licence authorized the said sale." This statement is not technically accurate, but it gives the true result in substance. If a person has a licence to sell wine of Western Australia he cannot be punished for selling wine of Victoria. This does not, to my mind, involve any corollary that a man who sells Australian wine without any licence at all is not liable to the penalty : still less the corollary that he is not liable if he sells spirits.

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Appeal dismissed with costs.

Solicitors, for appellant, *Lawson & Jardine*, for *Northmore, Lukin & Hale*, Perth.

Solicitors, for respondent, *Hamilton, Wynne & Riddell*, for *R. S. Haynes & Co.*, Perth.

B. L.

[HIGH COURT OF AUSTRALIA.]

CLEMENT AND OTHERS . . . . APPELLANTS; PLAINTIFFS,

AND

JONES AND OTHERS . . . . . RESPONDENTS. DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1909. MELBOURNE, *March* 29, 30, 31. Griffith C.J., O'Connor and Isaacs JJ.

Real property—Title by adverse possession—Land of two owners within one fence—Presumption of possession—Equivocal acts of possession—Intention—Real Property Act 1890 (*Vict.*) (*No.* 1136), *Part II.—Transfer of Land Act* 1904 (*Vict.*) (*No.* 1931), *secs.* 10, 11.

Where two pieces of land belonging to two different owners are enclosed in one ring fence, the presumption is that the possession of each of the pieces remains in the respective owners, and this presumption is not rebutted

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by the fact that the whole of the land is used by only one of the owners, unless other facts show that the intention of the owner using the land is to exclude the other owner from possession.

A. bought from another person in 1875 a grazing paddock containing about 2,000 acres which was surrounded by one ring fence, but within this fence and not fenced off from the rest of the paddock was a block of 80 acres of which B. was the owner. From the time of the purchase and for more than 15 years afterwards A. used the whole of the paddock for grazing his cattle. During this period B. on several occasions cut firewood on his block and carried it away, and on one occasion B. renewed the survey marks on the boundaries of his block. In an action by A. after the expiration of the 15 years against B. for a declaration under the *Transfer of Land Act* 1904 (Vict.) that, by possession adverse to or in derogation of the title of B., A acquired a title to an estate in fee simple in possession of the 80 acre block :

Held, on the evidence, that any exclusive possession by A. of the 80 acre block, and any intention on his part to assert exclusive possession to it, were negatived, and that A. was not entitled to the declaration asked.

Observations as to burden of proof and effect of entry of documentary owner during statutory period.

Decision of the Supreme Court of Victoria (*à Beckett* J.) (*Clement* v. *Jones*, (1908) V.L.R., 704 ; 30 A.L.T., 95) affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court of Victoria on 10th June 1907 by Jeanie Swanson Clement, Isabella Tait Neill and Frederick Charles Neill against Arthur Cecil Jones, Ella Gertrude Jones, Charles Launcelot Lyon and the Registrar of Titles alleging that, by reason of certain facts set out in the statement of claim and by virtue of the *Transfer of Land Act* 1904 and Part II. of the *Real Property Act* 1890, the plaintiffs had, by themselves or their predecessor in title, by possession adverse to or in derogation of the title of the defendants, A. C. Jones and E. G. Jones, or of them and their predecessors, as registered proprietors, acquired a title to an estate in fee simple in possession free from encumbrances in two allotments of land containing together 80 acres of which the defendants A. C. Jones and E. G. Jones were registered proprietors, and they claimed relief accordingly. No claim was made against the defendant Lyon, who from 1896 onward held the land in question as tenant of the registered proprietors. The defendants A. C. Jones and E.

G. Jones, in addition to denying possession of the land by the plaintiffs or their predecessors, counterclaimed for accounts of the rents and profits thereof on the footing of wilful default, alleging that the plaintiffs' predecessor, one Peter Clement, had held the land as bailiff or agent or as guardian and trustee for John Frederick Patey Jones, a predecessor of those defendants.

