used by the public. On the contrary, it is averred that it was used by the plaintiffs and their predecessors. The averment in paragraph 8 of the complaint that the plaintiffs have no other "outlet to a public road" than that which they have been accustomed to use by going across the defendants' hacienda for the purpose of going to the town of Victorias also shows that when they commenced this action they had in mind the provisions of articles 564, et seq. of the Civil Code, which relate to the method of establishing the compulsory easement of way. The owners of an existing easement, as well as those whose properties are adjacent with a public road, have no occasion to invoke these provisions of the Code, which relate to the creation of new rights, and not the enforcement of rights already in existence.

It is true that in the opening statement made to the court, counsel for plaintiffs, who was not the same attorney by whom the complaint was signed, stated that plaintiffs contend that the road in question is public, but as no evidence was introduced tending to establish this contention concerning the Nanca-Victorias road, counsel for defendants had no occasion to object upon the ground that such testimony was not relevant to the averments of the complaint. No evidence was taken to indicate that at any time since the road in question has been in existence any part of the expense of its upkeep has been defrayed by the general government, the province, or the municipality. The trial judge said upon this subject:

"It is also true that whatever repairs were made on the road were made irregularly. The municipality of Victorias had no funds to devote to the construction and repair of roads, and the upkeep of the road depending entirely therefore on the initiative of the persons who used it, was attended to only at such times as repairs were absolutely necessary." (Bill of Exceptions, p. 49.)

The court also held that it appears from the government grant issued in 1885 to the original owner of the hacienda adjacent to the Hacienda Toreno on its western boundary, that the Nanca-Victorias road at that time separated that estate from the Jalbuena Hacienda, and that these facts constitute "circumstantial evidence that the road was in

existence in 1885." We have examined the document to which the court refers, and we agree that the road in question existed in 1885; but we do not believe that the document in question proves that the said road was a public highway.

Another circumstance established by the evidence, and which is of some importance in the determination of this issue, is that although the defendants closed the Nanca-Victorias road in the month of February, 1911, and since that time have collected toll from persons passing over it with carts loaded with sugar, including those belonging to several of the plaintiffs, nothing was done by them to prevent the continuation of this restriction until December, 1912, when this action was commenced. It is natural to assume that if plaintiffs had considered that the road in question was public, they would have protested immediately against the action of the defendants, and would have either commenced a civil action, as they subsequently did, or would have brought about a prosecution under section 16 of Act No. 1511.

Upon the evidence taken and admissions contained in the pleadings and those made during the course of the trial we consider that the following findings are warranted:

1. The town of Victorias has always been the shipping point of the products of the Hacienda Toreno, and of the haciendas of appellees, as well as the place from which supplies were brought to those properties.
2. For thirty or forty years before the commencement of the suit a wagon road, herein called the Nanca-Victorias road, has been in existence, connecting the haciendas of appellees with the town of Victorias, and this road traverses the property of defendants. Since the removal of the town of Victorias to a new site the Nanca-Victorias road has been used by appellees in travelling between their properties and the provincial road which crosses the Hacienda Toreno from east to west.
3. No public funds have at any time been expended on the construction or upkeep of the Nanca-Victorias road, but from time to time work has been done on it by the laborers employed by the present and former owners of the Hacienda Toreno and the haciendas owned by the appellees and their predecessors in title.
4. The Nanca-Victorias wagon road, including that part of it which crosses the Hacienda Toreno, has for thirty-five or forty years been used by the appellees and their predecessors in title for the transportation, by the usual means, of the products of their estates to their shipping points in or near the town of Victorias, and the transportation to their estates: of all supplies required by them, and has been used by all persons having occasion to travel to and from all or any of the estates now owned by the appellees.
5. The use of the Nanca-Victorias road in the manner and by the persons above mentioned was permitted without objection by the owners of the Hacienda Toreno until the year 1911, when they closed it, and began charging a toll of 5 centavos for each cart which passed over the road, including, carts belonging to the appellants, until restrained from continuing to do so by the preliminary injunction granted in this case.
6. The Nanca-Victorias road constitutes the only outlet from the estates of appellants to the nearest public road which is the provincial road which crosses the Hacienda Toreno from east to west.

