1955 *Present :* **Gratiaen J. and Pulle J.**

W. M. H. C. RODRIGO, Appellant, *and*
K. V. NARAYANASAMY, Respondent

S. C. 349—D. C. Colombo, 5,664 L

Co-owners—Amicable partition—Right of way—Express grant or reservation necessary.

When land which is owned in common has been amicably partitioned, a former co-owner is not, as a general rule, entitled to claim a right of way over a portion allotted to another co-owner unless it has been expressly granted or reserved in the cross-conveyances executed by the co-owners, even though a well-defined footpath had existed prior to the severance of the common property.

APPEAL from a judgment of the District Court, Colombo.

N. K. Choksy, Q.C., with *Eric Amerasinghe*, for the defendant appellant.

H. W. Jayewardene, Q.C., with *E. Gunaratne* and *P. Ranasinghe*, for the plaintiff respondent.

Cur. adv. vult.

February 8, 1955. GRATIAEN J.—

This is an appeal against a judgment declaring that the defendant is not entitled to a right of way over the plaintiff's contiguous allotments of land depicted as D1, E1 and F1 in the plan filed of record.

The defendant and his sister Jane Wijetunga had admittedly been co-owners of a larger land including lots D1, E1 and F1. In order to implement an agreement to partition the land, two contemporaneous notarial deeds of exchange P5 and P7 were executed in 1944. By P5 the defendant conveyed the entirety of his undivided interests in lots A, B, D1, E1, and F1 to Jane Wijetunga and she in turn conveyed to him all her interests in lots C, C3, D, E, F and G by P7. Each of them accordingly became (to the exclusion of the other) the sole owner of separate land comprising the several allotments conveyed by P5 and P7 respectively. At a later date, the plaintiff succeeded to Jane Wijetunga's rights by purchase.

It is admitted that, before the date of the amicable partition referred to there was a well-defined footpath which proceeded across lots D1, E1 and F1 and then continued beyond F1 until it reached a main highway leading to Colombo. This footpath had previously been used by both the defendant and Jane Wijetunga in the exercise of their rights of common ownership. The defendant's claim is that, upon a true construction of the conveyances P5 and P7 in his favour, he either acquired or reserved to himself a servitude entitling him to continue to use this particular section of the footpath (with which this action is alone concerned) as owner of the dominant tenement comprising his contiguous

allotments C, D, E, F and G. His alternative submission that he had acquired the alleged servitude by certain other means was abandoned at the trial and does not now arise for our consideration.

The terms of the conveyance P7 by Jane Wijetunga in favour of the defendant did not expressly purport to grant him the servitude which he claims to have acquired ; it is even more significant that the servitude was not expressly reserved in his favour in the contemporaneous deed P5 whereby his interests in D1, E1, F1 were, without express qualification, conveyed to his sister. Nevertheless, it was argued at the trial that the servitude was either granted by implication (under P7) or reserved by implication (under P5). In my opinion, the rejection of these submissions by the learned Judge was perfectly correct.

Under the Roman-Dutch Law, a servitude cannot as a general rule be granted by mere implication—*Meiyappa Chettiar v. Ramasamy Chettiar* [1]. Similarly with regard to the grant of an easement under the English Law. The exceptions to the general rule fall within the same principle in both systems. In the ultimate analysis, of course, the question always turns on the true meaning of a particular written instrument.

The argument that Jane Wijetunga's conveyance P7 had by implication granted a right of way over lots D1, E1 and F1 (as servient tenements) in favour of lots C, D, E, F and G (as dominant tenements) could only have succeeded upon convincing proof that the use and enjoyment of lots C, D, E, F and G would otherwise be rendered virtually ineffectual. It was not sufficient to show that the footpath had in fact been used before the partition took place ; the defendant had also to establish that its continued use after the severance of the common property was, even if not absolutely essential, at least "reasonably necessary for the reasonable and comfortable enjoyment of the part granted "—i.e., of lots C, D, E, F and G,—per Bowen. L. J. in *Bayley v. G. W. R. Co.*[2] The evidence in fact indicates that there were other reasonable and equally convenient means of access from these allotments to the main highway.

In the circumstances of the present case, the failure of the defendant to reserve the servitude in his favour in express terms in the cross-conveyance P5 not merely affords a very strong additional argument against his claim ; it conclusively destroys his case. The deeds of exchange were contemporaneously executed in order to implement a mutual agreement between the co-owners. They must be read together in order to ascertain the common intention of the parties, and in this case an implied grant of a servitude should not be read into the terms of P7 unless its implied reservation in P5 can be inferred with equal propriety.

A reservation of a servitude by a grantor in his own favour must generally be made in express terms—*Wheeldon v. Burrows* [3]. "Two well-established exceptions relate to (servitudes) of necessity and mutual (servitudes) such as rights of support between adjacent buildings. But these two specific exceptions do not exhaust the list which is indeed

[1] *(1939) 41 N. L. R. 324 at 327.* [2] *(1884) 26 Ch. D. 434 at 453.*

[3] *(1879) 12 Ch. D. 31.*

incapable of exhaustive statement, as the circumstances of the particular case may be *such as to raise a necessary inference that the common intention of the parties must have been to reserve some (servitude) to the grantor, or such as to preclude the grantee from denying the right consistently with good faith* "—per Jenkins L. J. in *Sandom v. Webb* [1]. The Court there held that a claim based on an implied reservation of an easement must fail unless the grantor can show that the facts were " not reasonably consistent with any other explanation ". It is idle to suggest that the defendant has satisfied this formidable test. I would therefore dismiss the appeal with costs.

PULLE J.—I agree.

Appeal dismissed.