1938 *Present:* **Keuneman J.**

PEIRIS *v.* INHABITANTS OF VILLAGE COMMITTEE, PALUWA PERUWA.

166—C. R. Gampaha, 7,186.

Via vicinalis—*Unproclaimed public road—Immemorial user—Roman-Dutch law.*

In Ceylon a *via vicinalis* may be acquired by immemorial user.

A *via vicinalis* is an unproclaimed public road and no *terminus ad quem* is necessary to constitute such a road.

Fernando v. Seneratne (*33 N. L. R. 346*); *Samarasinghe v. Chairman, V. C., Matara* (*34 N. L. R. 39*) referred to.

THE plaintiff sued the defendants for a declaration that the latter were not entitled to a cattle-track across the plaintiff's land. The defendants in their answer alleged that by immemorial user they were entitled to a public path and cattle-track across the land.

The Commissioner of Requests dismissed the plaintiff's action and declared the defendants entitled to the cattle-track claimed by them.

F. A. Hayley, K.C. (with him *Cyril E. S. Perera*), for plaintiff, appellant.—The evidence is such as to establish nothing more than a right of footpath which is conceded. User as a cattle-track is not proved. No witness has been called who drove his cattle across the land in question. Vague and indirect evidence that cattle had been driven along the track

[1] (*1909*) *12 N. L. R. 304.*

is insufficient to establish a public right as against the owner of the land. The user must be shown to be adverse and as of right, not permissive. In any event this being a right of way claimed on behalf of the public it must be shown the cartway led from one public highway to another. The evidence seems to indicate that here is nothing more than a *cul-de-sac* and that the *terminus ad quem* is nothing more than some fields belonging to private parties. In such a case no public right can be established by evidence of user, with nothing more by the public. *Attorney-General v. Antrobus* (the Stonehenge case) [1] and *Whitehouse v. Hugh* [2]. See in this connection *Attorney-General v. Sewell* [3]. The something more which is necessary to be shown would be, for instance, evidence of dedication to the public or evidence of maintenance by a public body. In the absence of such evidence no public right can here be said to have been established.

N. Nadarajah (with him *G. E. Chitty*), for defendants, respondents.—It is clear upon the evidence that the inhabitants of the village have used this track as a cartway for a period beyond living memory. It is not necessary to show that the whole world used it. We have here a clear example of what was known to the Roman-Dutch law as a *via vicinalis* or neighbours' road, even if it were held not proved to be a *via publica* proper. The distinction however has not been meticulously drawn by our Courts and a *via vicinalis* may be prescribed to in our law, by the inhabitants of a village. See Maasdorp's *Institutes of South African Law* (*5th ed.*), *vol. III., pp. 207 and 212,* and the cases of *Fernando v. Senaratne* and *Samerasinghe v. Chairman, Village Committee, Matara.* It is an inconsistent position while conceding a right of public footpath to deny a cattle-track on the mere ground that both *termini* are not public highways. That objection if valid should apply to both cases, but it is submitted that a *via vicinalis* may be established, as here, even despite such an objection. The evidence shows that the witnesses, some of whom are very old inhabitants of the village, speak to the existence of the cattle-track and its user as such for a period as far back as they can remember.

F. A. Hayley, K.C., in reply.— *Cur. adv. vult.*

March 17, 1938. KEUNEMAN J.—

The plaintiff sued the defendants for a declaration that the defendants were not entitled to a cattle-track across the plaintiff's land Milagahawatta. The defendants in their answer alleged that by immemorial user they were entitled to a public path across the land in question for passing and repassing on foot and for leading cattle to and from the fields.

At the trial the principal issue framed was: "1. Are the defendants entitled to a public footpath and cattle-track over the plaintiff's land along the route A, C, D, E marked in plan No. 912 dated October 10, 1936, by right of immemorial user". The plan in question was marked D 1. After trial the learned Commissioner dismissed plaintiff's action with costs, and declared the defendants entitled to the cattle track claimed of the width of 5 feet. The plaintiff appeals.

