1964 *Present :* **Basnayake, C.J., and Abeyesundere, J.**

W. PERERA, Appellant, *and* C. RANATUNGE, Respondent

S. C. 125/1961—D. C. (Inty.) Colombo, 9443/L

Servitude of light and air—Claim thereto by prescription alone—Maintainability—Prescription Ordinance, ss. 2, 3.

The plaintiff and the defendant were owners of adjoining premises. The plaintiff asserted that the defendant was not entitled to erect a multi-storeyed building on his land because it would deprive him of the light and air which his own building had received through certain windows which overlooked the defendant's land. The trial Judge held that the plaintiff had by " prescription obtained the servitude *ne luminibus officiatur* ".

Held, that a right of servitude of light and air cannot be acquired by prescription by mere enjoyment, i.e., by the mere fact that the neighbour has not built on his land for any length of time.

Pillay v. Fernando (1912) 14 N. L. R. 138 not followed.

APPEAL from an order of the District Court, Colombo.

H. V. Perera, Q.C., with *H. W. Jayewardene, Q.C.*, *C. G. Weeramantry*, *N. S. A. Goonetilleke* and *D. C. Amarasinghe*, for Defendant-Appellant.

C. Ranganathan, with *E. B. Vannitamby* and *K. N. Choksy*, for Plaintiff-Respondent.

Cur. adv. vult.

July 15, 1964. BASNAYAKE, C.J.—

This is an appeal against the order of the District Judge directing that an injunction be issued to the defendant-appellant (hereinafter referred to as the " appellant ") restraining him from further proceeding with the construction of the Eastern wall of his building pending the final determination of the action instituted by the plaintiff-respondent (hereinafter referred to as the " respondent ").

The appellant and the respondent are owners of adjoining premises in Norris Road. The former owns premises No. 59 (at one time 55A, 57 & 59) and the latter No. 61. No. 59 was till about June 1960 a building with one floor and No. 61 a building with two floors. The appellant pulled down his house and erected thereon a multi-storeyed building which rose above the respondent's building. The result was that the light and air which the respondent's building had received through certain windows which overlooked the appellant's land were cut out. The respondent asserted that the appellant was not entitled to build any structure on his land which deprived him of light and air. This action was accordingly instituted in assertion of the right he claimed. The learned District

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Judge held that the respondent had by "prescription obtained the servitude *ne luminibus officiatur*". He rested his decision on *Neate v. Abrew* [1] which he regarded as binding on him. Learned counsel for the appellant submitted that, although *Neate v. Abrew* (*supra*) is shown in the report as a decision of three Judges, it is in fact a decision of two Judges and is not a decision of the then Collective Court. This submission finds support in the following statement at page 127 of the report—

> "The appeal was argued on the 26th September, 1882, before Clarence and Dias, J.J. It was afterwards arranged, with the consent of counsel on both sides, that De Wet, A.C.J., should be furnished with a note of the authorities cited, and should take part in the decision of the appeal."

We agree that the decision cannot be regarded as a decision of the then Full Bench of three Judges, as the appeal was heard only before two of the three Judges who have delivered judgment. We are fortified in our view by the following observations of Bonser C.J. in a similar case (*Perera v. Pody Sinho* [2])—

> "But, as I said before, the respondent relied upon what he alleged was the decision of a Full Court, which would be binding on me, holding that no appeal lay in a case like the present. But, on examination of this case, it will be seen that it is of no authority. What happened was this. The late Chief Justice and Mr. Justice Lawrie sat together to hear the appeal. They were unable to agree upon the admissibility of the appeal, and, instead of the case being referred to a Full Court for argument and decision, counsel on both sides agreed to leave the matter to the arbitrament of the third judge. The third judge, after reading the case, but without hearing any argument, expressed the opinion that an appeal did not lie. It is quite evident that that expression of opinion of the third judge could have no binding effect on the parties unless they had agreed to accept it. That being so, it is of no use citing it as an authority, and I cannot understand why any reporter should have thought fit to report it."

The decision has therefore not the binding effect of a decision of the Full Bench. In our opinion *Neate v. Abrew* (*supra*) is not a decision which can be regarded as authoritative.

