1970 *Present :* H. N. G. Fernando, C.J., Alles, J., and de Kretser, J.

M. B. A. C. MARASINGHE and others, Appellants, *and* T. K. A. SAMARASINGHE, Respondent

S. C. 501/66 (F)—D. C. Gampaha, 10451/RW

Servitude—Right of way—Alteration of route by owner of servient tenement—Permissibility.

Held by ALLES and DE KRETSER, JJ. (FERNANDO, C.J., dissenting), that when a servitude of a right of way has been acquired by prescription, the owner of the servient tenement is entitled to offer a deviation of the route or track along which the right was acquired, provided that the proposed alternative route is equally convenient and serviceable to the owner of the dominant tenement.

Madanayake v. Thimotheus (3 C. Law Rec. 82), *Fernando v. Fernando* (31 N. L. R. 126) and *Hendrick v. Sarnelis* (41 N. L. R. 519) overruled.

APPEAL from a judgment of the District Court, Gampaha.

H. W. Jayewardene, Q.C., with *L. C. Seneviratne* and *B. Eliyatamby*, for the defendants-appellants.

C. Ranganathan, Q.C., with *M. Hussein*, for the plaintiff-respondent.

Cur. adv. vult.

October 3, 1970. H. N. G. FERNANDO, C.J.—

The only question which arises in this appeal is whether, when a servitude of a right of way across a land has been acquired by prescription, the owner of the servient tenement is entitled to deviate the route or track along which the right was acquired. In the present case, the defendants and their predecessors in title had acquired a servitude on a route which ran more or less across the centre of the plaintiff's land. The order of the District Judge, against which the defendants have appealed, is that the plaintiff is entitled to substitute a route along part of the boundary of the land, on the ground that this alternative route is equally practicable and convenient for the defendants.

An early case in which the question which arose in this appeal was considered is that of *Karunaratne v. Gabriel Appuhamy* [1]. The question was not however decided in that case, because it had not been raised in the lower Court.

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

1*——J 10970 2255 (12/70)

The same question arose again in *Madanayake v. Thimotheus* [1], in which Schneider J. examined the text of Voet 8.3.8, which is here set out from Gane's translation (Vol. 2, p. 471, 2) :—

"It is common to foot-passage, driving and right of way, nay to water-leading and to the drawing of water also that, when such a servitude over a farm has been granted in general terms, or has been so bequeathed by a testator, and no part of the farm has been allotted over which it is to be exercised, a choice of such part is enjoyed by the owner of the dominant tenement."

. . . .

"But in the second place also it is settled that he must thereafter pass or drive only by the way which he at first laid out, and that he no longer has the power to vary that way, so that the other parts of the farm beside that over which the servitude has been exercised are for the future deemed to be free, unless liberty to vary was also granted by covenant."

. . . .

"These things however do not prevent the owner of the servient tenement from having liberty to vary and to allot for the foot-passage, driving or right of way a space different from that which was originally marked out by choice or by covenant, provided that no prejudice is created thereby to the owner of the dominant tenement."

Schneider J. then made the following observations :—

"These passages put it beyond any manner of doubt that the writer is speaking of only those servitudes which are created in a particular way, namely where the right is granted in general terms without mention of the route over which it is to be exercised. From the very terms of its creation the right is in theory exercisable over every part of the land. It is therefore necessary for principles to be laid down upon which the precise route should be determined, and Voet indicates what those principles are."

. . . .

"I am at a loss to conceive how those principles or any one of them can be made applicable to a servitude of way acquired by user for the necessary period of prescription over a definite route. It is not a right which can be said to extend over the whole of the servient tenement. It is acquired without the consent of the owner of the servient tenement and by possession adversely to him. The reason given by Voet why the owner of the dominant tenement has the election of the route, and the owner of the servient the right to alter the route will not apply in the case of the acquisition of the right by prescription."

[1] *(1921) 3 C. Law Recorder 82.*

Schneider J. also quoted the views of Lascelles C.J. in *Karunaratne v. Gabriel Appuhamy,*[1] which show a similar understanding that the principles stated in Voet are not applicable in the case of a servitude acquired by prescription.

In *Fernando v. Fernando*[2] a Bench of two Judges adopted the reasoning of Schneider J. and held that the owner of a servient tenement has no right to deviate the route of a right of way which had been acquired by prescription.

Despite the full and able arguments which were submitted to us at the hearing of this appeal, Counsel had not been able to discover any statement in a Commentary on the Roman Dutch Law, other than the statement in Voet, regarding the diversion of the route of a right of way. Counsel appearing for the plaintiff has very properly conceded that the statement in Voet does not express the proposition that a deviation may be made in the circumstances of the present case. But Counsel relied on certain other decisions of our Courts, as well as a decision of the Appellate Division of South Africa, in support of this alleged right of deviation.

In *Costa v. Livera*[3] the plaintiff claimed a right of way along the line marked d...............d, shown in the plan filed of record. The defendant admitted that the plaintiff had acquired a right of way by prescription along that line ; but his case was that the parties had by mutual consent substituted a new route shown as a...............a for the former route, and that the plaintiff had lost the servitude of way over the line d...............d by abandonment or release. In the District Court, without evidence but upon a mere admission, it was decided that the plaintiff had used the new road. In appeal de Sampayo J. thought that without more evidence it cannot be held that there had been abandonment of the servitude along the old line. He thereafter referred to the question whether the requirement of a Notarial Instrument for an agreement affecting land may create difficulty in the way of the substitution of a new route for that over which a right of way had originally been acquired by prescription. On this point, he approved the proposition that, where in the case of a servitude acquired by prescription there is a deviation of the route, " the benefit of the old possession would attach to the new route ". In this connection de Sampayo J. stated that " 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 ". The judgment in appeal ultimately left it open to the lower Court to find upon evidence whether or not there had been an agreed deviation from the old line to the new.

[1] *(1912) 15 N. L. R. 25.*
[2] *(1929) 31 N. L. R. 126.*
[3] *(1912) 6 N. L. R. 26.*

It will be seen that the question now before us did not in fact arise for decision in the case of *Costa v. Livera*. But Counsel for the plaintiff has relied upon the dictum which I have cited above from that judgment for his submission that in every case, except one in which a right of way has been defined in a grant, there are mutual rights and obligations of the parties with respect to the route along which the right it exercised. According to this submission the rule stated by Voet, that in a case of a grant *simpliciter* of a right of way without specification of a route, the servient owner may deviate in a convenient manner the route chosen by the dominant owner, is a rule applicable not only in the case of such a grant, but is equally applicable in a case where a prescriptive right has been acquired by long user of a specific route.

