44 Phil. 292

[G.R. No. 18715. January 08, 1923]

LA SAGRADA ORDEN DE PREDICADORES DE LA PROVINCIA DEL SANTISIMO ROSARIO DE FILIPINAS, PLAINTIFF AND APPELLANT, VS. THE METROPOLITAN WATER DISTRICT, DEFENDANT AND APPELLEE.

D E C I S I O N

VILLAMOR, J.:

This is an appeal from a judgment of the Court of First Instance of Manila whereby the defendant was absolved from the complaint and the plaintiff was ordered to pay the defendant the sum of P1,404.44, the amount of defendant's counterclaim, with interest and costs.

It appears that upon the construction of the Carriedo water supply for the City of Manila, the plaintiff, "Sagrada Orden de Predicadores," donated to the municipality of Manila certain lands of its ownership situated in San Juan del Monte that were required for bringing the water to the city. In return for this act of liberality and generosity of the Dominican Fathers of the Province of the Holy Rosary, that is, the plaintiff corporation, the old city council of Manila, by a resolution dated October 20, 1886, decided to furnish, free of charge, the necessary water from the Carriedo waterworks for the use of the convent of Sto. Domingo, of this city. From the year 1886 the convent of Sto. Domingo has been enjoying the free use of the Carriedo waters until the first of July, 1920, when the defendant, in its capacity as administrator and trustee of the present water supply system in the City of Manila, required the plaintiff to pay for the water consumed during the months of July to September, 1920. The plaintiff paid the amount of P52.24 under protest, and this action followed.

Relying on the aforesaid resolution Exhibit B, of the old city council of Manila, the plaintiff prays that the defendant be ordered to fulfill its obligation to furnish free water consumption which plaintiff has been enjoying

long since, to refrain from collecting any charges for the water consumed in its convent and to refund the amounts paid by the plaintiff. The defendant in its answer sets up several special defenses, which we shall consider later on, and, as a counterclaim, asks that plaintiff be sentenced to pay the sum of P1,404.44, with interest thereon, for water consumed from September 1, 1916, up to the third quarter of 1920.

From the judgment aforementioned of the lower court, an appeal was duly and properly taken, and after the motion for new trial was overruled the case was brought to this court by bill of exceptions.

The errors assigned by the appellant in its brief are: (*a*) The finding that the right of the convent of Sto. Domingo to the free consumption of water has prescribed by reason of the fact that no time had been specified in the concession; (*b*) the finding that the obligation of the defendant to grant the convent of Sto. Domingo the gratuitous use of water has been extinguished by the Jones Law; (*c*) the finding that the right of the plaintiff entity has been extinguished by the fact that the water supplied to the convent of Sto. Domingo comes from the new water system; and (*d*) the fact of sentencing the plaintiff entity to pay the sum claimed in the counterclaim.

The resolution of the old city council of Manila of October 20, 1886, from which the plaintiff derives its right, is contained in Exhibit B, which reads as follows:

> "Finally, the council having been informed by several councilors that it is not possible to carry out what was resolved at the meeting of the 23d of July last, regarding the cost incident to the installation of the Carriedo waterworks in the buildings belonging to the convent of Sto. Domingo, which are yet without this service, for the reason that the said cost had already been defrayed by them, and the municipality desiring, however, to render the said convent a tribute of gratitude and a just return for the kind attention and generous act of liberality that it has shown the municipality by granting it gratuitously some lands belonging to it situated in San Juan del Monte that were necessary for the waterworks, it was resolved to give free of charge all the water of the Carriedo waterworks that may be consumed in the aforesaid convent of Sto.

> Domingo, of this city."

Admitting the validity of the gratuitous concession of water made by the old government of the City of Manila to the plaintiff entity, the court below, however, holds that as no time was fixed for the free use of water in the convent of Sto. Domingo, the successors of the old government of the City of Manila and the defendant herein, the Metropolitan Water District, are not under obligation to respect said concession. Following is the line of reasoning of his Honor, the trial judge:

> "It will be noted that in the aforesaid resolution nothing is said as to the time or duration of said concession or donation, it was simply resolved to *grant gratuitously* the water of the Carriedo waterworks that might be used in the convent of Sto. Domingo, and since it was not resolved nor stated that the concession of the said use of water was to be for the whole time of the existence of the said convent of Sto. Domingo, it cannot be reasonably said that the aforementioned donation was perpetual or permanent, from which it follows logically that the successors of the old government of the City of Manila and the herein defendant, the Metropolitan Water District, are not under obligation to respect the aforesaid donation, nor to continue furnishing gratuitously the water that may be needed and consumed in the convent of Sto. Domingo."

Whether or not the old city council of Manila had any authority to make the remuneratory concession here in question is not discussed in the decision of the court below. And as a matter of fact the Attorney-General confines himself in his brief to maintaining the proposition that the judgment appealed from is correct in all respects. So that defendant's counsel, who has not appealed from the judgment of the court below, cannot now raise this question in this instance, under Rule 20 of the Rules of this court.

However, in the discussion of this case among the members of this court, the question was raised as to the lack of authority on the part of the old city council of Manila to make the plaintiff the concession upon which the complaint is based.

