

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Humphrey v. Nowland, from the Supreme Court of New South Wales; delivered 5th March, 1862.*

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Present :

LORD CHELMSFORD.

LORD JUSTICE KNIGHT BRUCE.

SIR EDWARD RYAN.

LORD JUSTICE TURNER.

THEIR Lordships think that it would not be satisfactory that the rights of the parties should be finally determined by the verdict given in this case. Upon its delivery the Chief Justice who tried the cause expressed his condemnation of it in very strong terms, stating that he believed it to be "utterly wrong." This opinion he seems never to have abandoned; and although he delivered the Judgment refusing a new trial, and so far concurred with the majority of the Court, yet in various parts of it he intimates his own unaltered impression of the unsatisfactory nature of the verdict. It is evident that he was unable to satisfy himself whether the Jury thought that the exclusive possession of the Plaintiff extended to the whole of the land, or was confined to that part of it which lay on the western side of the River Mooki. But he thought the verdict erroneous, whichever way it was taken, and he expresses this opinion very decidedly and pointedly in the following passage of the Judgment:—"If the jury have in fact assessed damages for the entire station, it follows that, according to my view of the matter, the damages are assessed wrongly. On the other hand, if the damages have been assessed in respect

of the western portion only, then they are clearly in my opinion out of all proportion to the injury."

If, upon consideration of the evidence, their Lordships had been fully and clearly satisfied that the Jury were warranted in the conclusion to which they came, they would of course not have felt themselves bound to yield to the opinion of the Judge who presided at the trial, notwithstanding the advantages he possessed from having had the opportunity of seeing the witnesses under examination, and of forming an accurate judgment upon the case; but their Lordships would not venture to differ from the opinion of the presiding Judge, except upon clear and satisfactory grounds, and, upon a careful consideration of the whole of the evidence, they cannot help concurring in the view taken by the learned Judge of the impropriety of the verdict, whether it is to be applied to the whole or only to a part of the land in dispute.

It clearly appears that for upwards of twenty years before the present action was commenced there had been a concurrent possession of portions of the land by the predecessors of both parties; if there had not been almost an exclusive possession on the Defendant's part of the land on the eastern side of the river. It is not an immaterial circumstance in this contest that the Defendant, and those who used the Run before him, appear not to have depastured the land with cattle, but only with sheep, while the Plaintiff and his predecessors turned on no sheep, or, at least, only a very few, but depastured principally, if not solely, with cattle; as it seems that horned cattle will not graze on spots where sheep are depasturing. These facts tend strongly to prove that the possession by the Defendant and his predecessors must have interfered very materially with any right which the Plaintiff may at any time have acquired by reason of the previous possession either of himself or those who preceded him. The Plaintiff or his predecessors may occasionally have denied the right of the Defendant, or of those whom he succeeded to the use of the land, and there may have been instances of a more forcible assertion of claim in the Plaintiff's line of possession by acts of impounding (though these acts were not confined to one side only), but the

Plaintiff never asserted his right to an exclusive possession by proceedings at law before the year 1852, when he brought an action against Eales, the immediate predecessor of the Defendant in the use of the land.

The result of this action was not of a nature to afford much countenance to the Plaintiff's present proceedings; for although the jury were in his favour as to a hut, of the pulling down of which he complained, they found that the land itself was held in common by him and Eales. Now the circumstances under which the land was used from the time the Defendant began to depasture it with his sheep till the action against him, were not different from those which had previously taken place. A succession of occupiers on both sides had been permitting one another to continue undisturbed in the use of the land, and each fresh occupant at the commencement of his occupation found that he was not to be the sole possessor unless he could remove some other person who was exercising a right upon the land similar to that which he claimed.

The Plaintiff, upon this state of things, asserts his right to the exclusive possession of the land against the Defendant, on the ground that the first possessor in his line was upon the land before any one of the predecessors of the Defendant; and he shapes his case in this manner:—He says that the first lawful occupier was Parrott, who transmitted his legal possession through different persons to him; that the first person who entered upon the land while Parrott was in possession was a trespasser; that all who followed this original trespasser were themselves also trespassers; and that although they continued undisturbed for whatever length of time by those who represented the first lawful possessor, the illegal character of their original possession never changed; and that at the end of fifty years a person who had obtained possession in the line of the first possessor might maintain trespass against a successor of the original trespasser who continued to use the land.

If this view of the law is correct, it would utterly exclude the well-known and important doctrine of acquiescence upon which rights of every description have been constantly decided. The Plaintiff, however, asserts that this mode of presenting the case is

justified by a course of decisions in New South Wales upon similar questions applicable to waste lands in the Colony. Their Lordships have not been informed of the exact nature and extent of these decisions. They are referred to in the Judgment given upon the 7th and 8th objections raised upon the motion of the Defendant for a new trial, but all the cases mentioned in that Judgment are decisions of the Courts in this country. It does not appear clearly, from the expressions used in the Judgment, that the Judges meant to proceed as far in the protection of an original possessor of waste land and his successors as the argument of the Respondent asserts, although their language is perhaps not sufficiently guarded upon this point. At the same time, if there are decisions in the Colony applicable to a species of interest or possession of a very peculiar character, and entirely distinct from any state of things which could possibly exist in England, their Lordships would be very reluctant to try these decisions solely by the test of English authorities. But acquiescence is a principle which must be universally applicable, and especially, as it would seem, to such a species of possession as that which was in controversy in the present action.

Now, it appears to their Lordships that very insufficient weight was given to the facts which established an uninterrupted continuance of the same state of things for a very long course of years. The non-interference with the possession, which may be described as represented by the Defendant, was not only important in its bearing on the exclusive possession claimed by the Plaintiffs, but it reflected back upon the original possession, and gave a character to the very origin of the title which was the foundation of the Plaintiff's claim. If Parrott and those who succeeded Parrott suffered patiently the intrusion of other persons upon the land, an exclusive right to which is now claimed upon the footing of his original possession, it is surely very strong evidence either that Parrott did not possess the sole right, or that he was willing to permit others to share the use of the land with him, and surrendered the possession to his successors only to the extent to which he himself enjoyed it.

Their Lordships, in considering the whole case, cannot forbear from also expressing an opinion that

due weight was not given upon the trial to the effect of the Plaintiff's Schedule under his insolvency. It certainly is a most important document, bearing not only upon the question of damages, but upon the right itself which was involved in the action. It scarcely seems credible that if the Plaintiff had such a valuable possession as to entitle him to a sum of 2,000*l.* as damages for the intrusion upon it for four years, it should have been altogether omitted from his Schedule, or that his creditors should have been ignorant of this available item of property, and should not have compelled him to give them the benefit of it. And if it was of the value which it has assumed in the action, and the Plaintiff had not cattle enough to stock the land (which appears to have been the case), it is still more unaccountable that he should have retained the precarious use of it, constantly liable to disturbance as it was from his inability thoroughly to use it, and should not have availed himself of the profit which he might have acquired by the transfer of his possession.

Their Lordships forbear from any further remark upon the evidence in the case, as there must be a new trial the result of which they desire not to anticipate. Of course, upon such trial care will be taken to distinguish the evidence applicable respectively to the eastern and western sides of the river, to which very different considerations appear to attach; and the attention of the Jury will, of course, be called to the difference between these two portions of the disputed land, in order that the important question of acquiescence may be distinctly applied to each, and that if damages should be given, it may be known to what they were applied, and how they were estimated.

Their Lordships will recommend to Her Majesty that the Judgment appealed from be reversed, and a new trial granted; and that the costs of the Rule in the Court below abide the event of the cause, and the costs of this Appeal be paid by the Respondents.

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