[HIGH COURT OF AUSTRALIA.]

DABBS . . . . . APPELLANT;
DEFENDANT,

AND

SEAMAN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 20-23 *Aug.* 12.

Isaacs, Higgins and Starke JJ.

Vendor and Purchaser—Transfer of land—Certificate of title—Land described as abutting on lane—Lane on transferor's land—Right of way over lane—Grant—Estoppel—Real Property Act 1900 (*N.S.W.*) (*No.* 25 *of* 1900), *secs.* 3, 37, 39-41, 46, 47, 51, 103—*Local Government Act* 1906 (*N.S.W.*) (*No.* 56 *of* 1906), *secs.* 3, 99—*Width of Streets and Lanes Act* 1902 (*N.S.W.*) (*No.* 39 *of* 1902), *sec.* 3.

On a subdivision by J. of her land, which was under the *Real Property Act* 1900 (N.S.W.), the respondent purchased a block which was bounded on the south by a public road. The respondent subdivided the southern portion of his block into two one-acre lots, each fronting the road, and showed a 20 ft. strip along the east side of the eastern lot which he meant to afford access from the road to the rest of his land. The respondent sold the eastern lot to X, and by the respondent's direction J. transferred it to X. In the transfer and in the certificate of title issued to X the lot was described by reference to a plan thereon, which showed the 20 ft. strip with the words "20 ft. lane" upon it. Neither in the transfer nor in the certificate was there any mention of an easement. X having died, his representative sold and transferred to the appellant the lot which was described in the transfer by reference to X's certificate without any mention of an easement. The transfer was endorsed on X's certificate.

Held, by *Isaacs* and *Starke* JJ. (*Higgins* J. dissenting), that the appellant was entitled to have the 20 ft. strip for her use as a lane, with a right of way over it.

Decision of the Supreme Court of New South Wales (*Maughan* A.J.): *Seaman* v. *Dabbs*, (1924) 24 S.R. (N.S.W.) 481, reversed.

APPEAL from the Supreme Court of New South Wales.

A suit was instituted in the Supreme Court in its equitable jurisdiction by Robert Thomas Seaman against Emily Dabbs in which the plaintiff alleged, shortly, that he was, and since 15th June 1916 had been, the registered proprietor under the *Real Property Act* 1900 (N.S.W.) of a piece of land at Roseville in New South Wales having a frontage to Shirley Road 20 ft. wide to a distance of 518 ft. northerly from that road and extending thence about 252 ft. northerly with a width of about 223 ft.; that the defendant was, and since 19th April 1922 had been, the registered proprietor of a piece of land having a frontage of 67 ft. to Shirley Road and a depth of 518 ft. and immediately adjoining the western side of the plaintiff's land which was 20 ft. wide; that the defendant had built a house on her land; that the plaintiff was, and since July 1921 had been, the registered proprietor of a piece of land having a frontage of 30 ft. to Shirley Road and a depth of 770 ft. immediately adjoining the eastern side of the plaintiff's land which was 20 ft. wide; that the plaintiff had applied for the consolidation of the titles of the two pieces of land of which he was the registered proprietor and for the deletion from the records in the office of the Registrar-General of the words "twenty feet lane," which appeared upon the plan in his certificate of title to the first-mentioned piece of land where the land was 20 ft. wide as well as upon the plan in the certificate of title to the defendant's land; that the defendant claimed a right of way over the plaintiff's land where it was 20 ft. wide, and used that land as a means of access to her land. The plaintiff claimed a declaration that the defendant was not entitled to a right of way over the land which was 20 ft. wide; an injunction restraining the defendant from trespassing upon that land; an injunction restraining the plaintiff from asserting any claim to such a right of way and from taking any steps to prevent the plaintiff from obtaining the consolidation and deletion aforesaid; inquiries and directions and such further or other relief as the nature of the case might require.

The suit was heard by *Maughan* A.J., who made a decree substantially in the terms asked for: *Seaman* v. *Dabbs* (1).

(1) (1924) 24 S.R. (N.S.W.) 481.

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From that decision the defendant now appealed to the High Court.

The other material facts appear in the judgments hereunder.

S. A. Thompson, for the appellant. The description of the appellant's land in the transfer and certificate by reference to the plan is equivalent to a statement that the land abuts on a lane, and a transfer of land described as abutting on a lane gives the transferee a right of way over the land stated to be a lane (*Little* v. *Dardier* (1); *Bradley* v. *McBride* (2); *Mellor* v. *Walmesley* (3); *Roberts* v. *Karr* (4); *Espley* v. *Wilkes* (5)). The word "lane," although it has no precise legal meaning, means ordinarily a narrow passage-way (see *Width of Streets and Lanes Act* 1902 (N.S.W.), sec. 3; *Local Government Act* 1906 (N.S.W.), secs. 3, 99, 100; *Local Government (Amending) Act* 1908 (N.S.W.), sec. 8 (*g*) (3) (*c*)). The municipal council has a right to make this lane a public road, and consequently the respondent has no right to have the lane obliterated. Having made a representation that the appellant's land abuts on a lane, the respondent is estopped from denying that the lane exists as such. It is not necessary that the representation should have induced the contract: it is sufficient that the representation was of a material fact.

J. A. Browne, for the respondent. The appellant has no rights over the lane. If she had any right it must have been obtained either by grant to her through some certificate of title or by some representation either in a certificate or a transfer which amounted to an estoppel. The words of conveyance in the transfers do not include the lane. There is no grant of an easement in the manner prescribed by the *Real Property Act*. The words "twenty feet lane" on the plans mean no more than that along one of the boundaries of the transferred land there was a lane, and the word "lane" does not indicate that any rights were given to the transferee or his successors (see *Onward Building Society* v. *Smithson* (6)). There is no more reason for assuming that the words meant that the lane was for the benefit of Smith and his successors than that it was a

(1) (1891) 12 N.S.W.L.R. (Eq.) 319.
(2) (1886) 2 N.S.W.W.N. 56.
(3) (1905) 2 Ch. 164, at pp. 175, 180.
(4) (1809) 1 Taunt. 495.
(5) (1872) L.R. 7 Ex. 298.
(6) (1893) 1 Ch. 1, at p. 13.

private lane for the respondent's own use. The *Width of Streets and Lanes Act* 1902 throws no light on the meaning of "lane." What was done by the Shire Council on 3rd December 1913 in approving of the lane, under sec. 99 of the *Local Government Act* 1906 does not give the appellant any rights over the lane. The approval was not of such a nature that the lane became one over which the public had rights or one which the Council could make a public street. *Mellor* v. *Walmesley* (1) and similar cases are distinguishable, because there is no statement in the present case which is clear and unambiguous, or from which the transferee or anyone taking under him was entitled to assume that any rights over the lane were conferred, and because the statement made upon the plan must be taken in conjunction with the circumstances in which it was made, which include any other representations made to the person who claims rights over the lane. Here the appellant was definitely told that there was no right of way over the lane.

[STARKE J. referred to *Espley* v. *Wilkes* (2).

[ISAACS J. referred to *Rich* v. *Miles* (3).]

S. A. Thompson, in reply, referred to *Wicks* v. *Bennett* (4).

Cur. adv. vult.

Aug 12.

The following written judgments were delivered :—

ISAACS J. This appeal vitally concerns the safety of titles to land in New South Wales and, indeed, in Australia. The first step, and a very necessary one, is to clear the issues. When the mists of irrelevancy disappear, the question resolves itself into the following proposition, which I hold to be good law and to be absolutely necessary if titles under the *Real Property Act* are to be indefeasible: Where A, a registered proprietor of land under the *Real Property Act*, transfers to B a part of his land described by a plan indicating that the transferred land is bounded on one side by a 20 ft. lane situated on the other part of the transferor's land and the transfer is duly registered, then, in the absence of

(1) (1905) 2 Ch. 164.
(2) (1872) L.R. 7 Ex. 298.
(3) (1909) 10 S.R. (N.S.W.) 84, at p. 90.
(4) (1921) 30 C.L.R. 80.

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either a provision to the contrary on B's certificate of title or some subsequent personal legal or equitable relation to the contrary between B and the owner of the adjoining land, B, as long as he remains registered proprietor of the land so transferred and described, is entitled (1) to have the land marked "twenty feet lane" preserved as such, and (2) to a right of way over the lane.