The circumstances which gave rise to the action were as follow :—In 1875 one Glassford contracted to sell to Peter Clement a piece of land in the Parish of Woundellah, in Gippsland, known as the Thomson Paddock, said to contain about 2,150 acres, and which was used for grazing purposes, for the sum of £4 10s. per acre, £500 cash and the balance on completion of the title. The vendor agreed to make a good title to the property and to execute a conveyance of the same. He also agreed that in the event of his not being able to make title to a portion, about 220 acres, for the purchase of which he was then in treaty, there should be a reduction in the quantity of land sold. At that time the Thomson Paddock was enclosed on the north substantially by the Thomson River, and on the other three sides by fences, the south side abutting on a government road called the Heyfield Road. There were no subdividing fences. A government road also ran through the paddock in a north and south direction from the Heyfield Road to the river, but was not then definitely marked out on the land. Included in the paddock was a block of 80 acres bounded on the south by the Heyfield Road and on the west by the other government road, but not in any way divided from the rest of the paddock. This land had prior to 1862 been granted to one William Jones, who died in that year intestate, leaving him surviving his heir-at-law, John Frederick Patey Jones, then an infant, who attained his majority in 1877. Immediately after signing the contract of purchase Peter Clement turned his cattle into the paddock, and he continued to use the paddock in this way up to the time of his death. In 1877 Peter Clement erected a fence on each side of the government road which ran through the paddock, so that the 80 acres were then fenced on the south and west sides. Peter Clement died in 1890 and the plaintiff, J. S. Clement, was one of his executors, and was at the time this action was brought the sole trustee of his estate, the

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other plaintiffs being representatives of a deceased executor. In 1896 J. F. P. Jones was registered as proprietor of the 80 acres, and in 1904 he died. Subsequently A. C. Jones and E. G. Jones became registered proprietors as devisees under his will. Other facts and portions of the evidence are set out in the judgments hereunder.

The action was tried before *à Beckett* J., who held that Peter Clement had not been in possession of the 80 acres, and he therefore gave judgment for the defendants with costs in the action, and on the counterclaim he gave judgment for the plaintiffs: *Clement* v. *Jones* (1).

The plaintiffs now appealed from this judgment to the High Court.

McArthur and *Davis*, for the appellants. The evidence establishes that there was a discontinuance of possession of the 80 acres by the respondents' predecessor before 1875, an exclusive possession by Glassford up to 1875, and that from 1875 the appellants or their predecessors had for over 15 years been in possession to the exclusion of the respondents and their predecessors. That being so, at the expiration of the 15 years the appellants' title was absolute and the respondents' rights were extinguished and could not be revived by any subsequent re-entry by them: see *Real Property Act* 1890, secs. 18, 19, 43; *Carson's Real Property Statutes*, 10th ed., pp. 127, 179; *Trustees, Executors and Agency Co. Ltd.* v. *Short* (2); *Brassington* v. *Llewellyn* (3); *Perry* v. *Clissold* (4); *Doe d. Harding* v. *Cooke* (5). Even a person who goes in as tenant at will may at the expiration of 16 years from the beginning of his tenancy obtain a title by possession: *Lynes* v. *Snaith* (6). See also *In re Jolly, Gathercole* v. *Norfolk* (7). The acts done by the appellants' predecessor clearly show the *animus possidendi* which according to *Littledale* v. *Liverpool College* (8) is necessary.

[O'CONNOR J.—The acts done here do not seem to indicate an

(1) (1908) V.L.R., 704; 30 A.L.T., 95.
(2) 13 App. Cas., 793.
(3) 27 L.J. Ex., 297.
(4) (1907) A.C., 73.
(5) 7 Bing., 346.
(6) (1899) 1 Q.B., 486.
(7) (1900) 2 Ch., 616.
(8) (1900) 1 Ch., 19.

intention to exercise dominion over the 80 acre block that similar acts did in *Laing* v. *Bain* (1).]

The question is what was the effect of the acts done by the appellants and their predecessors? Did they amount to an exclusion of the respondents? Were they such that the respondents could have maintained an action for ejectment?

