1935

Present: **Koch J. and Soertsz A.J.**

DIAS *v.* FERNANDO.

175—D. C. Kalutara, 16,938.

Servitude—Right of cartway—Deviation of route by agreement—No notarial instrument—Validity.

Where a person acquired a right of way over another's land and a deviation of the route was effected by a mutual agreement, which was not notarially attested,—

Held, that the servitude attached to the new route.

APPEAL from a judgment of the District Judge of Kalutara.

H. V. Perera (with him *Ranawake* and *Kurukulasooriya*), for defendant, appellant.

M. T. de S. Amarasekera (with him *N. E. Weerasooria*), for plaintiff, respondent.

September 30, 1935. KOCH J.—.

The appeal is by the defendant from a judgment of the District Judge, which declared the plaintiff entitled to a right of cartway from her land over the defendant's land to a main road.

It is clear, and the learned District Judge has found, that a cartway was used by the plaintiff over the defendant's land for a considerable number of years, leading from the plaintiff's land to a point which presently is occupied by " steps " abutting the main road. About seven or eight years prior to 1934 when the trial took place, the crest of a hill in the cartroad at this spot was shaved down by the road authorities, thus lowering the level of the main road, and in consequence by agreement the path was deviated to a point somewhat to the east of the " steps " marked X on the plan filed in the case. The right of way now claimed is the old cartway with the difference caused by this deviation.

It is argued firstly that as the deviation took place only four or five years before the institution of these proceedings, viz., June, 1931, and was the result of only an oral agreement, the plaintiff is not entitled to the use of the new cartway as sufficient time for prescription has not elapsed. The point is pressed on the ground that a right of way is immovable in its nature and has been so recognized by law and cannot be validly acquired except by a notarial instrument or prescription.

I think it can be conceded that in the absence of a grant of a servitude of a right of way in general or specific terms over another's land, the right can only be acquired by prescription by user over a definite track. In this case such a right of way has clearly been acquired along a defined path and was in force up to about seven or eight years ago, this path being the old track up to the " steps ".

Has the plaintiff's right to this servitude been lost by reason of the deviation ? This will depend on what precisely is the plaintiff's right to a servitude of this nature, and whether there has been an abandonment of that right at the time of the deviation.

I think I would be correct in saying that if such a right is immovable in its nature and definitely confined to and incorporated in a particular track that had been used up to that date, the right to use a new path that came into being by a process of deviation can only be legally acquired by notarial instrument of ten years's prescription.

On the other hand, if the servitude is essentially an incorporeal right over a servient tenement and the particular route affects only the manner of its exercise and this incorporeal right is not immovable in its nature, a deviation in the particular route by an arrangement between the parties does not affect such incorporeal right, which will continue to exist and can be exercised over the substituted track without the necessity of a notarial instrument.

The opinion of Sir Thomas de Sampayo in *Costa v. Livera*[1] is in favour of the latter view. He has seen no reason to alter that opinion in his observations in the case of *Kandaiah v. Seenitamby*[2].

[1] *16 N. L. R. 26.* [2] *17 N. L. R. 29.*

If the views expressed by this Court in *Karunaratne v. Gabriel Appuhamy*[1], *Fernando v. Fernando*[2], *Madanayake v. Thimotheus*[3], *Andris v. Manuel*[4] and *Morgappa v. Casie Chetty*[5] are carefully examined, it will be found that the correctness of de Sampayo J.'s opinion has never been questioned. His view is that the incorporeal right to use remained although the path along which it was used was changed. " What is prescribed by long user ", he says, " is not the ground over which the way lies but the incorporeal right of the servitude ".

It may transpire that even this incorporeal right may be determined by abandonment. This will depend on the evidence and the circumstances of each particular case.

In this case the evidence which has been accepted by the District Judge shows that the defendant himself joined hands with the plaintiff in constructing the deviation when it became imminent that the old cartway would be impossible to use owing to the lowering of the main road. There was no intention to abandon the incorporeal right on the part of the plaintiff nor was there an intention on the part of the defendant to accept such a situation. I therefore hold that the District Judge was right in conserving to the plaintiff her right to use the new cartway.

On the second point I also feel that the District Judge is right. If the defence was that the terminal X in the new path was destroyed by the decree in a partition case in respect of a land, a strip of which interposed itself between the defendant's land and the road at this point, the decree in that case should have been duly produced and the position made clear that there was no conservation of the servitude over the strip. The production of a plan is insufficient.

I think the appeal should be dismissed with costs.

SOERTSZ A.J.—

I am not free from doubt in this case. It is clear law that a servitude of right of way can be acquired by " prescription " only over a definite track. It is true that " what is prescribed for by long user is not the ground over which the way lies, but the incorporeal right of servitude ", but that incorporeal right is limited to a definite track. The owner of the dominant tenement cannot exercise that right over any other part of the land at his choice. He can acquire a right over another track only by the laborious course of " prescribing " for it, or by agreement. The agreement, however, to be effective must be given expression to in a manner provided for by law. Our law requires that agreement affecting lands should be attested notarially. In this case there is no notarial agreement.

The way I feel about it is that the incorporeal right and the particular track are inseparable. The incorporeal right once acquired has no existence independent of the track. In other words, the right does

[1] *15 N. L. R. 257.*
[2] *31 N. L. R. 126.*
[3] *3 C. L. R. 82.*
[4] *2 S. C. D. 69.*
[5] *17 N. L. R. 31.*

not exist in the abstract. When a new track is substituted for the old one, it seems incomplete to say that the change affects only the manner of exercising the right. A new incorporeal right is created. But, as there is the very high authority of de Sampayo J. to the contrary in the case of *Costa v. Livera*[1] with which my brother Koch is in agreement, and as the view taken in that case is said not to have been questioned—although I would add, that this point did not come up directly for consideration in any of the later cases cited to us—I agree to make the order proposed by my brother and I comfort myself with the reflection that the order proposed does justice between the parties on the actual merits of this case.

Appeal dismissed.