

*Judgment of the Lords of the Judicial Committee
of the Privy Council, on the Appeal of Turner
v. Walsh from the Supreme Court of New
South Wales; delivered May 21st, 1881.*

Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR RICHARD COUCH.
SIR JOHN MELLOR.

THIS Appeal arises in an action brought by the Appellant against the Respondent for a trespass on a plot of land purchased from the Crown under the provisions of the Crown Lands Alienation Act, 1861, of the Statutes of New South Wales. He complained that the Defendant had entered the land, and pulled down some fences. The Defendant pleaded that there was a public highway over the plot of land, and justified his acts in the proper use of that highway. The question in the action is whether or not the Defendant has proved that such a highway existed. The land before the grant, which is of the date of 1st February 1879, belonged to the Crown. There was a suggestion that it had been leased for pastoral purposes, but there is no proof that any such lease had been made.

The evidence, though stated rather shortly by the learned Judge, Mr. Justice Hargrave, who tried the cause, is clear and explicit. It appears that for 40 years before the commencement of the action there had been a road over and across the piece of land granted to the Plaintiff, which had been used by the public with carriages, horses, and cattle, and on

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foot. It appears to have been the main road between Enabelong and Condobolin. The mail coaches travelled that road; teamsters conveying the produce of the country, especially wool, used it; and, in fact, it had been used by the public for all purposes, during this period, continuously and without interruption. Upon such evidence the Judge would be right, unless some positive restriction on the power of the Crown appeared, in directing the jury that they might presume a dedication of the road by the Crown to the public. The presumption of dedication may be made where the land belongs to the Crown, as it may be where the land belongs to a private person. From long-continued user of a way by the public, whether the land belongs to the Crown or to a private owner, dedication from the Crown or the private owner, as the case may be, in the absence of anything to rebut the presumption, may and indeed ought to be presumed.

The jury found for the Defendant, whereupon an application was made to the Court by the Plaintiff for a new trial, not on the ground that the verdict was against the evidence, but on the ground that the Judge had misdirected the jury. We have not the terms in which the learned Judge addressed the jury, and can only obtain information of what he said from his own judgment in discharging the rule, and from the grounds stated in the rule nisi for a new trial. The Plaintiff is, of course, confined to these grounds. They are—"That his Honour
" ruled that user in this colony may be relied
" on, in like manner as it may in England, for
" the purpose of presuming and establishing
" dedication of a road over Crown lands as against
" the Crown; and that the user proved in this
" case was sufficient to entitle the jury to

“ presume dedication by the Crown of the road “ in question.” The Plaintiff does not complain in the first of these grounds, that, supposing the same evidence had been given in England, the direction would not have been right; but he complains of the ruling of the Judge that user may be relied on in the colony, in the same manner as it may be in England, for the purpose of raising the presumption of dedication of a road over Crown lands. Their Lordships are not aware of any reason in point of law why the same presumption from user should not be made in the case of Crown lands in the colony as would be made in England, apart from the Statute to which attention will be presently called; though the nature of the user, and the weight to be given to it, may, of course, vary in each particular case.

The main contention of the Appellant was that the Crown Lands Alienation Act has placed restrictions on the power of the Crown to dedicate roads in the colony, and that the effect of that Act was not sufficiently regarded by the Judge in his direction to the jury. The Act was passed in the year 1861, and the third section enacts this:—“ Any Crown lands may “ lawfully be granted in fee simple or dedi- “ cated to any public purpose under and sub- “ ject to the provisions of this Act, but not “ otherwise.” Then the fifth section enacts:— “ The Governor, with the advice aforesaid, may, “ by notice in the Gazette, reserve or dedicate, “ in such manner as may seem best for the “ public interest, any Crown lands for any “ railway or railway station, any public road, “ canal, or other internal communication.” It is said that, taking these two provisions together, any dedication by the Crown since 1861 must be in the manner prescribed, that is by the Governor,

