1967 *Present :* T. S. Fernando, A.C.J., and Alles, J.

K. L. LEWIS PERERA and 3 others, Appellants, *and* H. JANE FERNANDO and 3 others, Respondents

S. C. 142/1966 (F)—D. C. Negombo, 888/L

*Servitude—*Usus*—Claim of right to wash clothes in a neighbouring paddy field—Maintainability—An essential ingredient of* Usus.

The defendants, who were dhobies by occupation, claimed the right to wash clothes in a portion of the paddy field belonging to the 1st plaintiff. They based their claim on some kind of long standing practice or custom and maintained that it fell within the ambit of the personal servitude known to the Roman-Dutch law as *Usus*. The plaintiff's unchallenged evidence was that if clothes were allowed to be washed in the field he would not be able to use the field because it would be polluted.

Held, that, although there was a finding of fact in defendants' favour, that for a considerable period they had washed clothes at the water hole on the 1st plaintiff's field, the defendants' claim must fail in view of the evidence of the plaintiff in regard to the damage to his field. The claim to the servitude of *Usus* is the right of using the property of others for daily needs *without detriment to the substance of the property.*

APPEAL from a judgment of the District Court, Negombo.

H. W. Jayewardene, Q.C., with *S. D. P. Valentine* and *I. S. de Silva*, for the plaintiffs-appellants.

N. E. Weerasooria, Q.C., with *W. D. Gunasekera*, for the defendants-respondents.

Cur. adv. vult.

November 29, 1967. ALLES, J.—

In this action, the defendants, who are dhobies by occupation, successfully obtained a declaration from the District Court that they were entitled to the right to wash clothes in a portion of the paddy field belonging to the first plaintiff and depicted as Lot A in the plan attached to the plaint. In spite of the plaintiff's persistent assertions that the water hole in his paddy field was not used by the dhobies in the neighbourhood for the purpose of washing clothes, there is a finding of fact against the plaintiff and the trial Judge has held that the water hole in question had been so used by the defendants and their forefathers for several years beyond the prescriptive period. On 25th October 1964, the plaintiff closed the water hole, planted paddy in the area so covered and sought a declaration from Court in this case that his paddy land was free of any right in the defendants to wash their clothes.

The question that has been argued in this appeal is whether the trial Judge came to a correct conclusion when he held that a servitude of the nature claimed by the defendants was one that was recognised in law. Counsel for the defendants-respondents sought to bring this claim within the ambit of the personal servitude known as Usus. According to Walter Pereira, (Laws of Ceylon, p. 507), Usus " consists, in reference to land, in the occupation of the same without hindrance from the owner or his workmen, and in the right to take fruits, vegetables, flowers, hay, and wood for daily consumption " and also includes such rights as the right of grazing on common land, and also the right of fishing in another's water. On a parity of reasoning, Counsel sought to claim the prescriptive right to wash clothes on another's land.

The learned trial Judge in the course of his judgment sought to equate the right to wash clothes on another's land to such servitudes recognised by Voet as " the right of pressing grapes or threshing corn or pulse on another's land ". In doing so the Judge has fallen into error because the kind of servitudes enumerated by Voet are rural praedial servitudes, which normally attach to land and have no analogy to the personal servitude claimed in this case. It is on the basis of a rural praedial servitude that Dalton, J. in *Tikiri Appu v. Dingirala* [1] recognised the right of a person to thresh his paddy on the threshing floor of another's land. In *Fernando v. Fernando* [2], which was a possessory action instituted by members of the dhoby community residing at Polwatte claiming a right to possess the land for the purpose of drying clothes, there was an alternative claim to a servitude of drying clothes on the land of another, but Hutchinson, C.J. held that no such servitude was known to the Roman Dutch Law. The case of *Fernando v. Fernando* was considered by Shaw, J. in *Kawrala v. Kirihamy and another* [3]. In the latter case, the plaintiff successfully claimed the right of threshing paddy on the threshing floor of a neighbouring owner as appurtenant to the plaintiff's field, and Shaw, J. held that such an easement was one that was recognised under the Roman Dutch law. Dealing with the claim of the dhobies in *Fernando v. Fernando,* Shaw, J. stated :

> " This is not a claim for a servitude such as we are dealing with in the present case. It was a claim of right such as is gained in some cases in England by custom for the inhabitants, or a particular class of inhabitants, of a district to make use of another person's property. All that *Fernando v. Fernando* decides is that such an extension of the law of servitudes as has been adopted in England has not been adopted under the Roman Dutch Law."

In the present case too the right that is claimed by the defendants to wash their clothes at the water hole on the plaintiff's paddy field is based on some kind of long standing practice or custom which the defendants seek to place on a legal basis by maintaining that it falls

[1] *(1934) 36 N. L. R. 267 at 268.* [2] *(1911) 14 N. L. R. 166.*
[3] *(1917) 4 C. W. R. 187.*

within the ambit of the personal servitude known to the Roman Dutch Law as Usus. The only recorded instance of an attempt to establish such a servitude in Ceylon was the unsuccessful effort of the dhobies of Polwatte in 1911, and here too they sought to claim the servitude as an alternative to their right to a possessory action. Percival Gane in his translation of Voet in commenting on this servitude states that there are only five decided cases in South Africa in which this subject has figured. "That it has not been more fully used may, so far as the servitude of use is concerned, be explained by the rarity of that servitude in and since Voet's day." (vide Translator's Note to Book VII, Tit. 8). Voet explains the reason for the rarity of this servitude in the following terms :—

> "Meantime at the present day the establishment of use is indeed rarer between private persons than is that of usufruct. That is because of the difficulties which commonly arise as to the extent to which the usuary ought to use, and because of the apprehension that fruits will be pillaged under cover of exercising use."
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> (Book VII, Tit. 8, Sec. 5)

Even Maasdorp (Vol. II, 7th Edn., p. 225) states that the personal servitudes of Usus and Habitatio are seldom met with in the present day. One can understand the reluctance of jurists to too readily recognise these servitudes since they are apt to seriously interfere with the right of the private individual and today they have invariably been superseded by agreement between the parties usually in legal form.

The Courts should therefore be slow to extend the application of this servitude to modern conditions particularly as it is likely to adversely affect the rights of private citizens and the servitude should only be recognised when there is clear evidence that the essential conditions necessary to establish the servitude have been proved.

In the present case, although there is a finding of fact in the defendants' favour, that for a considerable period they had washed clothes at the water hole on the plaintiff's field, the defendants' claim must fail in view of the evidence of the plaintiff in regard to the damage to his field. The claim to the servitude of Usus is the right of using the property of others for daily needs *without detriment to the substance of the property.* (Voet Book VII, Tit. 8, Sec. 1.) The plaintiff's unchallenged evidence in this case is that "if clothes are allowed to be washed in the field he will not be able to work the fields because the fields will be polluted". This is a legitimate fear and one that is not unlikely, having regard to the nature of the work contemplated. Therefore one of the essential elements necessary to claim this servitude has not been established by the defendants.

The defendants were not entitled to a declaration that they had the right to wash their clothes on the plaintiffs' field and the plaintiffs were entitled to the declaration which they prayed for in their plaint.

We set aside the judgment and decree of the District Court dismissing the plaintiffs' action and allow the plaintiffs' appeal with costs in both Courts.

T. S. FERNANDO, A.C.J.—I agree.

Appeal allowed.