Upon these facts the questions of law to be decided are;

- (a) Is the Nanca-Victorias road a public highway?
- (b) If the Nanca-Victorias road, or that part of it which crosses the Hacienda Toreno, is not a public highway, is it subject to a private easement of way in favor of the appellees?

The defendants are the owners of the Hacienda Toreno under a Torrens title issued in accordance with the Land Registration Act, conferring to them its absolute ownership, subject only to the limitations of paragraph four of

section 39 of said Act. It is admitted that there is no annotation on the certificate of title regarding the road here in question, either as a "public road" or as a "private way established by law," and, therefore, the questions presented by this appeal are to be determined precisely as they would be had the Hacienda Toreno not been brought under the operation of the Land Registration Act. The plaintiffs being the owners of the property in question, the presumption of law is that it is free from any lien or encumbrance whatever, and the burden therefore rests upon plaintiffs to establish the contrary. As this court said in the case of *Fabie vs. Lichauco and the children of Francisco L. Roxas* (11 Phil. Rep., 14) ;

"It is a settled doctrine of law that a property is assumed to be free from all encumbrance unless the contrary is proved."

There is admittedly no evidence to show that the land occupied by the road here in question was at any time conveyed to the general government or any of its political subdivisions by the present or any of the former owners of the Hacienda Toreno. There is no evidence, even remotely, tending to show that the road existed prior to the time when the property now known as the Hacienda Toreno passed from the State into private ownership. The record fails to disclose any evidence whatever tending to show that the Government has at any time asserted any right or title in or to the land occupied by the road, or that it has incurred any expense whatever in its upkeep or construction. The Civil Code defines as public roads those which are constructed by the State (art. 339), and as provincial and town roads those "the expense of which is borne by such towns or provinces." (Civil Code, art. 344.) While it is not contended that this definition is exclusive, it does show that during the Spanish regime, under normal conditions, roads which were public were maintained at the public expense, and that the fact that at no time was any expense incurred by the Government with respect to the road here in question tends strongly to support the contention of the defendants that it is private way.

During the Spanish regime the law required each able bodied citizen not within one of the exempted classes to work a certain number of days in each year, his labor to be devoted to "services of general utility" to the municipality of his residence. (Royal Decree of July 11, 1883, art. 5.) Under this Decree and the Regulations for its enforcement (Berriz, vol. 11, 258) the greater part of the work on the public roads of the Islands was accomplished. Had the road here in question been a public way, it is reasonable to assume that the *polistas* of the town of Victorias would have been employed in maintaining it. It is most significant that no mention is made in the testimony of the plaintiffs' witnesses of any work of this character having been done on the road at any time, particularly in view of the fact that their attention was drawn to this point. (Stet. notes, pp. 8, 10, 11, 12, 13 and 14.)

The evidence shows that the repairs were made by the owners of the estates benefited by the road, and by their laborers, as a purely voluntary act for their own convenience and interest. There being no evidence of a direct grant to the government of the land occupied by the road in question or that any Government funds or labor were expended upon it, the question presents itself whether the use to which the road has been put was such as to justify the conclusion of the lower court that it has become public property. There being no evidence that the original use of the road by plaintiffs' predecessors was based upon any express grant of the fee to the road or of an easement of way, or that it began under the assertion of a right on their part, the presumption must be that the origin of the use was the mere tolerance or license of the owners of the estates affected.

This being so, has that merely permissive use been converted into a title vested in the public at large, or in the plaintiffs by reason of their ownership of the land beneficially affected by the use?

Had it been shown that the road had been maintained at the public expense, with the acquiescence of the owners of the estates crossed by it, this would indicate such adverse possession by the government as in course of time

would ripen into title or warrant the presumption of a grant or of a dedication. But in this case there is no such evidence, and the claims of plaintiffs, whether regarded as members of the public asserting a right to use the road as such, or as persons claiming a private easement of way over the land of another must be regarded as resting upon the mere fact of user.

