HALKA AND RAM PRASAD *v.* SUKHDEO

[Appellate Jurisdiction (Hyne, C.J.) March 19th, 1954]

Right of Way—necessities required to establish.

The respondent owned land near to the appellant's freehold estate known as Movo near Labasa which he used to cross by means of a track.

The appellants claimed damages for the respondent's trespass and he in his defence alleged that he had a prescriptive right to cross the land and also that the track was a public right of way.

The Magistrate's Court at Suva held that there was such a right of way.

The respondent then appealed.

HELD.—(1) Public rights lie outside the scope of the Land (Registration and Titles) Ordinance and therefore dedication of a track as a highway is not registrable.

(2) A public right of way need not run from one public place to another public place and may end at the sea.

Cases referred to:—

Attorney-General v. Antrobus (1905) 2 Ch. 188.
Attorney-General v. Esher Linoleum Co. Ltd. (1901) 2 Ch. 647.
Howell v. District Land Registrar 27 N.Z.L.R. 1074.
Moser v. Ambleside U.D.C. 89 J.P. 118.
Turner v. Walsh (1880) A.C. 636.
Vickery v. Municipality of Strathfield N.S.W.S.R. (1911) Vol. II. 101.
Waimiha Saw Milling Co. v. Waione Timber Co. Ltd. (1926) A.C.
Williams-Ellis v. Cobb [1935] 1 K.B. 310.
Winterbottom v. Lord Derby 16 L.T. 771.

D. M. N. McFarlane for the appellants.

P. Rice for the respondent.

HYNE, C.J.—The learned Magistrate, having carefully considered the evidence, came to the conclusion that the defendant's claim to a right of way by prescription clearly failed, and he also, after careful consideration of the evidence submitted, came to the further conclusion that any claim to a "way of necessity" must also fail. With these conclusions I entirely agree.

The Magistrate then gave consideration to the question as to whether there was a public right of way or highway, as such ways are known in English law. In considering this question he had before him the evidence of Asaufilal to the effect that up to a date some fifteen years before the action commenced in his Court, Peramma ran a store on or near the land called Movo. Before her the grandmother of Asaufilal, and before that his grandfather, ran such a store. James Lestro gave evidence to the effect that everyone used these tracks, whether they were tenants or not. Lestro had lived at Nukutatava from a time prior to 1907 until 1921, and he visited it frequently from 1921 to 1948.

Peramma, although she had a personal interest in the matter, was regarded by the Magistrate nevertheless as a witness of truth, and she gave evidence to the effect that everyone had always used these two tracks, and that when Lestro conveyed Movo to her, nothing was said about the use of these two tracks because they were open roads and used by everyone. The fifth witness for the respondent, George Simmons, who also had no interest in the land, said these two tracks were used by everyone, by tenants and other people coming from Tabia to Labasa. Finally, the Magistrate with the parties, visited the land in question and observed well-defined and obviously well-established tracks suggesting that they had been there for a long period.

The learned Magistrate, in the course of his judgment, said as follows on page 22: "This track is part of a track seen by the Court when it viewed the land which runs from the Government road to the sea as shown on Plan X. There is evidence that near the sea it connects with another track running in an easterly direction near the coast. This track has been used openly and there is evidence that the owners of the land or their predecessors in title have never interfered with its use by the public as a right of way. The second witness for the defendant and his father (his predecessor in title) owned the land for a period of forty years. There is no evidence that anyone has ever been granted any special licence to use the land—it has in the past been used as of right by the public. There are no fences or gates on the track, which is well established and has the reputation locally of being a public right of way according to the testimony of the witnesses who have given evidence." The Magistrate therefore concluded that at some distant date in the past this track was dedicated as a highway, and he held therefore that the track over Movo is part of a public right of way.

The appeal came before this Court on the first occasion on the 16th April, 1953. After certain argument, Mr. McFarlane, for the appellants, and Mr. Rice, for the respondent, agreed that it was desirable to obtain from Australia certain legislation and certain reports on cases heard and dealt with by the Courts of New South Wales and Queensland. The hearing of the appeal was adjourned accordingly.

