1939

Present : **Hearne J.**

DON SIMON PETER *et al. v.* JAMES FERNANDO *et al.*

201—C. R. Negombo, 43,338.

Servitude—Right to draw water from well—Right of way through intervening lands—The well abandoned—Loss of right of way as accessory—Aquae haustus.

Where there are two servitudes—the one principal and the other accessory, which are due at the same time—and the principal servitude is abandoned, the accessory must also be regarded as having been abandoned.

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

N. E. Weerasooria, K.C. (with him *H. A. Wijemanne*), for plaintiffs, appellants.

N. Nadarajah (with him *S. Mahadeva*), for first defendant, respondent.

Cyril E. S. Perera, for third defendant, respondent.

Cur. adv. vult.

February 9, 1939. HEARNE J.—

The plaintiff established that for over a period of ten years he had used a footpath which led from his land, (1) in the plan, through the land of the third defendant, (4) in the plan, again through the land of the first defendant, (2) in the plan, and finally through the land of the second defendant, (3) in the plan, to the land of Anthony Silva in which there was a well, I. in the plan, from which he drew water. He used the footpath FGI.

Seven years ago the well I. crashed, and after an interval of about a month, the plaintiff started to use and continued to use up to the time the action was filed, a well H on the land of the second defendant. He used the path from F to G and from the latter point, by a slight diversion, the path GH.

The second defendant raised no objection to the use of so much of the path as is represented by GH, or to the drawing of water at H, but as it was held by the Commissioner that the plaintiff "had not prescribed to the right of way FGH" his access to the well along the route FG is barred. He has now appealed.

It was argued on behalf of the plaintiff that the servitude of drawing water (*aquae haustus*) at I. gave him the right to use path FG, as part of the path FGI, and that although the use of the well at I. had been discontinued the right of way over FG was unaffected by such discontinuance.

If this argument were sound it would follow that even if there had been no well in (3) from which the plaintiff could have drawn water either by agreement or by claim of right, he would still be entitled to use FG without let or hindrance.

This offends against first principles. Servitudes are indivisible in their nature. If two distinct principal servitudes are due from the same tenement, the abandonment of one does not destroy the other: but where there are two servitudes—the one principal and the other accessory, which are due at the same time—and the principal is abandoned, the accessory also is regarded as abandoned. (*Voet VIII. 6, 5.*)

It was, however, alternatively argued that the servitude had not been abandoned and that it had been merely diverted. I am unable to agree with this. The original servitude of *aquae haustus* in respect of the well at I. is not the same as drawing water from H which, even if based on a claim of right, has not hardened into a servitude. There is no servitude of way over FG which subserves or is accessory to any existing servitude of drawing water at H. I am sorry for the plaintiff but I think the law is against him.

I dismiss the appeal with costs.

Appeal dismissed.