1. *The Pleadings.*—It is all-important to extract the issues. The respondent, Robert Thomas Seaman, is the registered proprietor under the *Real Property Act* of a piece of land comprising about 2 acres at Roseville in the Kuringai Shire. His certificate shows that part of the land consists of a strip 518 ft. long by 20 ft. broad and marked "twenty feet lane." The appellant, Emily Dabbs, is the registered proprietor under the Act of a piece of land 518 ft. long and 67 ft. broad to the west of and immediately adjoining the respondent's strip marked "twenty feet lane." On the appellant's certificate the respondent's strip is shown as abutting on the eastern boundary and is there also described as "twenty feet lane." The respondent instituted a suit in equity in the Supreme Court of New South Wales against the appellant, claiming (1) a declaration that the appellant is not entitled to any right of way over the strip marked "lane," with consequential injunction; (2) an injunction restraining her from opposing the respondent's application to the Registrar-General to consolidate in one certificate his said land with other land he has acquired and to delete the words "twenty feet lane" from his certificate; (3) general relief. The ground of the claim is stated in the statement of claim to be that, when in 1913 the land of which the respondent's land and the appellant's land then formed part was subdivided, the strip marked "twenty feet lane" was set aside as a private lane solely for the purpose of providing access to the rest of the land now included in the respondent's certificate and was for that purpose only so marked on that certificate. That is the sole ground alleged for the claims made, no other allegation affecting the mutual rights proprietary or personal being made. I may mention at once that the statement of claim is utterly silent on the two essential points of this case, namely, (1) that the appellant's certificate, which is the earlier in point of date, shows her land as bounded on the east by the 20 ft. lane,

and (2) that it was the respondent who in subdividing his own land transferred to the appellant her land as it appears in her certificate. The appellant's defence fills up these essential particulars. Discarding immaterial matters, it alleges that one Maria Elizabeth Jenkins in 1913 subdivided 173 acres she held under the Act and deposited a plan of subdivision in the Land Titles Office, No. 7134; that Seaman purchased Lot No. 1; that Seaman sold part of that lot to one Smith; that Jenkins by direction of Seaman transferred the part so sold to Smith with a plan showing the strip marked "twenty feet lane"; that the Public Trustee, as Smith's representative, afterwards transferred the land to the appellant; that she claims to be entitled under her certificate to a right of way over the strip. The respondent, in reply, admitted the Jenkins' subdivision, the respondent's purchase of lot 1 and the sale of the portion to Smith. Otherwise he joined issue.

The first material point to observe—and it goes to the root of the matter—is that there is no attempt whatever on the part of the respondent to rectify or alter the appellant's certificate of title. That instrument is expressly referred to in the statement of claim, but there is no challenge of its accuracy and no mention even of its containing a reference to the 20 ft. lane. Obviously the claim ignores that circumstance and any necessity for alteration. No suggestion was made, either in the pleadings or during the argument, as to any variation of the appellant's certificate as it stands. Inspection of that certificate, as it appears in evidence, discloses that other persons not parties would be affected in any attempt to alter it. The appellant's right to assert under it, as it stands, a right of way over the 20 ft. strip or to have that strip maintained as a lane is denied for the sole reason already mentioned. A decree was made to the effect as prayed, the appellant's certificate remaining untouched. In my opinion the appeal should be allowed. I am unable to see how the respondent can succeed without destroying the cardinal feature of indefeasibility so long as the certificate stands.

2. *The Instruments.*—That certificate is, to my mind, the governing factor. Its purport should be stated more precisely. It was issued on 30th December 1913, and declares that Sidney Louis Smith, transferee under instrument of transfer from Maria Elizabeth

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Jenkins, No. A50143, is now—that is, at date of issue—the proprietor of an estate in fee simple, subject nevertheless to the reservations and conditions, if any, of the Crown grant and subject also to such encumbrances, &c., as are notified on the certificate, in " that piece of land . . . *as shown on the plan hereon and therein edged red* being part of lot 1 on a plan deposited in the Land Titles Office Sydney No. 7134 *and also shown on plan annexed to the said instrument of transfer No.* A50143 " &c. The description of the land, therefore, depends entirely on the plan upon the certificate, confirmed, if necessary, by the plan referred to as annexed to the transfer and incorporated by reference in the certificate. Now, the plan upon the certificate shows the land comprised therein to be a parcel having a southern frontage of 66 ft. $10\frac{1}{4}$ in. to Shirley Road (which is admittedly a public road), having a depth to the north of (say) 518 ft., the width along the northern boundary being 101 ft. $5\frac{1}{4}$ in. But immediately contiguous to the eastern boundary of the land is the contested strip shown by two parallel lines the space between being marked " twenty feet lane." The lane is shown closed on the north and open on the south where it meets Shirley Road. It is common ground, and it appears from the documents referred to, that at the date of the transfer to Smith the strip of 20 ft. belonged in law to Jenkins, who transferred to Smith, and in equity to Seaman, by whose direction the transfer was made. At the foot of the certificate there is a notification of the encumbrance of a building covenant contained in the transfer. The transfer accords with the certificate except that the lane is shown to be 20 ft. $0\frac{1}{4}$ in. and it is not shown open on the south. The lines upon the plan in the transfer are apparently neutral as to whether the lane is open or closed; the lines being, as I think, merely boundary lines extended to indicate direction and the southern line extended to lead to a corner post on the east and a rock mark on the west. It is established in evidence that in 1913 the land was virgin soil covered with shrub and rock. There was no lane in fact existing except so far as its site was indicated by corner pegs. The building covenant by the " purchaser " for himself, his heirs, executors, administrators and assigns, is with the " vendor," her heirs, executors and administrators, that the purchaser, &c., shall not erect or permit " to be erected upon

the said land any main building of less value than £300." Seaman also, about the same time, sold to one Henry Reynolds a similar block part of lot 1 and being immediately west of and adjoining Smith's block. A similar transfer and plan, excepting only the lane, was executed and registered. This left in lot 1 unsold by Seaman a residue of about two acres on the northern boundary of Smith's land and Reynold's land and the strip of 20 ft. lane to the east of Smith's land. On 2nd August 1916 a certificate of title was issued to Seaman for this residue of lot 1. That certificate shows, as already stated, that the strip in contest is a "twenty feet lane," and abuts on Smith's land. It also shows by the figures along Shirley Road the way in which the southern boundary of lot 1 is divided, that is to say, Reynold's 66 ft. $10\frac{1}{4}$ in., Smith 66 ft. $10\frac{1}{4}$ in. and the balance 20 ft. $0\frac{3}{4}$ in., the expression "dedn.," meaning, as ultimately ascertained, "deduction." It appears to be the practice of the Office to use that abbreviation to indicate the balance of the lot after allowing for the registered dealings. I may be permitted for a moment to observe that such an abbreviation is somewhat enigmatic. For some time I thought it meant "dedication"; but happily Mr. *Browne* satisfied me it should be understood as "deduction." I would suggest that, in an instrument on which so much may depend, nothing should be left to conjecture. Seaman's certificate, therefore, as it stands, confirms Dabbs' certificate. But Seaman desires to "rectify" his own, containing the servient land by hypothesis, by deleting the lane, leaving, however, Dabbs' certificate to stand as it is, clear but discrepant and evidencing the title to the dominant land.

3. *Indefeasibility.*—To the facts so stated, there must be applied the broad principle of indefeasibility of title under the Act, subject only to such qualifications as the Act itself declares. This is entirely consonant with the existence of special personal obligations (see *Barry* v. *Heider* (1)). But the position I am so far dealing with is clear of personal obligations. Indefeasibility is universally acknowledged in Australia as the effect of a certificate unaltered and unchallenged; and this is confirmed by the decision of the Privy Council in *Assets Co.* v. *Mere Roihi* (2). The same principle is given

(1) (1914) 19 C.L.R. 197, at pp. 213-214.

(2) (1905) A.C. 176.

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effect to under Canadian law (see *Creelman* v. *Hudson Bay Insurance Co.* (1)). The Act itself says (sec. 40 (1)): " Every certificate of title . . . shall be *conclusive evidence* that the person named in such certificate of title, or in any entry *thereon*, as seised of or as taking estate or interest in *the land therein described*, is seised or possessed of or entitled to such land for the estate or interest therein specified." The appellant being named in the relevant " entry " on the certificate entered 16th May 1922 as the transferee of Smith's estate, the certificate is " conclusive evidence " that she is seised or possessed of an estate in fee simple in the " land therein described."

4. *Construction.*—What, then, is the " land therein described " ? It was argued that that could only mean the physical substance contained within the metes and bounds marked red without reference to anything beyond those limits. I do not agree with that argument. The " land therein described " means the parcel delimited with all the inherent characteristics with which the terms of delimitation invest it. I say " inherent " in order to distinguish them from characteristics that are mere additions distinct in themselves but attached by some act quite independent of the original quality of the subject land. For instance, an easement to pass through a neighbour's garden is a superadded right of way and not an inherent characteristic of the subject land. Such an easement would properly fall within the terms of sec. 47 of the *Real Property Act*. But a right of access to the sea or a navigable river is an inherent quality of a riparian tenement. In the present case the " land therein described " is the parcel edged red bounded on the south by Shirley Road—a public road—and bounded on the east by a " twenty feet lane." Its contiguity to a lane 20 ft. wide is an inherent characteristic of the land described. The parcel, if Shirley Road or the lane were eliminated, would possess a quite different character. It would cease to be a parcel of which the owner is a frontager to a public road or a private lane (see *Stirling* L.J. in *Mellor* v. *Walmesley* (2)). The accessorial right is included in the grant itself, and is evidenced by the certificate without a special memorial or specification (*James* v. *Stevenson* (3)). The principle recognizing the right

(1) (1920) A.C. 194.
(2) (1905) 2 Ch., at p. 180.
(3) (1893) A.C. 162, at p. 169.

