

1897 SOPHIA C. KNOCK (DEFENDANT).....APPELLANT;
 *May 4, 5. AND
 *Nov. 10. JOSEPH KNOCK (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Easement—Necessary way—Implied grant—User—Obstruction of way—
 Interruption of prescription—Acquiescence—Limitation of action—
 R. S. N. S. (5 ser.) c. 112—R. S. N. S. (4 ser.) c. 100—2 & 3
 Wm. IV. (Imp.) c. 71, ss. 2 & 4.*

K. owned lands in the county of Lunenburg, N.S., over which he had for years utilized a roadway for convenient purposes. After his death the defendant became owner of the middle portion, the parcels at either end passing to the plaintiff, who continued to use the old roadway, as a winter road, for hauling fuel from his wood-lot to his residence, at the other end of the property. It appeared that though the three parcels fronted upon a public highway, this was the only practical means plaintiff had for the hauling of his winter fuel, owing to a dangerous hill that prevented him getting it off the wood-lot to the highway. There was not any formed road across the lands, but merely a track upon the snow during the winter months, and the way was not used at any other season of the year. This user was enjoyed for over twenty years prior to 1891, when it appeared to have been first disputed, but from that time the way was obstructed from time to time up to March, 1894, when the defendant built a fence across it that was allowed to remain undisturbed and caused a cessation of the actual enjoyment of the way, during the fifteen months immediately preceding the commencement of the action in assertion of the right to the easement by the plaintiff.

The statute (R. S. N. S. 5 ser. ch. 112) provides a limitation of twenty years for the acquisition of easements and declares that no act shall be deemed an interruption of actual enjoyment, unless submitted to or acquiesced in for one year after notice thereof and of the person making the same.

*PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

Held, that notwithstanding the customary use of the way as a winter road only, the cessation of user for the year immediately preceding the commencement of the action was a bar to the plaintiff's claim under the statute.

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✓ *Held* also, that the circumstances under which the roadway had been used did not supply sufficient reason to infer that the way was an easement of necessity appurtenant or appendant to the lands formerly held in unity of possession, which would without special grant pass by implication, upon the severance of the tenements.

APPEAL from a decision of the Supreme Court of Nova Scotia, affirming the judgment on the trial of the cause in favour of the plaintiff with costs.

The action asserted a right of way or easement over lands in the county of Lunenburg, Nova Scotia, for the purposes of a winter road. Statements of the facts of the case and of the questions raised upon the appeal appear in the judgments of their Lordships Justices Gwynne and King, now reported.

Wade Q.C. for the appellant. As the claim is adverse to the true owner of the soil the plaintiff must clearly make out the existence of the right. He must show a strict compliance with the statute which requires user for the full period of twenty years next before action. Actual user within a year of the commencement of the action must be shown. *Lowe v. Carpenter* (1); *Wright v. Williams* (2); *Earl de la War v. Miles* (3); *Hollins v. Verney* (4). Plaintiff did not use the road for the fifteen months preceding his action; *Parker v. Mitchell* (5); *Bailey v. Appleyard* (6). His user was not open and as of right; *Hollins v. Verney* (4); *Livett v. Wilson* (7); *Gaved v. Martin* (8). A contentious user will not satisfy the statute; *Eaton v. Swansea Waterworks Co.* (9). The interruptions by the locking of gates

(1) 6 Ex. 825.

(2) 1 M. & W. 77.

(3) 17 Ch. D. 535.

(4) 13 Q. B. D. 304.

(5) 11 A. & E. 788; 4 Jur. 915.

(6) 8 A. & E. 161.

(7) 3 Bing. 115.

(8) 19 C. B. N. S. 732.

(9) 17 Q. B. 267; 15 Jur. 675.

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and erection of barriers across the way are acts showing that no right to use the way was acknowledged, and that if the way were used a trespass would be committed. Goddard on Easements (3rd ed. pp. 135-6 and 230-231).

From the winter of 1894 until June 5th, 1895, the date of action, the obstruction of the way by means of the fence was submitted to by plaintiff, who thus abandoned any right he may have claimed and admitted defendant's right to obstruct the way. *Tapling v. Jones* (1).

