

Present : Schneider J.

1922.

KODITUWAKKU *et al.* v. MANSEER *et al.*

38—C. R. Kandy, 28,648.

*Way of necessity—Order to pay a sum annually to keep defendants' right alive—*

Where the Court entered decree granting the plaintiff a way of necessity, and ordering him to pay defendant one rupee per annum to keep the defendants' right alive.

Held, that the order as to payment of a sum annually was inconsistent with the granting of a way of necessity, and remitted the case for the Commissioner to ascertain what should be paid for the way.

THE facts appear from the judgment.

H. V. Perera, for appellant.

H. E. Garvin, for respondent.

June 2, 1922. SCHNEIDER J.—

Objection has been taken on this appeal that the plaintiffs have not claimed a way of necessity, while the Commissioner has granted them such a way. It is true that the plaint is not worded as precisely as it might have been, if the claim had been confined to a way of necessity, but the very words " way of necessity " are to be found in the fourth paragraph of the plaint, and it is obvious that both parties to the action understood what it was that the learned Commissioner was to decide by inspection of the land, that is, whether the way claimed by the plaintiffs was one of necessity. The learned Commissioner had so understood the request made by the proctors that he should " inspect and decide the case." I would, therefore, hold that he has rightly decided within the authority given him by the parties that the plaintiffs are entitled to a right of way of necessity, but his order that the plaintiffs should pay the defendants one rupee per annum to keep the defendants' right alive is inconsistent with the granting of a way of necessity.

I would, therefore, set aside that part of the decree and remit the case in order that he may decide upon evidence, if the parties so elect, what sum of money should be paid by the plaintiffs to the defendants for the user of this way of necessity. I would give no costs of appeal to either party.

*Set aside.*