

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Robertson v. Fairweather from the Supreme Court of New Brunswick in Equity (on Appeal); delivered the 14th February 1906.

Present at the Hearing :

LORD MACNAGHTEN.

LORD DAVEY.

SIR FORD NORTH.

SIR ARTHUR WILSON.

[*Delivered by Sir Ford North.*]

The Bill of Complaint in this action was filed in the year 1896, to restrain the Defendant George E. Lloyd from obstructing the Plaintiff's alleged right of way over a road called Mount Stewart Street in the Parish of Rothesay in the Province of New Brunswick. The Judge of the Supreme Court in Equity on the 21st of October 1902 decided against the Plaintiff and dismissed the Bill with costs; but on the 3rd of August 1904 the Supreme Court in Equity on Appeal reversed that Judgment and made a decree in the Plaintiff's favour. This is an Appeal by the Defendant James F. Robertson from that decision. The Defendant George E. Lloyd has not appealed.

In the year 1863 a parcel of land in Rothesay known as Lot 10 was conveyed to Mr. George E. King (afterwards a Judge of the Supreme Court of Canada) and his two brothers in fee; and in March 1881 it was conveyed by the Kings to the Plaintiff. Adjoining to this lot on its north-east side was a part of

another lot known as Lot 11; and the title to this must be briefly stated. That lot belonged to Charles C. Stewart, who in 1859 mortgaged it to a gentleman named Dawson, and he, on 3rd April 1866, commenced an action against Stewart to realize his security. Before decree Stewart by deed dated 20th April 1866 conveyed the lot mortgaged and also other property to Alexander Ballentine, in trust to sell the same, and apply the proceeds for the benefit of Stewart's creditors. By the decree in Dawson's action dated the 5th of June 1866 the mortgaged property was ordered to be sold in lots, with the approbation of Mr. Frith, an officer appointed by the Court, and he was directed upon sale to execute the conveyances to the purchasers. At this time a strip of land had, for the purposes of giving access to the back lots, been laid out for a road along the side of Lot 11 adjoining to Lot 10. This road was called Mount Stewart Street, and the conveyances made by Mr. Frith to the purchasers from him gave a right of way over that street. The result was, that in October 1868 all the lands shewn in the plan annexed to the Plaintiff's Bill of Complaint, and set out at page 2 of the Record, as on the side of Mount Stewart Street opposite to the Kings' property, were vested, as to that called "John Taylor's House," in Daniel C. Perkins; and as to that called "G. E. Lloyd's property" as to part in Stephen S. Hall, and as to the residue thereof in Charles H. Fairweather. In 1892 all the said property of S. S. Hall and C. H. Fairweather was sold and conveyed to the Defendant George E. Lloyd.

After the Plaintiff had taken possession of the land so purchased by him, disputes arose from time to time between him and Hall, the former owner—and after Lloyd's purchase between him and Lloyd—as to the user of that part of Mount Stewart Street lying between the Plaintiff's land

on the one side and Lloyd's property on the other. The Plaintiff claimed an absolute right of road over that site. This was denied by Hall and Lloyd, as a matter of right; though they were always ready to give him large permissive privileges as a friend, and by way of concession. In the result on the 27th of August 1896 the Plaintiff filed his Bill of Complaint in this action, the ground of relief being that Lloyd had obstructed him in the use of the road in question; and four days afterwards he obtained an *ex parte* injunction against Lloyd. On the 18th December 1896 Lloyd conveyed his property to the Appellant. So matters rested until the 29th March 1901 when the Appellant was made a Defendant to the action; but the bill was not amended.

The case set up by the Plaintiff's bill is that when Mount Stewart Street was laid out there was a small house on the northern corner of the Kings' property which blocked the entrance to that street from the Hampton highway, and that an arrangement was made by King J. (acting for himself and his brothers) with the owners of Lot 11 that the Kings should remove the house further back and throw the strip of land on which it stood into the roadway, and in return should have a right of way over the new street. This alleged agreement was never put into writing, and the Appellant relies on an Act of the Province corresponding with the Statute of Frauds, to which the Plaintiff replies that the Kings performed their part of the contract by removing the house from its position at the corner of the Kings' land to a place further up the road, and throwing the site of the old house into the road, as shown in the plan above referred to; and that this is a good answer to the plea of the Statute.