The contention, that the way existed prior to purchase from the former owner of the whole tract, and that on the severance of the lots the way continued in existence and the prior user during unity of possession in the last grantor can be tacked on to the subsequent user, is not law. Easements are by their nature rights possessed by the owner of one piece of land in another piece of land belonging to a different person. If seisin of the two pieces be united in one owner the right must cease as an easement, for it becomes one of the rights of property to which all owners of land are entitled. The right is not merely suspended on union of seisin so as to revive again on severance of the properties, for easements have their origin in grant, and on severance the easements cannot revive without a fresh grant, and then the rights granted are not the old easements, but new easements. Goddard on Easements (3rd ed. p. 494). *Sury v. Pigot* (2); *Buckby v. Coles* (3).

The easement claimed could not exist as a way of necessity; *Holmes v. Goring* (4); the tenement was not landlocked so as to imply a grant; *Brown v. Alabaster* (5).

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| (1) 11 H. L. Cas. 290; 34 L. J. | (3) 5 Taunt. 311. |
| C. P. 342. | (4) 2 Bing. 76. |
| (2) Pop. 166. | (5) 37 Ch. D. 490. |

There can be no distinction between an appurtenant easement and any other easement for all easements are appurtenant, and to claim an easement as being appurtenant is the same as claiming an easement because it is an easement. This does not help to ascertain how the easement was created or what the easement is appurtenant to. No easement or right passed to plaintiff by deed, for in it there is no mention of easements or appurtenances. An easement will not pass by deed to the grantee of the dominant tenement unless mentioned in the deed. Goddard (3rd ed. p. 128). *Midland Ry. Co. v. Gribble* (1).

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An inchoate right which has not ripened into an easement will not pass by general words in a deed. *Langley v. Hammond* (2).

Incorporeal hereditaments pass by grant, not by livery, and are to be distinguished from land the possession of which may be passed from one squatter or trespasser to another by livery and so make a claim sufficient to satisfy the statute of limitations. *Hewlins v. Shippam* (3).

This court may review the findings of fact in the trial court, where it is clear an erroneous view has been taken. *Bigsby v. Dickinson* (4); *Smith v. Chadwick* (5); *McCord v. Cammel* (6); *North British and Mercantile Insurance Co. v. Tourville* (7).

Harrington Q.C. for the respondent. We claim twenty years user and the benefit of the statute R. S. N. S. (5th ser.) ch. 112, s. 27, which re-enacts R. S. N. S. (4th ser.) ch. 100, and corresponds with 2 & 3 Wm. IV., ch. 71, ss. 2 and 4.

With regard to the last interruption to which, it is contended, the respondent submitted for upwards of

(1) [1895] 2 Ch. D. 827.

(2) L. R. 3 Ex. 161.

(3) 5 B. & C. 221.

(4) 4 Ch. D. 24.

(5) 9 App. Cas. 187.

(6) [1896] A. C. 57.

(7) 25 Can. S. C. R. 177.

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one year, it need only be said that the road or way was used in the winter time only, and for a limited purpose, and the necessity for its user after the year 1894 would not again arise until 1895. The year 1895 was the last one in which the interruption was made, and appellant could not be defeated by reason of submission unless such submission continued for a year after the winter season of 1894-95. The appellant enjoyed the easement for the year 1894, and that year is to be reckoned out of the statutory period of submission. The obstruction was really begun in January, 1895, as found by the trial judge. A cessation of user which does not exclude the inference of actual enjoyment is not fatal. *Hollins v. Verney* (1). Gale on Easements, pp. 181, 182 (notes). *Carr v. Foster* (2).

The appellant cannot recover in any event, for in January, 1893, she brought "suit or action" against the respondent, whereby the "matter was brought into question." *Cooper v. Hubbuch* (3).

