

A. L. Anderson - - - - - *Appellant*

v.

Sir Everard Duncan Home Fraser and another - - - *Respondents*

FROM

HIS BRITANNIC MAJESTY'S SUPREME COURT FOR CHINA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 4TH MAY, 1922.

Present at the Hearing :

LORD BUCKMASTER.

LORD ATKINSON.

LORD SUMNER.

LORD PARMOOR.

[*Delivered by* LORD BUCKMASTER.]

The question raised upon this appeal is really one of fact, and their Lordships think it unnecessary to reserve further consideration of the arguments.

The point in dispute is as to the right which the respondents claim they possess to use a private right of way that runs almost due north and south from a road known as the Great Western Road on the north down to a road now known as the Avenue Haig on the south. The respondents' property abuts on part of this road on its eastern side, the appellant's on the west. The respondents' claim is to use the road throughout the whole of its length, and the appellant denies that they have any right to use it at all. The learned Judge from whom this appeal has been brought has held that the respondents' claim is well founded, and the question for consideration by their Lordships is as to the soundness and accuracy of that decision.

The case arises in this way. Sometime in 1897 a certain parcel of land including the plots now owned by the appellant and the respondents respectively, was acquired by a Chinaman

named Wu Tschee Hung, who proceeded to plot it out for building purposes. Running through the land, from east to west, close to the southern boundary, was a creek or stream, the bed of which was not included in the property bought by Wu Tschee Hung, but upon the plans prepared the road was shown in its present position crossing the stream at right angles. Wu Tschee Hung having plotted out his land, caused it to be registered in the name of an American trustee with the Consulate of the United States, and in 1903 he registered a deed of grant of a right of way, dated the 19th November, 1903. It is under that deed that the respondents' claim arises. By this deed Wu Tschee Hung granted a perpetual right of way over certain plots of land that are numbered 809 and 810 in favour of the purchasers of the other parcels, which include both the appellant's and respondents' property, and covenants that he is the lawful and sole owner of the property, and has a good right to make the grant. Lots 809 and 810 did not include a continuous strip of land from the Great Western Road upon the north down to the Avenue Haig upon the south, because towards the southern portion of this strip of land there ran the stream; the lot 809 ended on the north of the stream, and the lot 810 ran between the south of the stream and the road now known as the Avenue Haig. He, therefore, had not at the time when that deed was granted, the right to create any such right as the deed purported to confer. But, none the less, having regard to the fact that the form of the deed shows that right of way is, in fact, continuous, and that it would be impossible for the holders of some of the more northern plots to use the right of way over the plot that lay to the south of the stream unless they had the right of crossing it, their Lordships think that the deed, according to its true construction, purported to grant an uninterrupted right of way from the Great Western Road down to the Avenue Haig. It would accordingly follow that if at any time the grantor acquired the strip of land which formed the bed of the creek, that strip would have fed the grant and created a complete right of way to all the people who were entitled to its benefit. Unfortunately, he did no such thing. He appears, first of all, on the 27th August, 1904, to have sold two plots of land on the eastern side of the road to the Navy League, who are the respondents in the present appeal, and in 1913 he sold to the appellant plots which lay on the other side of the road, still leaving the parties with this broken discontinuous right of way.

The body of the stream was owned by the Government of China, and a bridge was put across it so that people were enabled to pass. Whether that was done with the express licence of the Government, or whether they tacitly permitted it, or, indeed, whether they knew about it at all, there is no evidence before their Lordships to enable them to determine, but in 1915, the appellant Anderson first purchased the two lots 809 and 810, which had together formed the area along which the right of way was to run, and then acquired by virtue of a doctrine which appears to be known in Chinese law as the doctrine of

"Shengko," the site of the stream. The stream has been filled up, and the appellant has attempted to prevent the respondents from crossing over that part of the land that formed its bed. He appears also to have obstructed the right of way at the northern end, and, although it has been urged before their Lordships that that obstruction may have amounted to nothing more than the construction of an open gate, in a matter of this kind it is essential that their Lordships should be guided by the judgment and advice of people who have seen the matter on the spot, and the learned Judge who has seen it, and who has found against the appellant, has held, in fact, that this right of way is obstructed at the north just as it is admittedly obstructed on the south.

