NETTIE LAURIE (PLAINTIFF) .....APPELLANT;

AND

PERRY WINCH (DEFENDANT) .....RESPONDENT.

1952

*May 2, 5
*Oct. 7

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Easement—Right of Way—Grant silent as to dominant tenement, location and termini of way, nature and extent of rights conveyed—Evidence admissible for purpose of construing grant.

Circumstances existing at the time of a grant may be looked at, not only for the purpose of ascertaining the intention of the parties as to the dominant tenement, and as to the location and termini of a right of way granted, but also for the purpose of construing the conveyance as to the nature and extent of the rights conveyed. *Waterpark* v. *Fennell* 7 H.L.C. 650 at 678, 683; *Cannon* v. *Villars* 8 Ch. D. 415; *Pettey* v. *Parsons* [1914] 2 Ch. 653 at 667; *Canada Cement Co.* v. *FitzGerald* 53 Can. S.C.R. 263; *White* v. *Grand Hotel* [1913] Ch. 118; *Todrick* v. *Western National Omnibus Co.* [1934] 1 Ch. 191 at 206; *Robinson* v. *Bailey* [1948] 2 All E.R. 791 at 795.

S owned two adjacent farms A and B. Lake Simcoe bounded A on the west and B bounded it on the east. S subdivided A into lots. Lot 33 adjoined B and lot 17 had served as a lane whereby access was gained to the lake from B by passing along a lane on B over lot 33 to lot 17. S sold farm B and purported to grant a "perpetual right of way" over lot 33 to the purchaser "his heirs executors and assigns" to be binding on S his "heirs executors and assigns". B and lot 17 were later sold en bloc and the successor in title to this land subdivided B, laying out a road on the site of the old farm lane and, in selling lots, purported to convey a right of way over lot 33.

Held: On the construction of the grant in the light of the authorities that 1. The dominant tenement intended by the parties was the farm B and not lot 17. 2. The existence of the farm lane over lot 33 between the gates on the farm and lot 17 and the non-user in connection with the farm of any other part of lot 33 indicated that the way granted was over the existing farm lane and the width of the way was limited to the width of the farm gate for the purpose of access from the farm gate to the gate on eastern boundary of lot 17. 3. As it could not be said it was within the contemplation of the parties that the farm would always remain a farm, there was nothing to restrict the plain words of the grant to the use being made of the farm lane at that time, and further, that upon the severance of the dominant tenement into several parts, the easement attached to those parts. *Codling* v. *Johnson* 9 B. & C. 934; *Newcomen* v. *Coulson* 5 Ch. D. 141.

Judgment of the Court of Appeal for Ontario [1951] O.R. 504, reversed in part.

APPEAL from a judgment of the Ontario Court of Appeal (1), reversing a judgment of McRuer C.J.H.C. (2), declaring that no right of way existed on certain land.

*PRESENT: Kerwin, Kellock, Estey, Locke and Cartwright JJ.

(1) [1951] O.R. 504; 3 D.L.R. 81 (2) [1950] O.R. 626; 4 D.L.R. 577.

1952

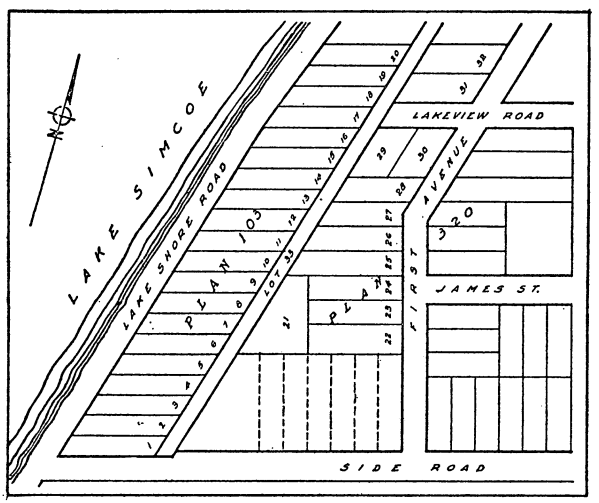
LAURIE v. WINCH

G. N. Shaver Q.C., F. W. Bartrem Q.C. and *G. M. Paulin,* for the appellant.

N. L. Matthews Q.C., Beatrice E. Lyons and *G. W. Gorrell* for the respondent.

The judgment of Kerwin, Kellock, Estey, Locke and Cartwright JJ. was delivered by:

