1938

Present : **Maartensz and Moseley JJ.**

WIJEYESEKERE *v.* VAITHIANATHAN.

367—D. C. Colombo, 316.

Servitude—Mortgage of property—Subsequent gift of property with a right of way—Sale of mortgaged property in execution of mortgage decree—Claim by purchaser of right of way—Nature of servitude gifted.

By mortgage bond No. 397 dated July 1, 1930, P. mortgaged with J. and another a defined block of land and the buildings standing thereon. By deed of gift dated March 28, 1931, P. gifted the same premises to V. F. together with a right of way over and along the reservation for a road twenty feet wide, forming the eastern boundary of the premises and belonging to P.

J. and his co-mortgagee put the bond in suit against P. and V. F. and purchased the mortgaged property in execution of the decree in their favour. They transferred the premises to defendant, who claimed a right of way over the road reservation.

The plaintiff, who purchased the road reservation from P., brought this action for a declaration of title to the strip of land and for an order restraining the defendant from using it.

Held, that the right of way created by the deed of gift was granted to V. F. personally and did not become an accessory of the property mortgaged.

Held, further, that the defendant was not entitled to exercise the right of way unless he was a successor in title of V. F. or unless the latter accepted the gift on behalf of the mortgagees.

THIS was an action brought by the plaintiff for a declaration of title to a strip of land called a road reservation and for an order restraining the defendant from using the said road. The facts are stated in the head-note. The learned District Judge gave judgment for the plaintiff.

H. V. Perera, K.C. (with him *N. Nadarajah* and *E. B. Wikramanayake*), for defendant, appellant.—The strip of land in dispute was reserved as a right of way for the benefit of the property purchased by the defendant. The deed of gift in favour of Virginia Fernando created a praedial servitude and this servitude attached to the property and passed with it as an accessory. At a mortgage sale the land passes as it then stands, with all improvements if it has been enriched in any way even by a third person. Buildings erected and plantations made even by a stranger, subsequent to the mortgage, accrue to the land and pass with it. Not only things expressly mentioned, but also all accessions and accretions become bound and pass with the property. *Berwick's Voet XX. 1, 2 ; XX. 1, 4.* Therefore the right of way passed with the property sold. It is a real servitude and cannot have an existence independent of the dominant tenement. Real servitudes cannot exist apart from immovable property since they are accidents and conditions attaching to immovable property. *1 Nathan 445 (art. 686)*. The right of way was not personal to Virginia. It accrued to the land and not to the owner, and it runs with the land. The dominant tenement was the person which acquired the servitude, so that it was transferred to every person possessing that tenement. The property drags along with it, at every sale, everything that has become accessory to it even subsequent to the mortgage. When the property is transferred the servitude cannot be excluded. A praedial servitude is an accession. It becomes a quality or characteristic of the dominant tenement, such as healthfulness or fertility. *Voet VIII. 1, 2 ;* Buckland & McNair's *Roman Law and Common Law 102.* It cannot be dealt with apart from the property itself.

The purchasers at the sale in execution were the successors in title of Virginia. The property was purchased by them with all easements, servitudes and appurtenances. What was sold was not the right, title and interest of the mortgagor, but the property itself with everything that accrued to it. The right of way accrued to the land and passed with it unless it was extinguished in some way known to the law. A joint owner may acquire a servitude for the joint estate, and a stranger for another's estate. (*Hoskyns' Voet VIII. 4, 10.*) Virginia acquired the right of way for the mortgagees. If the servitude did not pass with the property, what happens to it ? It either remained with Virginia or was extinguished. It could not remain with Virginia because it was not a personal right granted to her. If it was extinguished it must have been in one of the ways by which servitudes are lost. These are mentioned in *Grotius II. 37, 2-7,* but there has been no such extinction in this case.

