1944 *Present:* **Howard C.J.**

SILVA, Appellant, *and* FERNANDO, Respondent.

183—C. R. Negombo, 45,437.

Servitude **aquae haustus—*Right to draw water from a well—Road and land intervening between the dominant and the servient tenement.***

Plaintiff claimed a servitude of drawing water from the defendant's well. In order to reach the well plaintiff has to pass from her own land, proceed along a devata road and then pass over land in ownership other than that of the defendant until she reaches the well.

***Held*, that plaintiff was entitled to assert the right of *aquae haustus*.**

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

H. W. Jayewardene, for the first defendant, appellant.

L. A. Rajapakse, for the plaintiff, respondent.

Cur. adv. vult.

February 4, 1944. HOWARD C.J.—

In this case the plaintiff complained that the first defendant had wrongfully obstructed her from drawing water from a well situated in the defendants' land. The remaining defendants admitted the plaintiff's claim for a declaration that she was entitled to draw water from the well. The learned Commissioner found in favour of the plaintiff and awarded her nominal damages fixed at Rs. 10 and costs in the class in which the action was brought.

In contending that the Commissioner came to a wrong conclusion, Mr. Jayewardene has taken the point that the plaintiff's action cannot succeed inasmuch as her land, the dominant tenement, is separated from the servient tenement, the first defendant's land, by a public road. The plaintiff's land does not adjoin that of the first defendant. In order to reach the well the plaintiff has to pass from her own land, proceed along a devata road and then pass over land in ownership other than that of the first defendant until she reaches the well in the first defendant's land. It was established in evidence that the plaintiff had drawn water from this well for a period of thirty or forty years. Mr. Jayewardene also conceded that the plaintiff would have been entitled to claim the right to draw water if to reach the land of the first defendant from her own land the plaintiff had merely to cross a public road or river.

The burden is on the appellant to show that the Commissioner came to a wrong conclusion and in this respect Mr. Jayewardene has little authority to call in aid. In *Amarasuriya v. Ramanathan Chettiar*[1] it was held by Maartensz and Hearne JJ. that, where the plaintiff claimed the servitude of a cart way over the defendant's land which was separated from the plaintiff's land by an intervening field over which the plaintiff had only a right of footway, 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. In his judgment Maartensz J. at p. 87 cited the following passage from *Voet, Bk. VIII., tit. 4, s. 19*:—

> " 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.

[1] *40 N. L. R. 85.*

> 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."

Mr. Jayewardene has argued that this passage is an authority for his contention. The passage to my mind is, however, an authority to show that, although the dominant and servient tenements do not adjoin, water could lawfully be led by right of servitude through adjoining estates of more than one person provided each was subject to the same servitude. Moreover, the right of drawing water was not stopped by the fact that there existed an intervening public road or place. The following passages on p. 88 of the report are also in point:—

> " Maasdorp (Institutes of Cape Law, Book 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 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 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."

The passages cited from *Maasdorp* and *Voet* in the judgment of Maartensz J. in my opinion support the judgment of the learned Commissioner. The devata road in question must be regarded as a *via vicinalis* over which the plaintiff had a right of servitude as a member of the public whose land abutted on it, vide *Appuhamy v. Alapatha*[1] and *Peiris v. Inhabitants of Village Committee, Paluwa Peruwa*[2].

The case of *Vytialingam v. Murugesu*[3] was also cited by Mr. Jayewardene in support of his contention. This case, however, dealt not with a right of *aquae haustus*, but with the assertion of a right of *jus fluminis*, that is to say a right to allow the water of one land to flow over another's ground. It was held that the intervention of a public lane precluded the exercise of such a right. The facts of that case have,

[1] *7 C. L. R. 107.*

[2] *40 N. L. R. 54.*

[3] *1 Bal. Rep. 157.*

therefore, no bearing on the assertion of a right of *aquae haustus*. Mr. Jayewardene has also referred me to *Volume 1 of Huber's Jurisprudence of My Time*, and in particular the following passage that occurs at p. 330:—

> " Seventhly, in all servitudes neighbourhood or contiguity is requisite, but more in urban than in rural servitudes, for in most of the former the houses must be actually in contact. In country servitudes the rule is not so strict, but the peculiarities of each servitude and of each special property must be considered. Thus, foot-path, the driving of animals or vehicles, right to draw water, to water stock and so forth may also be established in cases where a high road runs between the two properties, but water-leading cannot so exist, since the road may not be excavated.

I can find nothing in this passage to support Mr. Jayewardene's contention.

For the reasons I have given, I have come to the conclusion that the verdict of the learned Commissioner was in accordance with the law and the appeal must be dismissed with costs.

Appeal dismissed.