

THE CANADIAN PACIFIC RAIL- } APPELLANT ;
WAY COMPANY (DEFENDANT)... }

1900

AND

*May 30, 31.

GEORGE GUTHRIE AND CATHA- }
RINE GUTHRIE, EXECUTOR }
AND EXECUTRIX OF THE } RESPONDENTS.
ESTATE OF DAVID GUTHRIE, }
DECEASED, AND JOHN D. }
GUTHRIE, (PLAINTIFFS)..... }

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*Feb. 19.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Easement—Right of way—User—Prescription.

A railway line passed over the northern half of lots 32, 33 and 34 respectively, of the eighth concession of North Dumfries, having a trestle bridge over a ravine on 34, near the boundary of 33. G., the owner of lot 33 (except the part owned by the railway company) for a number of years used the passage under the trestle bridge to reach a lane on the south half of lot 34 over which he could pass to a village on the west side, his predecessor in title, who owned all these lots, having used the same route for the purpose. The company having filled up the ravine, G. applied for an injunction to have it re-opened.

Held, reversing the judgment of the Court of Appeal (27 Ont. App. R. 64) that such user could never ripen into a title by prescription of the right of way nor entitle G. to a farm crossing on lot 34.

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

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

The question raised on the appeal is sufficiently indicated by the above note of the judgment thereon. The facts are fully set out in the opinion of Mr. Justice Gwynne speaking for the court.

Armour Q. C. and Nesbitt Q. C. (Macmurchy with them) for the appellant. If title to the right of way could be acquired by user in this case the user did not continue for twenty years by persons in the same right. See *Ackroyd v. Smith* (2); *Bailey v. Stephens* (3); *Thorpe v. Brumfitt* (4).

The court will always presume that a person using another's land is a licensee, not a trespasser. *Micklethwaite v. Vincent* (5).

Title by prescription from user will not arise where a lost grant cannot be presumed, which is the case here. The railway company can only hold the lands for railway purposes, and a grant for any other purpose would be void. *Mulliner v. Midland Railway Co.* (6); *Creyke v. Hatfield Chase* (7)

As to the claim for a farm crossing, see *Grand Trunk Railway Co. v. Huard* (8). *In re Metropolitan Railway Co. and Cosh* (9).

Shepley Q. C. for the respondents.

The judgment of the court was delivered by:

GWYNNE J.—The plaintiffs claim, as owners of the north half of lot No. 33, in the 8th concession of the Township of North Dumfries, in the County of Water-

(1) 27 Ont. App. R. 64.

(2) 10 C. B. 164.

(3) 12 C. B. N. S. 91.

(4) 8 Ch. App. 650.

(5) 8 Times L. R. 635.

(6) 11 Ch. D. 611.

(7) 12 Times L. R. 383.

(8) Q. R. 1 Q. B. 501.

(9) 13 Ch. D. 607.

loo, in the Province of Ontario, a prescriptive right of way under the Credit Valley Railway (now vested in and operated by the C. P. Railway Company) where it crosses the north half of lot No. 34, in the said 8th concession so as thereby to obtain access to a piece of land called Dickson's Lane, situate wholly on the south half of said lot No. 34, and by that lane to the Town of Ayr. The Court of Appeal for Ontario, from whose judgment this appeal has been taken, affirmed a judgment of the Chancellor of Ontario by whom the prescriptive right so claimed was adjudged in favour of the plaintiffs; and have also held that independently of such prescriptive right the plaintiffs in right of their ownership of the north half of the said lot No. 33 are entitled to the way claimed by them under the railway where it crosses the north half of the said lot No. 34 as an ordinary farm crossing in virtue of the Act relating to railways, C. S. C. ch. 66.

We expressed at the hearing our unanimous opinion that the appeal must be allowed, and it only remains now for us to express the grounds upon which that opinion rested.

One Charles McGeorge some time in the year 1854 acquired a fee simple estate in the north halves of lots Nos. 32, 33 and 34 in the said Township of North Dumfries by title derived from one James Colquhoun, and by a deed dated the 25th day of February, 1854, and executed by the said James Colquhoun, the said Charles McGeorge became seized in fee simple of a part of the south half of the said lot No. 34, containing 3 acres, 2 roods and 38 perches, described as follows :

Commencing at the centre of the said 8th concession of Dumfries in the line between lots Nos. 33 and 34; thence along the south boundary of the north half of the said lot No. 34 south 76° 30' west

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25 chains more or less to the western limit of the said lot No. 34, then along said limit south $15^{\circ} 40'$ east 17 chains more or less to the said road leading from the store heretofore occupied by James Forbes to the distillery belonging to John Hall ; thence north $76^{\circ} 30'$ east 91 links ; thence north $15^{\circ} 40'$ west 16 chains 9 links more or less to within 91 links of the centre of the concession ; thence north $76^{\circ} 30'$ east 24 chains and 9 links more or less to the line between lots 33 and 34 ; thence north $15^{\circ} 40'$ west 91 links to the place of beginning.

