1929

*Present:* Drieberg J.

ELWES *v.* VAN STARREX.

*250—C. R. Kandy, 5,586*

*Right of way—Declaration that land is free from servitude—Jurisdiction.*

Where the plaintiff sued for a declaration that the defendant was not entitled to a right of way over the plaintiff's land,—

*Held*, that the test of jurisdiction was the depreciation in value caused to the land by a recognition of the right of way.

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

*Soertsz*, for defendant, appellant.

*H. V. Perera* (with *Rajapakse*), for plaintiff, respondent.

April 23, 1929. DRIEBERG J.—

The respondent is the owner of Kituldeniya Estate. There was a public footpath 3 or 4 feet wide, referred to as a Gansabhawa path, from the high road at Daulagalla to Gadaldeniya, which passed over Kituldeniya Estate. In 1903 the respondent, having bought some other blocks of land for the purpose, constructed a road 12 to 15 feet wide over the track of the path where it passed through his estate. He obtained the sanction of the Government Agent before doing so. The road cost about Rs. 3,000 or Rs. 4,000 and the upkeep of it amounts to about Rs. 1,000 a year. There is evidence which stands uncontradicted that the respondent would not allow cart traffic on the road except with his permission. People on foot use this road as they did the footpath before it was merged in the road, and the footpath continues from the end of this road to Gadaldeniya. The respondent does not deny the right of people to walk along the road.

The appellant, who is the owner of Bournebrook Estate, claims the right to drive his car over this road and the respondent brought this action to obtain a declaration that the appellant is not entitled so to use it, and for an injunction.

The appellant in his answer took the position that by widening what he called the old public road the respondent could not become entitled to the exclusive use of it for wheeled traffic. He also pleaded prescription based on the uninterrupted user by him and his predecessor in title for over thirty years.

It is clear from the evidence that there was no cart track previously along what is now the road but that there was merely a footpath. The case is not one of the respondent improving an existing cartway but of his constructing a road on his own land and the footpath.

There has been no attempt to prove the claim of prescription for wheeled traffic. In fact, in 1925 the appellant offered to make a payment of Rs. 12 a year for the use of the road, and his claim to enjoy a servitude of a right of way over it has no substance in it. His claim to use it as a right of way in common with the public generally is based on some suggestion that there has been a dedication of this road to public user. The evidence however completely negatives this. The respondent has consistently asserted his exclusive right to use wheeled traffic on the road, both as against private persons as well as the officers of the Provincial Road Committee, who took his permission for taking carts over it.

Objection was taken to the jurisdiction of the Court to try this action. The land which forms the road is over Rs. 300 in value, but there is no real dispute as to the ownership of it, and all that the appellant claims is the right to use it. If the appellant sued to get a declaration of a right of way over this road the test of jurisdiction would be the price for which the right could be acquired, *Soyza v. Perera*[1]. The respondent has stated that by the appellant using the road he has suffered damage to the extent of Rs. 200. I understand this to mean that the road would suffer a diminution in value of Rs. 200 if the appellant's claim was allowed. This appears to me to be the proper test of jurisdiction, and there is nothing to show that the respondent's assessment is wrong.

The decree declares that the appellant is not entitled to use the road as a cartway. It should be amended to conform to the prayer in the plaint that the appellant is not entitled to use the road for carts and cars.

Subject to this amendment the appeal is dismissed with costs.

*Appeal dismissed.*

[1] *(1919) 6 C. W. R. 153.*