1954 *Present :* **Gratiaen A.C.J. and Gunasekara J.**

S. L. SUWARIS *et al.*, Appellants, *and* E. D. SAMARAJEEVA, Respondent

S. C. 471—D. C. Colombo, 5,778

Servitude—Habitatio—*Its precise nature—Grant to a person and " his heirs, executors, administrators and assigns "—Effect of such grant.*

If an owner of immovable property conveys it to A but, in the same instrument, purports to grant to B " the buildings " standing on it (exclusive of any soil rights), the instrument *prima facie* operates under the Roman Dutch law as a grant of the ownership of the land and buildings to A subject only to a personal servitude of *habitatio* in favour of B.

The servitude of *habitatio*, i.e., the right of inhabiting the house of another, is a personal servitude and terminates on the death of the grantee.

Where a servitude of *habitatio* was granted in favour of a husband and wife and " their heirs, executors, administrators and assigns "—

Held, (i) that two different personal servitudes were created, one of which was subsequently acquired by the immediate heirs of the first grantees. The term " heirs " in such a case is restricted to the first generation only, and so long as one of the heirs is alive the servitude is not terminated.

(ii) that the words " executors, administrators and assigns " must in the context, be regarded as " a notarial flourish ".

(iii) that the servitude of *habitatio*, though " personal " in character, nevertheless confers on the *habitator* for the time being a real right and entitles him to bring a *rei vindicatio* action for the recovery of that right even against the true owner of the property.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, with *M. L. de Silva,* for the defendants appellants.

E. G. Wikramanayake, Q.C., with *O. M. da Silva,* for the plaintiff respondent.

Cur. adv. vult.

March 2, 1954. GRATIAEN A.C.J.—

Four persons (being the predecessors-in-title of the plaintiff) together with Mr. and Mrs. Suwaris (a married couple) at one time enjoyed various interests collectively comprising full *dominium* over a property situated in Wellawatte. Lot 195c depicted in survey plan P9 dated 26th June, 1921, is a divided allotment of that property.

Lot 195c was caused to be sold by the Municipal Council of Colombo for non-payment of rates in 1920, and it became absolutely vested free of all encumbrances in the Council, as purchaser, under a vesting certificate P8 dated 1st June, 1922.

In 1929 the Council reconveyed Lot 195c to the six persons previously referred to for valuable consideration ; the intention of the Council (as expressed in the deed P6) was to restore to each grantee the title or interest which he or she claimed to have enjoyed in the property before the forfeiture for non-payment of rates had taken place. There is a recital in the conveyance P6 to the effect that (as jointly represented by all the grantees) the predecessors-in-title of the plaintiff had been co-owners of the property in certain specified shares, whereas Mr. and Mrs. Suwaris were only "*entitled to the house and outhouse exclusive of any portion of the land on which they stand*". The Council accordingly conveyed Lot 195c "*to the said grantees, their heirs, executors, administrators and assigns . . . . to hold the same in the manner hereinbefore particularised*".

Mr. and Mrs. Suwaris died before the present action commenced, leaving the defendants as their intestate heirs. The title of the other grantees ultimately passed to the plaintiff on 2nd August, 1949. Two months later he sued the defendants, who were admittedly in possession of " the house and shed " standing on Lot 195c, for a declaration of title to the entire property including the buildings, and also for ejectment. He admitted in paragraph 22 of his plaint that Mr. and Mrs. Suwaris were during their lifetime " entitled to the said house ".

Lot 195c is only 21·64 perches in extent, and has been valued by the plaintiff (inclusive of the buildings) at Rs. 3,000. The buildings alone (which are substantially in the same condition as they were in 1920) were separately assessed by the learned Judge at Rs. 1,000. There are a few coconut trees standing on the rest of the land which serves as a compound of the main building.

The case for the plaintiff is that, whatever description might have been given to the interests of Mr. and Mrs. Suwaris in respect of the buildings during their lifetime, the defendants (as their heirs) enjoy nothing more than a right to be compensated for their value. He claims that as he is now the sole owner of Lot 195c, he is entitled to eject them whenever he chooses to do so on payment of such compensation.

The defenadants completely over-stated their case in the Court below. They attempted to prove that the right of occupation conveyed to Mr. and Mrs. Suwaris and to them under the conveyance P6 had long since been enlarged into full ownership of Lot 195c by virtue of adverse prescriptive user. I agree with the learned Judge that this plea was not established by the evidence, and I accept his finding that Mr. and Mrs. Suwaris' enjoyment of the produce from the few trees standing on the compound had been merely permissive. On the other hand, their occupation of the buildings was referable to the exercise of the legal rights conferred on them by P6, and could not therefore be relied on as a mode of acquiring further rights of ownership by prescription.

