Present: Dalton J.

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FERNANDO *v.* FERNANDO.

20—C. R. Chilaw, 22,727.

Right of way—Claim over three separate lands—Partition decree in respect of one land without conserving the right—Extinction of servitude.

Where the plaintiff claimed by prescription a right of way from his land to the high road across three lands, owned severally by the defendants, and where a partition decree had been entered in respect of one of the servient tenements without the decree conserving the right of way,—

Held, that the right of way was extinguished.

A way of necessity is limited to the absolute necessities of the case.

THE plaintiff claimed a right of way by prescription from his land, Bogahawatte, over three lands to the Colombo-Chilaw high road. In the alternative he claimed a cart way of necessity. The land immediately to the west of Bogahawatte was owned by first to tenth defendants; then intervened the land belonging to the twelfth defendant, and the land between it and the high road belonged to the heirs of one Domenico Fernando. The first to tenth defendants and the eleventh and twelfth defendants by their answer denied that the plaintiff exercised any right of way. It was further contended by the defendants that by virtue of the partition decree entered in D. C., Chilaw, No. 6,598 on February 25 in respect of one of the servient lands, in which no right of way was reserved, the right of way claimed by the plaintiff was extinguished. The Commissioner of Requests held that the plaintiff had established a right of way by prescription and gave judgment accordingly.

H. V. Perera (with *Rajapakse* and *Weerasooria*), for first to tenth defendants, appellants.

Zoysa, K.C. (with *Croos da Brera* and *Amerasekera*), for plaintiff, respondent.

August 21, 1929. DALTON J.—

The plaintiff in this action claimed a right of way, as the owner of a land called Bogahawatte, over three lands (called below X, Y, and Z) to the west of Bogahawatte to the Colombo-Chilaw high road as depicted in plan PX of January 11, 1927. The action was commenced on September 14, 1926. He claimed that he and his servants had used this cart way for a period of over ten years

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adversely to all others and had obtained a prescriptive title thereto. In the alternative, as he says he has no other means of ingress and egress, he claimed the cart way as a way of necessity. According to the plaint the land immediately to the west of Bogahawatte is owned by the first to tenth defendants (I will call their land X); then comes the land (land Y) of the eleventh defendant, and between the latter and the high road is a land (land Z) belonging to the heirs of one Domenico Fernando, who, Counsel states, are first to fourth defendants. It was disclosed by 11th defendant in his answer that the land Y belonged to his wife Maria Perera, and she was made 12th defendant. This land it is stated has since action was brought been purchased by plaintiff's brother, and he is made an added defendant. The 1st to 10th defendants and the 11th and 12th defendants by their answers denied that plaintiff had any right of way and asked that his action be dismissed. The added defendant, who had purchased the 12th defendant's interests on October 4, 1927, stated he had no objection to plaintiff being declared entitled to the right of way claimed. When the case came on for hearing the 6th defendant alone appeared to contest the claim. All the 1st to 10th defendants had the same Proctor, and the 6th defendant presumably acted as representing them, since they are all appellants in this appeal.

The right of way claimed is the road marked A, B, C, D on the plan PX filed, A being the point on the high road and D the point on plaintiff's boundary. The first issue in the case was as to whether plaintiff and his predecessors in title had acquired a prescriptive right to this road, and the answer of the Commissioner is in the affirmative. He states the substantial line of defence put forward was that the right of way had ceased to exist by virtue of the partition decree in case D. C., Chilaw, No. 6,598 dated February 27, 1925. This was set out in the fifth issue. A copy of this decree was produced marked D 3. It is conceded that by that decree lot E was allotted to the eighth defendant in the partition action, who is the 12th defendant in this action. It is further conceded that the land I have called Y above which belonged to the 12th defendant is a portion of this lot E. It is admitted that by the partition decree no right of way was reserved across any part of lot E to any person, and therefore it is urged that any right of way that plaintiff had at the date of the decree has ceased to exist since it has not been either claimed or preserved by that decree. I must admit I have some difficulty in following the judgment appealed from on the question of this fifth issue, but I think I am not mistaking the conclusion of the Commissioner, which appears to be to the effect that although the law is correctly set out in *Girigoris v. M. Meedin* [1] relied upon, the law there set out cannot

[1] *1. Bal. Reports 177.*

equitably be applied to the circumstances of this case. *Girigoris v. M. Meedin* (*supra*) was followed in *Silva v. Isohamy* [1], where Bertram C.J. said it was settled law that a partition decree extinguishes all easements not specifically provided for in the decree. That latter case was, so the Court held, an unfortunate case, but that was not held to be any reason for departing from the law as settled by authority. The Commissioner in the lower Court should remember, if this case is a hard case, as he suggests, that hard cases make bad law.

