[HIGH COURT OF AUSTRALIA.]

PRESIDENT &c. OF THE SHIRE OF NARRACAN
DEFENDANTS. . APPELLAN

AND

LEVISTON . . . . . RESPONDE
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 30; *May* 28, 29; *June* 5.

Griffith C.J., Barton and O'Connor JJ.

Highway—Dedication—Presumption from public user—User attributable to ag ment—Dedication by mortgagor.

An intention to dedicate land as a highway will not be presumed f mere user if that user is explained by circumstances negativing such intention.

Barraclough v. *Johnson*, 8 A. & E., 99, followed.

If the user is attributable to an implied agreement between the owner of land and the Crown, or between the owner and a public body having powe acquire the land for a highway on paying compensation therefor, that owner would permit the public to use the land as a highway pending exercise of that power, the intention to dedicate is negatived.

Under the *Land Act* 1869, A. selected land, and a licence was issued to by the Crown in 1877, containing a condition that the Crown might resu any part of the land for roads, paying compensation therefor, and a provis that the lease to be subsequently issued should contain a similar condition. track was in 1879 blazed through the land, the cost of which was paid subscriptions from neighbouring settlers. In the same year, at the request the municipality in whose district the land was situated, a surveyor was s by the Department of Lands who surveyed a road one chain wide follow the blazed track. Thereafter this road appeared in maps of the locality, a from time to time the municipality at its own cost cleared, made and repair

the road, which was during all that time continuously used by the public as a highway. In 1884 the municipality requested that the Crown should proclaim as public roads the roads within the shire, including the road so surveyed, and were informed that no proclamation would be made until all the roads were surveyed. No proclamation was, however, made of this road. In the same year, 1884, a Crown lease of the block of land, through which the road ran, was issued to A. without any condition as to resumption for roads. In 1886, A. mortgaged his lease, and in 1889 the mortgagee, under powers contained in the mortgage, sold and transferred the land to B., to whom a Crown Grant was issued in the same year without any excision of the road. Nine days after the issue of the Crown Grant B. mortgaged the land. In 1901, B.'s mortgagee sold the land to C. who sold to the plaintiff in 1902. C., having obstructed the road by locking a gate in a fence across the road where it entered his land, the municipality removed the fence and gate, whereupon C. brought an action for trespass.

Held, that the user of the road by the public should, in its inception, be attributed to an implied agreement between the municipality and A. that he would permit the public to use the road pending its proclamation as a public road, when A. would be compensated ; that any acts or omissions of subsequent owners or of the mortgagees, which otherwise might have indicated an intention to dedicate, should be attributed to that agreement ; and that the permission having been withdrawn by the plaintiff, the municipality was guilty of a trespass in removing the obstruction.

A mortgagor cannot, without the consent of his mortgagee, dedicate as a highway part of the land the subject of the mortgage.

Before removing the fence and gate the municipality had threatened to enforce penalties against the plaintiff for obstructing the road. The plaintiff did not replace the fence for a considerable period, during which cattle of the plaintiff strayed through the gap and were lost.

Held, that the loss of the cattle was a reasonable consequence of the unlawful act of the municipality for which damages might be recovered.

Decision of *à Beckett J.* affirmed.

APPEAL from the Supreme Court of Victoria (*à Beckett* J.).

The plaintiff, John Leviston, brought an action in the Supreme Court against the President &c. of the Shire of Narracan, claiming damages for wrongful entry on his land and the breaking down and destroying part of the fences and a gate thereon by the defendants, their servants and agents, and an injunction restraining the like acts in the future. Special damages were claimed in respect of the loss of 100 head of cattle, which wandered from his land through the breach in the fence and were lost.

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The defendants by their defence alleged that at all times material to the action there was upon and over the plaintiff's land a public highway and street and road within the meaning of the Local Government Acts; that the plaintiff or some other person had erected a fence and other obstructions across, upon, and in the said highway, street, and road, and the public were thereby prevented, obstructed, and impeded in their lawful passage over and along the same; and that the defendants under and by virtue of their power, authority, and duty under the said Acts, and doing no unnecessary damage in that behalf, caused the said fence and other obstructions to be removed so as to allow free passage over and along the said highway, street, or road.

The block of land, 320 acres in area, through which the alleged road ran, was first alienated from the Crown by licence to George Turner, under sec. 32 of the *Land Act* 1869, for two years from 1st June 1877, renewed for another two years from 1st June 1879. Both these licences contained a condition that the Governor in Council might at any time resume any portion of the land required for a public road or highway on repaying the amount of rent attributable to the acreage of the land resumed, and a provision that any lease granted by the Crown to the licensee should contain a similar condition. A lease under sec. 20 of the same Act was granted to Turner for fourteen years from 2nd June 1884, but did not contain a corresponding reservation. Turner mortgaged his lease in 1886 to the Commercial Bank of Australia Ltd., gave a second mortgage to the Mercantile Bank of Australia Ltd., and transferred all his interest in the land to Bernard Michael on 26th November 1886. On 26th March 1889, by transfer from the Mercantile Bank of Australia Ltd., George Dibdin became the proprietor of the lease. On 10th July 1889, the Crown grant of the land was issued to George Dibdin. On 19th July 1889, Dibdin mortgaged the land to The Trustees Executors and Agency Co. Ltd. On 29th January 1901, that company sold the land to William Henry Davies, who became the registered proprietor on 6th November 1901. In pursuance of a contract of sale made on 26th

November 1901, between Davies and Leviston, the plaintiff, the latter became registered proprietor on 18th June 1902.

The circumstances under which a road was formed over the land and was used by the public, are sufficiently set out in the judgments hereunder.

At the time the plaintiff bought the land there was a fence and a gate across the alleged highway where it entered the plaintiff's land. The plaintiff having locked the gate, the defendant Shire, on 18th June 1904, caused the gate to be broken down and the wires to be drawn from the fence to the full width of the road. The plaintiff replaced the fence in November 1904. The plaintiff alleged that, in the meanwhile, his cattle strayed through the gap in the fence so caused, although he attempted to prevent them, and that a large number of them were lost.

The action was heard before *à Beckett* J., who found that the road had not been dedicated to the public as a highway, and therefore that the act of the Shire in breaking down the gate and fence was wrongful; that the plaintiff had taken a reasonable course when the fence was broken down; and that the losses described by the plaintiff actually occurred. He therefore gave judgment for the plaintiff for £300 damages and costs: (*Leviston* v. *President &c. of the Shire of Narracan* (1).)

From this decision the defendant Shire appealed to the High Court.

Isaacs A.G. (with him *Schutt*), for the appellants. The substantial question is, was there a highway over the respondent's land? If there was, it was a highway by dedication. The question of dedication is one of presumption. If it is found that land is used by the public as a public highway, the onus is thrown upon the owner of the land to show that he did not intend to dedicate: *R.* v. *Petrie* (2).

[GRIFFITH C.J.—Does the principle of that case apply in Victoria, where all land was in the hands of the Crown a short time ago?]

It is an authority as to assent. At any rate, from 1889 the onus is on the other side to negative dedication. See also *R.* v.

(1) (1906) V.L.R., 1; 27 A.L.T., 106. (2) 14 E. & B., 737.