Further, the right of way was granted to the mortgagees as the mortgage bond and the deed of conveyance included all rights, privileges, easements, servitudes and appurtenances. The learned District Judge has not considered this fact. When the property was sold, all the benefits and advantages were also caught up, and the property carried with it the right

of way. The property originally consisted of two blocks both belonging to the same owner, and the people occupying the rear block used this path to get to the public road. The alienation of this block with " rights usually enjoyed " or " appertaining " or perhaps the mere grant without general words carried with it the right of way. (*Bayley v. Great Western Railway*[1]; *Hansford v. Jago*[2]; *Gale on Easements 165.*) Where a land is transferred without mention of a right of way, the transferee is entitled to assert his right to the servitude, though it was not expressly conveyed to him. (*Suppiah v. Ponnambalam*[3].)

F. A. Hayley, K.C. (with him *E. G. P. Jayatileke, K.C.*, and *J. L. M. Fernando*), for plaintiff, respondent.—A servitude does not attach to property. That is only a fiction. It is really a right residing in a person. Every servitude must belong to a person (*Hunter 394*), and he can exclude it when selling the property. The right of the dominant tenement over the servient tenement is a personal right. That is why a person cannot have a servitude over his own property, because he cannot have rights and duties over himself. When a stranger builds on mortgaged property, the building does not pass on the sale of the property. A servitude is not an accession in the sense that it increases the value of the land. It is not in the same category as a fixture. It can be surrendered or abandoned by a person, and it is extinguished by a public sale. (*Voet VIII. 6, 14.*) An accession must take place before the mortgage and must be of a physical thing, *e.g.*, a building or plantation. What was mortgaged and sold was not the property, but the mortgagor's right, title, and interest. The conveyance transferred the land " freed from the rights of Virginia ", so the right of way which Virginia had disappeared. (Mortgage Ordinance, No. 21 of 1927, section 10 (2).) Nothing more than what was actually mortgaged is sold. Otherwise, if a person mortgages an undivided half of a land, and subsequently acquires the other half, then this half accedes to the land mortgaged, and passes with the mortgaged property when that is sold. Mortgage is different from sale. In the case of a mortgage there are no covenants. There is only a charge over the interests of the mortgagor. Principles governing sale do not apply. The right of way was not mortgaged, and therefore it was not sold. Assessions in the case of mortgage of " *universitas rerum* " not the same as where " *res singulares* " are hypothecated. (*Berwick's Voet XX. 1, 2* and *XX. 1, 4.*) *Staves* substitute do not become bound. (*Berwick's Voet XX. 1, 4 and XX. 4, 7.*) Unless servitude is expressly imposed or houses are sold " as they now are " rights are not transferred. (*Berwick's Voet XX. 1, 6.*) A servitude is a burden and very clear evidence is required to establish its existence. (*6 Buch. 65 at 69.*) The principle in the English case cited applies to defined roads and ways of necessity. Moreover, the two blocks were mortgaged and sold as one land. The existence of a house now and the convenience of having the right of way claimed are not material. The state of the land at the time of mortgage must be considered. Although improvements made by the mortgagor accede to the property and pass with it, the rights of a third person do not accrue to the benefit of the mortgagees.

[1] *(1884) 26 L. R. (Ch.) 434.*
[2] *(1921) 1 Ch. 322.*
[3] *(1911) 4 N. L. R. 229.*

H. V. Perera, K.C., in reply.—If the right of way was a personal servitude and was retained by Virginia, she would still have the right to walk up and down the strip of land at any time. If she has surrendered it there must be a person to whom it was surrendered. If the servitude was real, it must pass with the property. It exists for each successive owner, and not to one owner or another. (*Sohm's Roman Law 342.*) A praedial servitude attaches to property rather than to the owner. (*Austin's Jurisprudence Lecture 50, Buckland's Manual of Roman Law 153 and 154.*) It must necessarily pass with the land to every person successively occupying the tenement, unless it has been previously extinguished. (*Salmond on jurisprudence 460; Hunter's Roman Law 413.*) The dominant tenement is a legal person. A real servitude is a benefit concurrent with the ownership of the property. (*Austin's Elements of Law 207.*) The general words in the deed must be given a liberal interpretation. Formerly ceremonials and formalities were of great importance, and words in deeds were interpreted strictly. The Roman-Dutch rules of interpretation have now been discarded. *Voet XIX. 1, 6* is not applicable. The real intention of the parties must be taken into consideration. (*Norton on Deeds 285.*) No reason to limit the principle laid down in the English decisions to ways of necessity. The transfer " freed from the interests of Virginia " means that Virginia has no more interests. It is on the supposition that a real servitude passes with the title to property that a purchaser is entitled for the purpose of prescription to rely on the possession of his predecessor in title who transfers only the property with no mention of the servitude.