Even supposing that the respondent has not had the user required by the statute, still his right is absolute under the common law, the road having been used by the respondent and his predecessors in title continuously from, say 1891, back for thirty years at least. See cases in Goddard on Easements, p. 201, and Gale p. 177 (note). Before the conveyance of the lands to the plaintiff his grantors had, by continuous user, an easement as of right, subject to be defeated only by acts of interruption and acquiescence as specified in section 29 of the Act, while they continued to be the owners of the lots; and, inasmuch as they conveyed the lands after more than twenty years' uninterrupted enjoyment, the easement passed under that conveyance, and thereupon became indefeasible in the hands

(1) 13 Q. B. D. 304 per Lindley (2) 3 Q. B. 581.  
 L.J. at p. 314. (3) 12 C. B. N. S. 456.

of the respondent. *Kay v. Oxley* (1); *Leonard v. Leonard* (2); *Doe d. Pritchard v. Jauncey* (3); *Staples v. Heydon* (4). The obstructions occurred subsequently, and, upon the authority of the cases last above cited, as an indefeasible easement had been already acquired under section 27, it passed to respondent and the interruptions are acts of trespass.

The respondent is entitled to the way in question as of necessity or as a way without which the premises cannot be enjoyed. There was no access to the wood lot except over the lands at present owned and occupied by the appellant. Having regard to the division of the land and also to the previous user of the road for the purpose of hauling firewood from the wood-lot to the homestead, the case comes within such cases as *Pearson v. Spencer* (5); *Bayley v. Great Western Railway Co.* (6). Indeed this is a much stronger case than *Pearson v. Spencer* (5), where there was merely unity of possession, but no necessity for the right claimed. See also *Barnes v. Loach* (7), per Cockburn C. J. at p. 97; *Russell v. Watts* (8), per Cotton L. J., 573, and Fry, L. J., p. 584. *Polden v. Bastard* (9); *Pyer v. Carter* (10); *Thomas v. Owen* (11); *Briggs v. Semmens* (12).

As to the findings of the trial judge on questions of fact being conclusive, where the evidence is conflicting, see *Webster v. Friedberg* (13); *Metropolitan Railway Co. v. Wright* (14); *Phillips v. Martin* (15); *McCall v. McDonald* (16).

TASCHEREAU J. dissented from the judgment of the majority of the court but gave no written reasons.

(1) L. R. 10 Q. B. 360.

(2) 7 Allen (Mass.), 277.

(3) 8 C. & P. 99.

(4) 6 Mod. 1.

(5) 3 B. & S. 761.

(6) 26 Ch. D. 434.

(7) 4 Q. B. D. 494.

(8) 25 Ch. D. 559.

(9) L. R. 1 Q. B. 156.

(10) 1 H. & N. 916.

(11) 20 Q. B. D. 225.

(12) 19 O. R. 522.

(13) 17 Q. B. D. 736.

(14) 11 App. Cas. 152.

(15) 15 App. Cas. 193.

(16) 13 Can. S. C. R. 247.

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GWYNNE J.—This is an appeal from a judgment recovered by the respondent in an action instituted by him for the obstruction by the appellant of a private right of way which the respondent claimed to have over certain land of the appellant as a winter road to a close of the plaintiff for cutting and hauling wood. The sole contention at the trial was whether or not the plaintiff had established a title by prescription, by actual enjoyment without interruption for the full period of twenty years next before the commencement of the action which took place on the 5th June, 1895. The obstruction of which the plaintiff in his statement of claim complained is thus alleged :

The defendant in or about the month of October, 1891, and on various other times thereafter wrongfully obstructed the said way by placing a fence or fences across the said way and has kept the said way obstructed by said fence or fences and she threatens that she will continue to obstruct the said way.

At the trial the plaintiff himself, giving his evidence on his own behalf, said that the fence was put up by the defendant in the fall of 1891 on the line between the land of the plaintiff and that of the defendant at the place where the plaintiff claimed right to enter from his land on to the way claimed on the land of the defendant. He said that the defendant thereby obstructed his right of way, and that in the winter ensuing its having been put up he asked the defendant to take it down, and told her that if she did not he would, and that she replied : " You can take it down if you put it up," and that he told her that he would put it up ; he then said that he took it down but did not put it up again ; the defendant herself had to put it up again. Then, as to the year 1893, he said that he went with his cattle and was obliged to return, and that he was much inconvenienced and damaged, and he added, " if I had taken the fence away I would

have been sued." Then he said that he and his brother Nathan, in January, 1893, met the defendant at the place in dispute, and, in relation to what took place then, his evidence as given in his own language is as follows :—

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I had just taken down the fence and was going home with a load of firewood ; she said, *who gave you leave to remove the fence ?* I said, *I gave myself leave.* She said, if you don't put it up I will sue you. I said, *sue as quick as you like.*

Plaintiff's brother Nathan gave his evidence of what occurred on this occasion as follows :—

I was hauling with my brother across the way. We had reached this place on the way home. Defendant met us there. She said, *who told you to take the fence down ?* He said, *I gave myself leave because I have got the right of way to the road.* She told him to stop hauling or she would sue. He said he would not. She said she would sue him, and she did.