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East Mark (1). What was in the mind of the person alleged to have dedicated is unimportant. There being acts evidencing dedication, the presumption of dedication can only be rebutted by showing the circumstances under which the use of the land took place. In the case of private land dedication must be by the registered owner. He is the only person the public knows in connection with the land. There are three periods which it is necessary to consider. First, from 1879 to 1884, when the land was under Crown licence; second, from 1884 to 1889, when the land was under lease; and third, from 1889 onwards, when the fee simple had been acquired. During the first period there was dedication by the licensee and by the Crown. During the second period there was dedication by the lessee and, if it is necessary, by the Crown. The lease is an inchoate fee simple: *Attorney-General for Victoria* v. *Ettershank* (2). If there can be dedication by an equitable owner, then Turner was the equitable owner and dedicated. During the third period there was dedication by the successive owners and by the mortgagees. The Crown can dedicate a highway: *Turner* v. *Walsh* (3). There is nothing taking away that power in Victoria.

[*Mitchell* K.C.—Sec. 49 of the *Land Act* 1869 restricted the power of the Crown to dedicate.]

No. That section refers to alienation of land. Dedication of a highway is not alienation. The effect of secs. 388 and 390 of the *Local Government Act* 1890 (secs. 363 and 365 of the *Local Government Act* 1874) is not that dedication in any other mode than that provided for shall be void: *Howlett* v. *President &c. of Shire of Tambo* (4). If a road was shown on the Crown grant it would be sufficient dedication: *House* v. *Ah Sue* (5). Once there has been assent by the owner of land to its use as a public highway, dedication is presumed. Neither the Crown nor the municipality was acting under its power to take land for a road, and there is no evidence that anyone believed that either was so acting. Turner having permitted the user of the land as a highway and the expenditure of money by the municipality on the

(1) 11 Q.B., 877; 17 L.J.Q.B., 177; 12 Jur., 332.
(2) L.R. 6 P.C., 354.
(3) 6 App. Cas., 643.
(4) 16 A.L.T., 223.
(5) 2 W. & W. (L.), 41.

road, the licence became irrevocable: *Liggins* v. *Inge* (1); *Plimmer* v. *Mayor &c. of Wellington* (2). A Crown lessee under the *Land Act* 1869 could dedicate land: *Powers* v. *Bathurst* (3). Being in the position of a purchaser, whatever he did bound his successors. Dedication is a question of law. Once the presumption arises, it cannot be got over by showing that the person did not dedicate, but only by showing that he had no power to dedicate. The damages awarded did not reasonably flow from the acts of the municipality. See *Mayne on Damages*, 7th ed., pp. 45, 185.

[He also referred to *R.* v. *Cheyne* (4); *Davies* v. *Stephens* (5); *Rangely* v. *Midland Railway Co.* (6).]

Mitchell K.C. and *Davis*, for the respondent. The finding that there was no dedication is right. If there was a dedication it was limited, *i.e.* the highway was subject to a gate or slip-rail being across it: *Roberts* v. *Karr* (7); *Stafford* v. *Coyney* (8); *Davies* v. *Stephens* (5); *R.* v. *Bliss* (9). Therefore, the only right the municipality had was to break the lock of the gate. The municipality must justify all it did: *Dovaston* v. *Payne* (10). Whether the dedication was limited or not the acts were excessive. The question of dedication is one of fact, and user for a long time is only evidence of dedication: *Mann* v. *Brodie* (11). It is a question of intention: *Macpherson* v. *Scottish Rights of Way and Recreation Society* (12); *Guest* v. *Goldsbrough* (13).

[Griffith C.J.—The circumstances of the user must be taken into consideration: *Behrens* v. *Richards* (14).]

Turner v. *Walsh* (15) is not an authority that the Crown can dedicate. Assuming that the Crown and the licensee could each dedicate, the Crown had power under the licence, and under the lease, to resume part of the land for a road but never exercised that power, and the lease and the Crown

(1) 7 Bing., 682.
(2) 9 App. Cas., 699.
(3) 42 L.T.N.S., 123; 49 L.J. Ch., 294.
(4) (1900) A.C., 622.
(5) 7 C. & P., 570.
(6) L.R. 3 Ch., 306, at p. 310.
(7) 1 Camp., 262 (*n*).
(8) 7 B. & C., 257.
(9) 1 Jur., 960.
(10) Sm. L.C., 11th ed., vol. II., p. 160, at p. 174.
(11) 10 App. Cas., 378.
(12) 13 App. Cas., 744.
(13) 12 V.L.R., 804; 8 A.L.T., 77.
(14) (1905) 2 Ch., 614.
(15) 6 App. Cas., 643.

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grant were issued for the whole of the land. The Crown never intended to do anything to get a road except under its statutory powers. The Crown had power under the *Land Act* 1869, and the municipality had power under secs. 363 and 365 of the *Local Government Act* 1874 (secs. 388 and 390 of the *Local Government Act* 1890), to take land for a road. The evidence points to this, that the Crown, the municipality and Turner contemplated proceedings in accordance with the statutory powers. Pending those proceedings, Turner and his successors allowed the road to be used, and were entitled to withdraw that licence at any time. The fact that Turner fenced across the road is material as to his intention to dedicate. Neither the Crown nor the licensee could dedicate except in the statutory way. See *Land Act* 1869, secs. 4, 20 (2), 22, 38, 48. During the period of the licence there is no evidence of dedication either in law or in fact. Nor is there as to the period covered by the lease. User for the purpose of dedication must be to the knowledge of the owner, or must be such that he must be taken to have known of it: *Land Mortgage Bank of Victoria Ltd.* v. *President &c. of the Shire of Warrnambool* (1); *Daniel* v. *North* (2). During the lease the only thing that happened in respect of the road was the user of it. A lessee cannot dedicate without the consent of his lessor: *Wheaton* v. *Maple & Co.* (3). Estoppel cannot apply to a case of this sort. It cannot be said that a representation was made upon which some person acted to his disadvantage. Estoppel implies mutuality: *Concha* v. *Concha* (4). There is no mutuality in dedication. The case of *Liggins* v. *Inge* (5) does not apply, for the decision there is confined to the case of one person allowing another to do something on the land of the latter. The principle of feeding the estoppel does not apply to implied grants. The rule is that it will be implied that a man will only grant the estate which he has, and if he afterwards acquires a larger estate the implication does not extend to that larger estate: *Booth* v. *Alcock* (6); *Beddington* v. *Atlee* (7). Estoppel by standing by only applies where the person sought to be estopped has acted in

(1) 21 A.L.T., 92.
(2) 11 East., 372.
(3) (1893) 3 Ch., 48.
(4) 11 App. Cas. 541.
(5) 7 Bing., 682.
(6) L.R. 8 Ch., 663.
(7) 35 Ch. D., 317.

such a way as deceived others, and with a view to get an unfair advantage for himself: *Ramsden* v. *Dyson* (1); *Proctor* v. *Bennis* (2); *Greenwich Board of Works* v. *Maudslay* (3). The case of *Morgan* v. *Railroad Co.* (4) only relates to the very peculiar Statute of Illinois, and lays down no general principle applicable to this case. The damages are not excessive, and reasonably flowed from the wrongful acts of the appellants. The evidence shows that the respondent did everything reasonable to keep his cattle from straying.

[They also referred to *Miller* v. *McKeon* (5); *Mercer* v. *Denne* (6); *Local Government Act* 1874, secs. 370, 379, 382; *Local Government Act Amendment Act* 1883, sec. 31; *Police Offences Act* 1865, sec. 16 (7).]

