1923.

Present: De Sampayo J.

NAGAMANI *v.* VINAYAGAMOORTHY *et al.*

21—C. R. Batticaloa, 2,905.

Servitude—Not using the path indicated—Abandonment.

For a servitude to be lost by abandonment, the abandonment must be deliberate and intentional.

THE facts appear from the judgment.

Schokman (with him *Bartholomeusz*), for plaintiff, appellant,—The servitude was created by the original owner of the entire land, Eliyatamby, when in 1907 he gifted lot B to second defendant. Though there is no specific mention of the servitude in the transfer by second defendant to plaintiff in 1912, yet the right of servitude passed to the transferee, for it is a right attaching to the land *Suppiah v. Ponnambalam.*[1] The disappearance of the "lane" referred to in the deed creating the servitude does not extinguish the right. The servitude created is clearly a right of way over the land to the south of lot B, and though the particular track indicated may not have been used and has disappeared, it is admitted that plaintiff did cross defendants' land to the south by a shorter route. This he could have done only by virtue of his right of way, and hence no question of prescription can arise.

Navaratnam, for defendants, respondents.—Although the earliest deed relating to the land in question purports to create a right of way over the adjoining block, yet the absence of any reference to the said sight in the subsequent deeds, and the fact that there is no evidence at all that the particular track was ever used, lead one to the conclusion that no right of way ever came into existence. The admission that the appellant had access to the main road along a shorter route through another land supports the contention that the alleged right of way was lost by abandonment. Counsel cited *14 N. L. R. 101.*

March 16, 1923. DE SAMPAYO J.—

This is a dispute with regard to a right of way which the plaintiff claims over the defendants' land which adjoins his own. It appears that one Eliyatamby was the owner at one time of the entire block of land shown in the survey plan marked B and filed of record, and

[1] *(1911) 14 N. L. R. 229.*

it would seem that Eliyatamby alienated at various times various portions of this land to other persons. In 1907 he gifted the portion marked B to the second defendant. In that deed he creates a right of way in connection with lot B over the adjoining portion of the land, as the deed puts it, "with the right of passing and repassing through the lane allowed on the southern side of this and eastern side of the southern share and on the southern side." That language looks very unintelligible, but it is quite plain when read in connection with the plan. The deed means that the right of way was given to the second defendant along the southern boundary of B, then along the eastern boundary of the adjoining land, then again the southern boundary of that adjoining land. The route is fairly indicated I think on the plan by dotted lines. In 1912 the second defendant sold lot B to the plaintiff, but there is no specific assignment of the right of way contained in that deed of gift. The second defendant is the wife of the first defendant, and it would seem that in the year 1918 they became owners of the lots C and D, over which the right of way was created by Eliyatamby. The plaintiff having been obstructed by the defendants blocking the route mentioned at a certain point has brought this action for a declaration of his right to the use of the right of way. I think the parties have rather misled themselves as to the meaning of the right of way. The case appears to have been made to turn upon the question whether there was a lane across the defendants' lots C and D. No doubt the original deed in favour of the second defendant did speak of a right of passing and repassing along the line indicated, but when rightly interpreted that means that the right of way along the route indicated was allowed to second defendant. It appears now there is no beaten track which might be said to constitute a lane, and the Commissioner, on that ground, has held that the plaintiff cannot exercise a right of way, as there is no lane, and has dismissed the plaintiff's action. There is no doubt about the right created by the deed, and it can only be lost by some means known to the law, such as an adverse right created in favour of a servient tenant against the dominant tenant, by means, for instance, of prescriptive possession. There is really no such possibility in the present case, and I think it cannot be held that the plaintiff lost the right of way by adverse prescriptive possession on the part of the defendants. Mr. Navaratnam, however, on behalf of the defendants, has cited to me the case of *Fernando v. Mendis*,[1] which held that under the Roman-Dutch law a servitude may be lost by abandonment, whether by express abandonment or implied abandonment. It is not necessary for me to dissent from that view, or to discuss the law as to abandonment. It is very clear that the abandonment must be deliberate and intentional. Illustrations of that kind of abandonment are

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

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mentioned in the very judgment cited, but I think this case cannot be brought under that principle. There is evidence, not only of the plaintiff, but of the witnesses, that the plaintiff after his purchase from the second defendant did pass over the lots C and D now belonging to the defendants. The plaintiff says he did so in the exercise of the rights created by the deed. The defendants could not quite meet this evidence, but alleged that the plaintiff passed over their land just as they passed over his land. Probably the defendants meant that plaintiff did not pass exactly over the route indicated in the deed, but in the most convenient way over their own land. Any way, this admission negatives the idea of abandonment. If the route indicated by Eliyatamby has not been observed, and there is necessity to define and fix it, it is open to the Court in this very case, by a proper survey and ascertainment of the proper way, to define and fix it. Probably it is a convenient way of preventing future disputes, but I think the Commissioner was wrong in dismissing the plaintiff's case on the mere ground that there is no lane across the defendants' land at the present time.

The judgment appealed from is therefore set aside, and the plaintiff is declared entitled to a right of way across the defendants' land marked C and D in the plan along the way indicated in Eliyatamby's deed.

If there is any uncertainty about that way, the Commissioner will take steps to define it by reference to a survey in the presence of all the parties.

The plaintiff is entitled to the costs of the Court of Requests and of this appeal.

Set aside.