It seems to me that the dictum of de Sampayo J. must be read in the context in which it occurs. That distinguished Judge was considering a proposition that a prescriptive right of way is not lost if, after it has been acquired, there is an oral agreement to deviate the original route. He thought that proposition to be sound because the essence of the servitude is a right over the servient tenement, which right remains even though the manner of its exercise is altered *by an agreement to deviate the route.* Whatever was said in the judgment about the effect of an agreement to deviate from the original route, I cannot think that de Sampayo J. had in contemplation any possibility of a unilateral deviation by a servient owner.

Indeed in *Kandaiah v. Seenitamby*[1] de Sampayo J. had occasion to refer to the passage in Voet which was considered by Lascelles C.J. and Schneider J. in the two earlier cases which I have cited, and he approved the following statement of Lascelles C.J. in *Karunaratne v. Gabriel Appuhamy*[2] :—

> " These principles (stated by Voet) 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."

In *Dias v. Fernando*[3] there arose for decision the precise matter which de Sampayo J. had earlier considered, namely, whether when there is an agreed deviation of the route of a right of way acquired by prescription, the prescriptive right of servitude is thereby lost. Koch J. here followed the opinion of de Sampayo J. and held firstly that the prescriptive right was not lost by deviation of the route, and secondly that a notarial instrument was not necessary for the Agreement to deviate. In effect the basis for that decision is that once the prescriptive right has been established over a servient tenement it is not lost by reason of a

[1] (1913) 17 N. L. R. 29.
[2] (1912) 15 N. L. R. 257.
[3] (1935) 37 N. L. R. 304.

change in the manner of its exercise. Soertsz J. agreed, but with much reluctance. The same principle that a servitude acquired by prescription is not lost because of a mere agreed deviation was recognised in *Sinnathamby v. Kathirgamu* [1].

It will be seen that none of the decisions to which Counsel for the plaintiff referred dealt with a claim that a servient owner has a right to deviate the right of a servitude acquired by prescription, so that none of them supports Counsel's submission that such a right is recognised by some principle governing the law relating to servitudes.

The reason why (as Voet states) a servient owner has a right to make a reasonable deviation from that chosen by the dominant owner is in my opinion quite a simple one. When a grant *simpliciter* is made and there is no definition by the grantor of the line for the exercise of the right granted, there has necessarily to be some determination of the precise line ; because the matter is left open in the grant, both parties continue after the grant is made, to have rights concerning this determination ; the grantee to elect a line and the grantor to offer a convenient alternative. As Voet pointed out, there is no scope for any such determination in the case of a defined grant, because the line for the exercise of the right has already been defined in the grant. In my opinion a servitude acquired by prescription is in this respect indistinguishable from one acquired by a specific grant.

In both these cases the line becomes established simultaneously with the servitude. At the time when a servitude becomes established by prescriptive user the line of the servitude is equally established by that user, and a servient owner has no right to participate in the determination of the line, any more than he has such a right of determination in a case where the determination has already been made in his own grant. In my view therefore a servient owner has in the case of a grant *simpliciter* a right to determine the line of this exercise of the servitude, only because there has not been an earlier final determination of the line. But in the case both of a defined grant, and of a servitude acquired by prescription, there is such a final determination and therefore no scope for any deviation, save by mutual agreement.

Counsel for the plaintiff relied heavily on the judgment on *Rubidge v. McCabe and Sons and others* [2]. The plaintiffs had admittedly a right of way by prescription over the defendant's farm along the road which had been used since 1887. In 1904 the defendant, without notice to the plaintiffs, constructed a weir in the vicinity of the place where the road crossed a river. After some negotiations between the parties, it was agreed that the plaintiffs would accept another road crossing the river at a different point, and this alternative road was provided and used between 1904 and 1911. At that stage the defendant built another weir

[1] *(1946) 47 N. L. R. 354.* [2] *1913 A. D. 433.*

across the river near the new crossing, and it was common ground that this construction rendered it impracticable to cross the road which the plaintiffs had used for seven years. The defendant then offered yet another crossing of the river at a different point, and the plaintiffs agreed to accept this on certain conditions. Ultimately the dispute came to the Courts, which ordered that upon a money payment by the defendant to the plaintiffs, the defendant shall be relieved of the duty to construct a crossing, except a bridge which he must construct and maintain. In the alternative the defendant could provide a new causeway at a point specified in the order which the plaintiffs must use if the resident Magistrate was satisfied that it is safe and practicable.

This statement of the facts in the South African case makes it evident that the Court was concerned with circumstances in which the owner of a servitude acquired by prescription had at various times negotiated and agreed with the servient owner for deviations from the original line of the servitude; in fact during the period 1904 to 1911, the dominant owner had actually used a new line in substitution for the original line of the servitude, and the dispute which was brought to the Courts concerned some further negotiations for yet another deviation. In this context, I must with great respect express my inability to understand why the Court thought fit to make general observations to the following effect :—

"As owners of the dominant tenements the owners must exercise their rights in the manner least oppressive to the defendant and as owner of the servient tenement the defendant has the right, after due notice to the plaintiffs, to divert the course of the road provided—and this is a most important proviso—he does not by such diversion make the use of the road less convenient or more expensive to the plaintiffs."

* * * * * *

"The evidence, in my opinion, does not establish that there was a public road over the farm, but rather that a servitude of right of way existed, the plaintiffs' farms being the dominant and the defendant's farm the servient tenements. And if that be the legal position it was competent to the defendant upon giving due notice to the plaintiffs to divert the course of such road, provided that the new road was equally practicable and convenient to them."

The passage from Voet which I have already reproduced above was cited during the course of the argument, but apart from the statements such as those now set out, there is no reference whatsoever in the judgments to any text which supports those statements of the law. In Ceylon there have been the three judgments of 1912, 1921 and 1935, which purport to apply the Roman Dutch Law, and which clearly declare that a servient owner has no right to deviate the line of a servitude acquired by prescription. In the absence of any contrary authority either in the Roman

Dutch texts or in any decisions of our Courts, I am not persuaded of any reason why we should at this stage disagree with Ceylon decisions which are directly in point.

For these reasons I am unable to agree with my brothers that the previous decisions of this Court on the question involved should be overruled. In my opinion the plaintiff's action should be dismissed.

ALLES, J.—

This appeal raises an important question of law on which, unfortunately, the Judges before whom it was argued by eminent Counsel have not been able to reach unanimity. The learned Chief Justice and my brother De Kretser J., whose judgments I have had the advantage of reading before preparing my own, have adduced reasons for their respective views on a question which is undoubtedly one of difficulty and acknowledged to be such by two previous Chief Justices of the Supreme Court.

