Appeal point out that the claim of the plaintiff was not in the nature of damages for a wrong. The claim there arose from an act which was not unlawful but was done lawfully in the exercise of statutory powers. It is pointed out that the compensation might be regarded as the price payable for the exercise of the statutory powers and was property.

I am of opinion that the Krishna Boyamma's claim against her agent based on his failure to collect the rents was not assignable.

I do not think we ought, in Second Appeal, to interfere with the finding of the Courts below as to the non-delivery of the accounts or with the damages awarded in respect thereof.

I would modify the decree of the lower Appellate Court by giving the plaintiff a decree for Rs. 300 only and direct that the parties should pay and receive proportionate costs throughout.

TYABJI, J.

TYABJI, J.—I concur.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Kt., Chief Justice, and Mr. Justice Tyabji.

1913. February 4 and 7.

P. VENKIAH (DEFENDANT), APPELLANT,

v.

S. KRISHNAMOORTHY (MINOR BY HIS NEXT FRIEND S. LAKSHMIKANTHAM) (PLAINTIFF), RESPONDENT.*

Deed, construction of—"Easements, advantages, appurtenances, held and enjoyed as part of the house," meaning of.

Words in a sale-deed of a house, such as the following :—"All my right, title and interest in and to the said house and ground with all the buildings, fixtures, rights, easements, advantages and appurtenances whatsoever to the said house and ground appertaining or with the same held and enjoyed or reputed as part thereof or appurtenant thereto," are wide enough to convey not only actually existing easements but also (a) a way formerly enjoyed as an easement, but as to which the right had been suspended by unity of possession of the two tenements, and (b) a way, which during the unity of possession, had never existed as an easement but was in fact used for the convenience of one of the tenements afterwards severed.

Chunder Coomar Mookerji v. *Koylash Chunder Sett* (1881) I.L.R., 7 Calc., 665, followed.

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* City Civil Court Appeal No. 12 of 1912.

VENKIAH v. KRISHNA-MOORTHY.

If on a disposition of property belonging to the same owner, tenements are severed and conveyed to different people either simultaneously or at different times but as part of one transaction, *quasi-easements*, apparent and continuous and necessary for the enjoyment of the several tenements as they were enjoyed at the time of severance, will pass to the grantees thereof. In either case the conveyances are regarded in equity as one transaction, and each grantee who takes his tenement with the knowledge that the other tenements are being conveyed at the same time or will be conveyed as part of the same transaction, is deemed, in the absence of express stipulation, to take the land burdened or benefited, as the case may be, by the qualities which the previous owner had a right to attach to the different portions of his property before severance.

APPEAL against the decree of C. V. KUMARASWAMI SASTRIYAR, the City Civil Judge, in Original Suit No. 446 of 1910.

The facts of the case appear from the judgment of WHITE, C.J.

T. Ethiraja Mudaliyar for the appellant.

V. V. Srinivasa Ayyangar for the respondent.

WHITE, C.J.

WHITE, C.J.—In this case, the plaintiff claimed, among other things, that he was entitled as owner of a house, which we will call No. 67, to the use of a passage to a latrine in his house, the passage in question forming part of a house which we will call No. 11—the property of the defendant. The two houses are practically adjacent. The learned Judge granted him this declaration. The Judge was of opinion that he was not entitled to the right which he claimed under section 13 of the Easements Act or on the ground that it amounted to an easement of necessity. But, on a construction of the sale-deed in favour of the plaintiff, the Judge held that the words of the conveyance were wide enough to pass by express grant the right over the defendant's passage. Now, before considering the law, it is desirable to state the precise findings with reference to this passage and the use of it. The learned Judge found on the evidence that the plaintiff's scavenger always entered the latrine of the plaintiff's house through the passage which now forms part of the house of the defendant. On the question of ownership of the properties, he found that one Narasimhulu Nayudu was the owner of the two houses till the 23rd January 1893, that on that date the plaintiff's house passed to Canthum & Co., and that both the properties again became subject to the same ownership on the 17th August 1894 when the defendant's house was sold to Canthum & Co., who had already

purchased the house No. 67. It comes to this, according to the finding, that there was unity of possession in one owner of the two houses till January 1893, and severance between January 1893 to August 1894, and there was again unity of possession in one owner in August 1894. Now, this owner who had unity of possession became an insolvent, and the Official Assignee sold the two houses by auction on the 22nd April 1910. At the auction sale, the plaintiff bought No. 67, and the defendant bought No. 11. As regards the order in which the properties were sold, we are told that the plaintiff bought before the defendant. Formal conveyances were given by the Official Assignee. The defendant got his sale deed on the 3rd August 1910, and the plaintiff got his sale deed on the 21st September 1910.

