Present : Jayewardene A.J.

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SANDRASEGRA *v.* SINNATAMBY.

403—P. C. Jaffna, 23,022.

Public place—Right of public to draw water from a well—Well sunk on private land within memory of living witnesses—Immemorial user—Dedication to the public—Is it a mode of conferring rights on the public.

A well was sunk about forty years ago in the outer courtyard of a Hindu temple where the people of the Mukkuwa caste worshipped. Whatever may have been the original intention, Christian Mukkuwas had also drawn water from the well without any objection during this period. The Hindu Mukkuwas now refused to allow the Christian Mukkuwas to draw water from the well, and enclosed the well with a fence. A riot took place, and the fence was pulled down. It was re-erected by the Hindus. The Maniager applied to Court for a conditional order under section 105 of the Criminal Procedure Code that the obstruction be removed, and that the well be thrown open for public use until the Hindus established their exclusive right to the well.

Held, that under section 105 it was essential that the person asking for an order should establish that the place from which the obstruction is to be removed is a public place.

[1] *(1900) 1 Br. 57.*

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Held, further, that the public had not acquired the right to draw water from the well either by immemorial user or by dedication.

Proof of uninterrupted use for thirty years and upwards is not sufficient to establish user from time immemorial in Ceylon ; user for a period extending beyond the memory of man must be proved.

The presumption of immemorial user from user for thirty years and upwards can only be made in the absence of any evidence as to when and how the user actually commenced. "In the present case there is clear evidence as to when the right to draw water first commenced."

Dedication otherwise than by deed as a mode of conferring right on the public is not recognized by the Roman-Dutch law. This principle of dedication has not been introduced into the law of Ceylon.

THE facts are set out in the judgment.

Hayley (with him *Rajaratnam* and *Ramachandra*), for the appellant.

E. W. Jayewardene, K. C. (with him *Rajakariar*), for respondent.

July 28, 1923. JAYEWARDENE A.J.—

This case, according to the Police Magistrate of Jaffna, involves points of public and caste interest. The appeal is taken from an order passed under chapter IX. of the Criminal Procedure Code, requiring the appellants to remove a fence round a well and to throw it open to public use. The well in question is situated in the village of Navaly in Jaffna. It is in the outer courtyard toward the north of a Hindu temple where the Mukkuwas or fisher-folk of the village worship. It is within the procession path of the temple, and is one of the few wells in the village which contain water fit for drinking purposes. Among the Mukkuwas there are many Christians closely related to the Hindu Mukkuwas. The position of the well shows that it has been constructed for the use of worshippers who wash their feet before entering the temple. The Christians and many of the Hindus say that whatever may have been the original intention, Christians have drawn water from the well for over forty years without any objection.

On April 20 this year there was a marriage of a Hindu Mukkuwa. He invited his Christian relatives to the wedding. The dhoby of the temple plays an important part at such functions. The managers forbade the dhoby to eat at the wedding house, as he poured oil into the lamps in the temple. To eat with Christians was pollution. A riot became imminent, but it was quelled by the prompt interference of the police and headmen. The dhoby used to serve both Hindus and Christians alike at one time, but recently he has been made to enter into a deed agreeing to serve only Hindus. The day after the wedding, the Hindus refused to allow the Christians to draw water from the well, and put a Hindu there to draw water for

them. The Hindus also enclosed the well with a fence. The Christians insisted on their right to draw water and pulled down the fence. A serious affray took place, and several persons were grievously injured. The fence has been put up again, and Christians are not allowed access to the well.

