RIGHT OF WAY AND PRESCRIPTION

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One of the vexing questions in Philippine law is whether or not a servitude of way may be acquired by prescription. The Supreme Court has rendered a number of decisions touching on the question but none of them has given a satisfactory answer. A recent decision—*Ronquillo, et al. v. Roco, et al., G.R. No. L-10619, February 28, 1958* [1]—gives a negative answer but does not appear to have settled the question definitely. For the decision was not unanimous and the main opinion indirectly suggests that the law on the matter be changed or clarified.[2] It is for this reason that we thought it might be worthwhile to comment on the question.

As an introduction, it would be profitable to state what are servitudes; the classes thereof; and how they are acquired.

The Civil Code of the Philippines defines a real or praedial servitude as "an encumbrance imposed upon an immovable for the benefit of another immovable belonging to a different owner." (Art. 613, par. 1.) Where a servitude has been "established for the benefit of a community, or of one or more persons to whom the encumbered estate does not belong," it is a personal servitude. (Art. 614.) Servitude, therefore, are a limitation on the right of ownership. They are imposed on another's property, never on one's own. For things serve their owner by reason of ownership and not by reason of servitude. (*Valderrama v. North Negros Sugar Co., 48 Phil. 492.*)

For the purpose of acquisition, servitudes are classified into: continuous and discontinuous; apparent and non-apparent; and positive and negative.

Continuous servitudes are those the use of which is or may be incessant, without the intervention of any act of man. Discontinuous servitudes are those which are used at intervals and depend upon the acts of man. (Art. 615, pars. 2 and 3.)

Apparent servitudes are those which are made known and are continually kept in view by external signs that reveal the use and enjoyment of the same. Non-apparent servitudes are those which show no external indication of their existence. (Art. 615, pars. 4 and 5.)

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[1] For a brief report on the case, see 33 PHILIPPINE LAW JOURNAL 417, issue of July, 1958.

[2] The main opinion was penned by Justice Montemayor with the following concurring: Bengzon, Labrador, Endencia, Bautista Angelo, Concepcion and Felix, JJ. Justice Padilla concurred in the result. Justice J. B. L. Reyes concurred in a separate opinion to which Chief Justice Paras and Justice A. Reyes affixed their signatures. It is to be noticed that all of the 11 members of the Supreme Court were agreed on the judgment. Nonetheless, Justice Montemayor speaks of a "minority of which the writer of this opinion is a part, (which) believes that the easement of right of way may now be acquired through prescription x x x." At the end of the decision Justice Montemayor also says: "However, the opinion of the majority must prevail, and it is held that under the present law, particularly, the provisions of the Civil Code, old and new, unless and until the same is changed or clarified, the easement of right of way may not be acquired through prescription."

Positive servitudes are those which impose upon the owner of the servient estate the obligation of allowing something to be done or of doing it himself. Negative servitudes are those which prohibit the owner of the servient estate from doing something which he could lawfully do if the servitude did not exist. (Art. 616.)

Servitudes may be acquired by title or by prescription of ten years. (Arts. 620 and 622.) By *title* is meant "the juridical act which gives birth to the servitude;" it may consist of "la ley, la donacion, el contrato y el testamento." (*North Negros Sugar Co. v. Hidalgo, 63 Phil. 664*, concurring and dissenting opinion of Justice Laurel, quoting 4 Manresa, Civil Code, 2d ed., pp. 594-595.)

Any kind of servitude may be acquired by title but only continuous and apparent servitudes, whether positive or negative, may be acquired by prescription. Lacking the character of being continuous and apparent, a servitude cannot be acquired through prescription because the law on adverse possession requires, among other things, that the possession be uninterrupted and public. (Art. 1118.)

Servitudes are established either by law or by the will of the owners. The former are called legal and the latter voluntary servitudes. (Art. 619.)

Among the legal servitudes is the servitude of way. Under the Civil Code aforementioned, "the owner, or any person who by virute of a real right may cultivate or use any immovable,[3] which is surrounded by other immovables pertaining to other persons and without adequate outlet to a public highway, is entitled to demand a right of way through the neighboring estates, after the payment of the proper indemnity." (Art. 649, par. 1.) The right to demand a right of way where the conditions herein mentioned are present, is imprescriptible. (Art. 1134.) According to Justice Laurel, *supra:* "The early Roman Law allowed the imposition of a servitude of way over the intervening tenements for the purpose of enabling strangers to reach the sepulchres of their ancestors. The modern civil law, however, has amplified the principle and invested it with a utilitarian concept for the convenience of land owners, particularly for the cultivation of enclosed rural estates."

