1968 *Present :* Siva Supramaniam, J.

H. B. A. SOMARATNE, Appellant, *and* D. E. MUNASINGHE *et al.*, Respondents

S. C. 32/65—C. R. Gampaha, 8330/A

Servitude—Praedial servitude—Incapacity of dominant owner to transfer or let the servitude apart from the land—Claim for cartway of necessity—Considerations applicable.

'A praedial servitude is constituted in favour of a particular praedium and can only pass with the land. The dominant owner cannot transfer the land to someone else and keep the servitude for himself, or *vice versa*, nor can he let the servitude, or lend the use of it to strangers apart from the land."—Domat; Vcet. Accordingly, the owners or occupiers of the dominant tenement in respect of a cartway cannot grant permission to the owners of the adjoining lands to use the cartway.

Where a claim for a cartway is based on prescription, an alternative claim may be made for a cartway of necessity. The failure of the plaintiff to establish prescriptive user will not necessarily disentitle him to a cartway of necessity along the same route.

The fact that after the cartway in dispute was blocked by the defendant the plaintiff used another route running over lands belonging to his close relatives is not a reason to hold that the plaintiff has other available means of access to the main road. The question should be considered as at the time of the commencement of the dispute.

If an owner of landlocked property has a number of adjoining owners from whom he must choose to demand a cartway of necessity, he is entitled to choose the owner whose property affords the most convenient route.

APPEAL from a judgment of the Court of Requests, Gampaha.

C. Ranganathan, Q.C., with *A. C. Gooneratne, Q.C.*, and *Ananda Wijesekera*, for the plaintiff-appellant.

H. A. Koattegoda, for the defendants-respondents.

Cur. adv. vult.

January 31, 1968. SIVA SUPRAMANIAM, J.—

The plaintiff who is the owner of an allotment of land called Siyambalagahawatte instituted this action for a declaration that he is entitled by prescriptive user to a cartway 8 feet wide along A B C D as depicted on Plan No. 1894 dated 7th May 1962 drawn by Samson Fernando, Licensed Surveyor, marked X. In the alternative, he claimed a cartway of necessity along the same route. The sections of the cartway marked CD, EC and AB run respectively over lands belonging to the 1st, 2nd and 3rd defendants. The plaintiff's land does not abut any highway and contains a coconut plantation. The nearest highway is the Bandarawatte-Bemmulla V. C. road which is shown on the said plan.

The plaintiff led a large volume of evidence to prove that he as well as his predecessors in title had transported coconuts from his land for upwards of ten years along the route in question to the aforesaid V. C. road. The 1st and 2nd defendants, on the other hand, denied that either the plaintiff or his predecessors had used the route in question. According to the 2nd defendant, he had been away in hospital between July and November 1961, and during that period, the plaintiff had unlawfully broken down portions of the boundary fences on the Western and Eastern sides of his (the 2nd defendant's) land at the points B and C respectively and had made use of a footpath across his land and, on his return from hospital, he (the 2nd defendant) had closed the gaps on the fences.

At the end of the trial, the learned Commissioner appears to have found himself unable to make up his mind as to which version he should accept. He said : " It is not easy to garner the truth in this welter of contradictory evidence so that one has to be guided mainly by the testimony given by the two surveyors. "

He rejected the plaintiff's case in regard to the user of the way in question mainly on two grounds :—(1) That when Surveyor Fernando visited the spot for the purpose of survey in May 1962 there were no marks visible on the ground to indicate that carts had been taken along that route. (2) That Vipulasena, a brother of the plaintiff, and James, a friendly neighbour, who owned respectively the lands lying to the West and North of the plaintiff's land had admittedly used the cart road shown

on plan Y dated 12th September 1963 to transport material for the construction of houses on their lands and if the plaintiff had been making use of the cartway in question, that Vipulasena and James too would have made use of the same cart way for the transport of materials. In his judgment the learned Commissioner concluded his examination of the plaintiff's case with the rhetorical question : " And why is it that if the direct and shorter route had been in existence for so long, James and Vipulasena preferred to take the longer route to their lands to carry their building materials ? ". He held that this was a circumstance which " strongly militated against the plaintiff's case ".