On June 11 the Maniagar of Valikamam West came to Court and filed his complaint. He alleged that the appellants had prevented a certain section of the public of Navaly from using this well which had hitherto been used by the Mukkuwas irrespective of creed, that it had been accessible to every member of the Mukkuwa community for over forty years, that on May 26 the appellants had put up a fence diverting the course of a public lane and excluding the Christian Mukkuwas and their Hindu relations from using the well, which is the only well in the vicinity from which the Mukkuwa Christians and their Hindu relations living near could draw water for drinking purposes, and that this unlawful obstruction had entailed hardship on a large number of people. He, therefore, applied for a conditional order under section 105 of the Criminal Procedure Code that the obstruction be forwith removed, and the well be thrown open for public use until the appellants established their exclusive right to the well. This application was resisted on two grounds. First, that as the claim of the appellants was *bona fide*, proceedings should not be taken under the criminal law (see *Hendrick Mendis v. Sri Chandrasekera Mudaliyar.*[1]) Second, that the well was not a public well, and so section 105 could not apply. That part of the fence which encroached on the public lane, the appellants said, they were prepared to remove.

As regards the first contention, I entirely agree with the learned Police Magistrate that the appellant's claim is not a *bona fide* one, and that this was a proper case for investigation under chapter IX. of the Criminal Procedure Code. The Magistrate has also held, after a patient and careful trial, that the well is a public well, and that the order applied for should be made. I regret I am unable to agree with his conclusion on this point.

Section 105 enacts, *inter alia*, as follows :—

" Whenever a Police Magistrate considers on receiving a report or other information, and on taking such evidence (if any) as he thinks fit—

That an unlawful obstruction or nuisance should be removed from any way, harbour, lake, river, or channel which is or may be lawfully used by the public or from any public place . . . . such Police Magistrate may make a conditional order requiring that

[1] *(1908) 12 N. L. R. 33.*

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the person causiug such obstruction or nuisance . . . . shall, within a time to be fixed by such order—

Remove such obstruction or nuisance; or . . . . or appear before himself or some other Police Magistrate of his Court at a time and place to be fixed by the order, and move to have the order set aside or modified in manner hereinafter provided."

Under this section it is essential that the person asking for an order should establish that the place from which the obstruction is to be removed is a "public place." It is contended for the respondent that a well, if it is a public well, falls within the term "public place" in section 105. This may be assumed to be so for the purpose of the argument. What the appellants have done is to place a fence on the land round the well, but they had placed no obstruction in or over the well, so that there was no obstruction which they could have been ordered to *remove* from the well. The obstruction, the fence in this case, was on land outside the well, Therefore, what the respondent had to prove was that the land on which the fence stood was a public place, and that the fence constructed on it was an obstruction. It may be that, if the fence is removed the public would have free access to the well, but I do not think that it was competent for the Magistrate to order, under section 105, not only the removal of the fence, but also that the well be thrown open to public use. However, I need not pursue the matter further, as no objection was raised on that ground, and the parties appear to have proceeded on the basis that the well and the land surrounding it formed one place, and that an obstruction placed on the land would be an obstruction of the use of the well also.

All the evidence in the case has been directed by the parties to prove their respective contentions: the respondent, that the well is a public one; and the appellants, the contrary. I accept the learned Magistrate's finding that for about forty years both Hindu and Christian Mukkuwas have drawn water from the well. The Vellallas do not do so as they are of a higher caste, and the Nalavahs and Pallas cannot do so as they are of a lower caste. Proceeding on this basis I will examine the contention of the respondent. I will assume that the use by the Mukkuwas alone of the right of drawing water from the well amounts to a user by the public. That alone, however, is not sufficient, and the respondent must further prove that the well has become a public well in some way known to the law.

There are, in my opinion, three modes in which rights can be conferred on or acquired by the public:—

(1) By grant executed according to law;
(2) By immemorial user;
(3) By dedication (*dedicatio ad populum*) otherwise than by deed.