The questions in the action are (1) whether there was a binding concluded agreement to the effect alleged? and (2) whether the Appellant is

bound by it? The principal witness in support is King J., who was called by the Plaintiff as his witness; and while their Lordships place implicit reliance upon his fairness and candour they cannot but regret that his examination on commission in British Columbia had to be by the very unsatisfactory process of written interrogatories and cross-interrogatories. He stated:—

“ About the time that the adjoining property to the northward
 “ known as the Stewart property was being divided into lots
 “ and sold, Mr. Ballentine, whom I understood to have the
 “ management of the matter, expressed a wish that we would
 “ remove the small building spoken of at the corner of the lot
 “ in order to improve the appearance of the entrance to the
 “ roadway, and that if required we should move back our fence
 “ and enlarge the opening to the roadway; and he stated that if
 “ we would do so we should have a right of way along the
 “ roadway as far as our clearings extended. This was stated
 “ by him to be a distance of 70 or 90 rods, I cannot state
 “ positively which. I consulted my brothers who with me
 “ owned the place and told Mr. Ballentine that we would do
 “ so. Subsequently—I cannot fix the time—in order to carry
 “ out this arrangement and in the belief that it was concurred
 “ in by Messrs. Hall and Fairweather and Mr. Perkins, who
 “ had acquired rights to the land along the roadway, we
 “ moved the building to the place marked No. 2 on the sketch.
 “ We also moved back our fence, and made it a curved line
 “ at the entrance from the Great Road to the roadway in
 “ question.”

He also stated further on that the removal of the house was in 1868, or very soon afterwards, to the best of his recollection.

Then Ballentine was also called by the Plaintiff as his witness. He said that Halland C. H. Fairweather spoke to him about having the small house moved, but that he could never get any explicit instructions from them; and that he was unable to make, and never did make, any such arrangement with King J. as is alleged. He says some drafts were prepared; first a draft by King J., in which he claimed a right of way along the whole length of the road, but that Ballentine did not agree to this; and also that there was no proper provision for the repairs of the road, and that he altered

King J.'s draft, and subsequently made another draft of his own which was afterwards altered by King J., but that the whole matter dropped; and that afterwards King J. drafted some paper which was a kind of revival of the thing, but no terms were ever settled. The witness was of great age, and was examined before a Commissioner, but his intelligence and clearness of mind and competency to give evidence were admitted.

Then Mr. Hall, one of the former owners, was called by the Appellant, and he says that he did hear of some negotiations with the Kings as to their moving their house, and having some right of way over the road, but that these negotiations all fell through, and were never completed; and that he never made any agreement for giving the Kings any right of way, or authorized Ballentine to do so.

But the matter does not rest on verbal testimony. Two documents are put in evidence which their Lordships consider not only admissible, but important. The first document is in King J.'s handwriting, and is a draft of a proposed assignment by Ballentine to the Kings of a right of way for 36 chains along Mount Stewart Street, the consideration being the conveyance by the Kings to Ballentine by a deed of even date of a small strip of land therein described, which was doubtless the site of the small house which the Kings removed and set back. That draft was dated 1st September 1868 and it provided for the grant of a right of way over the whole length of the road, and for a contribution by the Kings towards the cost of keeping it in repair. On receiving that draft Ballentine was not satisfied, but prepared another draft of the proposed deed, which is the second document. That draft bears date 13th September 1868, and by it Ballentine proposed to limit the extent of the grant of way to

10 chains of the street only from the Hampton highway, and also made provision for the Kings sharing in the cost of repairs. To this draft it is clear that King J. did not consent, and the provision as to repairs was struck out, and the negotiations dropped. There was apparently some attempt to revive them at a later time, for the date of Ballentine's draft was altered to the 13th of October 1870, and a fresh clause as to repairs was inserted; but there apparently all negotiations ceased without the parties having come to any definite agreement, and nothing further was done, and no conveyances of the site of the house or of the right of way were ever executed. King J. does not in his evidence refer to any agreement as to the cost of repairs, although they are mentioned in his draft, and the Plaintiff now repudiates all liability to contribute to such cost.

Their Lordships regret that these drafts were not before King J. when he gave his evidence. Had they been he could not have suggested that all the terms of the arrangement had been settled at the time when the house was removed. They were also never produced to Ballentine, but there can be no doubt that they are the documents to which he refers, and form part of the actual negotiations between the parties. And they very strongly confirm his evidence as to the course which the negotiations took, the reasons why they broke down, the subsequent attempt to revive them, and their final collapse.