The matter next came before this Court on the 17th July, 1953, when certain legislation and reports were presented to the Court. No Queensland reports or cases were submitted as it was considered that the New South Wales reports, and extracts from New South Wales legislation would be sufficient for the purposes of Counsels' arguments.

At this hearing Mr. McFarlane, after further argument, asked for leave to amend the grounds of appeal. Leave having been granted, Mr. Rice thereupon asked for an adjournment to enable him to consider the amendments which had been proposed. Further hearing was adjourned to a date to be fixed after consultation between Counsel. The matter did not come on again for hearing until the 16th February of this year.

I should like to record here how greatly indebted I am to both Counsel for the very careful manner in which this somewhat difficult matter has been argued by them before me.

Mr. McFarlane in his submission said that the Magistrate, in giving judgment, had overlooked certain aspects of the Torrens System which applies in this Colony and has applied since the Real Property Ordin-

ance of 1876. The relevant ordinance is now Cap. 120, and the section to which special reference is made is section 14 which corresponds to section 14 of the Real Property Ordinance of 1876.

Section 14 reads as follows:—

> "The instrument of title of a proprietor issued by the Registrar upon a genuine dealing shall be taken by all Courts of law as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, and the title of such proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to have been a party or on the ground of adverse possession in another for the prescriptive period. A duplicate or certified copy of any registered instrument signed by the Registrar and sealed with his seal of office shall be received in evidence in the same manner as an original."

Mr. McFarlane contended, and quite rightly, that section 14 makes no provision in regard to the protection of public rights of way. He referred to *Kerr, The Australian Lands Titles (Torrens) System,* p. 167, paragraph 312. This paragraph, after referring back to paragraph 311, which deals with provisions by which the indefeasibility of title is achieved, continues: "The relationship of these provisions to the general scheme of the Torrens Statute is thus explained in *Gibbes v. Messer,* and the object is to save persons dealing with registered proprietors from the trouble and expense of going behind the Register in order to investigate the history of their author's title and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases 'bona fide' and for value from a registered proprietor and enters his deed of transfer or mortgage on the Register shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title."

Mr. McFarlane, in further support of the indefeasibility of the registered proprietor's title, cited the case of *Waimiha Saw Milling Company v. Waione Timber Co. Ltd.,* reported in 1926 *Appeal Cases* at page 101, and he referred particularly to that passage in the judgment of *Lord Buckmaster* at p. 106, where the learned Lord says: "In the words of the Court of Appeal in *Fels v. Knowles*: 'The cardinal principle of the Statute is that the Register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon the registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the Statute.'" Mr. McFarlane therefore concluded that if there is any public right of way, as the Magistrate contended, such right of way is not protected by the provisions of Cap. 120 which, as he said, does not refer to or recognize public rights of way.

In Australia and New Zealand certain states specifically do protect rights of way and make provision for the protection of public rights of way, but this is not the case in Queensland and New South Wales, nor is it so in Fiji. The fact that Fiji legislation and New South Wales legislation are alike in the omission of any reference to the protection of public rights of way will be considered later when the *Vickery case,* decided by *Rich, J.* of the Supreme Court of New South Wales, is examined.

Very properly Mr. McFarlane referred to paragraph 638 in *Kerr,* which reads as follows: " Public rights of way or highways prevail notwithstanding the absence of any note of their existence from the certificate of title, and a transfer from the registered proprietor of land over which such public rights of way pass is subject thereto, although the certificate of title does not specify the rights of way." Nevertheless, Mr. McFarlane reiterated that the Court could not and should not as a matter of equity encumber a title with a right of way unless clearly authorized by law.

I shall deal more fully with the *Vickery case* later in the course of this judgment. It is sufficient to say at this stage that Mr. McFarlane submitted that the opinion expressed by the Judge was too wide and would defeat the object of the New South Wales Act, and that if the learned Judge were correct it would take away the safety and safeguards of the Torrens System.