Isaacs A.G. in reply. The power given to municipalities to create highways under secs. 363 and 365 of the *Local Government Act* 1874 does not preclude other methods of creation of highways: *Howlett* v. *President &c. of the Shire of Tambo* (7); *Roberts* v. *Hunt* (8). Nor does that power extend to enable municipalities to take private land, but it is limited to Crown lands. The dedication relied on by the appellants is not by the municipality, but by the respondent. Although the consent of the Crown is necessary to an immediate dedication by a licensee, if the licensee afterwards becomes the owner, the consent of the Crown is unnecessary, and the dedication is complete. As to the nature of estoppel by acquiescence, or rather by standing by, see *Sarat Chunder Dey* v. *Gopal Chunder Lala* (9); *Seton Laing & Co.* v. *Lafone* (10); *De Bussche* v. *Alt* (11); *Doe* v. *West Bank of Scotland* (12); *Cornish* v. *Abington* (13); *Thomas* v. *Brown* (14). The intention of a person sought to be bound by dedication is to be gathered from his acts: *Beard* v. *Turner* (15). The respondent must show some act which negatives an intention to dedicate. See *Best on Evidence*, 9th ed., p. 329; *Leake's Law of Uses and Profits of Land*, p. 505. There

(1) L.R. 1 H.L., 129.
(2) 36 Ch. D., 740, at pp. 756, 760.
(3) L.R. 5 Q.B., 397, at p. 404.
(4) 96 U.S., 716.
(5) 3 C.L.R., 50.
(6) (1905) 2 Ch., 528.
(7) 16 A.L.T., 223.
(8) 15 Q.B., 17.
(9) L.R. 19 Ind. App. 203.
(10) 19 Q.B.D., 68.
(11) 8 Ch. D., 286, at p. 314.
(12) 1 Rul. Cas., 480.
(13) 4 H. & N., 549, at p. 556.
(14) 1 Q.B.D., 714, at p. 722.
(15) 13 L.T.N.S., 246.

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is no evidence here of any agreement for a licence to use the land as there was in *Barraclough* v. *Johnson* (1), and such an agreement will not be presumed.

[GRIFFITH C.J. referred to *In re Northumberland Avenue Hotel Co.* (2).]

As to the mortgagees from Turner, they either knew or did not know what had been done in regard to the road. If they did not know, being privies in estate to Turner, they were bound. If they knew, they are equally bound with Turner. As to the measure of damages, see *The Notting Hill* (3); *Victorian Railways Commissioners* v. *Coultas* (4); *Helms* v. *Munro & Co. Ltd.* (5); *Loker* v. *Damon* (6); *Sedgwick on Damages*, p. 296; *Clegg* v. *Dearden* (7).

[He also referred to *Harrison* v. *Duke of Rutland* (8); *Hickman* v. *Maisey* (9); *Vernon* v. *Vestry of St. James, Westminster* (10); *Lawson* v. *Weston* (11); *Scott* v. *President &c. Shire of Eltham* (12); *Joy* v. *The Curator of Estates of Deceased Persons* (13); *Vinnicombe* v. *Macgregor* (14); *City of Cincinatti* v. *Lessee of White* (15); *Leckhampton Quarries Co.* v. *Ballinger and the Cheltenham Rural District* (16); *R.* v. *Broke* (17); *Hughes* v. *Boakes* (18); *Cherry* v. *Snook* (19); *Mawley* v. *Masterton Road Board* (20); *Mayor of Lower Hutt* v. *Yerex* (21); *Stevenson* v. *President &c. of the Shire of Narracan* (22).]

Cur. adv. vult.

June 5.

GRIFFITH C.J. This was an action for trespass to the plaintiff's farm by breaking down part of the fence and a gate, and for consequential damages caused by the loss of the plaintiff's cattle which escaped. The defendants are the local authority of the district in which the plaintiff's farm is situated, and they allege that

(1) 8 A. & E., 99.
(2) 33 Ch. D., 6.
(3) 9 P.D., 105.
(4) 13 App. Cas., 222.
(5) 16 V.L.R., 591.
(6) 17 Pickering, 284.
(7) 12 Q.B., 576, at p. 601.
(8) (1893) 1 Q.B., 142.
(9) (1900) 1 Q.B., 752.
(10) 16 Ch. D., 449.
(11) Legge, 668.
(12) 2 V.L.R. (L.), 98.
(13) 21 V.L.R., 620; 17 A.L.T., 144.
(14) 29 V.L.R., 32, at p. 47; 24 A.L.T., 200.
(15) 6 Peters, 431.
(16) 20 T.L.R., 559.
(17) 1 F. & F., 514.
(18) 17 N.Z. L.R., 113.
(19) 12 N.Z. L.R., 54.
(20) 7 N.Z. L.R., 649.
(21) 24 N.Z. L.R., 697, at p. 701.
(22) 20 V.L.R., 233; 15 A.L.T., 263.

there was at all times material upon and over the plaintiff's land a public highway, street and road within the meaning of the Local Government Acts; that the plaintiff had erected a fence and other obstructions across and upon such highway, street and road; and that thereupon the defendants, under their power and duty under the Statutes, and doing no unnecessary damage, caused such fence and obstructions to be removed so as to allow free passage over and along such highway, street or road. The substantial question in the case is whether there was a highway as alleged over the plaintiff's land. The land is a block of 320 acres, its boundaries running north and south, and east and west, the east and west boundaries being each one mile long, and the north and south boundaries each a half a mile long. The alleged road enters the northern boundary of the land and traverses it in an irregular winding line until it reaches a point on the eastern boundary about three-quarters of a mile from the north-east corner of the land, its length being about a mile. The result of the existence of such a road would be practically to sever the land into two portions, and the enjoyment of the whole would be materially interfered with, whether the road was fenced or not. The defendants say that this road was dedicated to the public by the successive owners of the land, or by some of them. It appears in evidence that the road has been in use more or less, and under circumstances to which I will refer later, since the year 1879. Before referring to the facts and to the title of the successive owners of the land, which is material in determining whether there has been dedication, I will refer briefly to the authorities as to the onus the party undertakes on whom is cast the burden of proving that a highway has been dedicated to the public.

The case of *Mann* v. *Brodie* (1) was an appeal from Scotland, and Lord *Blackburn* in moving the judgment of the House of Lords said:—"The case is to be governed by the law of Scotland. Any reference to English law is apt to mislead, unless the difference of the law of the two countries is borne in mind. In both countries a right of public way may be acquired by prescription. In England the common law period of prescription was time immemorial, and any claim by prescription was defeated by

(1) 10 App. Cas., 378, at p. 385.

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proof that the right claimed had originated within the time of legal memory, that is, since A.D. 1189. This was, no doubt, an unreasonably long period. And sometimes, by legal fictions of presumed grants, and in part, by legislation, the period required for prescription as to private rights has, in many cases, been practically cut down to a much shorter definite period (see *Angus* v. *Dalton* (1)). But this has never been done in the case of a public right of way. And it has not been required, though in the way in which the evil of the period of prescription being too long has been avoided, an opposite evil of establishing public rights of way on a very short usurpation has sometimes been incurred.

"In *Poole* v. *Huskinson* (2), *Parke* B. said:—'In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an *intention* to dedicate—there must be an *animus dedicandi*, of which the user by the public is *evidence*, and no more; and a single act of interruption by the owner is of much more weight upon a question of intention, than many acts of enjoyment.'