The second ground set out above indicates a grave misdirection on the part of the learned Commissioner in regard to the nature of the servitude of cartway. " Praedial servitudes are constituted in favour of a particular praedium and can only pass with the land. The dominant owner cannot transfer the land to someone else and keep the servitude for himself or *vice versa*, nor can he let the servitude, *or lend the use of it to strangers apart from the land* (Domat 1.1.12.1.14 ; Voet, S.1.1)"—Hall and Kellaway : Servitudes, 2nd edition, page 2. The cartway could therefore have been used only by the owners or occupants of the plaintiff's land and the plaintiff could not have granted permission to the owners of the adjoining lands to use it. The circumstance, therefore, that Vipulasena and James did not make use of the cartway that is claimed by the plaintiff cannot have any bearing on the question whether the plaintiff made use of the said cartway and cannot certainly militate against the plaintiff's case.

The burden of establishing that he had acquired the right by prescription lay on the plaintiff. The evidence relied upon by the plaintiff does not appear to have impressed the learned Commissioner. Without the benefit of having seen or heard the witnesses, I am unable to say, whatever view I may have formed on a reading of the depositions, that the learned Commissioner was necessarily wrong in his conclusion, despite the misdirection referred to above.

The failure of the plaintiff to establish his claim based on prescriptive user will not necessarily disentitle him to a cartway of necessity. That question has to be considered on different grounds. The learned Commissioner rejected the claim for a cartway of necessity on the ground that there is available to the plaintiff " one, or perhaps, even more alternative cart roads from his land to the V. C. road near the Pitiyagedera school ".

Surveyor Croos Dabrera who was called by the defendants produced plan Y depicting the alternative routes, which, according to the defendants, were available to the plaintiff. According to that plan, there is a well defined cart road leading from the V. C. road to the point J. From J there is a footpath leading to the land of James which lies to the North of the plaintiff's land. The surveyor stated that the footpath was wide enough for carts to be taken and that at the corner of the boundary between the lands of James and the plaintiff there was a detachable

portion of the fence through which carts could enter the plaintiff's land. The footpath leads to a devatta road which forms the Western boundary of the plaintiff's land. The devatta road leads to a tract of paddy fields on the South. According to the defendants, the devatta road leads to an irrigation bund and one can reach the V. C. road by going along that bund. It transpired in evidence, however, that the devatta road slopes very steeply and that carts are not permitted to be taken across the irrigation bund and also that the bund is not wide enough in certain parts for carts to go over. The learned Commissioner himself does not appear to have considered it to be a suitable access to the V. C. road from the plaintiff's land.

The first question which the learned Commissioner had to consider was whether any alternative route was available to the plaintiff and was, in fact, used by him before the disputes arose between the parties in regard to the cartway claimed in this case. If such an alternative route was available and was used by the plaintiff, he was not entitled to another on the ground of necessity even if the route available to him was circuitous and inconvenient and the one sought was the best and nearest outlet. (*Gray v. Gray & Estcourt* [1], *Lentz v. Mullin* [2] and *Wilhelm v. Norton* [3].)

According to the learned Commissioner's finding, the only two witnesses whose evidence was reliable were the two surveyors. But he appears to have completely overlooked certain items in the evidence of each of the surveyors which corroborated the plaintiff's case that it was only after the 2nd defendant blocked the cartway in question in December 1961 that he made use of the cartway shown in plan Y. According to the plaintiff, the coconuts were carried to the land of James and were thereafter taken along the cartway shown on plan Y. It was not disputed that there is no cartroad abutting the plaintiff's land on the West but, as stated earlier, the 2nd defendant's position was that carts could, if required, be taken along the footpath shown on plan Y. Surveyor Dabrera made his survey in September 1963 and according to his report Y1 as well as his evidence in Court, the 2nd defendant told him that the plaintiff took carts along the footpath J S T Q R only during the preceding period of two years. The surveyor found no traces of a cart track along that portion. The period of two years would be roughly from about the time of the commencement of the dispute between the parties. It is significant that none of the defendants informed Mr. Dabrera that the plaintiff had made use of the cart road shown on plan Y prior to 1961. On the other hand, according to the evidence of Surveyor Fernando and his report XI, the 3rd defendant who was present at his survey in May 1962 admitted to him that the plaintiff used to take his coconuts in a cart along the cartway in dispute in this case. This was not denied by the 3rd defendant although the 1st and 2nd defendants in their evidence denied that the plaintiff used that cartway. The 3rd defendant