Learned Counsel then proceeded to deal with the amendments to the grounds of appeal allowed by the Court—first, with the amendment to Ground 1, namely that there was no evidence that the path ran from one public place to another. Counsel pointed out that the track in respect of which public rights are claimed is part of the track A—D—C, and he contended that the Magistrate was in error in holding that it was part of the public right of way, inasmuch as the dispute here was not a question of what was a public right of way but what were the rights in regard to A—D—C insofar as they affected the appellant Halka and the respondent Sukhdeo.

In support of his contention learned Counsel referred to *Halsbury,* 2nd *Edition, Vol.* 16, at pages 226 and 227, and to the case of *Attorney-General v. Antrobus* (1905) 2 Ch., p. 188. This case, as appears from the head note, lays down, *inter alia,* that " a public highway must, prima facie, lead from one public place to another. A cul-de-sac may be a public highway, but the dedication of a cul-de-sac as a highway will not be presumed from mere public user without evidence of expenditure on the place in dispute for repairs, lighting, or other matters, by the public authority."

In paragraph 272, *Halsbury, Vol.* 16, the following appears: " The fact that a way leads to nowhere is however a point for consideration "; and further: " Proof that persons have wandered about at random over open land, or through woods, does not justify the inference that the whole of such land, or indeed any particular part of it, has been dedicated as a highway "; and lastly: " It would seem that in a country district it is necessary, in order to establish a public right of way by proof of user alone, to show that such way leads from one public terminus to another ; if both termini be not public places, for example, if one be merely a place of interest or a beautiful point of view on private property, mere user only justifies the inference of a licence to the public to visit the spot in question."

Again, very properly, Counsel referred to the case of *Williams-Ellis v. Cobb* [1935] 1 K.B., page 310. This case would seem to alter the whole position as contended for by him, namely that a public right of way must go from one public place to another.

Learned Counsel next referred to the fact that the seashore is not a public place, and that therefore a public road cannot end at the sea. The learned Magistrate in his judgment found that a public right of way did extend as far as the seashore.

Finally, Counsel submitted that if the Court comes to the conclusion that as a matter of principle no public right of way exists from point C on the Labasa Road to the coast, then the Magistrate was wrong in holding that there was a public right of way in respect of the small track over Movo.

Mr. Rice, for the respondent, submitted that as far as he could ascertain, criticism of the Magistrate's judgment seemed to be on three grounds. It is said, first, that under the Torrens system a public right of way cannot be recognized unless it is recorded as an encumbrance on the Certificate of Title ; secondly, that a public right of way must run from one public place to another public place ; and thirdly, that as this public right of way traverses a leasehold then its dedication cannot be presumed without the consent of the lessor. I agree that this correctly sets out the grounds of criticism. Mr. Rice, in a full and exhaustive argument, traversed all these grounds and cited considerable authority. He dealt first with the second and third grounds of criticism as enunciated. I think it will be convenient if the same is done in this judgment. It is at first necessary to decide what constitutes a highway at common law. English common law principles are, in my opinion, applicable to the question whether this track is a public right of way or not.

Mr. Rice referred to paragraph 270, *Halsbury* 2nd *Ed., Vol.* 16, wherein the following appears: " It is said that the fact that a way has been used by the public so long and in such a manner that the owner of the land, whoever he was, must have been aware that the public believed that the way had been dedicated and had taken no steps to disabuse them of this belief is evidence, but not conclusive evidence, from which the Court may infer a dedication by the owner. The test is whether the owner has so acted as to induce a reasonable belief on the part of the public that the way is public."

The matter is further dealt with in the case of *Attorney-General v. Esher Linoleum Company Ltd.* (1901) 2 Ch., p. 647, at p. 649, where *Buckley, J.* says: " In all these cases of right of way it is necessary to remember that the thing to be established is dedication, not user. A highway is not acquired by user. . . . In most of these cases dedication, it is true, is proved by user, but user is but the evidence to prove dedication. It is not user but dedication which constitutes the highway. Therefore what always has to be investigated is whether the owner of the soil did or did not dedicate certain land to the use of the public."

