Present : Wood Renton J.

June 20, 1911

SUPPIAH *et al.* v. PONNAMPALAM *et al.*

188—*C. R. Jaffna,* 8,050.

Servitude—Right of way—Transfer of land without any mention of right of way—Transferee may assert his claim to right of way.

Where an owner of land who had acquired a right of way by prescription conveyed the land by a notarial instrument to another,—

Held, that the transferee was entitled to assert his right to the servitude acquired by the transferor, though this servitude was not expressly conveyed to him.

APPEAL from a judgment of the Commissioner of Requests, Jaffna (M. S. Pinto, Esq.).

The second plaintiff and one Kanagamma, a minor, over whom the first defendant was appointed *guardian ad litem,* are adjoining landowners. Both the plaintiff's land and Kanagamma's land originally belonged to one Kottar. Kottar dowried the land now belonging to the plaintiff to his eldest daughter, Sinnapillai, in 1865, reserving the land now belonging to Kanagamma to himself. Sinnapillai dowried the land to her daughter, the second plaintiff, by notarial deed dated September 1, 1909. Neither the deed in favour of Sinnapillai nor the deed in favour of the second plaintiff made any mention of a right of way over the land now belonging to Kanagamma. The plaintiffs brought this action on March 30, 1910, for a declaration of a right of way over Kanagamma's land.

The learned Commissioner held that the second plaintiff and her predecessor in title had acquired the right of way by prescription.

The defendants appealed.

Balasingham, for the appellants.—Even granting that Sinnapillai had acquired the servitude by prescription, that would not confer any right on the second plaintiff. She became owner only in 1909, and the deed in her favour does not convey to her any right of way over Kanagamma's land.

A right of way is immovable property, and can only be transferred by a notarial deed. It has often been held that where an owner of land encroaches upon a neighbour's land and acquires title to it by prescription, and then sells the land originally belonging to him to another, the vendee does not acquire by the deed of conveyance any title to the encroached portion, unless it was expressly conveyed to him. The fact that the right of servitude is an incorporeal right does not make any difference ; it is clearly immovable property, and falls under section 2 of Ordinance No. 7 of 1840.

Counsel referred to *Voet* 19, 1, 6.

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Tissaveerasinghe (with him *J. Joseph*), for the respondents.—The Commissioner finds that the plaintiffs were in possession of the right of way. The plaintiffs are at least entitled to a possessory decree. (His Lordship intimated to counsel that he would hear him for the respondent, if necessary.)

Cur. adv. vult.

June 20, 1911. WOOD RENTON J.—

I see no reason in this case to differ from the conclusion of the learned Commissioner of Requests, on the evidence, that Sinnapillai had acquired a prescriptive title to the right of way in suit. The only question is whether the plaintiff-respondent, to whom she conveyed the land itself without any mention of the fact that there was annexed to it as a servitude this right of way, can avail himself of Sinnapillai's prescription. I can find no authority which would justify me in holding that, under Roman-Dutch law or even under Ordinance No. 7 of 1840, where a right of way has become attached to a land, and that land is made the subject of a valid legal transfer, the transferee is not in a position to assert his right as the owner of the dominant tenement against the owner of the servient tenement. In the absence of any such authority, I hold that the plaintiff-respondent is entitled to the benefit of Sinnapillai's prescription, and I dismiss the appeal with costs.

Appeal dismissed.