

HON. MR. JUSTICE MIDDLETON:—Malachi Quigley who died on 24th August, 1890, in his lifetime owned the whole block, and by his will devised to his son Samuel Quigley, 30 feet of land on Bond street, marked on the plan Ex. 1 as "A," and to Michael Quigley, the parcel marked as "B. & C." on Simcoe street, and also gave parcels D. and E. to other children.

The testator also devised the central part of the block or yard and a lane running to Bond street to his four children as tenants in common, "subject to the mutual rights of user of the same in common, hereinbefore mentioned." This refers to the fact that the gift of each parcel was followed by a further devise of a right to use the lane and yard "in common with the owners and occupants from time to time of all and every other portion of the said lot which adjoin the said lane and yard or either of them, together with a right of way over the said lane."

During the life of the testator he had built stores and cottages round this central yard and used the parcel marked "C" as a means of access to it. That portion of the "lane" east of parcel "A," was enclosed by fences and had never been used as a means of access to the yard.

The testator contemplated, by his will, a change in the mode of user the "lane" being opened to Bond street and the parcel "C" being included in the land given to Michael absolutely would then cease to be used as a way.

After the testator's death matters were allowed to remain as they were for some years but, finally, the lane was opened to Bond street, and since then it has been, and still is, used as a means of access to the yard.

Michael did not close the entrance from Simcoe street, and it was freely used as a mode of access to the rear of stores which he owned upon parcel "B" and on parcel "D," to which he had acquired title.

The defendants having acquired title from Michael Quigley, contemplated erecting a block of buildings on Simcoe street covering *inter alia* parcel "C" and so closing it as a means of access to the yard. The plaintiff claiming title under Samuel Quigley now brings this action for an injunction, claiming to have acquired a title by prescription to a right of way from the lane and yard across the strip of land in question.