In studying the proceedings of the city council of Manila in connection with the establishment of the water supply system, we need not look to any law regarding the organization and powers of the city council, but must determine rather the capacity of a trustee, for the following reasons:

(*a*) The funds, as well as the charitable idea of constructing a water supply system to furnish water to the inhabitants of Manila, came from a legacy provided in clause 15 of the testament of General Francisco Carriedo y Peredo who had appointed Marquis de Montecastro y Llanahermosa as testamentary executor.

(*b*) As appears in "Obra Pia" No. 43 inserted in the book entitled "*Obras Pias Sus Fundadores*" kept in the division of archives of Manila, on March 28, 1748, the aforesaid Marquis de Montecastro, as executor of General De Carriedo, assigned to the board of "Obra Pia" known as "Mesa de Sta. Misericordia" the sum of $8,000 Spanish dollars, stating that he was doing it in compliance with clause 15 of the testament executed by the said General shortly before his death, which amount was to be increased to 36,000 dollars, the total amount adjudicated to it, in order that with the part of such amount invested in business, the testamentary provision concerning this enterprise might be carried into effect, requesting the purveyors and members of the "Mesa" to receive it and keep it in their treasury. This request met with their approval with the only condition that 5 per cent of the profit that might be obtained should inure to the treasury.

(*c*) The powers of the board known as "Mesa de la Sta. Misericordia" with respect to the said funds passed to the city council of Manila, which assumed the administration thereof not as administrator of municipal funds but as trustee of the Carriedo charitable funds; hence it was then entitled in its various proceedings "Fideicomisaria de las Obras de Carriedo" (Trustee of the Carriedo Works).

(*d*) In administering the funds as well as in carrying into effect the object of the testator to furnish water to the inhabitants of Manila, the council was acting in compliance with the last will of the testator, Carriedo, in the place and stead of the testamentary executor, Marquis de Montecastro y Llanahermosa, and not precisely by virtue of any ordinance or municipal law.

According to the ancient expounders of the Spanish law, in fideicommissary substitutions, that person is regarded as the fiduciary who is charged with the execution of the will of the testator, and fideicommissary the person to whom the inheritance is to be delivered as beneficiary. In this case the inhabitants of Manila are the fideicommissary and the council the fiduciary. The city council of Manila as fiduciary charged with the carrying out and performance of the testamentary trust was authorized to use the necessary means to accomplish the object contemplated by the testator.

In its capacity as fiduciary of the Carriedo charitable fund, the old city council of Manila had under the law all the necessary powers to accomplish the bringing of the waters to the city, with which it was charged. It had the power to appoint the necessary personnel to carry the project into effect and to buy not only the materials necessary for such a great enterprise but also to buy or acquire by condemnation proceedings such lands as were needed for the placing of the Carriedo water pipes. And it so appears in the resolution book of the city council from which Exhibit B was taken. It is not necessary to demonstrate that, under the sound principles of law, the authority to buy carries with it that to exchange, and this is what happened in the instant case.

In the testament of Carriedo we find, among others, the following provisions:

> "Also, That if the desired object of conducting the water to this city be accomplished, three or four public fountains must be constructed within the same, and without, such number as may be deemed convenient, and at the expense
> of said funds water conduits must be laid to conduct the water to the convents of San Francisco, San Juan de Dios, and Sta. Clara.
>
> "Also. That if any other convent, religious community or private house desires to enjoy this benefit, the same must be granted with the condition that it must contribute to the expenses of conducting the water in a proportionate amount then to be determined, and of the amount thus paid a prudential part must
> be used as an aid to the undertaking, the residents and traders of the Noble

> City being at liberty to increase it so that with its interest and profit the losses of the enterprise might be compensated, and the reasonable salaries of the persons in charge of the maintenance, repair, and preservation of said work paid."

As can be seen, the testator making the legacy provided that if any convent desired to enjoy the benefit granted the convents of San Francisco, San Juan de Dios, and Sta. Clara to have the water conduits laid at the expense of the funds of the enterprise, it should be granted with the condition that said convent shall contribute to the expenses of laying the conduits. In the present case, as appears in the aforesaid resolution of the city council, the community of Sto. Domingo had defrayed the expenses of installing the waterworks in its convent, which expenses the city council desired to defray in return for the donation that said convent had made of its lands in San Juan del Monte in favor of the city council for the construction of the Carriedo waterworks, and so the city council resolved to grant said community the free use of the water in the convent of Sto. Domingo.

If the city council of Manila was authorized to adopt the resolution under discussion, it seems to us unquestionable that that resolution has produced its legal effects. In the old ordinances prescribing rules for the government of the City of Manila and the proceedings of the chapters approved by Royal *Cedula* on September 12, 1686, the following, among other things, is provided:

> "Also. It is ordered and decreed that no resolution voted at one meeting shall be revoked at another; that should this be necessary in any particular case and for just and urgent reasons, it so be done always as not to impair any right of a third person arising from contract or quasi-contract, and that all the members of the Chapter be present at the meeting held for that purpose * * * that whatever resolution might be adopted be carried into effect unless appeal is taken therefrom to any superior court. * * *" (Pages 65-69, vol. 3, *Legislacion Ultramarina* by Joaquin Rodriguez San Pedro.)

The said resolution has been in force ever since it was adopted and having

created a definite state of things, it cannot now be revoked without injuring the right of the party plaintiff.

