Present: Bertram C.J. and De Sampayo J. 1921.

SENANAYAKE *v.* SELASTINA HAMINE *et al.*

26—D. C. Negombo, 13,604.

Conveyance of an undivided eastern portion of 2 acres—Legal effect—Partition.

Where a person granted to another an undivided eastern portion of land in extent 2 acres,—

Held, that it was not possible to give legal effect to a word of locality introduced into a grant of an undivided share, but that on a partition the Court would endeavour to give effect to the intention implied by the use of such a word by assigning to the shareholder a portion in the direction indicated.

THIS action was instituted by the plaintiff to partition the land called Higgahawatta. The plaintiff upon deed No. 5,645 of February 13, 1918, marked P 3, claimed an extent of 2 acres from the east, the defendant being entitled to the rest of the land.

The defendant filed answer admitting the shares, and consented to the partition, provided the plaintiff was given his 2 acres extent from the eastern portion of lot C. At the trial the plaintiff refused to accept his share from the eastern portion of lot C, on the ground that lot C was extremely barren land, and also that his vendors, the daughter and son-in-law of the defendant, purported to sell to him an extent of 2 acres from the eastern portion of lots A and B. The District Judge (W. T. Stace, Esq.) delivered the following judgment :—

This is a partition case in which it is admitted that the plaintiff is entitled to 2 acres of the land and the defendant to the rest. There is a dispute, however, as to where the plaintiff should have his two acres. Plan 3,003 filed of record shows this land consists of lots A, B, and C. The whole land belonged to the defendant. She gifted to her daughter "the undivided eastern portion of land in extent 2 acres." Her daughter sold it to the plaintiff. Plaintiff claims that he should have his share out of lot B. This is fertile land. Defendant claims that an eastern portion should be interpreted to mean the most eastern portion, and that would be the eastern part of lot C. The eastern corner of lot C, however, is much poorer land than the rest, and hence plaintiff objects. It is difficult to interpret such utterly vague language as that of the deed in question. But, I think, it is clear that defendant cannot have intended to sell 2 acres out of lot B, because a glance at the plan will show that 2 acres extent to the east of lot B would include the defendant's residing house. Moreover, plaintiff's argument from the value of the land as recited in the deed is worthless, because the value recited there is admittedly fictitious. Hence, since defendant did

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not intend to sell from lot B, it must be from lot C, and it is certainly the case that this accords best with the wording of the deed, since lot C stretches further east than the rest of the land.

The land described in lease deed No. 7,634 is from the boundaries and extent obviously lot C in the plan. The ownership of lot C by plaintiff and defendant will, therefore, be subject to this lease. Costs of contest between plaintiff and first defendant to be paid by plaintiffs, and other costs *pro ratâ*.

P 3 was as follows :—

Transfer No. 5,645.

On February 15, 1918, we, Ranatunga Aratchige Francina Hamine and Tennekonmudalige Cornelis Perera Appuhamy, wife and husband, of Yatiyana in Dasiya pattu of Alutkuru korale, declare that the under-described property belonging to us on the deed No. 1,272 dated February 22, 1916, attested by D. B. P. Karunaratne, Notary Public, for Negombo District, is under our uninterrupted possession :

And we have agreed with Senanayaka Aratchige Don Seadoris Senanayaka of Vigada in the said pattu and korale to sell and transfer the same in manner, free of mortgage, security, and all encumbrances for Rs. 750 Ceylon currency ; and so—

Know all men by these presents that for the said agreement and for the sum of Rs. 750 well and truly paid to us by him, the said Don Seadoris Senanayaka (the receipt whereof we hereby acknowledge), the following sale was made :—The Higgahawatta at Valpitamulla, in Dasiya pattu of Alutkuru korale in Negombo District, is bounded on the north and west by land of Juanis Silva, Muhandiram ; east by garden of Kuruppu Aratchige Denus Appo and the field ; and south by lands of late Don Bastian, Police Vidanerala, and others ; in extent within these boundaries 17 acres 17 perches. Of the undivided five-sixths shares of this land, an eastern undivided portion of 2 acres and the buildings, plantations, and all appurtenances thereof we hereby sold and transferred unto the said Don Seadoris Senanayaka.

So all our rights thereto shall devolve on vendee and his heirs, &c., for possession or disposal at will.

Attested by D. Jn. Gunewardana,
Dated February 15, 1918. Notary Public.

Hayley, for the plaintiff, appellant.

F. de Zoysa (with him *Croos-Dabrera*), for the defendants, respondents.

October 3, 1921. Bertram C.J.—

In this case a difficulty arises, because the grantor of a share in land now sought to be partitioned has effected a conveyance to his grantee of an undivided eastern portion of land in extent 2 acres. The question is whether a grantor, who has granted such an interest, can claim on a partition that his grant is to be treated exactly as though it was a grant of a divided 2 acres. The truth appears to be that it is not possible to give legal effect to a word of locality

introduced into a grant of an undivided share, and such a word is in itself of no legal consequence. But on a partition the Court would endeavour to give effect to the intention implied by the use of such a word by assigning to the shareholder a portion in the direction indicated. The grantee of such a share would, however, be entitled to all the privileges which in such circumstances belong to the owner of an undivided share, that is to say, in this instance compensation in respect of the inferior quality of the land assigned to him, and a right of way between the portion so assigned to him and the public road. For a grantor to seek to refuse such rights to his grantee is an attempt to derogate from his own grant. In my opinion the decree should be varied by a direction to the effect above indicated, and the appeal should be allowed, with costs.

DE SAMPAYO J.—I agree.

Appeal allowed.