1967 *Present :* **H. N. G. Fernando, C.J., Tambiah, J., Abeyesundere, J., Silva, J., and Samerawickrame, J.**

D. H. MOOSAJEE, Appellant, *and* Y. CAROLIS SILVA, Respondent

S. C. 381/63—D. C. Colombo, 9457/L

Servitude of light and air—Window light—Negative servitude—Bare enjoyment cannot create prescriptive title—Prescription Ordinance (Cap. 68). s. 3.

Judical precedent - Principal of stare dicisis*—Qualifications as to the binding nature of previous decisions—Meaning of terms " Collective Court ", " Full Court ", " Full Bench "—Extent of the binding force of a decision of a Collective Court—Courts Ordinance, ss. 7, 38, 51.*

Under the law of Ceylon mere long enjoyment, for ten years, of the free access of light and air through a window of a building does not entitle the owner of the window to the servitude *ne luminibus officiatur*, i.e., the right to prohibit a neighbour from obstructing the window light by erecting a higher building on his adjoining land. This servitude cannot be acquired by the mere fact that the neighbour has not built on his land for a long period so as to cause such obstruction of light and air.

Neate v. de Abrew (1883) 5 S. C. C. 126, *Goonawardana v. Mohideen Koya & Co.* (1910) 13 N. L. R. 264, and *Pillai v. Fernando* (1905) 14 N. L. R. 138, overruled.

A Court of five Judges constituted in terms of section 51 of the Courts Ordinance is not bound to follow a previous decision of a Collective Court upon a question of law if that decision did not duly consider the relevant law and was founded on a manifest mistake or oversight. Accordingly, the case of *Neate v. de Abrew* (supra), even assuming that the Court which heard it was a properly constituted Collective Court, has no binding force for the reason that the Court did not duly consider the law relating to acquisition by prescription of the servitude *ne luminibus officiatur* and the *ratio decidendi* of the decision is obscure.

In regard to the terms " Full Court ", " Full Bench " or " Collective Court ", each term conveys the same meaning. The only proper and meaningful term is " Collective Court ", that is, a Court consisting of the full number of Judges who at a particular time constitute the Supreme Court in terms of section 7 of the Courts Ordinance or the corresponding sections in earlier enactments. A Collective Court is not bound except by a judgment of a previous Collective Court. A decision of any Bench of three Judges in the period between 1901 and 1921 is not a decision of a Collective Court, because during that period the full number of Judges was four.

Prior to 1901, three Judges did not constitute a Collective Court unless it was assembled to hear an appeal which had been especially reserved for the consideration of the Collective Court, either by one Judge or by the Chief Justice in exercise of his statutory or inherent rights. Hence a Bench of two Judges sitting at the present time is not strictly bound to follow a decision rendered by a Court of all three Judges prior to 1901 if the latter Court was not especially assembled to sit as Collective Court. If therefore the correctness of such a decision is seriously doubted by a Bench of two Judges, the appropriate course is that a numerically superior Bench, i.e., of five or more Judges, should be constituted under section 51 of the Courts Ordinance, with power either to approve or overrule the doubtful decision. It is not clear whether *Neate v. de Abrew* (supra) was decided by a Collective Court properly so called.

1*—H 11339—2,130 (2/68)

APPEAL from a judgment of the District Court, Colombo. This appeal was referred to a Bench of five Judges in terms of section 51 of the Courts Ordinance.

H. W. Jayewardene, Q.C., with *S. W. Walpita, B. J. Fernando, S. S. Basnayake, B. Eliyatamby* and *T. L. D. Fernando*, for the Defendant-Appellant.

C. Ranganathan, Q.C., with *A. P. Ranatunga, E. B. Vannitamby* and *K. Thevarajah*, for the Plaintiff-Respondent.

Cur. adv. vult.

