1939 *Present :* **Wijeyewardene and Nihill JJ.**

MEIYAPPA CHETTIAR *v.* RAMASAMY CHETTIAR

298—D. C. Kandy, 57.

Servitude—Property held in common—Agreement to exchange services of bath-room and closet—No servitude—Right to withdraw from arrangement.

The plaintiff and the defendant who were once co-owners of a house partitioned it amicably, the plaintiff getting a divided northern portion and the defendant a divided southern portion.

The property had only one bathroom and a water-closet the bathroom was on the portion allotted to the plaintiff and the water-closet on the portion allotted to the defendant.

In pursuance of an indenture entered into between the parties, the defendant in consideration of the permission granted to him to use the bathroom and water-pipe allowed the plaintiff, his servants, &c., to use the water-closet; and the plaintiff in consideration of the permission granted to him to use the water-closet allowed the defendant and his servants, &c., to use the bathroom.

After some time the defendant gave notice to the plaintiff that he would not permit the use of the water-closet from a certain date, and that that the agreement would cease to have effect after that date.

***Held,* that the indenture did not create a servitude and that it gave the plaintiff merely a permission to use the water-closet in consideration of the permission granted to the defendant to use the bathroom.**

Held, further, **that there was nothing in the indenture which militated against the revocation of the permission by one party against the wishes of the other.**

THIS was an action instituted by the plaintiff for a declaration that he was entitled to the use of a water-closet in terms of an agreement entered between the defendant and himself. The facts are stated in the head-note. The question was whether the indenture P 1 was revocable.

The learned District Judge held that it was not open to the defendant by his unilateral act to determine the agreement.

N. E. Weerasooria, K.C. (with him *Colvin R. de Silva*), for defendant, appellant.—The agreement *P* 1 discloses nothing more than a licence. It creates a permission or personal licence and cannot be regarded as involving an interest in land. A licence is revocable at will. For meaning and effect of licence, see Vol. 8 of Wood-Renton's *Encyclopaedia of the Laws of England, pp. 160-161; Wilson v. Tavener*[1]; *King v. David Allen*[2]; *2 Van Leeuwen, ch. 19, section 5* (Kotze's Translation, 1921 ed., p. 282); *Voet 8.4.18* (Hoskin's Translation, p. 58).

Looking at the agreement in the light of a contract of tenancy, it is terminable at will—*Wille on Landlord and Tenant, p. 67 (1910 ed.)*.

H. V. Perera, K.C. (with him *S. J. V. Chelvanayagam*), for plaintiff, respondent.—The authorities cited have no application to the facts of this case. A licence is a permission given to a person personally and not as owner of a certain property.

There is a distinction between a right granted to a person to do something on another's land, *e.g.*, the right to stick bills, and the right given to a person as an owner of certain property. The former is a personal right, whereas the latter is a real right and becomes an accessory of the property. Th persons mentioned in the grant of a real right are not material. In the present case, for example, children have not been included. The inclusion of servants in P 1 is conclusive evidence that the right which was granted was in relation to property. The distinction between a personal right and a real right is dealt with in *Voet 8.1*.

Considering the circumstances under which the agreement was entered into, the right given to plaintiff in *P* 1 was clearly in connection with the occupation of property, and not personally. It has, therefore, the nature of a servitude. The agreement would never have been notarially executed unless a right in respect of property was in contemplation. There can be no doubt that the agreement in question was intended to be a contract. A permission, on the other hand, is not a contract, nor is a licence.

The word "permit" occurring in the agreement does not always indicate licence. It may be used in a grant. The context should determine the meaning of the word—*Phillips v. Smith*[3].

The right to use a water-closet can be the subject of a servitude, according to the view taken in *Kaurala v. Kirihamy et al.*[4].

[1] *(1901) 1 Ch. 578.*
[2] *(1916) 2 A. C. 54.*
[3] *(1810) 12 East. 455.*
[4] *(1917) 4 C. W. 187.*

N. E. Weerasooria, K.C., in reply.—A servitude being onerous in its nature, clear evidence is required to establish it—*2 Maasdorp 168 (5th ed.); Peakcock v. Hodges*[1]. The phraseology used in the agreement is entirely consistent with the grant of a licence. If a servitude was intended, the words ordinarily used in connection with a grant of servitude would have been used.

Cur. ad. vult.

September 14, 1939. WIJEYEWARDENE J.—

The questions that arise for consideration turn on the construction of the indenture P 1. The recitals in the deed show—

(i.) that the plaintiff and the defendant were at one time co-owners of a house No. 20 in Brownrigg street, Kandy;

(ii.) that the plaintiff and the defendant petitioned this property amicably, the plaintiff getting a divided northern portion and the defendant a divided southern portion of the property;

(iii.) that the property No. 20 had only one bathroom and a water-closet ;

(iv.) that the bathroom stands on the portion allotted to the plaintiff and the water-closet on the portion allotted to the defendant.

