*Present :* Lascelles C.J.

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KARUNARATNE *v.* GABRIEL APPUHAMY *et al.*

*105—C. R. Negombo, 18,522.*

*Right of way—Acquisition of right by prescription—Right of owner of servient tenement to alter the situation of the servitude—How far principles of the Roman-Dutch law as to right of owner of dominant or servient tenement to change situation apply to Ceylon where the servitude has been acquired by prescription.*

"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."

*Quære.*—Whether the principles of the Roman-Dutch law stated in *Voet 8, 3, 8,* as to the right of the owner of the dominant or servient tenement to change the situation of the servitude, are applicable to a case where the right to pass over a defined track has been acquired by prescription?

THE facts appear clearly from the judgment.

*Bawa, K.C.*, for the appellants.

*H. A. Jayewardene*, for the respondent.

*Cur. adv. vult.*

June 5, 1912. LASCELLES C.J.—

The plaintiff in this case is the owner of an allotment of land called Kongahawatta, at Kochchikade, on which are situated certain buildings used for the purposes of a fish market, vegetable market, and boutiques. By his statement of claim the plaintiff alleged that he, his servants, and others resorting to the markets on the plaintiff's land were entitled to the use of a footpath on the trace marked D D D on the plan X over the land of the defendants. He further alleges that on December 23, 1910, the defendants unlawfully built a cadjan shed across the right of way on their land and so obstructed the free use of the footpath. The plaintiff claimed a declaration that he was entitled to the use of the right of way marked D D D on the plan X, and that the defendants should be ordered to remove the obstruction caused by the erection of the cadjan shed. The answer of the defendants consists only in a denial of all the allegations in the plaint.

At the hearing of the case, and before the issues were fixed, a discussion took place, at which it was admitted that the plaintiff was entitled to a right of footway over the defendant's land. Apparently the defendants contended that they were entitled to allow the right

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of footway in a situation more convenient to themselves than that claimed by the plaintiff. The learned Commissioner of Requests expressed the opinion that even a slight deviation from the right of way if acquiesced in by the plaintiff would involve the sacrifice of his prescriptive right altogether, and held that the plaintiff's right of way over the defendant's land is inseparable from the particular path by the use of which that right had been set up and acquired. No issue was framed with regard to the defendant's right to claim a deviation from the footway, and the case went to trial on the following issues:—

(1) Has plaintiff used the path D D D, in plan 99 E filed, for ten years or more?

(2) Did defendants on December 23, 1910, obstruct that path by building a cadjan shed across it?

(3) Damages?

On these issues the learned Commissioner found for the plaintiff, and gave judgment in terms of the plaint. On the appeal it was not contended that the judgment was wrong on the issues on which the case went to trial. This being so, it is impossible for me to interfere with the judgment. If the defendants had desired to raise the question of their rights to alter the course of the right of footway across their land, they should have requested the Commissioner to frame an issue on this point, and if the Commissioner had refused to do so they should have appealed. In view of the discussion which took place at the argument on appeal, as to the rights of the defendants to claim that the plaintiff's servitude should be exercised along a route which would be more convenient to the defendants than the line over which the defendants had acquired a prescriptive right, I do not wish to dispose of the case without pointing out the difficulties which appear to me to stand in the way of the defendant's contention.

The appellant's contention is based on the authorities collected in *Voet 8, 3, 8*. I understand the general effect of this text to be as follows:—Where a right of way through a property is granted or left by will in general terms and without assigning any definite place for its use, the selection of the place rests with the owner of the dominant tenement, the principle being that, as no particular locality is designated, the entirety of the tenement is subject to the right. But the right of selection must be exercised "civiliten," hence it follows that a right of way could not be claimed through a dwelling-house or through a vineyard, where an equally good selection could have been made elsewhere with less damage to the servient tenement. Although the whole tenement is theoretically subject to the servitude, no particular portion being allocated for the purpose, still only those parts are considered to be subject to the servitude which when the servitude was granted were free from buildings and trees. But the dominant owner's right or selection

does not preclude the owner of the servient tenement from changing the situation of the servitude and assigning a different situation from that originally specified by grant or agreement, if this can be done without damage to the owner of the dominant tenement. This appears to be the substance of the text in Voet. These principles are readily applicable to a system of law under which real servitude 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 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.

The judgment of the Commissioner, on which the case went to trial is clearly correct, and the appeal must be dismissed with costs.

*Appeal dismissed.*