The learned Judge awarded the plaintiff a decree for declaration of title and ejectment against the defendants as prayed for, but directed the plaintiff to pay to them a sum of Rs. 1,000 as compensation for the value of the buildings. It is but fair to the learned Judge to state that the trial had throughout proceeded on the assumption that, as a matter of law, this was the necessary consequence of a decision adverse to the defendants on the

issue of prescription. In my opinion, however, the true legal position arising from the established facts calls for a closer analysis than it had received in the lower Court.

Absolute *dominium* over Lot 195c, including the buildings standing on it, had without doubt passed to the Council in 1922 under the vesting certificate P8, which operated to extinguish all prior rights enjoyed over the property by the plaintiff's predecessors-in-title and by Mr. and Mrs. Suwaris—*vide* section 145 of the Municipal Councils Ordinance (Cap. 193). Similarly, the subsequent grant of the soil rights in favour of the plaintiff's predecessors-in-title also vested in them the ownership of the buildings which, in accordance with the maxim *omne quod inaedificatur solo cedit,* had acceded to the soil and become part and parcel of it. " If in a conveyance of land the alienor purports to convey the soil apart from the surface, this does not prevent the surface passing with the soil, for by its nature it is one with it "—*Digest 44.7.44.1.* This is the converse case.

To what extent was the totality of these proprietary rights conveyed by P6 reduced by the contemporaneous grant to Mr. and Mrs. Suwaris and their heirs of the " house and outhouse exclusive of the land on which they stand " ? That the ownership of the buildings themselves did not pass to Mr. and Mrs. Suwaris or their heirs under P6 has already been made clear ; and it is equally clear that the ownership of the bare materials with which the building had originally been constructed did not pass to them either, for those materials had long since lost (and have never reacquired) the character of " movable property ". The conveyance does not purport (even by implication) to authorise Mr. and Mrs. Suwaris or their heirs to demolish the buildings (to the ultimate prejudice of the other grantees who owned the property) and to remove the materials from the site.

Two alternative theories as to the true meaning of the conveyance P6 have been submitted for our consideration : the first is the view which had been tacitly assumed at the trial to supply the only true answer, and the other was raised for the first time during the hearing of this appeal. The alternatives suggested are :

(1) that the grant of the " house and outhouse exclusive of the land they stand on " operated only to restore to Mr. and Mrs. Suwaris a *jus retentionis* coupled with a right under the common law to be compensated for the improvements previously effected by them either as co-owers or as *bona fide possessors* of Lot 195c ;

(2) that it operated as a grant to Mr. and Mrs. Suwaris and also to their " heirs " of a personal servitude (*habitatio*) entitling them to occupy the buildings which, upon the execution of P6, passed into the ownership of the other group of grantees.

I agree with Mr. Wikramanayake that we should not at this stage entertain the argument based on this latter proposition if the problem involves consideration of a mixed question of fact and law. In other words, we must be satisfied that the true meaning of the words of P6 can and must be ascertained exclusively from the language of P6 itself and without an investigation of extraneous facts.

If an owner of immovable property conveys it to A but, in the same instrument, purports to grant to B " the buildings " standing on it (exclusive of any soil rights), the instrument *prima facie* operates under the Roman Dutch law as a grant of the ownership of the land and buildings to A subject only to a personal servitude of *habitatio* in favour of B. By this interpretation, what would otherwise be two inconsistent grants are logically reconciled.

The precise nature of the servitude of *habitatio* is explained in *Voet 7.8.6–9.* It is " the right of inhabiting the house of another, its substance being preserved intact, and he who has this granted to him cannot give it but can let it to another. . . . It perishes by the death of him to whom it was granted ". The maxim *res servit personae* is fundamental to the nature of such a servitude—*Willoughby's Consolidated Co. Ltd. v. Copthall Stores Ltd.* [1]. On the other hand, there is nothing to prevent the grant of a personal servitude to an immediate grantee and also to " his heirs ", in which event, there are created " two different (personal servitudes), one of which is afterwards acquired by the heirs of (the first grantee) . . . . But though under the name of ' heirs ', also ' heirs of heirs ' *ad infinitum* are usually comprehended, yet in this case the first generation only is to be considered included, lest otherwise the ownership might be of no use whatever to the owner, the (personal) servitude being severed from it in perpetuity "—*Voet 7.4.1.* What the jurist has there expressly stated in regard to the servitude known as *usufruct* is equally applicable to all other personal servitudes. Vide also *Kanagalingam v. Kamalawathie* [2]. (The addition of the words " executors, administrators and assigns " appearing in the conveyance P6 must in this context be regarded as " a notarial flourish ".)

