HEDLEY T. FULTON, MINNIE PATTERSON AND MABEL FULTON (PLAINTIFFS) ..... APPELLANTS;

AND

WILLIAM P. CREELMAN (DEFENDANT) .. RESPONDENT.

1930
*Oct. 20.
*Dec. 15.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Trespass—Highways—Alleged existence of public right of way—Sufficiency of evidence to justify finding of dedication—Inference from circumstances—Admissibility in evidence of ancient book.

In an action of trespass, defendant alleged a public right of way across plaintiffs' land.

Held, that the evidence as to uninterrupted public user of the alleged road for a period coextensive with the memory of witnesses, along with other circumstances in evidence, justified a finding of dedication (*Folkestone Corporation* v. *Brockman,* [1914] A.C. 338, at 368, cited); and that the judgment of the Supreme Court of Nova Scotia *en banc,* 1 M.P.R. 556, holding (by a majority, reversing judgment of Paton J., *ibid*) that the alleged public road exists, and dismissing plaintiffs' action for trespass, should be affirmed.

Anglin C.J.C. and Lamont J. dissented, holding that there was not sufficient evidence of dedication of the alleged highway (the only ground relied on at bar) to prove that fact; that the locus of the highway claimed to have been dedicated was left quite uncertain; and that the acts of user were wholly consistent with there having been merely a private right of way, or personal understandings for use of a way, and, while circumstances may warrant an inference of dedica-

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Lamont and Cannon JJ.

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tion, just as they may prove any other fact, that inference must be the only one that can reasonably be drawn from them.

The admissibility in evidence of an ancient book, being a record of meetings of the proprietors under the original settlers' grant from the Crown, was discussed, but not decided; the majority basing their judgment on evidence apart from it, and the dissenting judges, while much inclined in opinion against its admissibility, yet assuming its admissibility in dealing with the case.

APPEAL by the plaintiffs (by special leave granted by the Supreme Court of Nova Scotia *en banc*) from the judgment of the Supreme Court of Nova Scotia *en banc* (1) which, by a majority (reversing judgment of Paton J. (1)) held that a public road exists across plaintiffs' lands in question; that defendant as one of the public had the right to use the road; and that the plaintiffs' action, which was for damages for trespass and for an injunction, should be dismissed.

The material facts of the case are sufficiently stated in the judgments now reported. The appeal to this Court was dismissed with costs, Anglin C.J.C. and Lamont J. dissenting.

C. J. Burchell K.C. for the appellants.

C. B. Smith K.C. for the respondent.

The judgment of the majority of the court (Duff, Newcombe and Cannon JJ.) was delivered by

NEWCOMBE J.—The defendant alleges a public right of way across the plaintiffs' lands, which he had been accustomed to exercise, and which, in 1929, the plaintiff, Hedley T. Fulton, obstructed by a fence. The plaintiffs are proprietors of a parcel of land in the eastern part of the peninsula of Nova Scotia, contiguous to the river Stewiacke on its southern bank and opposite to the village of Upper Stewiacke, which is situated on the other side of the river. The highway leading easterly to Musquodoboit passes through the village. The Meadowvale Road, at this place going northerly, crosses the river by a bridge below the plaintiffs' lot and, just beyond the bridge, joins the Musquodoboit highway. A little farther up, to the eastward, the Stewart Hill Road, running in this stretch nearly parallel to the Meadowvale Road, crosses the river by another bridge, and likewise opens into the Musquodoboit high-

(1) 1 M.P.R. 556.

way. The distance between the upper and the lower bridge is about half a mile. The riparian area between the Meadowvale Road and the Stewart Hill Road is taken up by four lots belonging, respectively, to James D. Cox, the plaintiff Hedley T. Fulton, Ross Johnson and Henry Cox, in the order mentioned; James D. Cox abutting upon the Meadowvale Road and Henry Cox upon the Stewart Hill Road; Fulton and Johnson thus come between. All these four lots terminate southerly at a gully, and neither the plaintiffs' lot nor that of Johnson is reached by any public road, unless the way in issue be a public road.