Cur. adv. vult.

August 2, 1938. MAARTENSZ S.P.J.—

The defendant in this action appeals from a decree of the District Court of Colombo declaring the plaintiff entitled to the strip of land called road reservation, 20 feet wide, more fully described in the schedule to the decree, and that the defendant has no right to the said road, and restraining the defendant from using the said road.

The strip in dispute forms part of the land depicted in plan P 4 which the plaintiff's father, Mr. D. D. Pedris, purchased in 1908 on deeds P 2 and P 3 and divided up into parcels. The houses Medway, Bowness, Siriden, Glenford, and Cestria shown in plan Y, filed with the plaint, were built by Mr. Pedris. The strip of land lies between Medway, Bowness, and Siriden on one side and Glenford and Cestria on the other.

By deed No. 1969 (D 3) Mr. D. D. Pedris gifted Medway to the plaintiff on July 31, 1929. It is described as lot A in plan No. 3,235, bounded on the east by lot C in the plan being premises called and known as Glenford and a passage or reservation for a road 20 feet wide. The grant included among the easements, servitudes and appurtenances " the full and free right and liberty of way and passage in over and along the reservation for a road 20 feet wide leading from the high road called Edwin's Drive to the said premises ".

On the same date by deed No. 1968 (P 5) Mr. Pedris gifted Glenford to the plaintiff bounded on the west by a passage or reservation for road 20 feet wide along lost B and A, lot A being Medway.

There was a right of way granted over the reservation in the same terms as in D 3.

By deed No. 372 (P 6) dated July 1, 1930, Pedris mortgaged Siriden as described in plan No. 3,686, bounded on the east by the passage in question.

It appears from the evidence of Mr. de Saram that Pedris first offered to mortgage Siriden (lot Y in plan D 2) exclusive of the portion X to the east of Bowness. There was a hedge between X and Y. Then X was offered as additional security and Mr. de Saram went to it by the strip in dispute. There was no building on it at the time, but Mr. de Saram says it was offered as a building site. Then a plan amalgamating Siriden and X was brought to him.

After the bond was executed Pedris by deed D 12 dated March 28, 1931, gifted Siriden as depicted in plan 3,686 to his grand-daughter Virginia Fernando. The grant of the estimates included the right of way in, over, and along the reservation for a road 20 feet wide forming the eastern boundary.

The bond was sued in case No. 51,511 of the District Court of Colombo. The defendants were Pedris and Virginia Fernando. Whether she was a necessary party or not does not appear from the proceedings.

The decree has not been read in evidence. In default of payment of the decree the premises mortgaged were sold by an auctioneer on the order of the Court and purchased by the mortgagees Messrs. Joliffe & de Saram, and the Secretary of the Court executed the conveyance No. 2,282 (P 8) dated September 19, 1933, in their favour.

The deed recites that D. D. Pedris "seized and possessed" of the premises described in the schedule mortgaged the property by bond No. 372 and gifted it by deed No. 212 to Virginia Fernando subject to the mortgage.

That bond No. 372 was put in suit in action No. 51,511 of the District Court of Colombo, against the first defendant for the recovery of the amounts due to the plaintiffs and also against the second defendant "for a declaration that the said property and premises be sold for the recovery of the said sum, interests, and costs freed from her rights and interests in the event of the first defendant making defaults in the payment of the same".