[ISAACS J.—The cutting and carting away by the respondents of firewood from the 80 acres in the years from 1881 to 1884 are acts of possession at a time when Clement was a trespasser. They amount to entries under the respondents' title and were *animo possidendi*: *Solling* v. *Broughton* (2). For that purpose an entry for an hour is as good as an entry for a week: *Locke* v. *Matthews* (3).

GRIFFITH C.J.—Those acts seem to be at any rate evidence of joint possession, and therefore to negative the exclusive possession of the appellants.]

There is no finding of fact as to the cutting of firewood and the evidence is very contradictory. The entry for that purpose is not sufficient to disturb the possession of the appellants: *Doe d. Baker* v. *Coombes* (4). There was no such acknowledgment in writing of the respondents' title as would establish the respondents' possession under sec. 30 of the *Real Property Act* 1890. An acknowledgment is ineffectual for that purpose if it is made by an agent: *Ley* v. *Peter* (5); *Sugden's Real Property Statutes*, 2nd ed., p. 68; *Roscoe's Nisi Prius Evidence*, 18th ed., p. 1076. The *Transfer of Land Act* 1904 is only a machinery Act, and sec. 10 gives no other rights than those which were conferred by the *Real Property Act* 1890.

[*Hayes* referred to *Darby and Bosanquet's Statutes of Limitations*, 10th ed., p. 503.]

The appropriate way of taking possession of grazing land is to put cattle upon it.

[They also referred to *Bullen and Leake's Precedents of Pleadings*, 3rd ed., p. 416; *Rains* v. *Buxton* (6); *In re Allen* (7); *Seddon* v. *Smith* (8); *Coverdale* v. *Charlton* (9); *Lord Advocate*

(1) Knox., 28.
(2) (1893) A.C., 556, at p. 559.
(3) 13 C.B.N.S., 753.
(4) 9 C.B., 714, 19 L.J.C.P. 306.
(5) 3 H. & N., 101; 27 L.J. Ex., 239
(6) 14 Ch. D., 537.
(7) 22 V.L.R., 24; 18 A.L.T., 28.
(8) 36 L.T., 168.
(9) 4 Q.B.D., 104, at p. 118.

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v. *Lord Blantyre* (1); *Worssam* v. *Vandenbrande* (2); *Doe d. Curzon* v. *Edmonds* (3); *President, &c., of the Shire of Narracan* v. *Leviston* (4); *Bree* v. *Scott* (5).

Hayes, for the respondents, was not called upon.

Griffith C.J.

GRIFFITH C.J. The more the appellants' case has been argued the more hopeless has it become. The land in question consists of two square blocks each of 40 acres, each side being 20 chains long, which were acquired from the Crown in the early sixties. One of them is situated on the north or north-east side of a road called the Heyfield Road, and the other is immediately at the back of it. To the western or north-western side of the two blocks ran a government road which is laid out on the plan, but is not definitely marked out on the land. It appears that in the early seventies these blocks were included in a ring fence with a large quantity of other land—over 2,000 acres in extent—which ran back from the Heyfield Road to the River Thomson, and the whole was known as the Thomson Paddock. The claim of the plaintiffs is that they acquired a title to these 80 acres of land by continuous possession, beginning in 1875, against the true owners who are represented by the defendants Jones, now the registered proprietors. The plaintiffs' predecessor, Clement, in 1875 entered into a contract with one Glassford to buy the land known as the Thomson Paddock, described as containing 2,150 acres or thereabouts, for the sum of £4 10s. per acre. The vendor agreed to make a good title to the property. Reference was made to a portion of land about 220 acres in extent, as to which it was possible the vendor would not be able to make title, and provision was made that in that case there should be a proportionate reduction in the price. The plan put in shows that the total area of land in the Thomson Paddock, including the 220 acres, was about 2,209 acres instead of 2,150 acres. Under these circumstances I think it is plain that both the vendor and the purchaser knew that the block of 80 acres was not included in the purchase. If it had been, we might at least have expected some provision with respect to it similar to that in respect of the other land as to

(1) 4 App. Cas., 770, at p. 791.
(2) 17 W.R., 53.
(3) 6 M. & W., 295.
(4) 3 C.L.R., 846.
(5) 29 V.L.R., 692; 25 A.L.T., 220.

which the title was doubtful. As to the 80 acres they knew there was no title, and, if any inference is to be drawn, it is that the 80 acres was not included in the purchase.