in such circumstances has been settled in many cases, of which *Roberts* v. *Karr* (1) is the root and *Furness Railway Co.* v. *Cumberland Co-operative Building Society* (2) is the most authoritative. In *Roberts* v. *Karr* (3) *Lawrence* J. says: "If a man buys a piece of ground described as abutting upon a road, does he not contemplate the right of coming out into the road through any part of the premises?" *Mansfield* C.J. (4) says:—"If then he afterwards prohibits the defendant from coming there, is it not a sufficient answer to say, you have told me in your lease, 'this land abuts on the road': you cannot now be allowed to say that the land on which it abuts is not the road." Those passages were quoted with approval by *Kelly* C.B. for himself and *Cleasby* B. in *Espley* v. *Wilkes* (5). There a lease described the land as "bounded on the east and north by newly-made streets" &c., and added "a plan whereof is endorsed on these presents." The Chief Baron thought the plan so important as to incorporate it pictorially in his judgment. There, as here, the "street" on the east was a piece of rough waste ground, and it so remained for the most part impassable as a road down to the time of the trial, that is, about twenty years. The Chief Baron said that the lessor was estopped from denying that there were streets which were in fact ways along the north and east fronts, and adds: "We should have thought this point clear upon the obvious and necessary *construction* of the lease and plan"; and then adds that *Roberts* v. *Karr* was a direct authority to that effect. It is important to observe that the "estoppel" arises on the "construction" of the deed. It is not unimportant to observe that *Kelly* C.B. (6) says: "Here the land is *described* as abutting upon 'newly-made streets.'" Unless land shown on a certificate by a plan only is thereby "described," it is not described at all, and sec. 40 would have no operation upon it. And if it is thereby described, as it must necessarily be, the plan showing the contiguity of the lane to the subject land brings the case precisely within the authorities cited. Lord *Selborne* in *Furness Railway Co.* v. *Cumberland Co-operative Building Society* (7) so considered the effect of a plan. In the

(1) (1809) 1 Taunt. 495.
(2) (1884) 52 L.T. 144.
(3) (1809) 1 Taunt., at p. 501.
(4) (1809) 1 Taunt., at p. 503.
(5) (1872) L.R. 7 Ex., at pp. 303-304.
(6) (1872) L.R. 7 Ex., at p. 304.
(7) (1884) 52 L.T., at p. 145.

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Furness Railway Co.'s Case (1) Lord *Selborne* C. and Lord *Blackburn* affirmed both the cases mentioned. Lord *Fitzgerald* also rested on some general words: "Together with all buildings, ways, advantages" &c. But the opinion of the other learned Lords was quite independent of those words, as was the judgment of *Kelly* C.B. and *Cleasby* B. independent of similar words in *Espley* v. *Wilkes* (2). Those general words are additional to, and not explanatory of, the description of the subject land. Lord *Selborne* says (3): "How is it possible to regard the *description* of this land as *bounded by streets* as otherwise than most material to the subject of the contract and to the bargain between the vendor and purchaser?" In *International Tea Stores Co.* v. *Hobbs* (4) *Farwell* J. reaffirmed the doctrine of *Roberts* v. *Karr* (5) by saying "the fact that the conveyance states that the property is bounded by a roadway constructed and leading to the yard estops the defendant from saying there is not in fact a roadway which necessarily passes the door in the plaintiffs' wall opening on to the yard." *Mellor* v. *Walmesley* (6) is an important and instructive case. The whole Court agreed that by describing the land conveyed as "situate on the seashore" the grantor was estopped from saying that some land belonging to him intervening between the actual seashore and the land conveyed was not itself seashore. *Vaughan Williams* L.J. says (7): "The description itself is a description of a piece of land situate on the seashore of certain dimensions which are set forth." He did not, nor did *Stirling* L.J., carry the estoppel so far as to include the intervening strip as part of the land conveyed, though *Romer* L.J. did go so far. The principle has been acted upon in New South Wales in *Little* v. *Dardier* (8) and *Bradley* v. *McBride* (9), and, doubtless, property rights in many cases rest upon those decisions.

5. *Estoppel.*—In view of the argument as to the estoppel established by the doctrine of *Roberts* v. *Karr* (5), it is necessary to say a few words respecting its nature. Estoppel in that case simply means that the conveyance or lease or other instrument is based

(1) (1884) 52 L.T. 144.
(2) (1872) L.R. 7 Ex. 298.
(3) (1884) 52 L.T., at p. 145.
(4) (1903) 2 Ch. 165, at p. 173.
(5) (1809) 1 Taunt. 495.
(6) (1905) 2 Ch. 164.
(7) (1905) 2 Ch., at p. 174.
(8) (1891) 12 N.S.W.L.R. (Eq.) 319.
(9) (1886) 2 N.S.W.W.N. 56.

upon a conventional state of facts, and therefore to dispute that conventional state of facts in order to set up another state of facts is an attempt to destroy the very basis of the transaction. In *Ashpitel* v. *Bryan* (1) in the Exchequer Chamber *Pollock* C.B. says :—" Estoppel may arise without any mistake or misleading, as by matter of recital in a deed executed by two parties. So here, for the purposes of the transaction in question, the parties agreed that certain facts should be admitted to be facts as the basis on which they would contract, and they cannot recede from that." The governing principle is stated in *Blackburn's Contract of Sale*, 3rd ed., p. 204, that " when parties have agreed to act upon an assumed state of facts, their rights between themselves are justly made to depend on the conventional state of facts, and not on the truth." This was adopted and applied in the Exchequeur Chamber in *McCance* v. *London and North-Western Railway Co.* (2). In *Horton* v. *Westminster Improvement Commissioners* (3) *Martin* B. states it thus : " The meaning of estoppel is this—that the parties agree, for the purpose of a particular transaction, to state certain facts as true ; and that, so far as regards *that transaction*, there shall be no question about them." Lord *Blackburn* himself so held in *Burkinshaw* v. *Nicolls* (4). Lord *Mansfield* in *Goodtitle d. Edwards* v. *Bailey* (5) said : " No man shall be allowed to dispute his own solemn deed." But a question may always arise whether there has been adopted, for the purposes of an instrument and as its conventional basis, any given state of facts. That must be determined upon its construction. *Brett* L.J. expresses this truth in *Simm* v. *Anglo-American Telegraph Co.* (6), where, after speaking of other kinds of estoppels in business and daily life, he says :—" I speak not of that estoppel, which is said to arise upon a deed of conveyance or other deed of a similar nature. I incline to think that when the word ' estoppel ' is used with reference to deeds of that kind, it is merely a phrase indicating that they must be truly interpreted.'" If on the true construction of a conveyance it is found that a recorded state of facts is part of the very thing effected

(1) (1864) 5 B. & S. 723, at p. 727.
(2) (1864) 3 H. & C. 343, at p. 345.
(3) (1852) 7 Ex. 780, at p. 791.
(4) (1878) 3 App. Cas. 1004, at p. 1026.
(5) (1777) 2 Cowp. 597, at p. 601.
(6) (1879) 5 Q.B.D. 188, at p. 206.

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by the instrument, then the party so effecting it cannot dispute the state of facts without disrupting the transaction itself. If he succeeded, he would be leaving something other than was originally done. In the process of construction a Court may be required to examine the document to determine whether that state of facts is clearly enough adopted. *Onward Building Society* v. *Smithson* (1) shows that it must be definitely stated. But that must not be misunderstood. *Bowen* L.J. in *Low* v. *Bouverie* (2) said:— "An estoppel, that is to say, *the language upon which the estoppel is founded*, must be precise and unambiguous. That does not necessarily mean that the language must be such that it cannot possibly be open to different constructions, but that it must be such as will be *reasonably understood in a particular sense by the person to whom it is addressed.*" A recital may satisfy the claim to an estoppel (*Bowman* v. *Taylor* (3)), or it may not (*South-Eastern Railway Co.* v. *Warton* (4)). I apprehend it is to the former class of cases that Lord *Phillimore* (then *Phillimore* L.J.) adverted in *Poulton* v. *Moore* (5). The Lord Justice said (6): "With regard to the question of estoppel by recital in a deed, it is truly said that the law of estoppel in the case of real property is different from the law of estoppel as between persons." The expression "as between persons" I understand to mean "in pais." The doctrine of *Roberts* v. *Karr* (7) and the line of cases supporting it, does not refer to recitals: it refers to the very essence of the transaction, the description of the thing granted. That must, *ex vi termini*, be the *basis*—perhaps a true basis, perhaps a conventional basis—but at all events the indisputable basis, of the transaction. It cannot be disputed. No inquiry is permissible once that stage is reached. To permit such an inquiry would be to permit a man to derogate from his grant (per *Vaughan Williams* L.J. in *Mellor* v. *Walmesley* (8)). The rule that a man may not derogate from his grant is a rule of law and not a rule of equity. It is quite different from the obligation of grantor arising from his covenant which might give

(1) (1893) 1 Ch. 1.
(2) (1891) 3 Ch. 82, at p. 106.
(3) (1834) 2 A. & E. 278.
(4) (1861) 6 H. & N. 520, at pp. 527, 528.
(5) (1915) 1 K.B. 400.
(6) (1915) 1 K.B., at p. 414.
(7) (1809) 1 Taunt. 495.
(8) (1905) 2 Ch., at p. 175.

rise to equitable considerations (*Cable* v. *Bryant* (1)). The obligation of a grantor not to derogate from his grant, as explained by Lord *Parker* (when *Parker* J.) in *Browne* v. *Flower* (2), is altogether independent of those obligations which arise from the express or implied creation of easements. Lord *Loreburn* for the Privy Council in *Lyttleton Times Co.* v. *Warners Ltd.* (3) said: "The maxim that a grantor cannot derogate from his grant expresses the duty ordinarily laid on a man who sells or leases land." That duty here arises upon the terms of the grant operated upon by the statute.

