1944 *Present:* **de Kretser J.**

JAYASEKERA HAMINE, Appellant, *and* AGIDA HAMINE, Respondent.

65—C. R. Colombo, 87,297.

Servitude of footway—Obstruction to prevent cattle trespass—Footway includes right of use bicycle or wheelbarrow—Right to free use of way.

Where the plaintiff claimed the servitude of a footway three feet wide over the defendant's land and where the defendant pleaded that she was entitled to put up a contrivance of logs at the entrance to the path in order to protect her land from cattle.

Held, further, that the servitude of footway (*iter*) includes the right to have the obstruction removed.

Held, further, that the servitude of footway (*iter*) includes the right to use a bicycle or wheelbarrow.

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

L. A. Rajapakse, K.C. (with him *Kingsley Herath*), for the plaintiff, appellant.

N. E. Weerasooria, K.C. (with him *E. B. Wikremanayake*), for the defendant, respondent.

Cur. adv. vult.

December 8, 1944. DE KRETSER J.—

The plaintiff brought this action on October 13, 1942, alleging that a path used by her, and on which a wheelbarrow and cycle were used, had been obstructed by the defendant on May 17, 1942, and deviated at one end to a ditch. The path was shown in an annexed sketch and later in a plan. Defendant filed answer stating that plaintiff's right, *if any*, was only one of proceeding on foot along the northern boundary and that the coconut logs of which plaintiff complained had always been in existence in order to prevent cattle trespass. The logs of which in particular plaintiff complained were two placed right on the path at each terminus of it on defendant's land. Between plaintiff's and defendant's land there is a ditch which is crossed by a footbridge made of coconut logs. Plaintiff's land is on a higher elevation. The plan shows a fence along the western boundary of defendant's land with a gap in it, each end of the gap being flanked by a coconut log standing about 3 feet from the ground, and a third log forms a triangle with these two. The same contrivance was erected at the end where the path meets the footbridge. The surveyor gave evidence and stated that the space between the stumps at the gap was 15 inches, on another side of the triangle it was 16 inches and on the third 19 inches. The ditch was spanned by 2 logs placed side by side.

At the trial which extended from March 31 to November 3, the following issues were raised:—

(1) Is the plaintiff entitled to the use of the way demonstrated in plan No. 3,436 dated March 14, 1943 ?

(2) Is plaintiff entitled to use a wheelbarrow and a bicycle along the said way?

(3) Prescriptive rights of parties.

(4) Did the defendant on or about May 17, 1942, wrongfully and unlawfully obstruct the free use of the said path?

(5) Damages.

(6) If issue No. 1 is answered in the affirmative is the plaintiff's right limited as set out in paragraph 3 of the answer?

The learned trial Judge inspected the land on July 9, and he made his order on November 3, declaring plaintiff entitled to a footway along the trace marked in the plan but with its end near the road shifted to a distance of one fathom from the drain on the north. He allowed the logs to stand and ordered that a minimum space of 16 inches should be allowed between the logs. He disallowed the right to use a bicycle or wheelbarrow.

He seems to have approached the case from the wrong point of view. It was conceded in the course of the trial that plaintiff was entitled to a footway 3 feet wide and the defence was that the contrivance of logs was one defendant was entitled to put up in order to protect the land from cattle. He has not considered the law nor has he correctly appreciated the facts. The plaintiff was entitled, and had been entitled to well over 30 years, to the free use of the footway and the obstructions necessarily restricted the right. She was, therefore, entitled to have them removed. Defendant was entitled to protect the land, but only in such a way that the plaintiff (and this includes all those visiting or having business with her) had the free use of the path at all times. The question was not whether plaintiff could wriggle through the contrivance. but whether she had the full and free use of the path. That she has not, and the obstructions must be removed.