November 14, 1967. H. N. G. FERNANDO, C.J.—

The plaintiff in this action is the owner of premises No. 71 Old Moor Street, Colombo, and the defendant is the owner of premises No. 69 which adjoins the plaintiff's premises on the western side. The building on No. 71 is a very old one and the wall on its western side had for a long period contained a small window, and the access of light and air through this was not obstructed by the old building which formerly stood on No. 69. Some time prior to the institution of this action, the defendant demolished the building which previously stood on No. 69 and commenced to construct a new building of two floors. The plaintiff thereupon sued for an order on the defendant to remove certain encroachments alleged to have been made on the plaintiff's property, and to restrain the defendant from building any structure which might interfere with the light and air entering through the window on the western side of the plaintiff's building. The learned District Judge has entered decree ordering the removal of certain encroachments, and also ordering the removal or alteration of the eastern boundary wall of the defendant's building in such a manner as to remove the obstruction to the free passage of light and air through the window on the western wall of the plaintiff's building. In this appeal the defendant does not contest that part of the decree which orders the removal of certain encroachments. The appeal is only pressed against the order for the removal of the obstruction to the free passage of light and air.

Although the District Judge does not refer in his judgment to any case law governing the claim for a free passage of light and air, the decision of the learned Judge is fully in accord with the decision of this Court in the case of *Neate v. de Abrew* [1] in which it was held that where a plaintiff had for ten years enjoyed an unobstructed flow of light and air through a window, he acquires a servitude *ne luminibus officiatur*. This judgment was followed in the cases of *Goonawardana v. Mohideen Koya & Co.* [2] and *Pillai v. Fernando* [3]. Nevertheless in the case of *Perera v. Ranatunge* [4], a Bench of two Judges of this Court decided that the servitude cannot be acquired by mere enjoyment, i.e., by the mere fact

[1] *(1883) 5 S. C. C. 126.*
[2] *(1910) 13 N. L. R. 264.*
[3] *(1900) 14 N. L. R. 138.*
[4] *(1964) 66 N. L. R. 337.*

that the neighbour has not built on his land for any length of time. The present appeal was referred by my predecessor for consideration by a Bench of five Judges in view of the conflict of previous decisions and of an argument that the decision in *Neate v. de Abrew*, even if incorrect, is binding on this Court and must be followed.

The case of *Neate v. de Abrew* is reported both in the Fifth Volume of the S. C. Circular and in Wendt's Reports as having been decided by a Bench of three Judges, de Wet A.C.J., Clarence and Dias, JJ. ; but there is a divergence in the two Reports as to the circumstances in which the appeal came to be decided by three Judges. Both reports state that the appeal was argued on the 26th September, 1882 before Clarence and Dias, JJ. Thereafter according to one report (5 S. C. C. 127) :—

> " The appeal was argued on the 26th September, 1882, before Clarence and Dias, JJ. It was afterwards arranged, with the consent of Counsel on both sides, that De Wet, A.C.J., should be furnished with a note of the authorities cited, and should take part in the decision of the appeal. "

but according to the report in Wendt's, p. 196 :—

> " The case was subsequently (on 29th November) put on for reargument before the full Court (De Wet, A.C.J., Clarence and Dias, JJ.) when Counsel agreed to leave the case without further argument, furnishing their Lordships with copies of the above report of the argument."

The original minutes of the Supreme Court contain a purported order that the appeal be listed before the Full Court. This order creates some doubt as to the correctness of the opinion expressed by Basnayake, C.J. in *Perera v. Ranatunge* that " the decision cannot be regarded as a decision of the then Full Bench of three Judges . . . ". Subject therefore to certain observations which we will reserve for the latter part of this judgment, we propose first to regard the decision in *Neate v. de Abrew* as having been *prima facie* one of a Full Court. Under the law then prevailing (1882) the Supreme Court consisted only of three Judges.

Upon the passing of Ordinance No. 24 of 1901 the Supreme Court came to consist of 4 Judges, and while that was the number of Judges the question of the binding effect of a judgment of three Judges was considered in *Rabot v. de Silva*[1]. That case was heard in review by a Bench of three Judges pending an appeal to the Privy Council and it was contended for the defendant that the Court was bound by two earlier rulings, each of a Bench of three Judges (in 1903 and 1904), when the number of the Judges of the Court was four. In considering the position of a Bench thus sitting in review, Hutchinson, C.J. made the following pronouncement :—

> " There is no law prescribing whether the Court so constituted is to follow the ruling of a similar Court given in review. But I think it is right that, whether it agrees with the ruling or not, it should follow

[1] *(1907) 10 N. L. R. 140.*

it, unless perhaps it was founded on a manifest mistake or oversight or was inconsistent with some previous decision of a similar Court which appears to be of equal or greater authority. Such a ruling ought to be regarded as the law until it is reversed by His Majesty in Council."