The appellants, introducing the "Brief of Argument" in their factum, very frankly state that "the sole question for consideration in this action is whether the evidence adduced established the existence of the public highway across the appellants' lands"; and, it thus becomes, in reality, a question of fact, depending upon the inferences which may be drawn from the testimony and exhibits in proof, to establish a presumption of dedication. There is a considerable body of evidence, substantially uncontradicted, of long, continuous and uninterrupted user by the public of a way from the Meadowvale Road to the Stewart Hill Road through these lots, along the riverside. It is shewn that there is an undisputed road from a point on the Meadowvale Road just to the south of the lower bridge and known as the "Oak Island Road," leading down, along the river, to Oak Island and the settlement at South Branch. This road, in fact, crosses the Meadowvale Road on to the lot of James D. Cox, and the defendant maintains that it is thence prolonged in a direct course, deflected slightly to the north, across the lots of the plaintiffs, Johnson and Henry Cox, where it opens into the Stewart Hill Road; thereby affording immediate access to the public road running along the riverside from the Stewart Hill Road, at the southern end of the upper bridge, easterly, to the grist mill and settlements above.

It is not disputed that if the travelled road across these four lots had its origin in dedication, or otherwise became a public road, it so remains, for it was never closed according to law, and our attention was directed to sec. 47 (1) of

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The Public Highways Act of Nova Scotia, R.S.N.S., 1923, cap. 75, as follows:

47. (1) Except in so far as they have been closed according to law, all allowances for highways made by surveyors for the Crown, all highways laid out or established under the authority of any statute, all roads on which public money has been expended for opening them, or on which statute labour has heretofore been performed, all roads passing through Indian lands, all roads dedicated by the owners of the land to public use, every public road now used as such, and all alterations and deviations of, and all bridges on or along any road or highway, shall be common and public highways vested in the Crown until the contrary be shown.

It was on 28th October, 1783, that the government of Nova Scotia granted to John Harris, Joseph Brewster and fifty-two others, named as grantees, a tract of land on the river Stewiacke, then called Wilmot River,

containing in the whole, by estimation 20,250 acres more or less, allowance being made for all such roads as may hereafter be deemed necessary to pass through the same, according to the plan annexed, being wilderness land withal, and all manner of mines unopened (excepting mines of gold and silver, lead, copper and coal).

By the habendum, the grantees were to have and to hold the premises "in the following proportions"; the number of acres for each grantee being specified, and varying from 750 acres to 250 acres each, respectively. There is no record in evidence of the partition. Apparently, the settlement of the district was consequent upon this grant and took place at that time; there is a book which was admitted in evidence shewing that the proprietors were holding meetings upon the ground as early as October, 1786. This was a settlers' grant, and the grantees came under obligation gradually to clear and work, erect dwelling houses, etc.

The case was tried before Paton J., who thus disposes of the defendant's case, upon the main question of public highway; the learned judge says (1):

The defendant's chief contention was that there was once and therefore still is a public highway where the present wheel ruts now are over the Henry Cox lot and the James Cox lot, and that the road necessarily continued over the two intervening lots of Ross Johnson and the plaintiff. There was no evidence to support that contention. Any occasional passage over the land by defendant was not sufficient to create an easement;

and, accordingly, he granted the plaintiffs an injunction and assessed nominal damages.

(1) 1 M.P.R. 556, at 557.

Upon the appeal to the Supreme Court of Nova Scotia (1), the Chief Justice and Chisholm J., for the reasons stated by the former, would have maintained the judgment; but the other judges, Mellish, Graham and Ross JJ., each of whom stated his reasons, were for the defendant; and, upon the discussion of fact, I have come to the conclusion, after careful consideration of the case, that I cannot usefully add anything to the reasoning which is so clearly set out by Graham J., and the other learned judges who upheld the defendant's appeal in the court below. The defendant might, of course, have encountered serious difficulty to overcome the trial judgment if it could be held to have proceeded upon the weight or credibility of the evidence; but this, with due respect to the learned judge, is a plain case of misdirection; and, in the result, instead of considering the probabilities of the case and the inferences which it legitimately suggests, he founds his judgment upon a denial of the evidential quality or value of the facts upon which the defendant relies. The learned judge, having stated the defendant's chief contention, that the road in question is a public highway, finds that there was no evidence to support that contention. Now the defendant had called a number of witnesses, living in the neighbourhood, two of them very old men, who had been familiar with the locality all their lives, and who testified to the uninterrupted use of the road for highway purposes, so long as they could remember; not only this, but they pointed to the existence of cellars along that road, some between the Stewart Hill Road and the Meadowvale Road, and some farther down, as marking the situations upon which settlers had formerly lived. Also, there was evidence introduced of an ancient bridge crossing the river opposite the line between the plaintiff's property and that of James D. Cox, to the westward. This position coincides very well with that described in the order of the Colchester Court of Sessions, of July, 1800, which the defendant put in evidence, subject to the objection that "it has no reference to the part where the trespasses were committed," and whereby it was

Ordered upon the memo of Thomas Pearson, Esquire, and Samuel Kent, that £8 be paid them out of the money now in the licence fund for

(1) 1 M.P.R. 556.