Where a servitude of way is created as above stipulated, its mode of acquisition is by title and the title would be "la ley". A servitude of way may exist, not by virtue of a title in law because the prescribed legal conditions are not present, but by some other title. Let us suppose that A owns a parcel of land and he already has an adequate outlet to a public highway. Nonetheless, A desires to pass over the adjoining land of B for reasons of convenience in order that he may reach said highway. To obtain the right of passage over B's land, A may acquire a servitude of way in a number of ways, e.g., by "la donacion, el contrato y el testamento." In any of these, the mode of acquisition is by title and the right of way would be a voluntary and not a legal servitude.

[3] E.g., a usufructuary, a lessee with a recorded lease.

May a servitude of way be acquired by prescription and not by title alone? A survey of the decisions of the Supreme Court touching on the question provides interesting reading.

In *Archbishop of Manila v. Roxas, 22 Phil. 450 (1912)*, Roxas, the owner of a certain *hacienda,* claimed a right of way across the property of the church to Tejeron street, a public street. The proof showed that the road in question had been used by the tenants of the *hacienda* 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 Tejeron street. The Supreme Court, through Justice Trent, held that under the facts of the case the use of the road was merely "permissive and under an implied license, and not adverse." The court also said:

> "A right of way, like the one sought to be established in the case at bar, is a charge imposed upon real property for the benefit of another estate belonging to a different owner. Such a right of way is a privilege or advantage in land existing distinct from the ownership of the soil; and because it is a permanent interest in another's land with a right to enter at all times and enjoy it, it can only be founded upon an agreement[4] or prescription. And when the latter is relied upon in those cases where the right of way is not essential for the beneficial enjoyment of the dominant estate, the proof showing adverse use—which is an affirmative claim—must be sufficiently strong and convincing to overcome the presumption of permissive use or license, as such right of way is never implied because it is convenient." (At pp. 452-453.)

In *Municipality of Dumangas v. Bishop of Jaro, 34 Phil. 541 (1916)*, the plaintiff sought to register several lots in its name but registration of one of them was opposed by the defendant who claimed ownership over it. The Supreme Court, in an opinion penned by Justice Torres, granted registration in favor of the plaintiff but ordered "the land in litigation x x x to be burdened with an easement of right of way x x x to such extent as may be necessary for the transit of persons and four-wheeled vehicles." In granting the right of way, the Supreme Court said:

> "The record shows that the church of the pueblo of Dumangas was constructed in or about the year 1887; that its wall on the southeast side adjoins the building lot in question; and that since the construction of the church there has been a side door in this wall through which the worshippers attending divine services enter and leave, they having to pass over and cross the land in question. It is therefore to be presumed that the use of said side door also carries with it the use by the faithful Catholics of the municipal land over which they have had to pass in order to gain access to said place of

[4] Of course a right of way which is not founded upon a title in law may be acquired not only by agreement but also by donation and will.

worship, and, as this use of the land has been continuous, it is evident that the Church has acquired a right to such use by prescription, in view of the time that has elapsed since the church was built and dedicated to religious worship, during which period the municipality has not prohibited the passage over the land by the persons who attend services customarily held in said church.

"The record does not disclose the date when the Government ceded to the Church the land on which the church building was afterwards erected, nor the date of the laying out of the adjacent square that is claimed by the municipality and on which the side door of the church, which is used as an entrance by the people who frequent this building, gives. There are good grounds for presuming that in apportioning lands at the time of the establishment of the pueblo of Dumangas and in designating the land adjacent to the church as a public square, this latter was impliedly encumbered with the easement of a right of way to allow the public to enter and leave the church—a case provided for by Article 567 of the Civil Code [5]—for the municipality has never erected any building or executed any work which would have obstructed the passage and access to the side door of the church, and the public has been enjoying the right of way over the land in question for an almost immemorial length of time. Therefore, an easement of right of way over said land has been acquired by prescription, not only by the church, but also by the public which, without objection or protest, has continually availed itself of the easement in question." (At pp. 545-546.)

