1948 *Present:* **Basnayake J.**

ADONIS FERNANDO *et al.*, Appellants, *and* LIVERA, Respondent.

S. C. 59–60—C. R. Negombo, 45,880.

Right of way—Presumption against servitude—Way of necessity—What must be established—Path from one land to another.

A person is not entitled to a way of necessity for the purpose of going from one land owned by him to another.

[1] *(1933) S. L. T. (Sh. Ct) 21.* [2] *(1921) 1 Ch. Div. 404.*

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

H. V. Perera, K.C., with *K. C. de Silva*, for the third, fifth, and sixth defendants, appellants.

E. F. N. Gratiaen, K.C., with *D. W. Fernando* and *Cyril E. S. Perera*, for the plaintiff, respondent.

Cur. adv. vult.

April 19, 1948. BASNAYAKE J.—

The plaintiff-respondent (hereinafter referred to as the plaintiff) is the owner of a land called Kottangahawatta in extent 1 rood and 30 perches which he purchased in 1942. The first and second defendants own the land adjoining it on the north-west, the third defendant the adjoining land on the north-east, and the fourth defendant the land to the north of the third defendant's land. The land between the fourth defendant's land and the Village Committee road to the north is also the property of the third defendant. The fifth and sixth defendants are minors and it is not clear why they have been made parties. They appear by their guardian *ad litem*, the third defendant. To the south of Kottangahawatta is a hamlet called Ihalapetigoda of about 15 acres in extent inhabited by about 15 families. The plaintiff owns another land known as Katukenda 108 acres in extent in the same village which abuts on the high road to Giriulla. From Kottangahawatta it is about 40 yards to the closest point of Katukenda. The hamlet of Ihalapetigoda is surrounded on three sides by Katukenda and on the other by Kottangahawatta so that it is hemmed in on almost all sides by the plaintiff's lands. The inhabitants of the hamlet gain access to the Village Committee road to the north by the public footpath over which the plaintiff claims a cart-way. This footpath is not of uniform width throughout. It appears that it varies from three to about eight feet, but the evidence on this point is not precise.

The plaintiff claims that he and his predecessors in title of the land Kottangahawatta have enjoyed for over ten years a right of cart-way from the point A on his land to the point C on the Village Committee road to the north as depicted in plan X produced in these proceedings, and have thereby acquired a title by prescription to the said cart-way. Alternatively he claims a right of cart-way of necessity along the same route.

The right the plaintiff claims is what in Roman-Dutch Law is called a real servitude, which cannot exist nor be understood to exist apart from immovable property; inasmuch as "real servitudes are only accidents and conditions attaching to immovable property" (*Voet 8.1.1.*). Voet says in the same connexion [1]:—

> "Servitudes are real, when indeed one thing is subservient to another and so loses some of its own rights while it increases those of another. By our laws such servitudes have also been styled praedial servitudes; for the reason that for the constitution

[1] *Voet 8.1.2 Hoskyns' Translation.*

and the exercise of such servitudes it is necessary that there should be both a dominant tenement in the position of creditor and a servient tenement in the position of debtor of those servitudes ; and they have no existence apart from immovable property."

To be entitled to the right he claims, the plaintiff must prove that he and his predecessors have exercised it—

(*a*) *nec vi*, that is, the exercise of the right must be peaceable,

(*b*) *nec clam*, that is, it must be openly exercised and the person asserting the right must have suffered no interference at the hands of the true owner, nor must he by any act have acknowledged anyone as the true owner,

(*c*) *nec precario*, that is, the use must take place without the consent of the true owner. It must not be with his leave and licence or on sufferance.

It should be noted that knowledge of the owner of the servient tenement is not requisite for the acquirement of a servitude by prescription (*Voet 8.4.4*). The onus of proving all these elements is upon the person claiming the right [1], [2]. In the case of *Van Heerden v. Pretorius* [2], Lord De Villiers C.J. says at page 78 :—

" It is a settled rule that a person claiming a servitude over the land of another should give clear and convincing proof of the existence of such a right."

A matter that should always be borne in mind when considering a claim for a servitude is that our law does not favour anything in the nature of a servitude. The South African decisions show that the attitude of the law there is the same.

