

1921.

*Present : Bertram C.J.*HODSON *v.* MOHOMADU.538—*P. C. Kalutara, 58,038.**Thoroughfares Ordinance, ss. 86 and 88—Public road—Immemorial usage—Thirty years' possession.*

From a user by the public for a considerable time of a right of way, the Court may infer a user from time immemorial.

“ 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 ; 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 existed from time immemorial.”

The object of section 88 of the Thoroughfares Ordinance is to deal with obstructions already established on a public thoroughfare. The object of section 86 is to prevent such obstructions growing up.

THE accused was charged with putting up a wall along the road leading from the Colombo-Galle road to the old road at Mahagoda without giving one month's previous notice as required by section 86 of Ordinance No. 10 of 1861 as amended by Ordinance No. 6 of 1913. The Police Magistrate of Kalutara delivered the following order :—

“ There is nothing to show that the road in question is a public road, nor is there any proof that it has been proclaimed as a public road. The prosecution has not complied with the requirements as explained in *2 S. O. C. 105* before prosecuting the accused. The accused denies that the alleged road is a public road, and says it is his private road. In this case it is not possible for me to decide these questions. I acquit the accused.”

M. W. H. de Silva, C.C., for the appellant.

J. S. Jayawardene, for the respondent.

June 16, 1921. BERTRAM C.J.—

It appears to me that in this case the learned Magistrate gave his decision without having all the authorities placed before him for his information. If I understand the evidence rightly, it is to the effect that villagers, that is to say, the general body of the villagers,

have used this road for a period somewhat roughly described as over a hundred years. I understand both the Muhandiram and the other witnesses when they say that the road has been in existence for a long time to mean that it has been in existence as a public road, although this is not very clearly expressed. The learned Magistrate, however, thought that he had no evidence before him to show that the road was a public road, and that the proper course for the public authority was to act under section 88 of the Thoroughfares Ordinance.

Our law as to public roads is on a clear footing, and is summarized in a recent case, *Tissera v. Fraser*,¹ where my brother De Sampayo says :—“ 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.” But 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. I quote the following passage from *Maasdorp*, vol. II., p. 199, which has been previously quoted with approval in an unreported decision of this Court : “ 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 existed from time immemorial.”

The learned Magistrate seems to think that the local authority should have proceeded under section 88. Section 88 has a different purpose from section 86. The object of section 88 is to deal with obstructions already established on a public thoroughfare. The object of section 86 is to prevent such obstructions growing up. What the section requires is that before a man erects any building or wall on a public thoroughfare, he shall give notice to the local authority. That is to enable the local authority to make inquiries as to whether the erection, which it is proposed to set up, is likely to be an obstruction to the thoroughfare. This section can only be enforced by inflicting a fine, which is in practice a small fine, on any person who fails to give notice.

I quite agree with Mr. Jayawardene that it would be an inappropriate section to set in motion against an old established obstruction. But it does not appear that the wall in this case was of that nature. I think the section is a very salutary section in the interests of the

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public, and that the law intended that there should be a summary remedy for their protection.

As I do not think that the learned Magistrate had the matter very fully before him, or that the evidence of the witnesses is as clear and specific as it might be, I think the best plan will be that the case should go back to the Magistrate to be re-heard, and for evidence to be called on both sides of the case, in the light of the principles I have explained. I make order accordingly.

Sent back.