KELLOCK, J.:—The appellant is the owner of lots 18, 19 and 33 on registered plan 103 which fronts on the easterly side of a road known as the Lake Shore Road skirting the easterly shore of Lake Simcoe in the Province of Ontario. The respondent is the owner of lots on plan 320 which adjoins plan 103 to the east. Plan 103 consists of thirty-two lots, numbering from south to north, fronting on the east side of the Lake Shore Road, and also a long narrow lot, number 33, which adjoins the easterly limits of the other lots and fronts on the north limit of a road called the Mahoney Side Road which, in turn, runs east and west to the Lake Shore Road along the southerly limits of the two plans. Lots 1 to 32 are fifty feet in width, while lot 33 is thirty feet. The attached sketch sufficiently indicates the situation.



When plan 103 was registered in or about the year 1910, the lands covered by both plans, as well as other land to the east, were owned by one O. B. Sheppard, the lands now covered by plan 320 and the land to the east being in the

occupation of a tenant, John T. Smith, who was engaged in farming operations thereon. Subsequently, Sheppard conveyed the farm to Smith and his wife as joint tenants.

The farm fronted on the north side of the Mahoney Side Road, but there had been in use for some time prior to the conveyance to the Smiths a farm lane running in an easterly and westerly direction from the farm buildings located some distance north of the side road, across the farm, over lot 33 to lot 17, plan 103, and thence to the Lake Shore Road. This lane was used as a means of access to and from the farm buildings.

The farm was fenced off from plan 103 by a wire fence running along the easterly boundary of lot 33, the only opening in it being a gate opposite lot 17 where the farm lane met the east limit of lot 33. There was also a gate opposite in the east limit of lot 17, while there was another gate in the west limit of lot 17 where the lane entered Lake Shore Road.

Lots on plan 103 were from time to time disposed of by Sheppard, usually together with a right-of-way over lot 33. Sheppard conveyed lot 17 on September 9, 1924, to one Lascelles, reserving to himself a right-of-way over the entire lot "for all purposes and at all times." At this time Sheppard remained the owner of lot 18 immediately to the south, as well as lot 33. On November 29, 1924, Lascelles conveyed lot 17 to the Smiths, subject to the above-mentioned right-of-way. Subsequently, on September 21, 1925, Sheppard executed the following deed:

> In consideration of the sum of one dollar the receipt of which is hereby acknowledged I hereby give to John Smith of the Township of North Gwillimbury in the County of York and Province of Ontario his heirs executors and assigns a perpetual right of way over Lot thirty-three (33) Plan one hundred and three (103) registered said Lot & Plan being in the Township of North Gwillimbury in the County of York and Province of Ontario. This is to be binding on my heirs executors or assigns.

In 1941 the Smith farm, as well as lot 17, plan 103, was conveyed (the latter subject to the right-of-way already mentioned) to the predecessor in title of the respondent, together with "a perpetual right-of-way over lot No. 33 according to plan No. 103". The registration of plan 320 followed on March 30, 1946. This plan shows a street known as Lakeview Road overlying the site of the westerly

1952

LAURIE v. WINCH

Kellock J.

portion of the old farm lane, but this street is sixty-six feet in width, whereas that of the lane was about fifty feet between its fences.

This action was commenced by the appellant to restrain the respondent and certain other owners of lots on plan 320 from entering upon lot 33, and in the alternative, from using lot 33 to any greater extent than the same was actually used prior to the year 1945. The action was tried by the Chief Justice of the High Court who held that the conveyance of 1925 from Sheppard to Smith was a personal license only, but that if it amounted to the conveyance of an easement, Smith acquired nothing more than the right to pass over the portion of lot 33 between the gates already mentioned, and for the purposes only for which the lane was in fact used at the time of the grant. The only one to appeal to the Court of Appeal was the defendant Winch. As to him, the trial judgment was set aside and the action dismissed although the Chief Justice of Ontario would have restricted Winch's right-of-way over lot 33 to that part between lot 17 and the point on the east limit of lot 33 where the gate had been.