The plaintiff, the owner of the servient tenement, instituted this action against the defendants as owners of the dominant tenements for a declaration that the defendants, who it is admitted were entitled to a right of way across the plaintiff's land by right of prescriptive user, were not entitled to the exercise of such a right. The plaintiff was prepared to grant a footway along the southern boundary of his land as an alternative to the existing route and the learned District Judge held, after an inspection of the land, that it was "fair, just and equitable to permit the plaintiff to offer the alternative track to the defendants which will not cause any inconvenience or hardship or prejudice or any detriment to the defendants but will enable the plaintiff to develop his land which lies on either side of the original footpath." In the light of this eminently reasonable view of the facts should the law be so intractable as to prevent the plaintiff from obtaining relief in a case in which the Court has held that he is justly entitled to the relief he claims ?

The question of law which arises for determination in this appeal is whether, when a servitude has been acquired by prescription, the owner of the servient tenement is entitled to offer a deviation of the route or track from the one over which the right has been acquired, provided the former route is as convenient and serviceable to the owner of the dominant tenement as the latter.

Before examining the decisions of the Ceylon courts on this question, which have sought to interpret the Roman Dutch Law, I propose to examine that law and consider such decisions of the South African Courts which might be of assistance. It is not disputed that the law has been

laid down in the text of Voet at 8-3-8[1] and I have set down below the relevant law as indicated by Voet and marked it as A, B, C, D and E for the purpose of ready reference.

A. It is common to foot-passage, driving and right of way .... that, when such a servitude has been granted in *general terms, or has been bequeathed by a testator,* and no part of the farm has been allotted over which it is to be exercised, a choice of such part is enjoyed by the owner of the dominant tenement.

B. The reason for such a right of choice is that, where no part has been selected, the whole farm and every clod of it are deemed to be subject to the servitude .....

C. Nevertheless the power of choice belongs to the owner of the dominant tenement subject to his being obliged to behave civilly in making the choice .....

D. But in the second place also it is settled that he must thereafter pass or drive only by the way which he at first laid out, and that he no longer has the power to vary that way, so that the other parts of the farm beside that over which the servitude has been exercised are for the future deemed to be free, unless liberty to vary was also granted by covenant.

E. *These things however do not prevent the owner of the servient tenement from having liberty to vary and to allot for the foot-passage, driving or right of way a space different from that which was originally marked out by choice or by covenant, provided that no prejudice is created thereby to the owner of the dominant tenement.*

In passage " A " when Voet refers to a servitude granted in general terms or bequeathed by a testator, he is clearly contemplating the creation of a servitude *simpliciter*. It therefore became necessary to lay down certain rules whereby the right of the dominant owner to the exercise of the servitude had to be regulated and this had to be done in a manner which would cause the least possible burden on the owner of the servient tenement. The passages marked " C " and " D " seek to lay down those rules and bind the dominant owner to his choice which must be exercised by him *civiliter*. The resulting position is that once such a choice is made the rest of the land is free from the servitude. A further consequence of the choice being made by the dominant owner or by agreement between the parties as to the route chosen is, that there cannot be a variation by the servient owner except with consent and the route chosen or agreed upon becomes the only defined track over which the dominant owner can exercise his rights, leaving the rest of the servient tenement unburdened. It seems to me, therefore, that the passage

[1] *Gane's translation, at p. 471 and 472.*

marked " E " which relates to the rights of the servient owner are quite independent of the rights of the dominant owner set down in the passages marked " A ", " C " and " D " in Voet's text.

In the case of a servitude acquired by prescriptive user, the dominant owner uses the land of his neighbour by an unilateral act choosing the track along which he proceeds and using it adversely to the interests of the servient owner for the duration of the prescriptive period. In order to acquire the servitude he has to proceed along a defined track. It would not be sufficient for him to prove that he had the general right to stray all over the land. In the case of a servitude created *simpliciter* the right of the dominant owner arises at the time of the creation of the servitude, be it by grant in general terms or by testamentary disposition, whereas in the case of a servitude acquired by prescription, the right is acquired at the end of the prescriptive period. In both cases the choice of the route is left to the dominant owner—in the one case he exercise his choice lawfully and in the other adversely to the servient owner. In both cases there must be a defined track over which the servitude has to be exercised. If this be a fair analysis of the legal position, I cannot see why the passage at " E " of Voet's text cannot be made applicable to the case of a servitude acquired by prescription as well. It is significant that although Voet deals with the law of prescription in other Titles (8–4–2, and 3 and 4) in 8–3–8 he makes no reference to prescription when he refers to the right of the servient owner to offer an equally convenient alternative route to the dominant owner. I am of the view that Voet did not make this reference because he intended the principles of the law to be applicable in all cases whether the servitude is created *simpliciter* or acquired by prescriptive user. In either case the dominant owner suffers no prejudice. His legal right is protected and he is offered an equally convenient defined track for the exercise of that right. Needless to say, whether the alternative track is as convenient and suitable to the dominant owner would be a question of fact to be decided in the circumstances of each particular case. The fact that a defined track had been used for the duration of the prescriptive period without interruption would be a cogent factor which the Court is entitled to take into account in deciding this question.

There is another reason which inclines me to the view that the text in Voet 8–3–8 and, in particular the passage at " E ", can be made applicable to a servitude acquired by prescription. When Voet in that passage referred to the right of the servient owner to vary and to allot " a space different from that which was originally marked out by choice or by covenant " (quam prius *electione* vel conventione designatum fuerat spatium) he was referring to the selection of the route by choice. In the case of a dominant owner who acquires a prescriptive user over a defined track also there is in fact a selection of the route or track by him.

In regard to the rights of the servient owner the Commentators on the Roman Dutch law make no distinction whether the servitude is created *simpliciter* or acquired by prescription. In Van Leeuwen's Commentaries[1] the Commentator sets down the law stated by Voet and refers to those servitudes where the dominant owner has a choice but does not expand on the nature of the choice or as to how the servitude is created. He also states that the dominant owner is bound by his choice, " which, however, the owner of the *res serviens* may do (i.e. change the route) without inconvenience or hindrance to him who enjoys the servitude ". Lee's Commentary on The Jurisprudence of Holland by Grotius[2] refers to the respective rights of the dominant and servient owners. He agrees that Voet 8–3–8 refers to a servitude created *simpliciter* as distinct from a servitude originally constituted which could only be altered by mutual consent. Lee then quotes a passage from the judgment of De Villiers A. J. A. in *Garden Estates Ltd. v. Lewis*[3] to which reference will be made later in the course of this judgment. In the same note Lee makes reference to the leading case of *Rubidge v. McCabe & Sons*[4].