The result, so far, is that the estoppel relevant to this case is the estoppel which as a rule of law arises, not, it is true, upon the *operative* words of the transfer or certificate, but upon the *true construction as to the land transferred* of the appellant's certificate founded on the transfer by Jenkins by direction of the respondent. The construction being established that, as an essential part of the transaction and the certificate, the land is described as fronting a 20 ft. lane on land belonging then to Jenkins or Seaman and now to Seaman, it is not permissible to Seaman to contradict or impugn that conventional state of facts. In order to test the position of the present appellant, suppose immediately after Smith became the registered proprietor Seaman had set up his present claim, basing it as here on the alleged fact that the lane had been intended solely for the residual part of lot 1, is it not plain he would have failed? Even if he had proved Smith's knowledge of that fact, he would have failed. The answer would have been that he had nevertheless accepted for the purpose of that transaction the conventional fact that the land transferred was to have the 20 ft. lane abutting upon it. The words of *Mansfield* C.J. in *Roberts* v. *Karr* (4) would have applied, namely: "But supposing that Pratt, which I do not believe, had in his mind the intent to reserve this land, he could not consistently with what appears *upon the face of these deeds*, prevent the defendant from opening his door into the street; because he has *described* the defendant's land in his lease as thirty-six feet nine inches in breadth, and abutting on the street." Unless by reason of some recognized head of equity jurisprudence,

(1) (1908) 1 Ch. 259, at p. 264.
(2) (1911) 1 Ch. 219, at pp. 225-256.
(3) (1907) A.C. 476, at p. 481.
(4) (1809) 1 Taunt., at p. 502.

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such, for instance, as mutual mistake, the instruments were rectified, the claim must have been disallowed (*Creelman's Case* (1)). The appellant stands in the same position now as Smith did then (*Little* v. *Dardier* (2) ; *Phillips* v. *McLachlan* (3) ; *Assets Co.* v. *Mere Roihi* (4)). Assuming, what is not proved, that the lane was intended solely for the residual land, and assuming the appellant was told so, how could that affect her rights in respect of Smith's land according to the certificate ? Those rights were rights of grant depending solely on the subject described, and not dependent on covenant or any other purely personal obligation of Seaman. *Cable* v. *Bryant* (5) applies. But still more authoritatively is the point decided in *Sarat Chunder Dey* v. *Gopal Chunder Laha* (6). Lord *Shand* for the Judicial Committee stated the law very distinctly ; which is correctly abstracted thus in the last paragraph of the head-note : " Where a mortgagee has a good title by estoppel, he can give a good title to a purchaser under a mortgage sale, even though the purchase is made with knowledge of the circumstances to which the estoppel applies." It needs hardly be said that that is not based on any special position of a mortgagee as distinguished from an absolute transferee, but upon the general law of estoppel as applied to grants.

So far it is clear that Seaman is estopped by his transfer and by Dabbs' certificate from diminishing even by a wall the space of 20 ft. described as a lane. Dabbs' land is entitled to that clear space to the east.

6. *Right of Way.*—The next question is, has the appellant also a right of way over the 20 ft. lane ? The answer depends on the natural import of the word " lane " used in the collocation and in such a document as we have before us. No direct definition of " lane " appears in any Act and therefore, as was said by *Simpson* C.J. in Eq., in *Rich* v. *Miles* (7), its ordinary meaning must be found. The ordinary meaning of " lane " is a passage or way. It is a species of the same genus as street and road, their common

(1) (1920) A.C., at p. 197.
(2) (1891) 12 N.S.W.L.R. (Eq.), at p. 324.
(3) (1884) 5 N.S.W.L.R. (L.) 168.
(4) (1905) A.C., at p. 202.
(5) (1908) 1 Ch. 259.
(6) (1892) L.R. 19 Ind. App. 203, at p. 220.
(7) (1909) 10 S.R. (N.S.W.), at p. 90.

characteristic being a place along which persons pass from one place to another. A "lane" imports a narrower passage than "street" or "road." In New South Wales it is found in many Acts of Parliament without special definition, showing that the Legislature has recognized that it has a well-known acceptation. For instance, in 42 Vict. No. 25 (*Sydney Improvement Act* 1879), sec. 15, it is forbidden to build a dwelling-house fronting "a lane court or way" less than 20 ft. wide. Act No. 39 of 1902, *Width of Streets and Lanes Act* 1902 (re-enacting the law of 1882), provides by sec. 3 that every street laid out or defined since 1881 shall be at least 66 ft. wide, and every lane laid out or defined since 1881 shall be 20 ft. wide at least. Act No. 56 of 1906 by sec. 3 defines, for the purposes of the Act the word "road" as meaning "road, street, lane, highway or thoroughfare, including a bridge or culvert thereon." It seems quite plain that the Legislature of New South Wales regards "lane" as possessing naturally the same dominant feature as "street" and "highway," since it is placed between those words in the Act of 1906, and by the Act of 1879 is a place which may be fronted by buildings, and by the Act of 1902 differs from a street in being narrower. If it may be fronted by buildings, it would be absurd to imagine that the inhabitants of the building could not pass along the lane. It would be almost equally absurd for the Legislature to require all lanes to be 20 ft. wide unless to secure safety in passing along them. In the present case the restrictive building covenant adds to the certainty that in the present case "lane" must be understood in its ordinary and popular sense of a place in the nature of a way or passage. That is the primary meaning ascribed to it in the *Oxford Dictionary*, namely: "A narrow way between hedges or banks; a narrow road or street between houses or walls; a bye-way." The illustrations show how deeply rooted in the word "lane" is the sense of a way or passage from Chaucer to the present day. Drury Lane in London, Flinders Lane in Melbourne, are notable instances of the use of the word in its primary sense. There are numerous instances in every capital city of a similar use. There can be no doubt that was the essential meaning attributed to it by Seaman and by Jenkins in August 1913.

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When the transfers to Smith and Reynolds were lodged in September, the "lane" appears to have attracted the attention of the Registrar-General, who required the consent of the Shire Council to the "lane." This was obviously in view of sec. 99 of the *Local Government Act* 1906. Accordingly, on 2nd December 1913, a firm of solicitors, *Makinson & Plunkett*, wrote to the shire clerk of Kuringai Shire as follows:—"Jenkins and Seaman to Smith and Reynolds.—Part of Lot 1 Jenkins' Estate, Roseville.—The Registrar-General requires the consent of your Council to the lane adjoining Mr. Smith's land. Would you please let us have a letter to this effect as the matter is extremely urgent. We enclose plan showing the lane which we require the consent to." The reply from the shire clerk is dated 3rd December 1913 and states: "I am in receipt of your letter of the 2nd instant and in reply thereto beg to inform you that my Council has approved of the plan of the subdivision of the subject land enclosed herewith and endorsed by me and has consented to the lane 20 ft. wide shown thereon." It necessarily appears, therefore, (1) that a "lane" was intended by Seaman to be opened upon his land lot 1; (2) that it was to be used as a means of access to two or more parcels of land, for otherwise, as appears by sec. 99, sub-sec. 1, consent of the Council was unnecessary; and (3) that consequently it could not have been intended merely for his *one* retained portion on the north which itself was not subdivided.

Some suggestions were made during the argument to escape from the obvious effect of this application and consent. One was that under Ordinance No. 32 very elaborate plans were required. The answer to that is twofold. First, as the correspondence refers to plans, there is no reason in the absence of contrary evidence to refuse to apply the maxim *Omnia præsumuntur rite esse acta*, and therefore to presume that the plans were sufficient. The ordinance requires the position of the proposed new road ("road," by sec. 3 of the Act, includes "lane") and its width to be stated. Next, it does not matter in the least whether the plans were sufficient or not. The important matter is that Seaman asked for some official recognition by the Shire Council of the proposed new "lane," and that he did so because the Registrar-General would not register

the transfer without that consent and noted the necessity of the consent in the plan in the Titles Office, as appears on the exhibit, and then, after the consent of the Shire on 3rd December, the transfer was re-lodged on 30th December and registered, the certificate bearing that date as the date of production for registration (sec. 36 of the *Real Property Act*). No legislative provision could be referred to as relevant to such an application except sec. 99. The intention of Seaman is all that I regard as important in this connection—though, as I have said, it only adds to what is certain without it.

There was another suggestion which should be briefly noticed. It was that the application was made under Ordinance No. 70, relating to building. Regs. 8 to 11 would, in that case, be relevant. In my opinion that ordinance is quite inapplicable. There was no building scheme; there was a restriction in building but that would not attract the ordinance. I would, however, add that if it be applicable it is fatal to Seaman's case because reg. 8 requires "a plan of the land showing the subdivision proposed and the *means of access* proposed to be provided to afford *access to the rear as well as to the front* of the building to be erected." Reg. 9 enables the Council to approve and reg. 11 requires, in case of approval, that the land shall not be disposed of except in accordance with the approval. As the Council approved of there being the 20 ft. lane, then, if that is to be the means of access to the rear as well as Shirley Road to the front, the respondent's case is, on that alone, utterly hopeless. However, I thought, and still think, that in justice to the respondent that last suggestion should be rejected and the application attributed to its proper source, sec. 99 of the Act. The conclusion appears to me irresistible that the appeal should succeed.

