1955 *Present:* **Weerasooriya, J.**

MOHOTTI APPU *et al.*, Appellants, *and* WIJEWARDENE, Respondent

S. C. 164—C. R. Kegalle, 19,913

Servitude—Way of necessity—Scope—Effect of alternative route.

A person can claim a way of necessity for the purpose of going from one land owned by him to another. The right of way will not be granted if there is an alternative route to the one claimed although such route may be less convenient and involve a longer and more arduous journey.

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

C. R. Gunaratne, for the defendants-appellants.

No appearance for the plaintiff-respondent.

Cur. adv. vult.

December 21, 1955. WEERASOORIYA, J.—

This appeal is from the judgment and decree of the Court of Requests, Kegalle, declaring the plaintiff-respondent entitled to a right of way of necessity over the land Kandewatte belonging to the defendants-appellants along A to C as delineated in Plan No. 1071 dated the 25th August, 1954.

According to the evidence this land was divided under partition decree entered in 1925 into four separate allotments of which a lot referred to in that decree as A 1 is the subject of the disputed right of way. To the north-west of lot A 1 was Lot A which was also subsequently divided under partition decree of 1948 into five separate allotments marked A, B, C, D and E in the partition plan of which Lot E was at the time of the institution of the present action owned by one Gunadasa. This Lot E and Lot A 1 belonging to the defendants-appellants are contiguous lands and lie between the land Tennehena belonging to the plaintiff-respondent (on the west of Lot E) and another land called Meemendigalawatte (on the south and south-east of Lot A 1). The residing land of the plaintiff-respondent is Hitinawatte to the south of Meemendigalawatte and adjoining a portion of Meemendigalawatte separately possessed by one Dingiri Appuhamy as a co-owner. The plaintiff came into Court on the basis that he is also a co-owner of Meemendigalawatte but although his title to the land seems to be in dispute no issue was raised on that point.

The plaintiff says that in order to go to Tennehena, a small rubber land, from his residing land Hitiniwatte he gets on to the portion of Meemendigalawatte possessed by Dingiri Appuhamy and from there it is necessary to go across Lots A 1 and E of Kandewatte which two

lots would constitute the servient tenements in respect of the right of way claimed. The footpath shown from points A to C in Plan No. 1071 commences at the boundary between Lot A 1 and the portion of Meemendigalawatte possessed by Dingiri Appuhamy and extends across Lot A 1, while C to D represent the continuity of it over Lot E up to the land Tennehena. The owner of Lot E has not been made a party to this action on the ground that no objection has been raised by him to the plaintiff going across his land to Tennehena.

Mr. Gooneratne who appeared for the defendants-appellants submitted that as the right of way was claimed from one land to another the plaintiff could not in any event succeed since such a right is not recognised by our law. For this submission he relied on a passage in the judgment in *Fernando v. Livera* [1] where it is stated that a person is not entitled to a way of necessity for the purpose of going from one land owned by him to another. The facts as appear from the judgment in that case show, however, that what was claimed was a way of necessity from one of plaintiff's lands to a village committee road to the north of it, and not from that land to his other land. The particular statement relied on in that judgment would, therefore, appear to be in the nature of an *obiter dictum*. According to Hall & Kellaway on the Law of Servitudes [2], "a way of necessity is a right of way granted in favour of property over an adjoining one, constituting the only means of ingress to and egress from the former property to some *place* with which it must of necessity have a communicating link". There is, thus, no reason to take the view that the place with which the communicating link is sought to be established may not be another land. The authors give as an example a right of way (to be used only upon necessary occasions) "from the cornfields to the dominant property" and cite as authority for this statement a passage from Grotius' Introduction to Dutch Jurisprudence [3] which refers to a right of way "for the purposes of the harvest, of interment, or of some other necessity".

But even if on the ground of necessity it would have been open to the plaintiff to claim a right of way from Tennehena to either Meemendigalawatte or his residing land Hitinawatte over the land of the appellants, having regard to the burden which lay on him to establish his claim he has, in my opinion, failed to adduce sufficient evidence to entitle him to judgment. All that he has stated as a ground for claiming the right of way is that latex collected from rubber trees on Tennehena is coagulated in his house. He has given no reason why the process of coagulation cannot be done elsewhere. Moreover, there is evidence adduced on both sides that an alternative route from Hitinawatte or Meemendigalawatte to Tennehena is available to the plaintiff. This route is said to lie, at least in part, over privately owned property, but so does the way claimed. The plaintiff and the defendants-appellants are at variance over the length of this alternative route. According to the evidence adduced by the plaintiff it is about one and a half miles, while according to the defendants it is not much more than a quarter

[1] *(1948) 49 N. L. R. 350 at p. 354.* [2] *(1942 Edition) p. 65.*
[3] *2.35.7 (Maasdorp's Translation).*

of a mile. There is no evidence as to the length of the route between the plaintiff's house and Tennehena over the appellants' land, which route undoubtedly is the more direct one. But even if the difference is, on an acceptance of the evidence adduced by the plaintiff, taken as about a mile, that alone would not be a reason for allowing his claim. It was held in the case of *Lentz v. Mullin*[1] that if the person claiming the right of way "has an alternative route to the one claimed, although such route may be less convenient and involve a longer and more arduous journey, so long as the existing road gives him reasonable access to a public road he must be content, and cannot insist upon a more direct approach over his neighbour's property". These observations would equally apply where the right of way claimed is from one land to another.

The judgment and decree appealed from are set aside and the plaintiff's action is dismissed with costs here and in the Court below.

Appeal allowed.

[1] *(1921) E. D. L. 268.*