"But it has also been held that where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was."

I refer next to the speeches of the law Lords in *Macpherson* v. *Scottish Rights of Way and Recreation Society Ltd* (3). Lord *Halsbury* L.C., said:—"My Lords, the question in the mind of an English lawyer is not only whether he can, on proper judicial evidence, determine that there has been an exercise of such a right of way as is here in question, but whether he can reasonably infer from that that the owner had a real intention of dedicating that way to the use of the public." Bearing in mind the passage which I have quoted from the judgment of Lord *Blackburn* in *Mann* v. *Brodie* (4) pointing out the differences

(1) 6 App. Cas., 740, at p. 750.
(2) 11 M. & W., 827, at p. 830.
(3) 13 App. Cas., 744, at p. 746.
(4) 10 App. Cas., 378, at p. 385.

between the law of England and that of Scotland, and also that they both depend in a certain sense on prescription, I will read some passages from the speech of Lord *Selborne* in *Macpherson's Case*. He says (1):—"Now, when you have the fact of user of a road of this description in the manner and to the extent which would be the natural consequence of its being a matter of public right, and that fact proved by a sufficient amount of evidence, how is that to be met? According to the well known text of the civil law a claim of right of this kind will be repelled if it is shown to have been enjoyed *vi* (which is out of the question here, for certainly there has been no force), or *clam* (which I think is equally out of the question, for whatever use there was was so public that it must have been known), or *precario*; and that is the real question here." Then after referring to the evidence in the case he continued:—"My Lords, I then ask the question, whether there has been any leave or licence or tolerance or sufferance, regarded as a question of fact. Is there any evidence whatever given in support of the affirmative of that opinion? Absolutely none." Lord *Watson* said (2):—"My Lords, having regard to the character of the track in dispute, and to the thin population of the district in which it is situated, I think the amount of actual user, for upwards of forty years past, has been just such as might have been expected if it had been admittedly a public way. That being so, the case is narrowed to the issue—was such use had in the exercise and assertion of a public right, or must it be ascribed to the tolerance of successive proprietors?"

Those doctrines I conceive to be equally applicable to the law of England, which is also the law of Victoria, as to dedication. Now, there is no doubt that though continuous user of land without interruption may be sufficient evidence of dedication, as *Parke* B. said, it is only evidence. It may be so strong that a finding against it cannot be supported. But there is another element to be taken into consideration which is well illustrated in the case of *Barraclough* v. *Johnson* (3). It was alleged in that case that a road had been used for nineteen years, but it appeared that it had been laid out by the owner of the

(1) 13 App. Cas., 744 at p. 749. (2) 13 App. Cas., 744, at p. 751.
(3) 8 A. & E., 99.

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land under an agreement with a company and with the inhabitants of a hamlet that the road should be left open if the inhabitants would make and maintain it, and if the company would pay the owner five shillings a year and would find the materials for maintaining the road. Eighteen years afterwards there were disputes, and the road was obstructed by the owner of the land. The question to be considered there was whether, under those circumstances, dedication ought to be presumed. Lord *Denman* C.J. said (1):—"As to the other point, the agreement between the land-owner and the township, if it could be considered a conditional dedication, was as public as it can be expected that such a dedication should be: and it was for the convenience of both parties. Then, can there be a conditional dedication of the kind here supposed? Perhaps not. A dedication must be made with intention *to dedicate*. The mere acting so as to lead persons into the supposition that the way is dedicated does not amount to a dedication, if there be an agreement which explains the transaction: and, referring to the agreement here, it is plain that there was only a licence to use. There was a permissive enjoyment from 1814; but it was put an end to in 1832. If such an enjoyment may be permitted by means of the way being left open to everyone, the leaving it so is not in itself evidence of a dedication. In *Wood* v. *Veal* (2), the public had used a way over the *locus in quo* as long as could be remembered; but the land had been under a ninety-nine years' lease during the whole time, and *Abbott* C.J., left it as a question for the jury whether there had been a dedication to the public before the term commenced, saying that, if not, there could be no dedication except by the owner of the fee, and the lease explained the user as not being referable to a dedication by him." *Littledale* J. said (3):—"The supposed dedication was, I think, a mere permission. When the circumstances under which it arose are stated, the idea of a dedication is rebutted. It is said that an intention to dedicate must be inferred from the acts of a proprietor; and it is true that the question is not decided by what he says. A man may say that he does not mean to dedicate a way to the public, and yet, if he

(1) 8 A. & E., 99, at p. 103.
(2) 5 B. & Ald., 454.
(3) 8 A. & E., 99, at p. 104.

had allowed them to pass every day for a length of time, his declaration alone would not be regarded, but it would be for a jury to say whether he had intended to dedicate it or not." *Patteson* J. said (1):—"I think that the intention to dedicate or not must be left to the jury. The very term dedication shows that the intent is material. There cannot be such a thing as turning land into a road without intention on the owner's part." *Coleridge* J. said (2):—"A party is presumed cognizant of the consequences following his own acts; and, if he permits user of a way over his land, a jury may presume that he intended to dedicate such way to the public. But you cannot exclude evidence of the circumstances under which the user commenced. And it appears here that an agreement took place between the land-owner, the surveyors of the hamlet, and the proprietors of the iron-works, that these last were to pay 5s. a year and to find cinders, which the inhabitants of the hamlet were to lead and spread: these are circumstances which, if not to be excluded, throw a strong light upon the commencement of the user, and show that no dedication was intended, provisional or absolute. And again, after nineteen years, we find an alleged breach of contract by the parties using the way, and a consequent interruption of the user. Suppose that, after nineteen days, the Thorncliffe Company had refused to fulfil their engagement; could not the land-owner have resumed the right of way? And, if so, why might not he after nineteen years?" I have read the final passage because it is material to this case from another point of view.

The doctrine, therefore, that dedication may be presumed from continuous user must be qualified by adding the words "if unexplained," and it is always permissible, as pointed out by *Patteson* J., to inquire under what circumstances the piece of land came to be used as a road. Was it under such circumstances as showed an intention to dedicate? Or was it under such circumstances as to negative such an intention? Or was it under such circumstances as not to point in one direction rather than the other? A passage cited in argument from the judgment of *Bowen* L.J., in *Blount* v. *Layard* (3), is, I think, fairly applicable to Australia. If, every time a

(1) 8 A. & E., 99, p. 105.

(2) 8 A. & E., 99, at p. 106.

(3) (1891) 2 Ch. 681*n*.

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landowner allows anyone to ride over his land, that act is to be regarded as evidence of a user that will establish dedication of a road to the public, I think the inconvenience the public would suffer would be much greater than any benefit they would receive. *Bowen* L.J. said (1):—"Nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood. I can conceive nothing more unfortunate than that the owners of the right of fishing on large streams should be driven to prevent the successors and followers of Isaac Walton from dropping their lines for trout, for fear that their doing so should crystallize into a right. It would be a most unfortunate thing for the public if that should ever happen, and I think that, however continuous, however lengthy, the indulgence may have been, a jury ought to be warned against extracting out of it an inference unfavourable to the person who has granted the indulgence."