7. *Other Circumstances.*—There has been a great body of oral evidence in order to establish (1) the original intention in fact of the respondent to restrict the lane to his residual land; (2) that the appellant was before purchasing made aware of that original intention; (3) that she was not induced to purchase by any belief that Seaman intended to attach a right of way over the lane to Smith's land. From those circumstances it was argued that there could be no estoppel against Seaman, and that consequently Dabbs

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took nothing but the bare land edged red fronting Shirley Road. For the reasons already stated the facts referred to, even if established, are utterly immaterial. They do not, and, so long as the principle definitely established in *Assets Company* v. *Mere Roihi* (1) remains unaltered by legislation, they cannot, affect the conclusive force of a registered title. Nor do they as between the parties create any subsequent relation referable to any known head of equity which calls for the interposition of a Court of equity. But I may with propriety, in view of the stress laid upon them, add a few words condensing greatly the mass of material concerned. As to the original intention the circumstances I have stated negative the alleged intention in fact. Other evidence shows that the lane was intended to serve the residual land, but nowhere is it stated that the intention was to confine it to that land *solely*. Nor does any reason appear for any such intention. Unless Seaman intended to live there himself and not to dispose of it, one can hardly imagine why once the lane was created he should endeavour to confine it to the residual land. The application to the Shire Council connotes that the lane was to serve at least two properties. Therefore, either Seaman intended to cut up the residual land or the lane was to serve that and Smith's. The second fact, namely, notice to the appellant—assuming the first established—arises under a misapprehension of the legal position. No suggestion of such a case appears in the pleadings. The only objection made as alleged is referred to in par. 7; but that is after her purchase. The respondent gave evidence, which, in my opinion, was properly objected to and was inadmissible, that he had in conversation with the appellant before her purchase showed her the 20 ft. lane and an adjoining 30 ft. frontage as comprising 50 ft. which belonged to him and was for sale as one allotment, and that he had obtained the Council's consent to building on the combined 50 ft. and was proposing to obtain a consolidated certificate. He admits he knew nothing about the appellant's intention to buy Smith's land, so that he said nothing to them directly as to the Smith transaction. No case is made as to any estoppel *in pais* against Seaman. He admitted, however, that he did apply in 1913 to the Council to get the lane approved.

(1) (1905) A.C. 176.

He suggested that the surveyor made a mistake in putting "lane" instead of "private lane," but that he, the respondent, did not notice it. There can be no doubt as to what he did and how his act must have appeared to Smith, whatever his own private intention may have been. The probability is that, as in *Roberts* v. *Karr* (1), his present view is an afterthought. In any case it is impotent to affect the matter.

Then much testimony was given as to the appellant before she bought being told by Mrs. Reynolds, the devisee from Smith of the land, and by the officer of the Public Trustee, that the lane was not being sold, that they had nothing to do with the lane, and were selling only the land edged red in the certificate. But, after all, that was only a statement of supposed legal rights, and, I should think, meant only to warn Dabbs that the "land" for sale was simply the red-edged land. In any event what was *sold* to her and what was *transferred* to her and what is now *held* by the appellant is whatever the transfer and certificate on their true construction comprise. The appellant, relying on that, is not affected by any words to the contrary—if they were to the contrary. In short, Dabbs does not rest her claim upon any personal relation with Seaman, and all personal relations with the Public Trustee are merged in the transfer and certificate, and no one seeks to disturb them.

I am clearly of opinion the appeal should be allowed.

HIGGINS J. The appellant, Mrs. Dabbs, having bought an acre of land from the trustee of one Smith, claims to be entitled to a right of way over an adjoining strip of land of which the respondent Seaman is registered proprietor in fee simple.

It is not pretended that Seaman ever agreed with the appellant to give any right of way—Seaman never made any agreement of any sort with the appellant. The appellant rests her claim on the fact that in the transfer of the acre to Smith, from whose trustee she purchased it, there appeared on the east of the land expressed to be transferred a strip of land, shown within two parallel lines, and having the words "lane 20 ft. wide." Seaman was not the

(1) (1809) 1 Taunt. 495.

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actual transferor to Smith; but as he had bought a block of four acres odd from Jenkins, and sold this one acre thereof to Smith, he signed the transfer to Smith as a directing party. The plan which is usefully incorporated with the judgment of my brother *Starke* fairly explains the position; but it has to be remembered that to the north of the acre and of the "lane"—on the opposite side to Shirley Road—was the unsold residue of Smith's land—an irregular polygon—having no frontage to Shirley Road.

The case for the appellant is put on two grounds:—(A) That the two parallel lines with the words "lane 20 ft. wide" in the transfer to Smith constituted a grant by Seaman to Smith of a right of way along the lane, and that the right of way passed from Smith's trustee to the appellant; (B) that Seaman is estopped, as between himself and the appellant, from denying that she has such a right of way.

(A)—There are three answers at least to A, any one of which, if sustained, would be fatal to the claim of Mrs. Dabbs. Answers 1 and 2 were not mentioned—at all events, were not stressed—in the argument. (1) That the land concerned is under the *Real Property Act* 1900, and if it was intended by Seaman to create a right of way in favour of Smith, it was not created in the manner allowed by the Act; (2) that if Smith got such a right of way, it has not been transferred by his trustee to Mrs. Dabbs; (3) that even if the land concerned were under the old conveyancing law, the use of the two parallel lines with the words "lane 20 ft. wide" would not be sufficient to grant a right of way to Smith.

As for answer 1, land under the Act cannot be transferred, or any easement created, except as prescribed by the Act (sec. 39). Under sec. 46 "When land under the provision of this Act or any estate or interest in such land is intended to be transferred or any right of way or other easement is intended to be created or transferred, the registered proprietor may execute a memorandum of transfer in the form of the Fifth, Sixth, or Seventh Schedule hereto, which memorandum . . . shall contain an *accurate statement of the estate, interest, or easement intended to be transferred or created.*" Now, the Fifth Schedule contains the only relevant form. That form is followed in the transfer of the acre lot, but it contains no words

as to any right of way, although as the form directs, "Here also should be set forth any right of way or easement, or exception, if there be any such not fully disclosed, either in the principal description or memorandum of encumbrances." Sec. 103 contains certain relaxations of the rigidity of this requirement as to the use of forms, but none of the relaxations applies to this case. The transfer to Smith—the only transfer—is as follows:—"I Maria Elizabeth Jenkins of" &c. "being registered as the proprietor *of an estate in fee simple* in the land hereinafter described *subject however to such encumbrances liens and interests as are notified by memorandum underwritten or endorsed hereon* in consideration" &c. "do hereby transfer to the said Sidney Louis Smith *All my estate and interest as such registered proprietor* in All that piece of land *containing one acre* situate" &c. "being part of the land comprised in certificate of title dated 1st August 1913" &c.

Now, this transfer applies to Jenkins' estate and interest as registered proprietor; and she was not registered proprietor of any easement. Under her certificate of title (1st August 1913) Jenkins was registered proprietor of an estate in fee simple in a large block of land, which included the land purchased from her by Seaman, and consequently, the land transferred to Smith by direction of Seaman. In Jenkins' certificate there were no parallel lines with the words "lane 20 ft. wide"; nor were there such lines and words in any plan referred to in the certificate. The lines and words appeared in the transfer Jenkins to Smith; but all that was transferred was one acre of the land of which Jenkins was registered proprietor. It is only the estate or interest of the *transferor* "*as set forth in the instrument*" that passes (sec. 51); and the only estate or interest of the transferor—Jenkins—as set forth in the instrument was a fee simple.

Moreover, sec. 47 directs the Registrar-General to enter a memorial of any instrument creating an easement on the folium of the register book constituted by the existing certificate of title to the dominant tenement. What is meant by a "memorial" appears in sec. 37, and there is no such memorial here. *There is no such memorial entered on Smith's certificate of title*, although Smith took out his certificate after the transfer (30th December 1913). That certificate

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states merely that Smith is the proprietor of "*an estate in fee simple*," and there is no mention of any interest but *the fee simple estate*. An easement, being a mere incorporeal hereditament, cannot be the subject of an estate—fee simple or any other estate. Moreover, in the transfer, Jenkins to Seaman, of the residue of the land purchased by him (15th June 1916)—nearly three years after the transfer Jenkins to Smith (22nd August 1913)—there is no notification of any easement as an encumbrance; although the residue included the narrow strip called "lane" in the transfer to Smith, and, if there were an easement, it would be the duty of the Registrar to mention it as an encumbrance on Seaman's title.

As for answer 2, we have in evidence the transfer from Smith's trustee to Mrs. Dabbs; and there is no mention of the alleged right of way. The words are as follows:—"I the Public Trustee (herein called transferor) *being registered* as the proprietor of an estate *in fee simple* in the *land hereinafter described* . . . in consideration of £200 . . . paid to him by Emily Dabbs . . . (herein called transferee) do hereby transfer to the said transferee All *such* his estate and interest in all the land *mentioned* in the schedule following." This schedule then mentions nothing but "County—Cumberland. Parish—Gordon. State if whole or part —The whole. Vol.—2433. Folio—215." This volume and folio refer to the certificate of title in the name of Smith, and the certificate has the parallel lines with the words "lane 20 ft. wide"; but no right of way is *mentioned* in the schedule, and the only property transferred is property of which the Trustee was proprietor *in fee simple*. Counsel for the appellant relies on sec. 51 of the Act. This section provides: "Upon the registration of any transfer, the estate or interest of the transferor *as set forth in such instrument*, with all rights, powers and privileges thereto belonging or appertaining, shall pass to the transferee . . ." But it is clear that the only estate and the only interest that pass to the transferee are the estate and interest "*set forth in such instrument*," and this alleged right of way is not therein "set forth." The words "rights, powers and privileges" do not include easements over other land; they refer, in my opinion, to the usual rights, &c., which are incident to the estate (in this case, the fee simple estate) transferred, including

the right to cut trees, to dig to the centre of the earth, &c. The expression cannot cover rights in some other person's soil, for that interpretation would be inconsistent with the specific directions of secs. 46 and 47 as to the mode of passing such rights. Moreover, under sec. 41 (1), on registration of any instrument (which includes the transfer from the Trustee to Dabbs) the estate or interest "*specified*" in such instrument shall pass—not any interest to be inferred. It is true that by the *Conveyancing Act* 1919, sec. 67, a conveyance is to be deemed to include and convey with the land all buildings, *easements*, *&c.*, appertaining to the land at the time of conveyance; but, by sub-sec. 5, the section does not apply to land which is under the provisions of the *Real Property Act* 1900 (as this land is). The very object of the Torrens system is defeated if people are to be deprived of its certainty and simplicity, and forced back on the old inferences and implications and conjectures.

