*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Clark* v. *Elphinstone and another, from the Supreme Court of the Island of Ceylon; delivered November 25th*, 1880.

---

Present:

SIR JAMES COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE SMITH.
SIR ROBERT COLLIER.

THE Appellant, who was the Plaintiff in the action, and the Respondent, the Defendant, are the owners of conterminous estates, and the dispute between them relates to a piece of land, containing about 54 acres, lying between their two estates. The Plaintiff's estate may be called Wattagoda and the Defendant's Holyrood, the names which were used in the proceedings below. Both owners derived title under grants from the Crown made in the year 1842. Wattagoda was granted to two persons, Wilson and Ritchie, who in 1844 conveyed to Johnstone, and in 1873 Johnstone conveyed to the Plaintiff. The grant of Holyrood was made by the Crown, on the same day, to Mackenzie, who in 1869 conveyed to Thomson; and Thomson, by two conveyances, in 1870 and 1873, conveyed to the Defendant.

The action was in trespass. The Defendant, besides denying that the piece of land in dispute formed part of the Plaintiff's estate, and asserting that it formed part of his own, set up the defence that he was entitled to hold the land under the provisions of the Ceylon Ordinance 22 of 1871, by reason of an undisturbed possession of 10 years.

The first of these questions, that of the title to the piece of land in dispute, arose in consequence of a latent ambiguity in the description

Q 3771. 100.—12/80. Wt. 3729.

of the boundaries of the estates contained in the grants from the Crown. One of the boundaries was a stream called the Welle Ella; and upon applying that description to the ground, and to the streams, as they actually existed, a question arose which of two streams was the Welle Ella mentioned in the grants, the piece of land in dispute lying between those two streams. The boundary mentioned in the grant of Wattagoda is in these terms:—"On the east"—that is, bounded on the east—"by land applied for by Mr. Ritchie, and Welle Ella." In the grant of Holyrood the western boundary is thus given:—"On the west by the same"—that is, the property of Messrs. Gibb, Clarke, & Co.—"and Welle Ella." Plans are attached to both grants, and referred to as giving the true delineation of the estates granted. The lands embraced in both grants were forest and jungle lands. At the time the dispute arose both the Plaintiff and the Defendant had cleared portions of their lands and cultivated them for coffee, but neither had touched the disputed piece of ground, which remained in its original state of forest or jungle.

The action was tried before the District Judge. Evidence was given on the part of the Plaintiff, by surveyors and others, to show that the stream which was marked for convenience on the map X.A.B. was the Welle Ella stream indicated in the grants. On the other side it was contended that the stream which was marked X.Y.Z. was the true boundary; but no surveyors were examined by the Defendant on that point. The Defendant also contended that the evidence showed that he had had undisturbed possession for 10 years. The District Judge found in favour of the Plaintiff on both issues; viz., that the true boundary was the stream marked X.A.B., and that the Defendant had not had possession for 10 years within the meaning of

the Ordinance. Upon an appeal the Supreme Court held that the District Judge was right in his findings, and affirmed his judgment in favour of the Plaintiff.

The judgment of affirmance was given by the two puisne Judges of the Supreme Court, either in the absence of the Chief Justice or during the vacancy of the office; afterwards, when Chief Justice Phear was present, an application was made for a review of this judgment. A review being granted, and the case reheard, the Court, whilst adhering to the former judgment of the two Judges upon the question of the real boundary, was of opinion that the Defendant had been for 10 years in undisturbed possession of the disputed land, and was therefore entitled to the benefit of the Ordinance of 1871, and on that point reversed its former decision and the judgment of the District Judge, and dismissed the Plaintiff's action.

Upon the first question, that of the true boundary, their Lordships entirely agree in the concurrent judgments which have been given. It is not their usual practice to entertain the discussion of a mere question of fact which has been decided by the concurrent judgments of two Courts below; but in the present case, as the question of fact involved the consideration of the description in the grants, their Lordships have heard the argument upon it. Having done so, they see no reason whatever to dissent from the view which the Courts below have taken, and which the evidence seems entirely to support.