No grant is produced in this case, so that the first mode does not apply. Has the well in question been used from time immemorial ? Admittedly this well stands on private property, as the Judge finds. The land on which it is sunk is claimed by one Sinnatamby Kandiah, one of the complainant's witnesses, by inheritance from his grandmother who purchased it in 1876 on deed D 1. Sinnatamby Kandiah also claims the well as his private property. He does not wish it to be declared a public well, but wants it to be reserved for Vellallas, Mukkuwas, and Christians only. The well was sunk within the memory of living men. The complainant's witness, Sinnatamby Sabapathy, an old man of 72, says that one M. Sinnatamby had it sunk, and that he has known it for forty years. K. Sinnatamby, a witness for the accused, who had been a manager of the temple many years ago, says that P. Vairavy sank the well thirty or thirty-five years ago. Another witness for the accused also says that Vairavy sank the well out of money collected from Hindus. If the complainant's witness' evidence is accepted as correct, it proves that the well was sunk forty or forty-five years ago within his memory. The meaning of the term " immemorial user " in connection with the acquisition of rights by the public has been explained in several local cases. It means the user of a right for a period extending beyond the memory of man. In *Goonewardene v. Perera* [1] where the right of using a plot of ground at the mouth of a river for hauling up fishing boats and spreading nets and selling fish was claimed as a right belonging to the public. Wendt J. said—

> " The defendant's case was that the right belonged to the public, or to a certain section of the public, hence their averring and undertaking to prove that the right had been continuously exercised from time immemorial. No historical documents or other ancient records were produced to show the existence of the alleged right, and fifth defendant's testimony, even if it in other respects satisfied the requirements of the law, did not go back far enough. He could only speak to a date fifty years before the trial, and that was well within living memory. The defence must at least show that the right was claimed and exercised at the earliest date that could be recalled by oldest living inhabitants. The phrase used by *Voet, Bk. 43, 7, 1* (" *quorum memoria non extat* "), in speaking of the establishment of a public right of way, implies at least that much, and I think that there is an analogy between the two kinds of rights."

See also *Andris v. Manuel.*[2] Voet following the *Digest* uses the term in connection with public rights of way, but it has been held applicable to all similar rights claimed as belonging to the public. Thus it has been held in South Africa that a right of public outspan

[1] *(1908) 4 Bal. 16.*

[2] *(1909) 3 Weerakoon's Rep. 69.*

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can be constituted in favour of the general travelling public by immemorial user (see *de Toit v. Aberdeen Divisional Council*[1]). The same principle has been applied to rights of pasturage and common (see *2 Maasdorp 194*).

For the respondent, the case of *Hodson v. Mohomadu*[2] is relied upon. There this Court relying on a passage from *Maasdorp's Institutes of Cape law, vol. II., p. 191*, said that it is a recognized principle that from a user by the public for a considerable time the Court may infer a user from time immemorial. That passage is as follows :—

> " By such immemorial usage it was laid down in the case just quoted that a road, which was in the first instance in the position merely of a reciprocal servitude between the owners of a number of properties situated in the same neighbourhood, might be converted into a public right of way in favour of the public ; and it was held that, where such a user is proved to have continued for thirty years and upwards, the Court will in the absence of any evidence as to when and how it actually commenced, be justified in holding that it had existed from time immemorial."

The case referred to in that passage as " the case just quoted " is the case of *Ludolph et al. v. Wegner et al.*[3] I have looked up this case in *Bisset and Smith's Digest, p. 2826*. It is given under the head " Water," and as far as I can see it has nothing to do with roads. It is about an obstruction to a water course, and there Villiers C.J., has, according to the headnote, held, *inter alia*, that—

> " If, it be difficult from the nature of the surface to ascertain what is the natural channel, then, the course in which the water has immemorially flowed will be considered as having had a natural and legitimate origin.
>
> " Where the water has flowed in an artificial channel for thirty years or more, it may be presumed, in the absence of evidence to the contrary, to have flowed thus immemorially."

And there is a passage in the judgment of Villiers C.J. in *Peacock v. Hodges*,[4] in which he says :—

> " I think clear proof of uninterrupted use for thirty years and upwards is sufficient by the law and practise of this Colony (that is Cape Colony) to establish an user from time immemorial."

