

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
James v. Stevenson and others, from the
Supreme Court of Victoria, delivered 11th
February 1893.*

Present :

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD HANNEN.

LORD SHAND.

SIR RICHARD COUCH.

SIR EDWARD FRY.

[Delivered by Sir Edward Fry.]

The Respondents are the owners and occupiers of a piece of land, part of a Crown grant, portion one, in the parish of Keelbundora, county of Bourke, in the Colony of Victoria. They were Plaintiffs in the action.

The Appellant who was the Defendant is the owner of a piece of land adjoining the Plaintiffs' land to the west, which was included in the same Crown grant.

The action was brought to assert a right to a way along the western side of the boundary which divides the lands of the litigant parties.

The Crown grant under which both parties claim, bore date the 31st January 1839, and was made to Thomas Walker. The land granted was bounded on the south by the Yarra Yarra river; on the west by a creek known as Darebin Creek; on the north by a section line dividing portion No. 1 from portion No. 3; and on the

east by a similar line dividing portion No. 1 from portion No. 2.

By Indentures of Lease and Release, bearing date respectively the 7th and 8th June 1839, the Crown grantee, Thos. Walker, conveyed to George Brunswick Smyth, the predecessor in title of the Plaintiffs a part of the same portion No. 1. It was described as bounded on the east by the original eastern boundary of this portion, being a line commencing at the Yarra Yarra river, and running 132 chains in a northerly direction; on the north by the marked sectional line bearing west 29 chains from the north-eastern point; on the west by a line of road, one chain in width, "the use of which," says the Release, "is hereby also released and conveyed," and bearing south from the north-western point to the Yarra Yarra river; and on the south by that river. The deed further describes the land as "containing by ad-measurement in or about $374\frac{1}{2}$ acres, be the same more or less." Then follows a grant of the road before mentioned, in these words: "With a right of road or way, one chain in breadth, in, through, and out of the same, and commencing at or about the north-western point of the said portion of land hereby released, or intended so to be, and running in a southerly direction to the Yarra Yarra river." The plan on the deed, which is referred to in the grants as containing a more particular description and delineation of the property granted, shows distinctly a road leading from the Yarra Yarra river to the north-west point of the land conveyed, along the western boundary of that land, but on the land retained by the vendor, Thomas Walker. On the plan the road is marked "reserved road" which is, no doubt, inappropriate language; and the words "in, through, and out of the same," contained in the description of the road in the Release, are not very intelligible;

but no doubt exists in their Lordships' minds as to the effect of the deed as a grant by Walker to Smyth of a right of road over the land retained by Walker along its eastern boundary.

It should be added that the Release further reserved to Walker a right of way across the land released in a direction east and west; this way was subsequently dedicated to the public, and is known as the Lower Heidelberg road.

The Plaintiffs claim under Smyth, the grantee of the right of way: the Defendant claims under Walker, the grantor.

It is the common case of both parties that at the date of the Release of 1839 there was no fence existing between the land conveyed to Smyth and the land retained by Walker.

When this action was begun in the year 1888, and when the trial took place, the condition of the properties was as follows:—they were intersected by several public roads; 1st, beginning towards the south by the Lower Heidelberg road running in a general east and west direction along the line of way reserved by the Release of 1839; next, by the Melbourne and Heidelberg Railway running from S.W. to N.E.; next, by the Upper Heidelberg road, having a general direction of S.W. to N.E.; and, lastly, by a road to Eltham with a somewhat more northerly trend; the northern boundary of the plot was then skirted by a public road known as Banksia road.

Except where these public roads intervened, the whole western side of the Plaintiffs' land was divided from the Defendant's land by an ancient wooden fence, which was shown to have been there as long ago as the year 1842, which extended from the Yarra Yarra river to the north-west corner of the land in Banksia road. Along this western fence from the Yarra Yarra river northward to the Lower Heidelberg road there was no

visible track; nor was any user of a road there shown, except upon one occasion when the Plaintiffs' predecessor was doing repairs to the fence; but at the north-east corner of the Defendant's land in the Lower Heidelberg road there was a gate which, so far as appears, was ordinarily left open. From the Lower Heidelberg road northward as far as the Eltham road, along the eastern side of the Defendant's land, and by the side of the ancient fence there was a road which appears to have been in existence as far back as the evidence goes and to have been used as a private road by the Plaintiffs and their predecessors. From the Eltham road northward to Banksia road no track existed; no gates are shown to have been inserted in the fences, which were wooden ones, and no user is shewn.

The right of the Plaintiffs to use the private road between the Lower Heidelberg road and the Eltham road is not in question; the dispute relates to rights of way claimed over the pieces of land respectively south and north of this private way, and in direct continuation of it.

It was in the first place contended that the true western boundary of the land conveyed to Smyth in 1839 was different from the existing line of fence; that the real line of division began on the north-west corner, at a point to the west of the end of the actual fence, and terminated at the south-west corner on the river at a point considerably east of the southern end of the existing fence, from which it was contended that the way claimed was essentially different from the way granted.