For the purposes of the question we have to decide, it seems to me immaterial that house No. 67 was knocked down first at the sale by auction whilst the formal conveyance to the defendant was prior in time to the formal conveyance to the plaintiff, because I think, for the purposes of the question we have to decide, we must take it that the transaction was one and that we must deal with the case on the footing that the two conveyances were simultaneous. The law is stated in Mr. Peacock's book, page 385, "It is now settled law that when on a disposition of property belonging to the same owner, the severed tenements are conveyed either simultaneously or at different times but as part of one transaction, *quasi-easements*, apparent and continuous and necessary for the enjoyment of the severed tenements as they were enjoyed at the time of severance, will pass by presumption of law to the grantees thereof. In either case the conveyances are regarded in equity as one transaction, and each grantee who takes his tenement with the knowledge that the other tenements are being conveyed at the same time or will be conveyed as part of the same transaction, is deemed, in the absence of express stipulation, to take the land burdened or benefited, as the case may be, by the qualities which the previous owner had a right to attach to the different portions of his property before severance." Then, later on, on page 387, he says "It is important to note that the rule applies not only in the case of simultaneous conveyances as in *Allen* v. *Taylor*(1), but also in the

(1) (1880) 16 Ch D., 355.

VENKIAH v. KRISHNAMOORTHY.

WHITE, C.J.

case of conveyances executed at different times but as part and parcel of the same transaction. In such cases the conveyances are founded upon transactions which, in contemplation of equity, are equivalent to conveyances between the parties at the time the transactions were entered into, such transactions being entered into at the same moment of time and as part and parcel of one transaction." On behalf of the appellant, it was contended that the right which the plaintiff claims in this case is not a *quasi-easement,* apparent and continuous. It seems to me it is a *quasi-easement.* Whether it is a *quasi-easement* apparent and continuous, I do not think it is necessary to consider, because I think the principle laid down there with regard to *quasi-easements* apparent and continuous is applicable to the right which the plaintiff claims in this case.

With regard to this question of one transaction, I may refer to the terms of the conveyances. Both the conveyances recite, the sale by the Official Assignee was made under an order of Court and both the conveyances, I think I am right in saying—certainly the conveyance to the plaintiff—recite the sale at court-auction to the vendees in pursuance of which a formal deed of conveyance was afterwards executed. Now, turning to the words of the conveyance itself, what the sale deed to the plaintiff purports to convey is "all his rights, title, interest and claim whatsoever and of the said adjudicated insolvents and of the said mortgagee in and to the said house and ground No. 67, Govindappa Naick Street, Peddunaickenpettah, Madras, more further described in the schedule hereunder written together with all the buildings, fixtures, rights, easements, advantages and appurtenances whatsoever to the said house and ground appertaining or with the same held and enjoyed or reputed as part thereof or appurtenant thereto." There is no express reference to any right of way in that conveyance, whereas in the conveyance to the defendant there is reference in express terms to rights of way. It seems to me that, on the authority of *Chunder Coomar Mookerji* v. *Koylash Chunder Sett*(1), we ought to construe this conveyance to the plaintiff as wide enough to carry the right to use this particular passage for the purpose of obtaining access to the plaintiff's latrine. The words are "appurtenances whatsoever to the said house and ground appertaining or with the

(1) (1881) I.L.R., 7 Calc., 665 at pp. 670 and 671.

same held and enjoyed or reputed as part thereof or appurtenant thereto." Words, very similar if not identical, were before the Court in *Chunder Coomar Mookerji* v. *Koylash Chunder Sett*(1). WILSON, J., in dealing with the law, says: "About the law applicable to this question, there is, I think, no doubt. The words 'appurtenant' or 'belonging' will ordinarily carry only actually existing easements, and therefore will carry no right over the land of the grantor." Later on, he says: "Where further words are used, such as those in this deed, 'therewith held or used,' "—and we have these words in the deed before us, 'with the same held and enjoyed'—"the case is different. Those words will carry a way formerly enjoyed as an easement, but as to which the right has been suspended by unity of possession. . . . On the other hand, such words will not carry a way made by the owner of both properties during the unity of possession for his own greater convenience in the use of the two properties jointly. . . . Where again, during the unity of possession, a way, which has never existed as an easement, is in fact used for the convenience of one of the tenements afterwards severed, the authorities show that the words in question are large enough to carry it." I should be disposed to hold that the present case comes within the first proposition, "those words will carry a way formerly enjoyed as an easement, but as to which the right has been suspended by unity of possession." Whether this is so or not, I have very little doubt that the present case falls within the third proposition, "where again, during the unity of possession, a way, which has never existed as an easement, is in fact used for the convenience of one of the tenements afterwards severed, the authorities show that the words in question are large enough to carry it." Here, we have the finding that the particular way has always been used as the means of access to the plaintiff's latrine, the inference from that finding is that, during the unity of possession, the way had in fact been used for the convenience of tenement No. 67 which was afterwards severed from tenement No. 11. On behalf of the appellant, it has been pointed out that there is express reference in the instrument which was being considered by WILSON, J., to 'ways, paths, passages,' etc., and that there is