In *Cuaycong, et al. v. Benedicto, et al., 37 Phil. 781 (1918)*, the plaintiffs claimed the right to use two roads on a tract of land belonging to the defendants and in support thereof they asserted, among other things, that they had acquired a right of way by prescription. The Supreme Court, through Justice Fisher, held "that the plaintiffs have failed to show that they have acquired by prescription a private right of passage over the lands of the defendants." The Court also said:

"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. x x x

"(In this case) no evidence has been made to prove immemorial use x x x. 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

[5] Art. 567 of the Spanish Civil Code reads: "When a tenement, acquired by purchase, exchange, or partition, is surrounded by other tenements of the vendor, exchanger, or co-owner, the latter shall be obliged to grant a right of way without indemnity, in the absence of an agreement to the contrary." For the corresponding provision in the new Civil Code, see Art. 652.

provisions of the present Code of Civil Procedure relating to prescription,[6] 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 x x x . Our conclusion is, therefore, that plaintiffs have not acquired by prescription a right to an easement of way over the defendant's property; that their use x x x 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." (At pp. 795-796.)

In *North Negros Sugar Co. v. Hidalgo, 63 Phil. 664 (1936)*, the plaintiff sought to enjoin the defendant from passing through its property. In the main opinion penned by Justice Recto, the Supreme Court refused to grant an injunction on the ground, among others, that the plaintiff had created a personal servitude of way over its property when it constructed a road thereon and offered its use to the general public upon payment of a certain sum as passage fee in the case of motor vehicles. However, Justice Laurel did not believe that a servitude of way had been created on the plaintiff's property in favor of the defendant. He said that the defendant had no title and prescription could not be considered for:

"It should be observed that a right of way is discontinuous or intermittent as its use depends upon acts of man (art. 532, Civil Code; 4 Manresa, Civil Code, 2d ed., p. 569; Cuaycong v. Benedicto, *supra*). Lacking the element of continuity in its use, a right of way may not be acquired by prescription but solely by title (art. 539, Civil Code). Only continuous and apparent servitudes, like the servitude of light and view, may be acquired by prescription (art. 537, Civil Code). Even assuming, however, that a servitude of way may be acquired by prescription in view of the provisions of the present Code of Civil Procedure, nevertheless, it can not be held that prescription exists in the present case. The free passage over the private way rests on mere tolerance on th part of the plaintiff, and it is a settled principle of law in this jurisdiction that acts merely tolerated can not give rise to prescription. x x x." (At pp. 695-696.)

In *Ronquillo, et al. v. Roco, et al., supra,* the plaintiffs claimed to have acquired a right of way over the land of the defendants by means of prescription. Plaintiffs alleged continuous and uninter-

[6] Act No. 190, particularly Sec. 41 which reads: "Ten years actual adverse possession by any person claiming to be the owner for that time of any land or interest in land, uninterruptedly continued for ten years by occupancy, descent, grants, or otherwise, in whatever way such occupancy may have commenced or continued, shall vest in every actual occupant or possessor of such land a full and complete title x x x. In order to constitute such title by prescription or adverse possession, the possession by the claimant or by the person under or through whom he claims must have been actual, open, public, continuous, under a claim of title exclusive of any other right and adverse to all other claimants. x x x."

rupted use of a road which traversed the land of the defendants and their predecessors in interest, in going to Igualdad Street and the market place of Naga City, from their residential land and back, for more than 20 years. In the main opinion penned by Justice Montemayor, the Supreme Court held that the servitude of way is discontinuous and may not be acquired through prescription. Nonetheless, Justice Montemayor said:

> "The minority of which the writer of this opinion is a part, believes that the easement of right of way may now be acquired through prescription, at least since the introduction into this jurisdiction of the special law on prescription through the Old Code of Civil Procedure, Act No. 190. Said law, particularly, Section 41 thereof, makes no distinction as to the real rights which are subject to prescription, and there would appear to be no valid reason, at least to the writer of this opinion, why the continued use of a path or a road or right of way by the party, specially by the public, for ten years or more, not by mere tolerance of the owner of the land, but through adverse use of it, cannot give said party a vested right to such right of way through prescription."

In his concurring opinion, Justice J. B. L. Reyes stressed the discontinuous character of the servitude of way. He said:

> "The essence of this easement ('servidumbre de paso') lies in the power of the dominant owner to cross or traverse the servient tenement without being prevented or disturbed by its owner. As a servitude, it is a limitation on the servient owner's right of ownership, because it restricts his right to exclude others from his property. But such limitation exists only when the dominant owner actually crosses or passes over the servient estate; because when he does not, the servient owner's right of exclusion is perfect and undisturbed. Since the dominant owner can not be continually and uninterruptedly crossing the servient estate, but can only do so at intervals, the easement is necessarily of an intermittent or discontinuous nature."