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repairing the Stewiacke Bridge. Ordered upon the presentment of the Grand Jury that the sum of £8 be assessed upon the settlement of Stewiacke for repairing the bridge over the river at William Fulton's house, and for other necessary repairs of highways where Robert Gamiel, Commissioner, shall find it necessary.

It seems perhaps remarkable that, at a time before living memory, the village of Upper Stewiacke should have had two bridges crossing the river within half a mile of each other; but no doubt is suggested of the fact, and there is no explanation of it. Certainly, however, there must have been one bridge before there were two, and, in 1800, when the place was a mere pioneer settlement, if that bridge were, as there is evidence independent of the Colchester minute to signify, located between the points which subsequently became the sites of the two bridges now in use, it suggests the existence of public roads communicating with its approaches on both sides. Moreover, it was shewn that the schoolhouse of the district had been at or about the point of junction between the road in dispute and the Stewart Hill Road, which, as I have shewn, itself unites with the public road leading easterly from the upper bridge along the southern bank of the river. These are material facts which should not have been disregarded, and they cannot, consistently with the justice of the case, be rejected upon the holding that they afford no evidence.

There is, among the exhibits before the court, the registry book of the proprietors under the grant. It is bound in parchment, now worn and shattered, and inscribed, "Proprietors' Registry Book, 1786." Its authenticity as an original record is not denied. Nobody assails the verity of the book; the learned Chief Justice, who dissents and would have excluded the entries, says (1):

> It is an ancient looking book, and I have no doubt of its genuineness and that it is what it purports to be, a record of certain meetings of the proprietors under the old grant of 1784;

evidently meaning the Settlers' Grant of 28th October, 1783, the only grant in the case. The truth of the entries thus seems out of question, and not the less so because, out of the exigencies of their situation, the proprietors would seem to have proceeded voluntarily, under a *de facto* organization. In the book the minutes of the proprietors' meetings are recorded, the first entry being on 10th Octo-

(1) 1 M.P.R. at 562.

ber, 1786, and relating to a reservation of intervale on the south side of the river for a glebe. The granted lands were held in common and the minutes relate generally to matters of common interest to the proprietors, who, in the years immediately succeeding the grant, were presumably the only persons concerned; they were signed usually by the clerk and "moderator," as the chairman of the meetings was called, and refer, among other things, to the appointment of surveyors of roads and the expenditure of public money on the roads and the bridge. The last entry recording minutes of a meeting is of 15th November, 1796. From that time forward the book was used only for the inscription of the earmarks for identification of the proprietors' cattle and sheep; the first of such entries bearing date 26th June, 1794, and the last 17th September, 1853; and it is interesting to recall in this connection that by chap. 1, sec. 6, of the Nova Scotia Acts of 1765, entitled, "An Act for the choice of town officers and the regulating of townships," it was provided that

> Whereas many inconveniences have arisen for want of cattle being branded or otherways marked, that run in common, Be it enacted, That all and every owner of any horse or horses, neat cattle, sheep, or swine, shall brand or otherways mark such horse or horses, neat cattle, sheep or swine, in such manner as that the same may be clearly known, and shall enter such mark or brand with the Town Clerk, in a book to be kept by him for that purpose, and the said Town Clerk shall receive for recording the said mark or brand the sum of six pence.

There are some minutes in this book that, subject to doubt suggested as to the identity of the localities to which they relate, afford information as to the public roads of the district; and the matters of record generally are of such a character that the book naturally would be kept in the custody of the clerk for public access and information.

