1938 *Present :* **Maartensz and Hearne JJ.**

AMARASURIYA *v.* RAMANATHAN CHETTIAR.

167—D. C. Galle, 35,662.

Servitude—Right of cart way—Dominant and servient tenements not adjacent —Right to claim servitude.

Where the plaintiff claimed the servitude of a cart way over the defendant's land which was separated from plaintiff's land by an intervening field over which the plaintiff had only a right of footway.

***Held*, that the plaintiff was not entitled to claim the servitude of a cart way unless he was entitled to a similar servitude over the intervening land.**

APPEAL from a judgment of the District Judge of Galle.

Plaintiff as owner of a land called Amukotukande asked for a declaration of title to a right of cart way over Sindamani estate belonging to the defendant.

Between the plaintiff's land and defendant's estate there was an intervening field over which the plaintiff had only a right of footway.

The defendant admitted that plaintiff was entitled to a right of footway but denied that he had acquired a right to use it for vehicles.

The learned District Judge held that the plaintiff had used the road as a cart way for over ten years and gave judgment for the plaintiff.

H. V. Perera, K.C. (with him *E. B. Wikramanayake*, *Curtis*, and *Renganathan*), for defendant, appellant.—Where the dominant tenement does not adjoin the servient tenement a right of cart way cannot be acquired by prescription unless the intervening land is subject to the same servitude. *Voet*, VIII. 4. 19. The illustrations given by *Voet* make that clear. By the same servitude *Voet* means a servitude of the same kind. It is true that *Maasdorp* says some servitude is sufficient. *Maasdorp, bk. II. p. 168.* But *Maasdorp* is dealing with servitudes generally. What the plaintiff claims in this case is to take a cart from the high road over the defendant's land to its boundary and take it back to the road again. This is not a right of way which can be said to appertain to his land. The evidence also is quite insufficient to establish the acquisition of a right of way by prescription.

Hayley, K.C. (with him *N. E. Weerasooria, L. A. Rajapaksa, G. P. J. Kurukulasuriya,* and *J. R. Jayawardana*), for plaintiff, respondent.—Although the dominant and servient tenements do not adjoin each other a right of cart way can be acquired by prescription, if the intervening

property is subject to some servitude, and need not be the identical servitude. It is sufficient if some servitude which brings the servient tenement into touch or communication with the dominant tenement is established. *Maasdorp (Institutes of Cape Law, bk. II., p. 168).*

Cur. adv. vult.

March 17, 1938. MAARTENSZ J.—

This is an appeal from a decree of the District Court of Galle declaring the plaintiff, as owner of a land called Amukotukande, entitled to a right of cart way over Sindamani estate belonging to the defendant along the route A, B, C, D in plan X.

Amukotukande is to the north of Sindamani estate (hereafter referred to as "the estate") but does not adjoin it. Over the intervening parcels of land which do not belong to the defendant there is only a footpath. The cart road commences at the northern boundary of the estate and joins the Galle-Akuressa high road on the south. The cart road is marked (reading from the north) A, B, C, D.

The plaintiff's case is that he had acquired by adverse user for over ten years a right of cart way from the main road to the point A, and a right of footway from A to Amukotukande, and that the defendant had since January 25, 1937, obstructed the cart road at the points A, B, and C in sketch P 1.

The defendant admitted that the plaintiff was entitled to use the cart road as a footway but denied that he had acquired a title to use it for vehicles. It was admitted that plaintiff had occasionally driven his car only along the road, but that user was said to have been permissive.

The evidence of user by the plaintiff is meagre but I am not prepared to say that there is insufficient evidence to justify the District Judge's finding that the plaintiff used the road as a cart way for over ten years and that the user was not permissive.

The main defence to the claim both in the District Court and in appeal was that under the law regulating the enjoyment of servitudes, the plaintiff could not acquire a servitude of a cart way over the estate as there was no right of cart way over the fields which lie between the estate and the dominant tenement. In support of this defence we were referred to *Voet, bk. VIII., tit. 4, s. 19,* which reads as follows:—

> "There is, lastly, this common characteristic, that in every praedial servitude the dominant and servient tenement ought to adjoin one another; which proximity, however, ought to be judged rather from the advantage which is afforded and the capability of a servitude being imposed, than from the fact that the two properties touch one another. For although there is a distinction between urban and rural servitudes in this, that whilst as a rule, in the case of rural servitudes a servitude is prevented by an intervening tenement not subject to a servitude, nevertheless, in urban servitudes it is not so; for the servitude preventing the blocking up of lights or view, or preventing the raising of

buildings, can be imposed on a tenement between which and the dominant there is another tenement, the liberty of which remains intact; provided only that the dominant and servient tenements are not so far distant from one another that they cannot be seen the one from the other. But in rural servitudes as well, a tenement not bordering on the dominant tenement can be subject to a servitude to it, if only the intermediate tenement owes the same servitude. For which reason it became the custom that water could lawfully be led by right of servitude through the adjoining estates of more than one person, and that one and the same servitude of passage, driving, and way, could be constituted over several farms of several owners ; and the right of drawing water was not stopped by the fact that there existed an intervening public road or place ".

Voet uses the word " same " in the sense " of the same kind ". That appears from his illustrations. If water could be led through each of two adjoining estates, the servitude being the same, the water can be led from the farther, through the nearer, up to the dominant tenement. Similarly a servitude of passage, driving, and way can be constituted over three farms with separate owners if there was a servitude of passage, of driving, and of way respectively over each of the three farms. *Voet* does not say the *servitudes* of passage, driving and way. If this interpretation of *Voet* is correct, the servitude of cart way cannot be acquired by the plaintiff even if he had used the cart way as such for the prescriptive period.

Maasdorp (*Institutes of Cape Law, bk. II., p. 168*) dealing with the requisites of proximity says (citing *Voet VIII., 4, 19* as his authority). " An urban servitude, for instance, may subsist though the two tenements are separated by intervening properties which are free from servitude ; but this cannot be the case with respect to rural servitudes, which require that the intervening properties shall be subject to some servitude, though not necessarily the same as the servient property, in order to bring the latter into touch or communication with the dominant tenement ".

The respondent's Counsel contended on the authority of this passage from *Maasdorp* that plaintiff could acquire a right of cart way over the estate as the footway over the intervening tenement brought the estate into touch or communication with the dominant tenement.

I do not think this is a correct construction of the effect of the passage in *Maasdorp* (if it is, it is contrary to *Voet*). The dominant and servient tenements not being physically in touch, the servitude, whatever it is, over the intervening tenement, must be of such a kind as enables the plaintiff to exercise the right of cart way up to the dominant tenement.

The servitude of footway only over the intervening tenement precludes the plaintiff from taking his carts or other vehicles up to the dominant tenement. The servitude therefore does not entitle him to claim the cart way sued for.

The passage in *Voet* is not inconsistent with the passage in *Maasdorp, Voet* was referring to servitudes which are continuous between the dominant tenement and the other terminus such as the servitudes of leading water passage driving and way. *Maasdorp* was referring to servitudes generally and in the case of some servitudes the servitude over the intervening land need not be the same. As for instance the servitude *aquae haustus* which could be enjoyed by the dominant tenement even if there is a land intervening if it has a right of way over the intervening tenement.

In my judgment when the servitudes are of the character referred to by *Voet* the servitude over the intervening tenement must be of the same kind. The plaintiff's action therefore fails and must be dismissed with costs in both Courts.

HEARNE J.—I agree.

Appeal allowed.