

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Steele and Loxdale v. Thompson, from the Supreme Court of Civil Justice of British Guiana; delivered on the 16th February, 1860.*

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Present :

LORD KINGSDOWN.

LORD JUSTICE KNIGHT BRUCE.

SIR EDWARD RYAN.

SIR JOHN TAYLOR COLERIDGE.

IN this case three points were raised :

1. Whether the servitude in question was well constituted ?
2. Whether, if well constituted, it was duly transferred to the Appellant ?
3. Whether if well constituted and duly transferred, it was lost by the failure of the Appellant to intervene and bring forward his claim on the transfer of the servient tenement to the Respondent.

There was very little controversy at the bar, either as to the material facts of the case or as to the general principles of law applicable to the subject, and the argument was conducted on both sides in a manner most creditable to the Counsel and most useful to their Lordships.

It is admitted that the servitude in question is of the character of immoveable property, and like other immoveable property can only be passed according to the Roman Dutch Law, which prevails in the Colony, by a proceeding in the presence of some Judge of the place in which the property is situate.

The first question in this case, is whether the transfer which was made of the dominant tenement,

with all due solemnities before Judges Commissary, can or cannot be construed by the rules of law to include the servitude in question.

This again depends, first, on the question whether the terms of the instrument import that all which was mentioned in the articles of agreement as intended to be conveyed, should be actually included in the transport: And secondly, whether supposing this to be the true import of the words such a transport, by way of reference to another document, is a sufficient compliance with the rule requiring a transport in the presence of the Judge.

The articles of agreement made between the vendor of the first part, and the purchasers of the second part, purport that the vendor offers to sell to the purchasers certain lands described by metes and bounds, and forty-three negroes, for a sum of 12,000*l.*, of which sum 6,000*l.* are to be paid by bills upon London, to be given at the time when the transport is passed; 4,000*l.* are to be secured by a first mortgage to be passed also at the time of the before-mentioned transport, to be charged on the plantation and negroes agreed to be sold, and also on twenty-five other negroes to be put on the plantation by the purchasers: the mortgage to be paid in two instalments of 2,000*l.* each, and the remaining sum of 2,000*l.* is to be secured by a second mortgage on the same property with the first, to be passed at the same time with the first, and to be paid in two instalments of 1,000*l.* each.

The agreement then states that the parties have agreed that the purchasers and their successors, owners of the plantation sold, shall have, for the benefit of that plantation, a right to the use of a canal belonging to the vendor for certain purposes therein specified, with a right to divert and change the course of it, and with various stipulations as to the expenses of the repairs and cleansing out of the canal, a part of which is to be thrown on the plantation sold. It is not clear that by the effect of the agreement the plantation sold is not charged, *at all events* with a proportion of the expenses of keeping up the canal whether the easement is used or not, and the expenses are to be such as may be mutually agreed upon.

The offer thus made, which must, according to the fair construction of the agreement, mean the

offer to sell the plantation with such rights in the canal as are specified in the articles, is then at the close of the agreement accepted by the purchasers.

If, therefore, the transport is to be read as embodying the agreement, and as conveying all that by the agreement was meant to be conveyed, there can be no doubt that it must be read as conveying not only the plantation and negroes, but also the right over the canal which was intended to be attached to the plantation.

But can the Court fairly attribute to the words used a meaning so extensive?

The vendor by the transport professes to sell, transport, and in full property make over to the purchasers the plantation in question, adopting the description in the agreement, and also the number of forty-three negroes as per Schedule of Registration hereto annexed, all agreeably to contract of sale and purchase recorded in the Secretary's Office of the Colony in book No. 27, vol. i, page 469, acknowledging to be fully paid and satisfied for the same, and engaging to warrant the property free from all claims whatsoever, according to law.

