1934 *Present :* **Macdonell C.J.**

THAMBOO *v.* ANNAMMAH *et al.*

98—C. R. Jaffna, 965.

Servitude—Co-owners—Partition of land by deed—Lane reserved for common use—Sale of lot by one co-owner—No title to right of way.

Where a land held in common was partitioned by deed among the co-owners, a strip of land being reserved for their common use as a lane giving access to the several lots ; and where one of the co-owners sold a portion of his lot together with " the right accruing thereto in the lane reserved for common use as a thoroughfare "—

Held, that the conveyance did not give title to any portion of the soil of the lane or to a right of way over it.

A co-owner cannot grant a servitude over the common property without the concurrence of the other co-owners.

APPEAL from a judgment of the Commissioner of Requests, Jaffna.

N. Nadarajah, for defendants, appellants.

S. Subramaniam, for plaintiff, respondent.

Cur. adv. vult.

November 8, 1934. MACDONELL C.J.—

The points of law in this case are best introduced by a description of the piece of land giving rise to them. This piece of land was bounded on the east by a road, and it extended thence westward and then made a right angle to the south. Its owners partitioned it by deed No. 19,231 of May 17, 1926, by which they severally took lots numbered 1 to 8 but reserved as property in common a strip of land as a lane giving access to the several lots. This strip reserved as a lane ran from the high road on the east towards the west keeping south of lots 1 to 4, after which it made a right angle to the south having lots 5 to 8 opening into it there. At the elbow making a right angle to the south, the partitioned land impinged on another piece of land called A to the west of and quite distinct from it, and owned by a person or persons other than the partitioners under deed No. 19,231, but with one corner abutting on the elbow of the lane which those partitioners had retained in common, Westward again of this lot A was a lot C owned, it and the house on it, by plaintiff as his residing land.

Plaintiff had bought in 1922 an undivided half share of A, the land to the east of his residing land C; he thus became co-owner of a land abutting on the common lane of the partitioners. One of these partitioners, Jacob, entitled under the deed No. 19,231 to a quarter of the land partitioned had received as his share lot 8 of 7 lachams in the southern extremity of the land partitioned and lot 2 of 3 lachams towards the eastern end of that land. To get to Jacob's lot 2 from the high road on the east, you would only have to go a short distance along the common lane, well short of where the lane, making its elbow, abuts on lot A. In 1927, the plaintiff on deed No. 13,509 bought from Jacob the western portion, in extent 1 lacham, of this lot 2; this 1 lacham portion is called lot B. Plaintiff's position now is this. He has lot B opening on to the lane towards its

eastern end and not far from the high road. He has also a half share of A, quite distinct from the partitioned land, which lot A has one of its corners abutting on the lane at its angle, and, adjoining A to the west, plaintiff has his original residing land C.

Plaintiff in this case claims that the deed No. 13,509 selling him lot B (the 1 lacham out of the lot 2 which fell to Jacob on the partition under deed No. 19,231), gave him a portion of the lane reserved in common—a portion of the whole lane—and so a right of using that lane in its entire length for foot passage and carts, whereby he would have access along that lane to lot A where it abuts on the lane and through lot A to his residing land C further west. Looked at the other way, he claims the right to go from his residing land C through his undivided half of A into the lane and along it to the high road on the east. In his plaint he claims, paragraph 4, to be entitled to the use of the lane by virtue of owning lot B, and he also asks, paragraph 6, for a declaration that he is entitled to use the lane to have access to lot A, and through it of course to lot C his residing land, and to restrain the defendants from interfering with such use by him of the lane. In paragraph 7 he asks as an alternative for a declaration that the lane is a way of necessity to the high road from lot A, and therefore of course from his residing land lot C. The defendants in this action are the partitioners on deed No. 19,231 and their successors in title.

The learned Commissioner has made a careful examination *in loco* of these lands, recording in the judgment what he found there. He finds as a fact that there is no justification for asking for a cart road from lot A along the lane to the high road to the east. He also finds as a fact that to the west of plaintiff's residing land C—right away, that is, from the lane and the partitioned land—there does exist a rough track, called in the plan produced a " channel ", along which the owner of lot C, the plaintiff, could get to the high road. These are findings on fact which I have to accept. The learned Commissioner says " I hold that the plaintiff is not entitled to a right of way by prescription or to a way of necessity to lot A over the lane ".

