1957 *Present:* Sansoni, J.

MAHESWARY and another, Appellants, *and* T. PONNUDURAI, Respondent

S. C. 228—C. R. Point Pedro, 1,211

Right of way—Praedial servitude—Transfer of the praedium—Effect on the servitude

When a right of way becomes attached to a land by prescriptive user and that land is transferred, the servitude itself passes even though it is not specially mentioned in the deed of transfer.

APPEAL from a judgment of the Court of Requests, Point Pedro.

N. K. Choksy, Q.C., with *T. K. Curtis*, for the defendants-appellants.

C. Ranganathan, with *P. Nagaleswaram*, for the plaintiff-respondent.

Cur. adv. vult.

December 10, 1957. SANSONI, J.—

The dispute in this action concerns a lane. To the east of this lane lies a land belonging to the plaintiff, to the west and north of it are lands belonging to the two defendants. The plaintiff's land is separated from the public road by a land belonging to one Thamotharam, and the plaintiff's case is that access to the road lies along this lane.

The plaintiff claims that he and his predecessors in title used that lane to go to and from his land for over 10 years and thereby acquired a prescriptive right to use the lane as appurtenant to that land. In 1952 access to the lane from the public road was blocked by the defendants, and this action was brought in consequence.

The defendants denied that the plaintiff had any right to use the lane. They claimed the lane as part of a larger land of which their lots to the West and North of the lane formed a part. They pleaded that the lane existed solely for their use as a means of approach from the public road to their lots.

The learned Commissioner held that the lane has existed as a lane for over 60 years. This conclusion is inevitable in view of the deeds produced by the defendants themselves. From 1890 onwards the eastern boundary of one of the defendants' lands has been consistently described as a lane, and the other land has been described as bounded on the south by a lane. The plaintiff's deeds describe his land as bounded on the west by the lane. But there is a further conclusion which may also be reached from the description in the deeds, and it is that this lane for the last 60 years or more has not been a part of either the plaintiff's or the defendants' lands, for where the boundary of a land is a lane, that lane cannot form part of the land. Indeed this is how the father (and predecessor in title) of the present defendants also regarded this lane. In 1944 an action was brought for the partition of the larger land of which the defendants' lands formed part. The father of the defendants, and the first defendant herself who was also a party to that action, asked that the lane in question should be excluded from the scope of the action as it was a common lane. They would not have made this request if the land over which the lane ran was part of the land to be partitioned.

There is no evidence as to how or when this lane came into existence. The plaintiff's witness Kathirgamar who is 74 years old has stated that the lane was in use ever since he could remember, and that it was used by the owners of the lands adjoining it. The learned Commissioner was entirely justified in holding that the plaintiff and his predecessors in title used this lane as a means of approach to their land. The need for using it may not have been so urgent when the plaintiff's land and the land lying to the south of it belonged to one owner, because the public road would then have been the southern boundary of the entire land. But in 1916 the southern portion adjoining the public road was separated off and sold, and it now belongs to Thamotharam. From 1916 therefore, access to the public road from the plaintiff's land was only possible either

along this lane or over the land lying to the east of the plaintiff's land. It was suggested for the defendants that the latter was in fact the mode by which the plaintiff and his predecessors in title had access to the public road, but the learned Commissioner has rejected this suggestion; I am not surprised that he did so, seeing that the defendants' witness Murugesu, who was apparently called to support this suggestion, failed to support the defendants on this point.

Mr. Choksy for the defendants-appellants also submitted as a matter of law that the deed upon which the plaintiff purchased his land has not in terms conveyed to the plaintiff the right to use this lane. He submitted that as there was no mention of servitudes or appurtenances in the plaintiff's deed, the servitude in dispute did not pass to the plaintiff. Now the learned Commissioner has correctly held that the plaintiff and his predecessors in title used this lane to have access to their land and acquired a prescriptive right so to use it. It follows that a right of way became attached to the plaintiff's land by such user. When the land was transferred to the plaintiff, the right of way over this lane also passed to the plaintiff, and I hold that there was no necessity for particular mention to be made of this servitude. In *Suppiah v. Ponnampalam* [1], Wood Renton J. held that when a right of way became attached to a land and that land was transferred, the transferee was entitled to assert his right, as the owner of the dominant tenement, against the owner of the servient tenement even though the right of way was not specifically transferred. I would follow this decision which is supported by many authorities to which my attention has been drawn.

Voet S.J.C. says "The imposition of real servitudes moreover burdens every successor, whether universal or particular, to the servient tenement, and contrariwise benefits those who succeed to the dominant tenement, the tenements, that is to say, passing along with their burden". There is also the following statement in *The South African Law of Property, Family relations and Succession* by Lee and Honore (1954) page 24, "The benefit to and the burden of a servitude are inseparable from the land to which they are attached; they pass with the land to every succeeding owner. The right to the servitude cannot be separated even temporarily from the right to the land". In *Hall and Kellaway on Servitudes* at page 2 we are told that "praedial servitudes are portions of immovable things and as such are themselves immovable". It follows that when the praedium of which the servitude forms a part is transferred, the servitude itself passes even though it is not specially mentioned in the deed of transfer.

It is not necessary to consider the position of a personal servitude such as the right of way which was granted in the case of *Wijeyesekera v. Vaithianathan* [2], for such a servitude does not become an accessory of the dominant tenement and therefore does not pass with a transfer of the dominant tenement. In the present case we are concerned with a right of way acquired by prescription for the benefit of the plaintiff's

[1] *(1911) 14 N. L. R. 229.*

[2] *(1938) 40 N. L. R. 315.*

land : such a servitude is real, and on the authorities to which I have referred it seems clear that upon a transfer of the dominant tenement the servitude vests in the transferee.

Mr. Choksy also referred me to the case of *Sellathurai v. Chelliah* [1], where it was held that a transfer of the dominant tenement "with the appurtenances" passes a real servitude. It does not follow from this decision that if the words "with the appurtenances" are omitted from the deed of transfer a real servitude which attached to the land does not pass.

I dismiss this appeal with costs.

Appeal dismissed.