The Plaintiff having thus established that under the grant from the Crown in 1842 the true boundary of the estate granted to Wilson and Ritchie was the stream marked X.A.B., and consequently his title to the land in dispute, it lies on the Defendant to prove that he had held undisturbed possession of the land for 10 years

before the action, so that under the Ordinance his possession could not be disturbed by the Plaintiff. Upon that point the Court in Review has decided in his favour, and the only question that was fairly open to argument in the case is whether the Court is right in coming to that decision.

There are two Ordinances, one No. 8 of 1834 and the other No. 22 of 1871. It is indifferent which is taken, for they are in the same terms. The last Ordinance is as follows:—

" Proof of the undisturbed and uninterrupted " possession by a Defendant in any action, or by " those under whom he claims, of lands or " immovable property by a title adverse to or " independent of that of the Claimant or Plaintiff " in such action (that is to say, a possession un- " accompanied by payment of rent or produce, " or performance of service or duty, or by any " other act by the possessor from which an " acknowledgment of a right existing in another " person would fairly and naturally be inferred), " for 10 years previous to the bringing of such " action, shall entitle the Defendant to a decree " in his favour with costs. And in like manner " when any Plaintiff shall bring his action or " any third party shall intervene in any action " for the purpose of being quieted in his posses- " sion of lands or immovable property, or to " prevent encroachment or usurpation thereof, " or to establish his claim in any other manner " to such land or other property, proof of such " undisturbed and uninterrupted possession as " hereinbefore explained by such Plaintiff or " intervenient, or by those under whom he " claims, shall entitle such Plaintiff or inter- " venient to a decree in his favour with " costs."

The grounds of the judgment of the learned Chief Justice, which were substantially acquiesced

in by the other two Judges,—though it is rather difficult to formulate them, inasmuch as the Chief Justice mixed them together, rather than relied on them separately—appear to be these: first, that a boundary had been agreed upon or established between the parties, and that the establishment of that boundary "must be regarded as an overt act of exclusion." The boundary which he assumes to have been established is the boundary which the Defendant contends for. Then, that the boundary being established, the piece of land in dispute became a part of the entire area of the Defendant's estate, so that acts done on any part of that area would be evidence of the possession of the whole of it. There is another ground indicated in the judgment of the Chief Justice; namely, that the Plaintiff was estopped by his own conduct from now setting up the real boundary. The conclusion of the judgment of the Chief Justice is based upon the Ordinance, but there is no doubt an indication in his observations that he conceived that some estoppel existed in the case by which the Plaintiff was bound; and that point has been formally argued at their Lordships' bar by the Respondent's Counsel.

It is well to see, first, how the learned Chief Justice himself puts the case, and then how far the evidence bears out the assumptions on which his judgment is based. He says:—
" Unfortunately, it is not made quite clear by
" the evidence at whose instance it was that
" these gentlemen went,"—that is, the surveyors,
" —but it seems certain that their results were
" made known to the owners for the time being
" of the two estates, and accepted by them as
" trustworthy, and as decisive of their mutual
" boundary relations. The conduct of the owners
" towards each other in view of these surveys

" seems to have amounted to an assertion by the " one party of right of ownership and exclusive " possession up to the line so ascertained, and " an acquiescence by the other party in that " right. And the establishment of a pro- " prietary boundary line as against a conter- " minous owner, whether it be by metes and " bounds or not, must be regarded as an overt " act of exclusion." Assuming that under some circumstances the establishment of a proprietary boundary line might have that effect, their Lordships think that in the present case the conclusions to which the Chief Justice has come are not supported by the evidence. They think the evidence fails to prove the establishment of a boundary line in the sense of an agreement, or of an estoppel binding on the parties. The Chief Justice relies upon a transaction which appears upon the evidence; namely, that Mr. Hood pointed out to Captain Oldfield the boundary X.Y.Z. as the true boundary. The evidence of what took place is extremely scanty, and fails to sustain that which the learned Chief Justice builds upon it. Captain Oldfield says that he went to the land in 1862 with Mr. Hood, who pointed out the stream X.Y.Z. as the boundary, and he says he was asked by Mr. Gibson Thomson to get the boundary defined. Now if the year is correctly stated, Mr. Gibson Thomson had at that time apparently nothing to do with the estate, for he did not become assignee until the year 1869. All that appears about Mr. Hood is the statement of the Defendant that he had been for 15 years superintendent of Wattagoda. What is the meaning of superintendent, or whether Hood was anything more than farm bailiff, does not appear. It does not appear that the deeds were looked at, nor that Hood had authority to make any admission at all on the subject. If therefore it be granted that he