Now the transport, if it be read as conveying the property described in it, is, as far as it goes, in conformity with the agreement. It does not, it is true, exhaust the agreement; it is not a fulfilment of all the terms of the agreement, but it does not purport to be so; it is in effect—whereas the vendor has contracted to sell a plantation and certain slaves to the purchaser at a certain price, now in conformity with that agreement he hereby makes over such property to the purchaser, and acknowledges to have received the purchase-money. Nobody reading the transport would infer from it that anything more was intended to be conveyed than is expressed.

It is clear that it never was intended that this transport should complete the agreement. Two other transports are to be executed by way of mortgage, and not only so, but twenty-five additional negroes are to be put upon the property, and included in such mortgages.

It cannot be pretended that if the agreement had been for the purchase of two plantations, and only one had been conveyed, the words "agreeably to articles of agreement of such a date recorded in such a book," would have been sufficient to include

the other plantation, the properties being distinct. A conveyance of A, in pursuance of an agreement, could not amount to a conveyance of B also, though the agreement to convey included B. But it is said that here the properties were not distinct, that the one was an incident to the other, and that the conveyance is to be read as if it purported to convey the plantation to be held and enjoyed with the incidents to it, specified in the articles. But this is not the language of the instrument; and what in this argument is termed an incident, does not become an incident until it has been legally constituted. At the date of the transport it was a distinct interest in a real estate, which real estate was not included, and was not meant to be included, in the conveyance. The plantation conveyed and the right over the canal were not inseparably connected. The right over the canal could not, it is true, be enjoyed, according to the agreement, except by the owner of the plantation. But the plantation might well be conveyed and enjoyed without the right over the canal, and the plantation being first conveyed, the right over the canal might be the subject of a separate conveyance. There seems, therefore, to their Lordships to be no sufficient reason for extending the words of the transport beyond their ordinary sense, viz., that the conveyance thereby made, was made in consequence of the articles therein referred to. A conveyance of the right over the canal, mentioned in the articles, with the several conditions to which it was to be subject, might have required a distinct instrument containing mutual engagements by the owners of the dominant and servient tenements, as to the expenses of repairs and other matters.

It is said that the construction which we have adopted gives no effect to these words, "All agreeably to the articles of agreement." But this is not quite so: the transport is, in truth, an acknowledgment before the Judge, and by him put upon record, of an agreement previously made between the parties, and which it appears may be either verbal or in writing. It is, therefore, the usual practice to refer to the agreement.

2. If, however, it could be held that the intention of the parties to include in the transport everything which is included in the agreement is

sufficiently apparent, the question would still remain whether effect could be given to such intention consistently with the rules of law prevailing in the Colony.

The law provides that the transfer of immovable property shall only be made before some judicial authority. It is, in fact, a judicial act. It is to be collected from Mr. Burge's Commentary, pp. 719 to 721, that the instrument of transport must "contain a description of the lands, situation, and boundaries. That when it is acknowledged, it is entered instanter among the Acts of the Court, and becomes a judicial record." That a grosse or copy is given to the parties, and that the production of this instrument affords sufficient proof of the title.

Whatever may be the reasons for requiring the sanction of the Court to the sale, if one be, as suggested in Van Leuwen (Book 11, cap. 7, sec. 4), to prevent parties from being deceived in the buying, selling, or mortgaging of immovable property, and if the production of the copy of transport be evidence of title, it should seem capable of argument, that in order to prevent fraud, either in the immediate or in subsequent transactions, the description of the property sold should appear upon the instrument itself, without reference to any other document.

No authority, however, upon the point was cited to us by the Counsel on either side, and their Lordships therefore abstain from expressing any opinion upon it, resting their judgment on the ground already stated. It is not without regret that their Lordships have come to the conclusion at which they have arrived, which probably disappoints the real justice of the case between the parties. In reporting their opinion to Her Majesty, they will recommend that the decree be affirmed, without costs.

The view which they have taken of the first point in the case has made it unnecessary for their Lordships to consider the others.

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