That the District Court of Colombo on March 13, 1933, entered a mortgage decree whereby it was ordered and decreed that the first defendant do pay to the plaintiffs the sum of Rs. . . . .

That by the said decree the said property and premises were declared specially bound and executable for the payment of the said sum of Rs. . . . . on the footing of the said bond No. 372 . . . . "freed from the rights and interests of the second defendant";

That the decree further ordered that in default of payment of the said sum . . . . that the said property be sold freed from the rights and interests of the second defendant and the proceeds applied in payment of the said sum, interests and costs;

That the first defendant having made default in the payment of the amount of the said decree, the property was put up for sale and purchased by the plaintiff.

The operative clause reads as follows (I quote the relevant portion) :—

"Now Know Ye and these presents witnesses that the said . . . . Secretary of the District Court of Colombo in pursuance of the said orders and directions made in the said action No. 51,511 of the said District Court and by virtue of the authority granted as aforesaid and for and in consideration of the said sum of Rupees . . . . in terms of the order of Court as aforesaid and in exercise of every right, power and authority vested in him or in anywise enabling him in this behalf doth hereby grant, convey, assign, transfer, set over and assure unto the plaintiffs . . . . the said property and premises in the schedule hereto fully described freed from the rights and interests of the second defendant together with all buildings, trees and plantations thereon and all rights, privileges, easements, servitudes and appurtenances whatsoever to the said property and premises belonging or in any way appertaining or used or enjoyed therewith or reputed or known as part and parcel thereof and all the estate, right, title, interest, property, claim and demand whatsoever and howsoever of the first defendant in, to, out of, or upon the same and together with all deeds, documents and other writings therewith held or relating thereto."

The grantees by deed No. 473 (P 9), dated August 22, 1934, sold the property to the defendant. The property is depicted in plan No. 3,686, P 7, made by Mr. M. G. de Silva, dated May 21, 1929. The plaintiff disputed the defendant's right to use the strip in question as a road and the plaintiff purchased it from Mr. D. D. Pedris upon deed No. 856, dated October 2, 1934. The plaintiff apparently forestalled the defendant who had approached Mr. Pedris with a view to purchasing from him the right to use the strip as a road or way to the land he purchased.

The defendant insisted on his right of way over and along the strip in question, and the plaintiff brought this action for a declaration that she was entitled to the strip, that the defendants has no right to use the said road, and for an order restraining the defendant from using it.

The defendant pleaded that the lane was a public lane, or, if it was not a public lane, that it was constructed for the benefit of premises Nos. 15 and 17 (the property he purchased from Joliffe & de Saram), that it was an appurtenance to the premises, and that he had acquired by prescription a right of way over the strip of land.

The action was tried on a number of issues arising from these pleadings. In appeal, however, the right of the appellant to a right of way over the strip was stressed on two grounds.

The first ground on which the right of way was claimed was based upon the deed of gift or D 12 executed by D. D. Pedris in favour of his daughter Virginia Fernando. It was contended that the deed of gift created a praedial servitude of way over the strip of land owned by the donor which attached to the dominant tenement gifted to Virginia Fernando and that the defendant was entitled to the right of way so created, as an accessory of the property mortgaged or as a right which passed to his vendours under the conveyance P 8 executed to give effect to the sale in execution of the mortgage decree and from them to him by deed No. 473 (P 9), or because the deed of gift was accepted on behalf of the mortgagees by Virginia Fernando.