The case the plaintiffs undertook to make is that from 1875 for 15 years they were in continuous possession of the land. They must prove that they were in exclusive possession and that the true owners were out of possession. It is not sufficient to prove that they enjoyed in common with the true owners the use of the land. The fallacy of the argument of the plaintiffs is that they have assumed that it is a presumption of law or of fact that, when land of more than one owner is enclosed in one common fence, the whole of the land is in the view of the law in the possession of the person who happens to be using the land. There is no foundation for such a doctrine either in law or in fact. In the case of unoccupied land the possession follows the title, that is, the person who has the title is to be deemed to have possession of the land unless the contrary is shown. That applies as much to land within a fence as to land outside it. It is not an extraordinary thing in Australia for a paddock to be enclosed by an external fence, and for the land within the external fence to belong to various persons, and in the case of pastoral or grazing land, such as this was in the early seventies —over 2,000 acres carrying about 300 head of cattle—it is not to be expected that it would be sub-divided more than was necessary. In the case of a paddock of that size, where the land of more than one person is enclosed in the fence, the presumption is that the possession is in the owners, and that there is a tacit understanding between the different owners that each may put his cattle in the paddock, and that none of them will complain if the cattle of the others trespass over the imaginary boundary lines. This doctrine cannot depend on the relative areas of land belonging to each owner. Whether one is only 80 acres in extent or much larger, the argument is equally applicable. There is, therefore, no presumption to begin with in favour of the plaintiffs. The same considerations show that whether possession is to be attributed to the person who alone is running cattle on the enclosed land or not is a doubtful question. The act of running cattle on the land is equivocal, and, as *Lindley* M.R. said in *Littledale* v.

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Liverpool College (1):—"When possession or dispossession has to be inferred from equivocal acts, the intention with which they are done is all-important." In *Leigh* v. *Jack* (2), referred to by *Lindley* M.R., *Cotton* L.J. made an observation very relevant to what I have said:—"In deciding whether there has been a discontinuance of possession the nature of the property must be looked at." In the same case *Bramwell* L.J. said (3):—"In order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it." The plaintiffs, therefore, in this case must show that acts were done which were inconsistent with the enjoyment of the 80 acres of land by the true owners for the purposes for which they would be likely to intend to use it.

The possession being equivocal and the presumption being as I have said, what evidence is there to show that the possession of the defendants was excluded and that the possession of the plaintiffs became exclusive? I have already said that, in my opinion, nothing is to be inferred from the fact of mere inclusion in the one fence. There is no evidence that after 1893 the Jones family ran any cattle in the paddock, and all that appears is that Clement ran cattle over all the Thomson Paddock. There is another fact, that in 1877 the road I have referred to running through the Thomson Paddock was fenced on both sides from the road to the river. I do not think that makes any difference to the result. It being, then, at best doubtful, to begin with, whether the plaintiffs had obtained exclusive possession as distinct from exclusive use in fact, what is the evidence? What took place afterwards may be evidence of admissions by the plaintiffs as to what was the intention with which they had exercised such acts of ownership, if any, as they did exercise over the land—whether the use they were making of the land is to be treated as exclusive of the rights of the defendants or not. I will refer to the evidence which appears to be material to that question.

According to the evidence of Arthur Cecil Jones, in the years

(1) (1900) 1 Ch., 19, at p. 23. (2) 5 Ex. D., 264, at p. 274.
(3) 5 Ex. D., 264, at p. 273.

