GEORGE NOBEL STEWART v. THE LUSAKA MANAGEMENT BOARD.

CIVIL APPEAL CAUSE No. 4 OF 1938.

Kaffir path—Townships Ordinance Cap. 120—street—highway—gravel pit—legal duty of owner towards licensee—obligation to fence.

The facts and the law are fully set out in the judgment hereunder.

Robinson, J.: In this appeal the facts can be set out very shortly and I quote from the judgment of the learned Resident Magistrate:

"The plaintiff (present respondent) is a mill superintendent employed by Mr. Du Buisson at the Lime Works at a salary of £7 per month. On 6th June last year, a Sunday, the plaintiff was engaged in repairing a pipe at the lime works and he had two native boys assisting him. At about 6 p.m., when the repairs were finished, the plaintiff sent the two boys home and told the watch boy, who had then come on duty, that he was going for a walk until his supper was ready. According to the plaintiff's evidence he intended, at that time, to walk along the wagon road leading from the lime works to Lusaka for some distance, then to turn north along that road to the lime works where he lived. However, after the plaintiff had left the lime works, he decided to walk as far as the post office in Lusaka to ascertain if there were any letters and then return to the mill. In order to do this the plaintiff branched off from the wagon road on to a kaffir path, apparently thinking this way was shorter than continuing along the wagon road. At some spot which is not clearly defined the kaffir path seems to have forked, one fork continuing forward and the other fork leading to a pit. Unfortunately the plaintiff proceeded along the road leading to the pit and when he reached the pit he fell in and sustained a broken leg. It was dark and he had no lamp.

At this stage I propose to say a few words about this pit. It is admitted by the defendants that the pit is in the township area. The pit is one which was originally used to get gravel for road-making purposes but apparently none has been taken from that particular pit since April, 1933, and since that time the pit, which is about five feet deep and covers an area of about 200 by 100 feet, has been partly used as a dump for rubbish and partly as a latrine. There is no doubt, however, that the defendants were well aware of its existence because Mr. Young visited it on an average of once a week for many years, but did not regularly visit the part into which the plaintiff fell. The bottom of the pit is littered with many large stones and boulders and the supposition is that the plaintiff fell on to one of these and so broke his leg."

In those circumstances the respondent claimed damages from the appellants and he was awarded £200 on the grounds that this path was a highway and the defendants were under a Common Law liability to fence. From that decision this appeal is now brought.

The first ground of appeal is that this native path was not a highway or a street or in any legal sense a footway or other means of public passage.

It appears that there have been regulations for the Management of Lusaka Township since 1913 but I think there is no doubt that the present management board is a creature of the Township Ordinance, Cap. 26, Vol. I, Laws of Northern Rhodesia.[1] In section 2 " Street " is defined as including any bridge, street, road, avenue, lane, sanitary lane, footway, causeway and pavement. The learned Resident Magistrate found, on the argument that this path was a footway, that it necessarily followed that this path was a street. I do not agree with him. It does not necessarily follow that even if it was a street that it is a public thoroughfare. Under this definition, a sanitary lane is a street and yet it is definitely laid down by rule 86 of section 27 of the regulation made under Cap. 26[2] that sanitary lanes are not public thoroughfares. Lusaka was declared a township in 1933 and an area of 3,000 acres approximately was handed over to the management board. By Government Notice No. 106 of 1936 the area was increased to over 8,000 acres. All that land is not yet developed and in the meantime the undeveloped portions must I think be considered unalienated Crown land under the management of the board.

I do not think it can be seriously argued that persons walking across these waste spaces and forming well-defined tracks can be said to be making streets. Some limit must be put upon it and in my opinion the proper limit is to be found in the definition of " Street " in Cap. 27,[3] the Town Planning Ordinance: which came into force a week after Cap. 26[1] and both before the gazetting of the present Lusaka township. In that Ordinance (Cap. 27)[3] street is defined as including any street, road, avenue, lane, sanitary lane or thoroughfare *shown on the general plan*. I do not think it unfair to restrict the definition in Cap. 26.[1] The Township Ordinance is merely giving the Governor in Council authority to declare townships—Part V of Cap. 26[1] deals with streets and it says that the Governor in Council may vest in any local authority the control of streets.

When this Ordinance was first brought into force, after " streets " the words were added " Which have been constructed by the Government ", These words were deleted by Ordinance No. 13 of 1931 presumably so that the discretion vested in the Government should not be restricted only to streets constructed by themselves. I think there can be no doubt that the intention of the section is to refer to streets and public ways constructed according to some general lay-out of the town. Any streets made after the handing over must necessarily appear on a plan.

I would like to make it clear that I am not laying down that in no circumstances could there not be " a street " unless it was shown in the

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[1] Now Cap. 120.—*Editor*.
[2] Regulation 86 of the Townships Regulations, Cap. 120.—*Editor*.
[3] Now Cap. 123.—*Editor*.

general plan but I think a presumption is set up against it and it would require strict proof of dedication or intention and user to rebut it. I have come to the conclusion that this native path is not covered by the definition of street in Cap. 26.

The next point is as to whether it is a highway. In my opinion the answer is in the negative. The nature of this area of land must not be lost sight of. It is unalienated Crown land under the management of the board. At present the area is undeveloped but it is possible for it all to be built over. In that event proper roads and streets would be made but I cannot conceive that it would lie in the mouth of anybody to say "You cannot build there because of this native path. It is a public way." The position in my opinion is that this is an area awaiting development. Until such time as the land is wanted for the purpose for which it was intended in the township area, the public are permitted to walk across it how they will. They are not invited to do so but are tacitly permitted to do so. Now a highway I agree is in English Law the largest expression to designate a public way and is a way open to all the King's subjects, but it has special characteristics. Once it is there, it is there for all time. There must be dedication of it or if dedication cannot be shown then long years of user go a considerable way to show dedication in the past, but not all the way, as witness the case of *Robinson* v. *Cowpen Local Board* (1893), 63 L.J.Q.B. 235, the headnote of which reads:

> "The mere fact that the public have for more than thirty years used an open space in a town, surrounded on all sides by highways, by passing over it in all directions, is not conclusive evidence of an intention on the part of the owner of the soil to dedicate such space as a highway."