(1) (1881) I.L.R., 7 Calc., 665 at pp. 670 and 671.

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no such reference in the deed before us. That is, no doubt, perfectly true. But, notwithstanding that, it seems to me that the words "appertaining or with the same held and enjoyed or reputed as part thereof or appurtenant thereto," are sufficiently wide, as the learned Judge held, to carry the right in question. In connection with this point, I may refer to the decision in *Bayley* v. *Great Western Railway Company*(1). There, there was a conveyance to the vendee of all rights of the vendor at the time the conveyance was executed. All that was conveyed was a house. In that case, "the vendor had many years previously made a private road from the highway to the stable over his own land for his own convenience and had used it ever since. The soil of this road was not conveyed to the company, and no express mention of it was made in the conveyance. It was held that, notwithstanding the unity of possession of the stables and the private road at the date of the conveyance to the company, a right of way passed to the company under the general words in the conveyance." Other authorities have been cited to us, but I do not propose to discuss them, as it seems to me that this case falls within the principle of *Chunder Coomar Mookerji* v. *Koylash Chunder Sett*(2) and the view of the City Civil Court Judge that the words of the grant were wide enough to pass this particular right is right. I think that the appeal fails and should be dismissed with costs.

TYABJI, J.

TYABJI, J.—On the 22nd April 1910 the Official Assignee sold by public auction the properties now owned by the respondent and the appellant respectively. The conveyance to the appellant is dated the 3rd August 1910, and the conveyance to the respondent is dated the 21st September 1910. In the first of the two conveyances, *i.e.*, to the appellant, there is no reservation by the Official Assignee of any such right of way or passage as is claimed by the respondent, and we have to decide whether, in the words of the Earl of Selborne in *Russell* v. *Watts*(3), the respondent in this case has the right to "insist that the appellant cannot consistently with the terms and good faith of the contract under which he derives his title" obstruct the respondent from using the passage in question. The case to which I have alluded

(1) (1884) 26 Ch.D., 434. (2) (1881) I.L.R., 7 Calc., 665.
(3) (1885) 10 A.C., 590 at pp. 596 and 597.

shows that such rights may arise though there may be no express reference to them in the conveyance, and the question is whether the facts in the present appeal come under the principle laid down or implied in this case. The facts clearly cannot come under the principle unless we come to the conclusion that the two conveyances in this case form part of one transaction. I agree with the learned Chief Justice that there are sufficient reasons for our holding that these two conveyances did form part of one transaction.

Assuming that the two conveyances are to be taken as forming one transaction, I agree with the learned Chief Justice that, under certain circumstances such as exist in the present case, we should be justified in holding that the conveyance to the appellant must be read with such reservations as to entitle the grantor, *i.e.*, the Official Assignee, to pass to the respondent the right in question, and to burden the appellant with the correspondent duties, notwithstanding that such reservations may not have been expressly contained in the conveyance to the appellant. The principle of law governing such cases, I understand to be that where the same grantor conveys in the course of one transaction portions of his property to several grantees, it is equitable under certain circumstances to presume that it was intended that each grantee should take the property conveyed to him subject to such rights as are created in favour of the other grantees, and that each grantee knew that it was so intended and consequently that the grant to him must be read with such reservations. The principle must, of course, be applied with great caution. Nothing could more strikingly illustrate this than the difference of views in *Russell* v. *Watts*(1). That case, it must be observed, was concerned with the obstruction of windows, and it is clear that the easement of light and air stands on a somewhat different footing from that of a right of way. But when a reference is made to the remarks by CHITTY, J. in *Bayley* v. *Great Western Railway Company*(2), and to the remarks of Sir CHARLES SARGENT, C.J., in *Esubai* v. *Damodar Ishvardas*(3) the latter of which were alluded to by the learned Judge in the tenth paragraph of his judgment, I think it will be found that the principle to which I

(1) (1885) 10 A.C., 590. (2) (1884) 26 Ch.D., 434 at pp. 441 and 442.
(3) (1892) I.L.R., 16 Bom., 552.

