1936 *Present:* **Moseley J. and Fernando A.J.**

KARUNARATNE *v.* INHABITANTS OF MAMPE

239—D. C. Colombo, 50,562.

Public bathing place—User from time immemorial—Permissive user to neighbours—No public right.

Where the owner of a land allowed neighbours to come to his land and bathe in a well or pond, such a user cannot give rise to a public right.

A public right claimed from time immemorial must be exercised of right. It cannot originate by permission or usurpation of an act of pure neighbourliness.

A partition decree respecting the land would not affect public rights unless the Crown was a party to the action.

APPEAL from a judgment of the District Judge of Colombo.

H. V. Perera (with him *G. E. Chitty*), for plaintiff, appellant.

N. E. Weerasooriya (with him *J. R. Jayawardene*), for defendants, respondents.

Cur. adv. vult.

November 26, 1936. FERNANDO A.J.—

The plaintiff brought this action to have it declared that the inhabitants of the subdivision of Mampe-Kesbewa were not entitled to use the well situated on her land as a public bathing place, for restoration of possession, and for damages. The defendants in their answer pleaded that from time immemorial, and by prescriptive use the inhabitants of the subdivision had been in the enjoyment of the well or pool in question as a bathing place, and that the public had acquired a right thereto. The learned District Judge held on the evidence that the pond or pool in question had been used as a bathing place far beyond living memory, but it was contended for the appellant that this finding is not supported by the evidence. The plaintiff herself in cross-examination stated that she had been living on the land for about 20 years, and that during that period the villagers had come to the land to bathe there, and that she could not say how long the bathing place had been in existence before her marriage, which was about 25 years ago. The witness Kulatunga stated that he was 69 years old, and that his native village was Demaladua, a little more than a mile from this land, and that even during his boyhood the Pokuna was used as a bathing place by all the inhabitants of the neighbouring village. He added that people came to this place to bathe because there is no suitable bathing place in the locality, and that there was a road over this land to go to the Pokuna. He then added that he heard that this Pokuna was handed over in 1907 by the original owner to be repaired and maintained. In cross-examination he admitted that the original owner was a wealthy landed proprietor, that the people who came to bathe were the neighbours of this land, and that the plaintiff's father-in-law had offered the bathing place for the use of the general public. It is clear however that he does not know personally about this so-called dedication. He added that the old path is not now used, and there is another path and could not say whether that path went near the plaintiff's house. He had heard that some repairs had

been done in 1916, but did not see the work being done. He himself had written the letter P 4 addressed to the plaintiff's proctor, and the position taken up in that letter is that the well has been used and maintained by the Village Committee for the public since 1907 when it was handed over to the Village Committee by the then owner. In view of this document, and of the nature of his evidence, it seems clear that this witness knew little or nothing of the use of this well or pond before he came ino office as Chairman of the Village Committee in 1930. The next witness Abeykoon does not appear to be a very satisfactory witness. At the beginning of his evidence he stated that he had known the Pokuna for about a hundred years, although he gave his own age as 67. "This pond," he says, "is used by the residents of the locality, and they have so used it from the time I remember". In cross-examination however, he stated that at the time he took the contract to repair the pond in 1916, the owner was Mendis Mudalali, and that Mendis Mudalali had given permission to people to bathe in this pond, and further added that the people who came to bathe are the neighbours within about 200 yards. It seems clear from this evidence that the use of the pond for bathing purposes began with the permission of the plaintiff's father-in-law Mendis. The other witness Caralina is the widow of Mendis, and her knowledge of the land comes from visits paid once in two months in order to pick nuts. "I have seen 10 or 12 people bathing when I go to pluck nuts. The people of Pilliandara and Hettigala, and all those people used to come and bathe. People from Jaligoda even used to come and bathe". In view of this evidence given in cross-examination, there seems little ground for her statement earlier that the pond was used by people from two or three villages for bathing, and that about 200 to 300 people came to bathe. At all events it is clear that she came to know the land only after her husband purchased it, and his purchase was subsequent to his marriage. I come to the conclusion therefore, that the evidence of Kulatunga and Caralina does not prove that this pond was used by the public from time immemorial, and that the evidence of Abeykoon clearly shows that it began to be used only during the ownership of Mendis, who gave permission to the neighbours to bathe in the pond. In order to establish a right of this kind, there must be evidence of immemorial user; that is to say, evidence to show that the right was claimed and exercised at the earliest date that could be recalled by the oldest living inhabitants, as is stated in *Krause's Voet, p. 174,* the immemorial usage must be exercised as of right, and must not originate in a favour or permission or on usurpation of an act of pure neighbourliness. In other words where the owner of land allows the neighbours to come to his land and bathe in a well or pond situated in it purely as a neighbourly act, such use of the well or pond cannot give a right to the persons using that well for a considerable period. The evidence of Kulatunga and Abeykoon indicates that the user began from the act of Mendis, plaintiff's father-in-law, who according to Kulatunga offered the pond for the use of the general public to bathe, or according to Abeykoon gave permission to people to bathe in the pond. Neither of these witnesses was present at this so-called permission or offering, and they have merely put into their own language, the fact of which they seem to be aware, namely, that the neighbours were allowed by Mendis to bathe at the well.

I would accordingly hold that there was no evidence of immemorial user, and that the evidence also indicates not a user by the public as such, but merely by the neighbours living within a short distance of the land. It is also significant that the right is not claimed by any person living in the neighbourhood as an appurtenant to his own land, but only as a public right.

The plaintiff also relies on the partition decree in her favour, and the document P 1 is the certificate of title issued to the plaintiff. It would appear from P 1 that a decree for sale was entered on November 23, 1926, and that the premises in question was sold to the plaintiff on March 7, 1927. The decree itself has not been produced, but it is admitted that the decree did not reserve any right to bathe in the well in question, either to the public or to any other person. It is clear law that the rights of the public would not be affected by a partition decree inasmuch as those rights would vest in the Crown, and unless the Crown is a party to a partition action, the decree in the action will not bind the Crown. A partition decree, however, is good against all others, and there can be no doubt that any rights that any private individual whether as owner of land, or otherwise might have had over the premises in question, have been extinguished by that partition decree. In these circumstances, I think the learned District Judge was wrong in his findings on issues 6A, 6B, 6C, and 6D. The plaintiff is the absolute owner of the land, and there are no persons having any servitude over the land, and at the same time, it is clear that the public have no right to bathe in the well in question. I would accordingly allow the appeal, set aside the decree of the District Court, and enter decree for plaintiff as prayed for without damages. The defendants-respondents will pay to the appellant the costs of this action here and in the Court below.

MOSELEY J.—I agree.

Appeal allowed.