FERNANDO *v.* FERNANDO *et al.*

C. R., Colombo, 6,905.

1899.
March 9. and 20.

User of way across intervening land—Personal user and not user as owner of dominant tenement—Prescriptive right.

Where plaintiff, a dhoby, by permission of defendant used for more than ten years a footpath through defendant's land to go from a house in which he was living, and which adjoined defendant's land, to his washing pond, which was on the other side of defendant's land and where the plaintiff, having purchased in 1893 the house in which he had been living, continued to use the footpath till 1898, when the defendant objected to the plaintiff going through defendant's land,—

Held, per LAWRIE, J., that the law of Ceylon does not recognize the acquisition by user of servitudes personal to a single individual, and that, as the plaintiff's user previous to 1893 was not as owner of a dominant tenement, his user previous thereto, though enjoyed for more than ten years, did not create a prescriptive right in his favour.

PLAINTIFF, as owner of a piece of land called Kospatadeniya, claimed to be entitled to a footpath over defendant's land in order to go to a pond situated in a land belonging to the plaintiff.

Plaintiff averred that for a period of upwards of fifteen years he had enjoyed this user by a title adverse to and independent of the defendant. He alleged that defendant had wrongfully obstructed the right of way, and he prayed that " he may be declared entitled to the use of the said footpath," and for damages and costs.

It appeared that between plaintiff's house and plaintiff's pond there intervened the defendant's land, and the footpath led directly

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through it to the pond. The defendant denied plaintiff's right of way, and pleaded that plaintiff and other villagers had always used a circuitous footpath to the pond in question without going through defendant's land.

On the trial day plaintiff and his witnesses deposed that he was a dhoby; that he had lived in his present house for thirty years; that before he became owner of the land in which the pond was, he had used the pond for washing clothes by permission of its owner Rapiel; that Rapiel sold it in 1893; that he had washed clothes in the pond for fifteen or sixteen years, and had always during that period gone to the pond by the path which went over defendant's intervening land; that defendant blocked it up three months before action brought, and that there was no other path to the pond. The defendants and his witnesses deposed that there was another path (besides the one in dispute) leading to the pond which had been used by plaintiff.

The Commissioner thought the weight of evidence was decidedly in favour of plaintiff's contention, and " was satisfied that " plaintiff has a prescriptive right to the footpath.....over " defendant's land," and gave judgment accordingly for plaintiff.

Defendants appealed.

Dornhorst, for appellants.—According to plaintiff he bought the land on which the pond is only in 1893. The action was filed in 1898. So he had only five years' use of the path. If this is regarded as a prædial servitude, it was incumbent on the plaintiff to prove that his predecessors in title to that land enjoyed the servitude. There is no such evidence. If, on the other hand, the servitude be regarded as personal to plaintiff, it has not been shown that he had a grant from the defendant for it, nor has he enjoyed the servitude for a period of ten years or more. Therefore the Commissioner's judgment is wrong.

E. Jayawardena heard *contra*.

Cur. adv. vult.

20th March, 1899. LAWRIE, J.—

I do not understand that the plaintiff claims this right of way as a servitude appertaining to the land in which he lives. He does not say that this is a servitude, of which his land is the dominant, and the defendant's land the servient, tenement. I understand that he means he has acquired by use a personal right of way. The issue shows that that was the plaintiff's claim; for the issue is, " Is plaintiff entitled by prescriptive use to a foot- " path over the defendant's property as shown by a line.....on " plan 434?"

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In my opinion our law of prescription does not recognize the acquisition by user of servitudes personal to a single individual. Even if the use by the plaintiff of this path had been proved for a third of a century, he would not have acquired right of way. There must be a dominant tenement, and the user by the owner must be to the advantage of that tenement.

Here the plaintiff, before 1893, had no right to use the water of the pond, which was useful to him only because he was a dhoby. He had the permission of the owner—that permission was personal to himself—it was not connected with his ownership of the house he lived in. A purchaser of the house, who was not a dhoby and had no permission, could not have claimed right of way to the pond.

The position of the plaintiff became different when in 1893 he bought the pond. Then the path became the way between two lands belonging to the same proprietor, The user of way across an intervening field, from one field to another, will, if continued without interruption for ten years, become a right of way in favour of the two tenements connected by the path against the tenement over which the path passes.

In my opinion the plaintiff has not acquired the right of way claimed, and I set aside and dismiss the action.