In the same case Wendt, J. referred at some length to the binding nature of various decisions of the Court, and after considering a number of earlier cases expressed himself as follows: —

"Having given the matter my most careful consideration, ... I suggest that this Court, whether hearing an original appeal or sitting in review, should consider itself bound by a decision upon a question of law of a three Judge Bench, whether pronounced before or after the Ordinance of 1901 became operative, and whether upon an original appeal or in review, provided it appears that the law and the existing decisions of the Court have been duly considered before the three Judges arrived at such decision. If, however, it were made clear that the decision in question was founded on manifest mistake or oversight I should recognize that as an exception to the rule."

It will be seen that both Hutchinson, C.J., and Wendt, J., were of opinion that even after the Supreme Court came to consist of four Judges, the Court was yet bound by previous decisions of a bench of three Judges, whether the decision had been given before or after 1901. Middleton, J. however, agreed with Wendt, J., only to the extent that a Court of *three Judges* would thus be bound :—

"Whether a Court of four Judges should be deemed to have power to over-ride the decision of three is a matter that I would leave to be decided by that Court if necessary when it is first called into operation."

The occasion thus contemplated by Middleton, J. apparently never arose ; we have not been referred to any case decided by the full complement of four Judges in the period between 1901 and 1921, in which latter year the number of Judges was increased to five. In the first case decided by the full complement of five Judges, Bertram C. J. observed that although the former s. 54A of the Courts Ordinance empowered the Chief Justice to reserve any case for the consideration of all four Judges, there was a series of cases reserved, not for four Judges, but for only three Judges out of the four, and that the decisions in those cases have been consistently referred to in the law reports as decisions of a Full Bench. In this first decision of a Bench of five Judges (*Jane Nona v. Leo*[1]) the question which precisely arose was whether after 1921 a Bench of five Judges was bound by a judgment of a Court of three Judges. The majority of the Court held that they were not so bound, but only on the ground that a decision given by three Judges at a time when the Bench consisted of four Judges, must not be regarded as a judgment of a Collective Court and is therefore not binding on a Collective Court of five Judges. Accordingly, the judgment in *Jane Nona v. Leo* has no direct bearing on

[1] *(1923) 25 N. L. R. 241.*

that part of Wendt J.' s proposition in which he referred to the binding nature of a decision given by three Judges at a time when the Court consisted of only three Judges. For the purposes of the point under discussion in the present appeal, it suffices to state that the Court in *Jane Nona v. Leo* did not disagree in any way with the qualifications stated by Hutchinson, C.J. and Wendt J,. as to the binding nature of previous decisions. It is interesting that the House of Lords in 1962 (*Scruttons Ltd. v. Midland Silicones, Ltd.* [1]) referred to similar qualifications :—

> " I would certainly not lightly disregard or depart from any *ratio decidendi* of this House. But there are at least three classes of cases where I think we are entitled to question or limit it : first, where it is obscure, secondly, where the decision itself is out of line with other authorities or established principles, and thirdly, where it is much wider than was necessary for the decision so that it becomes a question of how far it is proper to distinguish the earlier decision. The first two of these grounds appear to me to apply to the present case."

There must of course have been numerous occasions during the past 60 years when Judges of this Court have stated themselves to be bound by decisions of three Judges of the Court whether sitting as the proper " Full Bench " before 1901, or as the mis-named Full Bench after 1901, but such statements cannot be fairly understood to have constituted an abandonment of the qualifications as to the binding effect which were expressed in *Rabot v. de Silva.*

Let me now consider the arguments for the appellant in the present case in support of his submission that in reaching the decision in *Neate v. de Abrew*, the Court did not duly consider the law relating to acquisition by prescription of the servitude *ne luminibus officiatur*, and that the *ratio decidendi* of the decision is obscure.

De Wet, A.C.J., referred in his judgment to certain general statements of Van Leeuwen as to the character of servitudes. None of these statements contains any reference whatsoever to the mode of acquisition of servitudes ; and the only references in any of the statements to the servitude under consideration in the case are explanations of the nature of the right. Finally the learned Judge cites the following statement from Huber, Book 2, p. 294 (5 S. C. C. 129) :—

> " The right that my neighbour shall not build so as to obstruct my light I do not lose even though he should not so build for 50 years, but only if he has built and obstructed my light and I have acquiesced in the same for 10 years."

