Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Moubray Rowan and Hicks v. *Drew, from the Supreme Court of Victoria, delivered 4th March* 1893.

Present :

LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

The Appellants who were Defendants in the action were lessees and occupiers of large business premises in the city of Melbourne, situated on the south side of Little Collins Street which runs east and west. Along the eastern boundary of the Defendants' premises there is a lane about 10 feet in width and about 164 feet in length opening into Little Collins Street on the north, and closed at the south end, thus forming a *cul de sac*. Over this lane the Defendants under their lease had a right of way, and it was used by them as a means of access to their buildings in the rear. The premises leased to the Defendants and the ground on which the lane was formed are part of Crown Allotment No. 5 of Section 13.

The Plaintiff who is now Respondent was the occupier of a shop and restaurant in Little Collins Street bounded on the west by the lane

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already described. His premises are part of Crown Allotment No. 6 of Section 13.

Allotments Nos. 5 and 6 were granted by the Crown on the same day to different persons without any reservation of rights as between the grantees.

In his statement of claim the Plaintiff alleged three causes of action against the Defendants, (1) obstruction to the lane as a public way, (2) trespass by fixing boards to his premises, and (3) interference with the access of light and air through certain windows in his premises which looked into the lane.

The case was tried before Mr. Justice Holroyd without a jury. The evidence was somewhat conflicting. But the learned Judge found (1) that the lane had not been dedicated to the public, (2) that no trespass had been committed by the Defendants, and (3) that the Plaintiff was not entitled to the access of light and air which he claimed. Judgment was accordingly given for the Defendants but without costs.

From this judgment the Plaintiff appealed. The learned Judges of the Full Court did not differ from the primary Judge as to any of the findings of fact on which his decision was based. But on the appeal an argument was raised for the first time as to the effect of the Melbourne Corporation Act 1850 (14 Vic. No. 20) under which as appeared in the evidence at the trial the lane in question had been brought. The Full Court acceded to this argument and directed that judgment should be entered for the Plaintiff for one shilling damages for the obstruction of the way.

In the opinion of the Full Court which was delivered by the late Chief Justice Higinbotham the Act of 1850 is discussed at length. The conclusion at which the Court arrived and on which

their judgment rests is stated in the following passage :—

"We entertain no doubt that when a lane set out on private land has once been made under the provisions of this Act, the adjoining owners and occupiers and all persons claiming through or under them acquire under and by virtue of the Act a right of passage over such lane, and that the owner in fee can never resume the control or exclusive possession of his property so as to deprive any of such persons of that right."

The question therefore which their Lordships have to decide is whether the Act of 1850 does interfere with private rights in the manner and to the extent supposed by the judgment under appeal. The question is obviously one of great importance to the community as well as to the owners of private property in the city of Melbourne. If the judgment is right the owner of a block of land with a private way upon it once brought under the operation of the Act would find it extremely difficult on any future occasion to improve his property by laying it out on a different plan.

The Act of 1850 is intituled "An Act for "regulating the formation, drainage and re- "pair of streets courts and alleys on private "property within the City of Melbourne." It recites that "there now are and hereafter may "be streets courts and alleys" within the city boundaries "formed or set out on private "property . . . which are not or may not "be sufficiently paved . . . drained or other- "wise completed or repaired" and that it would "conduce to the convenience comfort and health "of the inhabitants . . . and to the public "advantage if provision were made to regulate "and enforce the paving . . . draining and "sewering or otherwise completing or repairing "such streets courts and alleys in manner here- "inafter mentioned." It then enacts (Sec. 1) that all streets courts and alleys on private property within the city shall be under and

subject to the rules and directions thereinafter contained, but it is provided that nothing in the Act shall apply to any such street court or alley unless "the owners or occupiers of two or more "tenements adjoining or abutting thereupon "have the right to use or do commonly use the "same."

The words "tenements adjoining or abutting "on such street court or alley" are defined in Sec. 11 to mean "tenements or premises the "owners or occupiers of which communicate "with or have the right to use or commonly "use any such street court or alley or part "thereof." That definition was afterwards amended by 27 Vic. No. 178 Sec. 65 which enacts that the words in question where used in the Act of 1850 shall be deemed and taken to mean "all tenements or premises actually "abutting upon and accessible from and com-"municating with such street court or alley "whether the owners or occupiers thereof have "or have not a right to use or do commonly use "the same."

Sec. 2 of the Act of 1850 provides that the Council of the city may order that any such street court or alley or any part thereof which in their opinion is not in a proper state "shall be "freed from obstruction paved . . . drained "and sewered or otherwise completed or repaired "in such manner and within such time as to "the said Council may appear expedient" and thereupon the owners of the tenements adjoining or abutting upon such street court or alley on each side thereof are required to comply with the order as regards "so much of the said "street court or alley to the centre thereof as "may be opposite to and co-extensive with their "respective tenements adjoining or abutting on "such streets courts or alleys respectively."

