3 Phil. 394

[G.R. No. 972. March 14, 1904]

JOSE V.L. GONZAGA, PLAINTIFF AND APPELLANT, VS. CARMEN F. DE CAÑETE, DEFENDANT AND APPELLEE.

D E C I S I O N

WILLARD, J.:

This case has been before the court on three former occasions (1 Off. Gaz., 45,[1] 346,[2] 525[3]).

On April 1, 1902, a judgment for the defendant was reversed, and a new trial granted (1 Off. Gaz., 525). Upon the new trial judgment was again ordered for the defendant. The plaintiff excepted to the judgment, but did not move for a new trial. In the decision of December 3, 1902 (1 Off. Gaz., 45), in proceedings to settle a bill of exceptions, we held that we could not weigh the evidence nor retry the questions of fact. Certain exceptions, however, appear in the record, which will be considered.

1. The case was tried originally in the special court of the Island of Negros, created by Act No. 166 of the Commission. When the first judgment was reversed and a new trial ordered it was retried in the same court, against the objection and exception of the plaintiff. His claim is, that a new trial having been ordered, it became a new case and consequently was not a case pending on June 16, 1901. There is nothing in this point. There was only one suit pending between the parties. The new trial was a new trial of the old case.

2. The plaintiff claims that Judge Norris, having tried the case once, was disqualified to try it the second time. Section 504 of the Code of Civil Procedure allows the Supreme Court, when a new trial is granted, to designate another judge for that purpose. This is not mandatory, however. Judge Norris was competent to try the case.

3. The court below, in its decision, found that the defendant had acquired title by prescription to the use of the waters of the canal in question, and that when the municipality of Granada closed the canal it was acting without authority, and was a mere trespasser. The appellant assigns this holding as error. It is not necessary to determine this question, because the court found also as a fact that after the canal had been "closed the defendant opened another canal which furnished the plaintiff the same power with which to operate his mill as had the old one, and that he had not been damaged by the act of the municipality. The plaintiff was not therefore entitled to rescind the lease by reason of this act.

   The appellant insists that the evidence showed that the new canal did not furnish the same power as the old one, but as has been said before, we have no power to retry that question of fact.

4. We have already held that the failure of the defendant to furnish the carts called for by the contract was no ground for its rescission. (1 Off. Gaz., 525.)

5. By the contract of lease the defendant let to the plaintiff the hacienda called "Rosario." It was stated therein that it contained about 600 hectares, and the boundaries thereof were given. The plaintiff claims as one of his grounds for rescission that the hacienda included the tract known as " Lausurica," of which the defendant never put him in possession. The court made the following findings upon this point:

   "It is clearly seen from the evidence that when the plaintiff took possession of the Rosario estate, which was when the contract of lease was drawn up, the representative of defendant accompanied the plaintiff and designated the land and boundaries of the said estate; that the lands which were delivered and the boundaries which were designated did not include the parcel called 'Lausurica.'

   "That the plaintiff remained in possession of the said estate for more than a year, without making any claim for said parcel of land, and that the first claim advanced by him in connection therewith was when he asked for the rescission of

the contract, founding said claim on other grounds. No evidence whatever has been presented for the purpose of showing that the Rosario estate has not an area of 600 hectares, more or less, exclusive of the parcel called ‘ Lausurica,’ and the court finds that it was not the intention of any of the parties to said contract of lease to include said parcel of land, and that the plaintiff has not proved his allegation in respect to this point.”

These findings are
conclusive against the plaintiff, as we can not review the evidence for the purpose of seeing if they are supported by it.

6. At the commencement of the introduction of evidence at the trial the plaintiff asked that the court appoint a commission to survey and make a plan of the hacienda, according to the boundaries described in the lease, and to measure the motive power furnished by each of the two canals. He excepted to the refusal of the court to appoint such a commission. This was not a refusal by the court to receive evidence offered by the plaintiff. He should himself have procured these experts, caused them to survey the land and measure the water, and then present them as his witnesses at the trial. As is said by the defendant’s counsel in his brief, it was not the duty of the court to make, at its expense, an investigation for the purpose of ascertaining if the facts alleged in the plaintiff’s complaint were true or not.

   The motion of the plaintiff that
   a commission of accountants be appointed to ascertain what the plaintiff’s damages were, was properly denied for the same reason.

7. The fact that one of the witnesses for the defendant had been formerly the lawyer for the defendant in this suit was no ground for rejecting his testimony. (Code of Civil Procedure, sees. 382 and 383.)

8. The denial of the motion of the plaintiff that the testimony of the witnesses be taken down in writing was not error. There is no provision of law which *requires* this in civil cases.

9. We have already held (1 Off. Gaz., 45) that it was not necessary to

> incorporate in the bill of exceptions any of the documents presented by the plaintiff, and received in evidence without objection, with the exception of document No. 14, which does so appear.

No exceptions other than those hereinbefore discussed are mentioned by the appellant in his assignment of errors, or anywhere referred to in his brief.

The judgment is affirmed, with the cost of this instance against the appellant.

Arellano, C J., Torres, Cooper, Mapa, McDonough, and *Johnson, JJ.,* concur.

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[1] 1 Phil. Rep., 529.

[2] 1 Phil. Rep., 334.

[3] 1 Phil. Rep., 189.

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