In the case of Vasquez Vilas *vs*. City of Manila (42 Phil., 953), the Supreme Court of the United States held that:

> "The City of Manila holds the Carriedo fund as a trustee and such fund is liable for obligations incurred in the administration of the Carriedo waterworks. (Vidal *vs*. Philadelphia, 2 How., 127; 11 L. ed., 205; Girard *vs*. Philadelphia, 7 Wall., 1; 19 L. ed., 53; United States *vs*. Baltimore & O. R. Co., 17 Wall., 322; 21 L. ed., 597; Tippecanoe County *vs*. Lucas, 93 U. S., 108, 115; 23 L. ed., 822, 824; Hunter *vs*. Pittsburgh, 207 U. S., 161, 179; 52 L. ed., 151, 159; 28 Sup. Ct. Rep., 40; Philadelphia *vs*. Fox, 64 Pa., 182; People *ex rel*., Le Roy *vs*. Hurlbut, 24 Mich., 44; 9 Am. Rep., 108; McDonough *vs*. Murdoch, 15 How., 367; 14 L. ed., 732; New *vs*. Nicoll, 73 N. Y., 127; 29 Am. Rep., 111; Noyes *vs*. Blakeman, 6 N. Y., 580; Van Slyke *vs*. Bush, 123 N. Y., 47;25 N. E., 196.)"

Appellee urges that the cession of the water was made in return for another cession, that of the strip of land made by appellant, and as the latter has revoked its donation, it cannot now claim fulfillment of that which, for reciprocity, was accorded it by the predecessors of the defendant appellee.

It is true, as evidenced by the record, that when the entire San Juan del Monte Estate was registered under Act No. 496 in the name of the appellant, and also when it transferred the land to Mr. Orense and to the present owner, J. K. Pickering & Co., the strip of land donated to the old city council of Manila was included in the registration; however, the same records show that the plaintiff, upon noticing such inclusion, requested the present owner, J. K. Pickering & Co., to exclude the said strip of land from its title, reducing thereby the price, to which J. K. Pickering & Co. consented, as is shown by Exhibits D and E. The Attorney-General himself, representing the defendant, admits in his motion, Exhibit C, filed with the court in the record G. L. R. O. 975, that the Metropolitan Water District and J. K. Pickering & Co. had come to an agreement by which the present owner of the land binds itself and

undertakes to transfer unto the said Metropolitan Water District, as the administrator of the Carriedo waterworks, unconditionally and without any limitation, the title and ownership of the whole strip of land within the limits of the Province of Rizal that had been given in 1886 by the Dominican Fathers for laying the water pipes.

On the other hand, it does not appear that the defendant, nor the City of Manila, has ever been disturbed by the appellant or by the present owner, in their use and possession of the land occupied by the water pipes in San Juan del Monte.

The fact that the water supply of the City of Manila almost the whole year around comes from the Montalban reservoir does not affect the rights and obligations growing out of the resolution above quoted of the old city council of Manila, since it is an indisputable fact that the defendant, the Metropolitan Water District, remains in the possession of the same lands donated by the appellant, which was the basis for the grant of the free use of water to the convent of Sto. Domingo by the former city government of Manila.

In its decision, the lower court says that by virtue of section 3 of the Act of Congress of August 29, 1916, known as the Jones Law, the convent of the Dominican Fathers of the City of Manila cannot continue in the free enjoyment of the use of the water supplied by the City of Manila, for the reason that the said section strictly prohibits that any public property or fund be used or destined, without due compensation, for the use, benefit or maintenance of any church, or religious institution or denomination. It should be observed, in the first place, that the free supply of water granted by the old city council of Manila to the convent of Sto. Domingo was made, not on account of any religious consideration, but in return for an act of liberality of the Dominican Fathers in donating part of their lands to the City of Manila for the laying of the water pipes of the Carriedo waterworks. Secondly, the donation was remuneratory; in other words, the free consumption of water is compensated by the value of more than ten thousand square meters of land which the party plaintiff had donated. Supposing that the old city council of Manila could validly purchase the necessary lands for bringing the water to the city, there is no logical reason why the said city government could not equally, instead of paying the price of the land, furnish free of charge the water that might be used by the

convent of Sto. Domingo, the donor. Considering the case at bar in the most favorable light for both parties, it is evident that these donations, made reciprocally by the plaintiff corporation and the old city council of Manila, the predecessor of the defendant, constitute in the final analysis an exchange or barter whereby one gives its lands and the other the supply of water. It cannot be held, therefore, that the free supply of water to the convent of Sto. Domingo is made without compensation; wherefore, we are of the opinion that the court below erred in applying section 3 of the Act of Congress of August 29, 1916, to the present case.

The question as to whether or not the obligation contracted by the former municipal council of the City of Manila was transmitted to the present municipal board of Manila upon the change of sovereignty, has already been decided in the affirmative by the Supreme Court of the United States in the case of Vasquez Vilas *vs*. City of Manila (42 Phil., 953). That high tribunal, after an exhaustive review of the precedents and authorities upon the point, among other enlightening doctrines contained in its wise decision, held that the present City of Manila, chartered by the Philippine Commission, with almost the same municipal attributes, territorial extension and population that it had as the municipality of Manila under the Spanish regime, is liable for the municipal obligations contracted before the cession of the Philippine Islands to the United States by the Treaty of Paris of December 10, 1898.