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TYABJI, J.

have referred above may be applicable also where the disputes are of the nature that we have to deal with in this case.

It remains to decide whether, assuming that the two conveyances formed part of one transaction and that the said principle is applicable to the present case, the terms in which the conveyance to the respondent is couched are such as to give him any right to this passage. The clause in the conveyance so far as material is as follows: "All rights, easements, advantages and appurtenances whatsoever . . . appertaining to or with the same held or enjoyed or reputed as part thereof or appurtenant thereto." Now, on the authority of the cases referred to by the learned Chief Justice, I think we should be justified in holding that the right of passage in question falls within the description of "rights, easements, advantages and appurtenances." The cases decided in England, such as the decision of CHITTY, J., in *Bayley* v. *Great Western Railway Company*(1), show the wide meaning given to such words as 'rights.' We have here, in addition, the word 'advantages.' Again, the cases referred to by WILSON, J., in *Chunder Coomar Mookerji* v. *Koylash Chunder Sett*(2) show the meaning to be given to such expressions as 'appurtenant to,' 'enjoyment of' or 'being reputed as forming part of' in deciding what easements or other rights are to be taken as having been granted under a conveyance which contains them. It seems to me, therefore, that, both when we consider the class of rights that are referred to in the conveyance in the descriptive part of the clause, and when we refer to the manner in which those rights are annexed to the premises, we have words sufficiently wide to pass the right of passage involved in this appeal. I therefore agree that this appeal should be dismissed with costs.

JUDGMENT IN MEMORANDUM OF OBJECTIONS.

WHITE, C.J.

WHITE, C.J.—As regards the drain the Judge said he was not satisfied that it existed before the purchase by the plaintiff. It is true, there was no cross-examination of the plaintiff's next friend with regard to this, and there is no specific denial of the allegation in the plaint with reference thereto; but the written statement states that the defendant does

(1) (1884) 26 Ch.D., 434 at pp. 441 and 442.
(2) (1881) I.L.R., 7 Calc., 665 at pp. 670 and 671.

not admit any of the allegations not expressly admitted. We are not satisfied the Judge was wrong as to this. Also we are not satisfied he was wrong as regards the water pipe.

The memorandum of objections is dismissed with costs.

APPELLATE CIVIL

Before Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

1913. January 28 and February 7.

RAMASAWMY NAICKER (MINOR BY HIS MOTHER AND NEXT FRIEND CHELLAMMAL AND LEGAL REPRESENTATIVE OF THE FIRST APPELLANT), APPELLANT,

v.

RASI NAICKER AND FOUR OTHERS (DEFENDANTS), RESPONDENTS.*

Waterflow—Agricultural lands, upper and lower, owners of—Right of upper owner to drain his water naturally on lower land—Indian Easements Act (*V of* 1882) *sec.* 7, *ills.* (*a*) *and* (*i*).

An owner of upper agricultural land is entitled to let his water flow in its *natural* course without any obstruction by the owner of the lower land, and the lower owner is not entitled to raise any bund on his land which will have the effect of seriously interfering with the upper owner's cultivation.

Mahamahopadyaya Rangachariar v. *The Municipal Council of Kumbakonam* (1906) I.L.R., 29 Mad., 539, distinguished.

Subramaniya Ayyar v. *Ramachandra Rau* (1877) I.L.R., 1 Mad., 335 and *Abdul Hakim* v. *Gonesh Dutt* (1886) I.L.R., 12 Calc., 323, followed.

Sangana Reddiar v. *Perumal Reddiar* (1910) M.W.N., 545, dissented from.

SECOND APPEALS against the decrees of A. S. BALASUBRAHMANYA AYYAR, the Temporary Subordinate Judge of Tuticorin, in Appeals Nos. 986 of 1909 and 18 of 1910, preferred against the decrees of S. SUBBAYYA SASTRI, the Additional District Munsif of Tinnevelly, in Original Suits No. 3949 of 1907 and No. 117 of 1908.

The facts of the case are given in the judgment.

S. Doraiswami Ayyar for the appellant.

V. Venkatachariar and *C. S. Venkatachariar* for the respondents.

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* Second Appeals Nos. 1266 and 1267 of 1911.