If the owner of a tract of land, to accommodate his neighbors or the public in general, permits them to cross his property, it is reasonable to suppose that it is not his intention, in so doing, to divest himself of the ownership of the land so used, or to establish an easement upon it, and that the persons to whom such permission, tacit or express, is granted, do not regard their privilege of use as being based upon anything more than the mere tolerance of the owner. Clearly, such permissive use is in its inception based upon an essentially revocable license. If the use continues for a long period of time, no change being made in the relations of the parties by any express or implied agreement, does the owner of the property affected lose his right of revocation? Or, putting the same question in another form, does the mere permissive use ripen into title by prescription?

It is a fundamental principle of the law in this jurisdiction concerning the possession of real property that such possession is not affected by acts of a possessory character which are "merely tolerated" by the possessor, or which are due to his license (Civil Code, arts. 444 and 1942). This principle is applicable not only with respect to the prescription of the dominium as a whole, but to the prescription of right in rem. In the case of *Cortes vs. Palanca Yu-Tibo* (2 Phil. Rep., 24, 38), the Court said:

"The provision of article 1942 of the Civil Code to the effect that acts which are merely tolerated produce no effect with respect to possession is applicable as much to the prescription of real rights as to the prescription of the fee, it being a glaring and self-evident error to affirm the contrary, as does the appellant in his motion papers. Possession is the fundamental basis of the prescription. Without it no kind of prescription is possible, not even the extraordinary. Consequently, if acts of mere tolerance produce no effect with respect to possession, as that article provides, in conformity with article 444 of the same Code, it is evident that they can produce no effect with respect to prescription, whether ordinary or extraordinary. This is true whether the prescriptive acquisition be of a fee or of real rights, for the same reason holds in one and the other case; that is, that there has been no true possession in the legal sense of the word." (See also *Ayala de Roxas vs. Maglons*, 8 Phil. Rep., 745; *Municipality of Nueva Caceres vs. Director of Lands and Roman Catholic Bishop of Nueva Caceres*, 24 Phil. Rep., 485.)

Possession, under the Civil Code, to constitute the foundation of a prescriptive right, must be possession under claim of title (*en concepto de dueño*), or to use the common law equivalent of the term, it must be adverse. Acts of a possessory character, performed by one who holds by mere tolerance of the owner are clearly not *en concepto de dueño*, and such possessory acts, no matter how long so continued, do not start the running of the period of prescription.

A similar question was presented in the case of the Roman Catholic Archbishop of Manila vs. Roxas (22 Phil. Rep., 450), in which case it appeared that Roxas, the owner of the Hacienda de San Pedro Macati, claimed a right of way across the property of the church to Calle Tejeron, a public street of the town of San Pedro Macati. The proof showed that the road in question had been used by the tenants of the Hacienda de San Pedro Macati for the passage of carts in coming and leaving the hacienda "from time immemorial," and further that the road had been used for time out of mind, not only by the tenants of the hacienda but by many other people in going and coming from a church half-way between the boundary line of the hacienda and Calle Tejeron. The court held that the facts did not give rise to a prescriptive right of easement in favor of the owner of the hacienda, upon the ground that such use "is to be regarded as permissive and under an implied license, and not adverse. Such a use is not inconsistent with the only use which the proprietor thought fit to make of the land, and until the appellee thinks

proper to inclose it, such use is not adverse and will not preclude it from enclosing the land when other views of its interest render it proper to do so. And though an adjacent proprietor may make such use of the open land more frequently than another, yet the same rule will apply unless there be some decisive act indicating a separate and exclusive use under a claim of right. A different doctrine would have a tendency to destroy all neighborhood accommodations in the way of travel; for if it were once understood that a man, by allowing his neighbor to pass through his farm without objection over the pass-way which he used himself, would thereby, after the lapse of time, confer a right on such neighbor to require the pass-way to be kept open for his benefit and enjoyment, a prohibition against all such travel would immediately ensue."

