APPELLATE CIVIL.

Before Sir Sydney Robinson, Kt., Chief Justice, and Mr. Justice Brown.

1924

June 17.

S. A. CHRISTOPHER
v.
J. A. COHEN AND TWO OTHERS.*

Right-of-way—Abandonment—Non-user—Circumstances to be taken into consideration.

Held, that while mere non-user is not sufficient to amount to abandonment of a right-of-way, it is a fact to be taken into consideration with the other facts and circumstances of the case, and it is from all such facts that the Court has to decide whether or not a clear intention to abandon can be inferred or is indicated.

Held, that where the plaintiff and his predecessors in title had failed to exercise a right-of-way, had fenced off their land so as to shut off the right-of-way and had omitted any specific mention of the right in various conveyances, an abandoment was established.

Crossley v. *Lightowler*, 36 L.J. Ch., 584 ; *R.* v. *Chorley*, 12 Q.B., 515 ; *Ward* v. *Ward*, 21 L.J. Ex., 334—*followed.*

This was an appeal against the judgment and decree of the High Court passed in its Original Civil Jurisdiction (Beasley, J.) in Civil Suit No. 471 of 1922 dismissing the appellant's claim to a right-of-way over a strip of waste land lying between his land and that of the 3rd respondent and ending in the land belonging to the 1st respondent. The facts arising appear in the judgment of the learned Chief Justice reported below.

Chari—for the Appellant.

Das—for the Respondents.

ROBINSON, C.J.—The plaintiff-appellant claims that he has a right-of-way over a strip of jungle land lying between his property and that of the 3rd defendant-respondent and ending in the property of the 1st

* Civil First Appeal No. 142 of 1923 against the judgment and decree of he High Court passed in its Original Civil Jurisdiction in Civil Suit No. 471 of 1922.

defendant-respondent. The whole of these lands at one time belonged to Messrs. Short and Hannay, and they conveyed them in three parcels to various persons.

By Exhibit B, dated the 9th June, 1891, Short and Hannay conveyed Lot No. 3, to one Srinivasa Iyer.

The conveyance contains the following special clause :—

> "And it is hereby expressly provided, agreed and declared by and between the said Vendors and Purchaser that the Road marked and described as 'Common Road' in the plan hereto annexed and lying between Lots Nos. 3 and 5 shall be left open and freely used by the owners of Lots Nos. 3, 4 and 5, each having a right-of-way over the same at all hours of the day and night and none of the owners of the said lots shall have any right to close the same at any time or claim more right in it than any of the others."

These lands have subsequently been subdivided, but, for the purposes of this case, I will refer to them as Lots Nos. 3, 4 and 5. At that time this pathway, which is described as the "Common Road," was practically impassable It was jungle land, with holes in it, in which water lay, and it had never been used by any one. The original owners reserved the right of ownership in this strip to themselves, clearly in order to permit of an exit from these three lots on to Churchill Road.

Srinivasa Iyer by Exhibit C, dated the 28th April, 1893, conveyed Lot No. 3, to one Kruse. The same special clause, with reference to the "Common Road" is included in the conveyance. By Exhibit D, dated the 28th February, 1902, Kruse conveyed it to Mrs. Desmazures, and the same special clause

1924

S. A. CHRISTOPHER v. J. A. COHEN AND TWO.

ROBINSON, C.J.

appears in the conveyance. Then by Exhibit E, dated the 7th February, 1912, Mr. Desmazures transferred this property, as administrator of his wife's estate, to himself personally, setting out that the original purchase in his wife's name had been *benami*, he having provided the purchase money. The conveyance sets out the land as described in the schedule. The schedule specifies the land by lot numbers, and is delineated in the plan annexed, "together with the two-storied timber built house and out offices and all other buildings common fences liberties privileges easements and appurtenances whatsoever to the said piece or parcel of land belonging or in any wise appertaining or usually held or occupied therewith or reputed to belong or be appurtenant thereto * * * ." There is nothing said about the "Common Road"; and, if the particular right now claimed was conveyed, it must be under the general terms above recited.

Then by Exhibit F, dated the 15th May, 1917, Mrs. Martindale, Mr. Desmazures' sister, purported to transfer the land as his administratrix to herself as his heir. The wording of the schedule is verbatim the same as that of the schedule to Exhibit E, both these deeds having been drafted by Mr. Bagram.

Then, on the 13th August 1919, by Exhibit G, Mrs. Martindale conveyed the property to the plaintiff-appellant. There is no mention of the "Common Road," nor does the plan attached to the deed show the "Common Road." The property is conveyed with "all the legal and usual appurtenances and all the estate right title or interest claim or demand whatsoever of the vendor in to and upon the said premises."

When this property was purchased by Mrs. Desmazures in 1902, or shortly afterwards, a house

was buil upon the plot, and an entrance on to Churchill Road was constructed with a road running parallel to the "Common Road" in dispute. A fence was erected between this road and the "Common Road." It is admitted that the plaintiff-appellant never knew of the right-of-way originally granted over the "Common Road," and that he has never used it, nor, apparently, had any of his predecessors in title.

