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Present: Bertram C.J. and Jayewardene A.J.SILVA *et al.* v. ISOHAMY.

450—D. C. Galle, 18,890

Servitude—Effect of a partition decree—Mutual rights of co-owners—Power of Court to provide for reasonable servitudes.

A partition decree extinguishes all easements not specifically provided for in the decree, whether such easements be claimed as between co-owners or by the owners of neighbouring lands over the land partitioned.

Semble a Court has power in dealing with a partition action to provide for all reasonable servitudes as between co-owners. A *servitude ne luminibus officiat* would be such a servitude.

IN a partition action the plaintiff and the defendant had been allotted adjoining lands under the decree. Defendant's lot contained a house which was over ten years old, situated close to the defendant's boundary. Plaintiff proposed to erect a wall along his boundary, which it is admitted would interfere appreciably with defendant's light and air, and the present action was brought by the plaintiff to obtain a declaration of his right to build it.

Samarawickreme, for plaintiff, appellant.

M. W. H. de Silva, for defendant, respondent.

September 16, 1924. BERTRAM C.J.—

In this case plaintiff and defendant had been allotted certain adjoining lands under a partition decree. Defendant's lot contained a house which was over ten years old, and this house under the scheme of partition was situated close to the defendant's boundary. Plaintiff now proposes to erect a wall, seven feet high, along his boundary. It is admitted that this wall will appreciably interfere with defendant's light and air. Indeed it almost touches the lowest step leading up to his house. The defendant objects to the erection of this wall, and the present action is brought by plaintiff to obtain a declaration of his right to build it.

The defendant is certainly in a very unfortunate position. It appears to be settled law that a partition decree extinguishes all easements not specifically provided for in the decree. This is held to be the effect of section 9 of the Partition Ordinance, No. 10 of 1863, which declares that the partition is good and conclusive against all persons whomsoever, whatever right or title they have

or claim to have in the property partitioned. See *Girigoris v. Mammadu Meedin*.¹ It seems clear that this principle applies to easements claimed as between co-proprietors equally with the easements claimed over the land partitioned by the owners of neighbouring lands.

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Even therefore if it were clear that a co-owner who erects a house upon land held in common can acquire by prescription a servitude *ne luminibus officiatur* as against a co-owner (a question which it is not necessary for us to determine), and even if such a servitude had been acquired in the present case, it would have been extinguished by the decree. In any view of the case, therefore, plaintiff is entitled to the declaration which he seeks.

This case draws attention to the importance of making provision in partition decrees for the respective rights of co-owners in such matters as these with respect of the lands assigned to them in severalty. It is always competent to a Court in granting a partition decree to provide for mutual servitudes. One of the recognized ways by which a servitude may be created is *officio iudicis*, see *Voet 8, 4, 2. Sed et officio iudicis in iudiciis divisorii eadem constitui nihil vetat*. This opinion is based, among other passages, upon a passage in the *Digest 10, 2, 22*, where Ulpian, quoting Labeo, declares that a Judge in an action *familiæ ercisundæ* may divide a farm into different tracks and assign them to the heirs; he adds, '*sed etiam cum adjudicat, poterit imponere aliquam servitutem*'. The same principle was held to be applicable to an action *communi dividundo*, see *Digest 10, 3, 7*. It appears clear, therefore, that a Judge in our own Courts dealing with a partition action may provide for all reasonable servitudes as between the co-owners.

It also appears to be clear that a servitude *ne luminibus officiatur* would be such a reasonable servitude. I am disposed to think that even without a period of prescription a co-owner, who reasonably and without objection from his co-owners builds a house upon common land, would be able to restrain a co-owner from erecting a wall in such close proximity to the house as to obstruct the lighting of it. As was observed by Bonser C.J. in *Siyadoris v. Hendrick*² there is surprisingly little authority as to the mutual rights and obligations of co-owners. But it appears to be settled law in South Africa that each co-owner is entitled to make only a reasonable use of the common property. See *Maasdorf, vol. II., chap. 14, ad initium*. Further it has been held in our own Courts that a co-owner who has so erected a house is entitled to eject any other co-owner who attempts to occupy the house without his permission. See *Kathonis v. Silva*.³ Suppose one co-owner sowed crops and erected a fence round the crops to protect them from wild animals, he would clearly be entitled to object to another

¹ (1905) 1 Bal. 177.

² (1896) 6 N. L. R. 275.

³ (1919) 21 N. L. R. 452.

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co-owner removing the fence and ploughing up the strip on which it stood. Similarly (particularly in urban areas), I think a co-owner who erected a house on the common land would be entitled to object to another co-owner unreasonably erecting a wall in such a way, as to block his light. It would clearly be reasonable, therefore, that in a partition action the Judge should, where necessary, take care to preserve to such a co-owner an equivalent of the right which he enjoyed before the partition, subject, no doubt, to such compensation as the other co-owner thereby affected ought reasonably to receive.

Unfortunately, nothing of the kind has been done in the present case. In my opinion, therefore, the appeal should be allowed with costs, both here and in the Court below, and the plaintiff must be granted the declaration he seeks.

Appeal allowed.