The plaintiff then put in evidence a summons bearing date the 25th January, 1893, whereby the plaintiff was summoned to appear before a magistrate to answer an information and complaint of the defendant charging the plaintiff with having unlawfully, on the 16th January, 1893, thrown down and broken part of the line fence of the defendant. The plaintiff in his evidence stated that he attended upon this summons, and that it was dismissed.

There was then produced in evidence upon the part of the plaintiff two letters from the solicitors of the plaintiff to the defendant, the one bearing date the 15th November, 1893, and the other the 16th February, 1894, in both of which the plaintiff's solicitors on his behalf assert his right to the easement in question, but allude to the obstruction offered thereto by the defendant as follows : In the former letter they say :

Mr. Joseph Knock, of Second Peninsula, informs us *that you have obstructed by a fence the road leading from his property to his wood and timber lands, a part of which said road passes over your land.*

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And in the letter of February 9th, 1894, they say :

You will doubtless remember having last winter taken action before R. H. Griffiths, J.P., against Joseph Knock, of Second Peninsula, farmer, for taking down a fence which you alleged to be on your property, and that after a hearing before said justice extending over a period of several days, your case was by him dismissed. *As you are aware the fence in question was one erected and maintained by you across the road leading from said Joseph Knock's homestead property to his wood and timber lands and passing through your property. Notwithstanding that he is entitled to the free use of this road as well for the purpose of reaching his said wood and timber lands with teams, &c., hauling his winter wood over it, &c., &c., as otherwise, you have during the last two or three years, although requested and notified to desist therefrom, undertaken to obstruct and prevent him in the use of said road to his serious damage and detriment.*

As to the winter of 1894-5 the plaintiff gave evidence that he had not used the road in consequence of the fence being still maintained by the defendant where it had been erected, for he says :

That winter *I was obliged* to go round the common and get bushes.

The defendant in relation to what took place as regards the erection of the fence by her, testified as follows :

In October, 1891, I put up the fence across the alleged right of way. In winter of 1892 plaintiff came to ask me if he might take down a length of fence to haul his wood. I said he could provided he put it up. He said he would. I asked him how long it would take him to haul his wood home. He said three or four days. I said, then after you are done put it up for the winter, then in the spring put it up for good. He did not put it up. He did not say then that if I did not take down the fence he would. I had a man to put up the fence in the spring. It stood until the winter and plaintiff knocked it down, and I met him. I asked him who gave him liberty to knock down the fence. He said, *I myself*. I said, *you take the law in your own hands*. I sued him for that and there was a trial and the magistrate dismissed the suit.

This suit was the complaint before the magistrate for trespass, which, when it appeared that plaintiff did what was complained of in the assertion of a right,

the magistrate having no longer jurisdiction in the matter had no alternative but to dismiss the complaint.

The defendant's evidence was confirmed by her son-in-law, one Alexander Smith, and his wife, defendant's daughter.

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The learned judge who tried the case gave judgment for the plaintiff with twenty dollars damages and an injunction restraining the defendant *from continuing or repeating* said obstruction, saying that he adopted the plaintiff's version of what had taken place between the plaintiff and defendant in the winter of 1891 and 1892, after the erection of the fence in October, 1891; but as shown above, while the plaintiff since that time has been always asserting a right to the way claimed, a right to remove the obstruction caused by the fence, all the evidence given by and on behalf of the plaintiff establishes the correctness of the allegation in the statement of claim which is made the very gist and cause of the action, namely, that the defendant in October, 1891, erected the fence which has caused the obstruction complained of by the plaintiff, and thereby wrongfully obstructed the said way, and has ever since kept up and maintained the fence which caused the obstruction. The erection of the fence in 1891 was a manifest obstruction and interruption of the right of way claimed by the plaintiff, and was plainly understood so to be by him. The continuance of it by its re-erection in 1892 after it had been taken down by the plaintiff, and the summons obtained by the defendant for trespass against the plaintiff in January, 1893, for his having then recently taken it down again, its re-erection and maintenance ever since, and the letters of plaintiff's solicitors made part of the plaintiff's evidence, show conclusively, as is alleged in the statement of claim, that in October, 1891, the defendant erected the fence, which is the obstruction complained