One Andris, a relative of the defendant, is clearly the person responsible for the obstruction. He instructed defendant's lawyers, he gave evidence, and it is clear these obstructions were maliciously erected on a pretext of preventing cattle trespass. Mr. Weerasooria was of opinion that cattle are so stupid that while they will walk straight ahead they will not wriggle through a stile. It may be difficult for them to bend about as they have long bodies but I fail to see why they should make a bee-line for the middle post and not start their trespass at one end and walk right through the side of the so-called stile unless they were in very good condition. Be that as it may, the plaintiff is entitled to have the obstruction removed. The question of gates is considered in Hall and Kellaway in their book on Servitudes at page 77 and they quote cases decided in South Africa where it was held that the question whether an obstruction hindered free passage is purely a question of fact to be decided on the circumstances of each case. The Court had ordered the removal of a gate which used to be kept locked at times and so prevented the full use of the path. Voet deals with the matter in Bk. 8. 3. 4. A gate across the path, which could be opened at all times, allows the use of the path and may be permitted (it is usually a matter of agreement) but an obstruction is quite a different thing.

As I shall show later, even on the facts the plaintiff is entitled to the path she claims.

The rights to use a bicycle and a wheelbarrow are not free from difficulty. They were modes of conveyance not known to the Roman law or to the Dutch law and the claim to use them can only be decided on principle. The Roman law divided servitudes relating to passages into *iter* (3 or 4 feet wide), *actus* (usually 8 feet wide) and *via* (usually 12 feet wide), each succeeding right including the previous ones. The chief principle, if not the only one, seems to have been the extent of the burden on the servient tenement. The up-keep of the passage lay on the dominant owner and everything necessary for the use of the right was impliedly given. Accordingly plaintiff would be entitled to erect a footbridge 3 feet wide over the ditch separating her land from the defendant's.

The Roman law allowed under the right of *iter* the right of going over the passage on foot, on horseback or by being carried over it. Grotius, however (Introduction Bk: 2 C. 35 s. 1), divides *iter* into footway and bridle-path and seems to make them different servitudes. He quotes no authority and gives no reason. Voet (8. 3. 1) follows that division and quotes Grotius as his authority, adding that it was according to their custom to call one a footpath and the other a bridle-path. There is undoubtedly a difference in nomenclature, and to that extent the division is justified. One has to infer that because they were distinguished, therefore, they are different. Voet says " it is to be noted that according to our custom *iter* is properly restricted to the right of going on foot and it is different from going on horseback." The right of going on horseback was recognized but it was no longer treated as *iter* but as a special servitude. It was not *iter* nor was it *actus* or *via*. They had in fact divided up *iter*. Grotius says the right of bridle-path included that of footpath. But why? The space apparently was the same but possibly a horse may prove restive and so trespass outside the path or damage any protecting fence.

Actus was intended for driving cattle, even one, and vehicles. If so, is another principle recognized, viz., the possibility of damage to the servient owner? *Actus* was normally 8 feet vide, indicating the size of the vehicle contemplated. The considerations, therefore, seem to have been in the first instance the space occupied and next the possibility of other damage, not to the footpath, but to the remainder of the land. There is a scarcity of authority, whether of writers or of cases, on the subject. Nathan (Vol. 1 p. 515 *et seq.*) states the Roman law, mentions the distinction drawn by Grotius and Voet, and adds " In any case, there is no difference in their mode of exercise ". This comment rather suggests that he did not favour the distinction. No case on the point seems to have arisen in South Africa. Did the Dutch colonists carry with them the customary distinction made in Holland, perhaps for local reasons, and if they did has it fallen in desuetude? It seems to me it happened in Africa, and the same thing happened in Ceylon. The original law would then remain in force. I am rather inclined to think that a right to use a bicycle or to use a wheelbarrow should be

conceded to a person entitled to a footpath. Neither of them requires more space nor can cause damage to the surrounding land.