This last statement, in the opinion of the learned Judge, supported the proposition " that any man is of right entitled to the enjoyment of light and air ". It is clear, however, that the passage from Huber refers, not to the acquisition of the servitude, but to the loss of the right of

[1] *(1962) 1 A. E. R. 12.*

servitude by the sufferance of an obstruction for the period of prescription. Although therefore the learned Judge thought that he was applying the Roman Dutch Law to the question before him he did not in fact refer to any text applicable to that question. Thus Voet VIII, 4, s. 5 (Gane's Translation, Vol. 2, p. 484) states :—

> " No prescription results from failure to use a right. Meantime it seems that we should by no means omit to notice that prescription of servitude is not brought on by the mere fact that perchance one of the neighbours has not used his right upon his property for a long term, and that the other neighbour has reaped an advantage thereby. What if he has not planted trees on his ground, has not made a pleasure garden or has not built higher on his ground, and it has thus happened that his neighbour's lights have for a very long time remained undarkened and his freer outlook in no way obstructed ? Wrong would it surely be for his neighbour on the strength of that to claim for himself a servitude of not building higher or of not having his outlook or lights blocked. To build up higher on one's own ground and to do things like that are matters of sheer capacity, in respect of which prescription has not been proved, but freedom has all the time been retained. Ulpian therefore lays down that no action lies against one who by building up darkens the house of a neighbour to whom he owes no servitude, nor can any notice in regard to the new work be given."

Indeed the judgment of Clarence J. in the same case indicates emphatic dissent from the opinion of de Wet, A.C.J.:—

> " There can be no question but that, under the Roman Dutch Law, a negative servitude such as this could not be acquired by prescription in virtue of bare enjoyment such as plaintiff has had in this case."
>
> " But in the negative kind, such as window-light, the enjoyment is not attended necessarily by any invasion of the neighbour's dominium. Voet (VIII, 4, 5) is as distinct as possibly can be in laying it down that bare enjoyment will not create the negative servitude by prescription ; and he cites from Neostadt (Decis. No. 98), a decided case which is precisely on all fours with the present, in which the owner of the windows failed to establish his right although until the neighbour began to obstruct them they had remained unobstructed from beyond the memory of man."

Clarence, J. himself in *Neate v. de Abrew* held that upon a construction of s. 3 of the Prescription Ordinance of 1871 (now Chap. 68), the mere uninterrupted enjoyment for ten years of window lights, deriving light from a neighbour's land, entitles the owner of the windows to have the adjoining landowner restrained from building so as to obscure them. This conclusion was reached by Clarence, J. upon the basis of a decision of this Court in *Ayankar Nager v. Sinatty* [1]. But unfortunately Clarence, J. appears to have formed the opinion that the principle of *juris quasi possessio*, which was applied in that case in regard to a right of way,

[1] *Ramanathan's Reports 1860–62, p.75.*

was equally applicable in regard to a negative servitude. This opinion, presumably based upon a passage from Savigny cited in that case, turns out to have been quite erroneous. The passage cited in *Ayankar Nager v. Sinatty* is from page 151 of Perry's Translation of Savigny. But Savigny deals elsewhere with the specific case of the acquisition of negative easements, and the following statements appear in the course of his discussion :—

> " If my neighbour has built his house to a certain height only, I enjoy the benefit of it merely casually and as a matter of fact, and I have therefore no possession." (p. 385)

> " It follows from the above that the possession of negative easements may be acquired in two ways—by adverse user, and by legal title ; i.e., 1st, by resistance to the attempt to obstruct the user ; 2nd, by any juridical proceeding . . . " (p. 386)

Savigny further states that the same principle which applies in regard to the acquisition of a positive servitude must apply also in this case :— " In general the acquisition of this *juris quasi possessio* may be stated thus :—

> the act which constitutes the subject of the right must be exercised in fact, and be exercised as of right."