But it is to be observed that the existing fence has been in its present situation for upwards of 40 years; that no legal origin can be shewn to this fence except the boundary drawn by the Release of 1839; that in like manner the private road between the Lower Heidelberg and the Eltham public roads runs along the side of this

wooden fence; that no legal origin can be shewn to this road except the grant of a right of way contained in the same deed; and that the possession and enjoyment of the lands of the Plaintiffs and Defendant are at the present time, and have probably since 1839, or very soon after, been determined and regulated by the existing fence. In such circumstances there arises, in the judgment of their Lordships, a very cogent presumption in favour of the existing fence being on the line intended and expressed by the deed of conveyance by the predecessors in title of the Defendant to the predecessors in title of the Plaintiffs, a presumption not to be displaced, if at all, unless by the most conclusive evidence of error in the actual position of the fence. In the present case their Lordships are not convinced that there is any such error; the eastern fence, as it actually existed, is stated in the evidence to have been "a little wavy" in its course, but in the plan which is set forward as demonstrating the error, it is a straight line; the deed of 1839 describes the eastern boundary as running 132 chains in a northerly direction; the plan above mentioned draws it northwards 180.01 chains. In the deed the northern boundary is described as bearing west, language which does not necessitate its being drawn due west. In the plan used to demonstrate the error, a distance of 29 chains on a somewhat arched line, is measured from a point near the south-eastern corner of the plot to ascertain the western boundary on the Yarra Yarra river, and there is nothing which appears to justify this particular method of measurement. Lastly, it is not shewn whether the plot bounded by the line now put forward as the true one has precisely the same limits on the Yarra Yarra river as are indicated on the original Release, nor whether it includes the 374½ acres

mentioned in the Release of 1839, or more or less than that quantity. In their Lordships' opinion the presumption that the existing fence is the true boundary of the properties, according to the rights of the parties as ascertained by the Release of 1839, is not rebutted, and consequently they are of opinion that the way claimed by the Plaintiffs is along the strip of land subjected to the easement by that deed.

It has, in the next place, been contended at the bar that the right of way has been abandoned. This is a question of intention to be decided upon the facts of each particular case, as was expressly laid down in the case of *Crossley and Sons v. Lightowler* (L. R., 2 Ch. Appeals, 478). There can be no question of the abandonment of the entire right of way granted in 1839, because an important part of it has been and is used by the Plaintiffs without disturbance; the only question can be, whether the northern and southern continuations of that road have been abandoned. Now the only facts which can be relied on by the Defendant in the present case are, the absence of user of the northern part of the way; the absence of gates in the fences of that part of the land; the absence of user of the southern right of way by the Plaintiffs and their predecessors, except on one occasion in 1872, when it appears that materials for the repair of the fence were carted under the direction of the agent of Stevenson, a predecessor of the Plaintiffs, through the gate in the Lower Heidelberg road, and down the west side of the fence; and the user by the Defendant and his predecessors, for farm purposes, of the portions of the land over which the roads in question would pass. But these facts are, in their Lordships' judgment, insufficient to show any intention to abandon the right of way. It does not appear that occupants of the Plaintiffs'

land have ever had any occasion to use the northern part of the way, or the southern part, except once, and then they did so use it; and to have required gates to be inserted in the wooden fence at Banksia Road and the road to Eltham, when the way was not wanted for use, would have been an unreasonable act, the omission of which cannot be construed as the expression of an intention to abandon the right of way. Nor is the occupation for agricultural purposes of the strips of land subject to the easement, when the easement was not wanted, in the opinion of their Lordships a conclusive circumstance. It is worthy of notice, in reference to this question of abandonment, that ever since the year 1875 the Plaintiffs have distinctly asserted their right to the way which they now claim, and if in the earlier period there is no evidence of such assertion it must not be forgotten that it is one thing not to assert an intention to use a way, and another thing to assert an intention to abandon it.

Lastly, a contention was raised by the Defendant, based upon the provisions of the Transfer of Land Statute. On the 27th March 1886, two certificates of title under that statute were issued to the Defendant in respect of portions of his land in question, and contained no notice of any right of way over any part of this land. On the 5th June 1888 two certificates of title were issued to the Plaintiffs, which stated their right over the private road between the Lower Heidelberg and Eltham roads, but were silent as to any rights of way to the north and south of this private road. It is contended that the legal effect of these certificates was to extinguish the Plaintiffs' right of way if it ever existed. This contention is in their Lordships' judgment untenable. The 49th section of the Transfer of Land Statute provides that land included in any certificate of title shall be

deemed to be subject to any easements subsisting over it. The subsequent legislation on the subject has not in their Lordships' judgment interfered with this provision. The amending Act, No. 610, by Section 2, makes a certificate of title which certifies that the person named therein is entitled to an easement conclusive evidence that he is so entitled, but it does not make such certificate the only evidence admissible. The 41st Section of the subsequent amending Act, No. 872, requires the Registrar to specify upon the certificate as an encumbrance affecting the land included in it any subsisting easement affecting the same which shall appear to have been created by deed or writing; but their Lordships agree with the judgment of the Full Court of Victoria that "the omission by the Registrar to enter the easement as an encumbrance on the certificate of the servient tenement, under this provision, would not relieve the servient tenement of its liability." In like manner the omission of the Registrar to state on the certificates granted to the Plaintiffs the existence of the rights of way they claim is no bar to that claim.

These observations dispose of all the points presented to their Lordships at the bar, and for the reasons given they will humbly advise Her Majesty that this appeal be dismissed with costs.