The decision in the House of Lords of *Bullen* v. *Michel,* with respect to the vicarage of Sturminster Newton (1), is thus in part summarized in the headnote:

> Ancient entries made by the monks of an abbey, relating to an endowment by them of a vicarage, (whether perfect or not) are good evidence (*quantum valeant*) of their subject-matter; although such entries be mixed with extraneous memoranda, and the book be not confined or appropriated to subjects *ejusdem generis*. And being admitted, they may be read throughout, for the purpose of proving any thing which is material to the issue, provided it is relevant, although it go to affect third persons who were not privy to it, and could have had no cognizance of the matters to which it relates.—Wood, Baron, *dissentiente*.

(1) (1816) 2 Price, 399.

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As to the actual custody from which the book comes, the evidence of James D. Cox, the postmaster, called by the defendant to lay a foundation of admissibility, is that "probably ten years ago, eight or ten years, perhaps more," the Town Clerk of Upper Stewiacke handed it to him (the witness), who kept it for a number of years and then sent it to the Dominion archives building at Halifax for safe-keeping.

Q. And you got it back from them the other day?—A. Yes.
Q. And handed it to us (the defendant's counsel)?—A. Yes.

There was no cross-examination, nor was any objection to the admission of the book subsequently raised at the trial; but, on the appeal to the court below, and also in this court, it was objected that the book, as a public document, does not come from proper custody, and does not shew anything admissible by way of reputation. The rules against secondary or hearsay evidence must, of course, be observed; and, if the book be not admissible consistently with the established practice, it should, upon objection properly stated, have been rejected. At the hearing I was not disinclined to the view that the admission of the book would not offend the principles which have been enunciated in the cases; but that is not so clear as I had expected to find, and I do not think it is necessary to solve the question in this case, for, whatever the rule may be as to the strict admissibility of the evidence, assuming the plaintiffs are entitled now to raise it, I am, for my part, like Mellish J., content to rely upon the proof which remains, assuming the rejection of the book; and, whether it be received or rejected, the appeal ought, I think, to be dismissed.

It is not without some misgiving that I have reached this conclusion, in view of the dissent; but, with great respect, I think the learned Chief Justice of Nova Scotia has failed to address his mind to the inference to be drawn from the indubitable fact in evidence of the public and uninterrupted use of the road for the period coextensive with the memory of witnesses. This is a fact which, considered along with the evidence of the ancient cellars and the abandoned bridge, seems amply to justify a finding of dedication; and, in *Folkestone Corporation* v. *Brockman* (1), Lord Atkinson, at page 368, affirmed the view ex-

(1) [1914] A.C., 338.

pressed by Taylor on Evidence, 9th ed., paragraph 131, saying that the statement contained in the paragraph is perfectly correct and is supported by the six authorities mentioned in the notes. "It is to this effect, that the uninterrupted user of a road justifies a presumption in favour of the original *animus dedicandi* even against the Crown." He adds, that the rule "as to the unrebutted presumption of dedication is a good working rule for all judges of fact to act upon. It is a rule which juries should be instructed to act upon, and which they ought to act upon." Moreover, I am persuaded that the learned Chief Justice has allowed his mind to be unduly affected by the absence of evidence of compliance with the statutory procedure for the lay out and the establishment of the road. These settlers were evidently proceeding voluntarily, and that is what might naturally have been anticipated.

The judgment of Anglin C.J.C. and Lamont J., dissenting, was delivered by

ANGLIN C.J.C.—I have had the advantage of reading the carefully prepared opinion of my brother Newcombe, but regret to find myself not in accord with his conclusions.

In my opinion the convincing judgment of the Chief Justice of Nova Scotia (1), in which Mr. Justice Chisholm concurs, and which affirms that of the learned trial judge, establishes

(1) that there is not sufficient evidence of dedication of the alleged highway (the only ground relied on at bar) to prove that fact;

(2) that the locus of the highway claimed to have been dedicated is left quite uncertain;

(3) that the acts of user proven are wholly consistent with there having been merely a private right-of-way in existence for the benefit of the lands lying between the Stewart Hill and Meadowvale roads, or with an understanding, tacit or express, of the persons, who, from time to time, for their convenience, made use of the alleged roadway, with the owners of the properties so traversed, which would fall far short of the clear and convincing proof requisite to establish dedication of the land as a highway.

(1) 1 M.P.R. 556, at 558-565.

