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Present : Bertram C.J. and Schneider J.

PERERA *v.* SAMARAKOON.

417—D. C. Colombo, 1,912.

Servitude—Owner of the dominant tenement acquiring an interest in the servient tenement—Is servitude extinguished?—Admission on a point of law in the District Court—Is party making the admission bound by the admission in the Appeal Court?

One of the owners of the dominant tenement does not lose his servitude over the servient tenement by acqui ing an interest in the latter.

"An erroneous admission of counsel on a point of law has no effect, and does not preclude the party from claiming his legal rights in the Appellate Court."

THE facts are set out in the judgment of the District Judge (H. A. Loos, Esq.) :—

The plaintiff sues the defendant for a declaration that he is entitled to a right of way for carts and other vehicles over the defendant's lands Balawalakanatta and Haminewatta from the Gansabhawa road on the south to his (plaintiff's) fields on the north of the defendant's lands, along the track marked XXX shown in the sketch P filed with the plaint.

He states that under and by virtue of the deed No. 2,703 dated December 9, 1919, he became entitled to an undivided two-sevenths part of the land called Haminewatta and to an undivided two-sevenths of half share of the land called Balawalakanatta, and that in lieu of the said shares of those two lands, he, by arrangement, has been in possession of a divided portion of the land called Haminewatta, in extent about 3 roods, and depicted as lot C in the sketch P referred to above.

He states that the defendant is also a part owner of those two lands, and is in possession of a defined portion towards the south of his land, in extent about 1½ acre, and depicted as lot D in the sketch.

The plaintiff alleges that he and his predecessors in title had for upwards of thirty years been using the right of way already referred to through the defendant's portion, and have acquired a title by prescription thereto, but that on or about March 25, 1920, the defendant obstructed that right of way by putting up across it two barbed wire fences at the points marked Y and Z in the sketch P to his loss and damage of Rs. 50 per annum.

The defendant admits that the plaintiff is entitled to certain undivided shares in the two lands in question, but denies that by arrangement he is in possession of a divided portion of Haminewatta in lieu of those shares.

He admits that he is entitled to an undivided interest in those two lands, but denies that he is in possession of a defined portion as alleged by plaintiff.

He denies that the plaintiff and his predecessors in title have been using the track XXX for thirty years, and that they have acquired a right of way by prescription. He states further, that to the east of the track claimed by the plaintiff there is a footpath leading to the fields on the north, and furthermore, that there is a cart road along the western boundary of the said lands.

He denies that he obstructed the right of way referred to, and as a matter of law, he pleads that the plaintiff cannot maintain this action, inasmuch as he is a co-owner of the lands over which he claims the servitude.

The parties went to trial upon the following issues :—

(1) Is the plaintiff entitled to a right of cart way by prescription along the track shown in plan No. 1,743 made by J. Rodrigo ?

(2) What damages, if any, is plaintiff entitled to ?

(3) Is the plaintiff entitled by prescription to lot A in plan No. 1,743, or is he entitled to the undivided shares set out in paragraph 2 of the plaint ?

(4) If the plaintiff is entitled to the undivided shares set out in the second paragraph of the plaint, can he claim a servitude over the land held in common ?

It was agreed that the damages, if any, should be assessed at Rs. 5 per annum.

It was also admitted by plaintiff's counsel that no servitude is possible over the land if the plaintiff holds an undivided share of it.

The plaintiff has sought to establish that a division took place between the owners of the two lands, and that instead of undivided shares, divided and defined portions were allotted to each of them.

He has produced a document P 1, which purports to be an "allotment receipt," upon which he relies to prove that the division took place.

Admittedly, only a very few of the owners took part in that arrangement, and I am of opinion that it cannot be accepted as evidence of a formal division between the owners.

There is no doubt that some of the owners in pursuance of that arrangement took possession of defined blocks and lived on and cultivated them, but, admittedly, several of the owners were away from the village, and the blocks which it is alleged were allotted to them would appear to have been unoccupied and uncultivated till recently, after those shares had been sold to others.

That there was no formal division and possession by the several owners of divided and defined blocks, and that the division alleged to have been made was not accepted by or acted upon by all the owners seems to be clear, for so recently as in December, 1919, the deed in favour of the plaintiff himself purported to convey to him only undivided shares of the lands.

If there had been a formal division in 1898, as alleged by plaintiff, which was acted upon, I would have expected the plaintiff's deed to convey to him the defined portion which he now states he is entitled to.

The plaint seems to suggest that the arrangement by which the plaintiff came into possession of a defined block was made after his purchase, but no attempt has been made to establish such an arrangement subsequent to his purchase.

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There seems to be little doubt, upon the evidence, that the track claimed by the plaintiff has been used as a cart road for many years, for a deed No. 7,989 dated March 24, 1906 (P 2), under which defendant's father purchased a portion of the land in question, specifically excludes the "road running from the road bordering the eastern boundary to the wela"; it is proved by the vendor on that deed that the road there referred to as being excluded is the road now claimed by plaintiff.