Rubidge v. McCabe & Sons was strongly relied upon by Counsel for the plaintiff in support of the proposition that a servient owner had the right to offer an equally convenient alternative route even when the servitude was acquired by prescription. This was a decision of the Appellate Division of South Africa (Lord De Villiers C.J., Solomon J, and De Villiers J.P.) and was admittedly a case where a servitude of a right of way had been acquired by prescription. Voet 8–3–4 and 8–3–8 was cited by Counsel in the course of the argument and the Appellate Court appears to have accepted the law as stated by Voet in applying it to the servitude acquired by prescription. Lord de Villiers was quite satisfied that the plaintiffs (the owners of the dominant tenement) had acquired a right of way by prescription over the defendants' farm to the main road but all three Judges concentrated on the question whether the divergence of the route suggested by the servient owner did in any way prejudice the dominant owner's rights. In doing so the learned Judges applied the law as stated in Voet.

At p. 441 Lord de Villiers C.J. stated this—

" As owners of the dominant tenements the owners must exercise their rights in the manner least oppressive to the defendant and as owner of the servient tenement *the defendant has the right, after due notice to the plaintiffs, to divert the course of the road provided*—and this is the most important proviso—*he does not by such diversion* make the use of the road less convenient or more expensive to the plaintiffs. "

[1] *Van Leeuwen's Roman Dutch Law (1881) Book II, Chap. XXI, Section 6, p. 294.*

[2] *The Jurisprudence of Holland by Grotius—Cap. XXXV, Section 6, pp. 188, 189.*

[3] *(1920) A. D. 450.*

[4] *(1913) A. D. 441.*

Solomon J. took the same view at p. 445 when he said—

> "The evidence, in my opinion, does not establish that there was a public road over the farm, but rather that a servitude of the right of way existed, the plaintiffs' farms being the dominant and the defendant's farm the servient tenements. And if that be the legal position it *was competent to the defendant upon giving due notice to the plaintiffs to divert the course of such road, provided that the new road was equally practicable and convenient to them.*"

and dealing with the alternative routes suggested by the defendant the same Judge said at p. 448—

> "As already stated, I am satisfied that neither of these in its present condition is such a road as the plaintiffs can be compelled to take. But the question remains whether it is not possible to improve both or either of them, so as to render them as safe, practicable and convenient to the plaintiffs as the road which crossed the river at the point T, and which they had used from 1904 to 1911."

De Villiers J.P. in agreeing to the substitution of an alternative route said at p. 451—

> "There has not been any serious dispute about the law applicable to the case. The plaintiffs and their predecessors have from time immemorial enjoyed a right of way over the farm now owned by the defendant, and the defendant was not entitled to interfere with that right of way without their consent..........
>
> It is therefore, clear that the plaintiffs are in a position to demand that the defendant should provide them with a right of way across his property to the main road to Graaff-Reinet which is equally suitable to the road they had enjoyed before he constructed his second weir."

The decision of the Appellate Court, therefore, establishes, in my view the proposition of law for which Counsel for the plaintiff respondent contends in this case. There is nothing in the judgment to indicate that the alternative right of way was decided by mutual consent and not in the exercise of the right of the servient owner to offer an equally convenient route. *Rubidge v. McCabe & Sons* was cited with approval by the Appellate Division in *Gardens Estate Ltd. v. Lewis*. This was a case where a servitude constituted in favour of the dominant owner and his heirs was definite and not created *simpliciter* and it was held that the Gardens Estates Syndicate, who were the successors of the dominant owner did not have the right to deviate the pipe line without the consent of the servient owner. De Villiers, A.J.A. who delivered the judgment of the Court stated—

> "A definite servitude having originally been constituted, it could only be altered by mutual consent. In this respect a *servitude as constituted* differs from a *servitude created simpliciter*. In the latter

case according to Voet 8–3–8, the owner of the dominant tenement has the election where to lay the line, which he must however exercise *civiliter*. If he has once exercised his election, he cannot afterwards change. But the owner of the servient tenement would have the right to do so provided the new route is as convenient as the old one (*McCabe v. Rubidge* 1913A.D. 441). When Voet, line 50 says that the owner of the servient tenement has the right to point out another route to that which has been agreed upon (*vel conventione designatum fuerat*) he speaks of servitudes created *simpliciter*. It follows that the Gardens Estate Syndicate had no right to deviate the pipe line as it did, and the appellant having assumed liability for it in the declaration is responsible for this illegal act."

Although the learned Judge was dealing with a servitude that was constituted and not subject to alteration except by mutual consent, his reference to *McCabe v. Rubidge* can only mean that when the right of the servient owner to offer an alternative route arises for consideration in an appropriate case there is no difference whether the servitude has been created *simpliciter* or whether the servitude has been acquired by prescription. This view has been endorsed by Lee in his Commentary to the Institutes referred to earlier.

The case of *Rubidge v. McCabe & Sons* has been referred to in several texts on the Roman Dutch Law and is a leading case on the point. Reference has already been made to Lee's note in his Commentary to Grotius' Jurisprudence of Holland. In Lee's Introduction to Roman Dutch Law[1] he states the principles by which the direction of a way is to be determined and cites *Gardens Estates Ltd. v. Lewis* and *Rubidge v. McCabe* in regard to the servient owner's rights, making no distinction between the servitude created *simpliciter* and servitude acquired by prescription. In the Principles of South African Law by Wille[2] the same two cases are cited in support of the servient owner's right to divert the route. In Hall and Kellaway on Servitudes[3] these two cases are again referred to in connection with the rights of the servient owner. Maasdorp in his Institutes of South African Law[4] dealing with Water Servitudes, in support of the right of the owner of the servient tenement to alter the course of the furrow, provided the new route which he selects is as convenient as the former one, relied on these two cases.

From a consideration of the Commentaries of the Roman Dutch law and the Roman Dutch law texts, it appears to me that in South Africa the Courts have concentrated on the fundamental principle that a servitude should be so used as to throw the least possible burden on the servient tenement. One important method by which this object could

[1] *Lee's Introduction to Roman Dutch Law 3rd Ed., p. 172.*

[2] *Wille—The Principles of South African Law (5th Ed.), p. 222.*

[3] *Hall and Kellaway on Servitudes (1942), p. 122.*

[4] *Institutes of South African Law, Vol. II, p. 137.*

be achieved was by permitting the servient owner to offer an equally convenient and suitable route to the dominant owner in an appropriate case. It would also appear from the decisions of the South African Courts that in South Africa, as far as the servient owner's rights were concerned, a servitude acquired by prescription was equated to the servitude *simpliciter*.

Although the decision in *Rubidge v. McCabe* was delivered in 1913, this decision appears to have been considered in Ceylon only thirty-seven years later. In *Thambapillai v. Nagamanipillai* [1] Gratiaen J. quoting this decision seemed to take the view that it was possible for a slight deviation (for the convenience and concurrence of the parties) of a defined track over which prescriptive rights had been acquired. Had the decision in the South African case been brought to the notice of the learned Judges of our Court before that year the Ceylon decisions might have taken a different course.