Justice Reyes also said:

> "Because possession of a right consists in the enjoyment of that right (old Civil Code, Art. 430; Art. 423, new Civil Code) and to enjoy a right is to exercise it, it follows that the possession (enjoyment or exercise) of a right of way is intermittent and discontinuous. From this premise, it is inevitable to conclude, with Manresa and Sanchez Roman, that such easement can not be acquired by acquisitive prescription (adverse possession) because the latter requires that the possession be *continuous* or *uninterrupted* (old Civil Code, Art. 1941; new Civil Code, Art. 1118).
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> "The Code of Civil Procedure (Act 190) did not change the situation. Observe that its section 41, in conferring prescriptive title upon 'ten years adverse possession' qualifies it by the succeeding words

'uninterruptedly continued for ten years', which is the same condition of continuity that is exacted by the Civil Code."

Commenting on the Dumangas case, Justice Reyes said that it "does not, if properly analyzed, constitute authority to hold that the easement of right of way is acquirable by prescription or adverse possession." According to him:

> "x x x the *ratio decidendi* of that case lies in the application of Article 567 of the old Civil Code, that provides as follows: 'Art. 567. When an estate acquired by purchase, exchange, or partition is enclosed by other estates of the vendor, exchanger, or co-owner, the latter shall be obliged to grant a right of way without indemnity, in the absence of an agreement to the contrary.'
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> "Bearing in mind the provisions of the article quoted in relation to the wording of the decision in the Dumangas case, it can be seen that what the Court had in mind is that when the Spanish Crown apportioned the land occupied by the Church of Dumangas, it impliedly burdened the neighboring public square (which was also Crown property at the time) with an easement of right of way to allow the public to enter and leave the church, because without such easement the grant in favor of ecclesiastical authorities would be illusory: what would be the use of constructing a church if no one could enter it Now, if there was an implied grant of the right of way by the Spanish Crown, it was clearly unnecessary to justify the existence of the easement through prescriptive acquisition. Why then does the decision repeatedly speak of prescription? Plainly, the word 'prescription' was used in the decision not in the sense of adverse possession for ten or thirty years, but in the sense of 'immemorial usage' that under the law *anterior* to the Civil Code of 1889, was one of the ways in which the servitude of right of way could be acquired. x x x."

It is to be noted that in the Roxas and Dumangas cases the Supreme Court held that a servitude of way could be acquired by prescription but it passed *sub silentio* on the question whether such servitude is continuous or discontinuous. The comment of Justice Reyes on the Dumangas case appears to be equally relevant to the Roxas case; the Court, in speaking of prescription, must have had in mind the law in force before the enactment of the Civil Code of Spain under which the servitude of way, although regarded as discontinuous, could be acquired by prescription through immemorial usage. However, the Cuaycong, Hidalgo and Ronquillo cases make it clear that the servitude of way is discontinuous. From this premise there can be no question that a servitude of way can not be acquired by prescription under the provisions of the Civil Code of the Philippines for under that Code no discontinuous servitude could be acquired by such mode.

Strictly speaking, no servitude can be used without man's intervention. For this reason when the Civil Code defines a continuous servitude as one "the use of which is or may be incessant, without

the intervention of any act of man," the requirement in respect of man's intervention must be deemed to refer to the incessant or continuous use of the servitude—to the continuity of user.

In the case of the servitude of way it is obvious that to effect continuity in its use man must necessarily intervene by using the way. Stated in another way, the servitude of way can not be used continuously without man's intervention. It is in this light,—not "porque no es posible fisicamente que su uso incesante" [7] or because it can be used only at intervals [8]—why the servitude of way must be deemed a discontinuous servitude as that servitude is defined in the Civil Code.

But prescinding from the provisions of the Civil Code, there is no compelling reason why the servitude of way may not be acquired by prescription based on, among other things, continuous use.[9] In fact, as we have noted above, the old Spanish law permitted the acquisition of a right of way by prescription through continuous immemorial usage.

In the United States, easements or servitudes can also be acquired by prescription. Such acquisition has also to be based on continuous use. But it is to the credit of American law that it has not defined continuous use with perfect accuracy. This is probably due to the fact that Americans are a highly practical people and they are far from being conceptualists. Unlike the progenies of the Roman legal system, they do not give too much importance to definitions. For there are always borderline cases and a definition cannot always be used properly as a major premise. Accordingly, it has been said that: "The correct rule as to continuity of user and what shall constitute such continuity can be stated only with reference to the nature and character of the right claimed. A failure to use an easement when not needed does not disprove a continuity of use shown by using it when needed." (17 Am. Jur. 774, citing *Hesperia Land & Water Co. v. Rogers, 83 Cal. 10, 23 P. 196, 17 Am. St. Rep. 209; Hill v. Crosby, 2 Pick. (Mass.) 466. 13 Am. Dec. 448; Cecelia Soc. v. Universal Car & Serv. Co., 213 Mich. 569, 182 N.W. 161; Swan v. Munch, 65 Minn. 500, 67 N.W. 1022, 35 L.R.A. 743, 60 Am. St. Rep. 491; Alcorn v. Sadler, 71 Miss. 534, 14 So. 444, 42 Am. St. Rep. 484; Hays v. De Atley, 65 Mont. 558, 212 P. 296; Bird v. Smith, 8 Watts (Pa.) 434, 34 Am. Dec. 483.*)[10]

