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consideration for the agreement to give the boy in adoption. That would be sufficient to invalidate the agreement; and we need not consider the question whether the payment of the annuity, if there had been good consideration for it, could be enforced against the heirs of Ganpatrao, although we may point out that the two decisions in *Balkrishna* v. *Janardana*[1] and *Babubhai* v. *Beharilal*[2] appear to be in conflict, and may require to be considered hereafter. The appeal, therefore, will be dismissed with costs.

Appeal dismissed.

R. R.

[1] (1904) 6 Bom. L. R. 642. [2] (1905) 7 Bom. L. R. 686.

APPELLATE CIVIL.

1922.

January 27.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

DHUNDIRAJ BALKRISHNA PHALNIKAR (ORIGINAL DEFENDANT), APPELLANT *v.* RAMCHANDRA GANGADHAR KALE AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS*.

Easement—Way—Line of way once defined cannot be altered without consent—Indian Easements Act (V of 1882), section 22.

A line of way when definitely set out cannot subsequently be altered without consent.

Per MACLEOD, C. J.:—"The provisions of section 22 of the Indian Easements Act, 1882, can only apply when the exact way to be taken over the premises of the servient owner has not been defined."

SECOND appeal from the decision of K. B. Wasoodew, Joint Judge of Poona, amending the decree passed by J. N. Bhatt, Additional First Class Subordinate Judge at Poona.

Suit for injunction.

* Second Appeal No. 385 of 1921.

The plaintiffs' house was to the east of the defendant's house. There was a privy at the back of the plaintiffs' house. The privy was cleaned by sweepers who used to pass through a door in the western wall of the defendant's house. The way was also used by plaintiffs' *bhisties* (watermen). The user had ripened into an easement.

In 1916, the defendant rebuilt the wall in doing which he transferred the door to the extreme end of the wall. The new passage thus given though shorter and convenient differed from the line of way which was long enjoyed.

The plaintiffs sued in 1918 to restrain the defendant from altering this line of way.

The trial Court non-suited the plaintiffs; but, on appeal, the Joint Judge granted the injunction sought.

The defendant appealed to the High Court.

P. B. Shingne, for the appellant:—It is open to the servient owner to prescribe a line of way over his property to the dominant owner, provided the new line is not more lengthy than the existing line. Here, the new passage allowed was not only shorter but even more convenient to the dominant owner. See section 22 of the Indian Easements Act, 1882.

G. N. Thakor for *K. V. Joshi*, for the respondent:—Section 22 of the Indian Easements Act has no application to this case. It applies only when the line of way has not been fixed or ascertained. The dominant owner has a right to pass along the line which he has used so long: the question of convenience or comfort is beside the point: see *Deacon* v. *The South-Eastern Railway Company* [1].

[1] (1889) 61 L. T. 377.

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MACLEOD, C. J. :—The question in this second appeal is whether the order of the lower appellate Court restraining the defendant from obstructing the plaintiffs' Bhangi and Bhisti from entering by the door X in the map, Exhibit 20, and thence passing over the defendant's back-yard and entering the plaintiffs' privy at point A is right.

Defendant's house adjoins the plaintiffs' house to the west. There is a lane to the west of the defendant's house and it is admitted that the plaintiffs have a right of way over the defendant's back-yard, so that the sweeper may have access to the plaintiffs' privy. The defendant bought his house in 1915. Until then the sweeper had passed through the door X but in 1916 the defendant made certain alterations. He opened a door at the southern end of his wall and after reserving a passage of about three feet he built a wall to the north, so as to reserve for himself the rest of the back-yard. It cannot be said that it would be in any way more inconvenient for the sweeper to pass along this passage to the plaintiffs' privy than to go in by the door X as he used to do, but the plaintiffs contend that they are entitled to stand on their strict right, that, the right of way from the door X to their privy having once been acquired, the servient owner cannot substitute any other way between the lane and the plaintiffs' privy. The trial Judge appears to have admitted this proposition of law to be correct, but considered that the plaintiffs were agreeable to the new arrangement when he visited the spot. Because the second plaintiff had adduced no evidence to show that the defendant had made the alterations against his will or without his consent, the learned Judge appears to have held that there was acquiescence on the part of the plaintiffs, and that it was owing to other disputes having arisen between the parties relating to the

ownership of the party wall and certain windows in the plaintiffs' house that the plaintiffs began to object to the obstruction at door X. If an issue had been raised on the point of acquiescence this finding might have been entitled to consideration, but the Judge seems to have thought that the plaintiffs, even if the issue had been raised, ought to have called evidence to prove that they had not acquiesced, and, as the appellate Court has pointed out, the defendant never pleaded consent, no issue was raised, and the evidence was not directed to it. It would, therefore, be dangerous to assume that consent had been given. I do not think that section 22 of the Indian Easements Act can assist the defendant. Its provisions can only apply when the exact way to be taken over the premises of the servient owner has not been ascertained. Whether the servient owner, when once the right of way has been defined, can substitute a new way is a question which does not seem to have been provided for by the Indian Easements Act and therefore we must have recourse to the Common Law: *Lovell* v. *Smith*[1]; *Hulbert* v. *Dale*[2]; and *Young* v. *Kinloch*[3]. No doubt the general rule is that a right of way once defined cannot be altered (*Deacon* v. *The South-Eastern Railway Company*[4]) and the dominant owner is entitled to exert his strict rights unless he can be induced to consent to a deviation. The defendant was aware of the existing right of way when he bought his premises, and unless he can prove acquiescence in the new way the plaintiffs must succeed. The appeal must be dismissed with costs.

COYAJEE, J.:—I concur, and would add that Courts in this country have given effect to the general rule that when once the line of way has been definitely set out, neither the dominant nor the servient owner can

(1) (1857) 3 C B. N. S. 120.
(2) 1909] 2 Ch. 570.
(3) [1910] A. C. 169.
(4) (1889) 61 L. T. 377.

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compel the other to give or to accept a different and a substituted way. In *Hamid Hossein* v. *Gervain* [1] Norman C. J. observed: "We think it is clear that if any person has a right of way from one place to another over a particular line, if he and his ancestors have been accustomed to use that way from a long time past, he has a right to go over it and cannot be compelled to use *a different* and *substituted* way." Similarly, in *Varajlal Parbhudas* v. *Moti Kuber* [2], where the facts were not widely different from those in this case, this Court held that: "If the defendant's right of way was directly from the door in plaintiff's *osri* to the defendant's *osri*, the plaintiff cannot obstruct that right of way and offer him another way through his *chowk*." In my opinion, therefore, the decision of the lower appellate Court is right.

Appeal dismissed.

R. R.

[1] (1871) 15 W. R. 496. [2] (1893) P. J. 473.

APPELLATE CIVIL.

1922.

January 31.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

NAGABHATTA TIMMANBHATTA BOPPANHALLI, HEIR OF GANGAMMA KOM SUBBAYYA (ORIGINAL PLAINTIFF), APPELLANT *v.* NAGAPPA SUBBAYA HAVIK AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS*.

Decree—Execution—Court sale—Property not subject to mortgage included by mistake and sold in execution—Remedy of the owner to have the sale set aside—Indian Limitation Act (IX of 1908), Articles 96, 12.

The plaintiff mortgaged seven out of eight of his properties first; and some time afterwards again mortgaged all the eight properties. In a suit to redeem the second mortgage, the plaintiff recited the first mortgage but by mistake described all the eight properties as subject to that mortgage. In the redemption suit, a decree was passed that the plaintiff should pay off the first

* Second Appeal No. 538 of 1921.