1899

*June 6, 7.
*Oct. 24.

JOHN PURDOM (DEFENDANT).....APPELLANT;

AND

JOHN A. ROBINSON (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Right of way—Easement—User.

A right of way granted as an easement incidental to specified property cannot be used by the grantee for the same purposes in respect to any other property.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of Meredith J. at the trial in favour of the plaintiff.

The appeal involved the decision of the single question of law stated in the above head-note. The facts giving rise to the litigation are fully set out in the judgment of the court.

Purdom for the appellant referred to *Parker* v. *Elliott* (2); *Gage* v. *Bates* (3); *Attorney General* v. *Perry* (4); *Powers* v. *Bathurst* (5). Hall on the Sea Shore, (2 ed.) pp. 156-184

Glenn for the respondent cited *Ackroyd* v. *Smith* (6); *Skull* v. *Glenister* (7); *Telfer* v. *Jacobs* (8); Dillon on Municipal Corporations (4 ed.) p. 751.

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The respondent, who is the plaintiff in the action, is seized in fee of part of lot no.

PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, King and Girouard JJ.

(1) 26 Ont. App. R. 95.
(2) 1 U. C. C. P. 470.
(3) 7 U. C. C. P. 116.
(4) 15 U. C. C. P. 329.
(5) 49 L. J. Ch. 294.
(6) 10 C. B. 164.
(7) 16 C. B. N. S. 81.
(8) 16 O. R. 35.

1 in the first concession of the Township of Yarmouth, fronting on Lake Erie. This lot extends to the water's edge. The original grant from the Crown of lots nos. 1 and 2, in the first concession, and of lot no. 1, in the second concession of Yarmouth, made on the 19th of September, 1804, to John Bostwick, thus described the lands granted:

> Commencing in front upon Lake Erie, in the limit between the Township of Yarmouth and Southwold at the south-west corner of the said lot no. 1, in the first concession. Then north one hundred and fifty-nine chains more or less, to the allowance for road between the second and third concession, then east 25 chains 53 links more or less, to the limit between lots 1 and 2, then south 80 chains more or less, to the rear of the first concession, then east 25 chains 53 links to the limit between lots Nos. 2 and 3, then south to Lake Erie, then westerly along the water's edge to the place of beginning, containing 600 acres, more or less, with allowance for road.

Upon part of lot no. 1, upon which there is now the village of Port Stanley, the respondent has laid out ranges of village lots which are shown upon a registered plan (no. 177) which has been put in evidence. These lots do not extend to the waters of the lake, though they front in that direction; between them and the water's edge there is now a strip of beach. At the time of the original grant by the Crown this beach did not exist. The lakeward boundary was then a bluff or cliff, the foot of which was washed by the waters of the lake. This appears from the map of the original survey produced from the Crown Lands Office, from which it also appears that there was no allowance for road between the southern boundary of the lot and the water. Until recently this bluff descending to the water's edge remained as the southern limit of the lot, but within a few years the beach already mentioned has been formed by a sort of accretion partly by the subsidence of the lake and partly by the crumbling away of the cliff or bank.

1899

PURDOM v. ROBINSON.

The Chief Justice.

One of the ranges of village lots laid out by the respondent consists of seven lots numbered from the east, commencing at the boundary line between township lots nos. 1 and 2. Some distance to the east of township lot no. 1, and upon township lot no. 2, a range of building lots have been laid out on township lot no. 2. These front towards the lake, and there are some fifteen or twenty cottages adapted for summer residences erected upon them. This locality is known as Orchard Beach. The appellant is the owner of one of these Orchard Beach residences, and has for a number of years occupied it during the summer months. A convenient way for the Orchard Beach residents to reach the village of Port Stanley, the railway station and steamboat wharf, is to pass along the beach in front of the respondent's lots westerly until Main street in the village is reached. In the summer of 1897, the appellant and his family were in the habit of making use of the beach in front of the respondent's property in the manner and for the purposes mentioned, and being warned to desist did not do so, but persisted in using and claimed the right to use the beach as a way to and from the premises of the appellant at Orchard Beach.

This action was thereupon brought on the 10th of August, 1897, alleging that the appellant had trespassed on the respondent's property, and claiming that there was no right of way along the beach or across the respondent's property, and that the appellant be enjoined from committing such trespasses in the future.

