1928.

Present : Drieberg J.

FERNANDO *et al. v.* DE SILVA.

100—C. R. Negombo, 34,635.

Right of way—Cart road—Way of necessity—Misjoinder of parties and causes of action.

Where the plaintiffs, who owned distinct allotments or land, sued the defendant claiming a cartway of necessity over the defendant's land,—

Held, that the action was bad for misjoinder of parties and causes of action.

The owner of a land which has access to the high road by a path cannot claim a cartway unless the actual necessity of the case demands it.

THIS was an action instituted by the plaintiffs, who were the owners of divided allotments of a land called Dawatagahawatta. They claimed a way of necessity for cart traffic from their lands over the defendant's land. Objection was taken in the lower Court that the action was bad for misjoinder of parties and causes of action. The learned Commissioner of Requests refused to uphold the objection and gave judgment for the plaintiffs.

Hayley, K.C. (with *Croos-DaBrera*), for defendant, appellant.—There is a misjoinder of parties as well as of causes of action. The plaintiffs are owners of separate lands. There are as many causes of action as there are lands. (*Don Simon Appuhami v. Marthelis Rosa,*[1] *Anganpillai v. Kurrukel.*[2])

Under the Roman-Dutch law a way of necessity cannot be claimed beyond the actual necessity of the case. Here there is no proof that a cartway is a necessity, as the plaintiffs are shown to have have been content during the last fifty years with carrying their produce on their shoulders along the footpath. (*Grotius II. 35, 7; 2 Maarsdorp 184.*) Even if a cartway be considered a necessity, the plaintiffs have lost their right by prescription, inasmuch as they have not instituted their action all these years.

Rajapakse, for plaintiffs, respondents.—Although the plaint refers to the title of the plaintiffs to the separate lots, there is really one land, Dawatagahawatta, and the plaintiffs are owners of it in undivided shares. There is no misjoinder, therefore. The interest of the plaintiffs against the defendant is joint. (Section 36 of the Civil Procedure Code.) Even if there is a misjoinder, no

[1] *9 N. L. R. 68.* [2] *16 N. L. R. 231.*

prejudice has been caused to the defendant by it (*Perera v. Fernando* [1]); and in any case judgment may be given to one of the plaintiffs and the action by the rest dismissed (section 11 of the Civil Procedure Code).

An owner of a land having a *jus viae* may maintain an action for broadening the path for a cartway of necessity (*Allis v. Silva*[2]; *Voet VIII., 3, 4*): and the fact that such an owner has a right of footpath to the high road does not prevent him from claiming a right of cartway of necessity (*Boteju v. Abilinu* [3]).

The necessity for the cartway arose only recently, that is, when the plaintiffs' coconut trees came into bearing and the nuts had to be carted to the high road.

October 2, 1928. DRIEBERG J.—

The respondents who are the owners of the lands A, B, C, and D in the plan in the sketch filed with the plaint ask for a way of necessity for cart traffic from their lands over the appellant's land. They have at present a right of way along the footpath AB but they want this enlarged into a cartway. These allotments are portions of Dawatagahawatta, which is lot No. 59,445 in the Government plan P 10 and in the deeds are described with reference to that number.

The land is however now held in divided lots; A in extent 2 acres 1 rood and 25 perches is owned by the first, second, and fourth respondents; B in extent 1 acre and 32½ perches by the third and fourth respondents; C in extent 2 acres and 2 roods by the first and the fifth to the tenth respondents; D in extent 1 acre and 1 rood by the sixth to the twelfth respondents. The thirteenth respondent hold a lease of a half of A and a one-fourth share of C.

The objection taken in the lower Court that the action was bad for misjoinder of parties and of causes of action was not upheld. It has been raised again in the argument before me and I am of opinion that it must succeed.

Mr. Rajapakse sought to argue that the division was for convenience of possession and that the title to these lots was not separate and distinct. He pointed to some passages in the evidence which, he claimed, supported this. It is not possible, however, to consider the title of the parties on any other footing than that presented in the plaint.

Regarding these several lands as the subject of distinct and separate ownership the claims of the owners of each of them to a right of way over the appellant's land are separate and distinct causes of action. The owners of each land have no doubt a common

[1] *4 C. W. R. 148.*

[2] *8 N. L. R. 76.*

[3] *7 C. W. R. 36.*

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interest in the establishment of this road for it will benefit all of them, and in the case of each claim there are common questions of law and of fact to be determined, but the owners of any one land are not jointly interested with the owners of any other in the relief claimed. The joint interest is between the owners of each separate land.

There is therefore a clear misjoinder and the action must fail. I need not refer to any authority on this point beyond the case of *Don Simon Appuhami et al. v. Marthelis Rosa.*[1]

The only question is whether the respondents' action should be dismissed or whether the action should be allowed for the benefit of some respondents and the action of the rest dismissed. It is not possible however to adopt the latter course. The only witnesses called on the main question were the thirteenth respondent and the third respondent. The former has a leasehold interest in A and C. He has no status in this matter and any inconvenience he undergoes for want of a cart road cannot be considered. His chief reason is that he is vedarala and that it is very hard on his patients not to be able to drive in a cart to his house. It is sufficient to say that he should not have engaged a house which was subject to this drawback. The third respondent who with the first and second respondents owns lot A, is sixty years of age; he has lived all his life on the land and apparently has not felt the necessity of a cartway until recently when his aunt who was ill had to be carried along the pathway to the road.

Both he and the thirteenth respondent seek to emphasize the danger of the path by pointing to the case of a man who when walking along it was bitten by a snake and died.

So far as A, which is the only land, which can be dealt with, is concerned, the evidence is quite inadequate. The respondents appear to have relied on the force of their united demand rather than on the actual merits of that demand for a cartway. Mr. Hayley asked that I should express an opinion on the merits of this claim. If the action is dismissed for misjoinder of parties the respondents will have the rights of bringing new and separate actions.

However, as the matter has been argued before me I may point out that there appears to be a misapprehension as to what a way of necessity is.

The Roman-Dutch law proceeded on a general maxim that there could be no *blokland* and therefore what was called a way of necessity was allowed " as well for a person on foot, as with a wagon, in order to gather and carry off the fruits of the land or of driving the cattle to and from it," (Kotze's *Van Leuwen, ed. 1881, vol. I., p. 295*). But this road by necessity can be claimed no further than the actual necessity of the case demands (*Peacock v. Hodges* [2]).

[1] *(1906) N. L. R. 68.*

[2] *Buchanan's Reports, 1876, p. 65, at p. 69.*

These lands lie a short distance from the Negombo-Mirigama road. The land in that part of the country, as indeed is the case in most rural areas, consist of numerous small holdings and necessarily comparatively few of them can have direct access by carts to the main road. Under these conditions the respondents whose lands cannot be described as *bloklands*, because they have free access to a road by the path, cannot say that a cartway is a necessity. Far from this being the case it would be a distinct luxury not enjoyed by the majority of owners of similar lands.

It has been claimed that a road is necessary to take the produce of these lands to the cart road. In my opinion there is no such necessity, for the limited produce of small extents like this can easily be carried by men to the main road.

The appeal is, therefore, allowed and the judgment appealed from is set aside. The respondents will pay the appellant the costs of this appeal and of the proceedings in the lower Court.

Appeal allowed.