Finally, Act No. 2832 of the Philippine Legislature, creating the Metropolitan Water District, in its section 8 empowers and directs the governing body created by that law to receive and take charge, in the name of the Metropolitan Water District, of all the assets and obligations pertaining to the waterworks and sewerage system of the City of Manila. Wherefore, it is our opinion, and so decide, that the Metropolitan Water District is in duty bound to respect the obligations contracted by its predecessor, the old city council of Manila, by supplying gratuitously water for the consumption in the convent of Sto. Domingo, which pertains to the plaintiff corporation.

By virtue whereof the judgment appealed from is reversed and the defendant is sentenced to supply gratuitously the water that may be consumed in the said convent of Sto. Domingo and to refund the amount of P52.24 paid by the appellant, without special pronouncement as to costs. So ordered.

Araullo,
C.J., Johnson, Avanceña, and *Romualdez, JJ.,* concur.

CONCURRING IN PART AND DISSENTING IN PART

STREET, J.:

I concur in so much of the opinion as holds that the plaintiff "La Sagrada Orden de Predicadores" cannot be made to pay to the Metropolitan Water District the sum of P1,404.44, as the value of water used by the convent of the Dominican Fathers since September 1, 1916, and prior to the third quarter of 1920, because that water was voluntarily supplied, and no obligation on the part of the plaintiff to pay for it has existed at any time. The provision cited from the Jones Law cannot, in my opinion, be considered as creating a civil liability on the part of the Order to pay for said water.

As to the effect of the so-called "act of cession," effected by the Ayuntamiento of the City of Manila in 1886, authorizing the supply of water *gratis* to the Dominican convent, it is to be admitted that this grant was based on a meritorious, though past, consideration. Nevertheless, I consider it somewhat in the light of an administrative regulation, conferring a mere privilege, and authorizing the persons in charge of the water system to supply water to the convent for nothing, until otherwise directed; and I can see nothing in it in the nature of a permanent donation or irrevocable grant. The present administrators of the water system are therefore not bound to continue to supply the water in conformity with that grant, if minded to revoke the privilege.

DISSENTING

JOHNS, J., with whom concurs **MALCOLM, J.:**

The pleadings are important. The complaint is as follows:

> "Comes now the plaintiff entity and, as a cause of action against the defendant, alleges:
>
> "I. That the plaintiff is a religious entity duly incorporated in accordance with the laws now in force in these Islands, having its place of office in this City of Manila, convent of Sto. Domingo of Manila.
>
> "II. The defendant is a public corporation created by Act No. 2832, to take charge of the sewer and water supply systems, with capacity to sue and be sued.
>
> "III. On October 20, 1886, in compensation for the benefit granted the municipality of Manila by the plaintiff entity, the said municipality in its capacity as administrator of the Carriedo Charitable Funds executed in favor of the convent of Sto. Domingo a donation of the gratuitous water service as follows:
>
> > " 'Desiring, however, to give said convent a positive expression of its gratitude and a just return for the kind attention and generous act of disinterestedness of said convent in ceding to the municipality gratuitously
> > such lands belonging to it situated in San Juan del Monte, and complying with
> > the resolution adopted by the aforesaid municipal corporation at the ordinary
> > session held on the 20th instant, let the aforesaid religious order be informed
> > that the municipality gratuitously grants all such water of the Carriedo Canal
> > as might be used in the aforesaid convent of Sto. Domingo.'

"IV. Upon the discontinuance of the Spanish sovereignty, the municipal administration of Manila passed to the City of Manila, a corporation of a public character created by Act No. 183, the whole control of the management and administration having been transferred to said corporation from the *Corregimiento* of the City of Manila, which at that time had been in charge of it.

"V. Since March 6, 1919, the date of the enactment of Act No. 2832, the control over the sewer and water supply systems, which at that time had been in the hands of the City of Manila, passed to defendant entity, and the City of Manila ceased to exercise further right to control over the same.

"VI. Since the aforesaid date, October 20, 1886, the convent of Sto. Domingo of Manila, which belongs to the plaintiff entity, has been enjoying the benefit granted it, consisting in the gratuitous use of the water which was used in said convent up to the third quarter of 1920, when the defendant refused to continue supplying the water gratuitously, the plaintiff having been compelled to pay P54.24 for said quarter to avoid being deprived of the use of the water.

"VII. The defendant in this way intends to revoke and did in fact revoke the remuneratory donation executed in the year 1886 by the municipal corporation sanctioned by a prescription in favor of the plaintiff entity on account of there having elapsed more than thirty-four years.

"Wherefore, plaintiff prays the court that judgment be entered in its favor, sentencing the defendant to respect and comply with the donation of the gratuitous use of water which the plaintiff has been enjoying, to supply the convent of Sto. Domingo gratuitously the water which is used in said building to the same extent as was done before the transfer of the sewer and water supply systems to the defendant, to refrain from charging anything for such use of water, and to return to the plaintiff all the amount unduly paid the said defendant, and the costs of the action."

To which the following demurrer was filed:

"Comes now the undersigned Acting Attorney-General in behalf of the defendant

and respectfully shows:

"That he demurs to the complaint on the ground that the facts therein alleged do not constitute a cause of action.