Apart from the question of abandonment, it follows from what their Lordships have said that there can be no excuse whatever for blocking the right of access to the road on the north.

So far as the right of way to the south is concerned, the matter is different. There, the appellant is entitled to rely on the intervening strip forming the bed of the stream, unless, indeed, effect can be given to the argument which impressed the learned Judge in the Court below, and which has been urged before their Lordships to-day by Counsel for the respondents, namely, that the estoppel that would have affected Wu Tschee Hung had he acquired this piece of land, must affect the people who bought from him the property he originally held, and were thereby enabled to acquire the bed of the stream. This contention depends upon the doctrine of Shengko, but so far as it is possible to ascertain from the evidence that has been placed before their Lordships, the doctrine of Shengko amounts to no more than this: That the owners of property adjoining a stream, the bed of which is owned by the Government, have the right to acquire from the Government, if the Government be desirous to sell, the ownership of the bed. If there are separate owners, it appears that each owner can acquire half. But there is nothing in any of the evidence to which their Lordships' attention has been called to suggest that land so acquired possesses any different quality or character in the hands of the purchasers from land that might have been acquired had it been bought from a totally independent third person. The respondents have been unable to refer their Lordships to any authority in support of the proposition that the estoppel that might have bound Wu Tschee Hung could have bound the purchasers from him, unless it be something, associated with the peculiar quality of the purchase, referred to under the name of Shengko. Their Lordships are unable to find that there is any such peculiar quality in property so purchased at all, and, consequently, they think that the appellant is justified in saying that a right of user by the respondents of the strip of land formerly constituting the bed of the stream does not exist, and that he is entitled to obstruct it in the manner he has done. The learned Judge who tried the case regarded the Chinese law as a matter within his judicial cognizance rather than a question of fact upon which he should receive evidence. It is unnecessary to determine whether he

was right in this view, for evidence was admitted upon the nature of land acquired by Shengko, and this is the material circumstance.

There only remains to be considered the final contention of the appellant that whatever right was originally possessed by the respondents has been abandoned. This is said to have been effected, because the respondents consented to pay a portion of the cost of erecting a bamboo fence which has been put up along the whole of the western side of their property bounding the road in question. The fence is described as being "a tarred bamboo fence, 6 feet high and supported by pine posts of a minimum radius of 3 inches, also tarred," and that is all the information possessed by their Lordships upon the matter.

The answer to that contention is this: That if the right was originally granted by the deed, and as there is no document to show that such a release has been granted, the question as to whether it has been released is a question of fact, which necessitates the investigation of actual evidence of circumstance and user. There is nothing before their Lordships to enable them to know how durable, or how impenetrable, this bamboo fence was, and the learned Judge who has examined the whole spot has held as a fact that its erection does not constitute any abandonment of the right conferred. Their Lordships will not interfere with that conclusion, and they think, further, that there is much force in the contention, urged by Mr. Murphy, that the correspondence suggests that there was, in fact, means of access through the fence from the property of the respondents across the road. If that were so, there never was anything like an extinguishment. For these reasons, their Lordships are of opinion that the appellant's case, so far as it seeks to prevent the use of the road by the respondents from the northern boundary of what was once the stream up to and affording access to the Great Western Road, must fail.

There only remains the consideration of the question of costs, and their Lordships think that, in the circumstances of this case, there ought to be no costs granted to either side. Their Lordships will, therefore, humbly advise His Majesty that the judgment of the Supreme Court ought to be discharged, except as to costs, and that it ought to be declared that the respondents are entitled, by virtue of the deed of the 19th November, 1903, to the full use and enjoyment of the road therein mentioned, with access to and egress from the Great Western Road, but that they are not entitled to use or enjoy the strip of land forming the site of the stream or creek which at the date of the grant separated the lots 809 and 810 mentioned in the deed. The parties will bear their own costs of this appeal.

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In the Privy Council.

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DELIVERED BY LORD BUCKMASTER.

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