The only person who can dedicate is the owner of the fee simple, in this case the Crown. The management board are in the nature of tenants. They can permit the public to walk across the land but they cannot dedicate it to bind the freehold.

There is no suggestion that when Government handed over this area of land to the board they did so with the intention that it should always remain an open space dedicated to the public. Another method of dedication is by Statute and there is no Ordinance in point here. User, in the circumstances of this case, does not arise. Africa is large and natives from time immemorial have walked hither and thither across it. When a house is built they walk round it and in my opinion it is not reasonable, nor should the Courts support the view, that because there is a native path the origin of which goes far back into the past, they should have a legal right always to walk upon it in that particular place for all time in the future. It is not in accordance with conditions in this country. It cannot be held against the Crown that this area was handed over to the management of the board subject to the rights of natives and others always to have a legal right to walk about on it at will for the future.

The only other way to regard this area is that the whole space might be a highway, as in the Robinson case cited *supra*. It would in no event be possible I think to regard each of the many native tracks, criss-crossing over the area, to be each a highway but, for the reasons above given, I hold that neither the area nor the track in question is a highway. The

learned Resident Magistrate felt he was bound to find that this track was a highway on the authority of *Rex* v. *Severn and Wye Railway Co.* (1832), 2 B. and Ald 648, but there the facts were very different. I am not disputing the settled law that a footway can be a public highway but I say that a public highway can only be established by statute or dedication or possibly prescription and that none of these elements are present here.

The position therefore is that the respondent was walking on this land with the tacit permission of the appellants and he fell into a hole which the appellants knew about. The fact that there were paths there does not, in my opinion, affect the matter one way or the other. The hole was not near a highway. In my opinion the legal position is that the respondent when he walked on the land was a bare licensee. A person who goes upon land by the owner's permission "must take the permission with its concomitant conditions and it may be perils". Those words were spoken by WILLIAMS, J. in *Hounsell* v. *Smyth* (1860), 7 C.B. (N.S.) 743. The facts were similar to this case. There was some waste land upon which was a quarry. The waste land was unenclosed and open to the public and persons were wont to walk across it with the license and permission of the owners. The quarry was situate near to and between two public highways. The defendants knew about the quarry and left it unfenced. The plaintiff having occasion to pass along one of the highways, accidentally took the wrong road owing to the darkness of the night so he started to cross the waste in order to get on to the other road. He did not know of the existence or locality of the quarry and owing to the darkness he could not see it. He fell in and was injured. The Court held he could not recover. That case was followed by the Court in *Brinks* v. *S. Yorkshire Railway Co.* (1862) 3 B. and S. 244 where *Hardcastle* v. *S. Yorkshire Railway Co.* (1859) 4 H. and N. 67 was also discussed. The legal duty, at common law, towards a licensee is confined to a warning of any concealed source of danger. By a concealed source of danger is meant one which is not apparent to a person who keeps his eyes open and uses ordinary care. In this case, the hole is there for everybody to see by day, and ordinary care would require a lamp by night. I come to the conclusion therefore that at Common Law the appellants were under no obligation to the respondent to prevent him falling into this hole and they were not negligent.

That finding does not conclude the appeal because it is said that if the appellants are not liable under the Common Law even then they have a statutory liability. All questions of law, so long as the point was taken in the Court below, are open to the Appellate Court and therefore I must consider each. They are threefold: (1) Liability under the Quarry (Fencing) Act (1887) Cap. 19, 50 and 51 Vict.; (2) Liability under the Mining Proclamation, 1912,[1] and (3) Liability under the Townships Regulations. (1) Section 3 of the Quarry (Fencing) Act is as follows:

> "Where any quarry dangerous to the public is in open or unenclosed land, within fifty yards of a highway or place of public resort dedicated to the public . . . it shall be kept reasonably fenced for the prevention of accidents, etc."

[1] Repealed by the Mining Ordinance (Cap. 91).—*Editor.*

As that is the wording I do not need to examine whether or not the statute applies to this colony. From the plan put in (Ex. E) it is clear that this hole is not within fifty yards of a highway and I have held that this land is not a place of public resort dedicated to the public. (2) I agree with the learned Resident Magistrate that the Mining Proclamation of 1912 cannot cover this gravel pit. No prospecting licence or mining rights have ever been acquired by the management board, nor would they ever have been granted for land within the township, see section 8 (2) (*d*). (3) It is argued that the Townships Regulations impose a liability in that rule 4 (39) states that no person shall dig any excavation . . . without permission . . . or having such permission leave it not properly fenced. I agree with the Resident Magistrate that the rule does not apply in that the Regulations were not published until November, 1933, and are not made retrospective and there was no digging after April, 1933. It need not be examined further. The other point taken was that rule 72, which empowers the local authority to serve notices for the fencing of excavations, creates a liability. The rule is permissive only and the local authority is itself the occupier. No definite obligation is created.

It follows that the appeal must be allowed with costs here and in the Court below. The damages awarded by the learned Resident Magistrate now lodged in Court must be returned to the appellants.

It is an interesting case and I thank counsel on both sides for their arguments. Now that the non-liability of the appellants has been established I venture to hope that their treatment of this unfortunate respondent will not be ungenerous, at least in the matter of costs.