1958 *Present :* **Basnayake, C.J., and Sinnetamby, J.**

ABRAHAM SILVA, Appellant, *and* CHANDRAWIMALA and others, Respondents

S. C. 144—D. C. Colombo, 6767/L

Servitudes—Right of way—Route connecting two lands of same owner—Acquisition by prescriptive user—Prescription Ordinance, s. 3.

A right of way may be acquired by prescriptive user over an intervening land for the purpose of going from one land of a person to another land of the same person. Such a right is a praedial, and not a personal, servitude and may pass to the persons to whom the person who has acquired it conveys the dominant tenement.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *J. M. Jayamanne* and *Miss Maureen Seneviratne*, for 1st Defendant-Appellant.

N. E. Weerasooria, Q.C., with *H. W. Jayewardene, Q.C.*, and *W. D. Gunasekera*, for Plaintiffs-Respondents.

Cur. adv. vult.

December 8, 1958. BASNAYAKE, C.J.—

The sole question for determination on this appeal is whether the owner of an allotment of land on which he resides can by user acquire over the adjoining land of which he is not the owner a right of cart way in order to go to and from his field and owita for the purpose of cultivating them and gathering the produce thereof and transporting it to his dwelling house.

Shortly the facts are as follows : The plaintiffs reside on a land marked " A " in plan " X ". They are also the owners of an owita marked " F " and a paddy field marked " G " some distance away. To get to the owita and the paddy field and transport the produce thereof to their house the plaintiffs claim that they have used for over thirty-five years the track " C " over the 1st defendant-appellant's intervening land and the path " D " over the property of another named S. T. de Costa. The learned District Judge holds that the plaintiffs are now the owners of lot " A " and of the owita " F " and the field " G " in plan " X " which their father had owned immediately before them. He holds that their father and the plaintiffs themselves used track " C " to transport by carts their produce from lot " A " to the owita and the field, for well over a period of ten years, and that they are entitled to a decree in their favour in respect of the cartway " C " claimed by them.

Learned counsel for the 1st defendant-appellant did not challenge the finding of fact but he urged, as a matter of law, that a right of way cannot be acquired by user over an intervening land for the purpose of going from one land of a person to another land of the same person. That in any event such a right is a personal servitude and does not pass to the persons to whom the person who has acquired the right conveys the dominant tenement. He also submitted that the servitude claimed was not one known to the Roman-Dutch law.

The first question that has to be considered is whether the plaintiffs are entitled to a decree in their favour under section 3 of the Prescription Ordinance. That they and their predecessor, their father, have used the right of way is not challenged in appeal. Does user of a right of way constitute possession within the meaning of that expression in section 3 ?

This very question arose for decision under the corresponding provision of the repealed Prescription Ordinance, No. 8 of 1834, in the case of *Ayanker Nager v. Sinatty* [1] and the Collective Court held that the words "possession of immovable property" applied to the enjoyment of a right of way. It defined "possession" when applied to a servitude such as *jus itineris*, to be the exercise of *jus in re*, with the *animus* of using it as your own as of right, not by mere force, not by stealth, and not as a matter of favour, *nec vi, nec clam, nec precario*. It also held that the words of the Ordinance of 1834, which are in exactly the same terms as the Prescription Ordinance of 1871 now in force, applied to servitudes of way, water, light and numerous others. The judgment quotes the following extract from Smith's Dictionary of Greek and Roman Antiquities which bears repetition—

> "Though things incorporeal are not strictly objects of possession, yet there is a *juris quasi possessio* of them, as for instance in the case of servitudes (easements). The exercise of a right of this kind is analogous to the possession of a corporeal thing, in other words, as real possession consists in the exercise of ownership, so this kind of possession, which is fashioned from analogy to the other, consists in the exercise of *jus in re* or of one of the component parts of ownership. In the case of possession, it is the thing (*corpus*) which is possessed, and not the property; by analogy then, we should not say that the *servitus* or the *jus in re* is possessed, but as in the case of *jus in re* there is nothing to which the notion of possession can be attached, while in the case of ownership there is the thing to which we apply the notion of possession. We are compelled to resort to the expression *juris quasi possessio*, by which nothing more is meant than the exercise of a *jus in re*, which exercise has the same relation to the *jus in re* that proper possession has to ownership."

The view taken in *Ayanker Nagar's* case was also taken in the case of *Karunaratne v. Gabriel Appuhamy* [2], although the legal position was not discussed in the latter case in the same way as in the former. There is nothing in the report to show that *Ayanker Nager's* case was cited. Lascelles C.J. observed—

> "In the system of law which prevails in Ceylon rights of way are acquired by user under the Prescription Ordinance, and the course or track over which the right is acquired is necessarily strictly defined."

On the finding of the learned trial Judge the plaintiffs are entitled to a decree in their favour with costs. As the view I have taken is that section 3 of the Prescription Ordinance applies to the right of way claimed it is not necessary to discuss the citations of learned counsel. Under our law servitudes which were not known in the times of the Roman-Dutch law writers can be granted or acquired. The Roman-Dutch law is not a

[1] *Ramanathan 1860-1862, p. 75.* [2] *(1912) 15 N. L. R. 257.*

static system of law; but in the words of Lord Tomlin—" a virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society ". *Pearl Assurance Co. v. Government of the Union of South Africa* [1].

It would appear from the following definitions of servitude in Voet and Van Leeuwen that the right of way claimed in the instant case is consistent with the principles of Roman-Dutch law.

" Rights established in favour of one person over the property of another, by which a property brings to someone other than the owner an advantage which is contrary to the nature of ownership. Some of them are personal, when, that is to say, a property serves a person, others are real, when property serves property or land serves land. " (Voet Bk VII Tit. 1 s. 1—Gane's translation, Vol. 2, p. 312).

1. " A servitude is a right constituted over the property of another, by which the owner is bound, in order that another may draw some advantage, to suffer something to be done with respect to his property, or himself to abstain from doing something.

2. " Servitudes are divided by the expounders into real or praedial servitudes, in which another man's property is burdened with a servitude in favour of somebody, which form the proper subject of this chapter; and personal servitudes by which another man's property is burdened with a servitude in favour of the person of somebody, which servitude is attached to this person and perishes along with it. Of which class are usufruct, use, and habitation." (Van Leeuwen, Censura Forensis, Pt I Bk II Ch. XIV s. 1-2—Foord's translation).

Besides, Voet himself states that—

" Other fresh servitudes may be added at the desire of contracting parties to those already enumerated, if only the nature of praedial or personal servitudes is discovered in them ". (Voet Bk VIII Tit. 3 s. 12 —Gane's translation Vol. 2 p. 475).

Voet discusses in great detail the subject of personal servitudes (Bk VII Tit. 1 s. 2) and it is clear that the right claimed in the instant case does not fall within the scope of the personal servitudes of usufruct, use and dwelling. We have here a case of property serving property and not a case of property serving a person.

The appeal is dismissed with costs.

SINNETAMBY, J.—I agree.

Appeal dismissed.

[1] *1934 A. C. 570 at 579.*