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of in the statement of claim, and has persistently maintained and still maintains that fence, and has thereby ever since October, 1891, interrupted the enjoyment by the plaintiff of the way to which he claims a right.

The question is not whether or not the plaintiff has abandoned a right of way which he previously had, but whether he has had the *uninterrupted* enjoyment of the way, to which he claims a right, for the full period of twenty years next preceding the commencement of this action, and that by the plaintiff's own allegation in the record and by his evidence given at the trial he plainly had not, however entitled he might have been to succeed in his action if it had been commenced in 1892 instead of in 1895. In that case the question would have arisen which need not now be entered upon, namely, whether the former user of the way claimed by the plaintiff was of right or permissive only. In the present action he cannot, in my opinion, succeed. The appeal should, I am of opinion, be allowed with costs, and the action in the court below dismissed with costs.

SEDGEWICK J. was of opinion that the appeal should be allowed with costs.

KING J.—This action which was commenced on the 5th of June, 1895, is in assertion of a right of way. The right claimed is that of hauling firewood in the winter season from a wood-lot belonging to plaintiff to his house-lot over intervening land of the defendant. Both parties derive title through Philip Knock who owned and occupied the entire tract for many years prior to 1858, and who in that year died, devising it in portions to his three sons, Edward, John and Henry. All the lots abut upon a public road, but Philip Knock, while in the occupation of the whole,

was accustomed to use the roadway claimed for purposes connected with the convenient and practical use of it. The plaintiff in his statement of claim bases his right (a) upon lost grant; (b) upon immemorial usage; (c) as appurtenant; (d) upon continuous user for 20 years; and (e) generally under the provisions of chapter 112, sec. 27 of the Revised Statutes of Nova Scotia, 5th series.

The case was tried without a jury and the learned judge presiding came to the conclusion upon the evidence that there had been a continuous user of the way as of right for twenty years next preceding the action. He also found that

practically the only way in which plaintiff can haul wood in the winter season from the land beyond the defendant's boundary, is across the defendant's land; that to get it off by the main road, it would be a dangerous operation by reason of the steep ground at that place.

The Supreme Court of Nova Scotia upon appeal (Mr. Justice Meagher dissenting) sustained the judgment, upon the grounds of sufficient proof of twenty years' user, and also of the way passing as appurtenant to the lots devised by Philip Knock to his son Edward, through whom the plaintiff claims.

By the Revised Statutes of Nova Scotia, (5 ser.) c. 112, sec. 27, it is enacted as follows:—

No claim which may be lawfully made at the common law by custom, prescription or grant, to any way or other easement, or to any water-course, or the use of any water to be enjoyed or derived upon, over or from any land or water of Our Lady the Queen, her heirs or successors, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and

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where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

And by sec. 29 :

Each of the respective periods of years in the twenty-seventh and twenty-eighth sections mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question ; and no act or other matter shall be deemed to be an interruption within the meaning of this chapter, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.

This enactment in terms follows the provisions of the English Act 2 & 3 Wm. IV., c. 71.

The state of the law thereunder and the various authorities were fully considered by the Court of Appeal in 1884 in *Hollins v. Verney* (1).

After pointing out that actual enjoyment for the full period of twenty years may be established by evidence which falls short of proving actual user for the whole of that period without any cessation, the court say :

It is obvious * * that in the case of a discontinuous easement like a right of way, it is extremely difficult if not impossible, to say exactly what cessations of actual user are, and what are not, consistent with such an actual enjoyment for the full period of twenty years as the statute requires to establish the right. The statute leaves the difficulty to be solved in each case as best it may. * * * *

The truth is that the question whether, in any particular case, a right of way has or has not been actually enjoyed for the full period of twenty years appears to be left by the Act to be treated as a question of fact to be decided by a jury, unless the court sees that, having regard to section 6 (as to presumption of law) and the other provisions of the statute, there is no evidence on which the jury can properly find such enjoyment.