The note of the argument in *Neate v. de Abrew* (5 S. C. C., p. 128, and Wendt at p. 194) shows that these statements of Savigny were relied on by Counsel appearing for the defendant. The failure of Clarence, J. to refer to these statements in his judgment can only indicate that Clarence, J. failed to consider adequately the law applicable to the question for determination. Indeed he himself expressed in strong terms his own opinion that user of passage is not ordinarily to be regarded as possession, but he felt compelled to disregard his own opinion because he held himself bound by the decision in *Ayankar Nager v. Sinatty*. Yet in considering himself bound by that decision, he fell into the error of regarding the decision as being applicable in the case of a negative servitude.

The third judgment in the case of *Neate v. de Abrew* was that of Dias, J. He too held that the servitude had been acquired under our Statute Law governing prescription. But in this judgment also there is no reference whatsoever to the argument most strongly relied on by Counsel, by reference to Voet and Savigny, that the servitude *ne luminibus officiatur* cannot be acquired by the mere long enjoyment of light and air. The statement in the judgment " admittedly the plaintiff possessed the right which he claimed for more than 10 years " begs the question. For a right can only be possessed after a person acquires the right.

Having examined the three judgments, it is now certain that the opinion of the three Judges was not unanimous. The ground relied on by de Wet, A.C.J., was emphatically rejected by Clarence, J. The

ground relied on by Clarence J. and Dias J. was not accepted by de Wet, A.C.J., and it was a ground which could not have been accepted if the authorities cited to the Court had received examination. De Wet A.C.J. himself made no single reference to the only law which could have applied, viz., the Prescription Ordinance of 1871.

In these circumstances this Court is fully justified in reaching the conclusion that the law was not "duly considered" before the three Judges who decided *Neate v. de Abrew*, and accordingly that the decision is not binding in the sense explained by Wendt, J. in *Rabot v. de Silva*, and that it was founded "on a manifest mistake or oversight" in terms of the dicta of Hutchinson, C.J.

What s. 3 of the Prescription Ordinance (Chap. 68) requires is undisturbed and uninterrupted possession of lands or immovable property for 10 years, and "immovable property" includes a servitude. Once a person has acquired a servitude, i.e., a positive or negative right affecting his neighbour's property (whether by grant, judicial decree or prescription) he may properly be said to possess the right. But until the right has come into existence, there can be no possession of it. The case is different with land, for a person can actually possess a land while he has no right to possess it. That is why the doctrine of *juris quasi possessio* was necessary. If an act in relation to a neighbour's property is exercised by a person, he is said to possess the right of which the act is the subject. In the case of a positive servitude, e.g., a right of way, a person does exercise the subject of the right when he walks over his neighbour's property ; and if he does so "undisturbed and uninterrupted" and "adversely" he has the *juris quasi possessio* for the purposes of the law of prescription. But in the case of a negative servitude, the subject of the right is that one's neighbour must desist from doing an act on his own land. Many systems of Law—Roman Law, Roman-Dutch Law, Scots Law, Spanish Law, the Code Napoleon—recognize that subject only to one exception, there can be no exercise of the subject of such a right. (cf. Burge, Colonial and Foreign Laws, Vol. III, pp. 441, 442.) The exception itself is perhaps purely theoretical and cannot actually lead to an acquisition of a servitude by prescription save in extraordinary circumstances. This exception was first stated in the Code of Justinian (lib. 7.33.12), and is recognized in some of the systems of law mentioned above. If my neighbour attempts to obstruct the flow of light and air, and I oppose that attempt, the neighbour's long acquiescence in my opposition, presumably by his desisting from the obstruction, can give me a right to the servitude. But it would appear that the South African Courts do not recognize even this exception (*Ellis v. Laubscher* [1]).

Burge (Vol. III, p. 440) states that in English Law a servitude can only be created by deed. But in early English Law, long enjoyment of free access of light and air was held to establish a presumption of a grant of the servitude. (English Law appears to have been exceptional

[1] *(1956) 4 S. A. L. R. 692.*

in favouring claims for " ancient lights ".) Such long enjoyment now, by statute, creates the right that there should be no sensible diminution of the light and air thus enjoyed. But the terms of our Prescription Ordinance do not bring into operation the principle which is expressly stated in the English statute.