The right of way claimed is from plaintiff's land to the public road. It crosses the properties of three different lots of owners to get there. One of these properties was the subject of the partition action above referred to. If the evidence led for plaintiff is to be accepted, his right over this property and the others had been in continuous and uninterrupted use for over ten years prior to that, but no claim was then put forward. He was not a party to the partition action, but if the way was being used by him as a cart road regularly at the time, it is difficult to think he was not fully aware of the action going on, whilst in any case the decree is binding upon the whole world. As Pereira J. states in the authority cited, under section 9 of the Partition Ordinance, the partition is good and conclusive against all persons whomsoever whatever right or title they have or claim to have in the property partitioned, and these words are large enough to include a right of way. Plaintiff was entitled to be made a party to the action if he had a right of way over the land to be partitioned, and this was not done. The right of way as claimed therefore has a missing section, his alleged right over that section having gone. What is his position as regards the right of way as a whole ? This section has since the action was begun been acquired by his brother-in-law, who says he has no objection to plaintiff crossing his land on the way to the road. There has been however no re-creation at any time of this servitude by him after its extinction as a result of the partition decree (see *Voet VIII., 4, 1*) and no compliance with the provisions of Ordinance No. 7 of 1840, whilst the rights of the parties must, further, I take it, be considered as they were at the time the action was commenced.

It will be seen therefore that plaintiff has lost the right of way at any rate across one of the alleged servient tenements. The Commissioner has in his judgment referred to Maasdorp's *Institutes of Cape Law, Vol. II., p. 168*, to the effect that the dominant and servient tenements need only be neighbouring but not necessarily contiguous or adjoining. The authority however is clearly drawing a distinction here between urban and rural tenements. He says: " An urban servitude fore instance may subsist although the two tenements are separated by intervening properties which are free

[1] *26 N. L. R. 374.*

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from servitude." The servitude preventing the blocking up of lights or view, or preventing the raising of buildings are examples of such cases (*Voet VIII., 4, 19*). Maasdorp continues: " But this cannot be the case with 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 tenements." Voet states that in rural servitudes 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. An intervening public road or place would not however stop the right (*Voet VIII., 4, 19*).

The obstruction in this case was made upon the tenement adjoining plaintiff's land, but the servitude he claims is not only over that adjoining land. It is clear, taking the effect of the partition decree as set out above, that one of the lands over which the servitude is claimed, namely, that land adjoining the road, is now separated from the alleged dominant tenement by a piece of land which does not owe the same servitude. Plaintiff therefore fails to establish the servitude he claims, namely, the right of way, from his land to the road. The Commissioner's decision on this question must therefore be reversed.

The question of a way of necessity was not decided in the lower Court. This right is limited to the absolute necessities of the case (*Maasdorp Vol. II., p. 84; Voet VIII, 3, 4*). Upon the evidence led in this case it seems to me that plaintiff is not without other means of approach to and departure from his land, namely, on the south, and that therefore he is not entitled to the way claimed as a way of necessity. His residing land, it would seem, is to the south of the land which he claims is the dominant tenement. How he gets from that residing land is not clearly stated, but I gather from the evidence it is by some other route than through the land to the north. If that is so he has ample means of approach and departure on that side. His complaint would seem to be, to use his own words, that he has no easier means of access or no closer road leading to the high road other than the roadway he now claims. It is not always easy to follow his evidence as there is no complete plan of all the different lands surrounding his, but he admits he is the owner, by purchase, of a land called Kosgahawatte which he has included within the boundaries of Bogahawatte and that the former owners of Kosgahawatte always made use of a means of approach and departure from that land across another land which separated Kosgahawatte from the Gansabhawa road to the south. This road is marked on the plan (D 1*a*) as running from E to F. The Gansabhawa road joins the main road a little to the south of the right of way claimed. This is therefore a further means of access

open to him. Upon the evidence led it would in my opinion be impossible to hold that plaintiff has shown conclusively that he is entitled to the road claimed as a way of necessity.

The appeal must therefore be allowed. The order of the Commissioner is set aside and judgment must be entered for the defendants with costs. The order of the Commissioner fining the sixth defendant for contempt of court in respect of the injunction is also set aside. The appeal is allowed with costs.

Appeal allowed.