[1] *L. R. (1905) 2 Ch. 188; 74 L. J. Ch. 599; 92 L. T. 790.*
[2] *L. R. (1906) 1 CH. 253; 75 L. J. Ch. 154; 95 L. T. 175.*
[3] *88 L. J. Ch. 425; 120 L. T. 363.*

Before the Surveyor the plaintiff acknowledged the existence of a public right of foot path over his land, but denied that there was any right of cattle-track, and at the appeal Counsel for plaintiff conceded that the public right of footpath existed, and restricted his appeal only to the denial of the right of taking cattle over the track in question. At the trial several witnesses were called on both sides. The learned Commissioner accepted the evidence of the witnesses called for the defendants and rejected the evidence of the plaintiff's witnesses. One of the witnesses called for the defence Biyoris Appuhamy was 75 years of age. He stated that at one end of the track in dispute was a Village Committee road which led to the Colombo-Kandy road. At the other end of the track were fields and beyond the fields the village of Ihalayagoda. Witness said he knew from his childhood that the inhabitants had been using the cattle track in question to take cattle. Besides children had regularly used the track to go to and from school, and funerals had also been taken along the track to Ihalayagoda. He further said that the people of the village had always been using this cattle-track to take cattle to the village. Till the obstruction the inhabitants of Ihalayagoda had been continuously taking cattle to the fields along the cattle-track in dispute. Witness added that in 1889 the present plaintiff had obstructed the cattle track at point A by erecting a fence. Witness' father and 123 other villagers including witness had then petitioned the Government Agent and as a result of this, the plaintiff had removed the obstruction. Witness produced the letter D 2 dated October 21, 1889, from the Government Agent, which refers to the track in question as "a village path". Another witness K. D. Carolis, Police Vidane, aged 59 years, also gave evidence and stated that the people of Ihalayagoda who owned fields in the village had been using the track to drive cattle. He knew personally that for the last 30 or 35 years cattle had been taken along the track in question, and he did not remember the time when the cattle-track first began to be used. Besides the track was used by school children, and dead bodies were taken over the track for burial at Ihalayagoda.

Another witness Elaris Appu, 59 years of age, who lived at Ihalayagoda across the field, said that from the time he remembered anything, people had been regularly driving cattle along the cattle-track in question; and that the people who lived at Ihalayagoda across the field always drove cattle along the track in question when taking them to the Colombo-Kandy road. The track had also been used for funerals and by children going to and coming from school. Witness had himself driven borrowed cattle over the plaintiff's land. Witness added that there was a public footpath along the big ridge across the field, and access to the footpath was from plaintiff's land. The ridge was 2 to 5 feet broad, and cattle were taken along the ridge from one field to another.

It was argued by appellant's Counsel that this evidence was insufficient to establish a right of cattle track. It is true that witnesses did not definitely say that they saw cattle being driven, but their evidence indicated that they were speaking to matters of personal observation, in fact Elaris Appu said he had actually driven cattle across the track himself and no attempt was made in cross-examination to show that the

witnesses depended on hearsay. Nor can any adverse inference be drawn from the fact that the document D 2 refers only to "a village path", for Biyoris Appuhamy swore to the fact that long prior to 1889 the path had been used for taking cattle along, and had been blocked in that year by the plaintiff himself. Strangely enough plaintiff did not go into the box to refute this allegation.

It was further argued by appellant's Counsel that there was no public right of way established, because the evidence disclosed that the cattle were driven by the villagers along the track to their private fields, and not to any place where the public as such had a right to be. Great emphasis was laid on certain English cases. In *Attorney-General v. Antrobus* (the Stonehenge case) [1] Farwell J. said: "Now the cases establish that a public path is *primâ facie* a road that leads from one public place to another public place—or as Holmes L.J. suggests in the Giant's Causeway case there cannot *primâ facie* be a right for the public to go to a place where the public have no right to be. But the existence of a *terminus ad quem* is not essential to the legal existence of a public road.—But in no case has mere user by the public without more been held sufficient". The something more may be express words or conduct inducing expenditure on the track in question, and so showing that the *cul-de-sac* has been dedicated to the public. Similarly in *Whitehouse v. Hugh* [2], and *Attorney-General v. Sewell* [3], it was held that in the case of a *cul-de-sac* user alone was not sufficient to constitute dedication.