Lastly, in *Turner v. Walsh,* 1880-1881 *Appeal Cases,* Vol. VI, p. 636, the Privy Council, at p. 639, said as follows: " The presumption of dedication may be made where the land belongs to the Crown as it may be where the land belongs to a private person. From long continued user of a way by the public, whether the land belongs to the Crown or to a private owner, dedication from the Crown or the private owner, as the case may be, in the absence of anything to rebut the presumption may, and indeed ought to, be presumed."

In the case now before this Court on appeal there is abundant evidence, which the Magistrate believed, that there was long continued user of this track or way from point C on the plan to the sea, without any opposition from appellants' predecessors in title and without any opposition from the appellants themselves for many years—in fact,

not until shortly before the action was brought. There is nothing in evidence to rebut the presumption of dedication. I think, therefore, that the learned Magistrate was right in inferring " that at some distant date in the past this track was dedicated as a highway."

Mr. McFarlane submitted that a public right of way must be from one public place to another, and it is now necessary to examine this submission.

I have referred to the case of *Williams-Ellis v. Cobb* [1935] 1 K.B., p. 310. In this case it was held that " although the public have limited rights over the foreshore the sea may be sufficient *terminus ad quem* for a public way which may now be proved, even though it does not lead to a public place."

Lord Wright, at page 319, says, in the course of his judgment: " But I pass to question 4. . . . The Judge decides that ' The rule of the *terminus ad quem* is fatal to the claim set up by the defendants in this case.' He then answers the question to the effect that although a public right of way may be acquired by long user over private property, it must have a public terminus. . . . The County Court Judge decides, as I follow his judgment, that this question of law is fatal to the defence. I think, with all deference to the Judge, that he has taken a view of this question which is not perhaps very clearly enunciated but as far as I can judge is narrower than the law which in modern times has tended to a more liberal view of what may be sufficient in regard to a terminus to constitute a right of way. It is no longer the law (if it ever was) that a highway must end in another public way." The learned Lord then refers to the language used by *Atkin, L.J. in Moser v. Ambleside Urban District Council*: " ' I think you can have a highway leading to a place of popular resort, even though when you have got to the place of popular resort which you wish to see you have to return on your tracks by the same highway and you can get no further either by reason of physical obstacles or otherwise.' " It seems to be perfectly clear from this that the law as at present understood negatives any contention that in order to constitute a public highway it must run from one public place to another, and the case cited definitely lays down that a public highway can end at the sea. I agree, therefore, that the learned Magistrate was right in holding that this highway ran to the sea.

Learned Counsel for the respondent also submitted that the case of *Williams-Ellis v. Cobb* explodes the theory that if an alleged highway crosses a lease, dedication cannot be presumed. He referred to the judgment of *Slesser, L.J.* in the same case at page 327, where he says: " User is merely the evidence that proves dedication. Where the only user shown is a user over a period less than that covered by living memory, there may be good ground for coming to the conclusion that the dedication took place only just before the time at which the user began, but where, as here, the user took place over the whole period covered by living memory, such user is just as good evidence of dedication made 100 years before the first proved act of user as one made contemporaneously with that act. And this seems to be in accordance with numerous authorities, of which only one need be mentioned. In *Winterbottom v. Lord Derby* evidence was given of acts of user of a way extending over nearly seventy years, but during the whole of the period the land crossed by the way had been in lease.

The jury were, however, directed that from long continued user going back as far as living memory could go, they were at liberty to presume a dedication of a way to the public at a time anterior to the land being leased." From these words it seems clear that a dedication can be presumed even if a public way crosses a lease.

The track over Movo is part of the larger track which the Magistrate held, and, as I have said, rightly held, to have been dedicated as a highway.

The track begins at point C on the Labasa Road, crosses appellants' leasehold land, passes through Movo, skirts respondent's land, and runs through Nukutatava to the sea.

The authorities to which I have referred clearly indicate that a public highway can end at the sea, that it may cross land held in lease, and that it is not necessary that a public way should run from one public place to another public place.