Before parting with the case of *Neate v. Abrew* we should not fail to record our respectful dissent from the case *Pillay v. Fernando* [3] wherein following *Neate v. Abrew* it was held that a right of servitude of light and air may be acquired by prescription by mere enjoyment, just as much as any other servitude. Wendt J., while agreeing that under the Roman Dutch Law mere enjoyment however long was not sufficient to create a negative servitude and that a positive act of adverse possession extending over the prescribed period on the part of the dominant tenement was needed, held that he was bound by the decision in *Neate v. Abrew* which he, without close scrutiny, regarded as a decision of the Full Court. But

[1] (*1883*) *5 S. C. C. 126.* [2] (*1901*) 5 *N. L. R. 243 at 244-245.*
[3] (*1905*) *14 N. L. R. 138.*

some of the dicta expressed therein emphasise, though not sufficiently, that the servitude of *ne luminibus officiatur* cannot be acquired by the mere fact that the neighbour has not built on his land for any length of time. District Judge Lawrie, whose judgment is reproduced in the report, says—

> " I am of opinion that the mere circumstance of having made no objection to his having opened these windows does not infer acquiescence by the defendant, nor confer on the plaintiff a right to prevent her making full use of her own property."

Clarence J. having said—

> " There can be no question but that, under the Roman-Dutch Law, a negative servitude such as this could not be acquired by prescription in virtue of bare enjoyment such as plaintiff has had in this case."

goes wrong when he says, on an incorrect reading of the decision in the case of *Ayanker Nager v. Sinatty* [1]—

> " The result then is that the mere uninterrupted enjoyment for ten years (not of course by express permission or licence) of window rights, deriving light from a neighbour's land, entitles the owner of the windows to have an adjoining landowner restrained from building so as to obscure them."

It is common ground that the Roman Dutch Law of acquisitive prescription ceased to be in force after Regulation 13 of 1882 and that the rights of the parties fall to be determined in accordance with the provisions of the Prescription Ordinance. It is now settled law that the Prescription Ordinance is the sole law governing the acquisition of rights by virtue of adverse possession, and that the common law of acquisitive prescription is no longer in force except as respects the Crown. The question that arises in the instant case has therefore to be decided by reference to that Ordinance. But it would not be entirely irrelevant to add a word or two on the Roman Dutch Law before examining the provisions of that Ordinance.

Although opinion appears to be divided among Roman Dutch Law writers, the better view appears to be that a servitude cannot be acquired by mere inaction or by the mere assertion by one party that another has not got certain rights, or by forbidding the other from exercising his rights. Mere abstention from doing something at the request of a neighbour does not give rise to a servitude (Schorer's Notes to Grotius, Bk.II 34.20). In the case of *Ellis v. Laubscher* [2] the South African Appellate Division had occasion to examine the old and modern authorities on negative servitudes, and it formed the conclusion that there must be, as in the case of positive servitudes, adverse possession to acquire a negative servitude. The nature of adverse possession in relation to the acquisition of a negative servitude by prescription is discussed in that case. Savigny too examines the problem (Possession, 6th Edn. Perry's Translation) at pages 384–386. He takes the view that possession of a negative servitude cannot be acquired by mere passiveness on the part of the opposite party, but that user as of right is required. He comes to the conclusion

[1] *Ramanathan 1860-62, p. 75.* [2] *(1956) 4 S. A. 692 (A. D.)*

that possession of a negative servitude may be acquired by adverse user and by legal title. It would also appear from the judgment in the South African case, which is in Africaans and which has been read to me, and from the extracts from the commentators referred to in a note in Volume 74 of the South African Law Journal at page 135 that there has been no judgment either of the Courts of Holland or South Africa wherein it has been decided that a negative servitude had been created by prescription. We are in entire agreement with the view of the learned author of the note that the creation of a negative servitude by prescription is subject to requirements which are so difficult to fulfil that the creation of such a servitude is a theoretical rather than a practical possibility.