In pursuance of an agreement between the plaintiff and the defendant they executed the indenture P 1 in 1920 which was notarially attested. The material portions of the indenture are as follows :—

(*a*) that (the defendant) in consideration of the permission hereinafter granted to him to use the bathroom and water-pipe doth hereby permit and allow (the plaintiff), his servants, tenants and agents to use the water-closet standing on the premises belonging to (the defendant) . . . . . at all hours without objection or hindrance.

(*b*) that the (plaintiff) in consideration of the permission already granted to him by the (defendant) to use the water-closet . . . . . doth hereby allow and permit the (defendant), his servants, tenants and agents to use the said bathroom and water-pipe standing on the said premises belonging to the (plaintiff) . . . . . at all times without objection or hindrance.

By his letter P 2 of January 5, 1938, the defendant gave notice to the plaintiff that he would not permit the use of the water-closet after April 5 1938, and that P 1 would cease to have effect after that date.

The plaintiff thereupon filed this action on April 4, 1938, asking that he be declared entitled to the use of the water-closet in terms of P 1.

The question that has to be decided is whether the indenture P 1 is revocable.

The District Judge held that P 1 created a continuing contract and that it was not open to the defendant " by his unilateral act to determine the contract ". The present appeal is preferred by the defendant-appellant against that judgment.

[1] *(1876) 6 Buchanan 69.*

I do not think that the plaintiff could claim that the indenture P 1 has created a servitude whereby the property of the defendant "became bound or subject to the use of convenience" of the plaintiff's property. The indenture does not give and grant "a right over the defendant's property. It purports to permit and allow the use of the water-closet standing on the defendant's property. The indenture is drawn by a notary and it is the usual and almost invariable practice of notaries in Ceylon who draft deeds for transferring a real right to use a phrase containing the words "give and grant". Moreover P 1 gives the permission to the defendant, his servants, tenants and agents. Now in deeds of transfer of real rights the Ceylon Notary uses the words "the grantees, his heirs, executors, administrators, and assigns". It is difficult to understand why any reference was made by the Notary to the "tenants, servants and agents" of the defendant if it was intended to transfer a real right. It is also difficult to understand the special significance of the words "servants" and "agents". Is the permission granted to all the servants of the defendant, or only those servants who, live on that particular property of the plaintiff? What is the special significance to be attached to the word "agents"? The indenture does not appear to me to state with anything like precision the people to whom the permission is given. It is no doubt true that in the recitals the indenture refers to the ownership of the two lots by the plaintiff and the defendant. I am unable to infer from this fact that it was ever intended to create a real right over one property in favour of the other The fact of the ownership of the two lots was most probably stated in order to show that the plaintiff and the defendant each had the right to give the necessary permission for the use of the water-closet and the bath-room. In this connection it has also to be noted that the indenture does not state that the permission is given to the defendant as owner of the divided southern portion. The Forms ordinarily used by notaries in Ceylon for the purpose of granting a servitude are given in Jayasinghe's *Principles of Conveyancing*—*vide* Forms 17, 18, 19, and 20 in the chapter intituled Transfer of Land.

It is clear law that a deed creating a servitude must do so in express terms and that a servitude cannot, as a general rule, be granted by implication—*Maasdorp (1903 ed.), bk. 2, pp. 204 and 205.* Voet discussing the law with regard to the granting of servitudes states, "the granting of a servitude being as it were something vexatious and contrary to natural liberty, receives a strict interpretation, and when there is any doubt, the interpretation ought to be in favour of the *unfettered enjoyment of one's own property*". (*Voet VIII, 2, 2.*)

I hold therefore that the indenture does not create a servitude as argued by the plaintiff even if the parties had an intention to create a servitude. Considering however the class to which the parties belonged and the likelihood of tenants of different classes and communities occupying the two divided lots it appears to me most unlikely that the parties even intended to create a continuing right as a servitude.

I think the indenture gave the plaintiff no more than what is expressed, namely, a permission to use the water-closet. This permission was granted in consideration of the permission granted to the defendant to

use the bathroom. This indenture was most probably executed in order to prevent one party or the other from claiming a servitude at some future time by right of prescriptive possession and the document was intended to furnish proof of the fact that the possession was permissive and not adverse.

I am unable to see anything in the indenture which militates against the revocation of the permission by one party. All that the indenture ensures is that one party cannot avail himself of the permission granted to him after withdrawing the permission granted by him to the other.

No damages have been claimed in this action and it is therefore not necessary to discuss the right of the plaintiff, if any, to damages.

I would, therefore, allow the appeal with costs and dismiss the plaintiff's action with costs.

NIHILL J.—I agree.

Appeal allowed.