Some reliance is placed on the fact that in sec. 3 the word "land" means (if not inconsistent with the context, &c.) "land . . . and hereditaments corporeal and incorporeal . . . together with all paths . . . easements . . . and all trees and timber thereon or thereunder lying." It is sufficient to say that "land" is not the word used in sec. 51: the words used are "the estate or interest of the transferor as set forth in such instrument." But I may point out that even in this definition the words "thereon or thereunder lying," apply to "easements" as well as to "trees and timber."

As for answer 3, it is true that, under the old law of conveyancing, no particular words were necessary to a grant; "and any words which *clearly* show the intention to give an easement which is by law grantable, are sufficient to effect that purpose" (per Lord *Wensleydale* in *Rowbotham* v. *Wilson* (1)). But, in my opinion, the word "lane" within parallel lines as stated, does not show clearly, or at all, any intention to give an easement of way to the proprietor of Smith's land. As for the word "lane," it is an ordinary English word without legal or technical meaning; it is, happily, quite possible in England and elsewhere for one to live with one side of his house along a lane, although he has no right

(1) (1860) 8 H.L.C. 348, at p. 362.

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to walk or drive on the lane. It is different in this respect from the word "street" or the word "road," each of which implies a right of way, public or private (*Stroud's Judicial Dictionary*, "Street"). It so happens that there is a well-known narrow street called popularly "Flinders Lane" in Melbourne, as there are a "Fetter Lane" and "Chancery Lane" in London; and it is said that if land abutting on this "lane" were conveyed with the description as to one side, "bounded by Flinders Lane," Courts would treat the vendor as estopped from denying that that side extended to the "lane." A direct grant of a right over Flinders Lane is, of course, out of the question. I assume that there would be such an estoppel, if the purchaser were misled by the statement into purchasing; as the right rests on estoppel, the purchaser would have to show that he believed the representation, and acted on it. The parties to the action would be at liberty to show the circumstances of the locality—what *Neville* J. calls "the surrounding circumstances" (*Rudd* v. *Bowles* (1)—and the conveyance would be construed in the light of these circumstances. But it does not follow that a similar result would follow under the circumstances of this "lane." By virtue of his transfer, Smith had direct access to Shirley Road without this lane. Even if the vendor were estopped from denying that there was a "lane" as marked, it does not follow that there is any right of way over that lane; or that the right of way is to be enjoyed by Smith or Smith's assigns. Unless coerced by higher authority, I should feel it to be my duty to refuse so to extend the doctrine of *Rudd* v. *Bowles*, to the use of the word "lane" on this plan and under these circumstances. But if there were an estoppel in favour of A, I do not dispute, as the cases stand, that it would enure to the benefit of A's assigns. If a right of way were implied, why should we imply that the proprietor of Smith's land should have that right? Why should we treat the words as showing more than an intention to keep a strip for access to the residue of Seaman's land? Smith's land faced a public road already—Shirley Road; Seaman's other land did not. It is one of the maxims as to the transfer of property that *Quando lex aliquid alicui concedit*

(1) (1912) 2 Ch. 60, at p. 66.

conceditur etiam et id sine quo res ipsa esse non potest; but this maxim is limited by its very terms to things which are *necessary* to the proper construction of the grant; and this implication is not *necessary*. If a vendor describe land which he sells as "bounded on the east by a cricket ground," it does not follow that the purchaser is entitled to the use of the cricket ground, or to prevent the vendor from using the ground for cultivation. The cricket ground is used as a mere means of identifying the bounds of the land conveyed. On the other hand, where a vendor described land as "bounded on the west by the seashore," he was treated as estopped from denying that the land sold stretched as far as the sea. This was a representation as to an existing fact. The Court of Appeal, by a majority, refused to treat the intervening land as having vested in the purchaser; but the purchaser got, by estoppel, a right of access to the sea (*Mellor* v. *Walmesley* (1)). This case does not show that if the land sold were described as "bounded on the west by a lake," a right to sail on the lake would be implied in the grant; and such right as was declared rests not on grant but on estoppel. I propose to deal with estoppel presently, and with the circumstances under which the words "lane 20 ft. wide" were used; but at present I confine myself, as far as possible, to the documents of title, and to the question of an easement by direct grant, without regard to the oral evidence. Mr. *Thompson*, who has certainly done justice to the appellant's case, urged that having regard to the legislation of New South Wales the word "lane" could not mean anything but a right of passage for the persons whose land abutted on the lane; but why all such persons? The plans on the documents of title show that the "lane" runs up from Shirley Road to the remaining unsold land of Seaman's—a polygonal figure at the back of the land sold: why should not this long narrow lane be merely a means for Seaman (or his assigns) to get to and from Shirley Road?

No doubt, there are some Local Government Acts in which for the purpose of the particular Act, the word "road" includes lane, so that the council of the municipality has to look after lanes as

(1) (1905) 2 Ch. 164.

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well as roads. But such a special meaning is confined to the particular Act. Some of our Australian Acts provide that *for the purpose of the Act* " sheep " shall include goats ; but such a provision does not give the wider meaning to " sheep " generally.

I am, therefore, clearly of opinion that the appellant has no right of way over this " lane " by grant.

(B)—But the learned Judge has decided that the appellant has not even what is loosely called sometimes a right of way by estoppel, or an " easement by estoppel." As Mr. *Spencer Bower* has pointed out in his recent book on *Estoppel by Representation*, the doctrine is merely a rule of evidence, and personal to the parties; and it does not give title against the world (pp. 11, 19). In *Bank of England* v. *Cutler* (1) *Farwell* L.J. said : " It is true that a title by estoppel is only good against the person estopped, and imports from its very existence the idea of no real title at all, yet as against the person estopped it has all the elements of a real title." It might be sufficient to say that the appellant in her pleading does not rely on a right of way by estoppel; the pleading rests wholly on the effect of the transfer and certificate. But as the case has been fought on the lines of estoppel, I propose to deal with estoppel. If Seaman wilfully represented to Mrs. Dabbs that there was an *existing* right of way along the eastern side of the acre for the use of the owner of that acre, I think that he would now be precluded, estopped, from averring against her that there is no such right of way. In the case of *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (2) Lord *Selborne* put the doctrine exhaustively, distinguishing it from contract, equitable assignment, &c. :—" The foundation of that doctrine . . . is this, that if a man dealing with another for value makes statements to him as to *existing facts*, which being stated would affect the contract, and without reliance upon which, or without the statement of which, the party would not enter into the contract, and which being otherwise than as they were stated, would leave the situation after the contract different from what it would have been if the representations had not been made; then the person making those representations

(1) (1908) 2 K.B. 208, at p. 234. (2) (1873) L.R. 6 H.L. 352, at p. 360.

shall, so far as the powers of a Court of equity extend, be treated as if the representations were true. . . . But those must be representations concerning *existing facts*."

Now, the only representation on which the appellant relies as creating the estoppel is the appearance on the transfer of the parallel lines and the words "lane 20 ft. wide"; and if this does not "clearly" show an intention to give an easement—a grant of an easement—it cannot "clearly" show a representation that there is an existing easement. "It is a rule, that an estoppel should be certain to every intent, and, therefore, if the thing be not precisely and directly alleged, or be mere matter of supposal, it shall not be an estoppel" (*Right d. Jefferys* v. *Bucknell* (1)). As *Bowen* L.J. said in *Onward Building Society* v. *Smithson* (2)—"An estoppel can only be effected by what is express and clear. . . . It would be very dangerous to extract a proposition by inference from the statements of a deed, and hold the party estopped from denying it; estoppel can only arise from a clear, definite statement." It may be that Seaman was estopped from denying that there was a lane 20 ft. wide along this strip; but he is not estopped from denying that the lane was a thoroughfare and (if a thoroughfare) that it was to be a thoroughfare for the proprietors of Smith's land. It must be borne in mind that the transfer is not a representation of any *existing* fact, and could not be the foundation for an estoppel by representation. Even if one could read into the transfer to Smith, by implication, a grant, or a promise to grant, a right of way, there would be no estoppel by representation. There was no *existing* way at the time. The ground in question, though meant for habitations, is described by the appellant as "unfenced virgin bush . . . steep and rocky and quite impassable for vehicular traffic." If the transfer has any operation at all as to easement, it has no legal operation as creating an estoppel.

But when we come to examine the actual facts, it becomes amazing to find the question of estoppel being even seriously treated. For, as the learned Judge has shown in his judgment, the appellant knew before she bought, and from Seaman himself,

(1) (1831) 2 B. & Ad. 278, at p. 281. (2) (1893) 1 Ch., at p. 14.

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how it came that the word "lane" appeared on the transfer, and knew also that no right of way appurtenant to the acre had been given. I am dealing now with the alleged estoppel by representation, as to which such evidence is relevent—indeed, it was elicited in great part by cross-examination.