In support of the first branch of the contention it was strenuously argued that the servitude created by the deed was something real which attached itself to the dominant tenement (Siriden), which I shall hereafter refer to as Siriden, and was exercisable by any owner or possessor of Siriden. It became, it was submitted, a quality of the dominant tenement. In support of this submission we were referred to (*a*) *Voet, bk. VIII. tit. 1, art. 2* which reads thus :—

" Servitudes are real, when indeed one thing is subservient to another and so loses some of its own rights whilst it increases those of another. By our law such servitudes have also been styled praedial servitudes ; for the reason that the constitution and the exercis of such servitudes it is necessary that there should be a dominant tenement in the position of creditor and a servient tenement in the position of the debtor of these servitudes ; and they have no existence apart from immovable property. For what else, asks Celsus, are the rights attaching to immovable property, *but the qualities which they possess, as for instance, excellence, healthfulness, extent,* and rights advantageous to him who possesses them, but injurious to him who owes them ; so that the possessor of a farm burdened with a servitude, cannot sell the same unburdened ".

Particular reliance was placed on the dictum of Celsus, which I have underlined.

The passage in *Roman Law and Common Law p. 102,* by Buckland & McNair, which reads :—" In fact praedial servitudes seem to have been regarded rather as accidental characteristics or qualities of the land, like relative fertility ".

I find considerable difficulty in giving to either of these passages the wide meaning defendant's Counsel sought to attach to them, for if a servitude became in all respects a quality of the dominant tenement, the owner of the dominant tenement could not extinguish it by surrendering it. But that is what the owner of the dominant tenement could do both under the Roman law and Roman-Dutch law. The passages must, in my judgment, be limited to the servitude being a quality of the dominant tenement, while it is in existence.

It was also submitted that the servitude was analogous to the right which the owner of a land acquired in a building constructed on his land or a plantation made on his land by another person, or in land added to his property by alluvium. This is, I think, a false analogy, for a building or plantation is a concrete fact which the owner of the soil cannot take away from the soil except by breaking it down or pulling it up. He cannot for example, surrender the building or plantation without the soil to the builder or planter. He can only give up the materials. A servitude, on the other hand, is an abstract right which can be surrendered, apart from the soil of the dominant tenement.

It was also argued that as regards real servitudes the dominant tenement is in law a person. In support of this argument we were referred to *Salmond on Jurisprudence, p. 460,* where he states that a servitude appurtenant (real) runs with the dominant and servient tenements into the hands of successive owners and occupiers ; *Austin on Jurisprudence,*

Lecture 50, where he says with reference to real servitudes that these rights of servitudes are said to reside in given things and not in the person holding them ; hence we have such terms as " *servitude rerum* "; *Markby's Elements of Law, p. 207,* where he says in the case of a praedial servitude " besides the *res aliena* over which the right is exercised, there is another *res* to which the right is attached ; and the enjoyment of the servitude always accompanied the ownership of the second thing though it is of course not merged in it.

These passages are referable to the Roman law regarding servitudes. The passage in *Sohm's Institutes of Roman Law, p. 342,* that in the case of real servitudes they do not exist only for this or that owner but for every owner of the *praedium dominans* and that " it is in this sense that one piece of land is said to serve another " ; and *Buckland's Manual of Roman Law, p. 153,* that the essential difference, expressed in the name, is that praedial servitudes are regarded as attaching to the property itself rather than to the owner of it, were also relied on.

Reference was also made in this connection to a passage in *Hunter's Roman Law* which reads, " A praedial servitude is attached to the land in this sense, that it cannot be transferred by the owner of the dominant land to the owner of any other land. Until extinguished in one of the ways hereafter enumerated, a servitude passes with the land to every possessor ".

Hunter, however, in his commentary on Personal Servitudes, page 394, at page 395, says with reference to the right of usufruct and the right of way :—

" The distinction between these two classes of servitudes is described by the Roman jurists from a different and less satisfactory point of view. Marcian says that servitudes belong either to persons as usufruct or to things, as urban and rural servitudes (servitutes personarum, servitutes rerum or praediorum). *But for the solecism of attributing servitudes to things (for every servitude must belong to a person)* the language might be thus defended."

The rest of the passage is not material.

I think the words " for every servitude must belong to a person " concisely and cogently dispose of the argument that a dominant tenement is a person which can acquire a real servitude so as to become a quality of it transferable to and exercisable by every person in possession of the land.