It may be admitted that thereafter until his death in the year 1862 the said Charles McGeorge and his tenants had communication at their pleasure along the north half of the said lot No. 34 to the said above described piece of land on the south of the same lot which was known as Dickson's Lane, as affording a shorter access to the Town of Ayr, than round by the highway at the northern extremity of the said lots upon which the said lots fronted.

The said Charles McGeorge by his last will and testament devised the whole of his estate to the executors named in his will, three in number, in trust for the support and education of his children with directions that his executors upon his youngest child coming of age, or before that time, if judged necessary, should sell and dispose of the whole of his estate and divide it equally among the children or the survivors of them.

On the 1st of July in the year 1874 the Credit Valley Railway Company, a company incorporated by an Act of the Legislature of the Province of Ontario, passed in 1871, entered into an agreement with two of the said executors of the will of the said Charles McGeorge for acquiring the land required for the construction of their railway across the north halves of the said lots Nos. 32, 33 and 34 whereby the said executors in consideration of \$1 and a further sum of \$50 per acre to be paid on execution of a conveyance as therein mentioned, did for themselves, their heirs,

executors, administrators and assigns, covenant and agree to sell, grant and convey from time to time to the Credit Valley Railway Company, their successors and assigns so much of lots Nos. 32, 33 and 34, in the 8th concession of North Dumfries being part of the estate of Dr. McGeorge, as might be selected from time to time for the purposes of their railway, 4 rods in width, and also such other widths as might be required for the roadbed and slopes, berms, spoil-banks and materials for embankments or ballasting across and upon said lands and premises, and to make a good title to the same in fee simple, with all dowers barred, and free from incumbrances to the said railway company, and they did thereby grant to the said railway company the right to enter upon the said lands and premises, and to lay out and construct the said railway as might be required. It was thereby further agreed that the price above mentioned should be paid within two months from the date of the agreement, or should bear interest thereafter, and further, that the said price should be in full compensation for land and all damages of whatsoever nature or kind caused by the taking of lands as above mentioned.

Thereupon the company proceeded with the construction of their railway across the said lots in conformity with the provisions of the Acts of the legislature in that behalf, and there being upon the said north half of lot No. 34 a gully of about 19 feet in depth, the company erected, as they did in all similar places on the line of railway throughout, a trestle bridge instead of an embankment, deferring as is usual in such cases the making of embankments until later on and by degrees from year to year. The railway was not opened for traffic until the spring of 1880, and in the year 1881 the fee simple estate in the said

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lands was duly conveyed to the said railway company in accordance with the terms of the said agreement of the 1st of July, 1874.

Now that agreement although executed by two only of the trustee executors of the will of Charles McGeorge, became by force of the terms of the Railway Act, ch. 66 of the Consolidated Statutes of Canada which were incorporated with the Credit Valley Railway Act, absolutely binding as to the terms of compensation for price of land and for damages upon all three, the trustee executors of the said will, &c., &c., and absolutely conclusive as to all matters expressed therein although the legal estate in the said lands may have only become vested in the said company in 1881.

The railway across the said lots was completed save as to the laying of the rails early in the year 1875, or in the latter end of the year 1874, and upon such completion the effect was that whatever right, title or interest which the trustee executors of the will of Charles McGeorge had had in connection with the user of any part of the north half of lot No. 34 for access to the said piece of land on the south half thereof known as Dickson's Lane, became absolutely and for ever determined and extinguished. And in so far as the land taken for the railway was concerned, no right or title whatever remained in the said trustee executors to create any new right of way across the said railway lands or any part thereof. Their right even to acquire against the will of the company either a level or an under crossing if not wholly divested by the unlimited terms of the said agreement was limited to their statutory right to such farm crossings as might reasonably be required for access between the lands on either side of the railway which were severed by the railway, and such farm

crossings were provided by the company upon each of the said lots upon the level.

By an indenture dated the 20th January, 1876, and made between Alexander McGeorge, C. J. Muir and John Robson, the executors of Charles McGeorge of the first part, and Elizabeth, Mary, Annie and Charles McGeorge, children of the said Charles McGeorge, deceased, of the second part, the parties of the first part did grant to the said parties of the second part, their heirs and assigns for ever the north halves of said lots Nos. 32, 33 and 34 in the 8th concession of North Dumfries excepting and reserving therefrom all of such lots theretofore sold and conveyed or agreed to be sold and conveyed by the parties of the first part. This reservation excepted from the said grant so much of the said lots as had been taken under the statutes in that behalf for the purposes of the railway. This deed contains a singular clause, the intent and purpose of which it is difficult to see, but it seems to have been inserted by the person who drafted the deed as proper to be inserted as part of the estate of the deceased vested in the trustee executors to which for whatever benefit such estate might confer upon them the children of the deceased were entitled; but in transferring such estate the draftsman seems to have been under the impression that there was vested in the trustee executors only a right of way over the land called the Dickson Lane and not an estate in fee. The executors could of course only convey to the children the estate in the said piece of land which was vested in them which was an estate in fee subject it may be to the right of many persons to a right of way thereon and thereover, but the transfer to the children as tenants in common in fee of the land known as the Dickson Lane as the north halves of the lots 32, 33 and 34 had been transferred would have

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transferred all that was vested in the trustee executors and all that they could by any form of expression have conferred. This clause is as follows :

The said parties of the first part grant to the said party of the second part and to the tenants and occupiers of the said lands hereby granted a right at all times to use in common with the owners, tenants and occupiers of the land of the said late Charles McGeorge the land described in the deed from William Dickson to James Colquhoun dated 20th November, 1855.

