Present : Schneider A.J. 1920.

PERIES *v.* MUNASINGHE *et al.*

106—C. R. Colombo, 72,466.

Right of way—Extinction of servitude by merger—Subsequent sale of lands to different persons—Does right of way revive ?

Where a person bought both the dominant and servient tenements with no intention of any subsequent separation of the two tenements, and where he sold one land to plaintiff and the other was sold in execution to defendant's predecessor in title.

Held, that the servitude (right of way), which had become extinct by merger, did not revive on the subsequent separation of the two lands.

THE facts appear from the judgment.

A. St. V. Jayawardene, for plaintiff, appellant.

H. J. C. Pereira, for defendants, respondents.

September 13, 1920. SCHNEIDER A.J.—

The facts necessary for the decision of this appeal are these : One Edirisuriya acquired title to a highland and to some fields. At that date the owners of the fields had acquired by prescription a right of way over the highland to their fields. Edirisuriya owned and possessed both the highland and fields for nearly twenty years before this action. In 1918 and 1919 he sold the fields to the plaintiff. Subsequent to the sale in 1918, viz., in 1919, his interest in the highland was sold in execution of a decree. The defendants are now the owners of that interest by purchase from the purchaser at the sale in execution. The plaintiff since his purchase has used the path which existed along the highland without objection on the part of Edirisuriya or the purchaser at the sale in execution. Upon these facts the only question is, whether the confusion or merger of the right of servitude enjoyed by the owners of the fields by the acquisition of those fields by the owner of the servient tenement was revived by his sale of the fields to the plaintiff. The Commissioner dismissed the plaintiff's action on the ground that the servitude had been lost by merger.

Mr. Jayawardene, for the plaintiff, appellant, contended that the servitude was revived for two reasons, because (1) Edirisuriya in his conveyance to the plaintiff conveyed the right in question in express terms, (2) the law is that the right revives in such circumstances as those of this case, apart from any express agreement to revive.

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SCHNEIDER A.J.

Peries v. Munasinghe

As regards the first of these reasons I have no hesitation in holding that the deed of conveyance by Edirisuriya in favour of the plaintiff does not expressly convey a right of way over the highland. The deed is on a printed form, and contains within the printed portion no more than the usual words of conveyance of servitudes to be found in all deeds conveying title to land. Besides this, the language of the deed clearly refers to rights which are in existence, and cannot be construed as reviving rights which had ceased to exist. Nor can the contention prevail for the second reason.

Under our common law there is no room for any doubt that the servitude became extinct by confusion or merger by the same man becoming owner both of the dominant and of the servient tenement.[1] There is no local enactment to preclude the common law from operating to create this merger. Therefore the question remaining is, whether the merger afterwards ceased and the servitude was revived after the sale to the plaintiff.

The law on the point according to Voet is summarized correctly by Maasdorp in *The Institutes of Cape Law* :—[2]

> " If the merger was not intended to be permanent, as where a revocable ownership of the dominant or servient tenement had been acquired, it must be held that servitudes which were extinguished by the merger will be revived after the separation. On the other hand, if the merger took place without any contemplation of any future separation, unless some new cause should supervene and separation does afterwards take place, the servitudes, which have been extinguished by the merger, will remain extinct."

Voet after stating the principle which should be applied, proceeds to say :—[3]

> " On the other hand, if the fusion has been made with no intention of any subsequent separation of the two tenements, unless some new cause arises (whilst the dominant or servient tenement has been acquired by the owner of the other tenement, whether servient or dominant, without any intention of again parting with the property so acquired), and then after all the two tenements become separated, the servitudes which the fusion destroyed are not revived by such separation, unless it was specially agreed that they should be revived ; and this happens in every case where a man simply purchases a tenement subservient to his own, and then afterwards alienates one or the other of them."

In the circumstances of this case, the fusion of the two tenements appears from the first to have been effected with the intention that it should be perpetual. Edirisuriya possessed both for over twenty

[1] *Voet, Com. ad Pan, 8, 6, 2.* [2] *Bk. 2, Chap. XXVI., p. 216 (Ed. 1903.)*
[3] *Commentarius de Pandectas, Book 8, Tit. 6, para. 3.*

years. He held each under an absolute title, and not conditionally as in the examples given by Voet. Hence it is a case where the fusion was made with no intention of any subsequent separation of the two tenements.

The point was raised by Mr. Pereira, for the respondents, whether the Roman-Dutch law of the revival of servitudes which had been merged had not been modified by our Ordinance No. 22 of 1871, the effect of which is to extinguish a servitude which is not used for a period of ten years. I do not consider it necessary to decide this contention in view of my opinion that the servitude was lost by merger otherwise and was not revived by the sale of the fields to the planitiff.

I dismiss the appeal, with costs.

Appeal dismissed.