

The judgment of the Court (TEETZEL, ANGLIN, MAGEE, JJ.), was delivered by

MAGEE, J.:—The strip in question, which is alleged to be the servient tenement, adjoins the east side of the lane called Darling avenue, plaintiff's land in respect of which he claims the right of way being on the opposite side of the lane. The lane was a public thoroughfare, and plaintiff says that he "always considered the strip was part of the lane, and never thought it was anything else," and he "always" (that is throughout the 20 years) "thought he had a right," and all his witnesses likewise considered it part of the lane, and said that the public used it as such, and he says the "general traffic would be nearly all on that piece." The evidence for plaintiff, if it established any way at all, established it as a public way.

In *Earl de la Warr v. Miles*, 17 Ch. D. 53, James, L.J., says at p. 585: "For instance, if the owner of a particular house in London shews that he and all the people who have lived in that house have for a long period gone every year to Hampstead Heath and run about the Heath, he cannot thereby establish a particular right as annexed to that house to go upon Hampstead Heath, when it is quite clear that he only went there like every other person who went from London to recreate himself there."

In *Gale on Easements*, 7th ed. (1889), p. 164, it is said: "Prescription may be defined to be a title acquired by possession had during the time and in the manner fixed by law. . . . To constitute a legal possession there must be not only a corporal detention or that quasi detention which according to the nature of the right is equivalent to it, but there must also be the intention to act as owner. Thus no legal possession is acquired by a man walking across the land of his friend or using a private way thinking it to be a public one, or unless he would do the act in defiance of opposition."

Here plaintiff, on his own shewing, was not exercising an easement in respect of his land, but only a supposed right as one of the public, a claim which defendant was not called upon to meet.

Appeal dismissed with costs.