"In support of this demurrer, we submit the following:

"The plaintiff asks that a supposed donation made in its favor by the municipality of Manila in its capacity as administrator of the Carriedo Charitable Funds be respected and complied with.

"The donation if it had been really made is void because it was made by a person who was a mere administrator and could not dispose of the property administered (art. 624, C. C.), and it being void cannot be enforced and does not have any legal effect.

"Wherefore, defendant prays that the complaint be dismissed, with the costs against the plaintiff."

The demurrer was overruled, and the defendant filed the following answer:

"Comes now the defendant by the undersigned Acting Attorney-General and respectfully shows:

"That it admits paragraphs 1, 2, 4, and 5 of the complaint and denies generally and specifically the remaining paragraphs of the same with the exception of the part of them which is explicitly admitted in the following:

"SPECIAL DEFENSE

"1st. That the defendant is as its predecessors, the City of Manila and the municipal commonwealth of Manila, mere trustees of the water supply system constructed with the funds bequeathed by the deceased Carriedo, administering the same and taking the necessary measures for its maintenance and preservation.

"2d. That as such trustees, neither the defendant nor its predecessors have made any 'concession of gratuitous water service' as is alleged in the complaint

by the plaintiff religious entity.

"3d. That the most that the defendant should have granted the plaintiff was a privilege which was withdrawn, firstly, by the fault of the plaintiff which, having obtained it in return for the simple concession made by it of a strip of land in San Juan del Monte, which has been the object of condemnation proceedings to conduct the water coming from the reservoir constructed with the aforesaid funds, revoked said concession by inscribing in its name the aforesaid strip of land for which it obtained the corresponding certificate of title under the new Registration Act and sold it to other persons, ignoring entirely the said concession, and, secondly, because the Jones Law which took effect on the 29th of August, 1916, prohibited in its article 3 that any fund or public property be used, applied, donated or devoted either directly or indirectly for the use, benefit, or support of any sect or church of any kind or denomination or sectarian institution or religious system, priest, preacher, or minister or any other religious teacher or dignitary in his capacity as such.

"4th. That the water which is now supplied to plaintiff entity does not come from the old water supply system constructed in Santolan with the Carriedo Funds, but from a new one which has been constructed in Montalban with funds obtained through the issues of bonds by the Government which has bound itself in
order to pay them with the funds appropriated to that effect by Act No. 1323 to accomplish their redemption, and as

"COUNTERCLAIM

"The defendant alleges:

"That the plaintiff entity is indebted in the sum of P1,404.44 for the water which has been supplied to it from September 1, 1916, to the third quarter of 1920, which sum has not been paid, and the plaintiff denies to pay notwithstanding the repeated demands made to that effect.

"Wherefore, the defendant prays the court—

"(*a*) That the plaintiff be sentenced to pay the defendant the sum of P1,404.44 with legal interest thereon, and the costs of the suit.

"(*b*) That the defendant be absolved from the complaint; and

"(*c*) That defendant be granted any other relief which may be deemed just and equitable."

Upon such issues, judgment was rendered in favor of the defendant for P1,404.44, the full amount of its counterclaim with interest and costs, from which the plaintiff appeals, claiming that the court erred in the rendition of the money judgment in favor of the defendant, and in failing to render judgment for the plaintiff as prayed for in its complaint.

It will be noted that the answer admits paragraphs 1, 2, 4, and 5 of the complaint, and specifically denies all other allegations, and, as a special defense, it is further alleged in the answer that "neither the defendant nor its predecessors have made any 'concession of gratuitous water service' as is alleged in the complaint by the plaintiff religious entity." Hence, it devolves upon the plaintiff to prove the allegations made in paragraphs 3, 6, and 7 of its complaint.

Plaintiff's claim to the use of free water is founded solely upon the action of the City of Manila on October 20, 1886, more than thirty-six years ago.

We have quoted the complaint in full for the purpose of Showing the ground upon which plaintiff's alleged right is founded. It will be noted that plaintiff does not allege that any contract or agreement was ever made between it and the city, or that the action of the council was founded upon any contract. Neither does it allege that plaintiff ever made or cause to be made to the city any conveyance, right of way or easement to or over any land, for any purpose whatever, or that it was the owner of any land, or that it ever, or for any purpose, parted with any right, title or interest in any land to the city for any purpose. Neither is there any proof in the record that any conveyance, right of way or easement was ever made by the plaintiff to the city at any time for any purpose. Neither is there any allegation or proof of the recitals, terms, conditions or covenants of any alleged conveyance, right of way or easement. Defendant made a general denial, and if there was a conveyance of any right of way or easement by the plaintiff to the City of Manila, it devolved upon the plaintiff to prove that fact and to introduce the record of such conveyance for

the inspection of the court to show and prove the terms and conditions upon which the conveyance was made. In the absence of such allegation or proof, it is not only the legal right of this court to assume, but it must assume that no such a conveyance was ever made. But it is contended, and the evidence tends to show, that the City of Manila constructed its pipe line over the lands of the plaintiff, and that ever since it has had the use and possession of the land over which it was constructed. Be that as it may, any right of the City of Manila would then be founded on use and possession and use and possession only, and would not be founded upon a conveyance of any kind, or upon any covenants, terms or conditions. In other words, the city's easement and right to the use of the land for its pipe line would then be founded upon an irrevocable license and an irrevocable license only, and would be in parol as distinguished from a written conveyance with covenants and conditions.

