1948 *Present :* **Basnayake J.**

DE VAAS, Appellant, *and* MENDIS, Respondent.

S. C. 178—C. R. Balapitiya, 24,420.

Servitude—Way of necessity—Burden of proof.

In a claim for a right of way of necessity the onus of proving the necessity is upon the person alleging it. The word " necessity " in this context should be very strictly construed.

[1] *14 Bombay Law Reporter 115 (F. B.).* [2] *(1910) 13 N. L. R. 326.*

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

C. V. Ranawake, for the defendant, appellant.

G. P. J. Kurukulasuriya, for the plaintiff, respondent.

Cur. adv. vult.

April 19, 1948. BASNAYAKE J.—

The plaintiff-respondent (hereinafter referred to as the plaintiff) claims that he is the owner by right of purchase of lot 12, in partition plan No. 904B dated March 28, 1930, of a land called Wanigasekeragewatta. This lot is bounded on the north by lot 9 and on the west by lots 10 and 11 all of the same plan, on the east by Crown land on which the railway track is laid, and on the south by a land called Kottambagahawatta. The defendant-appellant (hereinafter referred to as the defendant) is the owner of lot 9.

Lots 7 and 8 have access to the public road by a footpath running along the southern and western boundaries of lot 7. The plaintiff seeks to obtain access to this footpath along the southern boundary of lots 8 and 9. The path which he claims is depicted as lot 9A in plan No. 841 compiled by Surveyor K. M. R. Silva. He has already obtained a path three feet wide along the southern boundary of lot 8 by Order of Court in C. R. Balapitiya, Case No. 24,328 on payment of compensation. It is shown as lot 8A in the afore-mentioned plan No. 841. This action is brought to compel the defendant to convey to him lot 9A on payment of compensation. The learned Commissioner of Requests has declared the plaintiff entitled to a right of way along lot 9A in plan No. 841 aforementioned on payment of Rs. 15 as compensation. The present appeal is from that decision.

What the plaintiff seeks to obtain in this case is a servitude of way of necessity by judical decree. This right is thus described by Voet (8.3.4) :—

> " Besides the right of way, which can either be granted or refused according to the will of the owner of the servient tenement, there is another right of way, which must of necessity be granted by the owner of the servient tenement, if there is no road leading to or from the neighbouring estate (commonly called *een nood-weg*) : and this right of way or passage by the Roman law was always of necessity granted to him who had a sepulchre on the estate, but no means of approach to it ; and to such an extent that Pomponius is our authority to the fact that it had been provided by the laws relating to the sale of farms, that the owners of the farms in which sepulchres were placed should, after the sale of the farms, afford a means of going to, and approaching and permit funeral processions to the sepulchres which were on the farms. But this rule has been by our interpreters equitably extended to all estates which are without means of approach or departure, so that indeed, after the extraordinary functions of the judge have

been called into exercise, the neighbouring owner either grants a full right of way, receiving in return an equitable price for it ; or at least he grants a right of way by concession (*precario*), to be exercised only when necessity compels and that to the smallest possible detriment to the owner allowing it ".

According to Grotius [1] :—

" All lands which do not abut upon a high road or neighbour's road are entitled to a road of necessity. High roads (*viae publicae*) are roads common to all and which may be used by everyone, the profits thereof going to the Crown. Neighbours' roads (*viae vicinales*) are roads belonging to several neighbours in common, and may not be closed except by common consent, the profits thereof going to the neighbours. If a man's land does not abut on a high road or neighbour's road, the court will grant him a necessary road whereby to reach the high road by the shortest way and with the least damage ".

In a claim for a *via necessitatis* the onus of proving the necessity is upon the person alleging it. He must prove that he has no reasonably sufficient access to the public road for himself and his servants to enable him, if he is a farmer, to carry on his farming operations. If he has an alternative route to the one claimed, although such route may be less convenient and involve a longer or more arduous journey, so long as the existing roads give him reasonable access to a public road he must be content, and cannot insist upon a more direct approach over his neighbour's property [2].

The comments of Voet, Van Leeuwen and Grotius indicate that the word " necessity " in this context should be very strictly construed.

In the present case I am of opinion that, according to the principles of law I have quoted above at some length, the plaintiff is not entitled to the right he claims. The partition plan No. 904B shows that a right of way has been established by the partition decree in respect of lots 1, 2, 3, 4, 5, 6, 7, 8, 10 and 11. Lots 9 and 12 have not been allowed a right of way. These lots abut on the land on which the railway track runs. The reason why a right of way in respect of these lots was not reserved does not appear from the evidence. The plaintiff has not explained it. It appears from the same plan that the public road from Galle to Colombo is on the further side of the railway line and that the plaintiff and the defendant have access to it across the land over which the railway line runs. The plaintiff also states that his predecessor in title gained access to the public road on the further side by going across the land on which the railway line runs. His ground for claiming a road over lot 9 is, in his own words, " I claim a road as the U. C. had not permitted me to build a house on the land." The *via ex necessitate* the plaintiff claims is not in order to reach the high road by the shortest way, but for the purpose of getting on to the path reserved in the partition decree for the lots I have mentioned above, particularly that on the southern boundary of lot 7, and thence proceeding by the path

[1] *Introduction to Dutch Jurisprudence—Maasdorp's Translation p. 151.*
[2] *Lentz v. Mullin (1921) E. D. L. p. 268 at 270.*

reserved for lots 10 and 11 to the public road. According to the partition plan the proposed route does not appear to be the shortest way to the high road on the hither side of the railway line. The shortest route seems to lie along the southern boundary of lot 11. It must also be mentioned that, according to the partition plan, the public road across the railway line seems nearer the plaintiff's lot than the high road he seeks to reach by the devious route along lots 9, 8, 7, 10 and 11.

I am doubtful whether, even apart from the other considerations I have stated above, the plaintiff is entitled to the relief he claims. I am inclined to think he is not. I am fortified in this view by the following passage from the Opinions of Grotius [1] :—

> " Where land has been subdivided into lots, and such lots have been sold and transferred according to a general plan of subdivision in which the roads for the different lots are laid down, the owner of each lot may use all such roads as are reasonably necessary for convenient access to and egress from the public or high roads. Such owner is not, however, entitled to the use of every road marked on the plan merely because it appears on such plan and the diagram attached to his transfer. Such owner, if his lot does not adjoin a certain road laid down on the general plan, is not entitled to any servitude thereover, unless it be *ex necessitate*, by prescription, or by registration, although such land is shown on the said plan as a road."

The plaintiff has made no endeavour to discharge the onus that rests on him. He expects to succeed in his claim on his bare word. He has not even called the surveyors who made the plans to explain them and assist the Court. A servitude will not be created by judicial decree for the mere asking. The person seeking such a decree must discharge the onus that rests on him.

This appeal is allowed with costs and the judgment of the learned Commissioner is set aside. In the result the plaintiff's action will be dismissed with costs.

Appeal allowed.

[1] *De Bruyn's Translation pp. 427–428.*