1957 *Present :* **Basnayake, C.J., and Pulle, J.**

SRI PANNALOKA THERO, Appellant, *and* P. JINORASA THERO, Respondent

S. C. 547—D. C. Panadura, 3,094

Buddhist Temporalities Ordinance (Cap. 222)—Section 34—Meaning of "immovable property"—Applicability to servitudes—Prescription Ordinance (Cap. 55), ss. 2, 3.

Section 34 of the Buddhist Temporalities Ordinance reads as follows :—

"In the case of any claim for the recovery of any property, movable or immovable, belonging or alleged to belong to any temple, or for the assertion of title to any such property, the claim shall not be held to be barred or prejudiced by any provision of the Prescription Ordinance :

Provided that this section shall not affect rights acquired prior to the commencement of this Ordinance."

Held, that the expression "immovable property" in the Section is used in the sense of corporeal immovable property only. The Section, therefore, is not a bar to a claim of right of cartway on the ground of prescriptive user.

[1] *(1922) 23 N. L. R. 362.*

APPEAL and cross-appeal in respect of a judgment of the District Court, Panadura.

Sir Lalita Rajapakse, Q.C., with *C. R. Gunaratne* and *D. C. Wickremasekera*, for Defendant-Appellant.

H. W. Jayewardene, Q.C., with *T. B. Dissanayake* and *D. R. P. Goonetilleke*, for Plaintiff-Respondent.

July 17, 1957. BASNAYAKE, C.J.—

This is an action by Pohaddaramulle Jinorasa Thero of the Ramanna Nikaya, controlling Viharadhipathi of the temple known as Mahigarjanaramaya at Pohaddaramulla (hereinafter referred to as temple "A") against Sri Pannaloka Thero of the Amarapura Nikaya, controlling Viharadhipathi of the adjoining temple of the same name (hereinafter referred to as temple "B"). The plaintiff asked that he be declared entitled—

(*a*) to the right of cart-way shown in the sketch "Y" attached to the plaint by right of uninterrupted possession for a period of over 10 years,

(*b*) to the recovery of damages, and

(*c*) in the alternative to a right of cart-way of necessity over the same route.

The defendant in his answer disputed the plaintiff's claim that he was the Viharadhipathi of temple "A" and also alleged that the plaintiff was residing on a portion of temple "B".

The learned trial Judge holds that the plaintiff had not acquired a prescriptive right prior to 1st November 1931 (the date on which the Buddhist Temporalities Ordinance came into operation) and that he is not entitled to maintain his claim in respect of his user after that date as the action was barred by section 34 of the Buddhist Temporalities Ordinance. In regard to the plaintiff's claim for a cart-way of necessity he declares him entitled to a cart-way along a route to be determined in the manner indicated in his judgment.

Learned counsel for the appellant has invited our attention to the case reported in *30 N. L. R. 56* followed by Wijeyewardene, J., in *45 N. L. R. 348* and also to the cases reported in *49 N. L. R. 350* and *525*. We are satisfied that according to the principles laid down in those decisions the evidence led by the plaintiff falls short of the standard required for the grant of a right of cart-way of necessity. The appellant is therefore entitled to succeed.

The respondent has filed cross-objections in which he canvasses the findings of the learned trial Judge (*a*) that user for over the period prescribed in section 3 of the Prescription Ordinance prior to 1st November 1931 has not been established, and (*b*) that section 34 of the Buddhist Temporalities Ordinance bars his claim to a decree in his favour for a cart-way by virtue of user for the prescribed period. Section 34 of the Buddhist Temporalities Ordinance reads as follows :—

> " In the case of any claim for the recovery of any property, movable or immovable, belonging or alleged to belong to any temple, or for the assertion of title to any such property, the claim shall not be held to be barred or prejudiced by any provision of the Prescription Ordinance :
>
> Provided that this section shall not affect rights acquired prior to the commencement of this Ordinance. "

In the first place we have to ascertain the meaning of " immovable property " in this section. Ordinarily " immovable property " means land and whatever is permanently attached to land and does not include incorporeal rights. There is nothing in the context of section 34 which suggest that the words " immovable property " should be given a meaning different from their ordinary meaning. On the other hand the context suggests that the expression " immovable property " is used in the sense of corporeal immovable property. This Court has held that the words " immovable property " in section 39 of the Village Communities Ordinance do not include incorporeal rights [1]. In fact it would appear from an examination of our legislative instruments that the expression " immovable property ", where its meaning is not expressly extended, is used in the sense of corporeal immovable property only. In the Prescription Ordinance " immovable property " is defined to include all shares and interest in land, and all rights easements and servitudes belonging to or appertaining to land. This action is clearly not a claim for the recovery of immovable property in the sense in which that expression is used in section 34 of the Buddhist Temporalities Ordinance. We are therefore of the opinion that that section is not applicable to the instant case.

The question that remains for decision is whether the evidence adduced by the plaintiff establishes uninterrupted and undisturbed possession of the path described in the sketch for a period of 10 years. The learned trial Judge seems to have taken the view that, but for the bar which he thought was imposed by section 34 of the Buddhist Temporalities Ordinance, the plaintiff was entitled to succeed on the ground of prescriptive user. Learned counsel for the respondent has drawn our attention to a number of passages in the evidence of the plaintiff which leave no room for doubt that the plaintiff has acquired a right to a decree in his favour by virtue of section 3 of the Prescription Ordinance.

[1] *(1957) 60 N. L. R. 30.*

The cross-appeal is therefore entitled to succeed and we accordingly set aside the order of the learned trial Judge and direct him to enter a decree declaring the plaintiff entitled to a right of cart-way over the land described in paragraph 2 of the plaint. The actual cart-way will be demarcated after a survey which should be carried out according to the directions of the District Judge who is hereby empowered by us to issue such directions after hearing the parties should he think it necessary to do so.

The plaintiff should bear the costs of such survey.

We do not propose to interfere with the order for costs of the trial. Costs of appeal will be divided between the parties.

PULLE, J.—I agree.

Appeal and cross-appeal allowed.