The decisions of the supreme court of Louisiana, a State whose jurisdiction is based, as is our own, upon the Roman Law, and whose Civil Code is taken, as is our own, very largely from the Code of Napoleon, are particularly persuasive in matters of this character. In the case of *Torres vs. Fargoust* (37 La. Ann., 497), cited by appellants in their brief, in which the issues were very similar to those of the present case, the court held that—

"The mere fact that for thirty or forty years the public was permitted to pass over this ground would not of itself constitute the place a *locus publicus* * * * dedication must be shown by evidence so conclusive as to exclude all idea of private ownership; * * * such dedication cannot be inferred from mere user alone; * * * no one is presumed to give away his property. The burden is on him who avers a divestiture of ownership to prove it clearly." We are, therefore, of the opinion, and so hold, that upon the facts established by the evidence it does not appear that the road in question is a public road or way. We are also of the opinion that plaintiffs have failed to show that they have acquired by prescription a private right of passage over the lands of defendants. The supreme court of Spain has decided that under the law in force before the enactment of the Civil Code, the easement of way was discontinuous, and that while such an easement might be acquired by prescription, it must be used in good faith, in the belief of the existence of the right, and such user must have been continuous from time immemorial. (Judgment of December 15, 1882.) In the appealed decision the court below says that the plaintiffs and their predecessors made use of the road in question "from time immemorial," but there is no evidence whatever in the record to support this finding, although it is true that the evidence shows the existence of the road and, its use by the plaintiffs and their predecessors for thirty-five or forty years. Speaking of the evidence required under the present Code of Civil Procedure to show immemorial use of an easement, this court said in the case of *Ayala de Roxas vs. Case* (8 Phil. Rep., 197, 198) :

"The third Partida in title 31, law 15 * * * says that discontinuous servitudes * * * must be proved by usage or a term so long that men can not remember its commencement. * * * In many judgments the supreme court of Spain has refused to accept proof of any definite number of years as a satisfaction of this requirement of the law. * * * We are of the opinion that in order to establish a right of prescription [title of prescription based upon use from time immemorial] something more is required than the memory of living witnesses. Whether this something should be the declaration of persons long dead, repeated by those who testify, as exacted by the Spanish law, or should be the common reputation of ownership recognized by the Code of Procedure, it is unnecessary for us to decide. On either theory the appellant has failed in his proof * * *."

The same thing may be said in this case. Witnesses have testified that they have known the road for a certain period of years, beginning at a time prior to the enactment of the Civil Code, but no evidence has been made to prove immemorial use by either of the means of proof mentioned in this decision cited, nor is immemorial user averred in the complaint as the basis of the right. It is evident, therefore, that no vested right by user from time immemorial had been acquired by plaintiffs at the time the Civil Code took effect. Under that Code (art. 539) no discontinuous easement could be acquired by prescription in any event. Assuming, without deciding, that this rule has been changed by the provisions of the present Code of Civil Procedure relating to prescription, and that since

its enactment discontinuous easement may be acquired by prescription, it is clear that this would not avail plaintiffs. The Code of Civil Procedure went into effect on October 1, 1901. The term of prescription for the acquisition of rights in real estate is fixed by the Code (sec. 41) at ten years. The evidence shows that in February, 1911, before the expiration of the term of ten years since the time the Code of Civil Procedure took effect, the defendants interrupted the use of the road by plaintiffs by constructing and maintaining a toll gate on it and collecting toll from persons making use of it with carts and continued to do so until they were enjoined by the granting of the preliminary injunction by the trial court in December 1912. Our conclusion is, therefore, that plaintiffs have not acquired by prescription a right to an easement of way over the defendants' property; that their use of the Nanca-Victorias road across the Hacienda Toreno was due merely to the tacit license and tolerance of the defendants and their predecessors in title; that the license was essentially revokable; and that, therefore, the defendants were within their rights when they closed the road in 1911.

While in the allegations from plaintiffs' complaint it might be inferred that it was their purpose to seek to impose upon defendants the easement to which arts. 564 et seq. of the Civil Code relate, that purpose was evidently abandoned, and the case was tried upon a wholly different theory. Proof was offered to show that the right of passage across defendants' land is necessary to enable plaintiffs to get their products to market, but there was no offer on their part to pay defendants the indemnity required by section 564.

For the reasons stated the judgment of the court below is reversed, the injunction issued against defendants is dissolved, and the action is dismissed. No costs will be allowed on this appeal. So ordered.

Arellano, C. J., Torres, Araullo, Street, Malcolm, and Avanceña, JJ., concur.

Johnson, J., dissents.

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