In Ceylon, it seems to me, that the underlying principle that should be followed is laid down in the dictum of Justice Sampayo in *Costa v. Livera* [2] where that distinguished Judge said "that 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 correctness of this dictum has never been questioned although several learned Judges have subsequently referred to it in the course of their judgments.

Some of the decisions of the Supreme Court in Ceylon appear, however, to have taken the view that the law as stated at Voet 8-3-8 has no application to a servitude acquired by prescription. An early case in which the question arose was in 1912 in *Karunaratne v. Gabriel Appuhamy* [3]. The observations of Lascelles C.J., though *obiter*, are however entitled to the highest respect. After explaining the law as laid down in Voet 8-3-8 the learned Chief Justice states as follows :—

"These principles are readily applicable to a system of law under which real servitudes were 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 the 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 defined.* How far the principles of the Roman Dutch law to which I have referred are applicable to a case where the *right to pass over a defined track has been acquired by prescription is a question of some difficulty* ; but so far as the present appeal is concerned the questions are purely academic."

[1] *(1950) 52 N. L. R. 225 at 227.* [2] *(1912) 16 N. L. R. 26 at 27.*
[3] *(1912) 15 N. L. R. 257.*

It will be noted that the learned Chief Justice inclines to the view that the principles set out in Voet 8-3-8 will not apply to a servitude obtained by prescriptive user although he chooses to leave the question open. When Lascelles C.J. referred to the system of law prevalent in Ceylon he no doubt had in mind the provisions of the Prescription Ordinance. But the law of Prescription existed in South Africa as well at the time the decision in *Rubidge v. McCabe & Sons* was delivered.

The authority that was strongly relied upon by Counsel for the defendants, however, was the decision of Schneider J. in *Madanayake v. Thimotheus* [1] where the facts were very similar to the facts of the present case and where the same proposition of law was enunciated. The trial Judge in giving judgment in favour of the servient owner held that the deviation was "practically as serviceable as the former route". After citing Voet *in extenso* the learned Judge explains the law there stated. Dealing with the concluding passage in Voet's text where the servient owner is given the right to offer an alternative route, provided it does not prejudice the owner of the dominant tenement, Schneider J. makes the following observation :—

> "The reason for this *must be the same* as that given by Voet why the owner of the dominant tenement should have the right of election, namely, that by its creation the servitude is a burden on the whole land.:......."

I am in agreement with my brother de Kretser J. that this reason does not bear critical examination. The reason given by Voet for the election by the dominant owner has no relevance to the right of the servient owner to offer the alternative route. Once the dominant owner makes his choice over a defined track, the rest of the land is free of the servitude. Therefore the servient owner's right to offer the alternative route from out of his unburdened land is independent of and quite distinct from the rights of the dominant owner which had to be regulated in a manner to cause the least possible burden on the servient owner. When Voet set down the passage at "E" of 8-3-8 he merely sought to emphasise that what he had stated earlier in that Title did not in any way affect the servient owner's right to offer an equally convenient alternative track. In my view this right he was entitled to exercise whether the servitude was created *simpliciter* or acquired by prescriptive user. The only exception to this rule would be when the servitude is created by a grant in which case the servient owner is bound by the terms of the grant. (*Gardens Estates Ltd. v. Lewis* (supra) .)

In *Fernando v. Fernando* [2] a Bench of two Judges (Fisher C.J., and Drieberg J.) followed the decision of Schneider J. in *Madanayake v. Thimotheus* but the learned Chief Justice who delivered the judgment of the Court did not make a critical analysis of the reasons given for the opinion expressed by Schneider J.

[1] *(1921) 3 C. L. R. 82.* [2] *(1929) 31 N. L. R. 126.*

With respect, therefore, I am unable to agree with My Lord the Chief Justice that these three decisions have settled the law on the point in Ceylon. There are two other decisions of our Supreme Court—*Hendrick v. Sarnelis*[1] and *Thambapillai v. Nagamanipillai*[2] which Counsel for the defendant has cited in support of his case and must be considered. I will deal with these decisions after considering the dicta in the decisions of our Courts which seem to support the plaintiff's contention.

The decision in *Karunaratne v. Gabriel Appuhamy* (supra) was delivered on 5th June 1912 and it is not unlikely that when Sampayo J. delivered his judgment in *Costa v. Livera* (supra) on 29th July of the same year the learned Judge was not aware of the views of Lascelles C.J. In *Costa v. Livera* the parties admitted the existence of the servitude and Sampayo J. took the view that for the purposes of prescription the benefit of the possession of the old route attached to the new route. The case was however remitted to the trial court for a consideration of the evidence on the lines suggested by Justice Sampayo.

Sampayo J.'s views in *Costa v. Livera* (supra) are not inconsistent with his decision in the later case of *Kandiah v. Seenitamby*[3]. In that case the question that arose for decision was whether a right of servitude existed and the Judge held that Voet 8-3-8 had no application in the circumstances of the case. He however agreed with Lascelles J. in *Karunaratne v. Gabriel Appuhamy* and Wendt J. in C. R. Mallakam 16,080 that the evidence to establish a prescriptive servitude of way must be precise and definite. In the circumstances there was no necessity for the learned Judge to refer to his earlier decision in *Costa v. Livera*. Ennis J. in *Morgappa v. Casie Chetty*[4] also held that in the case of a track claimed by prescriptive user, the track must be strictly defined, and distinguished *Costa v. Livera* because in that case the existence of the right of way was admitted. The view expressed by Sampayo J. in *Costa v. Livera* was followed by Koch and Soertsz JJ. in *Dias v. Fernando*[5]. In *Dias v. Fernando* the dominant owner had used a definite track for seven or eight years. Thereafter it became necessary to effect a deviation by the construction of some steps abutting on the main road as a result of some improvements being effected to the road by the authorities. The question that arose for determination was whether the new defined track could be claimed by the dominant owner without a notarial agreement or without user for the prescriptive period. Koch J. followed the reasoning of Sampayo J. in *Costa v. Livera* and held that a servitude, being essentially an incorporeal right over a servient tenement and the particular route affecting only the manner of its exercise and the incorporeal right being not immovable in its nature, a deviation in the particular route by an arrangement between the parties did not affect