If the plaintiff is to succeed then in obtaining a right of way from A along the lane to the high road on the east, he must do so by the terms of the deed No. 13,509 by which he purchased lot B.

That deed 13,509 is a sale by Jacob to the plaintiff of a piece of land described as follows:—" All that extent of 1 lacham varagu culture to the west along with the cultivated and spontaneous plants thereon (but excluding the house) and the right accruing thereto in the by-lane reserved for common use as a thoroughfare to get to my land and other lots from the road on the east out of all that piece of land in extent 3 lachams of varagu culture and 12 kulies situated at Chundikuli Parish, in the District of Jaffna, (in) Jaffna, Northern Province, called ' Aththiyadyvayal ', ' Mavilankaiaddyvayal ', ' Pulam ', and other lots to which I am entitled by right of possession and which said 1 lacham varagu culture is bounded on the east by the remaining property belonging to me, north by the property of Thangaponnu, widow of Sinnatamby, west by the property of Theresa Umma, wife of Edwin, and south by the aforesaid by-lane ". The question is, what is the meaning to be given to these words? The

learned Commissioner in his judgment says what Jacob sold was "that divided extent of 1 lacham varagu culture and the right and title belonging thereto out of the by-lane." He adds, "I think this description is sufficient to convey to the plaintiff a proportionate undivided share in the strip of land that forms the by-lane. The deed No. 19,231 shows that Jacob was entitled to a ¼th share of the land partitioned for which he received lots 2 and 8 of about 11 lachams in extent. The effect of the partition is that he held an undivided ¼th share of the by-lane as appurtenant to this 11 lachams in extent. Then what he conveyed to the plaintiff amounts to an undivided 1/44th of the strip of land that forms the by-lane subject to the condition that the common possession of the strip of land is to be as a by-lane and nothing more. In my opinion, on the strength of this right plaintiff is entitled to take carts along the lane in question from his land A, to go anywhere, where he has a right to go".

Now I would hesitate to say that the words "the right accruing in the by-lane reserved for common use as a thoroughfare" were apt to convey an ownership in a portion of the soil of the lane. They seem to me rather to be an attempt to convey a right of way over that lane, a servitude. But supposing that I am wrong and that they are apt to convey a right to the soil of the lane, then we must take into account the words that follow "out of all that piece of land in extent 3 lachams and 12 kulies". That piece of land is lot 2 clearly, towards the eastern end of the lane. True, the deed goes on to say "and other lots to which I am entitled" but in the absence of any reference to lot 8 at the south end of the lane it is difficult to hold that it is a right "accruing . . . . out of" lot 8; nothing out of lot 8 was ever sold to the plaintiff. If then these words convey ownership in the soil of the lane, it can only be ownership in that part of the soil of the lane between lot B, the 1 lacham out of lot 2 sold to the plaintiff, and the high road on the east. It cannot be a portion of the soil of the lane further west or south, in other words that portion of the lane which could give access to lot A. The right acquired by the plaintiff to the soil of the lane under this deed No. 13,509, if its words are capable of giving such a right, will only be a right to that portion of the soil which connects the 1 lacham sold out of lot 2 with the road on the east, it would not give him the right to any portion of the soil west or south of that point.

One of the reasons why these words are not apt to convey ownership in a portion of the soil is that such a right could not be described as one "accruing thereto . . . . out of all that piece of land in extent 3 lachams." The right to a portion of the soil does not "accrue" out of the right to another portion; it arises because it has been itself transferred. Jacob could have sold the whole of that lot of 3 lachams and not merely the portion B which he did sell, without any right "accruing thereby" out of that piece of land to the purchaser; Jacob's rights to one-fourth of the soil of the lane as co-owner would have remained intact, for the sale of the lot does not necessitate the sale of any portion of the soil of the lane. This seems clear, and if authority is needed it is furnished by the case of *Yoosoof and others v. Muttaliph*[1]. The facts there were not unlike those of the present case. A land had been partitioned but a