The conclusion of Clarence J. in *Neate v. de Abrew,* when considered in the light of all systems of law other than English Law, has the consequence that s. 3 of our Prescription Ordinance is unique in that it permits the acquisition of a negative servitude by prescription, on the ground of the mere long enjoyment of the access of light and air. We have shown already that the assumption of Clarence J. that there can be *possession* of the subject of this servitude conflicts with all earlier opinion, particularly that of Savigny. But a further consideration is that for purposes of prescription, possession must be *adverse.* Savigny contrasts casual or accidental or factual enjoyment with enjoyment as of right ; where there is enjoyment as of right, the element of adversity can be established. We find assistance in this connection from the principle often recognized in our Courts that a person's possession of property is referable to his lawful title. An owner of land, who erects thereon a building with windows, merely exercises his clear right to do what he pleases on his own land. His act is not referable to any intention to detract from his neighbour's rights ; such an act in no way resembles positive acts such as passage over the neighbour's land, inserting beams in his wall, or emitting rain or surface water into his premises. The erection of a window being thus referable to the lawful rights of an owner of land, is incapable of becoming subsequently an adverse act, except in the theoretical and unusual case to which reference has already been made.

In construing the meaning of s. 3 of our Prescription Ordinance and the concepts of " possession " and " adversity " our Courts have for long understood those concepts in the same sense as they were fairly recently explained in the American Re-statement of the Law (Property : Servitudes : s. 458, p. 2928) :—

> " Use must be wrongful or capable of being made wrongful. To be adverse a use must be wrongful as to the owner of the interest affected or must be capable of being made by him wrongful as to him. If a possessor of land builds on his land in such a way that his building receives support from neighbouring land, or receives light coming from neighbouring land, he is using the neighbouring land, but since these uses are not wrongful as to those having interests in such land, nor capable of being made wrongful by them, they are not adverse to them. The use or enjoyment authorized by a negative easement is neither

wrongful as to the owner of the interests affected nor capable of being made by him wrongful as to him. Hence such an easement cannot be created by prescription."

For these reasons, we hold that under the law of Ceylon mere long enjoyment of the access of light and air through a window does not entitle an owner of land to the servitude *ne luminibus officiatur*. We thus over-rule the previous decisions of this Court to the contrary. To do so is of great practical advantage in the public interest. In our congested cities and towns, adequate work and living space has to be provided by the erection of tall modern buildings, which may be in quite close proximity to each other. It is unthinkable that such necessary development of available ground-space should be impeded by the mere fact of the existence on a neighbouring land of a building which has hitherto enjoyed the access of light and air in fact only, and not as of right. The civic authorities have by statute sufficient powers to control development in the interest of public health and on other similar grounds.

We return now to the matter of decisions of a " Full Court ", a " Full Bench ", or a " Collective Court ", as such decisions have been differently termed. The difference in terminology is confusing, particularly if each term was intended to convey the same meaning. It appears from the judgments in *Bandahamy v. Senanayake* [1] that the only proper and meaningful term is " Collective Court ", that is, a Court consisting of the full number of Judges who at a particular time constitute the Supreme Court in terms of s. 7 of the Courts Ordinance or of the corresponding sections in earlier enactments. We use the term hereafter in the sense just explained. *Jane Nona v. Leo* has already decided that a Collective Court is not bound except by a judgment of a previous " Collective Court ". Thus a decision of any Bench of 3 Judges given in the period between 1901 and 1921 is not a decision of a Collective Court, because during that period the full number of Judges was four.

There remains the question whether every decision of a Bench of 3 Judges prior to 1901 must be regarded as a decision of a Collective Court. Wendt J. himself, while strongly favouring the opinion that decisions of 3 Judges prior to 1901 are binding, mentions the fact that sittings of 3 Judges were sometimes merely casual, and not deliberate (*Rabot v. de Silva* [2]) :—

" In practice, besides these hearings in review, and besides cases specially reserved, many cases (especially in the earlier years, even up to the seventies, when the number of appeals was small) came before

[1] *(1960) 62 N. L. R. 313.* [2] *(1967) 10 N. L. R. at p. 147.*

the Full Bench of three Judges, who, not having other demands upon their time, sat together to hear a mixed list composed of two-Judge cases and one-Judge cases. There were thus decisions of the Full Court which dealt with appeals not involving any " doubt or difficulty ", and which sprang out of a two-Judge Bench reserving for the opinion of the Full Bench cases involving points upon which conflicting decisions existed with the view of obtaining a definitve ruling thereon."