The estate by that deed conveyed was an estate in fee simple. Now as to what may be the value of this clause, and with the question whether or not, it has any value we are not at present concerned, for it is obvious that it is wholly irrelevant in the present case inasmuch as it does not confer and indeed does not assume to confer any right whatever to cross the railway upon the said north half of lot No. 34 or anywhere else ; on the contrary it in express terms excepts and reserves the lands taken for the railway from the operation of the deed, as land over which the grantees in the deed had no control whatever.

Now by a deed dated the 17th November, 1877, and made between the grantees in the said last mentioned deed namely, Elizabeth, Mary, Annie and Charles McGeorge of the first part and David Guthrie of the second part, the said parties of the first part granted to the second party of the second part the north halves of said lots 32 and 33, in the 8th concession of North Dumfries,

reserving however all lands sold or agreed to be sold by the executors of the late Dr. McGeorge, of the Village of Ayr, also reserving out of the above lands the lands sold or agreed to be sold to the Credit Valley Railway Company.

This deed contained a clause as to use of the Dickson Lane similar in terms to the language used in the deed of January 20th, 1876. By a deed dated the same 17th of November, 1877, between the same parties of the

first part as in the above mentioned deed and one David Smith of the second part, the said parties of the first part granted to the said David Smith his heirs and assigns the north half of the said lot No. 34, excepting and reserving thereout

the lands sold or agreed to be sold to the Credit Valley Railroad Company.

This deed also contained a clause as to the user of the Dickson Lane in the precise terms used in the deed of the same date conveying the north halves of lots 32 and 33 to Guthrie.

Now it is to be observed that the former of these deeds does not profess to transfer to Guthrie any estate or interest whatever in the said north half of lot No. 34. If it had expressly affected to do so it would have been simply void *quoad* any such right in so far as it might have purported to affect the railway land for the grantors in the deed had no interest or estate whatever in such lands; neither does the latter of the said deeds subject the estate in the land by that deed conveyed to Smith to any right of way whatever in favour of Guthrie or of any other person. This latter circumstance is referred to in the judgment of the Court of Appeal but was deemed unimportant because of the fact that Smith had not objected to Guthrie crossing his land on lot 34, but if Guthrie could only reach the railway upon lot 34 by the permission or sufferance of the owner of the land upon that lot adjoining to the railway how can it be said that Guthrie could in virtue of his ownership of lot 33 as is claimed in the declaration, cross the land of the railway company upon the said lot No. 34 by any other authority than the sufferance or permission of the railway company? And so no prescriptive right as claimed could have ever come into existence. It would operate as a complete miscarriage of justice if

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the mere non-interference by a railway company with the owner of land severed by a railway across it, in passing from his land on one side of the railway to that on the other side so severed, under a trestle bridge constructed on the line of the railway (which user of the railway company's land could not in any the slightest degree prejudice the company in the use of the railway) could mature into an indefeasible right in the land owner of such a character as to divest the company of the right to improve their railway, and make it better suited for the transport of traffic increased in quantity and weight, by substituting an embankment for the trestle unless they should purchase the permission of the land owner who had been so suffered to enjoy a convenience, without any cost to him, in the company's property.

The cases of *The Canada Southern Railway Co. v. Clowes* (1); and *The Canada Southern Railway Co. v. Erwin* (2); in this court, are cases in which it was held in circumstances somewhat resembling the present that no such right existed. In the present case there is this difference from those cases, that they were instituted at the suit of the owners of the lands whereon the trestle bridge in the railway which severed their lands respectively had been constructed; but in the present case Guthrie had no claim whatever, as owner of lot 33, nor any pretence to a claim for a farm crossing upon lot No. 34; there is therefore no foundation whatever for the claim of the plaintiffs as made in their declaration nor for a farm crossing as held by the Court of Appeal.

The substitution of an embankment for a trestle bridge on a railway is a work which is not to be regarded as a work merely in the interest of the railway company, but also as a work to be executed in dis-

(1) 13 Can. S. C. R. 139.

(2) 13 Can. S. C. R. 162.

charge of a duty imposed upon the company by statute, in the interest of, and for the safety of the public, and no user for any length of time under circumstances similar to those appearing in the present case could ever mature into a prescriptive right as claimed by the plaintiffs and allowed by the judgment now in appeal.

The form of the judgment will be to allow appeal with costs. Dissolve injunction and dismiss action with all costs.

Appeal allowed with costs.

Solicitors for the appellant: *Wells & Macmurchy.*

Solicitors for the respondents: *Guthrie, Watt & Guthrie.*

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