The defendant-respondent's land, Lot No. 4, was conveyed by Short and Hannay by Exhibit H, dated the 18th February, 1892, to one David. They reserved to themselves the ownership in this "Common Road," and the conveyance provides a conveyance of "liberties privileges easements advantages and appurtenances" which clearly will not cover the "Common Road," and, therefore, a special clause is inserted with reference to it, which runs as follows:—"And especially and more particularly a free right-of-way over a piece of the said allotments measuring about 46 feet long and 15 feet broad reserved for a road which is to be common to all owners of land adjacent thereto for passing and repassing to and from their respective portions of the said allotments."

On the 6th of March, 1919, by Exhibit J, Mrs. Lillicrap, as executrix of Mrs. David, conveyed to the 1st defendant-respondent the same plot of land "together with the appurtenances." There is no mention of the "Common Road."

Exhibit K, dated the 20th December, 1890, is the first conveyance by Short and Hannay of Lot No. 5. The boundary on the west is described as the road leading to Lot No. 4, which is the alleged "Common Road." There is no grant of any right-of-way over the "Common Road" in this deed at all.

1924

S A. CHRISTOPHER v. J. A. COHEN AND TWO.

ROBINSON, C.J.

The 1st defendant-respondent has filled up portions of this "Common Road," so as to make it passable. He has laid a pipe underneath the "Common Road" into which is collected the surface drainage from his land, and he has made man-holes at the side of the road for the purpose of clearing this pipe. He sold the northern portion of Lot No. 3, to the Tata Industrial Bank, Limited, and the Bank, with his permission, have erected posts along the edge of the "Common Road" to carry power from the main in Churchill Road to their house.

The plaintiff-appellant alleges that, by these acts, his rights in this "Common Road" have been infringed, and he asks for a declaration that the road is common to himself and the defendant-respondents, and that none of them have any higher right than any other. He prays for an order against the 1st and 2nd defendant-respondents to remove the pipe and iron pillars, and also for an injunction restraining them from using the said pathway in any other way, or for any other purpose, than a pathway.

The learned Judge on the Original Side, after inspecting the spot, has decided that the existence of these man-holes is an infringement of the plaintiff-appellant's rights, if he has any. He is of opinion that neither the pipe nor the pillars are such interference as the Court should take notice of. He finds that the rights originally granted were intentionally abandoned by Mr. Desmazures, and that the plaintiff-appellant acquired no such right-of-way as he claims.

The question we have to decide is whether the right-of-way granted by the original owners of the land over this "Common Road" had been abandoned by the plaintiff-appellant's predecessor in title.

The law as to the extinguishment of a continuous easement may now be regarded as settled. In

R. v. *Chorley* (1), it is said : "It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material for the consideration of the jury."

In *Ward* v. *Ward* (2), Alderson, B., said : "The presumption of abandonment cannot be made from the mere non-user. There must be other circumstances in the case to raise that presumption."

In *Crossley* v. *Lightowler* (3), Lord Chelmsford, L.C., said : "The authorities upon the question of abandonment have decided that a mere suspension of the exercise of a right is not sufficient to prove an intention to abandon it. But a long continued suspension may render it necessary for the person claiming the right to show that some indication was given, during the period that he ceased to use the right, of his intention to preserve it. The question of abandonment of a right is one of intention to be decided on the facts of each particular case."

These authorities appear to have been always followed in India ; and it may be taken as settled law that, while mere non-user is not sufficient to amount to abandonment, it is a fact to be taken into consideration with the other facts and circumstances of the case ; and it is from all these facts that the Court has to decide whether or not the clear intention to abandon can be inferred, or is indicated.

Turning to the facts of the present case, we find that this right-of-way was expressly granted by the original owners to Iyer, and by him to Kruse, and by Kruse to Mrs. Desmazures. When we come to the transfer by Mr. Desmazures, as administrator,

(1) (1848) 12 Q.B., 515. (2) (1852) 21 L.J. Ex., 334.
(3) (1867) 36 L.J. Ch., 584.

1924

S. A. CHRISTOPHER v. J. A. COHEN AND TWO

ROBINSON C.J.

to himself, as beneficial owner, we find that he did not expressly transfer this right-of-way. It is not, in my opinion, possible to suppose that Mr. Desmazures did not know anything about this right-of-way. He had two conveyances of this land prepared, and he could hardly fail to have observed the absence of the special clause with reference to the "Common Road."

Shortly after the land was first purchased by his wife, or himself, he erected a house and planted a hedge between his land and the "Common Road," shutting the "Common Road" completely off. The "Common Road" at the time was not in a state in which it could be used as an entrance on to his property, and he not only made no attempt to use it, or part of it, but he made another road inside his his fence, which would render the "Common Road" absolutely unnecessary to his land.

When we come to the plaintiff-appellant's title deed, Exhibit G, dated the 13th August 1919, we find the expression "legal and usual appurtenances," which clearly does not cover the right that is now claimed, which could only be brought in by the use of the very general terms "all the estate right title or interest * * * of the vendor."

The question then is: Does the fact of non-user, coupled with the wording of these conveyances, and the actions of Mr. Desmazures, show an express intention on his part to abandon this right over the "Common Road"? In my opinion they do show such an intention.

In my opinion, therefore, the decision of the Court below was correct, and the decree should be confirmed.

I would dismiss the appeal with costs, and fix the advocate's fee at ten gold mohurs.

BROWN, J.—I concur.