1940 *Present :* **Howard C.J.**

HENDRICK *et al. v.* SARNELIS *et al.*

*202—C. R. Gampaha, 8,248.*

***Servitude—Right of way acquired by prescription—Deviation of route by non-notarial agreement—Right does not attach to new route—Assent does not amount to permissive user.***

**A right of way acquired by prescription does not attach to a new route substituted by agreement in place of the old route in the absence of a notarial agreement or a user for the prescriptive period.**

***Dias v. Fernando* (37 *N. L. R.* 305) not followed.**

**Assent to the use of a right of way by acquiescence does not prevent the period of prescription from running.**

***Don Dionis v. Saranhamy* (1 *C. W. R.* 85) followed.**

APPEAL from a judgment of the Commissioner of Requests, Gampaha.

*H. V. Perera, K.C.* (with him *J. R. Jayawardana*), for the plaintiffs, appellants.

*Francis de Zoysa, K.C.* (with him *L. A. Rajapakse*), for the defendants, respondents.

*Cur. adv. vult.*

June 20, 1940. HOWARD C.J.—

This is an appeal from a judgment of the Commissioner of Requests, Gampaha, dismissing the plaintiffs' action. In view of the attitude assumed by the defendants at the trial in denying that the plaintiffs had ever taken cattle over the land of the first defendant, the Commissioner made a further order that the defendants would be entitled to only half costs. The plaintiffs claimed by prescription a right of way over a cattle track six feet wide marked H, G, E, F in plan No. 1063, X 1, situated on the land of the defendants, and damages for obstruction of their right by the defendants. It was proved at the trial that the plaintiffs had acquired by prescription a right of way for their cattle over a track marked A, B, C, D, E, F on the said plan and situated on the land of the defendants. It was admitted at the trial that eight years prior to the obstruction of which complaint is made by the plaintiffs, the plaintiffs and defendants by agreement substituted for the route A, B, C, D the route H, G, E, F. The point, therefore, at issue between the parties was whether the right of way acquired by the plaintiffs over the land of the defendants attached to the new route effected by mutual agreement by deviation of the old route. The learned Commissioner in finding for the defendants held that the plaintiffs had not merely to prove user of the cattle track but also that they used it adversely and that their use of the cattle track through the new gate at "H" was not adverse. In coming to the conclusion that the plaintiffs' user of the track was not adverse, the Commissioner was apparently influenced by the fact that they had been permitted this user during the life of Amaris, the father of the defendants. There was, however, no evidence of any formal agreement between the plaintiffs and Amaris with regard to the former's user of the

cattle track. Assent by acquiescence does not prevent the period of prescription running. In this connection I would refer to *Don Dionis v. Saranhamy* [1]. The reasoning, therefore, on which the Commissioner found for the defendants is based on wrong premises.

The question as to whether the prescriptive rights of the plaintiffs with regard to the old route attached after the deviation to the new route has been argued before me by reference to *Voet* and a number of decisions of this Court. It would be idle to pretend that I have not found considerable difficulty in reconciling those decisions. The passages in *Voet* on which reliance has been placed by the plaintiffs are to be found in Book VIII., Tit. III., section 8. Those passages, however, as has been pointed out by Schneider J. in *Madanayake v. Thimotheus* [2] make it clear 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. In indicating those principles *Voet* points out that the owner of the right having made his election is bound to the route selected by him and so far as he is concerned the rest of the land is free from the burden. This determination of the route will not prevent the owner of the land which is the servient tenement from altering the route provided he allows another route which in no way prejudices the owner of the dominant tenement. These principles cannot 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. Support for the view taken by Schneider J. in *Madanayake v. Thimotheus* is to be found in the judgment of Lascelles C.J. in *Karunaratne v. Gabriel Appuhamy et al.* [3] where it is stated as follows :—

> "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 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." In *Kandiah v. Seenitamby* [4] it was held by de Sampayo A.J. that the reasoning in *Voet* 8. 3. 8 was 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. Reference was also made by the learned Judge to C. R. Mallakam, 16,080 (S. C. Min. June 26, 1909) 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 straying across an open land

[1] *1 C. W. R. 85.*
[2] *3 C. L. Rec. 82.*
[3] *15 N. L. R. 257.*
[4] *17 N. L. R. 29.*

at any point which is at the moment most convenient". The same reasoning was followed by Ennis J. in *Morgappa v. Casie Chetty.*[1] In this case the learned Judge stated that one track cannot be substituted for another without a notarially executed document or user of the new track for the full prescriptive period. He distinguished the case of *Costa v. Livera*[2] because in that case the existence of a right of way was admitted. The same principle was also formulated by Wendt J. in *Andris v. Manuel*[3] and applied by Fisher C.J. in *Fernando v. Fernando*[4] in which the cases of *Madanayake v. Thimotheus, Karunaratne v. Appuhamy* and *Kandaiah v. Seenitamby* were cited with approval.

In view of this volume of authority it might be thought that the matter had been placed beyond the regions of doubt. In *Dias v. Fernando*[5], however, it was held by Koch J. and Soertsz A.J. that, 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, the servitude attached to the new route. The decision of Koch J. was based on the opinion of de Sampayo J. in *Costa v. Livera*[6]. From the wording in the judgment of Soertsz J. it will be observed that the latter's acquiescence in the decision of the Court was given with great reluctance. In fact the reasoning of Soertsz J.'s judgment indicates that the decision should have been in favour of the defendant. It is, therefore, of importance to examine closely the grounds on which the judgment of Koch J. are based. He states as follows :—

> "If the views expressed by this Court 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. 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'."

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, Madanayake v. Thimotheus* or *Andris v. Manuel.* It is, therefore, difficult to understand how the learned Judge could draw any deduction as to the soundness of the decision in *Costa v. Livera* from the fact that de Sampayo J.'s opinion was not questioned. Incidentally the earlier cases of *Andris v. Manuel* and *Karunaratne v. Appuhamy* were not mentioned in *Costa v. Livera.* Hence it might with equal force be said that the opinions expressed by the Judges in these earlier cases were not questioned. The case of *Costa v. Livera* was mentioned and distinguished in *Morgappa v. Casie Chetty* because in the earlier case the existence of a right of way was admitted. In *Costa v. Livera* whilst the plaintiff's right to use the old route was contested it was admitted by the defendant that the plaintiff had the right to use the new route. A right of way was therefore admitted, and the question arose as to whether the plaintiff had abandoned the old route. The case was sent back for the

[1] *17 N. L. R. 31.*
[2] *16 N. L. R. 26.*
[3] *2 S. C. D. 69.*
[4] *31 N. L. R. 126.*
[5] *37 N. L. R. 305.*
[6] *16 N. L. R. 26.*

re-trial of this question. It is difficult to understand how it can be regarded as an authority for the proposition accepted by Koch J. in *Dias v. Fernando* (*supra*) and put forward by the plaintiff in this case. De Sampayo J. does not even mention the case of *Costa v. Livera* in the case of *Kandiah v. Seenitamby* which, so it seems to me, is authority for the contrary proposition. In the circumstances I am of opinion that *Dias v. Fernando* is in conflict with the numerous other authorities that I have cited. The right of a cattle track over the new route is based neither on ten years user nor on a notarially executed agreement. The appeal therefore fails and must be dismissed with costs.

*Appeal dismissed.*