

1953

*Present : Rose C.J. and Palle J. .*

G. DON ABRAHAM, Appellant, and C. C. D. SAMARAKKODY, Respondent

*S. C. 168—D. C. (Inty.) Colombo, 3,997*

*Servitude—Emphyteusis—Proof.*

The servitude of *emphyteusis* is, as a rule, evidenced by a document. The absence, however, of such a document is not an insuperable objection.

**A**PPEAL from a judgment of the District Court, Colombo.

*H. V. Perera, Q.C.*, with *Christie Fernando*, for the defendants appellants.

*H. W. Jayewardene*, with *D. R. P. Goonetilleke*, for the plaintiff respondent.

*Cur. adv. vult.*

October 6, 1953. ROSE C.J.—

The plaintiff respondent filed an action for a partition of a field called Induruwiladeniya. The defendant appellants intervened claiming a  $\frac{1}{3}$ rd share of the land. While perhaps their position was not put before the learned District Judge in that form, their contention now is that they are entitled to a  $\frac{1}{3}$ rd share on the basis that their ancestors and they had acquired a servitude of *emphyteusis*.

So far as the decided cases go it would seem, as was pointed out by learned counsel for the respondent, that an emphyteusis is, as a rule, evidenced by a document, although the absence of such a document should not, in theory at least, be regarded as an insuperable objection.

The practical difficulty however in the way of a party seeking to establish an emphyteusis in the absence of a document is the difficulty of proving it, and so far as this particular case is concerned, in which the appellants do not rely upon a document as a starting point, it is in my opinion unnecessary to say more than that on the evidence adduced before the learned District Judge it would not be proper for this court to hold that an emphyteusis had been established.

That being so, the appeal is dismissed with costs.

PULLE J.—I agree.

*Appeal dismissed.*

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