The Act then contains provisions enabling

the Council in case of default on the part of the owners to do the necessary works themselves and to recover the expenses from the owners by action of debt and by a warrant of distress to be issued by any Justice of the Peace for the city of Melbourne or to recover the amount from the occupiers to the extent of any rent then due or thereafter to become due from them and in that case the amount was to be deducted from the rent.

Section 8 provides that every order of the Council is to be published twice in two successive weeks in the Government Gazette and in one or more of the Melbourne newspapers and that such order shall not "begin to take effect "until the end of one calendar month next after "the last publication thereof in such gazette or "newspaper" and it declares that such order and the publication thereof as aforesaid is to be deemed sufficient and valid notice to all owners occupiers and others interested in the said premises.

Section 9 enacts that any person obstructing or making any alteration in the pavement or carriage way or footway of any such street court or alley without the consent in writing of the Council or their Surveyor may upon conviction before the Justices of the Peace be ordered to pay for every such offence any sum not exceeding 5*l.*, to be recovered as mentioned in the Act, subject to a proviso that the Governor of the Colony for the time being may pardon any offender and remit the whole or any part of the penalty as the justice of each particular case may seem to require.

There is nothing else in the Act bearing on the question involved in this appeal.

Commenting on the main provisions of the Act the learned Judges of the Full Court make the following remarks:—

"These provisions of the Act while they impose upon adjoining occupiers as well as owners certain obligations confer in our opinion by necessary implication a statutory right of user of a lane upon all persons who are or may be required to contribute to the expense of forming it and upon their successors in title or occupancy. It cannot be supposed to have been the intention of the Legislature that a class of persons should be liable to be compelled to contribute in the first instance or absolutely to the making and from time to time to the repairing of a lane which they were not to have the right to use for passage to and from their houses. The fact that one or more of the owners and occupiers had not paid their proportions cannot in our opinion affect this question."

Their Lordships are unable to accept the view of the Full Court. It is to be observed that the Act does not, at least in terms, confer or purport to confer any rights whatever upon persons who may be called upon to contribute to the improvement of a private street without having at the time any legal right to use it; nor does the Act interfere or purport to interfere with the rights of owners of private streets except so far as may be required to carry out the purposes stated in the preamble. It is quite true that when a street has been improved in pursuance of an order made under the Act no obstruction or alteration is permitted without the consent in writing of the Council or their Surveyor. Some provision of that sort there must be or the Act would be futile. But it is not to be supposed that a public body like the Council of the city of Melbourne would use its powers arbitrarily to the prejudice of private rights of property nor is it to be assumed that such an abuse if it should be committed would be without remedy. It may or may not be unreasonable to compel a person whose property adjoins a private street which he has no right to use to contribute to its improvement so long as he has no communication with it. Legislation to that effect, whatever may be thought of the justice of the case as an abstract question, is not without precedent in this country. But it does not seem very unreason-

able to require contribution from an adjoining owner who chooses to keep up a communication between his property and a private street over which he has no right of way. If he has any grievance he has no one to thank but himself. He must have at least a month's notice of an order under the Act before it can "begin to take "effect." In the meantime if he likes he can close up all means of access and cut off all communication. In that case apparently there would be no liability upon him. If he prefers to count upon the goodwill or indifference of his neighbour, why should he not be taxed for the improvement of property which he is actually enjoying at the time though his enjoyment may be precarious? If it be hard upon him to make him contribute to an improvement the benefit of which he will not enjoy as of right, surely it is some hardship upon the owner of the property on which the street has been formed to compel him to share his rights with a person who pays him nothing for the privilege and who may by good luck escape payment altogether. The construction which the Full Court has adopted involves as their Lordships have already intimated a serious invasion of private rights and one which may be prejudicial to the public by preventing improvements desirable in the interests of the community as well as in the interests of the proprietor.

Besides arguing this question the learned Counsel for the Respondent endeavoured to maintain the judgment under appeal by contending that both Mr. Justice Holroyd and the Full Court were in error in holding that the lane in question had not been dedicated to the public. There is no absolute rule to the effect that two concurrent judgments on a question of fact are not to be disturbed. But this Board would certainly be very slow to differ on a finding of fact from a Judge of First Instance who has had the

advantage of seeing the witnesses when his judgment has been affirmed by the Court of Appeal. In the present case their Lordships having heard the Judge's notes of the evidence read and discussed agree with the Full Court in thinking that there is no reason to suppose that the Primary Judge came to a wrong conclusion on any of the issues of fact.

In the result therefore their Lordships will humbly advise Her Majesty that the appeal ought to be allowed and the judgment of Mr. Justice Holroyd restored. The Respondent will pay the costs of the appeal to the Full Court and of this appeal.