[1] *(1940) 41 N. L. R. 519.*
[2] *(1950) 52 N. L. R. 225.*
[3] *(1913) 17 N. L. R. 31.*
[4] *(1935) 37 N. L. R. 304*
[5] *(1946) 47 N. L. R. 354.*

such incorporeal right, which continued to exist and could be exercised over the substantial track without the necessity for a notarial instrument. Soertsz J., though agreeing with Koch J., had doubts about the correctness of the principle, a doubt which was shared by Gratiaen J. in the later case of *Thambapillai v. Nagamanipillai.*[1] Soertsz J. felt "that the incorporeal right and the particular track are inseparable and that the incorporeal right once acquired had no existence independent of the track. In other words the right does not exist in the abstract." His view was that when a new track was substituted for the old one, it seemed incomplete to say that the change affected only the manner of exercising the right and that a new incorporeal right was created. With all respect to Justice Soertsz, I cannot see that a new incorporeal right has been created. Once the period of prescription was completed, an incorporeal right to traverse over the land of the servient owner came into existence. This right was inseparable from the track over which the dominant owner travelled for the duration of the prescriptive period. By the servient owner offering an equally convenient defined track the incorporeal right which was vested in the dominant owner became merged in the new defined track and the incorporeal right did not exist in the abstract but existed in conjunction with the new defined track. The decision in *Costa v. Livera* was considered by Cannon and Jayetileke JJ. in *Sinnatamby v. Kathirgaman.*[2] Jayetileke J. who, as Counsel, successfully argued for the dominant owner in *Costa v. Livera* held that when a right of way has been acquired by prescription and a new route substituted by agreement for the old route the benefit of the old possession would attach to the new route.

In *Dias v. Fernando* and *Sinnatamby v. Kathirgaman* there was a mutual agreement between the parties to alter the route and the deviation consisted of a portion of the old track and part of the new track, whereas in the present case, except for a minor portion of the track which was over the land of one Ramanayake, who is not a party to this action, the entire portion of the alternative track offered by the servient owner lies over the land of the plaintiff. There was also no agreement between the parties, but the plaintiff relied on his legal right to offer the alternative track. If the Roman Dutch Law made no distinction between a servitude created *simpliciter* and a servitude acquired by prescription in regard to the rights of the servient owner, I do not see in principle any difference between an agreed deviation and a deviation offered only by the servient owner. In either case the deviation must proceed on the basis of a legal right that it is possible to make such a deviation. The principle is based on the dictum of Sampayo J. in *Costa v. Livera* followed in the later decisions in *Dias v. Fernando* and *Sinnatamby v. Kathirgaman.* The question that arose for decision in *Hendrick v. Sarnelis* was identical with the question that was before Sampayo J. in *Costa v. Livera* and Koch J. in *Dias v. Fernando.* Howard C.J., while realising the difficulty

[1] *(1950) 52 N. L. R. 225.* [2] *(1909) 2 S. C. D. 69.*

in reconciling the decisions which discussed the problem, refused to follow the decision of Koch J. in *Dias v. Fernando* and took the view that the dictum of Sampayo J. was no authority for the proposition accepted by Koch J. He follows the decisions in *Madanayake v. Thimotheus* and *Karunaratne v. Gabriel Appuhamy*. The reason why the learned Chief Justice considers Koch J.'s reasons to be faulty is because Koch J. states that "if the views in *Karunaratne v. Gabriel Appuhamy, Fernando v. Fernando, Madanayake v. Thimotheus, Andris v. Manuel* and *Morgappa v. Casie Chetty* are carefully examined it will be found that the correctness of De Sampayo, J.'s opinion has never been questioned." The learned Chief Justice, in connection with this passage, states that scrutiny of the reports of the cases mentioned by Koch J. indicates that *Costa v. Livera* is not referred to in *Karunaratne v. Appuhamy, Fernando v. Fernando, Andris v. Manuel* and *Madanayake v. Thimotheus*. "It is therefore difficult to understand", says he, "how Koch J. could draw any deduction as to the soundness of the decision in *Costa v. Livera* from the fact that Sampayo J.'s opinion was not questioned."

Costa v. Livera could not be referred to in *Karunaratne v. Gabriel Appuhamy* for the obvious reason that the judgment in the latter case was delivered prior to Sampayo J.'s judgment in *Costa v. Livera* ; *Andris v. Manuel* [1] was a criminal appeal decided in 1909, six years before *Costa v. Livera* saw the light of day ; it is a misdirection of fact to say that Schneider J. did not refer to *Costa v. Livera* in *Madanayake v. Thimotheus* and there was no necessity for the learned judges in *Fernando v. Fernando* to refer to *Costa v. Livera* in their judgments, because they followed *Madanayake v. Thimotheus* without questiom. Therefore the reasons of the learned Chief Justice for failing to consider the dictum of Sampayo J. in *Costa v. Livera* does not bear examination. What Koch J. sought to maintain was, that in the cases referred to by him in *Fernando v. Dias*, the dictum laid down in *Costa v. Livera* has been unshaken even though some of these decisions were prior to 1912 and others subsequent to that decision.

The observations of Gratiaen J. in *Thambipillai v. Nagamanipillai* at p. 226 are *obiter* because the issue in that case was whether a servitude was acquired by prescription. The evidence was to the effect that the defined route only existed for two or three years and that for the rest of the prescriptive period the right had been exercised in a general way and not along a particular track. Here too when the learned Judge cites *Kandiah v. Seenitamby* and *Morgappah v. Çasie Chetty* in support of the proposition that the substitution of one track for another has no application in cases where a servitude is claimed by virtue of prescriptive user, the learned Judge is not quite accurate, for, these decisions, as I stated earlier, only support the proposition that in order to establish a servitude by prescription, there should by a well defined track in existence.

[1] *(1909) 2 S. C. D. 69.*

I have endeavoured to discuss the Roman Dutch Law and the South African decisions which appear to be relevant to the question at issue. I have also discussed the decisions of our Courts where the learned Judges of this Court have considered this difficult problem. Before I conclude I desire to summarise my findings in support of the view that the plaintiff's action in this case is entitled to succeed.

The paramount consideration to be taken into account is that the servitude must be exercised in a manner which will cause the least possible burden on the servient owner and one method by which that object can be achieved is by granting the servient owner the right to offer an equally convenient route to the dominant owner. The law as laid down in Voet 8-3-8 in regard to the rights of the servient owner is applicable to servitudes created *simpliciter* and servitudes acquired by prescriptive user. This view is supported by an examination of the text in Voet 8-3-8, the principles of the Roman Dutch Law found in the Commentaries and the South African texts and also in the decisions of the South African Court of Appeal.