Bearing in mind these principles, upon which this case is to be determined, I will refer to the facts which were established in evidence. The land was first acquired under the *Land Act* 1869 by conditional purchase, under which system the selector obtained first a licence for three or six years, during the currency of which he had to perform certain conditions. At the end of that period, and having performed the conditions, the selector obtained a lease for the remainder of a period of 20 years, and at any time during the currency of the lease the selector might, by paying up the balance of the rent, obtain the freehold. That was the mode in which the title was obtained in this case. The licence began in 1877, and continued until 1884, when a lease was issued, which in 1889 was converted into a freehold. The defendant Shire came into existence in 1878. The country where the plaintiff's land was situated was then rough and unfrequented. There was, as was usual, a surveyed road, marked off on the Government plans and maps, passing along the northern and eastern boundaries

(1) (1891) 2 Ch., 681*n*, at p. 691*n*.

of the land, but which it is said was impracticable, and it was therefore desired to make a short cut through the plaintiff's land from north to south. One of the conditions of the licence was that during its currency the Government might resume any portion of the land for a public road upon returning to the licensee a proportionate part of the rent paid, and it was stipulated by the licence that there should be a similar condition in the lease when it was issued. As a matter of fact no such condition was inserted in the lease. Another condition of the licence was that the land should be fenced, and in 1879 the plaintiff's land was fenced, at any rate along the northern boundary. In that year one Farley blazed a track over the plaintiff's land and on to Mirboo, and that track afterwards became the road now in question. Farley's work was paid for by subscriptions received from the neighbours. In August 1879, the ratepayers presented a petition to the Shire Council asking that the road blazed by Farley might be cleared and proclaimed a main road. In the same month the Shire Council wrote asking the Lands Department to have the roads in the Shire surveyed, and on 13th September 1879, the Department wrote that one Lardner had been instructed to survey the roads in the Shire. As a matter of fact Lardner surveyed this particular road following more or less closely the track blazed by Farley. In the same month tenders were called by the Council for clearing part of the track to Mirboo, including the portion through the plaintiff's land, and portion of it, including that through the plaintiff's land, was cleared at the Council's expense. During this time Turner, the licensee, was residing on the land, as was required by the licence, and he offered no objection to this work being done. It is said that that is evidence of dedication of this highway by Turner to the public. We must bear in mind that dedication means that the owner of the land intends to divest himself of any beneficial ownership of the soil, and to give the land to the public for the purposes of a highway. It may be that as to England that statement is a little too wide, for there the owner retains the right of grazing on the land, but in Victoria under the *Local Government Act* 1874 then in force, if land was dedicated to the public as a highway, the owner ceased to have even the

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right of grazing on the land dedicated. Ought we then to infer that Turner intended to dedicate this road to the public? It was contended that the nature of his title was such that he could not dedicate even if he desired to do so, because during the continuance of his licence he was incapable of making any alienation of any portion of land. I will assume for the present purpose that, if a licensee of land under the *Land Act* 1869 deliberately and by unequivocal acts indicated his intention to make a present of part of his land to the public for a road, and remained there and allowed that road to be used until the expiration of his licence, during the continuance of his lease, and after he obtained the freehold, there would be a complete dedication of the road either by reason of the original laying out of the road, or, as argued by the Attorney-General, on the ground of estoppel. But it is not necessary to have recourse to the principle of estoppel, because in such a case very little user of the road by the public would be evidence of dedication, the intention to make a present of the road to the public being regarded as a continuing dedication which would become operative as soon as the licensee obtained the freehold. I will assume also that Turner did allow the public to use the road, and that the same result would follow, no matter through how many hands the title to the land passed before the freehold was acquired. What then ought we to infer as to the state of Turner's mind at the time he was licensee? He would assume that his allowing the public to use the road was a matter entirely unimportant. The Government could take the land back from him on paying him the few shillings he had paid in respect of it by way of rent, and the local authority could take it from him, either with or without the assistance of the Government, in which case also Turner would be compensated. Under those circumstances it appears to me that the only proper inference is that Turner believed that the proper authorities intended to take the land for the road in the manner provided by Statute, and that he acquiesced in that being done, and made no objection to the public using the road in the meanwhile, knowing that in due time he would receive proper compensation for the land so taken; in other words, that there was a tacit agreement between Turner and the local authority that, pending the necessary steps being taken for

completing the title of that authority to the road, he would allow the public to use the road. In that respect I think the case falls exactly within *Barraclough* v. *Johnson* (1). I should add that this road was not a mere track through the block of land, but was a definite strip of land, one chain wide from one end to the other of that block, the angles of the turns in it being marked by posts in the ordinary way, so that its boundaries were visible to persons passing along it.

That being the history of the inception of the road, how long might the owner continue to allow the public to use it without losing his rights? What necessary consequences would follow from his continuing to allow the public to use it? The natural thing that would happen would be that the local authority would treat the road as any other road in the Shire, and would go on spending money upon it, and the public would go on using it. The road was public enough. A sign-post stood at the turn-off from the road along the northern boundary of the block, and on it was written "Mirboo Road," but that boundary was kept fenced. In 1884, the licence was superseded by a lease, which was issued to Turner on 2nd June. In July, the local authority requested the Government to declare certain roads in the Shire public highways, including, no doubt, the road now under consideration. On 23rd August the Government informed the Shire Council that they considered the proclaiming of the roads should be delayed until all were surveyed. That was the state of things in 1884. There was still the tacit agreement that Turner would allow the public to use the road pending the completion of the arrangements for the dedication of the road by the local authority. The land owner did not interfere with the user, but the dedication contemplated at that time was by the Shire and not by the land owner.

It is contended that the user by the public is quite inconsistent with any such notion—apart from the authority of *Barraclough* v. *Johnson* (1). The analogy of the occupation of land without any title, but accompanied by payment of rent, from which a tenancy may be inferred, is very close. I will refer to some observations made in *In re Northumberland Avenue Hotel Co.* (2).

(1) 8 A. & E., 99.

(2) 33 Ch. D., 16.

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That was a case in which a company, under the erroneous belief that an agreement entered into before it came into existence was binding upon it, took possession of certain land, expended money in building, and acted upon the agreement. It was sought to establish that the company was bound by the agreement, but it was held that the agreement was incapable of confirmation by the company, and that the acts of the company were not evidence of a fresh agreement. *Cotton* L.J. said (1):—"The case is entirely different from those cases which have been referred to where the Court, finding a person in possession of land of a corporation, and paying rent, has held that there was a contract of tenancy. There was no mode of explaining why the occupier was there, except a tenancy, unless he was to be treated as a trespasser. The receipt of rent by the corporation negatived his being a trespasser, and it was therefore held that there was a tenancy. Here we can account, and in my opinion we ought to account, for the possession by the company, and for what it has done, by reference to the agreement of the 24th of July, which the directors erroneously and wrongly assumed to be binding upon them. We are not therefore authorized to infer a contract as it was inferred in those cases where there was no other explanation of the conduct of the parties."

In some of the highway cases it has been said that one reason for presuming dedication is that, if there had not been dedication, the public passing over the land would be trespassers. That argument has no application in this case, because all the acts done in this case are referable to an intended dedication either by the Crown or by the local authority. I am therefore of opinion that up to the time of the issue of the lease there was no dedication by Turner.