[1] *13 C. L. Rec. 171.*

certain portion consisting of a road and two latrines had been left unallotted, the decree containing no reference to them. A party who was successor in title to one of the persons in whose favour the partition decree had been entered, claimed the right of user of the unallotted portion as being a right appurtenant to the allotted portions, and it was held that his claim was not admissible and that the unallotted portion continued to remain the common property of the original co-owners, the use of which was referable to the unextinguished common ownership and to that alone. The facts in the present case are that the parties so far from leaving the land unallotted did expressly allot it to themselves by their partition deed. But their rights to it arise from their having so allotted it to themselves, they are not "rights" accruing to them from ownership of one or more of the lots into which the land was divided. I am satisfied therefore that these words in deed No. 13,509 do not convey an ownership to any portion of the soil of the lane.

Did they then confer a servitude, a right of way? Assuming for the sake of argument that they did, then that can only be a servitude in favour of lot B the 1 lacham conveyed by deed No. 13,509, the dominant tenement, over a lane going eastward from it to the high road, which bit of lane will be the servient tenement. It cannot be a right of way from plaintiff's half share in lot A which he acquired otherwise than by deed No. 13,509 and which therefore cannot be the dominant tenement under that deed. An English case was cited (*Harris v. Flower*[1]), which seems in point. There a man had two pieces of contiguous ground adjoining one another and from one of these, the dominant tenement, there was a right of way over the next piece of land, the servient tenement. It was held that the owner of this right of way did not acquire a right of way from the piece of ground which he owned contiguous to, adjoining, the dominant tenement, through that dominant tenement, to the servient tenement. The facts in the present case are slightly stronger. Here the plaintiff's two pieces of land are not contiguous and do not adjoin, and his right of way can only be from that one of them B, out of which the right is said to "accrue", but not from the other A which is quite independent of anything given to him by the deed No. 13,509, and cannot possibly be or become a dominant tenement by virtue of that deed.

But a further question arises which is this: can a co-owner grant a servitude over a portion of the property owned in common without the concurrence of his other co-owners? Jacob was a co-owner with certain other persons of the strip left in common as a lane. There is no suggestion that they joined in the deed No. 13,509 either when the deed was executed or at any later time. The deed No. 13,509, if it does purport to grant a servitude, is granting a servitude over a piece of land held in common without the concurrence of the other co-owners, and it seems that the law does not allow this to be done. *Voet, bk. VIII., tit. 4, s. 9.* "One of two co-owners cannot properly against the will of the other impose a servitude on an estate which is held in common in undivided shares." This seems to make the point perfectly clear and it can be supported by the passage from *Papinian, Digest VIII. 3, 34, "Unus ex sociis fundi communis permittendo ius esse ire agere nihil agit".* Both these authorities

[1] *91 L. T. 816.*

declare that one co-owner cannot of his own act create a servitude over the common property but that to do so he must have the concurrence of his other co-owner or co-owners. Then the words in the deed No. 13,509 are incapable of creating over any part of the lane the servitude claimed, namely, a right way.

The finding of the learned Commissioner on the facts—as also admissions made in argument for the appellant—suffice to show that the plaintiff must have a right of way on foot of necessity from his purchase, the I lacham lot B, over the lane to the high road on the east, but not any servitude other or in excess of this. The learned Commissioner finds as a fact that a right of way for beasts or vehicles over this lane is unnecessary. He has also held on the facts that the plaintiff has a sufficient right of way to a high road from his lot C, and therefore from lot A also, by means of the " channel " on the west of these lands. This latter finding is not necessary, on the view I take of it, for the decision of this case, but at least it shows that the plaintiff will suffer no practical harm if the right of way that he asks from A along the lane to the high road on the east is refused him, as it must be.

In the result then the words in the deed No. 13,509 relied on by the plaintiff do not give him title to any portion of the soil of the lane and they cannot give him a servitude over any portion of it.

For the foregoing reasons the appeal must be allowed, but with a declaration that the plaintiff is entitled to a right of footway of necessity from lot B along the lane to the high road on the east, but not to any right of way over that lane other or in excess of this. Otherwise the plaintiff's action must be dismissed with costs here and below.

Appeal allowed.