1956 *Present :* **Basnayake, C.J., and de Silva, J.**

VELUPILLAI, Appellant, *and* SUBASINGHE and another, Respondents

S. C. 152—D. C. Kurunegala, 5,320

Servitude—Right of way—Right of a lessee to acquire it by prescription—Way of necessity.

A servitude cannot be granted by any other than the owner of a servient tenement, nor acquired by any other than by him who owns an adjacent tenement. Therefore, where a land is divided by its owner into two portions and each portion is given on lease to a different person, the lessee of one portion cannot claim from the other lessee a right of way by prescription over the other portion. Nor is he entitled to claim a way of necessity.

APPEAL from a judgment of the District Court, Kurunegala.

E. G. Wikramanayake, Q.C., with *T. B. Dissanayake*, for plaintiff-appellant.

H. V. Perera, Q.C., with *Kingsley Herat* and *Stanley Perera*, for defendants-respondents.

March 1, 1956. BASNAYAKE, C.J.—

By an indenture of lease dated 10th February 1897 two bhikkhus by name Parusselle Dhammajoti and his pupil Akwatte Dewamitta of Malwatta Vihare leased to Jeronis William Charles de Soysa a land called Aturukultenne in extent 1077A 3R 36P for a term of sixty years. On 20th July 1907 the lessee entered into an agreement with the successors in title of the original lessors by which he retained 402 acres 1 rood 13 perches and surrendered the rest of the land. The rest of the land in extent 675 acres was on 19th November 1936, leased to the plaintiff. The present dispute is between the plaintiff and the defendants who have succeeded to the rights of Jeronis William Charles de Soysa. The plaintiff claims the right to use the cart way over the land leased to the defendants in order to get to the high road. He bases his claim on prescription and alternatively he asks for a right of way of necessity.

He also claims damages in a sum of Rs. 250 up to the date of the institution of the action and further damages at Rs. 250 per week from the date of action until the use of the road, which he alleges was unlawfully obstructed by the defendants, is restored.

The defendants deny that the plaintiff was entitled to the right of the cart-way he claims either by virtue of prescriptive user or by way of necessity.

At the trial as many as 22 issues were framed but on the invitation of Counsel for the defendants, the learned trial Judge first tried two of the

2——J. N. B 65597—1,593 (5/57)

issues of law that went to the root of the case. Those issues are as follows :—

"14. Even if issue No. 5 is answered in the affirmative can the plaintiff acquire and claim a servitude of cart-way either by prescription or by way of necessity ?

15. If issue No. 14 is answered in the negative has the plaintiff any cause of action and can he maintain the present action ".

After hearing Counsel's submissions on the law the learned trial Judge answered issues 14 and 15 in the negative. This appeal is from that decision.

The kind of servitude claimed in the instant case is a real or praedial servitude. Such a servitude cannot exist without a dominant tenement to which rights are owed and a servient tenement which owes them. A servitude cannot be granted by any other than the owner of a servient tenement, nor acquired by any other than by him who owns an adjacent tenement. Here the plaintiff who is the lessee and not the owner of the land claims a servitude from the defendant who is also not the owner but the lessee of the land. The owners of both tenements are one and the same group of persons. A praedial servitude is a right for all time and cannot be acquired except for the benefit of the lessor by the lessee whose rights are limited by the terms of the lease. It is unnecessary to refer to all the authorities cited by learned Counsel. It is sufficient to refer to the case of *City Deep v. McCalgan*[1], where this very question arose for decision and it has been held that a lessee in *longum tempus* cannot acquire a praedial servitude by prescription over the property of his lessor. That case refers to the case of *Jansen and Thorn v. Ysel*[2], in which Kotze, C.J., held that a lessee cannot acquire a real servitude for himself. We therefore hold that the learned trial Judge rightly decided this point against the appellant.

The other question that remains for decision is whether the appellant is entitled to a right of way of necessity. *Voet*[3] in dealing with rights of necessary ways states the law thus :—

"In addition to right of way to be established or refused at the discretion of the owner of a servient tenement, there is furthermore a right of way which must be granted of necessity by the owner of a servient tenement when the neighbouring farm has no access or egress. It is commonly called a ' way of necessity ' ".

It would appear from this passage that a person who is entitled to claim a way of necessity is the person who is the owner alone. The appellant is therefore not entitled to succeed in his claim for a right of way of necessity.

We accordingly dismiss this appeal with costs.

DE SILVA, J.—I agree.

Appeal dismissed.

[1] *(1924) W. L. D. 276.* [2] *1 S. A. R. 6.*

[3] *VIII, 3, 4.*