In 1886 Turner mortgaged his lease. I may say at once that, in my opinion, a mortgagor cannot without the consent of his mortgagee dedicate a road over the mortgaged property. There is no more reason why he should be able to do so than there is reason why a lessee should be able to dedicate without the consent of his lessor. From that time onward until 1901 the land continued to be under mortgage, with the exception of a

(1) 33 Ch. D., 16, at p. 20.

short period in 1889 when Turner ceased to be the lessee on the transfer of the land by the mortgagees to one Dibdin. In that same year the Crown grant was issued to Dibdin, who, nine days afterwards, executed two mortgages of the land. So long as Turner was on the land he was a party to the agreement with the Shire, and I think there was no dedication of the land by him. I think that under the circumstances there is no more evidence of dedication by Dibdin, while lessee, than by Turner. From the time Dibdin acquired the fee it was always under mortgage until 1901. I will assume that the succeeding owners of the land were bound to take notice of its actual condition. That being so, of what had they notice? They had notice that there was a track through the land which was used by the public, and that the track was marked on the maps of the locality which were prepared sooner or later. They would also have notice that the track was such as to indicate that some person in authority had laid it out. I will also assume that the mortgagees are equally bound, and are to be taken to have known all that was going on. On these assumptions the proper inference to be drawn is, in my opinion, that the mortgagees thought that the road had been proclaimed, or that it had been surveyed by the proper authorities with the intention that it should be proclaimed, and that in either case they could not successfully resist the resumption of the land. There was nothing then to call for the exercise of their volition as to dedication. The Attorney-General put it to us that the mortgagees must be taken either to have known or not to have known the exact facts. I agree. Suppose they did know the exact facts, then they knew that this piece of land was being used by the public under something in the nature of an executory agreement by which the local authority undertook by proper legal means to acquire the land and dedicate it to the public. That agreement being executory would continue, without the imputation to the land owner of an intention to dedicate, until it came to an end by the proclamation of the road, or by repudiation, but as soon as the local authority repudiated the agreement, the whole transaction came to an end, and one must look for a fresh dedication subsequently. If, on the other hand, the mortgagees

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did not know the exact facts, if they knew no more than they could see by going upon the land, bearing in mind the period of ten years which had elapsed since the road was surveyed, that the land was practically waste land, and that the fences had been destroyed in one of the fires which swept over the country, they would find indications that a road had been cleared and marked out by some statutory authority and was used by the public. The inference they would draw would be, either that the road had been proclaimed, or that proceedings for having the road proclaimed were in progress. The case is like that where a man builds a house upon the land of another by the mutual mistake of himself and that other. In such a case the owner of the land would not be estopped from asserting his title to the land. So, whichever way you take it, whether the mortgagees knew or did not know all that had taken place, the notion of dedication is absolutely excluded by the facts of this case. I am of opinion therefore, for these reasons, that, so far from there being conclusive evidence of dedication by the successive owners or mortgagees of this land, the facts almost conclusively negative any such presumption.

In the view I take of the case it is not necessary to deal with the view put forward that possibly a qualified dedication might be inferred, since we know the actual facts, viz., a tacit agreement to allow that particular piece of land to be taken by the local authority and used by the public as a road until the road was proclaimed. But I think that you can hardly imagine a road being dedicated under the laws of this State subject to the owner being allowed to keep a gate at the end of it.

The only other question in the case is one of damages. The learned Judge who heard the case thought that, under the circumstances, the damages claimed, £300, were the natural and reasonable consequences of the acts of the Shire. The land was used as a paddock in which cattle were kept. The local authority called upon the plaintiff to remove the fence across the road and threatened that unless he did they would enforce the statutory penalties against him. The plaintiff did not remove the fence and the Shire Council then proceeded to take down the whole one chain length of fence and to remove the posts. It is suggested

that it would have been reasonable for the plaintiff to put up another fence in order to keep in his cattle. But, after the intimation he had received from the Council, he might reasonably have believed that they would pull it down again. The learned Judge, after considering all the facts, believed the evidence for the plaintiff that he had really suffered the damages which were awarded. For my part I see no reason for questioning his decision. I think these damages might reasonably have followed upon the unlawful acts of the defendants. I am therefore of opinion that the appeal should be dismissed.

BARTON J. The learned Chief Justice has gone fully into the facts, and therefore it is not necessary for me to state them with particularity. I have very carefully considered the judgment of *à Beckett* J., and I am of opinion that it leaves nothing to be complained of either as to the law or as to the facts. In the case of *Lawson* v. *Weston* (1), *Sir Alfred Stephen* C.J. of N.S.W., stated the law to the jury as follows:—"1st. To constitute the dedication of a roadway to the public, there must have existed, in the mind of the owner of the soil, an *intention* to dedicate it. Mere sufferance of an user, therefore, by negligence, or as a matter of temporary favour, will not amount to dedication. 2nd. But, frequent and long continued user of the roadway, by the public, is ordinarily evidence of a dedication; for negligence on the part of the owner, or ignorance of his rights, or indifference to them, will not be presumed. This evidence will be more or less conclusive, according to circumstances; but particularly, according to the length of the time, and the number of instances of user. 3rd. Nevertheless, however long that time or numerous those instances, any open or distinct circumstances, done or caused by the owner, indicating and notifying an intention *not* to dedicate, will be strong evidence against the dedication. But it is essential to observe, that if, at *any* time, by *any* owner, a dedication (that is, a designed and intentional dedication) took place, that dedication could not afterwards be recalled, either by him or any subsequent owner. 4th. The act or circumstances must be, in fact, for the purpose of exercising the right of dissent, and notifying

(1) 1 Legge, 666, at p. 668.

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that right to the public. The putting up of a fence across the road, so as to prevent access to it, would be one of the strongest instances of such an act; and, if there were a gateway left in it, but the gate was generally or often kept locked, the inference from the act would remain the same. The erection of such a fence, however, with a slip rail in it at the point of intersection with the road, or a gate secured by a hasp only, may have been for no purpose of dissent and obstruction. It may have been, possibly, for the very purpose of saving the right of the public, while at the same time protecting the owner, by preventing cattle from trespassing over the land on either side. In the absence of any such act or circumstance for the purpose of expressing and notifying dissent, the user by the public is evidence that the owner *intended* a dedication. 5th. As the purpose must be to *notify* dissent or non-dedication, the means used should be such as to answer that purpose, in order that the public, being aware of the denial of their right to use the road, may assert that right by forcibly removing the obstruction, or otherwise opposing the act done in disparagement of the right. If, therefore, from the nature of the interruption (and from the fact of similar instances of obstruction being common, in known and recognized public roads), the public would have been likely to misunderstand its purpose and object, the fact of the obstruction itself will be of much less value obviously than an interruption, decided and unequivocal in its character." That statement of the law seems to be in accordance with the authorities as we have had them cited to us, and as they are compared and dissected in the notes to *Dovaston* v. *Payne* (1), and with the statement quoted by the Chief Justice from the judgment of *Parke* B. in *Poole* v. *Huskinson* (2), viz.:—"There must be an *animus dedicandi*, of which the user by the public is *evidence*, and no more; and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment."