The appellant seeks to restore the judgment of the learned trial judge on the ground that the conveyance of 1925 was a personal license only. In the alternative, the appellant seeks a declaration that (1) the right-of-way granted to Smith was limited to the purposes for which the lane was at that time used, and (2) that by reason of the filing of plan 320 and the sale of lots according thereto, there was such a change in the circumstances as amounted to an extinguishment of that easement.

The basis upon which counsel founds his argument that the conveyance of 1925 amounted to nothing more than a personal license, is that there is no dominant tenement named in the conveyance. It is therefore said that the conveyance amounts to a grant of an easement in gross, something unknown to the law, with the consequence that the grant is to be construed as a personal license only.

It is to be observed that in the case at bar, there is in the deed of 1925 not only no mention of a dominant tenement but, apart from the words "over lot thirty-three," there is no indication as to the termini of the "right-of-way" granted by the instrument. The grantee of the right, John

Smith, together with his wife, were owners as joint tenants, both of lot 17, plan 103, and of the farm lands to the east. To my mind, in addition to the silence of the instrument of 1925 with respect to any dominant tenement, there is also, when the terms of the grant are applied to the existing circumstances, ambiguity as to whether *the* right-of-way was intended to be granted over the entire length and breadth of lot 33 or over some lesser part of it only. It is to be noted that the lot extended some 700 feet north of the northerly limit of the farm lane and ended in a cul-de-sac.

As stated by Lord Chelmsford in *Waterpark* v. *Fennell* (1):

> Parol evidence is generally admissible to apply the words used in a deed, and to identify the property comprised within it. You cannot, indeed, show that the words were *intended* to include a particular piece of land, but you may prove facts from which you may collect the meaning of the words used, so as to include or exclude land, where the words are capable of either construction.

Lord Wensleydale, in the same case, at p. 683, said:

> In the course of the long and elaborate discussion which this case underwent in the Irish Court, some observations were incidentally made which are liable to be misunderstood as to the limits within which parol evidence is receivable to explain deeds, as if it could be done only in cases of doubt . . . The construction of a deed is always for the Court; but, in order to apply its provisions, evidence is in every case admissible of all material facts existing at the time of the execution of the deed, so as to place the Court in the situation of the grantor.

In *Cannon* v. *Villars* (2), Sir George Jessel M.R. said at p. 419:

> In construing all instruments, you must know what the facts were when the agreement was entered into.

In Goddard on Easements, 8th edition, p. 381, the author says that

> Under ordinary circumstances the owner of a private right of way is entitled to enter the way at one and the same place only, and not at any other; for instance, if a way to a field runs by the side of the field, the dominant owner is not entitled to alter the position of the gate through which he has been accustomed to pass from the field to the way, and to make a new entrance at a fresh place.

At p. 382 the author says with respect to a way originating by express grant:

> . . . . if the deed is silent as to the place of entry, surrounding circumstances must be taken into consideration to throw light on the intention of the parties.

(1) (1859) 7 H.L.C. 650 at 678, 683. (2) (1878) 8 Ch. D. 415.

1952

LAURIE v. WINCH

Kellock J.

In *Pettey* v. *Parsons* (1), Swinfen Eady L.J. at p. 667 said:

> It is a question of construction in a deed granting a right of way whether the way that is granted is a way so that the grantee may open gates, or means of access to the way, at any point of his frontage, or whether it is merely a way between two points, a right to pass over the road, and is limited to the modes of access to the road existing at the date of the grant. In each case it is a question of construction.

In *South Metropolitan Cemetery Co.* v. *Eden* (2), the right-of-way there granted was for the benefit of the dominant tenement "or any part thereof," and this was also the situation in *Cooke* v. *Ingram* (3), as well as in *Pettey* v. *Parsons, supra.* In *Sketchley* v. *Berger* (4), it was made plain by the deed that the grantee of the easement was entitled to enter at any point where the right-of-way touched his lands.

In *Deacon* v. *South Eastern Railway* (5), the defendant had granted to the plaintiff certain lands under a railway arch,

> together with a right of way to the said arch to and from Villiers Street.