1881 to 1884 he supplied his mother, who was one of the registered proprietors of one of the blocks, the other standing in the name of her deceased husband, with timber taken from the 80 acres. He said he was collecting it for several days at a time in twelve months, taking one load at a time with a dray and one horse, and that he took fully nine or ten loads. He got it from fallen wood on the 80 acres. On one occasion he saw William Clement there, who, he said, invited him to take wood from Clement's land, but Jones said he preferred to "take it off our land as I am clearing it by doing so, but thank you for your kind offer." Jones said he spoke to Peter Clement on one occasion and said "I have come on behalf of my mother to know if you will rent." He says Clement replied "No I won't, I am clean sick with you and your brother about this little bit of land." Jones further said that he again made a similar offer, to which Peter Clement said "Don't come again unless you come to sell." That is some evidence of two things, one, that Clement at that time gave Jones to understand that he (Clement) did not assert a claim to exclusive possession of the land as against the Jones family, and, secondly, that at that time the Jones family were actually using the land in such a way as would only be justified if they were in actual possession. It also goes to negative any intention of Peter Clement to take exclusive possession.

Again: in 1883 Boe, a neighbour, wrote to Peter Clement as follows:—"Mr. F. Jones has offered me a lease of 80 acres of ground in one of your paddocks at Woundella. It is only partly fenced and before stocking it I wanted to know whether cows or bullocks would suit you best for me to put in and how many, or I thought it might suit you better yourself to lease it, and although I have some land rented over there I would not care to be in your way." Peter Clement did not reply in writing to that letter, but when he saw Boe he said he did not care about leasing the land but wanted to buy it, and asked Boe to see Jones about it. That appears to bear out what I have said as to the proper presumption to be drawn, viz., that there was an understanding between neighbours that they would run their cattle together and that, in order not to inconvenience one another, they would consult with one another as to whether they

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would run bullocks or cows in the same paddock. So much one might infer from his knowledge of the world. It is evidence at any rate that Boe, Clement, and Jones thought so.

Then in 1886 Mrs. Jones gave formal notice to Peter Clement under the *Fences Act* 1890 requiring him to contribute towards the construction of a dividing fence between the 80 acres and the rest of the land, describing the 80 acres as "belonging to me and in my occupation as administratrix of the estate of John William Jones deceased." That was not strictly accurate, nor is it material whether it was accurate or not. It was a demand by her, asserting herself to be in occupation of the land. The replies went through Clement's solicitors, the first being a request to be allowed to examine Mrs. Jones's title. Afterwards the solicitor wrote on 29th September 1886, "My client will do his part of the fencing pursuant to your notice if your client will have the correct line marked out before the fence is erected." In the face of that, can it be contended that either party then attempted to set up that he was entitled to exclusive possession against the other? I think it is almost overwhelming evidence that, if they were acting honestly, the idea of exclusive possession had not entered the minds of either of them, and in a case of ambiguous facts intention is most material. Again: we find that in January 1890 (a date fixed by circumstantial evidence) before the expiration of the 15 years on which the plaintiffs must rely, one Robinson under instructions from Frederick Jones marked out the boundaries of the 80 acres, being then in the company of Frederick Jones, the eldest of the family. He "marked the boundaries, lifted the old pegs, looked for the old marks, pegs, and trenches and blazed trees, cleaned out the marks and trenches, and blazed fresh trees, and put in the old pegs again." That act done within the 15 years was certainly an assertion of the right of ownership, and, if there were no more in the case, I think it would be amply sufficient to establish a resumption of possession if the land had ever been out of the possession of the Jones family.

We are familiar in Australia with the mode of taking possession of claims on the goldfields by marking out by means of pegs and trenches, and we know also that where land is said to be forfeited

it is usual to go through the form of taking up the pegs and putting them in again. Moreover, to anyone who knows the system adopted in other countries of marking out the boundaries of land by posts and stones, the act of going upon land, ascertaining its boundaries, and adding to or removing the posts or stones, is about as strong a piece of evidence of possession as could be imagined. It is telling all the world "these are the boundaries of my land." It is said that the defendants ought to have done something more. If the land had been enclosed by fences to their detriment, it might have been desirable or necessary to pull down the fences. But that was not so. The outer boundaries were already fenced, and as to the inner sides all was done that could be done short of putting up fences. It is said that Frederick Jones might have disturbed the occupation Clement had of that part of the land. Why should he? He did not want to object to Clement's cattle grazing on the 80 acres. That did him no harm. He did all that reasonably could be done to assert that he took possession and acted as owner of the land. But, for the reasons already given, it is not necessary to rely upon these facts. In my opinion the plaintiffs have entirely failed to establish anything like exclusive possession for 15 years.