Now, the defendant had to make out that there was a right of way over the plaintiff's land. *à Beckett* J. heard the facts on both sides, and we have those facts before us, and one may say that there was evidence both ways. The learned Judge below came to a

(1) II. Sm. L.C., 11th ed., 160. (2) 11 M. & W., 827, at p. 830.

conclusion upon that evidence, the reasonableness of which it is not possible to doubt. His statement of the law does not differ materially from that which I have read. Ordinarily speaking the dedication of a highway is to be evidenced by open and unexplained user by the public as of right, from which user, with the knowledge of the owner, his intention to dedicate to the public may be inferred by a jury. I do not think it necessary to determine the question whether the reversioner (in this case the Crown) can be bound by the acquiescence of the tenant. In this connection I will merely mention some remarks of *Le Blanc* J. in *Daniel* v. *North* (1). That was a case in which lights had been "put out," as it is called, and enjoyed without interruption for above twenty years, during the occupation of the opposite premises by a tenant, and it was held that that would not conclude the landlord of such opposite premises, without evidence of his knowledge of the fact, which would be the foundation of presuming a grant against him; and consequently would not conclude a succeeding tenant who was in possession under such landlord from building up against such encroaching lights. *Le Blanc* J. said:—"It is true, that presumptions are sometimes made against the owners of land, during the possession and by the acquiescence of their tenants, as in the instances alluded to, of rights of way and of common; but that happens, because the tenant suffers an immediate and palpable injury to his own possession, and therefore is presumed to be upon the alert to guard the rights of his landlord as well as his own, and to make common cause with him; but the same cannot be said of lights put out by neighbours of the tenant, in which he may probably take no concern, as he may have no immediate interest at stake." I mention that passage because the question of the effect of the tenant's acquiescence as against the reversioner, where it is established as a fact, is one which may become very proper for decision, but it is not necessarily involved in this case, because I am of the opinion, with *à Beckett* J., that there was not such an acquiescence by Turner as would raise the question which under such circumstances would arise. The learned Chief Justice has referred with sufficient fulness to the Statute laws existing in Victoria and affecting this case. It

(1) 11 East., 372, at p. 375.

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seems to me the matter is in this position: There are a number of acts proved in evidence which are susceptible of one or other of two interpretations. One of them is that there was an intention on the part of the successive owners of this land to dedicate this track as a highway. But the same body of evidence is open to another interpretation, viz., that the holder of the land might reasonably look forward, under the circumstances of the acts being performed by the Shire and other persons, to such a statutory dealing with the question of a public road as would entitle him to compensation together with a fence on each side of the road. It was open to *à Beckett* J., dealing with these two interpretations of the facts, to come to the conclusion either that there was an *animus dedicandi* according to the common law, or that the right complexion to be put upon those acts was that the user was by the owner's indulgence, and attributable to the intended statutory acquisition of a road by the Shire. I am inclined to think that the facts are stronger in favour of the latter interpretation than of the former. The learned Judge thought so too, and, as his decision is, at least *primâ facie*, right, we should not disturb it. He said in the course of his judgment (1):—"The cases in which the intention has been presumed from long-continued user differ widely from the present. Dedication is a question for a jury, in whose place I stood. If I had had a jury before me at the trial, it would not have been proper for me, on the evidence there given to have directed them to find dedication; I should have left it to them to say aye or no upon the question. Standing in their place, I find that there has been no dedication. In considering whether there was dedication in fact intended or to be imputed by inference of law, I have had regard to the circumstances under which the track was first formed and continued to be used, and to the powers possessed by the Shire under Local Government Acts and by the Crown under Land Acts. The first owner of the land had distinct notice in his licence of the right of the Governor in Council to resume land for a highway, and found persons employed by the Shire, the road-making authority, forming a track across his land. He and those who succeeded him would

(1) (1906) V.L.R., 1, at p. 7.

naturally have assumed that these acts were done, as in fact they were done, with a view to the creation of a highway by the exercise of statutory authority which would entitle the owner in varying circumstances to varying compensation. Should he lose these rights because he did not treat the servants of the Shire as trespassers and forbid the public to use the road until it was actually proclaimed? Is he to be considered as giving because he did not resist those who had the power to take? A decision that absence of opposition by a landowner, in a case like the present, amounts to dedication, would, in my view, be not merely bad in law, but mischievous in its consequences, by forcing landowners to preserve their rights by obstructing every attempt to form or use a road until a road had been legally created by the exercise of statutory authority. Such an attitude on the part of landowners would impede the progress of settlement." *Mutatis mutandis* there is in that passage a very strong reflex of the remarks of *Bowen* L.J., in *Blount* v. *Layard* (1), as cited by *Buckley* J. in *Behrens* v. *Richards* (2):—"that nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood." So that by placing too liberal a construction in favour of the public and against the landowner upon acts of passage which are tolerated by him, there is a danger lest, in the sparsely settled districts of a country like this, where roads are few and unmade, and mutual concessions on the part of the landowners and the public are necessary, landowners should be put upon the defensive, and be forced to set obstructions in the way of every act which, in a long course of time, might be construed as the assertion of a right of public highway. Taking the whole case together, and concurring generally with the learned Chief Justice, I am of opinion that *à Beckett* J., has stated the law with accuracy and come to an unassailable conclusion on the facts. I therefore agree that this appeal should be dismissed.

(1) (1891) 2 Ch., 681 (*n*).

(2) (1905) 2 Ch., 614, at p. 620.

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O'CONNOR J. I also am of opinion that the judgment of *à Beckett* J. must be affirmed. The law laid down by him I entirely adopt, and I think there can be no question that he rightly applied that law to the facts. The learned Chief Justice has gone so fully into the whole matter that it is not necessary for me to say more than a few words with regard to the law or the inferences to be drawn from the facts as placed before us. The keynote of the law in regard to dedication of a highway by user is to be found in the few words of *Patteson* J. in *Barraclough* v. *Johnson* (1):—"The very term dedication shows that the intent is material. There cannot be such a thing as turning land into a road without intention on the owner's part." There cannot, therefore, be such a thing as turning this land into a highway without some intention on Turner's part. How is that intention to be gathered? It may be from the uninterrupted user by the public without objection, if that user is not otherwise explained. There can be no question that the user in this case is sufficient, if unexplained, to raise the inference of dedication. It is of no moment that only a few persons used the road, or that the road offered access to only a few places. The evidence is that the user was by the public as they wished, and for any purpose they thought necessary. Under the circumstances there was, in the absence of other explanation of the use of the road by the public, sufficient evidence for the Judge, if he thought fit, to draw the conclusion that there had been a dedication by user. But there was another explanation of the user, and in reference to that a most important question is how the user was initiated. That was the inquiry to which the Judges in *Barraclough* v. *Johnson* (2) directed themselves in the first instance, and although there was in that case an uninterrupted user for about nineteen years, they found that it had originated in an agreement, and had continued under it by a licence which the landowner might revoke at any time. So it is most important to consider whether, in this case, the user did not originate and continue under a licence which could be withdrawn at any time by the owner of the land for the time being if he thought fit to assert his right.

The Shire was constituted in 1878. So that in that year,

(1) 8 A. & E., 99, at p. 105.