Assuming that the plaintiff did grant the city a parol license to construct its pipe line over the lands of the plaintiff, conditions were very different in 1886 than at the present time. For many and different reasons, it was then important and necessary to the plaintiff and all other persons similarly situated to have running water in its buildings for its own use and consumption, and the right of way over its land was then but of little, if any, commercial value. In other words, for its own interests and for its own use, the plaintiff could well afford to give a right of way for a pipe line to insure it the right to have running water in and through its buildings, and it might well be contended that such was the primary and only purpose of the plaintiff in permitting the city to lay its pipe line over plaintiff's land. In the early days donations of right of way to promote some public enterprise were very common here and in the United States, and thousands of them were made to encourage the construction of railroads and waterworks in particular.

If it be a fact that the City of Manila constructed and has maintained its pipe line over the land of plaintiff under a parol license, then it must follow that there are no covenants running with the land. There is a marked legal distinction between personal covenants and covenants running with the land. Personal covenants are confined and limited to the immediate parties, and may be in parol. Covenants running with the land can only be created by a written instrument under seal in which they are recited in, and made a part of, the instrument.

Words and Phrases, volume 2, page 1691, defining covenants running with the land, says:

> "It is an agreement in writing, under seal."
>
> "It is a written agreement under seal, in the nature of a deed between two or more parties."
>
> "It is a contract or agreement to do or suffer a particular thing, evidenced by a writing, under seal, sometimes defined as a 'contract by deed.' "
>
> "It is an 'agreement or consent of two or more by deed in writing, sealed and delivered, whereby either one of the parties doth promise to the other that something is done already or shall be done afterward.' "
>
> "It is an agreement between two or more parties, reduced to writing and executed by a sealing and delivery thereof, whereby some of the parties named therein engaged, or one of them engages with the other or others, or some of them therein also named, that some act hath or hath not already been done, or for the performance or nonperformance of some specified duty."
>
> "It is an agreement, convention, or promise of two or more parties, by deed in writing, signed and delivered, by which either of the parties pledges himself to the other that something is either done or shall be done, or stipulates for the truth of certain facts."

In covenants running with the land, the grantee is bound by the recitals in any deed, through which he deraigns title. That is not true as to personal covenants between the immediate parties which may be in writing or in parol.

In the instant case the testimony is conclusive that no written instrument was ever executed by the plaintiff to the city giving it a right of way over plaintiff's land. In the first place, if such an instrument was ever executed, the most natural thing for the city to have done would be to file it for record, and the instrument itself or some trace of it should be found in the archives of the city. Second, in the very nature of things plaintiff would have something among its files and records tending to show the execution of such an instrument.

Again, an instrument containing covenants running with the land would be absolute and convincing proof of plaintiff's right to the free use of water. Also the testimony of Perfecto Gabriel himself is conclusive that no such a written instrument was ever executed.

If it be a fact that the plaintiff donated the right of way to the city under an agreement with the city that in consideration thereof it should have the free use of water perpetually, in the very nature of things, the contract would have been reduced to writing and officially signed by the city on the one hand and by the plaintiff on the other, and, yet, there is no claim or pretense that any contract in writing was ever made or signed by either party.

It appears from the record that prompt and timely objections were made by the defendant to the introduction of what is known in the record as Exhibit A, as tending to prove "the supposed donation for which there is no written record thereof." Also, "to the admission of Exhibit B because it refers to donation which was not written." In the opinion of the writer neither of such exhibits were admissible for any purpose. Neither of them, standing alone, is evidence of any contract or agreement either oral or written between the plaintiff and the city.

Much importance is attached to the language found in the municipal record of the city of October 20, 1886, known as Exhibit B, which is incorporated in, and made a part of, the complaint. Through the courtesy of Mr. Justice Villamor, I have been furnished an English translation of that record made by the official translator, which reads as follows:

> "Finally, the council having been informed by several councilors that it is not possible to carry out what was resolved at the meeting of the 23d of July last, regarding the cost incident to the installation of the Carriedo waterworks in the buildings belonging to the convent of Sto. Domingo, which are yet without this service, for the reason that the said cost had already been defrayed by them, and the municipality desiring, however, to render the said convent a tribute of gratitude and a just return for the kind attention and generous act of liberality that it has shown the municipality by granting it gratuitously some lands belonging to it situated in San Juan del Monte that were necessary

> for the waterworks, it was resolved to give free of charge all the water of the Carriedo waterworks that may be consumed in the aforesaid convent of Sto. Domingo, of this city."

It will be noted that, among other things, it says:

> "To render the said convent a tribute of gratitude and a just return for the kind attention and generous act of liberality that it has shown the municipality by granting it gratuitously some lands', etc."

This is an express recital that the lands were gratuitously ceded by the plaintiff to the city. In other words, that at some previous time the plaintiff had given the city a right of way for the pipe line over its land. That recital is conclusive proof that at some previous time the plaintiff gratuitously gave the right of way to the city. No plainer language could have been used. But the plaintiff relies upon the following language used in the same record:

> "That the municipality gratuitously grants all such water of the Carriedo canal as might be used in the aforesaid convent of Sto. Domingo."