If, therefore, in the present case, the conveyance P6 did in truth grant a personal servitude in favour of Mr. and Mrs. Suwaris, a similar servitude must also have been created by the same instrument in favour of the defendants as their immediate heirs. It must also be emphasised that the servitude of *habitatio*, though " personal " in character, nevertheless confers on the *habitator* for the time being a real right " comprising a part of the *dominium* " and entitling him to bring a *rei vindicatio* action for the recovery of that right even against the true owner of the property—*Galant v. Mahonga* [3].

The suggested alternative interpretation of P6 must now be considered. Can we rule out the view that (having regard to the recitals in P6) the conveyance conferred on Mr. and Mrs. Suwaris and their heirs only a *jus retentionis* terminable by payment of compensation in respect of the buildings (the full ownership of which had contemporaneously passed to the other grantees) ?

Even if it had been permissible to interpret P6 by reference to evidence extraneous to the document, I would have rejected the argument that, before the date of the vesting certificate P 8, Mr. and Mrs. Suwaris had possibly enjoyed the rights of *bona fide possessors* who had improved property belonging to its true owners. It is completely negatived by

[1] *(1913) A.D. 267 at 282.*

[2] *(1948) 49 N. L. R. 357.*

[3] *(1922) E. D. L. 79.*

the particulars of the chain of title pleaded in the plaint, and in any event I fail to see how an owner of property can confer by notarial deed a bare *jus retentionis* over it in favour of someone else.

According to paragraph 3 of the plaint, Mr. and Mrs. Suwaris had themselves been co-owners of the larger property (including Lot 195c) at a stage when the buildings under discussion had already been erected. It is apparent, therefore, that the only logical basis of the subsequent joint representation (if true) made to the Municipal Council by all the prospective grantees under P6 was that Mr. and Mrs. Suwaris had at some later point of time parted with their soil rights in the property, reserving to themselves only some limited right to occupy the buildings standing on it. Those rights necessarily fell short of rights of unqualified ownership. I am not aware of any principle of law under which, *apart from contract*, a former co-owner who subsequently retains only a right to occupy a building standing on what had once been common property can maintain a claim to be compensated for the value of that building. No such contract has been suggested in the pleadings and, even if it did exist, it could only have created rights *in personam* with which the Municipal Council was not in any way concerned.

Let us however assume that Mr. and Mrs. Suwaris, *as former co-owners who had improved the common property*, enjoyed at an earlier point of time a *jus retentionis* over the buildings until they received compensation from the plaintiff's predecessors-in-title. Even then, the property itself was released by operation of law from the impact of this assumed right when Lot 195c passed into the absolute ownership of the Municipal Council in 1922. Thereafter, the Council continuously enjoyed (until P6 was executed) the entire " bundle of rights " comprising *plena proprietas* over Lot 195c, and the conveyance was directly intended only to transfer that " bundle of rights " to a group of persons (including Mr. and Mrs. Suwaris) *in accordance with the scheme of distribution specified in the document*. There is no room for looking beyond the language of the conveyance itself for the details of this " scheme of distribution ". The intention was to restore to the grantees such real rights as they claimed to have enjoyed previously, not unspecified rights which they may have enjoyed in fact.

Let us not forget that the problem before us falls within a very narrow compass. Our duty is to interpret the conveyance P6 in accordance with well-established principles prescribed by law for the interpretation of written instruments. By P6, the rights of ownership previously vested in the grantor were distributed among a group of persons in the manner specified in the instrument itself. Before the conveyance was executed the grantor owned the buildings and also therefore enjoyed the right to occupy them. The effect of the conveyance was to pass the ownership of the land and buildings to one group of grantees, and the right to occupy the buildings to another group. In other words P6 operated primarily as a conveyance (by distribution) of proprietary rights, and not as an instrument for the creation or revival of extraneous rights and obligations. The language of P6 does not justify even the theory that it operated as a grant of unqualified ownership of the land and buildings to the plaintiff's predecessors-in-title subject to their acceptance of an obligation to make a payment of

money (by way of compensation) to Mr. and Mrs. Suwaris. If that had been the intention, the conveyance should have been very differently worded.

In my opinion, the only permissible interpretation of the conveyance is that the Council's ownership of the buildings passed to the plaintiff's predecessors-in-title, but subject to a personal servitude (*habitatio*) in favour of Mr. and Mrs. Suwaris and of the defendants as their immediate heirs. The property cannot therefore, except by renunciation, be released from this servitude so long as one of the defendants is alive—*vide* in this connection the observations of Gardner J.P. in *Arend v. Est. Nakiba* [1]. It follows that the claim to eject the defendants is premature. For these reasons, I would vary the decree entered in the Court below by granting a declaration of title in favour of the plaintiff as prayed for, but subject to a servitude of *habitatio* in favour of the defendants. I would also delete the order for ejectment and the order for compensation. As each party has partially succeeded in the action and in this appeal, there will be no order for costs in either Court.

GUNASEKARA J.—I agree.

Decree varied.