At the date of the grant and for eight years thereafter, there was only the one way by which the plaintiff could get from the land so granted to Villiers Street, and this he used. It was held by North J. that the right-of-way being undefined by the deed, the right to define was vested in the grantor, and he having defined the way, could not thereafter open a new way and require the grantee to use it.

In *Canada Cement Co.* v. *Fitzgerald* (6), the respondent had conveyed part of his farm to the appellant reserving

> the right to pass over for cattle, horses and other domestic animals for water going to and from Dry Lake.

A well defined way across the land conveyed had been used by cattle from the plaintiff's farm in going to and returning from Dry Lake for many years before and after the grant, and it was held by this court that the fact that the location and width of the passage over the land conveyed were not defined in the deed did not render it void for uncertainty, but that the way was sufficiently established by the evidence of the existing circumstances.

(1) [1914] 2 Ch. 653.
(2) (1855) 16 C.B. 41.
(3) (1893) 68 L.T.N.S. 671.
(4) (1894) 69 L.T.N.S. 754.
(5) 61 L.T.N.S. 377.
(6) (1916) 53 Can. S.C.R. 263.

In the light of these authorities, I think, in the first place, that the dominant tenement intended by the parties to the deed of 1925 was the farm and not lot 17. The fact that that lot, although also owned by the Smiths, was subject to a right-of-way appurtenant to lot 33 indicates, I think, that it could not have been intended that the easement created by the instrument of 1925 was intended to be appurtenant to a lot which was, at that time at least, sterile so far as building upon it was concerned.

In the second place, as pointed out by the learned Chief Justice for Ontario, the right-of-way granted was "a" right-of-way, and the situation existing at the time, namely, the existence of the farm lane over that part of lot 33 between the gates and the non-user in connection with the farm of any other part of lot 33 indicates, in my opinion, that the way granted was over the site of the existing farm lane. I think this conclusion is very strongly reinforced by the existence of the fence along the entire easterly limit of lot 33, which indicates clearly that the only place of entry upon lot 33 from the farm which the grantee was intended to have was at the gate in the easterly boundary of the lot. It follows that the width of the way was limted to the width of such gate. In admitting that he had no other point of access to lot 33 from plan 320, I think the respondent was well advised.

The words "over lot thirty-three" are just as capable of referring to that part of the lot north of the old lane as to that part of the lot to the south. It is not suggested that Smiths had ever made use of the northerly part of the lot or that its use could have been of benefit to the farm. Similarly, with respect to any user by the Smiths of the southerly part of the lot, I think, with the learned Chief Justice of Ontario, there is no evidence of such user. The only suggestion is that contained in the following evidence of an adopted daughter of Smith who had lived with him on the farm. She testified as to the use of the farm lane to and from the Lake Shore Road, and then gave the following evidence in answer to a leading question as to the use of lot 33 down to the side road:

Q. Did you ever have any occasion to travel on Lot 33 down to what was known as the Mahoney Side Road at that time?

A. Yes, I have travelled down there.

1952

LAURIE v. WINCH

Kellock J.

Q. Did any other people use it in that way?

A. Anyone that wanted to, used it . . . anyone that I know of.

Such evidence does not, in my opinion, indicate any user in connection with the farm or justify a conclusion that the parties to the conveyance of 1925 had reference to anything more than the one right-of-way over lot 33 for the purpose of connecting the western gate of the lane on the farm with the eastern gate of the lane on lot 17. The farm fronted on the side road and thus communicated with it directly. The lane was a means of communication between the farm buildings and the Lake Shore Road. There was little or no utility so far as the farm was concerned, in going to or from the farm buildings to the side road by means of lot 33.

With respect to the nature and extent of the easement granted, it is to be observed that the grant is one of a right-of-way *simpliciter* with no express restriction as to use. Just as the circumstances existing at the time of the grant may be looked at for the purpose of ascertaining the intention of the parties as to the dominant tenement and as to the location and termini of the way, the circumstances may also be looked at for the purpose of construing the conveyance as to the nature and extent of the rights conveyed.