From the evidence before him, therefore, and in view of what has just been said, the Magistrate was amply justified in holding that the track over Movo is a public right of way.

I come now to the question as to whether, under the Torrens System, a public right of way can be recognized even though it is not recorded as an encumbrance on the Certificate of Title. Torrens Systems deal with private rights and not public rights, but although they are conclusive as to private rights, do they recognize the existence of public rights where no reference to the reservation of public rights is made by legislation?

This matter was dealt with at great length by *Rich, J.* in the New South Wales case of *Vickery v. Municipality of Strathfield* (*State Reports N.S.W.* 1911, *Vol. II*). In the course of his judgment *Rich, J.* said: "It is clear that a registered proprietor holds his land absolutely free from all encumbrances, liens, estates, or interests whatsoever other than those notified in the grant or certificate of title, save in the cases expressly mentioned. Is this language sufficiently wide to cover public rights of highway? I am of the opinion that it is not. The language of section 42 itself suggests that the interests referred to are such as are capable of existing in an individual ; this is inconsistent with its applicability to public rights of user. But apart from this, public highways appear to lie wholly outside the scope of the Act. In the case of private easements their registration is contemplated and provided for by section 47. No provision has been made for the recording of the dedication of land for a highway, and indeed it has been held in New Zealand that such dedication is unregistrable." In the case of *Howell v. The District Land Registrar, 27 New Zealand Law Reports, page* 1074, the headnote sets out that "the instrument was not registrable, there being nothing in either the Land Transfer Acts or the Public Works Act to authorize its registration."

Section 14 of the Fiji Ordinance, (Cap. 120) makes no reference to public rights of way.

In some Australian States legislation provides specifically that land included in a certificate of title shall be subject, amongst other things, to any public rights of way.

In New South Wales and Queensland there is no such provisions, and as I have said no provision is made in Fiji legislation.

At paragraph 638 on page 304 of *Kerr—Australian Land Titles System,* it is said: "Public rights of way on highways prevail notwithstanding the absence of any note of their existence from the certificate of title, and a transferee from a registered proprietor of land subject to such public rights of way takes subject thereto, although the certificate of title does not specify the rights of way."

Although this paragraph makes reference to a footnote in which occur the names of certain Australian States which do make specific provision, I am of the opinion that the paragraph is general in its nature, and that it means simply what it says, namely that public rights prevail even though there is no reference to them in the instrument of title, and I think that the fact that certain States have made specific provision is merely a recognition of this principle.

Hogg, at page 99 in *Registration of Title to Land Throughout the Empire,* also says: "One difficulty in the way of framing a satisfactory list of rights and interests that are not affected by the "conclusiveness" of the register is that some rights and interests which do undoubtedly remain in existence after initial registration are by some of the Statutes preserved expressly. The argument that these rights and interests are impliedly abrogated by others of the Statutes that do not mention them is, however, of little weight. It is, for instance, hardly open to doubt—in view of existing case law that registered land is usually liable in all jurisdictions (just as unregistered land is) to such public burdens as rates and taxes, expropriation for public purposes and public rights of user."

I think, therefore, that I am justified in following the *Vickery* case, even though this Court is not, of course, bound by a decision of the Supreme Court of New South Wales, for although section 42 of the New South Wales Act refers to encumbrances, liens, estates and interests, and section 14 of the Fiji Ordinance does not, yet the statutory title in the First Schedule to the Ordinance does contain references to leases, mortgages and encumbrances. I think I am justified in holding, therefore, that public rights lie outside the scope of the Ordinance.

There is nothing in the Ordinance which requires such rights to be registered, and on the analogy of the New Zealand case, *Howell v. The District Land Registrar,* already cited, dedication of the track as a highway is not registrable.

I have already intimated that I am satisfied that the track over Movo is part of a track dedicated as a highway in the past, and that this track is a public right of way, and I am satisfied that the right to use it as such is not abrogated by reason of the fact that it is not endorsed on the instrument of title.

For all these reasons the appeal must be dismissed.