A right of way may, I take it, be granted to A, personally. For instance, the owner of a land may grant the lessee or owner of an adjoining land a right of way over his for his personal use ; or it may be a grant of a right of way to the owner of a land and his heirs *and successors creating* a praedial servitude exercisable by the grantee in respect of the land of which he is owner.

This right the grantee can surrender to the grantor or he can exclude it when selling the property. The result will be the same, for the purchaser of the property has not acquired the right and the grantee cannot exercise it because he has divested himself of the land and the right to possess it. He may possibly be entitled to exercise it if he remained in possession notwithstanding the sale.

The burden on the servient tenement will pass to the grantor's successors in title. He cannot, of course, any more than a mortgagee can, by any provision in the grant relieve the grantee of the burden on the land.

It was suggested that if the right was not an interest in the land, a person who purchased the land could not complete the period of adverse possession commenced by his predecessor in title for acquiring a servitude by a prescriptive title, if the servitude was not expressly transferred. In most cases the terms of a transfer would include the transfer of such a right. I do not think it necessary to discuss or decide what would be the position if the right of servitude was not transferred or excluded, as the question does not arise.

In my opinion, the praedial servitude of way created by the deed of gift P 12 was granted to Virginia Fernando and belonged to her and not to Siriden. It therefore did not become an accessory of the property mortgaged. The defendant is therefore not entitled to exercise the right unless he was her successor in title or unless she accepted the gift on behalf of the mortgagees.

This brings me to the second branch of the contention. I shall first deal with the argument that the right of way was acquired by Virginia Fernando on behalf of the mortgagees. This argument was based on the passage in *Voet, bk. VIII. tit. 4, art. 10,* which reads :—

> " But since by the law of the present day a man can make a valid stipulation not for himself merely but also for another, it follows that one joint owner can acquire a servitude for the joint estate, and a stranger for another's estate ".

This is, however, a very summary statement of the law referred to.

Under the Roman-Dutch law a stipulation in a contract in favour of a third party is valid, but it is only actionable by the third party if he has accepted it. (*Jinadasa v. Silva*[1]).

In this case I cannot by any process of reasoning find any stipulation in the deed of gift in favour of the mortgagees, nor if there was one that the mortgagees accepted it. The argument therefore fails.

The contention that the purchasers at the execution sale, namely, Messrs. Joliffe & de Saram, were the successors in title of Virginia Fernando, is in my opinion, absolutely inconsistent with the terms of the decree in D. C. Colombo, No. 51,511 as recited in the Secretary's conveyance and the terms of the deed itself.

I have already set out what I considered the portions of the deed material to the questions argued in appeal. I need only point out that the passage in the operative clause conveying the property to the purchasers expressly conveys it to them freed from the rights and interests of Virginia Fernando. I find it impossible to accede to the argument that the words " freed from " mean inclusive of the rights and interests of Virginia Fernando.

The deed embodies the effect given to a conveyance executed in pursuance of a sale in execution of a mortgage decree by section 10 of the Mortgage Ordinance, No. 21 of 1927.

[1] *(1932) 34 N. L. R. 344.*

Sub-section (2) enacts that subject to rights having priority " the conveyance shall, unless otherwise expressed therein, operate to convey the property sold for such estate and interest therein as is the subject of the mortgage, freed from the interests, mortgages, and rights of *inter alia* every part to the action.

In my judgment the effect of the sub-section is to give the transferee a title to the property mortgaged suprior to that of every party to the action and not inclusive of it. In short, that the mortgage decree and subsequent transfer rendered the title of Virginia Fernando null and void as against the title of the transferee. If not, defendant's title is defective for clearly Virginia Fernando's title under the deed of gift was not transferred by deed P 8.