This judicial *dictum* explains the reference in the passage from *Maasdorp* to " thirty years and upwards." Nathan, citing the same case, says : " Time immemorial in Cape Province may be defined as the period required for prescription " (*vol I., para. 711*). But in

[1] (*1910*) *Cape Pro. Div. 477.*
[2] (*1921*) *23 N. L. R. 348.*
[3] *6 S. C. 198* (*South African*).
[4] (*1876*) *6 Buchanan's Rep. 65.*

Ceylon we have no such law or practice, and when immemorial user is not restricted to user for a definite period, user for a period extending beyond the memory of man must still be proved. However that may be, the presumption there referred to can only be made in the absence of any evidence as to when and how the user actually commenced. In the present case there is, as I have shown above, clear evidence as to when the right to draw water first commenced. In view of the facts of this case and the authorities I have referred to, it is impossible to hold that the public have acquired the right to draw water from the well in question by immemorial user, and that the well is a public well.

There remains the third mode :—Dedication otherwise than by deed. The question at once arises whether rights can be conferred on the public by this mode according to our law—the Roman-Dutch law (see *Tissera v. Fraser*[1]). As far as I have been able to ascertain, this mode was first recognized in Ceylon in the year 1900, when Bonser C.J. in *Pullenayagam v. Fernando* [2] assumed that a piece of ground had been dedicated by the owner as a burial ground after its use as such for a period of about twenty years. No authorities were cited in support of this view. Again, in *Namasivayam v. Perinpanayagam*[3] where the plaintiff had constructed a cistern and trough on defendant's land, and complained that the defendant prevented him from repairing and restoring the cistern and trough. Middleton J., in upholding the dismissal of plaintiff's action, said—

> "So far as I can gather from the evidence of the plaintiff, he constructed this cistern and trough for the public benefit, upon land of the defendant with the permission of his father's executor, and practically dedicated it to the public."

This could hardly be considered a decision on the point. In *Amaris v. Manuel* (*supra*) Wendt J. speaks of user by the public from time immemorial as "a prescriptive user which amounts to a dedication to the use of the public." De Sampayo J., in *Tissera v. Fraser* (*supra*), questioned the existence of the principle of dedication in our law. He said in that case, in which the Crown claimed a right of way as a public way by dedication, "I doubt whether the principle of dedication, which appears to be a purely English notion, is applicable in Ceylon. Under the English law a public right of way may be created by statute or by dedication to the public." He explained the principle of dedication as understood in the English law thus—

> "Dedication may either be express or be implied from the conduct of the owner of the soil, such as acquiescence in the user of the way by the public under circumstances which show an intention of dedicating the road to the use of the public whether the period of user is long or short;"

[1] *(1919) 21 N. L. R. 241.* [2] *(1900) 4 N. L. R. 88.* [3] *(1905) 4 Bal. 98.*

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and after discussing the facts found that the circumstances negatived the idea of a dedication to the public. In the well-known case of *Allishamy v. Arnolishamy*[1] the question was raised as to the ways in which a road may be constituted a public road. The plaintiff proved the user of the road by himself and others for over ten years' and also led evidence to prove when the road was opened. Counsel for the respondent contended that as the road had been used by the public for over ten years, there was virtually a dedication to the public by the owner. Counsel for the appellant replied that dedication, if it obtains at all, must be through the proper authority, and that dedication in any other way does not seem to be recognized by the Roman-Dutch law. In the judgments (Bonser C.J. and Withers J.) no reference was made to dedication as a means of acquiring rights by the public, and Bonser C.J. said—

> " As I understand the law, a public road is either a road which has been constructed as such by the public authorities, or which has been used as a public road by people inhabiting the neighbourhood from time immemorial . . . . no amount of use of by the public is sufficient to make a road a public road when, as in this case, the road was made within the memory of man."

The omission to refer to dedication as a possible mode of acquiring a right to a public road seems to favour the view that such a mode of acquisition is not known to our law. *Maasdorp* in his *Institutes, vol. II., p. 191*, says that the method of acquiring the right to a public road by the process of dedication to the public was first recognized in South Africa in a suit decided by the High Court of Griqualand West. In that case the Court decided that when a road has been used by the inhabitants openly and publicly for a number of years, and the Town Council has repaired it with the apparent consent and acquiescence of the owners of the ground, this amounted to a dedication to the public, but in another case *Stow v. Hurd*[2] that view appears to have been contested, and it was questioned whether dedication is a mode of conferring rights on the public recognized by the Roman-Dutch law. (See *Bisset and Smith's Digest, vol. VII., p., 647.*)