It appears that Seaman, having bought lot 1 from Jenkins in 1913, got his surveyor to cut out two acre-allotments fronting Shirley Road, 518 ft. back to his other land (the polygonal figure), and to mark a lane 20 ft. wide along the east side of Smith's acre so as to have access by a private lane from this other land at the back to Shirley Road. Seaman's reason was that although on the north side of his lot 1 was Bayswater Road, there was a foot of land reserved by somebody which would prevent him from access to that road. This job the surveyor did; but according to Seaman, the surveyor put "lane" instead of "private lane" as he was instructed. Seaman did not notice the mistake; and he evidently had thought "private lane" meant that the lane was for his own use only. The transfer by the direction of Seaman to Smith is dated 22nd August 1913. But subsequently Seaman managed (July 1921) to purchase the one foot reserve along Bayswater Road; and having thereby got access to Bayswater Road, so that the strip of land in question was not necessary for him, he determined to sell the strip for building; and, in order to have land sufficiently broad for a building such as the Shire Council would sanction, he bought at the Council's suggestion, 30 ft. additional in lot 2 adjoining the strip—making in all a frontage to Shirley Road of 50 ft.

Not only is the position now clear as to these, the essential facts, but it was clear to Dabbs and his wife on 15th and 17th April 1922; and Mrs. Dabbs bought and got her transfer on the 19th. Dabbs and his wife had come to the land on the 15th, and then saw Mrs. Reynolds and her husband. Mrs. Reynolds was the devisee of the land under Smith's will, and she had purchased from Seaman the other acre adjoining on the west. Dabbs observed that the land (Smith's) was very narrow for the enormous depth; and Reynolds said: "Oh well, if you want more land there is a Mr. Seaman who has 20 ft. of land which he has offered me, and you can get it for

almost any price." Dabbs telephoned to Seaman, and met him on the land on the 17th. Seaman refused to sell the 20 ft., but offered to sell the 20 ft. with the 30 ft. he had acquired in lot 2. Seaman explained that the 20 ft. strip was meant for access to and from his own back land (the polygon); that afterwards he had bought the reserved foot of land along Bayswater Road and did not require access to Shirley Road; that he had bought 30 ft. to the east at the suggestion of the Council, so as to have a lot suitable for building, a lot to which the Council would give its approval; and that the 50 ft. strip, not the 20 ft. strip, was for sale. It is to be noticed that Mrs. Reynolds, from whom the appellant got the title, did not suggest or dream that there was any right of way over the strip. Dabbs tried to beat Seaman down from his price of £4 per foot for the 50 ft. One can speak confidently as to this conversation; for the learned Judge, who saw the witnesses, regards Seaman as a witness of truth, and accepts his account of the interview. On the Monday following, Dabbs and his wife called on Mrs. Reynolds, and the parties settled on £200 as the price for her acre. Dabbs and his wife swore that the "lane" was not mentioned; but Mrs. Reynolds swears that it was—that Dabbs asked would the lane not be, perhaps, a receptacle for rubbish and a resort for larrikins. It is found by the Judge that the parties definitely fixed on £200 as the price on this evening, as the price for the mere acre. On the next day, 19th April, Mrs. Reynolds and Dabbs and his wife called on the trustee of Smith, saw the documents of title for the first time, and took a transfer at this same price of £200. The officer of the trustee said to Dabbs when the "lane" was mentioned, "Look I am selling you this acre, not that lane." Nothing whatever was said on 19th April 1922 by Dabbs or his wife as to the lane being an inducement to their buying. This was the first time that they saw Smith's title or the transfer to Smith. Subsequently, when Seaman wanted the words "lane 20 ft. wide" deleted from his certificate, so as to consolidate his title to the lane and polygon with his title to the 30 ft., his solicitor wrote to Dabbs asking him to sign a consent to the deletion (28th August 1922). Dabbs would not agree, saying "my deeds have the lane marked on them as an established fact,

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and I would consider the elimination of the lane would considerably reduce the value of the land." Of course it might; but, as is pointed out in the judgment of *Maughan* J., Dabbs does not in his reply dare to say that his wife purchased the acre in reliance on the words "lane 20 ft. wide."

Under these circumstances, it looks to me absurd to suggest that there is any ground on the facts for the alleged estoppel. Seaman made no misrepresentations; Dabbs was not the victim of any misrepresentation—he and his wife knew the position before the wife purchased—knew that the lane was not meant to give means of access to Shirley Road to the proprietor of Smith's acre. Smith's acre already bordered on Shirley Road, and there was no actual necessity for a way of access to that road. If Seaman wanted to provide this lane as a means of passage for his transferees on subdivision, he would probably have put the lane between Reynolds' acre and Smith's acre. But conjecture is idle. In my opinion, Dabbs and his wife are merely blocking Seaman from getting his land affairs put on a true and businesslike basis because the lane as marked is "an established fact," and may mean money to them —unjustly gained.

Perhaps I ought to comment on some of the principal cases cited. The case of *Little* v. *Dardier* (1), decided by the late *Owen* C.J. in Eq. in 1891, was that of a right of way by estoppel, *not* a case of a right of way by grant; and it did not decide that the same principles as to the conveyance of easements apply to land under the Torrens system as to land under the old conveyancing law. The strip of land the subject of the easement by estoppel—the servient tenement—was not under the Torrens system; it had never been brought under the *Real Property Act*. The statement of the learned Judge is that "when a vendor . . . conveys . . . land described as bounded by a *street* or *road*, he is *estopped* from disputing that there is a right of way granted to the purchaser . . . over such *street* or *road*" (2). When a case rests on alleged grant, the Court has merely to consider the effect of the words in the instrument; but when the case rests on alleged estoppel, the

(1) (1891) 12 N.S.W.L.R. (Eq.) 319. (2) (1891) 12 N.S.W.L.R. (Eq.), at p. 322.

Court has to consider other matters also, and especially whether the plaintiff was misled by the (alleged) misrepresentation. The primary Judge in the present case has dealt with this point fully. I may add that I cannot see what right the defendant in *Little* v. *Dardier* (1) had to put up the obstructing fence against anyone; for, at the most, he had a mere right of way similar to the plaintiff's. The case of *Rudd* v. *Bowles* (2), decided by *Neville* J. and cited by my brother *Starke*, was a case in which access to the gardens sold could not be enjoyed without a right of way over the strip of land coloured brown; and counsel for the purchaser based his claim to a right of way on estoppel; whereas, in the present case the purchased lot actually fronts the public road. The right of way claimed is not necessary for the reasonable enjoyment of the acre, or to the construction of the transfer.

As for the form of this suit—A, a registered proprietor of the land, sues B the registered proprietor of adjoining land, because B claims to be entitled to a right of way over A's land, and uses, or intends to use, that alleged right. B also opposed the effort of A to get the words and figures deleted from B's title under which the right of way is claimed, and to get consolidation of A's titles on the basis of there being no such right. The Registrar-General refuses to delete and consolidate in the face of B's opposition; and he awaits a decision of the Court. I can see no sound objection to a suit under such circumstances for a declaration that there is no such right, and for an injunction against trespass, and an injunction against B's opposition. I should, indeed, have thought it well for the Registrar-General to be made a party so that he may be bound by the Court's decree. Such has been the practice in Victoria, and (I think) in other States, under similar legislation. But it is not contended that the Court cannot give any relief because the Registrar-General is not before it. In my opinion, the decision of *Maughan* J. was right.

For the instruments of title in this case, the register books were produced from the Office of Titles. I think it to be my duty to point out that the method adopted in describing parcels is very

(1) (1891) 12 N.S.W.L.R. (Eq.) 319.

(2) (1912) 2 Ch. 60.

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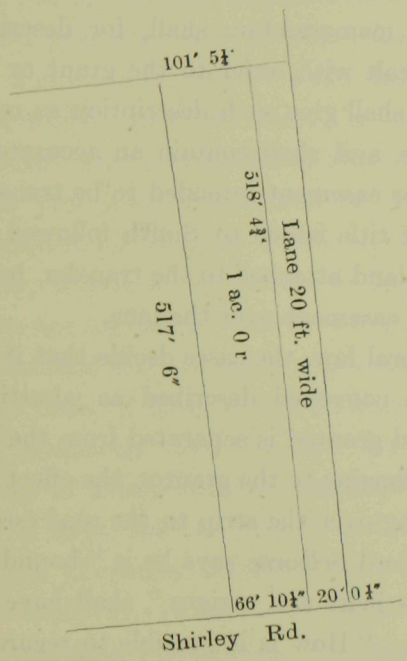
inconvenient and even dangerous. According to the Judicial Committee of the Privy Council, the object of the Act is to save persons having to deal with registered proprietors from the trouble and expense of going behind the register in order to investigate the history of their author's titles and to satisfy themselves of its validity (*Gibbs* v. *Messer* (1)). The policy of the Act is to make every new certificate of title a new starting-point of title, and to let the land transferred find its full description on the certificates and instruments registered (sometimes, necessarily, with the aid of annexures). But here we find that to complete the description in the certificates and instruments one has frequently to look back to plans of previous years—sometimes to successive plans (as in Ex. E, four or five separate plans). There is power under sec. 114 for the Registrar-General to call for subdivisional plans; but it was not meant that the subdivisional plans were to be the only means by which the size and identity of the parcels can be ascertained; or that parcels should be ascertainable by the mere colour of the boundaries. In the course of a few decades, still more in a few generations, the difficulties will become very great in ascertaining parcels, as the colour and the figures and the lines fade. I find also that in this case, when Seaman got his certificate, the original subdivisional plan of Jenkins was altered by inserting on it the subdivisional plan of Seaman, including this "lane," but there is no date and there is no initialling by any officer (see sec. 12). I want to draw the attention of the office to the need for an improved method, even if legislation should be necessary.

