

2. While the damages were large under the circumstances that was a matter peculiarly within the province of the jury and they were not so excessive as to call for the interference of the Court.

*W. F. O'Connor*, for appellant. *A. Drysdale*, K.C., and *Burchell*, for respondent.

Full Court.]

HORNE v. HORNE.

[Dec. 18, 1905.]

*Tenants in common—Division of lands by agreement and subsequent occupation—Way—User for more than twenty years.*

L. and H. who owned and occupied a farm in common agreed upon a division of the property between them and called in a surveyor for that purpose who ran a line upon which a fence was erected and by which the parties continued to hold. At the time of the division there was a road upon the property which had been used as a means of obtaining access to the public road and which both parties continued to use. After a time H. constructed a road on his part of the property which gave him a more convenient mode of access to the public road when going in certain directions, but he continued from time to time as necessary to use the former road. After the death of H., L. erected a fence for the purpose of preventing defendants, who claimed under H., from making use of the portion of the old road which passed through his land and upon defendants taking down the fence brought an action claiming damages for the removal of the fence and an injunction to prevent defendants from passing over his land.

The evidence shewed a continuous user of the way for a period of about thirty years and plaintiff failed to shew any abandonment or interruption of the user.

*Held*, affirming the judgment of the trial judge that plaintiff could not succeed in his action, and that the construction by H. of the new road over his own land and its use as mentioned was not an abandonment of his right to use the former way.

*W. F. O'Connor*, for appellant. *H. Ross*, for respondent.