All of the language taken together cannot be construed as evidence of any contract or agreement between the plaintiff and the city. Neither does it tend to show that the plaintiff conveyed a right of way to the city for its pipe line pursuant to any contract, understanding or agreement with the city that the plaintiff should have the free use of water.

Giving to the recital in the municipal record its full force and effect and a fair and liberal construction, it means this: That to promote and insure the construction of a water system by the City of Manila the plaintiff gave to the city a right of way over its land. That the gift was voluntary and was made to promote the construction of a water system for the City of Manila and was without any other consideration. After the plaintiff had given the city the right to construct the pipe line over its lands and without any compensation,

the then council of the City of Manila adopted the minutes of October 20, 1886, above quoted. Relying upon what the plaintiff did, the city has at a large expense constructed and ever since maintained the pipe line upon the land donated to it by the plaintiff. In addition, the city has expended a large amount of money for the installation and development of its present water system. In other words, relying upon the donation of the right of way, the city has installed, developed and maintained its present water system, and such parol license for a right of way is now coupled with an interest, and is, therefore, irrevocable. On the other hand, as a result of what the city said in its minutes, the plaintiff has not changed its conditions or expended one centavo, which it would not have otherwise spent. Any action of the city was purely voluntary on its part and did not arise from, or grow out of, any contract or agreement with the plaintiff. In other words, there is no evidence which shows or tends to show that the plaintiff gave the city a right of way in consideration of and on condition that in return it would have free water. The gift of the plaintiff was made without any condition or reservation, and was complete within itself and was not founded on any contract or agreement with the city. What the city did was done voluntarily and on its own motion, and without any contract or agreement, and was done some time after the gift to the city was complete. In other words, after the gift of the plaintiff to the city was complete, the then municipal council of the City of Manila, and in appreciation of the gift, in effect, said to the plaintiff that, as evidence of our gratitude, we will give you free water. That is the analysis of the whole transaction. Neither gift was dependent upon or connected with the other, and each was separate and distinct from the other, and the act of the council was a voluntary act upon its part. Hence, you have this situation—to insure and promote the construction of a water system by the city, the plaintiff voluntarily and without any other consideration gave the city a pipe line right of way over its land. Relying thereon the city installed its present system and expended a large amount of money. The then city council, desiring to show its appreciation of gratitude to the plaintiff, voluntarily said to it that we will give you free water. That was thirty-six years ago, and, through the acquiescence of subsequent city councils, the plaintiff has had free water.

The plaintiff is a private corporation dealing with its own property. The City of Manila is a public corporation representing public interests and dealing

with public property. No law has ever been cited and no decision of any court will ever be found holding that a voluntary gift of public property made by a city council thirty-six years ago is a perpetual, continuous gift, binding upon all other city councils through time and eternity, yet, that is the legal effect of the majority opinion. As a matter of fact, no law will ever be found which authorizes a city council to voluntarily give away public property to any one for any purpose. The whole transaction shows that the use of free water to the plaintiff was a voluntary gift. That the gifts from one to the other were not dependent on the other, and that the action of the city council was not founded upon any covenant, contract or agreement with the plaintiff, either oral or written.

The original minutes in Spanish reads:

> "Hagase saber a la referida Comunidad que el Municipio cede gratuitamente toda el agua que del canal de Carriedo se consuma en el Convento de Sto. Domingo."

According to the unabridged Spanish Dictionary, the word "cede" comes from the infinitive verb "ceder," meaning "to give, to transfer, to convey to another a thing, action, or right. To surrender, to submit to something," and "concesion," the noun of the verb "ceder" means "the action or the effect of giving," and the word "grant" means "concession, quality, gift, donation, permission, privilege."

Words and Phrases, vol. 4, page 3151, says:

> "* * * Grant is usually regarded as synonymous with give, confer, bestow, convey, transfer, admit, allow, concede * * *."

Hence, in the instant case and from the municipal record in 1886, upon which the plaintiff relies to prove its case, you have the council of the City of Manila voluntarily giving, conferring, and bestowing the use of free water to the plaintiff, and because the city council in 1886 voluntarily gave the plaintiff the use of free water, it now claims a perpetual right to such use. If

it be a fact that the plaintiff donated the pipe line right of way to the city under a contract or agreement with the city in substance and to the effect and in consideration thereof that the plaintiff should have the free use of water, and both parties in good faith acted and relied thereon, and such facts were alleged and relied upon in the complaint and sustained by the evidence, as between it and the City of Manila, plaintiff's position would then be tenable and sustained by the authorities, and that is the legal effect of all the authorities cited in the majority opinion. That is not this case. There is no allegation in the complaint that any contract or agreement was ever made between the plaintiff and the City of Manila at any time for any purpose, and there is no evidence of any contract showing or tending to show that the plaintiff gave the city a right of way for its pipe line with the understanding and agreement that the plaintiff should have the free use of water at all or for any length of time.