[1] (*1907*) *28 Natal L. R. 154.*
[2] (*1921*) *E. D. L. 263.*
[3] (*1935*) *E. D. L. 169.*

was one of the predecessors in title of the plaintiff's land. The learned Commissioner appears to have completely missed the significance of the admissions made by the 2nd and 3rd defendants to the surveyors. It is not an unreasonable inference from those admissions that the plaintiff made use of the cartway in question prior to 1961. Although the plaintiff failed to establish his prescriptive right to that cartway, the admissions referred to are very relevant for a consideration of the question whether a cartway of necessity should be granted along that route. The fact that after the cartway in dispute was blocked by the 2nd defendant the plaintiff found other means of transporting his coconuts is not a reason to hold that the plaintiff has other available means of access to the main road. The question should be considered as at the time of the commencement of the dispute. It would appear from the admission of the 2nd and 3rd defendants to the surveyors that the alternative routes now suggested by the defendants were not the ones previously used by the plaintiff. The learned Commissioner, in rejecting the plaintiff's claim for a way of necessity over the defendant's lands, appears to have been influenced by the fact that the alternative route which he used after the disputes arose runs over lands belonging to the plaintiff's close relatives. He states: "It is in evidence that the plaintiff has been using the alternative Northern route, at least after the alleged obstruction of the disputed right of way, and he can continue to do so particularly as it runs over the lands of his own close relations." This is a clear misdirection in regard to the proper approach to a determination of the question whether the plaintiff is entitled to a cartway of necessity over the route he claims. "If the owner of the landlocked property must choose from which of a number of adjoining owners he shall demand a right of way, he will be entitled to obtain it from the owner whose property affords the most convenirent oute." (Hall and Kellaway: Ibid, p. 70).

According to the learned Commissioner himself the alternative route which the plaintiff made use of after the alleged obstruction is "longer, more arduous and less convenient" than the one he claims in this case. Had the learned Commissioner properly approached the question he could not have failed to reach the conclusion that the plaintiff should be declared entitled to a cartway of necessity over the lands of the defendants. The only matter which has caused me some anxiety is that the section BC of the cartway A B C D cuts the 2nd defendant's land in two. The portions of the 2nd defendant's land which lie to the North and South of BC were originally two separate lands. But for some years anterior to the date of this action they had been possessed as one land by the 2nd defendant. If, therefore, the 2nd defendant does not wish the cartway to run across the middle of the land as presently possessed by him, he should be given the option to demarcate a cartway along the boundaries of his land (either of the Northern or of the Southern block) so as to connect the sections A B & C D. The plaintiff should pay compensation to each of the defendants for the land set apart by each to constitute the cartway.

I set aside the judgment and decree appealed from and remit the case to the Court below for a fresh decree to be entered declaring the plaintiff entitled to a cartway of necessity over the lands of the defendants. The trial Judge will ascertain from the 2nd defendant whether the cartway over his land should be over the portion marked BC on plan X or whether he desires to offer any other alternative route across his land. The decree will specify the route, if any, set apart by the 2nd defendant. In regard to the width of the cartway that should be decreed, the trial Judge will, after inquiry, fix the minimum width required to take a single bullock cart of average size but the width should not exceed 8 feet. The trial Judge will also determine and incorporate in the decree the quantum of compensation that should be paid by the plaintiff to each of the defendants for the use of such cartway, provided, however, that the total sum awarded as compensation does not exceed Rs. 300. The trial Judge, in his discretion, may direct the plaintiff to have the cartway that is set apart demarcated on a plan to be made by a surveyor on a Commission to be issued by the Court and enter the decree with reference to such plan. The cost of such Commission and plan should be borne by the plaintiff.

The costs incurred so far in the Court below will be borne by each party. The costs of the further proceedings will be in the discretion of the trial Judge. The plaintiff will be entitled to his costs in appeal.

Judgment set aside.