It was held that while such an interruption as the statute defines, continuing for a year, is, of course,

fatal, acts of interruption for less than a year are merely circumstances to be considered with the other facts of the case. So cessation of user for a year or more is not necessarily fatal, whether it occurs at the beginning, in the course of, or at the close of the twenty year period before action. It may be explained in a way that renders it consistent with an inference of actual enjoyment for the twenty years:

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At the same time the total absence of user for any year of the statutory period will be fatal unless explained in such a way as to warrant the inference of continued actual enjoyment notwithstanding such temporary non-user.

This reasoning is applicable to the provisions of the statute now under consideration, and it only remains to apply it to the facts as proved.

What has to be proved is an actual enjoyment by plaintiff claiming right thereto, for twenty years next before action brought, and without interruption submitted to or acquiesced in for one year after notice to plaintiff of defendant having made or authorized the interruption.

It is clear that there was sufficient evidence of user from which to infer actual uninterrupted enjoyment as of right for the full statutory period, provided the action had been brought in the year 1891; but it is contended that what took place between 1891 and 1895 excludes the reasonable inference of twenty years actual enjoyment as of right for the period of twenty years before the latter year, the date of the commencement of the action.

As to what took place prior to the year 1894, I am disposed to think that the conclusions of fact of the learned trial judge, fortified as they are by the concurrence of a majority of the judges of the court *en banc*, are fairly supported by the evidence given on behalf of the plaintiff which (for the purpose of this

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appeal) must be taken to be substantially correct. There was no interruption for a year, and no cessation for a year, and the user cannot be regarded as merely permissive, upon the hypothesis of the truth of plaintiff's account of it. But when we come to the year 1894, more difficulty arises. It is admitted that in the spring of that year the defendant put up a fence across the alleged way, and that it was suffered to remain undisturbed from that time until the commencement of the action in June, 1895, a period of about 15 months. It is clear that the plaintiff knew of the fence being there, and that it had been put up by defendant; and if, at the time it was put up, it constituted an act of interruption to plaintiff's claim of right, its continuance until the spring of 1895 would be fatal to plaintiff's right, as an interruption within the statute. But it is not possible to regard it as an act of interruption from the time that it was put up, because the winter season, during which alone plaintiff's right existed and was capable of being exercised, being at an end, the defendant had a right to put the fence there and plaintiff had no right to complain of it. It became an obstacle to and interference with the actual enjoyment of plaintiff's alleged right only when the next succeeding winter season set in, and its effect as an interruption began to run only from that time; and so there was not, at the time of action brought, an interruption in fact extending to a period of one year.

But there was, none the less, an entire cessation of user by plaintiff during the 12 months before action brought. This, of itself, would not be conclusive against the actual enjoyment for the twenty years before action brought, if there had appeared any explanation of the circumstance consistent with an inference, upon the whole case, of an actual enjoyment for the full period of twenty years next before action brought.

But this total cessation of user for a full year of the statutory period is fatal unless explained in such a way as to warrant an inference of continued actual enjoyment for the twenty years notwithstanding it.

In *Carr v. Foster* (1), where the right claimed was a common of pasture, a non-user for two years was explained by the fact that the party claiming had at the time no commonable beasts, and the explanation was deemed not inconsistent with the inference of actual enjoyment of the right. This is said by the court in *Hollins v. Verney* (2), to be the strongest case in that direction. In the present case the plaintiff required to use the way in 1894-95, and was, as he says, obliged, in consequence of the obstruction, to get bushes from a common for firewood. The evident reason for, and explanation of, the cessation of user for over a year was, of course, that the defendant had put up the fence. But the obstruction of the plaintiff's right, and his yielding to it, are not consistent with an inference of actual enjoyment as of right for the full period of twenty years covering such period of cessation. It is rather an enforced cessation which goes to negative the inference of a twenty years actual enjoyment next before action brought. It is true that the cessation for the twelve months covered several months when the way could not be used, viz.: during the summer season; but where a way is claimed for a limited period (as in this case for the winter season) the reasons explanatory of non-user must be germane to such user or non-user. For, as to the other portion of the year, there could be no inference drawn one way or the other from non-user, for nothing done or omitted during such period could be relevant to the question of actual enjoyment of the way during the portion of the year when alone it could possibly be enjoyed. There was, therefore, an

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(1) 3 Q. B. 581.