The principles that have been considered by the learned Judges of the South African Court of Appeal appear to be that the servitude should be exercised, to borrow the words of Solomon J. in *Rubidge v. McCabe & Sons* at p. 448, in a manner that would " satisfy the legal claims of the owner of the dominant tenement " and also " meet the convenience of the owner of the servient tenement ". In my view this is an eminently reasonable attitude having regard to the paramount consideration that the servitude should be exercised in a manner which will cause the least burden on the owner of the servient tenement. If such be the case, why should not the owner of the servient tenement offer an equally convenient alternative route to the dominant owner which does not prejudice him in any way ? For the same reason why should the servient owner by being deprived of this right in the case of a servitude acquired by prescription have his land burdened for ever by this fetter—a burden which will bind him and his heirs for all time ? There may be a variety of legitimate reasons why the owner of a servient tenement may not have been able to develop his land and avoid the dominant owner from obtaining a right of way by prescriptive user—lack of funds, absence from the Island, transfers as a public servant from one station to another, to mention a few. In later years he may contemplate developing his land either for an agricultural purpose or a housing estate or a residence for himself. Why should such an owner be condemned for ever to carry a burden over a part of his land ? If concessions can be allowed to a servient owner in the case of a servitude created *simpliciter*, there is more cogent reason why such concessions should be allowed in the case of a servitude acquired by prescriptive user.

In Ceylon it has been held that in order to establish a servitude by prescription there must be a defined track (*Karunaratne v. Gabriel*

Appuhamy, Kandiah v. Seenitamby and *Morgappa v. Casie Chetty*) but the possession by the dominant owner of the old route can be utilised for the purpose of proving prescription over the new route when the deviation is created by mutual consent (*Costa v. Livera, Fernando v. Dias* and *Sinnatamby v. Kathirgaman*). If a defined route by prescriptive user can be established by mutual agreement, there is no reason in principle why the servient owner should not be permitted to offer an equally convenient defined route which causes no prejudice to the dominant owner, when the law gives him such a right.

The decisions in *Madanayake v. Thimotheus, Fernando v. Fernando* and *Hendrick v. Sarnelis* should be overruled as they have been wrongly decided.

I take the view that the learned trial Judge was justified in the view he took in giving judgment in favour of the plaintiff. With changing social conditions and the need for developing one's own land to its fullest extent it would in my view, be a denial of justice to the servient owner, to hold otherwise.

I would dismiss the appeal with costs.

DE KRETSER, J.—

The Plaintiff in this case admitted that the Defendant had acquired by right of prescriptive user a right of way over his land Galabodawatta along the track A, B, C, D, E, F shown on Plan 7111 of 22.6.63 marked X and filed of record. Plaintiff claimed that as owner of the servient tenement he was entitled to deviate the right of way along the route E, B, Q, R, B, A shown on the same plan.

The Trial Judge who inspected these routes was satisfied that the route offered was " not less convenient or more expensive to the Defendant and that it was equally practicable to the Defendants except that it was a little more distant by some yards ". He was satisfied that if the route was allowed, it would enable the plaintiff to develop his land fully.

The question of law that then arose on his finding of fact was, "given a right of way acquired over a definite track by prescription has the owner of the servient tenement the right to assign a different track provided that the latter is as serviceable as the other ? ".

That question was directly before Justice Schneider in the case of *Madanayake v. Thimotheus*[1] who unhesitatingly answered it in the negative.

[1] *(1921) 3 C. L. Rec. 82.*

An examination of the case of *Madanayake v. Thimotheus* shows that the Trial Judge in coming to the conclusion that the owner of the servient tenement was entitled to alter the route, relied on the following passage from Voet :

" Quae tamen non impediunt, quo minus domino praedii 'servientis' mutare liceat, et aliud, quam prius electione vel conventione designatum fuerat spatium ad iter, actum, viam assignare ; si modo, nullum inde praedii dominantis domino praejudicium generetur. " (Commentarius ad Pandectas.) (VIII-3-8.)

In dealing with the appeal, Schneider J. was of the view that this passage, appearing as it does in Voet 8.3.8. with the passages in which Voet is dealing with how the route over which the servitude is to be exercised is determined in those cases where the incorporeal right of servitude is granted or bequeathed in general terms, has no application outside that context.

It is to be observed that Voet himself gives the reason for the need for selection as follows :—

" The reason......is, that when no part has been pointed out, the whole farm and every particle of soil on the farm is supposed to be subject to the burden of the servitude."

Voet points out that once the owner of the dominant tenement has made his selection, " he has not afterwards the power of changing it ; so that every part of the land other than that on which the servitude is exercised is for the future considered unburdened."

The passage quoted above which gives the right to the owner of the servient tenement to alter the route, contains no reason given by Voet as to why it should be so, and Schneider J. hazards the opinion "the reason for this must be the same as that given by Voet why the owner of the dominant tenement should have the right of election, mainly, that by its creation the servitude is a burden upon the whole land." That reason in my view does not bear examination for, with the selection of a route by the owner of the dominant tenement the rest of the land is free from the servitude. It appears to me rather that Voet, in putting in this passage after setting out the principles that guide the selection of the route where the grant or bequest is general in nature, wants to emphasize, that in no way is there taken away the inherent right of the owner of the servient tenement to claim that the fetter over his land should be exercised in the way he finds least

oppressive. That is why in the words of Voet " nothing in this prevents the owner of the servient tenement from making a change, and fixing on some other part of his property for the exercise of the right of passage, or of driving, or of way, than that determined on previously, either by election or by the agreement ; provided only that this change in no way prejudices the owner of the dominant tenement." Now what difference would it make that the right of servitude has become vested in the dominant tenement not in consequence of a selection made under a general grant, but by the user of a particular track for the period necessary in terms of the prescriptive ordinance ?

It is now settled law that it is a prerequisite to the acquisition of a right of way by prescription that a well defined and *identifiable* course or track should have been adversely used by the owner of the dominant tenement for over ten years, but the fact that that is how the dominant tenement became vested with the servitude does not make the continued use of the track thereafter anything more than the manner in which the servitude now vested is exercised. This aspect of the matter was first pointed out by De Sampayo A.J. in *Costa v. Livera* [1] when he said "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. "

As Lee in his Introduction to Roman Dutch Law 3 ed. Page 172—citing as authority *Van Heerden v. Coetzee* 1914 A.D. at Page 172—says—

" The principle is general that the owner of the dominant property must keep strictly within the terms of the servitude ". It is therefore not strange that the owner of the dominant tenement cannot exercise the right of way obtained by prescription over any other part of the land. That results from the fact that by the use of the particular track which gave birth to the servitude he had already made his choice of where he wanted the route and he had no right over any other part of the land. It will be seen therefore that he is in no worse position than the owner of the dominant tenement who has obtained his right by a general grant or bequest and has exercised his right of selection, which selection he is bound by. But all this does not affect in my opinion the right of the owner of the servient tenement to ask that in the exercise of the right, as little burden as possible should be cast on the servient tenement.

It appears then to me that there is no good reason that can be urged why it should not be open to the owner of the servient tenement with that object in view, to ask that the manner in which the servitude is

[1] *(1912) 16 N. L. R. 26.*

exercised, namely the route, should be altered in such a way that while it causes no prejudice to the owner of the dominant tenement, it results in less oppression to the servient.