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The very full analysis of all the testimony made by the learned Chief Justice of Nova Scotia renders it unnecessary to discuss it here in detail. Like him, I deal with the case on the assumption that the book, so much in question below, was properly received in evidence—although I deem its admissibility, to say the least, extremely doubtful, having regard to the facts that it is not, and does not purport to be, an official record, or one required by law to be kept, but, rather, memoranda of transactions of a group of private landowners, and that there is no evidence of anyone having been, at any time, officially designated to keep such a book. But, assuming its admissibility, it falls far short of showing facts sufficient to justify the conclusion of dedication for highway purposes of any particular portion of the lands now owned by the plaintiffs. As the learned Chief Justice says of the entries in the book,

> Most if not all of the entries relied upon are ambiguous to say the least of it. Many of them are clearly not understandable without local knowledge of the conditions existing more than a hundred years ago, and that is not available at this time.

Circumstances may, of course, warrant an inference of dedication, just as they may prove any other fact; but that inference must be the only one that can reasonably be drawn from them. The defendant, upon whom the burden of proof lay (the plaintiffs' paper title having been admitted), failed to suggest the person by whom, or the precise time when the alleged dedication was made, or to show what particular land was the subject of it. For aught that appears in the evidence, the way, which was apparently traversed at various times, either may have lain comparatively close to, and have followed generally the contour of, the bank of the stream, or it may have run in a straight line farther south across what is now the plaintiffs' property. Equally suggestive wagon tracks on both lines now appear on the property, as is evidenced by the surveyor's plan produced by the plaintiffs, the accuracy of which is duly vouched; and such user as was shown may be accounted for on the assumption of the existence of a private roadway or of an understanding such as suggested above.

There is no evidence of there having been any municipal or parish organization whatever. The entries in the old book show no expenditure on the alleged highway of monies raised by public taxation. At the most, they indi-

cate that some community funds belonging to the group of property owners in question were spent in repairs on some road or right-of-way lying south of the river under the supervision of men named by that group. To give to the presence of some stones or rocks in the river bed, said to indicate that a bridge formerly crossed the river at some point about midway between two bridges now existing on the respective lines of the Stewart Hill and Meadowvale side-roads, the significance claimed for them, requires an exercise of imagination which no court should be called upon to make. The same observation may be made in regard to the supposed remains of foundations of houses along the route of the alleged highway. As to the school house, said to have been located to the east of the Stewart Hill road, a private right-of-way would have served all the needs of the school children of any residents on the lots lying south of the river between the Meadowvale and Stewart Hill roads; and, for others, there was always available the main road running on the north side of the river.

Under all the circumstances, the absence of any mention of the highway, now claimed to have been dedicated, from the records of the Court of General Sessions in the District of Colchester, commented on so forcibly by Harris C.J., seems to me to be so significant as to be practically conclusive of the non-existence of the alleged highway at any early date; and, if dedication took place, it must have been at some very early date—about 1790 is the time suggested.

I should, perhaps, add that there is no evidence of any search having been made in the Registry Office, where one would expect to find a record of the alleged highway, if it, in fact, existed. In the absence of any plan being produced from the Registry Office showing such a highway it is fair to assume that there is none there. There is no suggestion of any grant having been made bordering upon such highway, or of the land which the highway would have occupied having been, at any time, excepted out of the grants of the property owned by the plaintiffs, or their predecessors in title—property which, admittedly, extends from a line well to the south of any possible location of the highway in question northerly to the water's edge.

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However, it would be idle and foolish to contend, in view of the contrary opinions expressed by three of the learned judges in Nova Scotia, and by my brother Newcombe, and more especially of the review of the testimony made by Graham and Ross JJ. in the court below, that there is nothing in the evidence suggestive of there having been a highway. No doubt, there are several circumstances quite consistent with, and, perhaps, even more readily explained by, the assumption that there was such a highway; but they do not, in my opinion, suffice to justify the reversal of the judgment to the contrary of the learned trial judge.

I am, for these reasons, of the opinion that the action was rightly dismissed in the trial court for lack of evidence to prove dedication and I would, accordingly, with the utmost respect for those who have thought otherwise, allow this appeal with costs here and in the Court of Appeal and restore the judgment of Mr. Justice Paton.

Appeal dismissed with costs.

Solicitor for the appellants: *S. D. McLellan.*

Solicitor for the respondent: *James A. Sedgewick.*