and Captain Oldfield went upon the ground, and that the boundary spoken of was pointed out, such an act could not bind either of their principals without evidence to show that these persons were authorised not only to point out the boundary but to agree upon it, and, to use the words of the Chief Justice, to establish it as the boundary between the two estates. It does not appear that anything was done in consequence of this transaction. It may be that the estates were about to be sold, but there is no evidence of it. There is no evidence that the supposed agreement as to boundary was communicated to an intending purchaser, though, possibly, Mr. Gibson Thomson may have at the time intended to purchase the estate.

There is evidence that a survey was made by Mr. Noad, a Government surveyor, in the year 1856, and in it the boundary of the two estates was marked as X.Y.Z. Nothing appears to have been done upon that survey; but it no doubt became known. It was not, however, acquiesced in, and a question having arisen in 1869 whether it was correct, Mr. Noad was again sent to the ground to re-survey it. It is true that he adhered to his original plan; but at the same time a Mr. Toogood, a private surveyor employed on the part of those interested in Wattagoda, also surveyed the ground; and he was of opinion that the stream X.A.B. was the true boundary. It is very unlikely that the owners of this estate, when furnished with this opinion, would have assented to the other boundary.

Their Lordships therefore think that there is no sufficient evidence of the establishment by agreement of a defined boundary which would operate to throw the piece of land in dispute into the area of the Defendant's estate, so as to make acts done on other parts of the estate evidence of the possession of this part.

It has been argued at the Bar, that, even if the evidence fails to show that the boundary had been established, acts done upon other parts of the land granted to the predecessors of the Defendant are evidence of acts done on this land. There is no doubt that in many cases acts done upon parts of a district of land may be evidence of the possession of the whole. If a large field is surrounded by hedges, acts done in one part of it would be evidence of the possession of the whole. So in the case which was referred to of *Jones* v. *Williams*, 2nd Meeson and Welsby, page 326, acts done over one part of the bed of a river were held to be evidence of the right—not of the possession merely—of the Plaintiff to the whole bed. The circumstances of that case are shortly stated in the marginal note: "Where in "trespass the Plaintiff claimed the whole bed of "a river flowing between his land and the "Defendant's, the Defendant contending that "each was entitled *ad medium filum aquæ*— "Held that evidence of acts of ownership "exercised by the Plaintiff upon the bed and "banks of the river on the Defendant's side "lower down the stream, and where it flowed "between the Plaintiff's land and a farm of C "adjoining the Defendant's land, was admissible "for the Plaintiff." There the acts tended to rebut the presumption on which the Defendant relied, that as riparian proprietor he was entitled to the land to the middle of the river. There it was a question of title whether the Plaintiff had the whole bed of the river, or whether the Defendant had the land *ad medium filum aquæ*. The acts given in evidence were inconsistent with the claim of the riparian proprietors, and were held to afford some evidence of the opposing claim of the Plaintiff to the whole bed of the river.