I am not satisfied that the plaintiff is entitled to the defined lot A claimed by him, and I must hold that he is only entitled to the undivided shares set out in paragraph 2 of the plaint.

That being so, the plaintiff cannot, as admitted by his counsel, claim the servitude in question, as the land is held in common by him with the defendant and others.

I decide all the issues against the plaintiff. Let judgment be entered, dismissing the plaintiff's action, with costs.

A. St. V. Jayawardene, K.C. (with him *W. H. Perera*), for appellant.

E. W. Jayawardene (with him *E. G. P. Jayatileke*), for respondent.

May 8, 1922. BERTRAM C.J.—

This case turns entirely upon a point of law, namely, whether one of the owners of a dominant tenement who acquires an interest in a servient tenement thereby loses his servitude over the latter.

The plaintiff sought to establish that there had been an informal partition of the servient tenement, and that his interest in that tenement had been converted into a divided interest; and further, that the part allotted to him was a part through which the right of way in question lay. This was a question of fact, and was decided against the plaintiff by the learned Judge, who held that the interests of the various persons entitled to the servient tenement must be still considered as undivided interests. He understood counsel for the plaintiff in the Court below to admit that no servitude was possible over the land if the plaintiff held only an undivided share of it, and accordingly gave judgment for the defendant.

In this Court it was contended that the learned District Judge had misunderstood plaintiff's counsel, that he intended to make no such admission, and that in law one of the owners of the dominant tenement does not lose his servitude over the servient tenement by acquiring an interest in the latter.

It was further urged that, even if it were the case, counsel for the plaintiff in the Court below had mistakenly given up this point, it was still possible for the proposition to be re-asserted in appeal. This contention appears to be sound. Mr. A. St. V. Jayawardene, who appears for the plaintiff, cited to us two Indian cases—*27 Cal. L. J. at p. 499*, where it was laid down that "an erroneous admission of counsel on a point of law has no effect, and does not preclude the party from claiming his legal rights in the Appellate Court." See

also *38 Cal. 81* and *Walles v. Walles.*[1] The principal point is therefore open for argument. In any case no formal note of the suggested admission was made in the learned Judge's notes, and it is by no means clear to me that he correctly appreciated the position of plaintiff's counsel.

On the point of law above defined plaintiff is entitled to succeed. The principle involved is that of the extinction of servitudes by *confusio*. A servitude is extinguished when the servient and dominant land meet in the same hand, but there is no such *confusio* unless the interest of the proprietor in both tenements is identical. As it is put in a passage of the *Digest 8, 3, 27*: "*Servitus extinguitur quia par utriusque domini ius in utroque fundo esse incipit.*" It is expressely laid down by Voet that an action claiming the existence of a servitude is open even to a co-owner (*etiam socio*) wherever a tenement owned in common is servient to a tenement which is the property of one of the co-owners, or wherever a tenement which is the property of one of the co-owners is servient to a tenement held in common. (See *Voet 8, 5, 1.*) This is supported by various passages from the *Digest*. Some of these may seem to relate to cases in which the interest acquired in a servient tenement is a divided interest. But there is one passage, that already quoted, which clearly relates to undivided interests only. *Si proprio meo fundo et proprio tuo idem serviat manebit servitus*, that is to say: "If you and I are severally the owners of tenements to both of which another tenement is servient, and we jointly buy that servient tenement, the servitude is not extinguished" *8, 3, 27*. See also *Wesenbecius 8, 6, 2*: "*Ut autem ususfructus consolidatione, ita servitutes confusione extinguuntur; si idem utriusque prædii dominus in solidum esse cœperit. Dico. in solidum; nam si pro parte tantum fiat dominus pro parte servitutem etiam totam retinebit.*"

This question never seems to have arisen in English law in this form, but a corresponding question was discussed. (See *Gale* on *Easements, 9th ed., p. 453*): "But in order that the easement should be entirely extinguished, it is essential that the owner of the two tenements should have an estate in fee simple in both of them of an equally perdurable nature." See *Co. Litt. 313 a*: "They are said to be extinguished when they are gone for ever, *et tunc moriuntur*, and can never be revived, that is, when one man hath as high and as perdurable an estate in the one as in the other." It is thus held that to bring about a permanent extinction the estates must be of the same duration. American authorities have, however, gone further. Mr. A. St. V. Jayawardene has cited to us from an American book, *Freeman on Co-tenancy and Partition, paragraph 187*, an American decision, *Reed v. West*,[2] where the following principle is enunciated: "A unity of possession or right that extinguishes a prescriptive right must be such that the party should have an estate

[1] *8 C. W. R. at p. 193.*

[2] *16 Gray 284.*

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in the land *a qua* and in the land *in qua*, equal in duration, quality, and all other circumstances of right." This principle is, in my opinion, identical with that of our own law.

For these reasons the plaintiff, in my opinion, is entitled to the allowance of his appeal, with costs, both here and in the Court below.

SCHNEIDER J.—I agree.

Appeal allowed.