Following the rule above stated, it is well established in the United States that rights of way may be acquired by prescription.

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[7] See IV MANRESA, CODIGO CIVIL ESPAÑOL, 5th ed., 529.

[8] Compare with Justice J. B. L. Reyes' explanation, *supra*.

[9] Tolentino, in opining that a right of way may be acquired by prescription under the Civil Code subject to certain conditions, would distinguish between its *use* and *possession*. He says: "The *use* of the easement may be intermittent, yet the *possession* of the easement may be continuous. In prescription, it is not the acts of possession which are required to be continuous; it is the possession itself that must be continuous. It is enough that the acts be exercised with some degree of regularity to indicate continuity of possession of the easement. The continuity of the use of the easement should not be confused with the continuity of the possession thereof. The possession of a discontinuous easement, therefore, may very well be continuous." (II Civil Code of the Philippines 310.) But it seems to us that the distinction is unimportant insofar as acquisition of servitudes through prescription is concerned for in the case of servitudes the Civil Code stipulates that their *use* be continuous without man's intervention.

[10] Tolentino also says: "The continuity in the exercise of a right does not have to be absolute: it is relative and conforms to the nature of the right being exercised. If the right is one that is to be exercised at intervals, there is continuity notwithstanding such intervals." (*Op. cit.*)

(17 Am. Jur. 969, citing a long list of cases.) And in *Graham v. Walker, 78 Conn. 130, 61 A. 98, 2 L.R.A. (NS) 983, 112 Am. St. Rep. 93, 3 Ann. Cases 641,* it was held that "a user would be continuous and uninterrupted if it were substantially such, although it were more or less frequent according to the nature of the way and the occurrence of the occasions for traveling over it." In *Cox v. Forrest, 60 Md. 74* as reported in the annotation in 1 A.L.R. 890, it was held that the uninterrupted adverse possession, does not require the use thereof everyday for the statutory period, but simply the exercise of the right more or less frequently according to the nature of the use. (See also 17 Am. Jur. 972.) And in *Myers v. Berven, 166 Cal. 484, 137 Pac. 260,* the Court said: "If a right of way over another's land has been used for more than five years, it is not necessary, to make good such use, that the claimant has used it every day. He uses it every day, or once in every week, or twice a month, as his needs require. He is not required to go over it when he does not need it to make his use of the way continuous. x x x If, whenever the claimant needs it from time to time, he makes use of it, this is a continuous use. An omission to use it when not needed does not disprove a continuity of use, shown by using it when needed. Neither such intermission nor omission breaks the continuity. *Hesperia v. Rogers, 83 Cal. 11, 23 Pac. 196, 17 Am. St. Rep. 209.* 'Continuous use' does not necessarily mean 'constant use.' x x x How frequently is immaterial, provided it occurred as often as the claimant had occasion or chose to pass. *Bodfish v. Bodfish, 105 Mass. 319.* See, also, *Webber v. Clarke, 74 Cal. 17, 15 Pac. 431; Montgomery v. Quimby, 164 Cal. 253, 128 Pac. 402.*"

From the forgoing it can be seen that the use of a right of way may be considered as continuous although it is not used constantly and only at intervals. Such use, however, has to be with the intervention of man. Accordingly, under the provisions of the Civil Code, the servitude is discontinuous and may not be acquired by prescription. But Justice Montemayor has mentioned the possibility of changing or clarifying the present law on the acquisition of the servitude of way by prescription. In this respect Article 646 of the Civil Code points the way to a change or clarification. The servitude of aqueduct is not necessarily continuous but under the aforementioned article, "for legal purposes, the easement of aqueduct shall be considered as continuous and apparent, even though the flow of the water may not be continuous, or its use depends upon the needs of the dominant estate, or upon a schedule of alternate days or hours." It seems to us then that it may well be provided in the Civil Code that: "For legal purposes, the servitude of right of way shall be considered as continuous and apparent provided the claimant has used it more or less frequently in accordance with his needs."