1934 *Present :* **Dalton J.**

TIKIRI APPU *v.* DINGIRALA.

5—C. R. *Matale, 2,561.*

*Servitude—Right to use a threshing-floor—Rural praedial servitude recognized in law—Possession* ut dominus.

The right to use a threshing-floor is a servitude recognized in law.

APPEAL from a judgment of the Commissioner of Requests, Matale.

*E. Navaratnam,* for plaintiff, appellant.

*Cur. adv. vult.*

May 14, 1934. DALTON J.—

In this action the plaintiff, as owner of a field named Pallewele Wagalekumbura, claimed to be entitled by prescription to the use of a threshing-floor called Godakumburekamata, situated upon a land belonging at the

time of the action to the defendant. He pleaded that the owner of Pallewele Wagalekumbura had been entitled to the use of this threshing-floor from time immemorial. The plaint further set out that on May 19, 1933, defendant wrongfully dug pits and planted trees on the threshing-floor, which interfered with the plaintiff's use of it and prevented him from threshing his crop there, which resulted in his suffering loss and damage to the amount of Rs. 81.25.

The defendant denied the truth of the allegations set out in the plaint, but admitted that he had prevented plaintiff from using the threshing-floor on May 19.

The issues framed were as follows:—

(1) Was the plaintiff entitled to the use of the kamata on Goda-kumbure ?
(2) Is that right claimed a right enforceable at law?
(3) What damages, if any, is plaintiff entitled to from defendant ?

The second issue raises a question of law, whether such a servitude as plaintiff claims is known to the law and enforceable at all. The Commissioner has answered the issue against the plaintiff, but has given no reason for this conclusion. I have unfortunately not had the benefit of hearing counsel for defendant (respondent) in support of this conclusion, but reliance for the correctness of the judgment seems to have been based on the decision in *Fernando v. Fernando*[1].

It is urged for plaintiff (appellant) that the right to the use of this threshing-floor is a rural praedial servitude, the dominant tenement being a yaya or range of fields, of which plaintiff's field, named above, is one, the servient tenement being Godakumbure. There is no evidence to show if any other land intervenes between the yaya in question and Godakumbure. No question has been raised in the lower Court as to that possibility creating any difficulty, hence it may be that defendant's land Godakumbure and the yaya are contiguous.

In support of this argument for appellant I have been referred to *Voet (bk. VIII., tit. 3, ss. 11 and 12)* and to Maasdorp's *Institutes vol. II., p. 229.* The latter points out that the rural praedial servitudes to which he specifically refers are not exhaustive of their number, for every limitation upon the rights of ownership which is placed as a burden upon any servient property for the benefit of a dominant property is a servitude. This is in accordance with what Voet says in bk. VIII., tit. 3, s. 12. In section 11, however, amongst the servitudes actually enumerated he mentions the right "of pressing grapes or threshing corn or pulse on another's land". Having regard to the fact that paddy is the principal plant cultivated in Ceylon, the term "corn" as used here is quite wide enough to include such a cereal plant as paddy. I have no difficulty in arriving at the conclusion that the second issue must be answered in the affirmative.

The first issue raises the question whether the plaintiff has established that he is entitled to this servitude. The finding of the Commissioner on the evidence is against him. He states he cannot place any reliance on

[1] *14 N. L. R. 166.*

the evidence of either plaintiff or the Vidane who was called as a witness. In addition to that, however, taking plaintiff's own evidence, there is considerable doubt in my mind as to whether plaintiff's alleged use of the kamata in question was ever claimed by him as of right. I gather from his evidence that his use of it depended upon the Vel-Muladeniya's permission, and not upon any right he, plaintiff, had as owner of any land. He states that he had been using the threshing-floor in question as long as he can remember. He then goes on to say it is a " communal " kamata, and then he states that he could not ask for the right to use it, but it is for the Vel-Muladeniya to do so.

The Vel-Muladeniya seems to agree with this to some extent. He does say that plaintiff had used the kamata in question from his youth, but apparently not as of right. He speaks of " Crown threshing-floors " and private threshing-floors, the one in dispute here being, he states, a Crown threshing-floor. He does not explain this further, although he states defendant has been prosecuted under some Irrigation Ordinance for not permitting plaintiff to use the kamata. He then adds that the kamata in question belongs to the cultivators of the yaya, and that there is also one other kamata for this yaya. He continues, " I can as Vel-Muladeniya make people allow others to use their private threshing-floors. Plaintiff did not come and ask me to allow him to thresh his paddy on another kamata. If he had, I would have allowed it ".

In view of this vague and unsatisfactory evidence from plaintiff and his principal witness, it is sufficient for the purpose of this case to say that plaintiff has failed to establish his right to the use of the kamata *ut dominus*.

In that event the dismissal of his action was correct and the appeal must therefore be dismissed with costs.

*Appeal dismissed.*