1919.

Present: De Sampayo J. and Schneider A.J.

TISSERA *et al.* *v.* FRASER.

146—D. C. Negombo, 13,104.

Public road—Road running along a canal—Erosion—User of adjoining land by the public—Dedication.

A road lying alongside a canal disappeared little by little by erosion during the last thirty or forty years, and the owners of the adjoining land suffered the public to use a corresponding portion of their land as part of the road.

Held, that there was no dedication to the public.

" There is no precedent or authority for this kind of piecemeal dedication . . . . . There are only two ways known to the Roman-Dutch law, which is our law, for establishing a public right of way, namely, by proof (1) that the road was constituted by the public authorities, or (2) that the road has been used by the public from time immemorial.............. From the statement of the defendant's

[1] *(1895) 2 N. L. R. 36.*

[2] *(1913) 16 N. L. R. 385.*

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own case it is clear that the road came into existence since the date of the Crown grant (1862), and quite within living memory. I doubt whether the principle of dedication, which appears to be a purely English notion, is applicable to Ceylon."

THE facts appear from the judgment.

Bawa, K.C. (with him *Croos-Dabrera*), for plaintiffs, appellants.

A. St. V. Jayawardene, for defendant, respondent.

October 2, 1919. DE SAMPAYO J.—

The plaintiffs are the owners of a land called Mandagahawatta, shown in the plan marked D 1. The plaintiffs having about two years ago placed a toll bar on the road which runs alongside the land as shown in the plan, the defendant, who is Chairman of the Local Board, Negombo, gave notice on September 18, 1918, under section 88 of the Thoroughfares Ordinance, 1861, that unless within one month from the service of the notice they took legal proceedings to prevent the removal of the toll bar, the Local Board would proceed with the removal of the same, and the plaintiffs brought this action to establish their title to the ground covered by the road. It appears that there was an old road lying between the road in question and the canal, which has been eaten away by the canal and has disappeared, except as to a small strip at one end. The title of the plaintiffs to the land Mandagahawatta is traced to a Crown grant dated February 11, 1862, with survey plan attached, which gives the northern and north-western boundary of the land as the old road. The plan D 1, which was made by the Local Board for the purpose of these proceedings shows by a red line the boundary as given in the Crown grant. There is, therefore, no question that the plaintiffs are entitled to the land over which the present road runs, and on which the plaintiffs have placed the toll bar. The onus then lay upon the defendant to show that the plaintiffs lost their title, and that the road became a public road. The defence appears to be that for the last forty or fifty years the road has been freely used by the public, and that the owners of the land must be presumed to have dedicated the road to the public. No definite time has been relied on for such dedication, but the District Judge's opinion is that as the canal from time to time took away portions of the old road, the owners of the adjoining land allowed the public to use a corresponding portion of their land as part of the road, and there was thus a series of dedications to the public. So far as I know there is no precedent or authority for this kind of piecemeal dedication. In any case the whole question of dedication requires consideration. There are only two ways known to the Roman Dutch law, which is our law, for establishing a public right of way, namely, by proof (1) that the road was constituted by the public authorities, or (2) that the road has been used by the public from

time immemorial. See *Allishamy v. Arnolishamy.*[1] The public authorities had at no time anything to do with this road, and the user by the public, if any, does not go back to any time beyond the memory of man. From the statement of the defendant's own case it is clear that the road came into existence since the date of the Crown grant, and quite within living memory. I doubt whether the principle of dedication, which appears to be a purely English notion, is applicable to Ceylon. Under the English law a public right of way may be created by statute or by dedication to the public. 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. Assuming that dedication in this sense is a mode available here for creating a public road, we have still to examine the facts in order to find whether the owners intentionally devoted a portion of their land to the use of the public. The purchasers from the Crown in 1862 were John William Karunaratne and Jusey Fernando, and they in October, 1862, entered into a deed of partition, by which the western portion, containing in extent 5 acres 21.72 perches, was assigned to Karunaratne, the old road mentioned in the Crown grant being given as the northern and north-western boundary. On March 22, 1880, Karunaratna sold this western portion to Francisco Fernando and Diago Pinto. In December, 1912, Francisco Fernando transferred his share to Francisco Juan Fernando and Diago Fernando, who in April, 1914, transferred the same to Manual Peris and his wife Lucia Fernando, who finally transferred it to the second plaintiff in this action. In 1896 Diago Pinto's share was given to the first and third plaintiffs, who in April, 1905, sold it to Julius Pinto, and bought it back again in 1960. It is clear from the description and extent given in these two series of deeds, from the year 1862 to the year 1916, that the owners for the time being considered the present road as part of their land, and dealt with it on that footing. So far as these deeds go, the supposed dedication of the road to the public is negatived, and, on the contrary, they disclose an intention to keep the whole land to themselves. There is no doubt, however, that a new road has come into existence over a portion of plaintiffs' land. The first plaintiff in his evidence stated that the road was " constructed " by the previous owners of their land. I think the District Judge has laid too much emphasis on the use of the word " constructed." It is clear that the first plaintiff meant no more than to say that the existence of the road was originally due to his predecessors in title. The fact appears to be that even the old road was mostly used by the owners of Taladuwa estate, which adjoins it, and that when the old road gradually disappeared, the owners of Taladuwa began to use a new track over their own land, for two of