It was suggested in the course of the arguments on this branch of the contention that what was sold in execution was the land mortgaged and not the right, title and interest of the mortgagor. I confess I could not follow the distinction Counsel sought to draw between the sale of a land and the sale of the owner's interests. The mere delivery of the land to the vendee will not give him title unless his vendor had title. The main purpose of the argument was, however, to establish that the sale carried with it the right of way. As I have held that the right of way did not form part of the land, I need not discuss the argument further.

I am accordingly unable to uphold the contention that the defendant is entitled to exercise the right of way as the successor in title of Virginia Fernando or as the successor in title of the mortgagees because Virginia Fernando acquired the right of way on their behalf.

The second ground relied on in support of the defendant's claim to a right of way over the strip in question is that there was an express or implied grant of the right of way to Messrs. Joliffe & de Saram under the mortgag bond (P 6) and the deed of sale (P 8) as the property was mortgaged and conveyed " togther with . . . . all rights, privilges, easements, servitudes and appurtenances whatsoever to the said property and premises belonging or in anywise appertaining or used or enjoyed therefwith or reputed or known as part and parcel thereof ".

It was argued that the general words must be construed according to the meaning given to them in the English decisions in analogous cases. It was also contended that *Voet's Dictum in bk. XIX. tit. 1, art. 6,* which reads :—

> " If the owner of two houses has sold them separately to different persons, or has sold one and kept the other for himself, and one received the droppings from the eaves of the other, or a beam, or a projection from the roof, or the like, to which there is no liability in the absence of a servitude, the better opinion is that such premises have not to be transferred to purchasers with rights of this kind—with the advantages to the one and disadvantages to the other—unless either a servitude has been expressly imposed, or the houses are sold with the clause ' as they now are ' ". (*Berwick's Trans., p. 168.*)

is not applicable to an instrument in which phraseology of an entirety different character had been used, and it was also argued that the general words relied on had the same effect as the words " as they now are ".

The principle laid down in the English cases was summarized by Fry L.J. in *Bayley v. Great Western Railway Co.*[1], thus:—

"If one person owns both Whiteacre and Blackacre, and if there be a made and divisible road over Whiteacre, and that has been used for the purpose of Blackacre in such a way that if two tenements belonged to several owners there would have been an easement in favour of Blackacre over Whiteacre, and the owner aliened Blackacre to a purchaser, retaining Whiteacre, then the grant of Blackacre either "with all rights usually enjoyed with it" or "with all rights appertaining to Blackacre," or probably the mere grant of Blackacre itself without general words, carries a right of way over Blackacre."

The principle applicable to made and defined roads was extended to cases where there was no formed or defined road if the grant of way was necessary for the reasonable enjoyment of the *quasi* dominant tenement—*Rudd v. Bowles*[2]; *Hansford v. Jago*[3].

The rules in these cases result, it is observed, in *Gale on Easements, p. 165,* independently of section 5 of the Conveyancing Act, 1881, and evidence of actual enjoyment.

Now, the property mortgaged and sold to the mortgagees is the parcel of land depicted in plan No. 3,686 (P 7) made by Mr. M. G. de Silva, According to this plan the property is a defined portion, marked B 2, with indefinite boundaries of several lots of land. In the bond the land is described as bearing assessment No. 1084|7 and in the conveyance to the mortgagees as No. 1084|7, presently bearing assessment No. 9, When it was sold to the defendant it was said to bear two assessment numbers, namely, No. 9, 31st lane, and No. 15, 30th lane.

It is obvious that access to the parcel of land mortgaged was from Edwards Drive and Charles Place. No other way was necessary for the "reasonable and convenient" enjoyment of what is termed in the English case "the *quasi*-dominant tenement" when it was mortgaged and sold to the mortgagees.

To establish the claim set up by the defendant recourse is had to the evidence of Mr. de Saram, which I have already referred to, that what was first offered as security for the loan was lot Y in plan D 2, and that when he considered lot Y insufficient he was shown X in plan D 2, which was separated from it by a hedge, and to his evidence that he went to X by the lane numbered 30th lane.