Now as to the Prescription Ordinance, section 3 of that Ordinance reads—

> "Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that to the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs. And in like manner, when any plaintiff shall bring his action, or any third party shall intervene in any action for the purpose of being quieted in his possession of lands or other immovable property, or to prevent encroachment or usurpation thereof, or to establish his claim in any other manner to such land or other property, proof of such undisturbed and uninterrupted possession as herein before explained, by such plaintiff or intervenient, or by those under whom he claims, shall entitle such plaintiff or intervenient to a decree in his favour with costs:
>
> Provided that the said period of ten years shall only begin to run against parties claiming estates in remainder or reversion from the time when the parties so claiming acquired a right of possession to the property in dispute."

The question for decision is whether the respondent possessed the light which his windows received at the time the appellant erected his new building. Adverse possession has to be evidenced by some positive act or acts from which the fact of such possession can be inferred. As aptly stated in *Ayanker Neger's* case (*supra*)—

> "Altogether the Supreme Court has no doubt that the words '*possession of immovable property*' in the Ordinance may apply to enjoyment of a right of way. There must be actual enjoyment, not mere claim of title or abstract right, and the Supreme Court may define 'possession', when applied in legal language to a servitude, such as the *jus itineris*, to be the exercise of a *jus in re*, with the *animus* of using it as your own as of right, not by mere force, not by stealth, and not as a matter of favour, *nec vi nec clam, nec precario*."

the Ordinance makes no distinction between positive and negative servitudes. The elements that must be proved to obtain a decree are the same in respect of both.

The inaction of the appellant over the act of the respondent in providing windows in his Western wall does not amount to possession by the respondent. His act only gives rise to the inference that he was acting as owner of his own building and not as owner of anything of which the appellant was owner. By exercising his rights over his own land, a person cannot acquire a right over his neighbour's land.

To satisfy the requirements of section 3, possession must be by an adverse title. The mere assertion by one party that another has not got certain rights or that he forbade the other to exercise such rights, even though the other may also acquiesce therein, does not give rise to an adverse title whereon a claim of prescription can be based. Possession in the Ordinance has to be given its ordinary meaning, and the light and air that are enjoyed, because the neighbour has not built higher, cannot be said to be possessed by the land owner who derives benefit therefrom. The opinion we have formed is in accord with the enactment and creates no hardship. In fact it does away with the hardships that the hitherto reputed view of the Roman Dutch Law created.

In this connection it is not irrelevant to note that the Law of Scotland does not recognize negative servitudes which are not evidenced by a grant from the servient owner. The following quotation from Erskine's Principles of the Law of Scotland (19th Edn.), page 213, sets out the law—

> " The servitudes (*non aedificandi*), *altius non tollendi, et non officiendi luminibus vel prospectui*, restrain proprietors from raising their houses beyond a certain height, or from making any building (at all, or any) that may hurt the light or prospect of the dominant tenement. These servitudes (being negative) cannot be constituted by prescription alone; for though a proprietor should have built his house ever so low, or should not have built at all upon his grounds for forty years together, he is presumed to have done so for his own conveniency and profit; and therefore cannot be barred from afterwards building a house on his property, or raising it to what height he pleases, unless he be tied down by his own consent."

Stair puts it even more forcefully when he says—

> " These servitudes of light or prospect cannot be introduced by the enjoyment and use thereof, though time out of mind ; " (Institutions of the Law of Scotland, Vol. I, p. 408).

The inclusion of the word " servitude " in the definition of immovable property in section 2 of the Prescription Ordinance does not have the effect of re-introducing the Roman Dutch Law of servitudes which it is now settled by the decisions of this Court and of the Privy Council has been replaced by the Prescription Ordinance which requires possession of

the type contemplated in the Ordinance for the acquisition of any right in land. It would appear that the words " easement " and " servitude " in the definition have been put in there to remove any doubt that when the Ordinance speaks of immovable property the servitudes that have been acquired in respect of any land or to which it is subject are included. The learned District Judge is in our opinion wrong in holding that the plaintiff is entitled to a decree in his favour.

The order of the learned District Judge is set aside with costs and we direct that the record be sent back so that the trial may proceed.

ABEYESUNDERE, J.—I agree.

Order set aside.