I have not referred to anything that happened afterwards. The plaintiffs fail because they fail to establish that they have successfully appropriated the land from its rightful owners. It is a singular fact that for 10 years before action the true owners had been in rightful possession of the land, and I am not sorry that the plaintiffs have not shown any right to dispossess them.

O'CONNOR J. I am entirely of the same opinion.

ISAACS J. I quite agree. I would only say one or two words about the assertion of ownership with regard to the taking of wood. I attach more importance to that than the learned primary Judge did. I quite agree with him, and with the Chief Justice that the fact that the Jones family constantly for years entered the land and supplied themselves with wood affords very cogent evidence that they never abandoned possession of the land, and, as they took the wood in the presence of Clement's

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manager, it is equally cogent evidence that Clement did not think he was in exclusive possession of the land. I will therefore say no more about this fact as displacing the primary evidence of the plaintiffs. But I will say a few words about the effect of this evidence as disturbing the possession of the plaintiffs. In *Solling* v. *Broughton* (1), a case which went from New South Wales, the Privy Council in their judgment said:—"The applicant comes forward and shows a complete documentary title, and proves that he was in possession within the period of twenty years before the commencement of the proceedings. Then the burden of proof is shifted: *Leigh* v. *Jack* (2), and it lies upon the caveators to show that the applicant's original title has been defeated, or in other words that the entry in 1875 was not effective.

"Then it was objected that the findings of the jury as to Broughton's entries on the land come to nothing. The Statute it was pointed out declares that no person shall be deemed to have been in possession of any land within the meaning of the Act 'merely by reason of having made an entry thereon.' That 'evidently applies,' as Lord *Campbell* observes in *Randall* v. *Stevens* (3), 'to a mere entry, as for the purpose of avoiding a fine, which may be made by stepping on any corner of the land in the night time and pronouncing a few words, without any attempt or intention or wish to take possession.' In the present case there is no ground for supposing that the findings of the jury, who must have had their minds directed to this question—the substantial question between the parties—were illusory and unmeaning. The entries must have been regarded by the jury as effective. They are so treated by the Court which included the learned Judge who presided at the trial. And if the evidence is to be looked at it is plain that these entries were made *animo possidendi*, and that on entering upon the land Broughton was in of his fee simple title, and that any other person there not having his licence or authority would have been a mere trespasser." Now that last observation depends upon a principle of law recognized in the House of Lords in *Lows* v. *Telford* (4),

(1) (1893) A.C., 556, at p. 559.
(2) 5 Ex. D., 264.
(3) 2 El. & Bl., 652.
(4) 1 App. Cas., 414, at p. 426.

quoting the well known case of *Jones* v. *Chapman* (1), in which *Maule* J. said:—"If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of those two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser."

Now applying those observations to the circumstances of this case, the only thing which could save Clement from being a trespasser would be an understanding, a tacit permission or licence to allow his cattle to graze upon the land for his accommodation. As I said during the argument, people in the situation of the Jones family and Clement do not act on the principle of the dog in the manger. As long as the Jones family did not want to have the exclusive use of that land they had no objection to Clement's cattle grazing upon it. But I think it was thoroughly understood that that was not to be treated as creating any adverse right in Clement or any exclusive possession in him to the detriment of the Jones family. There are other circumstances going the same way, and I think upon the whole evidence the judgment of *à Beckett* J. should be affirmed.

Appeal dismissed with costs.

Solicitors, for appellants, *Madden & Butler.*
Solicitors, for respondents, *Serjeant, Bruce & Frost-Samuels.*

B. L.

(1) 2 Ex., 803, at p. 821.