In *White* v. *Grand Hotel* (1), while the easement there in question was the subject of an express grant, there was no documentary evidence of its exact terms. The action was by the owner of the servient tenement to limit the user of the way, the dominant tenement having been changed from a private residence, at the time of the grant, to a hotel. It was held, that there being no limitation to be found in the grant in the nature of the width of the right-of-way or anything of that kind, full effect must be given to the grant and the way could not be restricted to such use as existed at the time of its execution. Hamilton L.J., as he then was, pointed out that the dominant tenement, although used as a private dwelling house at the time of the grant, might be, with the consent of a third person, as in fact it had been, turned into a house which could be used for the purpose of trade. The decision on this point was upheld by the House of Lords.

(1) [1913] 1 Ch. 118; 110 L.T. 209.

In *South Eastern Railway Co.* v. *Cooper* (1), Warrington L.J. used the following language at p. 226:

> There is no question that if this were a grant of a way from one person to another, the grantee would be entitled to use it for any purpose without reference to the purpose for which the dominant tenement was used at the date of the grant, and notwithstanding that the burden on the servient tenement was thereby increased.

In *Todrick* v. *Western National Omnibus Co.* (2), Farwell L.J. at the trial said, at p. 206:

> In considering whether a particular use of a right of this kind is a proper use or not, I am entitled to take into consideration the circumstances of the case, the situation of the parties and the situation of the land at the time when the grant was made: see *United Land Co.* v. *Great Eastern Ry. Co.* (3), and in my judgment a grant for all purposes means for all purposes having regard to the considerations which I have already mentioned.

It was held by the Court of Appeal in *Todrick's* case (4) that having regard to the width of the land over which the right-of-way there in question was granted, it was not within the intention of the parties to the grant that it should be used for heavy omnibus traffic.

In *Robinson* v. *Bailey* (5), Lord Greene M.R. referred to the language of Farwell L.J. in *Todrick's* case, *supra,* and said at p. 795:

> While not in any way dissenting from that statement as a general proposition, I would like to give this word of caution, that it is a principle which must not be allowed to carry the court blindly. Obviously the question of the scope of the right of way expressed in a grant or reservation is *prima facie* a question of construction of the words used. If those words are susceptible of being cut down by some implication from surrounding circumstances, it being, to construe them properly, necessary to look at the surrounding circumstances, of course they would be cut down. *Todrick's* case is a very good example of the sort of application of the rule which Farwell J. was enunciating.

In *Robinson's* case the court found that there was no limitation upon the language of the grant to be implied from the nature of the land over which the right was granted, but rather the contrary, and although the dominant tenement in question in that case was at the date of the grant subject to restrictions, those restrictions, like the situation in *White's case* (6), could have been gotten rid of by the consent of a third party.

(1) [1924] 1 Ch. 211.
(2) [1934] 1 Ch. 190.
(3) L.R. 10 Ch. 586 at 590.
(4) [1934] 1 Ch. 561.
(5) [1948] 2 All E.R. 791.
(6) [1913] 1 Ch. 118; 110 L.T. 209.

1952

LAURIE v. WINCH

Kellock J.

In the case at bar, while the Smith lands were, at the date of the grant, being used for agricultural purposes, there was no reason why they might not subsequently be subdivided into building lots as had been the case with the original part of the farm with respect to which plan 103 had been registered, and I cannot think that it is to be said that it was within the contemplation of the parties to the conveyance of 1925 that the farm would always remain a farm. I think, therefore there is nothing in the circumstances to restrict the plain words of the grant to the use being made of the farm lane at that time. Further, upon the severance of the dominant tenement into several parts, the easement attached to those parts; *Codling* v. *Johnson* (1), *Newcomen* v. *Coulson* (2).

I would therefore allow the appeal to the extent indicated. The farm lane having been obliterated and the gates having disappeared, I would, if the parties cannot agree, direct a reference to define the location of the right-of-way. The appellant should have her costs in this court and the respondent should have his costs in the Court of Appeal.

Appeal allowed in part.

Solicitors for the appellant: *Hollinrake & Bartrem.*

Solicitors for the respondent: *Mathews, Stiver, Lyons & Vale.*

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(1) (1829) 9 B. & C. 933.

(2) (1877) 5 Ch. D. 133.