(2) 8 A. & E., 99.

when, according to the evidence, the user first took place, the Shire was newly charged with the administration of the district, then apparently rather badly off for roads. In 1879 Turner got his second licence, having got his first one in 1877. It must be presumed that he complied with the conditions of his licence as to fencing and residence. What then was the position of the Shire on the one hand, and of Turner on the other hand, in 1879? Turner held the land under a title which gave him no right to dedicate to the public any road over his land. If any dedication of such a road could be inferred, it must have been a dedication in which Turner and the Crown concurred. I may say here that I see no reason why in Victoria there could not be dedication of a road by the Crown in any of the ways in which a road may be dedicated by the Crown in England. It is laid down in many cases, and was regarded as settled law in *Turner* v. *Walsh* (1) that the Crown in Australia, apart from local Statutes, may dedicate a road by allowing user by the public of Crown lands in exactly the same way as an individual may dedicate. It was urged by Mr. Mitchell that sec. 4 of the *Land Act* 1869 altered the law in Victoria in that respect. I am unable to come to that conclusion. It appears to me, although it is not necessary to decide the question in this case, that there is nothing in that Act to prevent the Crown, if there is proper evidence of dedication, from dedicating by user in the same way as an individual may dedicate. Whether that would be so in New South Wales, where the provisions of the corresponding Act are quite different, it is not necessary to say. So far as Victoria is concerned, there is no reason why the same rights of dedication as exist against the Crown in England should not exist here.

That being the position of the owner of the land and the Crown, let us look at that of the Shire. It had the right to take possession of the land and itself to dedicate the road. It also had power to request the Government to proclaim the road, and there was in the licence under which Turner held an express power reserved to the Government to proclaim a road through the land.

Such being the situation of the parties, it is apparent that in 1879 Turner's neighbours on the Mirboo side desired to

(1) 6 App. Cas., 636.

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get a road out from their selections, and the evidence shows that the only practicable route was through his property. So we find that in 1879 a track was blazed along the course of the present road by Farley, who was paid for his work by Rolls, the President of the Shire, not out of the Shire funds, but by subscriptions received from the settlers in the neighbourhood. Immediately afterwards, the ratepayers petitioned the Council that this road as it was blazed should be cleared and proclaimed a main road, and the Council thereupon made a request to the Government to have all the new and projected roads in the Shire marked off and surveyed. Shortly afterwards the Government sent an officer to survey this road among others. In the meantime the Council had called for tenders for clearing the road, and under their direction, it was cleared along the track blazed by Farley. So that, while waiting for Government action, the Shire Council, in so far as they could, carried out the request of the ratepayers, took over the land, formed the road and treated it in exactly the same way as any other road in the Shire, and apparently they have so treated it ever since. From time to time they have spent the Shire's money on it in side-cutting, laying corduroy, and scrub cutting.

Such being the circumstances in which the user of portion of this land as a road was initiated, the first question to be determined is what is to be inferred as to Turner's intention to dedicate from the taking over of the road, the clearing it, and the user of it by the public during that time? It appears to me those facts under the circumstances furnish no ground of inference that Turner intended to dedicate a road at that time. On the contrary, the most natural inference is that Turner would not assume that the Council was doing what would be an utterly illegal act, unless it was intended to be followed up by a proclamation of the road by the Government or by the Shire, in either of which cases Turner had a right to be compensated under the *Local Government Act* 1874. As far as the initiation of the road is concerned, it appears to me the only reasonable inference to be drawn is that Turner regarded it as practically taken over by the Shire Council, and that, pending the completion of arrangements, he

permitted the public to use the road, and the public did use it as I assume they would use any other public road.

That condition of things continued until 1884, when Turner got his lease. As far as the Crown is concerned all the evidence is against the Crown having made any dedication. In the first place, the Government in 1879 were requested by the Shire to have this road surveyed as a public road. In 1884 another request was made asking them to have all lands taken and used by the Shire as roads proclaimed as public roads under sec. 363 of the *Local Government Act* 1874, and, in reply to that request, in August 1884 the Shire got a letter from the Lands Department referring to this Mirboo Road, and stating that the proclamation of that road would be delayed until all the roads in the Shire had been surveyed. How is it possible, under those circumstances, to infer that the Crown intended to dedicate this road when it had been asked to proclaim it as a road taken by the Shire in the ordinary way?

Up to 1884, therefore, it appears to me quite impossible reasonably to come to the conclusion that there was an intention, either on the part of Turner, or on the part of the Crown, to dedicate this road, or that the user of the road can be referred in any way to any such intention.

Turner held the land until 1886, and then new interests came into existence. I do not intend to deal with that part of the case in any detail. It is only necessary to say that, where land is under mortgage, the mortgagor can no more assent to the dedication of a road by user than he can give an interest in the land of any other kind to a third person without the mortgagee's consent express or implied. Therefore, if it is desired to prove dedication by user while the land was subject to mortgage, it must be shown that there was knowledge of the user on the part of the mortgagees, just as it would be necessary to show knowledge on the part of a lessor of land under similar circumstances. It appears to me that there was evidence from which, under certain circumstances, it might be inferred that during the existence of the lease the mortgagees had knowledge that the land was being used by the public as a road. But knowledge alone is insufficient unless the inference of dedication can, under the circumstances, be drawn

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from the fact of user with the knowledge of the mortgagees. On that part of the case I entirely concur in the view taken by the learned Chief Justice. What would the mortgagees see, assuming that they had the opportunity of observing what was going on on the land? They would see that this road appeared to be properly surveyed and properly maintained for a road in such a locality, and that in all respects it was used by the public in the same way as any other public road in the Shire. Assuming them to have no other knowledge, they would come to the conclusion that the road was a public road, and as such had a lawful origin. They would not necessarily assume that there had been a dedication by the owner, nor is there evidence in fact which compelled such an assumption. But I do not think it necessary to consider that question because it appears to me the origin of the road was merely a licence on the part of the first owner Turner to the public to use the road pending the completion of arrangements for proclaiming the road. Any man who succeeded Turner was entitled to take up Turner's position, and at any period in the chain of title when the owner of the land for the time being thought fit to put an end to the licence, he was entitled to do so. Therefore, so far as all the mortgagees and the owners are concerned, even if there was any evidence of their knowledge of user, it does not affect the question as the licence might be withdrawn at any time.

That carries on the history of the title until 1901, when the Trustees Executors and Agency Co. transferred to Davies. It is clear that the company then knew that there was no title in the Shire to the road, and they intimated to Davies that they intended to take steps to block it. From that time on there was a continuing assertion of title by the parties who occupied the land, and a denial of the right of the Shire to have a road except upon payment. So that it is unnecessary to carry the matter beyond that time. Therefore, looking at the matter from the point of user, I think that *à Beckett* J. came to a right conclusion.

There is one other view of the matter with which I should like to deal, that is the view put by the Attorney-General, that the later owners of the land were estopped from taking up the position

that the land was not dedicated. In supporting that contention he relied on the principle laid down in *Ramsden* v. *Dyson* (1):— "If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented. But it will be observed that to raise such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner." The essential elements to create an estoppel in a case of that kind are wanting here. In the first place, I am satisfied that the Shire knew what the position of this road was, because it must be taken that they knew its history. It is clear from that history that there was no dedication to the public, but that the Shire was only allowed to take possession of the road for the purpose of having it proclaimed in the ordinary way. On the other hand, the owners and mortgagees believed it to be a public road proclaimed or intended to be proclaimed in the ordinary way. Under these circumstances, I think it is impossible to apply the doctrine in *Ramsden* v. *Dyson* (2), and therefore that there was no estoppel. For these reasons I have come to the conclusion that the judgment of *à Beckett* J. is right.

Appeal dismissed with costs.

Solicitor, for appellants, *D. Wilkie*, Melbourne.

Solicitor, for respondent, *E. H. Hick*, Melbourne, for *J. W. Sutherland*, Leongatha.

B. L.

(1) L.R. 1 H.L., 129, at p. 140.

(2) L.R. 1 H.L., 129.