Reference might here be made, without irrelevance, to the law of Scotland which is largely derived from Roman law, and is more akin to our law than the law of England. In Scotland it has been held, differing from the English law, that a public right of way cannot be acquired by dedication. In *Mann v. Brodie*[3] Lord Blackburn, in the course of an interesting judgment, forcibly pointed out the distinction between the English law and the Scotch law on the subject. He thought that the law of England on the

[1] *(1898) 1 Thamb. 26.*

[2] *(1916) Cape Pro. Div. 200.*

[3] *(1885) 10 A. C. 378.*

point was not "the perfection of reason," and ought not to be introduced into the law of Scotland if not so already.*

It may be here stated that when a period of prescription is fixed for the acquisition of rights by the public proof of immemorial user is for all practical purposes useless and unnecessary, for such prescription supersedes immemorial user which is equivalent to prescription by possession for an undefined length of time.

In view of these authorities, I hold that dedication otherwise than by deed as a mode of conferring rights on the public is not recognized by Roman-Dutch law. It cannot also be said that this principle of dedication has been introduced into the law of Ceylon. The respondent cannot claim the well as a public well by dedication.

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* "The case is to be governed by the law of Scotland. Any reference to English law is apt to mislead, unless the difference of the law of the two countries is borne in mind. In both countries a right of public way may be acquired by prescription. In England the common law period of prescription was time immemorial, and any claim by prescription was defeated by proof that the right claimed had originated within the time of legal memory, that is, since A.D. 1189. This was, no doubt, an unreasonably long period. And sometimes, by legal fictions of presumed grants, and in part by legislation, the period required for prescription as to private rights has, in many cases, been practically cut down to a much shorter definite period (see *Angus v. Dalton*). But this has never been done in the case of a public right of way. And it has not been required, though in the way in which the evil of the period of prescription being too long has been avoided, an opposite evil of establishing public rights of way on a very short usurpation has some times been incurred. . . .

But it has also been held that where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was. It is, therefore, I may say in England never practically necessary to rely on prescription to establish a public way.

Now, it is here to be observed that though the length of time during which a road is used as a public highway is an element in determining whether a dedication should be inferred it is not any definite time, and a very short period of usurpation will often satisfy a jury. But I am far from thinking that the law of England is here at all the perfection of reason, or such as ought to be introduced into the law of Scotland if not so already. No case is made here as to a right of way created by the owner, either on the titles or by such acts (if any there be), as without any writing might, according to the law of Scotland, preclude the owner and those who claim under him from denying that a right of way had been created. The sole claim is by prescription, and I think there is no dispute that, by the law of Scotland, the period of prescription is forty years. If the public had used the road to such an extent and in such a manner that they may properly be said to be possessed of it, and they have had such posession for forty years, they have acquired the right, and although it was shown that the owner in fee was during that time not dedicating it; but if less than forty years' possession is proved, there is not, as I understand, any principle or authority for saying that a dedication is to be presumed. And again, when the public are excluded for forty years, their right, however clear it may be that they once had one, is gone by negative prescription. The question, in short, is as to possession by the public or against the public for a period of forty years, and not, as in England, as to user by the public for such an undefined time, and in such a manner and under such circumstances as to justify the inference that an owner in fee had dedicated."—*Mann v. Brodie.*

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I therefore hold that the complainant has failed to prove that the well in dispute is a public well, or that the land on which the fence stands (except, of course, that part of the public lane on which the fence stands) is a public place.

The Christian Mukkuwas are greatly to be sympathized with. Their case is indeed a hard one. The attitude taken up by the appellants is highly unreasonable, and deserves to be condemned. I have tried to find a way of escape from what I consider to be the legal position, but I have tried in vain. Hard cases cannot be allowed to make bad law. I am compelled to allow the appeal, and set aside the order of the Police Magistrate, except in so far as the obstruction to the public lane is concerned.

Appeal allowed.