The object of the owner of the dominant tenement is to be able to go across the servient land, and if that object is preserved to him by the offering of a route in regard to which the finding of fact is that it is one which would cause him no more inconvenience, it is difficult to understand on what footing he could resist the change.

It is of importance to note that in South Africa, as far back as 1913 in the case of *Rubidge v. McCabe*[1] in dealing with a servitude of right of way which the Court was satisfied had its origin in prescriptive user, Lord De Villiers C.J. laid down the law as follows :—

" The legal position is, therefore, that a servitude exists, the plaintiffs' farms being dominant tenements and the defendant's farm servient tenement. As owners of the dominant tenements the owners must exercise their rights in the manner least oppressive to the defendant and as owner of the servient tenement the defendant has the right, after due notice to the plaintiffs, to divert the course of the road provided—and this is a most important proviso—he does not by such diversion make the use of the road less convenient or more expensive to the plaintiffs. " and Solomon J. who agreed with him laid down the law as follows :—" The evidence, in my opinion, does not establish that there was a public road over the farm, but rather that a servitude of right of way existed, the plaintiffs' farms being the dominant and the defendant's farm the servient tenements. And if that be the legal position it was competent to the defendant upon giving due notice to the plaintiffs to divert the course of such road, provided that the new road was equally practicable and convenient to them. "

This statement of the law has never been questioned so far as I have been able to ascertain in South Africa.

In Ceylon, the decision in *Madanayake v. Thimotheus* was followed in *Fernando v. Fernando*[2] by Fisher C.J. with whom Drieberg J. agreed. In following the judgment of Schneider J. in *Madanayake v. Thimotheus* Fisher C.J. said as follows :—

" The appellant's Counsel mainly relied upon certain passages from Voet in Book VIII. C.3.S.8 in support of his contention. These passages have no reference to a right of way acquired by prescription,

[1] *(S. A. L. R.) 1913 A. D. 433.* [2] *(1929) 31 N. L. R. 126.*

They are set out in the judgment of Schneider J. in *Madanayake v. Thimotheus*, and the learned Judge says in his judgment that they ' put it beyond any manner of doubt that the writer is speaking of only those servitudes which are created in a particular way, namely, where the right is granted in general terms without mention of the route over which it is to be exercised.' The sole question, therefore, is whether the right acquired is over the track used in process of acquiring it. In my opinion it is. User of a definite track is the only way in which a right of way over the land of another can be acquired by prescription (see *Karunaratne v. Gabriel Appuhamy* and *Kandiah v. Seenitamby*), and in the absence of any authority to the contrary it seems to me that the necessary and obvious consequence is that the right acquired is over the definite track."

While it is beyond question that in Voet 8.3.8, Voet is dealing with the grant of a servitude *simpliciter*, and in such a case how the route is to be selected and by whom, the question whether, because Voet makes mention in that context as follows :—

"These things however do not prevent the owner of the servient tenement from having liberty to vary and to allot for the foot-passage, driving or right of way a space different from that which was originally marked out by choice or by convenant, provided that no prejudice is created thereby to the owner of the dominant tenement."

it follows that the right of the servient owner so set out is limited *only* to cases in which the grant is *simpliciter*, has not been gone into in *Fernando v. Fernando* and has been taken for granted.

I have already set out why the reasoning of Schneider J. on this point does not appeal to me. In the result, in my opinion, *Fernando v. Fernando* carries the matter no further.

The other decisions in Ceylon cited at the argument, commencing with *Costa v. Livera* [1], *Dias v. Fernando* [2], *Henderick v. Saranelis* [3], *Thambapillai v. Nagamipillai* [4], are all concerned with the question whether a notarial document was necessary to give legal validity to a change of route where, *by mutual consent*, there was substituted a new route for an original route acquired by prescriptive user. They appear to me to be of little assistance in coming to a conclusion as to whether the owner of the servient tenement is entitled as of right to change the route.

[1] *(1912) 16 N. L. R. 26.*
[2] *(1935) 37 N. L. R. 304*
[3] *(1940) 41 N. L. R. 519.*
[4] *(1950) 52 N. L. R. 225.*

After drafting the main portion of this judgment, I had the privilege of reading the draft judgment of My Lord The Chief Justice, and it is a matter of regret to me that I find myself unable to agree with it. In the course of his judgment he says—

> " In my view therefore a servient owner has in the case of a grant *simpliciter* a right to determine the line of this exercise of the servitude, only because there has not been an earlier final determination of the line. But in the case both of a defined grant, and of a servitude acquired by prescription, there is such a final determination and therefore no scope for any deviation, save by mutual agreement. "

With respect, with the selection of the line by the owner of the dominant tenement, there is a line determined as final *so far as the dominant owner is concerned* as where the line is fixed in the grant itself or in the acquisition of the right of servitude by prescriptive user. I think it necessary to repeat that in the grant *simpliciter*, once the owner of the dominant tenement has made his selection in accordance with the rules set out by Voet, the line for the exercise of the servitude is established and *in the establishment of that line* the wishes of the owner of the servient tenement play no part. The owner of the servient tenement cannot change the line where it is fixed by grant even if he offers a route as convenient as the earlier one for the reason that as Voet points out in 8.3.6. the route has been precisely picked by the grant that creates the servitude. In such a case, the owner of the servient tenement would not be able to derogate from the grant given by one who had the right to burden the servient tenement in a manner which was pleasing to the grantor. In the case of the grant *simpliciter* he has no such handicap and can *from time to time* offer a route which he finds more convenient for the use he wishes to make of his land provided the route causes no prejudice to the dominant owner.

He has that right because the Roman Dutch Law is that all rights of way must be exercised so as to burden the servient property as little as possible—vide the authorities given by Lee 3 Ed. on Roman Dutch Law, Page 172. It appears to me that the fact that the owner of the dominant tenement has obtained his servitude by the prescriptive use of a particular track, is no bar to the owner of the servient tenement's right to have the track altered to one which is as convenient to the dominant owner. What is " as convenient " is a question of fact, and as to why the owner of the dominant tenement went along that particular track that resulted in his obtaining a servitude of a right of way will probably have a bearing on that question. In my opinion, the decisions

in *Madanayake v. Thimotheus* [1] and *Fernando v. Fernando* [2] must be overruled, and the appeal in the instant case from the decision of the District Judge that the Plaintiff is entitled to deviate the path on the proposed route which the District Judge has found will not "cause any inconvenience, hardship, prejudice or detriment to the Defendant but will enable the Plaintiff to develop his land", must be dismissed with costs.

I make my order accordingly.

Appeal dismissed.