But the rights can be decided in this case on the evidence, for even if they be separate rights the evidence indicates that they have been obtained by prescriptive user. Not only is the evidence for plaintiff much better than that called for the defendant, but the latter in fact in parts corroborates the evidence led for the plaintiff and in other parts is demonstrably false. The defendant's land is a strip ¼ acre in extent, the greater part of which lies to the south of the path. Defendant's assertion that the path was along the northern boundary is only approximately correct. On the north is a drain. The locality is liable to floods and the trial Judge had to postpone his inspection once for this reason. Presumably the portion near the drain would suffer most. Defendant's land is not separated from the adjoining land on the south, which she now owns and which at one time belonged to her grandmother and mother. There is a house on that land, which after her mother's death seems to have been rented out in more recent years. Defendant herself lived somewhere else for she speaks of visiting the land once in 3 or 4 months. She came to live on that land in recent times, evacuated during the Japanese raid in April, 1942, and later returned. During her absence Andris looked after the place for her. Plaintiff's land came to her from her husband, who died in 1929. He had a brick kiln on the land. The land yields some thousands of coconuts, which are sold and transported out of it. Beyond the plaintiff's lands are fields and the owners of these pass over both plaintiff's and defendant's land and transport manure, &c., to their fields. No trouble arose in the time of the defendant's grandmother or mother and defendant herself admits she passes over plaintiff's land. The trouble arose with Andris, who seeks to put the blame on plaintiff's husband's nephew, Edirisinghe, who came to live with them as a boy, and was about 17 years old when her husband died. He then got employed in a Colombo firm and used to go to his work on a bicycle. Andris admits Edirisinghe has been using a bicycle to go to his work and alleges that he never rode along the footpath but kept his bicycle in a house by the road and walked the remainder of the way. Defendant, however, admits having seen Edirisinghe riding along this path. The Court intervened and questioned her and she said she had seen him walking along the path but not with the bicycle, wheeling it. It is clear that he did ride his bicycle along this path and had done so since 1929. Plaintiff came to her land after her marriage about 30 years ago. She alleges that at that time there was no fence along the western boundary and her husband used carts for transporting his bricks, &c. Andris says he attended the wedding and the party then walked along the *cart track*. He admits that at that time the bridge was composed of logs, but he says they were put down only temporarily. Now, Andris admits he was looking after one Wijesekera's land and that plaintiff took the lease of that land. Plaintiff adds that her husband had taken a lease before she did. Plaintiff's husband died in 1929. She had then only Edirisinghe as a protector. Andris is clearly very angry with Edirisinghe for he says Edirisinghe came to plaintiff's house originally as a servant and that all the trouble arose after he asserted

himself. Even on appeal it was the right to ride a bicycle which was strongly contested. Clearly the obstruction was aimed at Edirisinghe. Soon after her husband died in August, 1929, plaintiff had occasion to complain to the Headman on January 3, 1930, that Andris had on the night of the 2nd thrown stones on her roof. The Headman saw the damage, questioned witnesses and Andris and granted a report. Andris pretends that he was not questioned. We have not been told what followed on the report. It has nothing to do with the right of way except by way of explaining the source of trouble.

On July 2, 1932, plaintiff complained that Andris had obstructed the road by putting up two fences. On July 31 she complained that he had come to the compound drunk and abusive and had later removed the footbridge of two logs. Andris' explanation was that it was too wide. Plaintiff seems to have complained to the Government Agent who alleged he could not interfere as it was not a public road. Plaintiff then prosecuted Andris on October 5, 1932. Eventually parties agreed to abide by an order made by the Magistrate, without evidence, but after inspection. The Magistrate inspected on December 29, *i.e.*, nearly 6 months after the alleged obstruction. His order was admitted in spite of objection, and in spite of the Magistrate having been summoned as a witness. The Magistrate records that he found a fairly well defined path. It is this path that the defendant denied in his answer and put in issue but later conceded. The Magistrate found two strands of wire at either end but did not think that they could be said to block the path. The charge had been one of wrongful restraint. Plaintiff had alleged that a fence along the southern boundary of the path had been shifted to a parallel line further north. This had nothing to do with the right of way but was apparently an allegation made because it was a fact. The Magistrate saw no trace of the fence along the south of the path (he could scarcely expect to find any) and he thought, as the posts were eaten by ants and the wire was embedded in the growing trees, the fence had always been where he saw it. It does not seem to have struck him to have the roots of the trees examined. It is well known that certain trees like the suriya can be planted in stumps and transplanted and they would continue to be green and to grow. It is a common way of making out a fence to be older than it really is and the only effective test is an examination of the roots. However, the question of the fence is immaterial. The Magistrate may have been right in considering it not to be a case of wrongful restraint but what we wish to know is the height of the two strands. On this point he only says they do not block the right of passage. Presumably they could be stepped over. A bicycle could easily be carried over them. Normally the two strands would not be more than two feet from the ground. The posts at the end of the fence are at present only about three feet high. Andris says that men carrying coconuts in bags jumped over the two strands. And yet he says these two strands were put there to prevent cattle trespassing, and that by night. Apparently cattle were tethered by day and let loose at night, when they might be stolen!

