1957 *Present :* Basnayake, C.J., and L. W. de Silva, A.J.

JAYATILLEKE, Appellant, *and* AMERASINGHE, Respondent

S. C. 44 (Inty.) with 808 (Final)—D. C. Colombo, 7,642

Servitudes—Common wall—Right to build on it—Adjoining houses—Sewerage—Common passage and doorways—Duty not to obstruct.

Where two adjoining houses are separated by a common wall which does not go right up to the roof, the owner of one house is not entitled to build on and into the common wall and cause damage to it without the consent of the owner of the other house.

A row of dwelling houses A, B, C, D, E, F and G adjoining one another belonged to the same owner and were built in such a way that the lavatory labourer used a two-foot passage next to the drain on the East side of the houses to go from house to house through the common doorways which were between the houses for the purpose of washing the common drain and removing the dustbins. Premises F and G were sold by the owner to the plaintiff and the defendant respectively. There was a common door which gave access from the rear of one house to the rear of the other.

Held, that the right to use the passage and the doorway for the purpose for which they had been originally intended and used all along was implicit in the grant to the plaintiff of the premises F with the common doorway. The defendant was therefore not entitled to remove the common door at the rear and obstruct the passage between F and G.

APPEALS from a judgment of the District Court, Colombo.

Walter Jayawardene, for Defendant-Appellant in S. C. No. 44.

W. D. Gunasekera, for Plaintiff-Respondent in S. C. No. 44.

H. W. Jayewardene, Q.C., with *W. D. Gunasekera* and *N. R. M. Daluwatte*, for Plaintiff-Appellant in S. C. No. 808.

K. Herat, with *A. Moosajee*, for Defendant-Respondent in S. C. No. 808.

October 15, 1957. BASNAYAKE, C.J.—

One Sophia Tudugalla was the owner of a row of dwelling houses adjoining one another depicted in plan No. 78 of 27th April 1951 (A1) made by S. D. Navaratnam, Licensed Surveyor, as A, B, C, D, E, F, & G. By deed A2 she sold house marked " F " to the plaintiff. That deed granted to the plaintiff the house " F " together with the right of way and passage over the road reservation marked lot " H " described in the schedule " C " thereto and the road leading from the said lot " H " to the main Paranawadiya Road and together with the right to drain rain and waste water collected in and flowing from the premises along the drain lying to the East and South of lot " G " reserving the right to the vendor her heirs executors administrators and assigns of the free passage of water along the drain lying to the East of the said lot " F".

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By deed R2 the defendant purchased the premises marked " G " adjoining the plaintiff's premises on the southern side and transferred them to Beatrice Meemanage by deed D5 and repurchased them by deed D6.

The two houses were separated by a common wall which did not go right up to the roof. The two houses have each a smoke vent in the roof built in one piece. There was also a common door which gave access from the rear of one house to the rear of the other.

The disputes to which this action relates concern the common wall, the smoke vent and the common doorway and passage at the rear. The plaintiff pleads as a first cause of action that the defendant has wrongfully and unlawfully and without the plaintiff's consent interfered with the smoke vent, and as a second cause of action that the defendant has wrongfully and unlawfully and without the plaintiff's consent built on and into the common wall and caused damage to it, and as a third cause of action that the defendant has wrongfully and unlawfully removed the common door at the rear and obstructed the passage between " F " and " G ". The defendant denies that any of the acts complained of by the plaintiff were unlawful or wrongful. The learned trial Judge has held that the plaintiff is not entitled to a right of way 2 feet wide at the rear of " G " as claimed by him. At the trial the defendant did not dispute the plaintiff's right to drain rain and waste water along the drain on the East and South of lot "G".

We shall first deal with the dispute over the common wall. It is in evidence that the common wall is built of cabook with mortar and plaster of mud and is about nine inches thick. It is a wall which separates the plaintiff's premises " F " from the defendant's premises "G". On this common wall for a length of about 8 feet the defendant has built a wall with bricks up to the height of the roof. There is no evidence as to whether this superstructure occupies the whole width of the common wall or less. The defendant has also let in one end of a concrete lintel into the common wall. It is claimed by the plaintiff that these combined operations have caused cracks in the common wall and displaced the plaster on his side. The plaintiff claims that the cracks are 5–6 feet long and 2–2½ inches wide ; but the defendant does not admit it. Her version is that the only damage is the displacement of the plaster of an area of about 2 square feet.

This being admittedly a party-wall built for the purpose of dividing tenement from tenement, the defendant was not in law entitled to build on it at all without the plaintiff's consent (Voet, Bk VIII, Title 2, Sec. 17—Gane's translation). Besides, the question of the right of a neighbour to build on a party-wall up to the middle line where it is not a wall dividing tenement from tenement is dependent on whether the party-wall is capable of receiving a superstructure (Voet, Bk VIII, Title 2, Sec. 17). The Dutch buildings extant in Ceylon show that the Dutch generally erected their buildings with much thicker walls than are built today. In applying the principles laid down by the Roman-Dutch writers we should make due allowance for that fact. Even if this wall had not been a dividing wall the rule allowing building up to the middle line cannot be applied to a

cabook wall 9 inches thick built with mud and nearly fifty years old. The Roman-Dutch remedy against building on a common wall without the consent of the neighbour is that the unauthorised builder has to take down the wall built by him (Voet, Bk VIII, Title 2, Sec 17). There is no reason why in the instant case the defendant should not be ordered to take down the superstructure.

The interference with the plaintiff's smoke vent is the direct result of the wall being raised. When the defendant takes down the wall she should also replace that portion of the smoke vent which was over the common wall because she is not entitled to interfere with it.

I now come to the common door at the rear of "F" and "G" which the defendant removed. The rule of Roman-Dutch Law is that what stands on the boundaries shall be common unless it be proved to be someone's property (Van Leeuwen, Censura Forensis, Bk II, Chapter XIV, Sec. 16). The defendant has not proved that the door is her property. She has therefore no right to remove it and must restore it. Next arises the question whether once the door is restored the plaintiff is entitled to use the doorway for the purpose of removing his dustbin through it and admitting his lavatory labourer for the purpose of going over to the defendant's part of the drain in order to remove any matter which is clogging the drain. We think that the plaintiff is entitled to do so. The evidence is that from the time these premises were built the lavatory labourer used the two-foot passage next to the drain on the East side of the houses to go from house to house through the common doorways which are between the houses for the purpose of washing the common drain and removing the dustbins. This right to use the passage and the doorway for the purpose for which they had been originally intended and used all along is implicit in the grant to the plaintiff of the premises "F" with the common doorway. The defendant is therefore not entitled to block the passage by building on it.

We accordingly direct that the defendant should within thirty days of the record reaching the District Court (*a*) remove the superstructure on the common wall, (*b*) restore the portion of the smoke vent over the common wall, and (*c*) remove all structures which she has erected in derogation of the plaintiff's right to use the two-foot passage through the common doorway. If within that period the defendant does not carry out the alterations to the satisfaction of the court, the plaintiff will be entitled to apply to the District Court for such orders as are necessary to compel the defendant to give effect to this order.

We do not propose to make any order for damages but the order for damages made by the learned trial Judge in a sum of Rs. 100 will stand.

The judgment of the learned trial Judge is set aside and the appeal is allowed with costs. The cross-objections of the defendant-respondent are dismissed without costs.

Appeal No. 44 is dismissed with costs.

L. W. de SILVA, A.J.—I agree.

Appeal No. 44 dismissed.
Appeal No. 303 allowed.