1932 *Present :* **Jayewardene A.J.**

SAMARASINGHE *v.* CHAIRMAN, V. C., MATARA.

192—C. R. Matara, 14,160.

Public path—User for sixty years—Time immemorial—Via vicinalis.

Proof that a footpath has been used by the public for sixty years is sufficient to establish a user from time immemorial.

APPEAL from a judgment of the Commissioner of Requests, Matara.

H. V. Perera (with him *Rajapakse*), for plaintiff, appellant.

Keuneman, for defendant, respondent.

May 6, 1932. JAYEWARDENE A.J.—

The plaintiff brought this action against the Chairman of the Village Committee of the Four Gravets, Matara, to have it declared that there is no public path over his land called Maswalakanatta. The defendant-respondent alleged that there existed a public road over the land in question from time immemorial and claimed a right of cartway. The third issue framed was whether there was a public cart road over the land.

The learned Commissioner held that it had not been proved that the road had been used as a cartway but that it had been used as a footpath by the public for nearly sixty years. As the period was so long, he thought he was justified in holding that the use was from time immemorial. He declared that the public were entitled to a footpath three feet in width. The path was to be laid down as far as possible along the southern boundary.

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 by the public is sufficient to make a road a public road where the road was made within the memory of man (*Allishamy v. Arnolishamy* [1]). This kind of road called *via vicinalis* or neighbour's road is recognized by the Roman and Roman-Dutch laws.

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

A *via vicinalis,* according to the *Digest,* was one which was made up of contributions of the ground of private landowners and which had existed from time immemorial . . . . "*Via vicinales, quae ex agris privatorum, collatis factae sunt, quarum memoria non extat, publicarum viarum numero sunt*". . . . . (Digest XLIII. 7, 3.)

According to the Roman-Dutch law there are two kinds of public roads : the *via publica* and the *via vicinalis.* A *via publica* is constituted such by the authorities when declared by them to be a public road.

A *via vicinalis* or neighbour's road is a road either in a village or leading to a town or village which has been used by the people of the neighbourhood from time immemorial . . . . (*Opinions of Grotius, p. 425.*)

Voet classes all public unproclaimed roads under the heading of *viae vicinales* . . . . "*ut tamen viae hac vicinales quae ex privatorum collatione sunt factae, quantum ad usum attinet, viarum publicarum numero habeantur; maxime, si constitutionis earum memoria non extet*" . . . . . (*Voet XLIII. 7, 1.*)

In *Appuhamy v. Alapatha* [1] the nature of a *via vicinalis* was considered and a "devata" road which was in question was regarded as a *via vicinalis.*

In *Fernando v. Senaratne* [2] it was held that public roads are those which have existed from time immemorial or which from time to time have been constructed on land belonging to the Crown, or acquired for the purpose and thereafter used by the public as a means of communication, and evidence of user by the public for over a third of a century was there considered sufficient.

In *Ludolph v. Wegner* [3], Villiers C.J. held that where the 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 (*2 Maasdorp 191*).

The whole question of public roads in South Africa was considered in *Peacock v. Hodges* [4], and clear proof of uninterrupted use for thirty years and upwards was considered sufficient, by the law and practice of that colony, to establish an user from time immemorial. The same principle was adopted in *Hodson v. Mohammadu* [5].

In the present case the judgment was well-founded. The learned Judge has inspected the road and noted his observations and he is of opinion that a footpath has existed for sixty years. No living person knows when this path was first used. I think that the presumption of immemorial user would apply to this path. There remains the question of costs. The first defendant claimed a cart track. In this he has failed. Further, it would be of great advantage to the inhabitants to have a declaration by this Court that this public footpath exists. In all the circumstances while dismissing the appeal, I would award no costs in this Court or in the Court below.

Appeal dismissed.

[1] (1926) 7 *C. L. R. 107.*
[2] (1932) 1 *Ceylon Law Weekly 199.*
[3] *6 S. C. 198 (South Africa).*
[4] (1876) *6 Buchanan 70 (S. A.).*
[5] (1921) *23 N. L. R. 348.*