The last sentence in the passage cited refers, not to instances where 3 Judges sat only casually, but to cases where because a Bench of 2 Judges was unable to agree on the decision of an appeal, the decision of the Court was suspended until 3 Judges were present. A similar suspension is still necessary under s. 38 of the Courts Ordinance in its present form.

There were thus decisions of Benches of 3 Judges rendered before 1901 where the Benches assembled for 3 different reasons :—

(1) 3 Judges sat purely casually, because there was no other demand on the time of one of them.

(2) 3 Judges sat in pursuance of statutory provision, but only for the reason that 2 Judges could not previously agree as to the decision of an appeal.

(3) 3 Judges assembled to hear an appeal which had been specially reserved for the consideration of the Collective Court, either by one Judge or by the Chief Justice in exercise of his statutory or inherent rights.

We are agreed that decisions of 3 Judges rendered before 1901 in the circumstances stated at (1) and (2) above cannot be regarded as binding judgments of a Collective Court and that before 1901, 3 Judges constituted a Collective Court whose decision would be a binding judgment only if their sitting was in the circumstances stated at (3) above. Hence a Bench of 2 Judges sitting at the present time is not strictly bound to follow a decision rendered by 3 Judges not assembled in the circumstances lastly mentioned. If therefore the correctness of such a decision is seriously doubted by a Bench of two Judges, the appropriate course is that a numerically superior Bench, i.e., of 5 or more Judges, should be constituted under s. 51 of the Courts Ordinance, with power either to approve or to over-rule the doubtful decision. Many of the judgments in *Bandahamy v. Senanayke* (62 N. L. R. 313) recognize the principle that the decision of such a Bench will, on the ground of numerical superiority and because of the special reservation under s. 51, be followed by any Bench ordinarily constituted under s. 38 of the Courts Ordinance.

The "facts" mentioned earlier in this judgment as to the hearing and decision of *Neate v. de Abrew* do not clearly establish that the case was decided by the Collective Court properly so called. That is a second reason why the present Bench may properly review and over-rule the decision.

The appeal is allowed, and the decree of the District Court is varied by the deletion therefrom of the order for " the removal or alteration of the eastern boundary wall of the defendant's premises in such a manner as to remove the obstruction for the free passage of light and air through the window on the western wall of the premises of the plaintiff."

In the unusual circumstances of this case, we make no order as to the costs of this appeal.

ABEYESUNDERE, J.—I agree.

SILVA, J.—I agree.

SAMERAWICKRAME, J.—I agree.

TAMBIAH, J.—

I agree with the reasons set out by My Lord the Chief Justice for allowing this appeal. In the early reports, particularly the Supreme Court Circulars, there are a number of judgments in which all the three judges who constituted the Supreme Court at that time had taken part. How far these judgments could be considered judgments of a Full Court or Collective Court has been discussed in *Rabot v. de Silva* [1].

As stated in that case it is only when the Supreme Court assembles under statutory provision to sit as a Collective Court its decisions wil have the effect of a Collective Court. Under the statutory provisions which existed when *Neate v. de Abrew* [2] was decided a Full Court could only be constituted if a case was referred to it either by a single judge or by the Chief Justice. Applying this test the case of *Neate v. de Abrew* should be regarded as a Full Court decision.

The three judges who decided the case of *Neate v. de Abrew* had given three different reasons. With respect to the learned judges who decided that case, the reasons given by them are demonstrably erroneous. Are the hands of future generations of judges tied and are they to follow this erroneous decision ? The answer to this question is found in the dictum of Denning L. J. who said : (vide the dictum of Denning L. J.

[1] *(1907) 10 N. L. R. 140.* [2] *(1883) 5 S. C. C. 126.*

in *Ostime v. Australian Provident Society* [1]). " The doctrine of precedent does not compel your Lordships to follow the wrong path until you fal over the edge of the cliff. As soon as you find that you are going in the wrong direction, you must at least be permitted to strike off in the right direction, even if you are not allowed to retrace your steps."

The English principle of *stare decisis* has been adopted by us. As this dictum of Lord Denning shows, in the United Kingdom a liberal view is now being taken permitting judges to depart from wrong decisions of a binding nature. In the Dominion jurisdiction, even a more liberal view is being now taken. In Ceylon, it would be sufficient to state that we should be content to follow the English principles on this matter which has been succinctly set out by the House of Lords in *Scrutton Ltd. v. Midland Silicones Ltd.* [2]. One of the principles enunciated in this case is that if a *ratio decidendi* of a case is obscure, the decision has no binding effect. The *ratio decidendi* of *Neate v. de Abrew* is obscure and we are not bound to follow it.