There is no evidence as to how long these two strands remained there, with people jumping over them. The answer alleged that the cocount

logs *always* existed. The Magistrate makes no mention of them. Andris went the length of saying the logs now there were there for over 10 years and he even explained that the bark had rotted. The survey thought them to be a few months old. Defendant said that the logs had taken the place of others which had rotted during her absence from the land, i.e., in April, 1942. Plaintiff's evidence of their having been put up after the raid is thus confirmed. In re-examination Andris seems to have appreciated the position better for he alleged that the logs had been replaced during the 10 years, the last time being 3 years before the trial. This is not what the defendant says. Now, in 1939, coconut logs had been planted. Defendant describes this as an attempt to erect a stile. Plaintiff did not go to a Headman but promptly sent a letter through a Proctor, threatening an action if the encroachment were not promptly removed. There can be little doubt it was removed for no action followed and it is unlikely that if plaintiff acquiesced in that obstruction she would later complain of a similar one. The truth seems to be that this threat of action frightened the defendant, who was quite aware how big an extension this was on the two strands of wire. It was quite realized at the time of filling answer that there was this difference and hence the allegation that the logs *always* evisted. They could not have, for quite respectable evidence given by the Headman and a Sanitary Inspector, against both of whom nothing is urged, shows that there was no obstruction from 1940, not even wires. Defendant came to live on the land about this time and perhaps she realized her need too use the plaintiff's land to go over. Prior to that tenants had lived in the house and Andris faded out after about 1932. He came in again when defendant left owing to the raid. Plaintiff also left, and realizing how ineffective the two strands of wire had been he then contrived this new method of obstruction. Andris admits that produce from defendant's land had to be carried out and manure brought in. He admitted wheelbarrows and carts were used but alleged that he opened a gap each time and closed it. He stated that the western fence was 15 years old. That fits in with plaintiff's evidence. One Endoris, a close relative of both parties, with no interests in either side, stated that originally the gap was 7 feet wide. It has now come down to 15 inches. He stated that plaintiff transported her coconuts along this road in wheelbarrows. Andris admitted that wheelbarrows were commonly used in that locality. He admitted that plaintiff rebuilt her house and completed the work 3 or 4 years before and he alleged that bricks were taken from the brick kiln on the land and that lime had to be brought from outside but said he had not seen it being brought. The wire away from the obstruction is older and rusty unlike the wire used in narrowing the gap.

I have said enough to show that the right to use a bicycle has been acquired by prescriptive user, with a temporary inconvenience in 1932, which affected its use only at the two ends. The right to use a wheelbarrow has also been established. The trial Judge's inference that because there was an obstructon in 1932, therefore, the bicycle and the wheelbarrow could not have been used thereafter is not a logical conclusion and is in the teeth of the evidence.

The decree entered is set aside save in so far as it orders the gap to be made further to the south. The path should run straight into the road without the deviation now attempted. Decree will be entered for the plaintiff as prayed for, the deviation will be removed. At the trial damages were agreed on at Rs. 5 " for the full period ". That was on March 20, 1943, and many months have elapsed since then. A further order should be made for the period which may elapse before the obstruction is removed. I would order damages at Rs. 5 a month starting from a period of 2 weeks after this order is communicated to the parties or their Proctors until possession is restored to the plaintiff, who is entitled to have a writ enforcing the order of Court and placing her in full possession of her rights. Plaintiff is also entitled to have her costs both in the Court below and in this Court.

Appeal allowed.