The case for the defendant is that what was in fact mortgaged and sold were two parcels of land X and Y in plan D 2, both of which were severed from the rest of Pedris's land, namely, 30th lane. As regards parcel Y there was and is access to it from Charles Place and Edwards Drive. As regards lot X the access to it from Edwards Drive was and is by the 30th lane, and that therefore the defendant is entitled to a right of way to X over 30th lane. In short, that lot X is the *quasi*-dominant tenement and 30th lane the *quasi*-servient tenement.

This case, in my judgment, involves a considerable expansion of the rule laid down in *Bayley v. Great Western Railway Co.* and *Hansjord v. Jago (ubi supra)*.

[1] *(1884) 26 L. R. 434, at p. 457.*

[2] *(1912) 2 Chancery 60.*

[3] *(1921) Law Reports 322.*

In those cases considerable stress was laid on the fact that the easements claimed, if not rights of necessity, were necessary for the reasonable and convenient use of the buildings standing on the *quasi*-dominant tenement when it was severed from the *quasi*-servient tenement. There is in this case some evidence that there was a cattle shed on lot X occupied by a dairyman, who used 30th lane for taking his cattle to and from the shed. The shed has disappeared, and it was not mortgaged or conveyed to the mortgagees after their purchase at the sale in execution, nor does the defendant claim the right of way as necessary for the reasonable and convenient use of the shed. In *Bayley v. Great Western Railway Co.*, the stable in respect of which the right of way was claimed by the railway was conveyed to the Company and it was held that the Company was not precluded from claiming the right of way so long as the premises were used as a stable. This case is therefore not an authority which supports the defendant's claim to the right of way in question, even if the evidence that it was used by the dairyman is true.

It is clear from the plans filed in the case that Mr. Pedris had the land he purchased blocked out and surveyed by Mr. M. G. de Silva on various dates. Glenford and Medway were depicted in plans 3,237 and 3,235, made on May 11, 1926, and 30th lane provided as a means of access to Glenford from Edwards Drive, and incidentally to Medway. Siriden comprising lots S and Y was surveyed and plan No. 3686 (P 7) made on May 21, 1929, more than a year before the mortgage was executed and before the loan was applied for by Mr. Pedris, and lots X and Y were mortgaged and sold as one parcel of land depicted in plan No. 3686.

Neither of the mortgagees nor the purchaser at the sale in execution had any reason to think that two parcels of land were mortgaged and sold. The fact that Mr. de Saram saw a hedge between one portion of the parcel and another portion of it does not convert the parcel into two. Lots X and Y had no existence as separate parcels until this case and the defendant is, in my opinion, not entitled to claim a right of way to the public road on the ground that X was a separate parcel of land.

This is not a case where an owner of two tenements had sold one, nor the case where an owner of a parcel of land has sold a part of it with the result that access from the parcel to the highway or a way necessary for its reasonable and convenient use has been cut off.

On the contrary, the owner has sold a defined parcel of land which has all reasonable and necessary access to the road and the buyer is not entitled to claim a right of way to some particular point of it. Even if lots X and Y consisted of two parcels, it is quite open to an owner to amalgamate them and sell them as one parcel by reference to a plan made for the purpose or by description, and a buyer who purchases the lots as one parcel is not entitled to say, "I must have another way of access to a portion of it, which by reason of the configuration of the land I can use as a separate portion".

Again, where the immediate purchasers have not claimed or made use of a right of way in dispute, it is, in my opinion, doubtful whether a subsequent purchaser could claim it as on an implied grant. But it is not necessary to decide that point.

I am of opinion that the defendant cannot by reason of the fact that he purchased Siriden as one parcel of land claim from Mr. Pedris or the plaintiff a right of way to lot X. It is therefore not necessary to discuss the evidence that it was used by a dairyman in going to and from the parcel now marked X nor to decide whether that evidence is true or false.

In the result the second ground upon which the right of way was claimed fails, and I dismiss the appeal with costs.

MOSELEY J.—I agree.

Appeal dismissed.