STARKE J. All the difficulties in this case have been created by loose and careless conveyancing.

Maria Jenkins, the registered proprietor of certain lands under the *Real Property Act* of New South Wales, subdivided it, and lodged a plan of the subdivision in the Office of the Registrar-General. The subdivision was clearly for building purposes. In August 1913, she, by the direction of Seaman, who had purchased portion of the subdivided lands from her, transferred to Sidney Louis Smith all her estate and interest as such registered proprietor in a piece of

(1) (1891) A.C. 248.

land containing one acre, and described as part of lot 1 on the Plan of Subdivision and shown on the plan attached. The plan attached is, so far as material, as follows :—



And by the transfer the purchaser, for himself, his heirs, executors, administrators or assigns, covenanted with the vendor, her heirs, executors, administrators or assigns, that the purchaser, his heirs, executors, administrators or assigns would not erect or permit to be erected upon the said land any main building of less value than £300. This confirms the view that the subdivision was for building purposes. Maria Jenkins was the registered proprietor of the land marked "Lane," and Seaman was entitled to the lane in fee simple in equity as the purchaser from Maria Jenkins. The lane, as a matter of fact, also gave entrance from Shirley Road to other portions of the land purchased by Seaman from Maria Jenkins which lay at the back of the one acre transferred to Smith. It will be noticed that the lane was not transferred to Smith. There is no express reference in the transfer to any easement, though sec.

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46 of the *Real Property Act* provides that "where land under the provisions of this Act or any estate or interest in such land is intended to be transferred or any right of way or other easement is intended to be created or transferred the registered proprietor may execute a memorandum of transfer" in one of the forms in the Schedule to the Act, "which memorandum shall, for description of the land intended to be dealt with, refer to the grant or certificate of title of such land, or shall give such description as may be sufficient to identify the same, and shall contain an accurate statement of the estate, interest, or easement intended to be transferred or created." The certificate of title issued to Smith followed the description in the plan of the land attached to the transfer, but made no express reference to any easement over the lane.

Under the general law, the cases decide that if land—particularly building land—is conveyed described as abutting on streets or ways and the land granted is separated from the streets or ways by a strip of land belonging to the grantor, the effect is that the grantee has a right of way over the strip to the road (see *Theobald, Law of Land*, p. 102). Lord *Selborne* says he is "bound to this effect, that the purchaser, his heirs and assigns," shall have the "use of those streets" or ways. "How is it possible to regard the description" of the land "as bounded by streets as otherwise than most material to the subject of the contract and to the bargain between the vendor and purchaser? Building land abutting upon a street means having access to and fro by that street" (*Furness Railway Co* v. *Cumberland Co-operative Building Society* (1); *Roberts* v. *Karr* (2); *Espley* v. *Wilkes* (3); *Mellor* v. *Walmesley* (4); *Donnelly* v. *Adams* (5)). It makes no difference that the land in the conveyance is described by reference to a plan attached to it (*Furness Railway Co.* v. *Cumberland Co-operative Building Society*; *Rudd* v. *Bowles* (6)). Nor does it make any difference that the abutting land is described as a street or way or as a lane—which is only a narrow passage or way—or even as a narrow strip coloured on an attached plan, running along a boundary of the land (*Rudd* v. *Bowles*).

(1) (1884) 52 L.T., at p. 145.
(2) (1809) 1 Taunt. 495.
(3) (1872) L.R. 7 Ex. 298.
(4) (1905) 2 Ch. 164.
(5) (1905) 1 I.R. 154.
(6) (1912) 2 Ch. 60.

Sometimes these decisions have been referred to the principle that a man must not "derogate from his own grant" and at other times to the principle that a man is "estopped from denying that there are streets which are in fact ways." (See the cases cited *supra*, and *Gale on Easements*, 9th ed., p. 110; *Goddard on Easements*, 8th ed., p. 132.) These two principles are not quite the same, for in the case of the former a grant is implied from the description contained in the conveyance, whilst "estoppel arises" according to the Lord *Halsbury* L.C. "where you are precluded from denying the truth of anything which you have represented as a fact although it is not a fact" (*Farquharson Brothers & Co.* v. *King & Co.* (1)), or, more accurately, where, in the words of Lord *Blackburn*, the rights of the parties are regulated, "not by the real state of the facts, but by that conventional state of facts which the . . . parties agree to make the basis of their action" (*Burkinshaw* v. *Nicolls* (2); cf. *Gale on Easements*, 9th ed., pp. 152, 153). But the distinction in theory is unimportant, if the benefit of the estoppel enures, as clearly it does, for the benefit of the grantee and his transferees or assigns (*Taylor* v. *Needham* (3) — a case of estoppel by deed; *Wood* v. *Seely* (4) — a case of estoppel *in pais*; *Furness Railway Co.* v. *Cumberland Co-operative Building Society* (5) — the case of an assignee; *Mellor* v. *Walmesley* (6) — the case of an assignee; *Rudd* v. *Bowles* (7) — the case of a mortgagee; *Sarat Chunder Dey* v. *Gopal Chunder Laha* (8) (to which my brother *Isaacs* has referred me): see also *Spencer Bower, Estoppel by Representation*, sec. 173, p. 149). Consequently, if this were a case of a conveyance under the general law, Smith would have been entitled to a right of way along the 20 ft. lane abutting on the land transferred to him by Jenkins at the direction of Seaman. And in *Little* v. *Dardier* (9), decided in the year 1891, these principles were applied to land under the *Real Property Act*. That decision was, in my opinion, right, either because the grant of a right of way was implied from the words and description used in the transfer, or because an equitable

(1) (1902) A.C. 325, at 330.
(2) (1878) 3 App. Cas., at p. 1026.
(3) (1810) 2 Taunt. 278, at p. 283.
(4) (1865) 32 N.Y. 105.
(5) (1884) 52 L.T., at p. 145.
(6) (1905) 2 Ch., at p. 176.
(7) (1912) 2 Ch. 60.
(8) (1892) L.R. 19 Ind. App., at pp. 215, 220.
(9) (1891) 12 N.S.W.L.R. (Eq.) 319.

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claim or right to the way arose by reason of estoppel (*Barry* v. *Heider* (1)). And in any case it would be difficult to depart from a decision which has been acted on for so long a time and upon which possibly many titles depend.

The remaining question is whether Smith's rights over the lane in question were transferred to the appellant Emily Dabbs. Smith died, and the Public Trustee became his legal personal representative. By transfer in the month of April 1922 the Public Trustee transferred all his estate and interest in all the land mentioned in Smith's certificate of title to Emily Dabbs, and she was, by endorsement on that certificate, registered as proprietor of the land. But the lane was not expressly mentioned in the transfer, nor was any right of way over it expressly given. What is the effect of that transfer? It purports to transfer a parcel of land described in a certificate of title, which discloses, upon examination, that the land abuts on one of its sides on the lane. Under the general law a grant of land passed all that was " legally appendant or appurtenant thereto " without the words " with the appurtenances " (see *Norton on Deeds*, p. 249). In practice " general words " were usually added so as to pass all appurtenances enjoyed with the land. But in New South Wales, as in England, legislation has rendered this addition unnecessary (*Conveyancing Act* 1919, sec. 67). It may be that the same result has been achieved under the *Real Property Act* by the definition of land in sec. 3 : " In the construction and for the purposes of this Act," the section provides " *and in all instruments* purporting to be made or executed thereunder (if not inconsistent with the context and subject matter) . . . the following terms shall bear the respective meanings set against them:— . . . 'Land'— Land, messuages, tenements, and hereditaments corporeal and incorporeal of every kind and description or any estate or interest therein, *together with* all paths, passages, ways, watercourses, liberties, privileges, easements, plantations, gardens, mines, minerals, quarries, and all trees and timber thereon or thereunder lying or being unless any such are specially excepted " (cf. *Ex parte Cuningham* ; *In re M'Carthy* (2)). And the title of the servient tenement is subject to any easement existing over the land although the same has not been

(1) (1914) 19 C.L.R. 197. (2) (1877) 3 V.L.R. (L.) 199, at pp. 204-205.

registered (*Real Property Act*, secs. 42, 47). But it is unnecessary to decide the point because Smith's representative has transferred to Emily Dabbs a piece of land described in his certificate of title by means of a plan, as abutting on the lane. Now, if Smith's representative had owned the lane he could not, as we have seen, have denied the right of Emily Dabbs to use it. On similar principles, if Smith's representative has a right of way over the lane, incident to the land which he sold to Emily Dabbs, then, if he has not expressly or impliedly granted that right to her, he is estopped from denying, and must be taken to have granted to her the right of way he had in or over the land (cf. *Cooke* v. *Ingram* (1)).

Emily Dabbs thus succeeds in establishing her right by the application of legal principles to the forms of transfers executed in this case, but somewhat, I am afraid, at the expense of justice. She never bargained for a right of way over the lane at the time of the purchase, and the learned Judge who tried the action was satisfied that she had been informed that she was buying the one acre of land and not any right to or over the lane. But a right of way over the lane was in point of law, in my opinion, granted or transferred to her, or must be assumed to have been so granted or transferred, and consequently her appeal must be allowed.

Appeal allowed with costs. Suit dismissed with costs.

Solicitor for the appellant, *R. J. M. Foord.*

Solicitors for the respondent, *J. McLaughlin & Co.*

B. L.

(1) (1893) 68 L.T. 671. at p. 674.