An examination of the plaintiff's case in the light of these principles reveals that he has failed to establish his claim. There is no evidence at all that he and his predecessors in the dominant tenement Kottangahawatta used this cart-way for a period of ten years. The plaintiff is a stranger to the hamlet of Ihalapetigoda. He purchased the dominant tenement in 1942 and says he transported coconuts in carts along the cart-way he claims to his Katukenda estate till he was obstructed by the third defendant in December, 1943. On the other hand there is a considerable volume of evidence that his predecessors in title neither transported their nuts in carts nor used the cart-way he claims. Not more than 300 nuts were plucked from Kottangahawatta at a time and these were conveyed to Katukenda by porters in the time of his predecessor, whose clerk deposes to this fact.

The evidence of the fourth defendant's employees completely negatives the plaintiff's claim that carts were used on the route A to G in plan X. The third defendant, who owns land on either side of the fourth defendant's land, says he used carts to convey the produce of his land to the south, but that he did so with the latter's permission.

[1] *S. A. Hotels, Ltd. v. City of Cape Town (1932) C. P. D. 229 at 236. Uitenhage Divisional Council v. Bowen (1907) E. D. C. 72 at 79.*
[2] *(1914) A. D. 69 at 76.*

The plaintiff's evidence was not directed towards proving the case arising on his plaint. All the evidence given on his behalf was designed to establish a public right of way from the hamlet to the Village Committee road. Charles, his chief witness, and Simion, both claim to have taken carts from their lands which are to the south of the dominant tenement over it and along the route A to G. Charles says that carts were taken on the occasion of weddings, funerals, &c., in the hamlet. He also claims to have transported goods for the fourth defendant and others. But all that ceased eight years ago when he sold his cart.

All this evidence may be relevant if the claim was for a public right of way from the hamlet to the Village Committee road or a *via vicinalis*, but it is of no assistance in establishing the claim now put forward by the plaintiff. In the case of such roads, use from time immemorial without interference by the owner of the land over which it runs must be established by the clearest evidence. Kotzé J.P. says in the case of *Uitenhage Divisional Council v. Bowen* [1] :—

> " A public right of way is more onerous than any ordinary servitude in favour of individuals ; and before the Court can pronounce that the public have a right to use this road to the necessary detriment of the owner of the land, very clear evidence of that right must be produced."

I shall now consider the plaintiff's claim to a cart-way of necessity. As I observed in my previous judgment in C. R., Balapitiya, case No. 24,420/S. C. 178, a judicial decree for a right of way of necessity is not given for the mere asking. The plaintiff must discharge the onus that rests on him. In the words of Graham J.P. [2] in *Lentz v. Mullin*—

> " The onus of proving a claim of this character is upon the person alleging it, and the claimant, to succeed, must show that he has no reasonably sufficient access to the public road for himself and his servants to enable him, if he is a farmer, to carry on his farming operations. If he has an alternative route to the one claimed, although such route may be less convenient and involve a longer or more arduous journey, so long as the existing road gives him reasonable access to a public road he must be content, and cannot insist upon a more direct approach over his neighbour's property."

In the present case it is in evidence that the plaintiff's predecessors transported their nuts, not by carts, but by porters. The plaintiff's land is less than half an acre. As I have mentioned earlier, the hamlet of Ihalapetigoda is hemmed in on almost all sides by the lands of the plaintiff. The nearest route to Katukenda estate is only forty yards from Kottangahawatta, and the plaintiff's Katukenda estate abuts on a public road. Having regard to all these facts I do not think it reasonable that the plaintiff should ask for a cart way to transport the coconuts from so small a land. Besides it is not access to the public road that he is seeking, but

[1] *(1907) E. D. C. 72 at 80.* [2] *(1921) E. D. L. 268 at 270.*

to his other land Katukenda Estate where he has his copra drying sheds. Under our law a person is not entitled to a way of necessity for the purpose of going from one land owned by him to another however convenient and advantageous it may be to the person claiming such a right of way.

The appeal is allowed with costs and the judgment of the learned Commissioner is set aside. The plaintiff's action is dismissed with costs

Appeal allowed.