Present : Grenier J.

Feb. 6, 1911

FERNANDO *v.* MENDIS *et al.*

491—*C. R. Negombo*, 18,057.

Servitude—Destroyed by express or tacit abandonment.

The abandonment of a right of servitude to draw water from a well standing on another's land destroys it, not only when such abandonment is express, but also when it is tacit.

THE facts are set out in the judgment.

A. St. V. Jayewardene, for the appellants.

Wadsworth (with him *Talaivasingham*), for the respondent.

Cur. adv. vult.

February 6, 1911. GRENIER J.—

The plaintiff in this action claimed the right to draw water from a well standing on the defendants' land, which adjoins his land. The plaintiff alleged as his cause of action that the defendants had on June 4, 1910, filled up the well, and have ever since prevented plaintiff from drawing water therefrom. The defendants answered

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that the plaintiff was permitted by them and their predecessors in title to draw water, but they denied that the plaintiff had acquired any right to do so. They alleged further that the well was closed with the consent of the plaintiff in the presence of the Inspector of Police and police headman.

At the trial the issues agreed upon were—

(1) Has the plaintiff acquired a prescriptive right to draw water from defendants' well ?

(2) Did the defendants on or about June 4, 1910, forcibly close the well and prevent the plaintiff from drawing water ?

(3) If so, what damage has plaintiff sustained ?

I accept the Commissioner's finding on the first issue, that the plaintiff had acquired the servitude in question by long user and prescriptive possession. I agree with him that the evidence of permissive user was quite inconclusive and should be rejected. As regards the second issue, whether the closing of the well was forcible, the Commissioner found against the plaintiff. He was satisfied that the Inspector of Police was an impartial witness, and his evidence was true that plaintiff did in fact consent to the closure.

The Commissioner, however, gave judgment for the plaintiff on the ground that as the consent of the plaintiff to close the well involved an interest in immovable property, such consent should have been embodied in a notarial document under the provisions of Ordinance No. 7 of 1840. A decree was entered up declaring the plaintiff entitled to draw water from the well, and ordering the first defendant to open up the well. In my opinion the Commissioner has taken a wrong view of the law relating to a servitude of the character in question. Under the Roman-Dutch Law, which should govern this case, there is what is known as the abandonment of a right of servitude of this description. According to Voet (8, 6, 5) " the abandonment of a servitude destroys it, not only when such abandonment is express, but also when it is tacit ".

As an example of a tacit abandonment, Voet mentions the case where something is conceded to the owner of the servient tenement, which naturally and of necessity obstructs the use of the servitude, as, for instance, if he be allowed to build on land set apart for the exercise of a right of way, or to raise his buildings, even although he be burdened with a servitude of receiving rain drops. In Nathan's *Common Law of South Africa* (*vol. I., s.* 722) reference is made to the case of *Edmeades v. Scheepers*,[1] where the facts and findings were as follows : The plaintiff purchased lots of ground from a Municipality, and the defendant had bought similar lots, against the transfer deed whereof was registered a servitude of grazing rights in favour of the landowners in the Municipality, the defendant

[1] *S. C. 344.*

reserving to himself only the right of building, and the defendant cultivated the land and continued doing so for sixteen to eighteen years ; it was held that the plaintiff was entitled neither to damages for obstruction of his grazing rights, nor to an interdict, as the cultivation of the land was necessarily repugnant to the grazing right, and the plaintiff had lost his servitude, seeing that he lay by for so many years and made no objection. It was apparently held in the case cited above, a report of which is not accessible, that the dominant owner cannot plead he was silent, and never openly acquiesced in the repugnant act, and that the servient owner cannot be compelled to restore the property to its former condition, although Voet was of opinion that the dominant owner is compellable to make good actual damage caused to the servient owner. Grotius, in *bk. II.*, 37, *IV.*, says that such servitudes are lost by permitting anything to be done repugnant to the servitude ; as, for instance, in case any one permits the ground on which he had a right of way to be built upon.

In the case now before me there was not a tacit but an express abandonment of the right which plaintiff had acquired to draw water. The Commissioner has found that the defendant gave his consent to the closure of the well, and, of course, it goes without saying on the authorities I have referred to, that in thus giving his consent he completely abandoned his right of servitude, and cannot now claim it in this action.

The judgment of the Court below must be set aside, and the plaintiff's action dismissed with costs in both Courts.

Appeal allowed.