1912.

Present: De Sampayo A.J.

COSTA *v.* LIVERA.

C. R. Negombo, 18,621.

Servitude—Substitution of a new right of way for an old one—Non-notarial agreement—Benefit of possession of old route attaches to new route—Owner of the dominant tenement must be restricted to the new route.

The plaintiff claimed a right of way along the line marked d.....d. The defendant averred that the parties had by mutual consent (without a notarial deed) substituted a new route a.....a for the old route d.....d. The new route crossed the old route at the point at which the plaintiff alleged that defendant had obstructed d.....d.

Held, that if the plaintiff had definitely abandoned the route d.....d, he must be restricted to the new route a.....a.

"Ordinance No. 7 of 1840 will not be in the way of such restriction, even if the user of the new line a.....a has not been long enough to give plaintiff a new right by prescription."

The essence of the servitude is the right of way over the servient tenement, and the particular route affects only the manner of its exercise. What is prescribed for by long user is not the ground over which the way lies, but the incorporeal right of servitude. The benefit of the possession of the old route would attach to the new route.

THE facts appear sufficiently from the judgment.

A. St. V. Jayewardene, for the plaintiff, appellant.—When the defendant obstructed the new route, the plaintiff acquired the right to use the old route. (*Payne v. Shedden* [1]) In *Fernando v. Mendis* [2] there was a total abandonment of a servitude. Here there was only a substitution of one right of way for another. *Fernando v. Mendis* [2] does not therefore apply to the facts of this case.

Jayatileke, for the defendant, respondent.—It is clear that the old route was abandoned and a new route substituted about four years ago. The plaintiff cannot now seek to get a declaration of right over the old route. *Fernando v. Mendis* [2] is a clear authority on that point. The benefit of the possession of the old route would attach to the new route. The plaintiff should have asked for a declaration of his right over the new route. *Payne v. Shedden* [1] does

[1] *M. & R. 382.*

[2] *(1911) 14 N. L. R. 101.*

not hold that where the substituted route is obstructed the owner of the dominant tenement is entitled to the old route.

A. St. V. Jayewardene, in reply.

Cur. adv. vult.

July 29, 1912. DE SAMPAYO A.J.—

The plaintiff brings this action for obstruction of a right of way which he claimed over the defendant's land. The way claimed is along the line marked d.....d in the plan filed in the case. That plaintiff has a right of way is not denied, but the defendant disputes the plaintiff's present claim to use the route d.....d for the reason that the parties had by mutual consent substituted a new route marked a.....a in the plan for the old route d.....d. The contention for the defendant is that the plaintiff has lost the servitude of way over the line d.....d by abandonment or release. That a servitude is extinguished by abandonment is, of course, indisputable. In *Fernando v. Mendis*,[1] which is relied on, the servitude was a right to draw water from a particular well, but that decision is no authority for the present contention. Abandonment or release is a question of fact in each case; and the point in this case is whether the mere fact of a new line of way being adopted in lieu of the old line is proof of abandonment of the servitude of way over the defendant's land along the old line. Without more evidence I cannot say it is. There was no evidence gone into at the trial, but the Court decided more or less as an abstract question of law on the mere admission " that plaintiff by agreement used the line a.....a instead of d.....d. As regards the law, as I have said, the decision I have above referred to does not quite apply. There is not much direct authority that I can discover applicable to the point. *Voet 8, 3, 8*, says that the owner of the servient tenement may by election or agreement alter the route, provided the change does not prejudice the owner of the dominant tenement. See also *Maasdorp's Inst. 183*. But it is not clear whether the owner of the dominant tenement may revert to the use of the old route, or whether the servitude must in the case of a change be confined to the new route. I should say that if the owner of the dominant tenement has finally and definitely agreed to the new route in lieu of the old route, such permanent change would bind him to the extent of disentitling him to use the old route again except by a fresh agreement. The matter may be complicated with us by reason of such agreements affecting land being required to be in writing notarially attested, and possibly it was the perception of this difficulty that induced the plaintiff to claim the old route in this case. Mr. Jayatileke, for the defendant, made the acute suggestion that where, as presumably in this case, the servitude was acquired by prescription, the benefit, of the

[1] *(1911) 14 N. L. R. 101.*

1912.

DE SAMPAYO A.J.

Costa v. Livera

old possession would attach to the new route, and he argued that the plaintiff could now exercise his prescriptive right over the new route. I think this argument is sound, because, after all, the essence of the servitude is the right of way over the servient tenement, and the particular route affects only the manner of its exercise. What is prescribed for by long user is not the ground over which the way lies, but the incorporeal right of servitude. This is not inconsistent with, but is in a sense supported by, the decision in *Payne v. Shedden*,[1] which was cited by Mr. A. St. V. Jayewardene for the plaintiff. There the action was for trespass (*quare clausum fregit*), and the defendant justified by pleading a right of way over the plaintiff's land by user for twenty years. It appeared that the line of the way had been a good deal varied during the twenty years, and at certain periods wholly suspended by agreement between the parties; and it was contended that a user with such variations and suspensions did not support the existence of a servitude or easement at all. The Court held, first, that a suspension of enjoyment by agreement would not extinguish the right; and secondly, that the user of a substituted line would be an exercise of the right and evidence of its continued enjoyment; that is to say, that the right of easement by whatever route remained unextinguished, and was a good answer to the action for trespass. That case did not decide, and was not intended to decide, as to what route the defendant was entitled or was bound to use. In my opinion this case cannot be decided on a mere abstract question of law, but can only be determined on evidence. If the plaintiff definitely abandoned the route d.....d, I think that he must now be restricted to the new route a.....a. For the reasons I have indicated the Ordinance No. 7 of 1840 will not be in the way of such restriction, even if the user of the new line a.....a has not been long enough to give plaintiff a new right by prescription. The length of time during which the new route has been used instead of the old one would, however, be a relevant fact for consideration in connection with the question of abandonment. But if the substitution was made under such circumstances that the inference of abandonment can be drawn, the question of time will not be of much consequence (*Regina v. Chorley* [2]). If upon the evidence the Court finds that the right to use the route d.....d can no longer be maintained, but that the plaintiff's right is to use the route a.....a, it does not follow that the plaintiff's action must necessarily be dismissed.

The point of obstruction complained of is at the junction of the two routes, and the plaintiff has a cause of action whichever line of way he may ultimately be found entitled to use. It is true that in the plaint he asserted his right to use the route d.....d, but it would be convenient, and save both parties further expense,

[1] *M & R. 382.* [2] *12 Q. B. 515.*

if the dispute be determined once for all in this action. The action may, therefore, proceed upon the footing that the defendant is sued for an infringement of the plaintiff's right of servitude by putting up an obstruction at the point indicated in the plan, whether the route up to the point of obstruction is along the line d.....d or along the line a.....a. This may be done after amendment of the pleadings if necessary and upon proper issues to be framed, and subject to such order as to costs consequent on such amendment as the Court may think fit to make.

The judgment appealed against is set aside, and the case is sent back to be proceeded with as above indicated. The costs of the last trial and of this appeal will abide the final result.

Sent back.