The appellant in his statement of defence relied upon a right to use the beach as a public way under some general right the nature of which he does not exactly define, but which he states as a right in the public so to use the beach, and for boating and bath-

ing purposes also. Further, it is alleged that there was a prescriptive right acquired to the public by long user. Then the claim is set up to a way across and along the beach under a title which the appellant acquired on the 14th of August, 1897, four days after the commencement of the action, to the east half of lot no. 3 in the range of lots belonging to the respondent laid out on township lot no. 1, as shown by plan no. 177 before referred to The whole of lot no. 3 had been sold and conveyed by the respondent to one Frederick Henry, in April, 1897. The conveyance to Henry contained a grant of a right of way to be used as appurtenant to the granted lot no. 3; this grant was as follows:

Together with the sole right to erect and use upon the said beach in front of lot no. 3, a private bath and boat house, and the right to use the beach in front of lots 1 to 7, inclusive on said plan for right of way, bathing, boating and all other pastimes in common with the owner and owners of said property as shown in said plan, their tenants and guests residing on said property, reserving to each owner of the said lots 1 to 7 to erect a private bath or boat house on the beach in front of their respective lots, and together with the full right and liberty for the party of the second part, his tenants, servants and guests in common with the other owners of the property mentioned in said plan, to use all the rights of way shown on said plan, and a right of way along said beach from east to west, reserving to John A. Robinson the right to erect fences with gates across said right of way on beach to prevent the public entering thereon.

This title is set up in the statement of defence, but the appellant does not counter-claim for any relief or declaration of right founded on it.

The action came on for trial before Mr. Justice Meredith, when evidence was given by both parties. The learned judge at the conclusion of the arguments delivered judgment in favour of the respondent, holding that the defence failed on all the points set up, and directed a decree to be entered declaring that the appellant had no right of way across that part of lot

1899

PURDOM v. ROBINSON.

The Chief Justice.

no. 1 owned by the respondent otherwise than under the right he might have (if any) under the conveyance from Henry, of the east half of lot no. 3 on plan no. 177, and restraining the appellant from using the way in question except under such right as he might have under the conveyance mentioned.

Against this judgment the appellant appealed to the Court of Appeal which unanimously dismissed the appeal for the reasons given in the judgment of the court delivered by Mr. Justice Moss, which are in all respects identical with those upon which the learned trial judge based his judgment.

The appellant has now appealed to this court.

I cannot refrain from saying that it is greatly to be regretted that any appeal should lie on such a trifling matter from the unanimous judgment of the Court of Appeal constituted by four judges, affirming a previous judgment.

The claim to a public right of way along the beach paramount to the rights of the Crown and its grantee is manifestly unsustainable. The grant by the Crown of township lot no. 1 to John Bostwick, the respondent's predecessor in title, made in 1804, makes the waters of Lake Erie the southern boundary of the land granted and the original survey in the Crown Lands Office shows that there was no reservation of any road or public way along the front of the lot. At the time of the grant the lakeward boundary was the bluff or cliff descending almost perpendicularly to the water, so that the state of the land patented was such that there could be no road or passage along the front In this state the land remained for many years but lately by gradual accretion or by the recession of the waters of the lake the beach in question has been formed. The land thus formed became in law the property of the owner of the adjoining land. *Foster* v. *Wright*

(1), judgment of Lindley J. and cases there cited. That the public had no rights across this newly formed beach superior to those of the Crown or those claiming under it is so well established by authority as not to admit of dispute. *Blundell* v. *Catterall* (2); *Attorney General* v. *Chambers* (3).

The claim to a prescriptive right of user on the part of the general public wholly fails on the evidence for it appears that the beach had not been in existence and consequently there could have been no user for a time sufficiently long to confer such a title; moreover the fact of general user of the beach as a highway since it has in fact existed is controverted by the witnesses called for the respondent.

The appellant does not in his pleading set up any dedication by the respondent of a highway along the beach though that claim was put forward both in the Court of Appeal and in the argument at this bar. There is, however, no foundation in fact for such a claim. The only evidence in support of it was that a plank walk had been laid down along the beach by the Municipal Council. This, however, is shown by evidence to have been done by the permission of the respondent and subject to his express reservation of all his rights of property.

There only remains to be considered the extent of the appellant's rights under the conveyance from Henry which was taken by him after the institution of the action and manifestly with a view of supporting his original claim to use the beach as a highway in going to the village from and returning to his house at Orchard Beach on township lot no. 2. That the appellant did not circumscribe his claims under the deed from Henry to such a user as was incidental

(1) 4 C. P. D. 438. (2) 5 B. & Ald. 268.
(3) 4 DeG. M. & G. 206.

