

1949

Present : Jayetileke S.P.J.

FERNANDO *et al.*, Appellants, and JAYASURIYA *et al.*,
Respondents

S. C. 175—C. R. Panadure, 11,479

Right of way of necessity—Claim on behalf of tenant—Right appertains only to land—Actual necessity.

Where the plaintiffs based their claim for a cartway of necessity on the fact that their tenant, who had a boutique and carpentry shed on the land, needed a cartway for the purposes of his business—

Held, that the plaintiff's claim was personal in its nature and that the right of cartway could only be claimed as appertaining to land.

APPPEAL from a judgment of the Commissioner of Requests, Panadure.

H. W. Jayewardene, for defendants appellants.

A. L. Jayasuriya, for plaintiffs respondents.

Cur. adv. vult.

May 31, 1949. JAYETILEKE S.P.J.—

The plaintiffs are the owners of lot 1 and the defendants of lots 5 and 6 in plan P 1. The said lots are situate in the village called Egoda Uyana in Moratuwa and are in extent 0·1·36, 0·0·20 and 0·1·0 respectively. The entire land depicted in P 1 belonged in common to several persons, who amicably partitioned it in the year 1923 by executing an indenture P 2. A footway was reserved along ABCD in P 2 for the use of the owners of the divided lots in order to give them access from their respective lots to the high road on the east and the sea-shore on the west. The plaintiffs alleged that they enlarged the footway into a cartway and used it as a cartway for a period well over the prescriptive period

and claimed the right to use it as a cartway by prescription. In the alternative they claimed a cartway of necessity. After trial the learned Commissioner of Requests held against the plaintiffs on the claim based on prescription and declared them entitled to a cartway of necessity. The defendants appealed against the judgment. It was urged on their behalf that the learned Commissioner was not justified in law in giving the plaintiffs a cartway of necessity on the materials before him.

A way of necessity is a right of way granted in favour of a property over an adjoining one constituting the only means of ingress to and egress from the former property to some place with which it must of necessity have a communicating link¹. Van Leeuwen² says that a way of necessity is allowed "as well for a person on foot, as with a wagon, in order to gather and carry off the fruits of the land or to drive cattle to and from it". He also says that the word "necessity" is interpreted very strictly³. In *Peacock v. Hodges*⁴ it was held that the claim for a way of necessity must be restricted to the actual necessity of the case.

The plaintiffs did not say that they needed a cartway to take the produce of the land to the main road or to bring manure and other things necessary for the cultivation of the land from the main road. Even if they did, the Court would not have been justified in granting them a cartway of necessity because their land is so small that the produce, &c., can very conveniently be carried by men. In *Fernando v. De Silva*⁵ Drieberg J. said :—

"These lands lie a short distance from the Negombo-Mirigama Road. The land in that part of the country, as indeed is the case in most rural areas, consists of numerous small holdings and, necessarily, comparatively few of them can have direct access by carts to the main road. Under these conditions the respondents whose lands cannot be described as *block lands*, because they have free access to a road by a path, cannot say that a cartway is a necessity. Far from this being the case it would be a distinct luxury not enjoyed by the majority of owners of similar lands. It has been claimed that a road is necessary to take the produce of these lands to the cart road. In my opinion there is no such necessity, for the limited produce of small extents like this can easily be carried by men to the main road".

The evidence seems to indicate that the plaintiffs have based their claim for a cartway of necessity on the fact that their tenant, who has a boutique and a carpentry shed, on the land, needs a cartway for the purposes of his business. The simple answer to this claim is that it is personal from its very nature and that a right of way can only be claimed as appertaining to land.

I would set aside the judgment appealed against and dismiss the plaintiffs' action with costs in both Courts.

Appeal allowed.

¹ *Hall and Kellaway on Servitudes* p 65.

² *Roman-Dutch Law* 2.21.7. 1 *Kotze* 295.

³ *Roman-Dutch Law* 2.21.12. 1 *Kotze* 297.

⁴ (1876) 6 *Buchanan's Reports* 69.

⁵ (1928) 30 *N. L. R.* 56.