by notice in the Gazette, and not otherwise. Assuming that to be the effect of the Statute, the evidence in this case, as has been stated, showed a continuous user of the road for 40 years, which gives (the case being tried in 1880) a user of 21 years before the Statute of 1861 came into operation, and during the time when the Crown held these lands in full right, *jure coronæ*, with full power to dedicate. Their Lordships have no difficulty in saying that the Judge was right in directing the jury that from the user of 21 years before the Statute, continued since 1861 down to the time of the action without any interruption or interference on the part of the Crown, they might presume a dedication prior to the Statute, and at a time when the Crown had power to dedicate. A further objection was that the Judge did not point out to the jury that the evidence of user after 1861 was of different and less weight than that of the previous user; but if there is any difference, the evidence of continuous and unbroken user since 1861 is stronger to raise a presumption of an old dedication than the earlier evidence, because, if there had not been an old dedication prior to the passing of the Act of 1861, the officers of the Crown might reasonably have been expected to stop the unauthorised use of the land by the public, and to put down acts which would have been, upon the hypothesis of the Appellant, a series of trespasses.

Their Lordships think it right to observe that one of the learned Judges, Sir William Manning, is scarcely correct in the way in which he regards the evidence. He says:—"There was then a further difficulty. It was, his Honour took it, plain that before 1861 (the date of the Crown Lands Alienation Act) the right by user was at least inchoate; did it follow then, that

“ the user, then enjoyed for twenty-one years.
“ would be put an end to by that Act? Would
“ not the inchoate right run on to maturity rather
“ than be blocked by the intermediate passing
“ of this Act.” This language does not accurately express the presumption which arises from long-continued user. It is not correct to say that the early user establishes an inchoate right capable of being subsequently matured. If the right had been inchoate only in 1861, the argument of the Appellant that it could not have been matured or acquired after 1861, except in the mode prescribed by the Act, would have had great force. The proper way of regarding these cases is to look at the whole of the evidence together, to see whether there has been such a continuous and connected user as is sufficient to raise the presumption of dedication; and the presumption, if it can be made, then is of a complete dedication, coëval with the early user. You refer the whole of the user to a lawful origin rather than to a series of trespasses. It may be that in this case the evidence of user prior to 1861 was alone sufficient to establish the presumption of dedication; but the strength of that presumption is increased by the subsequent user, and would certainly have been much diminished if the user had been discontinued after 1861. In this case their Lordships have no doubt that, the user being continuous, the direction is right, and if the direction is right, it is not contended that the verdict is wrong.

There are two cases where the principles which govern this case have been recognised: *The Queen v. The Inhabitants of East Mark*, 11th Queen's Bench, 877, and *The Queen v. Petrie*, 4th Ellis and Blackburn, 737. It may be observed that in the present case the evidence is very much stronger, to raise the presumption of a

dedication at the time when the Crown was competent to dedicate, than the evidence which was held sufficient to establish such a presumption by some possible owner of the fee in *The Queen v. Petrie*. In that case, after seven years' user without interruption of the road in question, the Court held that the Judge was right in directing the jury that they might from that user presume a dedication from an owner of the fee; though it was not proved that during that time there was anyone who was absolute owner of the fee, but it being possible that such an owner then existed.

There is only one other point which need be adverted to. The learned counsel for the Appellant referred to the Act 5th & 6th Vict., Cap. 36, of the Imperial Parliament, as in some way limiting the power of the Crown to dedicate roads. Their Lordships, on looking at that Act, find no such restriction in it. The second section enacts:—"That the waste lands of the Crown in the Australian Colonies shall not, save as herein-after is excepted, be conveyed or alienated by Her Majesty." The third section is:—"Provided always, and be it enacted, that nothing in this Act contained shall extend or be construed to extend to prevent Her Majesty or any person or persons acting on the behalf or under the authority of Her Majesty from excepting from sale, and either reserving to Her Majesty, her heirs and successors, or disposing of in such other manner as for the public interests may seem best, such lands as may be required for public roads or other internal communications." These enactments leave Her Majesty's power with regard to public roads as it existed by the common law, and do not interfere with her right to dedicate lands for this purpose.

Their Lordships think that this Appeal fails; and they will, therefore, humbly advise Her Majesty to affirm the judgment of the Supreme Court of New South Wales, with costs.

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