1899

PURDOM v. ROBINSON.

The Chief Justice.

to his enjoyment as the owner of the east half of lot no. 3 in plan 177, but claimed it as sufficiently extensive to cover for the future similar trespasses to those which he had committed on the respondent's property before the commencement of the action is made manifest by his own admissions in the witness box contained in the following extract from his deposition:

Mr. Donohue—Q. You bought this land in August? A. Yes.

Q. And you remained during that whole season? A. Yes.

Q. Living on lot no. 2? A. Yes, and walked over the sidewalk.

Q. And continued all that summer to walk over the sidewalk? A. Yes.

Q. Without any reference whatever to using it for the purposes of lot 3 on the plan?

His Lordship—He had no title to lot 3 on the plan.

Mr. Donohue—To witness—Q. Since buying the property you have been walking on the beach just the same as you walked before? A. Yes.

Q. And your using the beach had no reference to your owning lot 3? A. Not at all.

Q. It was in order to get back and forward to the place that you lived your trespassing? A. I did not take any notice of the trespassing.

Q. This alleged trespass consisted in your going from the place you were living on lot 2 to Main street? A. Yes; on Sunday morning.

Q. And having no reference to lot 3? A. Exactly.

Such a contention having regard to the state of the law as established by incontrovertible authorities cannot be maintained.

The easement granted to Henry, (and in which the appellant may possibly be entitled to participate as a sub-purchaser from Henry of a portion of the land to which that easement was attached (1),) was in express terms limited to the purposes of lot no. 3. What rights the appellant actually acquired to the enjoyment of this easement as purchaser of part of lot 3 is not a question calling for decision in this action and

(1) *Newcomen* v. *Coulson*, 5 Ch. D. 141, judgment of Jessel M. R.

the learned trial judge has very correctly refused to deal with it and has expressly excepted it in the decree. The question is whether the acquisition of any easement expressly made incidental to the enjoyment of lot no. 3 in plan 177 can be held to confer any rights on the appellant as the owner of a house at Orchard Beach. It manifestly never was in the contemplation of the respondent to confer any such rights on Henry, the appellant's grantor, and the appellant could derive from Henry no greater rights than the latter had which were limited to the purposes of lot no. 3.

That a right of way granted as an easement incidental to a specified property cannot be used by the grantee for the same purposes in respect of any other property is shown by many reported cases of which two cited by the respondent may be particularly referred to as establishing the proposition. In *Skull* v. *Glenister* (1) this was one of the questions decided and Erle C.J. says:

> This right of way was appurtenant to the land demised by the Wheelers to the defendants. The defendants are therefore bound to make use of this way for purposes exclusively connected with their holding of these demised premises.

In *Ackroyd* v. *Smith* (1) which may be consided the leading case on the point, the question was raised distinctly on demurrer whether the defendant could under a grant of a right of way as incidental to the enjoyment of a particular close make use of this way for his own purposes irrespective altogether of its use in respect of the dominant tenement to which it was originally made appurtenant. The defendant there claimed as an assignee of the right of way from the original grantee. It was held first that the road was granted only for purposes connected with the occupa-

(1) 16 C. B. N. S. 81. (2) 10 C. B. 164.

1899

PURDOM v. ROBINSON.

The Chief Justice.

tion of the land conveyed and therefore could only be used as connected with that land. It was, however, further determined that even if the original grantee did acquire under the grant a more extensive right, a personal right to use the way irrespective of the land granted, that was a mere personal license which could not be granted or assigned over by the original licensee since there is not known to the law such an interest in land as an easement in gross. The case of *Lawton* v. *Ward* (1) shows that the restriction of an easement to the purposes for which it is originally granted is no new law but is an old and well established rule of the law of property. See also Gale on Easements, 7th ed. p. 470.

These authorities are decisive in the respondent's favour. To apply them here we must hold that the original easement granted to Henry was limited to the purposes of the land as an incident to which it was an appurtenance and that the appellant can have no rights greater than those of this grantor. Further, even if there were any colour or pretence for saying that Henry acquired a personal right to the free use of the beach for all purposes and irrespective altogether of lot no 3, he could not grant over or assign that right to the appellant.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Parke, Purdom & Purdom*

Solicitors for the respondent: *James W. Glenn.*

---

(1) 1 Ld. Ray. 75.