

1935

*Present : Akbar J.*DE SILVA *v.* ATTORNEY-GENERAL

130—C. R. Galle, 14,500.

Railway line—Right of way across the line—Railway Ordinance, No. 9 of 1902, s. 32.

A right of way cannot be acquired across a railway line.

A PPEAL from a judgment of the Commissioner of Requests, Galle.

N. E. Weerasooria (with him *S. W. Jayasuriya*), for the plaintiff, appellant.

H. W. R. Weerasooria, Acting C.C., for the defendant, respondent.

Cur. adv. vult.

October 23, 1935. AKBAR J.—

This was an action brought by the plaintiff-appellant against the Attorney-General as representative of the Crown for a declaration that the footpath from the Dodanduwa lake to the Colombo-Galle road through Degalla was a public path, and it was alleged that the Railway Department recently obstructed the use of the path by putting up a rail fence across it. There are several difficulties in the way of such an action being brought by a private person as a member of the public and that action being brought against the Attorney-General which I need not discuss for the purposes of this appeal. The learned Commissioner came to the conclusion that under the circumstances of this case no prescriptive title had been proved. I think his finding is correct in view of section 32 of the Railway Ordinance, No. 9 of 1902. By that section any person who trespasses upon the railway, or upon any of the lines, stations, or other premises appertaining to the railway, is guilty of an offence, and liable to a fine not exceeding Rs. 20 ; and such person, when he refuses to leave the railway line when requested to do so by a railway official, commits another offence for which he is liable to a fine of Rs. 50, and moreover he is liable to be immediately removed therefrom by force by any railway official. Admittedly the alleged footpath crosses the railway line. By the same

Ordinance No. 9 of 1902 the word "railway" includes all railways already constructed or in the course of construction. So that when section 32 refers to trespass upon the railway it includes the actual crossing of the railway lines as in this case. I fail to see how in these circumstances any use by members of the public of the footpath, or at least that part of it which crosses the railway line can be said to be adverse user, because each time such person crosses the railway line he commits a criminal offence for which he can be punished.

Apart from this point, which is mentioned by the learned Commissioner, I think I will not be justified in interfering with the finding of the Commissioner who apparently accepted Mr. Parker's evidence that a fence was put up immediately after the acquisition 34 years ago, and I further cannot interfere with his finding that the footpath was included in the acquisition.

The appeal will therefore be dismissed with costs.

Appeal dismissed.

