

1929.

Present: Fisher C.J. and Driberg J.

FERNANDO v. FERNANDO.

76—D. C. Chilaw, 8,561.

Right of way—Definite track acquired by user—Action to divert track.

Where a right of way is acquired by prescription, the owner of the servient tenement is not entitled to divert the particular track acquired by user.

THIS was an action instituted by the plaintiff for a declaration that the defendant was not entitled to a right of way over plaintiff's land and in the alternative for a declaration of the plaintiff's right to divert the route of the right of way so acquired. The learned District Judge held that the defendant had acquired a right of way by prescription, but declined to grant the prayer asking for the right to divert the track acquired by user. The plaintiff appealed.

H. V. Perera (with Croos da Brera and N. E. Weerasooria), for plaintiff, appellent.

Ameresekera (with Navaratnam), for defendant, respondent.
September 12, 1929. FISHER C.J.—

In this case the plaintiff prayed "for a declaration that the defendant is not entitled to a servitude over the plaintiff's land or in the alternative if the Court finds the defendant to be entitled to such servitude for a declaration of the plaintiff's right to divert the above-mentioned route" The learned Judge in the District Court held that the defendant had acquired a right of way by prescription across the plaintiff's land, but declined to accede to the plaintiff's prayer for a declaration that he was entitled to divert the course of the right of way acquired. The appellant accepts the finding of the learned Judge as to the acquirement of the right by prescription, but asks this Court to reverse the finding as to the right of diversion. The defendant has therefore admittedly acquired a right of way by prescription across the plaintiff's land, but it is contended that the right acquired is not a right of way over the track used in process of acquiring the right but a right of way over such part of the plaintiff's property as the latter shall direct provided that it offers an equally convenient route. The appellent's Counsel mainly relied upon certain passages from Voet in Book VIII. C. 3, S. 8 in support of his contention. These passages have no reference to a right of way acquired by prescription. They are set out in the judgment of Schneider J. in *Madanayake v. Thimotheus*¹ and the learned Judge says in his

¹ (1921) 3 C. L. R. at page 84.

judgment that they " put it 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. "

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FISHER C.J.

*Fernando v.
Fernando*

The sole question, therefore, is whether the right acquired is over the track used in process of acquiring it. In my opinion it is. User of a definite track is the only way in which a right of way over the land of another can be acquired by prescription (see *Karnaratne v. Gabriel Appuhamy*¹ and *Kandaiah v. Seentamby*²), and in the absence of any authority to the contrary it seems to me that the necessary and obvious consequence is that the right acquired is over that definite track.

The judgment must be affirmed and the appeal dismissed with costs.

DRIEBERG J.—I agree.

Appeal dismissed.