But how are the acts here adverse to or inconsistent with the Plaintiff's title, and how can this rule of evidence be applicable to a question of undefined and disputed boundary? If the assumption of the Chief Justice was right that a boundary had been established, it may be that the rule referred to would apply; but that assumption failing, the acts which were done upon a distant part of the Defendant's land can in no way affect the title of the Plaintiff to the place in question. They are not inconsistent with his title or possession; and the argument is open in a case like the present to the fatal objection that it may be used, and with greater reason, by the Plaintiff, who has the title, to show his own possession of the disputed land. The Plaintiff has done precisely the same kind of acts on his land as the Defendant has on his, and may with at least equal force contend that acts of possession on a distant part of his land are evidence of his possession of the disputed piece. It is impossible that the question of disputed boundary can be affected one way or the other by such acts.

In this case there is no evidence whatever of actual possession of the land in question, nor of any overt or physical act of ownership done upon it. It remains, as it ever was, in its forest and jungle state. The learned Chief Justice assumed, as may be the case, that both parties believed that X.Y.Z. was the true boundary, so that the Defendant enjoyed what may be called an ideal possession of this land. But the terms of this Ordinance require that he should have had undisturbed and uninterrupted possession; meaning actual possession, and not one existing only in the imagination of the parties.

On these grounds their Lordships are of opinion that the Defendant has entirely failed

to bring the case within the Ordinance on which he relies.

The case of the Defendant, so far as it rests on estoppel, seems to be equally without foundation. The Chief Justice bases his judgment on an assumption which, if correct, might support this contention; but the evidence does not establish the fact which he assumes. The most pertinent part of his judgment on this point is as follows:—"The "original description of boundaries was no doubt "continued in the conveyances made on the "sales; but, as the District Judge finds, upon "the assurance of the surveys (which probably "took place preparatory to the sales), the stream "X.Y.Z. was locally understood"—that is, by the persons in the neighbourhood—"to be the "boundary stream, and both vendors and "purchasers intentionally dealt with each other "for the land up to its bank; *i.e.* for the plot "(C), with the rest of the land, in the presence, "so to speak, of the owners of Wattagoda, who "were, as I understand, admittedly aware of "the transaction, and acquiesced in it." The understanding of the people in the neighbourhood can hardly affect the Defendant. Then there appears to be no evidence that the owners of Wattagoda were either actually or constructively present at the sale of Holyrood to the Defendant, or that they were informed or had notice of the sale, or in any way acquiesced in it. The utmost that appears is that they did not interfere in it. But they had no right or reason to interfere when Mr. Thomson was selling his land to Mr. Elphinstone. If it was meant to bind the Plaintiff by anything like an estoppel, the parties who were then buying and selling should have gone to Mr. Johnstone, the then owner of Wattagoda, and have called his attention to the sale, giving him notice that they were dealing on the footing of this boundary, and

inquiring if they were safe in so doing. If they had so done there might have been ground for the estoppel that has been set up.

The strongest evidence in favour of the estoppel is the transaction with regard to the boundary which is supposed to have taken place between Captain Oldfield and Mr. Hood, upon which their Lordships have already commented; and as, in their judgment, that transaction does not amount to the fixing of the boundary so as to bind the respective owners of the estates, still less does it amount in itself to an estoppel in point of law, which would estop Mr. Clark from setting up his real title. It is not to be forgotten that in this case both parties have purchased upon the original descriptions in the deeds, and upon the delineations in the maps annexed to them, and that the additional acreage which Mr. Elphinstone says that he bought, and which, he conceived, included this land, is not contained in the deed of conveyance to him. He undoubtedly must have made his purchase taking his chance whether he could establish his title to the additional quantity of land or not. He clearly has not established a title to the piece of land in dispute, which their Lordships think is indisputably in the Plaintiff, nor in their opinion has he established any bar by reason of the Ordinance of Limitation, nor anything which approaches to an estoppel which would prevent the Plaintiff from setting up his real title.

Under these circumstances their Lordships will humbly advise Her Majesty to reverse the judgment under appeal, to affirm the first judgment of the Supreme Court, and to order that the Respondent do pay to the Appellant the costs of and incidental to the proceedings in the Supreme Court on review. The Respondent must also pay the costs of the Appeal to Her Majesty.