

The defendants set up that the lands in question formed part of a highway.

W. C. Chisholm, K.C., and A. E. Knox, for the plaintiffs.

A. C. Kingstone and Featherston Aylesworth, for the defendants.

MEREDITH, C.J.C.P.:—Two important questions are involved in this litigation: (1) whether the place in question ever was a highway; and, if so, (2) whether it has ceased to be such by reason of the exercise of the power conferred by an Act of Parliament.

The difficulties involved in the first question are much greater than they ought to be, by reason of the lack of evidence regarding the original laying out of the locality in question into lots and ways.

If one have regard only to the ground itself and any work upon it, the evidence is altogether against the defendants' contention—altogether against any notion that the very place in question ever was a way of any kind. By reason of its low-lying character, it was not suitable for a road; and has never been used as such. On the contrary, in earlier days, the way, of which the defendants contend it is a continuation, was always fenced off from it by a close board fence, with a gate only in it, used to "shoot" logs through; and there are yet indications, in broken posts, of a fence which inclosed the place in question and the adjoining property from all use as a way. And for a great many years past the plaintiffs, and those through whom they claim, have had the whole piece of property enclosed by a wire fence, built in the line of the old posts, and taking the place of the old fence. Such few acts of user as were proved afforded no evidence of a highway; they were but such acts as are common upon, and evidence of, vacant land being passed over without objection by the owner.

If one have regard to such plans as were produced at the trial, and of what would have been probable in laying out land ordinarily, no peculiar circumstances intervening, it might well be held that the place in question was originally laid out as an allowance for road. But there are some special circumstances: the low-lying character of the place, and the fact that from early days it was looked upon as the place of a shipyard and harbour; things of vastly greater importance, then, than another of the several ways to the river in that locality.