In Roman Dutch Law, the better view is that the servitude *ne luminibus officiatur* cannot be acquired by prescription. The Prescription Ordinance (Cap. 68) makes specific provision governing the acquisition of servitudes by prescription. In interpreting the provisions of section 3 of this Ordinance, a real servitude has been equated to immovable property and it could only be acquired by adverse possession for a period of ten years. There must be something in the nature of an invasion of another's right and adverse possession of such a right for the period of ten years, to entitle a person to claim the acquisition of a real servitude by prescription.

In the instant case, the plaintiff has failed to prove any adverse use. A person is entitled to build as high as possible on his land, under the common law, as an incident of his ownership. As stated by the Privy Council in *Corea v. Appuhamy* [3], possession could never be adverse if it is referable to a lawful title. If a person builds on his land to whatever height he may desire, he does so as the owner of the land and his right is therefore based on lawful title. In the absence of proof of other facts, he cannot acquire a negative servitude of this nature.

It was urged by Mr. Ranganathan that even if the case of *Neate v. de Abrew* was wrongly decided, it has been regarded as good law for well over eighty years and therefore should not be departed from by this Court. The principle *communis error facit jus* was stated by Lord Buckmaster as follows : " Firstly, the construction of a statute of doubtful meaning once laid down and accepted for a long period of time ought not to be altered unless your Lordships could say positively that it was

[1] *(1959) 2 A. E. R. 245 at 256.* [2] *(1962) 1 A. E. R. p. 12.*
[3] *(1911) 15 N. L. R. 65.*

wrong and productive of inconvenience. Secondly, that the decisions upon which title to property depends or which by establishing principles of construction otherwise form the basis of contracts ought to receive the same protection. Thirdly, decisions affecting the general conduct of affairs, so that their alteration would mean that taxes had been unlawfully imposed or exemption unlawfully obtained, payments needlessly made or the position of the public materially affected, ought in the same way to continue." vide *Bourne v. Keane* [1]. Lord Evershed M. R. said: " There is well established authority for the view that a decision of long standing, on the basis of which many persons will in the course of time have arranged their affairs, should not lightly be disturbed by a superior court not strictly bound itself by the decision." vide *Brownsea Haven Properties v. Poole Corpn* [2]. The decision in *Neate v. de Abrew* however does not affect title and does not come within the principles set out in perpetuating inveterate error. In *Pate v. Pate* [3] Lord Sumner in declining to follow earlier cases on the construction of section 18 of the Prevention of Frauds Ordinance (Cap. 70) which had stood for forty-four years said : " This is not one of those cases in which inveterate error is left undisturbed because titles and transactions have been founded on it which would be unjust to disturb ..... nor is it in any case sound to misconstrue a statute for fear that in particular instances hardship may result. That is a matter for the legislature, not for the Courts." Mr. Ranganathan was only able to cite a few cases (vide *Goonawardana v. Mohideen Koya & Co.* [4] and *Pillai v. Fernando* [5] where *Neate v. de Abrew* was followed ; on the other hand, recently it has not been followed. vide *Perera v. Ranatunge*[6]).

If negative servitude could be acquired by prescription by the mere act of building in one's own land, it would follow as a logical consequence that the right of servitude for prospects could also be acquired in this way. Such a result would be unthinkable in modern society. The recognition of this principle would act as a clog on building activity, prevent town expansion and act as a deterrent to town expansion, since a person who had put up a building ten years earlier could always say that he enjoyed the right of prospect to view either the sea or the range of undulating hills, and bring an action asking for an injunction preventing persons from building.

For these reasons I agree with the order proposed to be made by My Lord the Chief Justice.

Appeal allowed.

[1] *(1919) A.C. 815 at 874 ; 18 N. L. R. at 293.*
[2] *(1958) Ch. 574 C. A.*
[3] *(1915) A. C. 1100, 1108.*
[4] *(1901) 13 N. L. R. 264.*
[5] *(1905) 14 N. L. R. 138.*
[6] *(1964) 66 N. L. R. 337.*