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the owners were Diago Pinto and Francisco Fernando, who, as shown above, were plaintiffs' predecessors in title. The plaintiffs' case is that they exercised their right of ownership for twenty or thirty years by charging a toll for loaded carts which passed the road, and allowed only passenger carts to go free. The only loaded carts which did not pay toll were scavenging carts and butchers' carts, and this exception is explained by the fact that the town refuse was dumped on a portion of Taladuwa estate, and that the slaughter-house also was on that estate. The District Judge, while he does not reject the evidence as to the collection of toll, thinks that the toll was not collected in respect of carts, but in respect of boats calling at a ferry to which this road leads. It appears to me that the District Judge bases this conclusion on a very small fact. The first plaintiff's books, which contains accounts for a series of years, mentions receipts for a *thotupola*. This word is usually applied to a ferry, but I think it is also used, though loosely, to express generally a toll. The District Judge's main reason, however, is a contradiction between the first plaintiff and Dominico, who collected the toll. The first plaintiff said that the toll was collected at a toll-house on the roadside, and Dominico said that he collected the toll where the boats halted. But both are agreed that the toll was charged for carts which came to the ferry to unload or load goods. This is supported by a number of witnesses, whose evidence cannot be lightly disregarded, especially as it is not to their interest, as members of the public, to say, as they have done, that carts have paid, and are liable to pay, toll for the use of the road. The existence of a ferry is not of much consequence. The ferry as well as a *gala* at the same place is also on a part of Taladuwa estate, and the use of the road, so far as loaded carts are concerned, is practically confined to carts which go to the ferry to put down or take up goods. This also appears to me to explain the evidence of Dominico, when he said that he collected the toll where the boats halted. The District Judge says he prefers to believe and act on the evidence of two witnesses called for the defence. One of them is Hugo Fernando, the Annavi of St. Mary's Church. To my mind his evidence is valueless. According to him the road never shifted, and the present road is the one which always existed. This is contrary to the admitted facts of the case. Moreover, he does not appear to have taken carts himself, but says, generally that the public have been passing up and down this road, and have taken carts along it for the past fifty years. This is quite harmless evidence. The only definite and relevant statement is that Mr. Carry used to take carts to the ferry along this road, but Mr. Carry was superintendent of Taladuwa estate, to which both the ferry and, according to the plaintiffs' case, the road belonged. The other witness is Mr. A. W. Corea, whose evidence is also very harmless. He himself went in a passenger cart. He used to send goods in hired carts to the ferry, but he never at any

time accompanied the carts, and he says that "the toll is paid by the owners of the carts when toll is payable." I do not think that the evidence of these two witnesses has met the evidence called on behalf of the plaintiffs, or in any way satisfies the heavy burden which lay on the defendant to establish a public right of way over land which has been proved to be private property. Add to all this the important fact that the road was always gravelled and kept in order by the plaintiffs and their predecessors in title, and that neither the Local Board nor any other public authority did anything to the road. In my opinion the circumstances negative the idea of a dedication to the public by these owners or any of them, but it is sufficient to say that the defendant has failed to prove the existence of a public right of way.

I would allow this appeal, and give judgment for the plaintiffs as prayed for in the plaint, with costs in both Courts.

SCHNEIDER A.J.—I agree.

Appeal allowed.