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DE SILVA *et al. v.* WEERASINGHE.

D. C., Kandy, 8,482.

Right of way over a public footpath—Evidence of special injury to plaintiff.

In an action raised by the plaintiffs as owners of a certain garden for a declaration that they are entitled to a right of way over a public foot-path (leading from their garden to a street in Kandy), which the defendant had destroyed, and that the defendant should be ordered to reconstruct the same and pay plaintiffs a certain sum of money as damages arising from their inability to use the same,—

Held, that such action, in the absence of an allegation that the defendant had a land over which the footpath went, or the plaintiffs had a right of way over a land belonging to the defendant, could not be looked upon as a claim for a servitude on behalf of a dominant tenement, but should be treated as an action brought by a member of the public for obstructing a public pathway, and that, in the absence of proof of special injury to plaintiffs, such action was not maintainable.

THE judgment of Lawrie, J., is explicit as to the facts of the case.

Dornhorst appeared for defendant appellant.

Sampayo, for plaintiffs respondent.

Cur. adv. vult.

LAWRIE, J. 31st January, 1896. LAWRIE, J.—

The plaintiffs aver that they are the owners of Galahitiya-watta; that they have resided in a house on that land; that they were entitled to a right of way over a public footpath B1 to B2, to and from their house to a street in Kandy; that they have exercised the said right of way, and used the said public path uninterruptedly for more than ten years.

That about two and a half years before action brought the defendant destroyed a portion of this public path, by reason of which act of destruction the plaintiffs, their children, and servants, with cattle, have been prevented from using the said public path, &c., to the injury of the plaintiffs, for which they claim Rs. 200 damages.

Further, that the plaintiffs have suffered special damage by reason of their not being able (1) to carry and take along the said path to the town of Kandy the produce of the said land for sale; (2) to take their cattle from their house along the said path to town and back to the house; (3) to convey and bring manure from the town along the said path to the premises for the use of the said land; and they asked Rs. 250 special damages. The plaintiffs asked (1) for a declaration that they were entitled to a right of way over the said public path; (2) for a decree that the defendant,

within a specified time to be named by the Court, should re-construct or repair the portions of the said path which have been destroyed by him, or to pay plaintiffs a sum of Rs. 50 to meet the costs of re-construction or repair ; (3) for damages, Rs. 450.

Now the learned District Judge has not granted the second remedy prayed for ; he has made no order as to re-construction, nor awarded any sum towards that object ; and the learned Judge has also refused to give any special damages. Against his judgment on these points the plaintiffs have not appealed. To my mind, the learned District Judge was wrong in holding that this was proved to be a public path. The proof seems to me quite insufficient. The plaintiffs' claim is to my mind ambiguous. I think that they did not make up their mind whether to claim this path as a servitude or easement, of which their land Galahitiyawatta is the dominant, and the defendant's land is the servient tenement, or whether to claim as members of the public against a wrongdoer.

The defendant is not alleged to have any land over which the path goes ; and as the complaint is not that they have a right of way over a certain land belonging to the defendant, in my opinion this action cannot be justly dealt with as an action for the declaration of a servitude. It must be regarded as an action by one of the public against a man who, without right, has destroyed a public path. Now, in my opinion, such an action is not maintainable by a member of the public unless he avers and proves that he himself has sustained some injury for which damages are due to him.

The mere fact that a public way has been obstructed will not give to every quixotic member of the public a right to attack the wrongdoer and to get nominal damages from him, and yet, so far as I can see, this is what the District Judge has sustained, because he has found that the plaintiff has not placed any evidence before him which enables him to assess damages—still he has given them Rs. 30 damages. The plaintiffs' right to relief fails, if they have not proved that any produce grew on their land, which could have been taken for sale to Kandy ; if they failed to prove that they ever had a head of cattle which they could possibly have taken to and from Kandy ; if they failed to prove that they ever thought of bringing manure to their land, or that their land, in the old days, ever was manured ;—the only thing which remained was that the plaintiffs and their children and servants were prevented from using the path. It is proved that the path was destroyed, but *non constat* that that destruction did the plaintiffs any injury. They do not claim this as a way of necessity ; they

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have other ways by which to reach and to leave their house. This is not said to be the nearest way or the most convenient way from their house to Kandy, so far as I can see; and I am confirmed in this by the finding of the learned District Judge, that plaintiffs, as two of the public, have suffered no injury at all for which damages are due.

From the shape of their action, and from the proof adduced, they cannot succeed in having a decree in their favour as owners of a dominant tenement declaring this to be a servitude. They cannot succeed on the proof they have adduced in getting decree as members of the public, because they have failed to show such special injury as gives them a title to interfere. I would set aside and dismiss with costs.

WITHERS, J. WITHERS, J.—

I agree in setting aside this judgment. I take this to be an action by the plaintiffs as a member of the public, who seeks to recover damages for being specially injured by the defendant's obstruction of way, a common highway.

I am unable to agree with the District Judge in his finding that this is a public pathway. Taking the finding to be correct, I think he is bound by the judgment of this Court reported at *p. 195* of *2 S. C. R.* A plaintiff under such circumstances cannot succeed, unless he proved that he has been specially damaged by the highway being obstructed.

He has disclosed no such special injury as the law understands by that term.

The appellant will have his costs.