(2) 13 Q. B. D. 304.

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entire cessation of user during the whole year preceding action brought, which remains unexplained, or rather, which is explained in a way that excludes reasonable inference of actual enjoyment for the full period of twenty years next before the commencement of the action. Hence the claim under the statute fails.

There remains the contention that the way passed to plaintiff's father upon devise of Philip Knock at a time when there was in him, as to the whole of the land, unity of possession. This is claimed as passing by simple implication upon the devise of the house-lot and wood-lot, inasmuch as there are no words of grant, either general or particular, indicating an intention to pass things appurtenant or enjoyed therewith, but, perhaps, an implied intent to the contrary in the fact of the express inclusion, in respect of other lands devised by the will of rights of way.

Then, as to easements by implication, Bowen L. J. says, *Ford v. Metropolitan Railway Co.* (1):

By the grant of part of a tenement, it is now well known, there will pass to the grantee all those continuous and apparent easements over the other part of the tenement which are necessary to the enjoyment of the part granted, and have been hitherto used therewith.

It is not material whether the right claimed had its origin prior to the unity of possession, or was founded solely upon the manner of enjoyment of the several parts of his property by the person having unity of possession. Such modes of enjoyment, while not in the strict sense appurtenances to the land, are treated as quasi appendant thereto.

The rule above expressed as to the passing by implication of easements or quasi easements upon the severance of unity of possession is not entirely confined to easements of necessity and to continuous and apparent easements reasonably necessary to the enjoy-

ment of the part granted and previously used therewith. In *Thomas v. Owen* (1), Fry L. J. (speaking for himself, the Master of the Rolls and Bowen L. J.) says :

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But then, it is urged that, alike in implied reservations and in implied grants, a rule exists to this effect, that whilst such an implication may arise in the case of easements of necessity and continuous easements, it cannot arise in the case of easements which are neither of necessity nor continuous ; and, for this proposition, *Polden v. Bastard* (2) is cited, and many other authorities might have been invoked. But on this principle, as established by such decisions, there has been engrafted by other decisions an exception in the case of a formed road made over an alleged servient tenement to and for the apparent use of the dominant tenement ; per Bramwell B. in *Langley v. Hammond* (3) ; *Watts v. Kelson* (4).

The way here in question (notwithstanding the finding of the learned trial judge) was not what is known as a way of necessity. The land fronted on a highway which was a boundary common to all the parcels ; there was no physical obstacle to access thereby and the cost of a new road would only be, as the evidence shows, from \$25 to \$100. Nor was it a continuous and apparent easement. Was it then, within the above exception, a formed road made over the alleged servient tenement to and for the apparent use of the dominant tenement ? I do not think so. There was nothing upon the land to indicate its course and bounds. As a winter road it would for the most part be traced in the snow, and all traces of it would be obliterated with the disappearance of the snow. Being in no sense a formed road, and without the requisite characteristics of permanence and definiteness, it seems impossible to treat it (within the settled law on the subject) as passing, without any words of grant, but by mere implication, upon the severance of tenements previously held in unity of

(1) 20 Q. B. D. 225 at p. 231.

(2) L. R. 1 Q. B. 156.

(3) L. R. 3 Ex. 161.

(4) 6 Ch. App. 166.

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possession. Nor does there seem any good reason, growing out of the circumstances of the ownership of land in this country, for relaxing the rules as to the acquisition of rights of way by mere implication.

The result is that the action fails and the appeal should be allowed, notwithstanding the able judgments of the learned judges below. ✓

GIROUARD J. also dissented from the judgment of the majority of the court but did not state his opinion in writing.

Appeal allowed with costs.

Solicitors for the appellant: *Wade & Paton.*

Solicitors for the respondent: *Owen & Ruggles.*