In the absence of any such an allegation or proof of any kind, how and upon what theory or upon what legal principle can any court say that the plaintiff has a perpetual right to the use of free water, and, yet, that is what the majority opinion does. Again, it will be noted "that the municipality gratuitously grants all such water of the Carriedo canal as might be used in the aforesaid convent of Sto. Domingo." No time is specified as to how long the plaintiff should have the use of free water for the very apparent reason that a voluntary gift by one council could not bind another council, and for the further reason that no city council has the right to voluntarily give the property of the city to any person for any purpose. Again, the gift is confined to the "water of the Carriedo canal," and the testimony is undisputed that under changed conditions, the only time water from the Carriedo canal is used by the city for any purpose is from one to two weeks in the whole year, and that to all intents and purposes, the city has long since ceased to use any of the original waters from or out of the Carriedo canal to which the minutes of the city council of 1886 refer.

For a number of years the city's water source of supply has been and is now from Montalban the waters of which are separate and distinct from the waters of the Carriedo canal. In other words, it is only during a shortage of water and for a few days in the year that water is ever used by the city through the Carriedo canal.

A. Gideon, who has been water superintendent of the defendant for nearly seventeen years on direct examination, testified:

"Q. Do you know the deposit of the Carriedo waters?—A. Yes, sir.

"Q. The water system?—A. All the waterworks performed since 1878.

"Q. Does the Carriedo water system still continue?—A. No.

"Q. When was it stopped?—A. Around the year 1910.

"Q. And what water work system took its place to supply water to the City of Manila and adjacent towns?—A. The Montalban waterworks, by gravity system.

"Q. This new waterworks, is it related in any way with the Carriedo waterworks?—A. I have to explain this carefully to avoid mistakes. The Carriedo Water Works supplied the water by pumps in Santolan to 'the place called the deposit and from there the water was distributed in the City of Manila by water tubes 26 inches diameter. In the new system the water comes from Montalban where
it has its own deposit or dam and this system is not at all connected with the old waterworks system, except only during one or two weeks of the year during which, when there is not enough water in Montalban, we have to use the pumping
station of the Carriedo system to bring in water during that time. From the deposit to the San Juan Bridge the pipes are placed in the San Juan Lands. These pipes are 42 inches and are placed alongside the 26-inch pipes.

"Q. Excepting the use that you make during one or two weeks of the Carriedo system do you use that system at any other time?—A. No.

"Q. Why was the Carriedo waterworks abandoned?—A. Because it was not sufficient to supply the needs of the city. It could only supply 4 or 5 million gallons whereas now we need 22 or 24 million.

"Q. Can you state with what money the Montalban was constructed?—A. With the eight-million-peso loan made by the Insular Government from the United States Government and with that borrowed money we constructed this waterworks.

> "Q. Was any amount of money from the Carriedo Funds used in the construction of the new waterworks?—A. There was no money in the Carriedo Funds, it was always suffering a shortage of funds. The Government always had to come to the help of the Carriedo Funds."

On cross-examination:

> "Q. You say that the Carriedo waterworks is different from the modern system constructed by the Metropolitan Water District.—A. Yes, sir.
>
> "Q. The Carriedo waterworks, where does it have its distributing center?—A. It has no connection whatever.
>
> "Q. Now coming to the new waterworks, where does its water come from?—A. From
> a place known Uaua.
>
> "Q. What municipality?—A. Montalban, it is about three kilometers from Montalban.
>
> "Q. Are the old pipes there yet?—A. Yes, sir.
>
> "Q. In the same land?—A. Yes, sir.
>
> "Q. And that Santolan deposit is it connected at all with the new deposit at Montalban?—A. No, sir."

This is the uncontradicted testimony of a man who knows what he is talking about, and we must accept it as true, from which it appears that none of the waters through or out of the Carriedo canal are used by the city in the present water system more than two weeks in the whole year. That for many years the two water systems have been separate and distinct from each other, for the very simple reason that the waters from Montalban are brought in under a gravity system, and that the waters for the Carriedo canal were furnished by a pumping system, which is far more expensive than the gravity system. Giving to the minutes of the city council of 1886 the very broadest and most liberal construction, in any event, the free use of water to the plaintiff should be

confined and limited to “the waters of the Carriedo canal,” and for the period of time that waters are furnished to the city through that canal, which is not to exceed two weeks in the whole year. Yet, founded upon a voluntary gift to the plaintiff for the free use of waters of the Carriedo canal which canal for twelve years has not been used by the city more than two weeks in the whole year, the plaintiff now claims a perpetual right to the use of waters the whole year from and out of the present gravity system which was constructed at a cost of more than P8,000,000 to the Government. If it be a fact, as the majority opinion holds, that, because the plaintiff donated to the city the right of way for its pipe line in 1886 over lands which had, but little, commercial value, it now has a perpetual right to the free use of water from the present gravity system, and the property of the defendant will be burdened through time and eternity for millions of pesos, which even now amounts to P216.96 a year, which is more than the value of the right of way at the time it was donated by the plaintiff to the city in 1886, and which for thirty-six years at the same annual rate would amount to P7,800. This simple statement of figures is conclusive evidence that plaintiff’s claim is untenable and ought not to be sustained in any court.

My conscience and oath of office compel me to vigorously dissent from the majority opinion.

The decision of the lower court as to the money judgment against the plaintiff should be reversed, and, in all other respects, affirmed, without costs to either party.

Ostrand, J.: I concur in the conclusion reached in the dissenting opinion.

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