Present : Wood Renton J. and Grenier J.

June 5, 1911

RANHAMY *v.* WIJEHAMY.

130—*D. C. Kurunegala*, 3,961.

Public road—Obstruction—Action by private individual—Special damage.

A private person who seeks to recover damages for the obstruction of a public road is bound to prove that in consequence of such obstruction he has suffered special damage. By special damage is meant some particular damage to him in addition to the general inconvenience occasioned to the public. Where plaintiff proved that owing to the obstruction he had no longer a proper road by which he can take his cattle to the market ; that he had to go by a round-about way of two miles so as to reach his paddy fields ; that he had to hire out cattle for the cultivation of his fields, instead of, as before, cultivating them by his own cattle ; that he had to take all his produce to market by the long road above referred to, and to pay hire for its transport :—

Held, that this was evidence of special damage within the meaning of the English law.

THE facts are set out in the judgment.

H. A. Jayewardene (with him *Rosairo*), for the defendant, appellant.—The plaintiff has not established a right of servitude with respect to the paths. The finding of the District Judge that the paths are public paths is not supported by the evidence. For a path to be declared a public path the user must have been from time immemorial ; thirty years can hardly be said to be time immemorial. See *Allishamy v. Arnolishamy*.[1]

Even if the paths be public paths, the plaintiff cannot succeed unless he proves special damage. The plaintiff has proved no special damage peculiar to himself, as distinguished from others who may use the road. Counsel cited *Satuku v. Ibrahim*,[2] *Winterbotham v. Lord Derby*,[3] *De Silva v. Weerasinghe*,[4] *Don Davith v. Agiris*,[5] *Pollock on Torts* 405, 2 *S. C. C.* 195.

Vernon Grenier (with him *A. St. V. Jayewardene*), for respondent, not called upon.

Cur. adv. vult.

June 5, 1911. WOOD RENTON J.—

The plaintiff-respondent sued the defendant-appellant, in this action for a declaration of a right of way along two paths, A, B and

[1] *(1898) 1 Tam. 26.*
[2] *(1877) 2 Bom. 466.*
[3] *2 Ep. 316.*
[4] *(1896) 1 N. L. R. 308.*
[5] *(1902) 1 Bal. 152.*

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A C, in the plan filed in the case, and also for damages for the obstruction of these paths by the appellant. The respondent based his claim on prescriptive title and immemorial user. The appellant denied the right of way which the respondent claims. The case went to trial on a great number of issues, some of which seem superfluous, but none of which raised the questions whether the roads over which the right of way was claimed were public, or whether, apart from prescription and immemorial user, the respondent was entitled to a right of way by necessity, or either, or both of them. Evidence was led on both sides, and the learned District Judge held that the roads A B and A C were public paths, and that the respondent had a right of way over them. For the purposes of the present appeal we must take the finding of the District Judge that the roads in question were public as correct. There is evidence showing that they have been used as such by the villagers for a period of time that may fairly be reckoned as immemorial. I do not think that we ought now to allow that point to be re-opened, or, on the other hand, to permit the respondent to contend that he has in any way established a right of way by necessity. The case was argued before us on the basis that its decision depended on the principles of English and not of Roman-Dutch law, and to that ground also I would adhere in disposing of the appeal. If the appellant would have stood in a better position under the Roman-Dutch than under the English law, we may be quite sure that Mr. Hector Jayewardene would not have failed to take the point on his client's behalf. The finding of the District Judge as to the obstruction of the paths by the appellant must also be taken as correct. There is ample evidence in the record to support it.

The respondent, therefore, seeks to recover, under the principles of English law, damages for the obstruction of a public road by the appellant. He is bound, therefore, to prove that in consequence of such obstruction he has suffered special damage, and by special damage is meant some particular damage to him in addition to the general inconvenience occasioned to the public. (See *De Silva v. Weerasinghe*,[1] *Satkuvalad Kadir Sausae v. Ibrahim Agavalad Mirza Aga*,[2] where numerous English decisions on the point are collected, and *Don Davith v. Agiris*.[3] The respondent's right of action will not, however, in my opinion be taken away, if he has as a fact suffered damage over and above the inconvenience which the mere obstruction has caused to the public as a whole, by the fact that one or more individual members of the public may have suffered special damage of the same kind. That circumstance might confer a right of action upon them. It could not take away the respondent's right of action. If that is a correct statement of the law, the evidence as to special damage is as follows. The

[1] *(1896) 1 N. L. R. 308.* [2] *(1877) I. L. R. 2 Bom. 457.*
[3] *(1902) 1 Bal. 152.*

respondent says there is no longer a proper road by which he can take his cattle to the market ; that he has to go by a round-about way of two miles so as to reach his paddy fields ; that he has now to hire out cattle for the cultivation of his fields, instead of, as before, cultivating them by his own cattle ; and that he has to take all his produce to market by the long road above referred to, and to pay hire for its transport. It would seem from the record that he was asked in cross-examination whether he was prepared to swear to the truth of these statements on the *Jataka* book, and that he did in fact do so. This evidence constitutes, I think, evidence of special damage within the meaning of English law. It is as much special damage as was proved in the case of *Benjamin v. Storr*.[1]

I would dismiss the appeal with costs, but I think that the first paragraph of the decree should be amended so as to run as follows : " It is ordered and decreed that the plaintiff be, and he is hereby declared, entitled to a right of way over the public paths marked A B and A C in the sketch P 1 filed of record."

GRENIER J.—I agree.

Appeal dismissed.