1913.

Present : De Sampayo A.J.

KANDAIAH *v.* SEENITAMBY *et al.*

382—C. R. Batticaloa, 17,909.

Right of way—Prescription—Evidence of user of a defined track necessary.

Obiter, the evidence to establish a prescriptive servitude of way must be precise and definite. It must relate to a defined track, and must not consist of proof of mere straying across an open land at any point which is at the moment most convenient.

THE facts appear from the judgment.

A. St. V. Jayewardene, for the plaintiff, appellant.—The Commissioner has held that plaintiffs had for over ten years passed over defendant's land; the plaintiffs have therefore acquired a right of way over defendant's land. (Voet (*8, 3, 8*) states that even where no particular path has been used, the owner of the servitude is entitled to claim a right of way over the servient tenement. It was held in *Costa v. Livera*[1] that the essence of a servitude is a right of way over the servient tenement, and that the particular route affects only the manner of its exercise.

Bartholomeusz, for the first defendant, respondent.—The plaintiffs' claim as stated in the plaint is for a defined track. In C. R. Mallakam, 16,080, Wendt J. held that the evidence to establish a prescriptive servitude of right of way must be precise and definite, and that mere proof of straying across an open land is not sufficient. The passage in Voet (*8, 3, 8*) has been explained in *Karunaratne v. Gabriel Appuhamy* [2] as referring to servitudes created by agreement, and not to those acquired by prescription. Counsel also cited *3 Balasingham 239*.

Balasingham, for second defendant, respondent.

Jayewardene, in reply.

Cur. adv. vult.

October 31, 1913. DE SAMPAYO A.J.—

The plaintiff, who is the owner of the land marked A in the plan filed in the record, claims a right of way to a certain lane over the land marked B and C which belongs to the defendants. The right of way is claimed along a specific route by the side of the eastern boundary of the land B and C. The Commissioner, for reasons which he states in his judgment and which appear to me to be

[1] *(1912) 16 N. L. R. 26.* [2] *(1911) 15 N. L. R. 257.*

1913.

DE SAMPAYO A.J.

Kandaiah v. Seenitamby

sound, has held that the plaintiff has no right to the use of the particular way claimed by him, and that his right of access to the lane is by the lake shore to the east of the land B and C. The Commissioner, however, stated in the course of his judgment that "the evidence led for plaintiff does not establish a prescriptive title; it proves a long-established custom of passing over the land which now belongs to defendants, but it is not proved that this was a possession based on any claim of adverse title." This passage is construed by counsel for the plaintiff-appellant as a finding that the plaintiff had a right of way generally over the defendants' land, though not by any definite route, and it is contended that in such circumstances the plaintiff is by law entitled to select any route he may please. In the first place, the above passage in the judgment does not bear the construction put upon it—in fact, it expressly negatives the existence of any right at all. The Commissioner, in referring to a custom, obviously alludes to certain evidence given at the trial to the effect that, before the defendants' land was enclosed with a fence and when it was an uncultivated open ground, people generally used to walk over it in every direction without any hindrance. The Commissioner does not mean to hold that these people had a legal right of way over the defendants' land, nor does the evidence justify any such conclusion. Moreover, the plaintiff did not claim a general right of way and seek in this action to exercise his right of selection. In the plaint he claimed a right of way by prescriptive user over a particular track, and the issue tried was as to the plaintiff's right to the use of that particular track. This being so, it is hardly necessary to examine at length the authorities cited in support of the contention. The chief authority relied on is *Voet 8, 3, 8*, but I do not think that it is applicable to such a case as this. There Voet refers to a servitude of way granted or bequeathed indefinitely without any specification of the track over which it is to be exercised, and says that in such a case the owner of the dominant tenement can make his own selection, the reason stated being that, where no part has been pointed out by the person creating the servitude, the whole land and every particle of the soil is supposed to be subject to the burden of servitude. But this presupposes that the right of servitude already exists, and all that remains is to determine the particular manner of exercising it. The reasoning is not applicable to a case where the very question is as to the existence of a right of servitude and where one is sought to be established by prescription, inasmuch as *ex natura rei* possession or user for purposes of prescription must be in respect of a particular part or track of the land. The same passage of Voet was cited in *Karunaratne v. Gabriel Appuhamy*,[1] and there Lascelles C.J. observed: "These principles are readily applicable to a system of law under which real servitudes were

[1] *(1912) 15 N. L. R. 257.*

created only by agreement between the parties, and they appear to be limited to the case where the right of way was granted in general terms without specifying the exact course which it should follow. In the system of law which prevails in Ceylon rights of way are acquired by user under the Prescription Ordinance, and the course or track over which the right is acquired is necessarily strictly limited." I may also refer to C. R. Mallakam, 16,080,[1] in which Wendt J. laid down that "the evidence to establish a prescriptive servitude of way must be precise and definite. It must relate to a defined track, and must not consist of proof of mere staying across an open land at any point which is at the moment most convenient." The views expressed by these learned Judges support the opinion I have formed on the point.

I think the Commissioner of Requests rightly held that the plaintiff failed to establish a right of way over the defendants' land as claimed by him. The appeal is dismissed with costs.

Appeal dismissed.