1959 *Present :* **Sansoni, J., and T. S. Fernando, J.**

V. C. COORAY and another, Appellants, *and* U. P. SAMARASINGHE, Respondent

S. C. 412—D. C. Colombo, 642/Z

Servitude—Right to erect scaffolding on a neighbour's land for building purposes—Analogous to servitude of right of way of necessity—Damages.

If it is impossible to construct a building except by entering upon the adjoining land and even erecting a temporary scaffolding on it, the owner of the adjoining land may be compelled to permit such entry and erection *ex necessitate*. In such a case, damages can be claimed only from the date of the order of the Court granting the servitude.

APPEAL from a judgment of the District Court, Colombo.

G. T. Samerawickreme, for the defendants-appellants.

W. D. Gunasekera, for the plaintiff-respondent.

Cur. adv. vult.

February 27, 1959. T. S. FERNANDO, J.—

This appeal raises the question of the point of time at which a servitude of the nature of a way of necessity arises.

The plaintiff and the defendants in this action are owners of lands adjoining each other. On the land of the plaintiff stood a house which was being rented out by him to a tenant, and on June 3rd, 1955, a wall of this house collapsed rendering the house untenantable until the wall

[1] *(1954) 57 N. L. R. 21.*

was reconstructed. The wall that collapsed adjoined the fence that separated the land of the plaintiff from that of the defendants, and it is not in dispute that construction of the wall was not possible unless a temporary scaffolding was erected on defendants' land to enable the building operations to be completed. This the defendants were not willing to permit, and the plaintiff instituted this action claiming (*a*) a declaration that he is entitled to enter the defendants' land for the purpose of repairing and re-erecting the wall of his house, (*b*) a decree enjoining the defendants not to prevent the plaintiff from so entering and (*c*) damages.

The learned District Judge, after trial, held with the plaintiff and, on July 17th, 1957, entered judgment as prayed for, fixing the damages at Rs. 13/24 a month from July 1955. The assessed rent of the plaintiff's house was Rs. 13/24 a month.

The Roman-Dutch Law recognises a servitude of the nature claimed by the plaintiff. We were referred to Hall and Kellaway on Servitudes, page 39, where it is stated that

> " If it is impossible to construct a building except by entering upon the adjoining land and even erecting a scaffolding on it, the owner may be compelled to permit such entry and erection *ex necessitate* (Voet, 8.2.14). "

I reproduce below (from 2. Gane's translation, pages 454-455) the comment of Voet referred to above :—

> " *8.2.14.* (XV)—*Dumping of building material etc.*—Also a servitude of a neighbour being allowed to shoot earth, rocks and stones on to his neighbour's site, or of keeping them lodged there ; or of cutting stones on his own ground so that chips fall on to his neighbour's site ; or of making ramps or scaffoldings on a neighbour's site for building purposes. "

At the argument before us, learned counsel for the defendants did not contend that the plaintiff was not entitled to enter upon his clients' land and erect a temporary scaffolding for the purpose of reconstructing the wall. He limited his argument to the question that damages can be claimed only from the date of the order of the Court granting the servitude. He contended that the relief claimed by the plaintiff is an order of Court constituting a servitude and that this servitude comes into existence only on the making of the order by the Court. He himself relied (1) on the comment by Voet (8.2.14—2. Gane's translation, page 455) which I reproduce below :—

> " Even an unwilling neighbour could be constrained to grant such liberty for the erection of scaffoldings, if the building cannot be carried out in any other way. That is both because of the favour shown to public appearance, and also on the analogy of the road which must needs be yielded to one who is deprived of any other way out and way in. "

and (2) on another comment by Voet contained in 8.3.4.—See 2. Gane's translation, page 467—in dealing with the origin of the rural servitude of a right of a necessary way (*via ex necessitate*) :—

> "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 and egress. It is commonly called a way of necessity. . . . . But that was in fairness extended by the commentators to all landed estates which lacked access and egress, to the extent, that is to say, that on the duty of a judge being extraordinarily invoked the neighbour should either on receipt of a just price establish a full right of way, or should at least grant such right on sufferance, to be exercised at the time when need should demand it ; and that with the least possible harm to the neighbour suffering it."

In support of his contention, defendants' counsel has relied also on the South African Case of *Mazista State Quarries Ltd. v. Costhuizen et al.*[1] In that case, an applicant claimed against the respondents an order *pendente lite* restraining the latter from hindering his use of a road over their property. The applicant had not instituted an action against the respondents for a final grant of a way of necessity over the latter's property, but had stated in his application that he proposed to institute such an action. It was held that the applicant was not entitled to the order *pendente lite* claimed by him inasmuch as the Court could not in advance give him a right ***which could only be acquired at a later date.***

One of the recognised methods of creating servitudes is by a decree of Court. Hall and Kellaway in their treatise on Servitudes state at page 37 :—

> "Both Voet and Grotius in the passages referred to by Maasdorp in support of his statement seem to regard partition suits as being the only cases through which servitudes are created by judicial decree. In two other cases, perhaps, this may be said to take place, i.e., when a party to a suit seeks to obtain a way of necessity over his neighbour's land by means of the action '*de servitute constituenda*' and where an award of arbitrators by which rights of servitudes are established is made an order of Court as was done in . . ."

The claim of the plaintiff in this case being one which is recognised on the analogy of the right of way of necessity is one which, in my opinion, becomes effective only on the making of an order by the Court, and accordingly the contention of defendants' counsel that damages can accrue only from the date of the order of Court is entitled to prevail.

A further point raised on behalf of the defendants was that the damages awarded represent the rent that could have been recovered by the plaintiff had the defendants not prevented the reconstruction of the wall. No consideration has been paid to the circumstance that the rates were

[1] *(1943) T. P. D. 28.*

payable by the plaintiff. Plaintiff's house is situated within the Urban Council limits of Kotte and judicial notice can be taken of the fact that owners of house property are liable to pay rates. There is no evidence as to the amount of the rates payable in respect of this house, but we consider that the plaintiff should have furnished this evidence. We would accordingly reduce the damages by the probable amount of the rates the plaintiff would have had to pay and fix the damages at Rs. 10 a month.

In the result, the appeal is dismissed subject to the modification of the decree of the District Court that damages are payable at the rate of Rs. 10 a month as from the date of decree, viz., July 17th, 1957. There will be no costs of this appeal.

SANSONI, J.—I agree.

Decree modified.