I am not however clear that these decisions which affect the English law have any application in Ceylon. Under the Roman-Dutch law two classes of public roads were recognized: (1) the *via publica* which had been proclaimed as such by the proper legal authority; (2) the *via vicinalis*, originally made up of contributions of the ground of private land owners and which had existed from time immemorial. Maasdorp points out a difference between this and other public roads in that "the latter have their exit or terminus on the sea-shore, or in cities, or on the banks of public rivers, or in other public roads, whereas a *via vicinalis* had its one end on a public road and the other end gradually disappearing and losing itself without any exit. In other words a *via vicinalis* was a road leading from a proclaimed public road to a number of neighbouring farms, and used by the owners of such farms in common under an express or implied agreement to that effect". Maasdorp adds further "the difference between these and proclaimed roads is that in the latter the rights of the public are a matter of ownership exercised through the Divisional Councils —whereas in the former they are a matter of servitude exercised by each member of the public in his own right. Every person therefore who has land abutting on to a *via vicinalis* or who has a right of abutment on to such road is entitled to use the same, but not also persons whose land does not abut on to such road". And further "unproclaimed public roads are acquired by the public either by express grant *coram lege loci* or by immemorial usage". (Maasdorp's *Institutes of South African Law (5th ed.), pp. 212 and 213.*)

[1] *L. R. (1905) 2 Ch. 188; 74 L. J. Ch. 599; 92 L. T. 790.*
[2] *L. R. (1906) 1 Ch. 253; 75 L. J. Ch. 154; 95 L. T. 175.*
[3] *88 L. J. Ch. 425; 120 L. T. 363.*

I do not think it is necessary in this case to consider what persons have the right to use the *via vicinalis*. The important matters laid down by Maasdorp are that such a road is a public road, and that it is acquired by immemorial usage, and that no *terminus ad quem* is needed in the case of such a road.

In Ceylon it is doubtful whether any distinction was drawn between the proclaimed road and the unproclaimed road, *i.e.*, the *via vicinalis*. Both classes of roads were treated as public thoroughfares, vide *Fernando v. Seneratne* [1]. In this case Garvin J. went further and held that a partition decree would not extinguish a public path in the nature of a *via vicinalis*, unless the Crown was a party to the decree. "A public road is not merely a matter of servitude. It is something corporeal and as such the subject of ownership and extends at least to the surface and the whole area of user if indeed it does not extend to the freehold. To the extent to which it is the subject of ownership, a public road is the property of the public, that is of the State, and cannot be affected by a partition decree".

This judgment is of importance. If the *via vicinalis* consisted only of a bundle of individual rights of abutting landowners, there was no reason why these rights should not be extinguished by the partition decree. The judgment postulates that the property in such road is vested in the public, that is, in the State.

In the present case the evidence even of the first two witnesses I think established the existence of a *via vicinalis* which must be regarded as a public road vested in the State. The defendants have succeeded in proving the existence of a public cattle track along the points indicated by them.

I may also refer to the case of *Samarasinghe v. Chairman, V.C., Matara* [2]. In that case as in the present case the plaintiff sought to have it declared that there was no public path over his land. It was proved that there was a road of the nature of a *via vicinalis*, and it was decided that where there was proof of user for a considerable time, there was a presumption of immemorial user. The plaintiff's action was accordingly dismissed. In *Fernando v. Seneratne* (*supra*) there was clear proof of user for over one third of a century. In South African cases presumption of immemorial user has been drawn when user has been proved for thirty years and upward, *vide Ludolph v. Wegner* [3], and *Peacock v. Hedges* [4]. In the present case there has been user as of right from well before 1889, and no starting point of such user has been shown. I am satisfied that the presumption of immemorial user can be drawn and has in no way been rebutted. I am of opinion that in Ceylon nothing further is needed to prove a *via vicinalis* except immemorial user or express grant.

I may add that on the evidence not only has it been proved that one end of the track in question joined the Village Committee road which led to the Colombo-Kandy road, but also that at the other end there was a ridge, which was a public path along which cattle were driven as of right. This was established by the evidence of Elaris Appu, who said that the inhabitants of Ihalayagoda, as long as he knew had driven their cattle from the village, along the ridge, which was a public path, and then across

[1] *33 N. L. R. 346.*
[2] *34 N. L. R. 39.*
[3] *6 S. C. 198.*
[4] *(1896) 6 Buchanan 70.*

plaintiff's land, and thence to the Colombo-Kandy road. In the light of this evidence the track in dispute is not a *cul-de-sac*, but a thoroughfare in the fullest sense of the word. The language of Garvin J. in *Fernando v. Seneratne* (*supra*) is all the more relevant. "Every public path is a public road within the meaning of the Public Thoroughfares Ordinance, No. 10 of 1861, and I am aware of no difference in the legal status of the different types of public thoroughfares. All public roads including public paths are vested either in some local Government authority or in the Provincial and District Road Committees".

From whatever angle the evidence is regarded I think the learned Commissioner's finding that the existence of a public track has been established is justified. I accordingly dismiss the appeal with costs.

Appeal dismissed.