The Appellate Court seems to have entertained the idea that there was first an agreement complete in itself for the Kings to move their house back, and throw the site into the road, and have in return a right of way; and that this was performed by the removal of the house; and that subsequently there were further negotiations as to the obligations of the parties

for the repairs of the road, which came to nothing. But in their Lordships' opinion this is not the true view of the evidence. The grant of a right of road, and the obligation of the grantee with regard to the repairs of such road, are things which are not in their nature separable, but must be dealt with together. Moreover the drafts show that the parties were not at one as to the length of road over which the right was to be given. The evidence of King J. does not give any colour to the view that there was one completed agreement, followed by abortive negotiations for a further agreement about the same road.

But even if there had been any such agreement by Ballentine as the Plaintiff alleges, no proof has been given that he had any authority to bind the owners of the land to give the Kings the right of way claimed. Ballentine's evidence expressly negatives such authority; he says that he could not get any instructions from them. S. S. Hall says the same; C. H. Fairweather is dead, and as to Perkins there is no evidence whatever. The learned Judges of the Court of Appeal speak of the agreement as being between King J. and C. H. Fairweather, but this is also inconsistent with the clear evidence of King J., which shows that his negotiations were with Ballentine only, and that he did not have any personal communication with Fairweather, Hall, or Perkins. And the evidence of his brother F. A. King is to the same effect. This is further borne out by the drafts already mentioned, to which Ballentine is made a party as being the trustee for sale for Stewart's creditors under the deed of the 20th April 1866. But Perkins, Hall, and Fairweather had no interest in, and did not claim under, that deed. Their title was derived through the mortgage by Stewart to Dawson in

1859, and Ballentine was not in any way trustee for them.

Under these circumstances their Lordships are of opinion that the Plaintiff has failed to prove any such agreement as he has set up, or indeed any concluded agreement at all. Although there were doubtless negotiations with a view to some agreement being come to under which the Kings were to have some right of road, the terms of it were never settled between the parties; and until all the terms were settled there could be no complete agreement which a Court could enforce, or to which the alleged act of part performance could be referred.

But the Plaintiff at the trial set up a right of way over Mount Stewart Street, by prescriptive user from 1869 down to action brought; and the Judge allowed him to give evidence in support of such contention, although his only claim in the bill was under the King agreement. As to such user King J. said that when the small house was moved from the corner it was rebuilt on their land further up the street, and was occupied by a workman of theirs named Birch, who used the street for the purpose of getting access to his house during the whole time that he remained in the Kings' employment; that he left about 1873, and then Green occupied it till about 1877, and they both used the roadway in the course of their employment; but that there was a farm roadway on Lot 10 which was used by the Kings and their workmen for all ordinary farm purposes, which roadway was shown in a sketch made by King J. His brother, F. A. King, who was also examined on interrogatories, went much further, and said that the road was used for hauling crops and manure, and black mud, and as a lumber road, and for logging purposes, but that they had a roadway which was used for ordinary farming purposes. It

is strange that this gentleman, who was only there for short periods, at long intervals, should have seen so much more than King J. did, who was living on the spot; but he is contradicted by several witnesses, and none of the persons, who were named as having so used the road were called to give evidence. And one thing is beyond dispute. It is shown by the evidence of several persons, including the Plaintiff himself, that, until after the Plaintiff had gone into possession in 1881, there was a part of Mount Stewart Street, about opposite to the side street separating Taylor's land from the Defendant's land, which was absolutely impassable for vehicles of any kind until it was filled in and made good about 1883; and it could not have been used as F. A. King states. Moreover, King J. showed, by his sketch, that the farm road across Lot 10 was available for the purposes mentioned by his brother. Mr. Justice Barker found that the Plaintiff had established by user a right of road along Mount Stewart Street from its entrance to the Birch House, but only as incident to the use and occupation of that house; and that such right terminated when the Plaintiff pulled down the house many years ago, without rebuilding it, or intending to do so. Their Lordships agree with Mr. Justice Barker as to the result of the evidence on this point; subject to the following remark. The Appellate Judges doubted whether a right of road to Birch's house could have been extinguished by the house being pulled down and not rebuilt. This point was not argued before their Lordships, and they abstain from expressing any opinion upon it; for assuming that Birch's house had been standing for 20 years before it was pulled down by the Plaintiff, and that a right of way from the highway to that house had been acquired by prescription, that portion of Mount Stewart Street does not

about upon any part of the Appellant's land, and there is not a line of evidence to show that either of the Defendants had ever in any way obstructed or interfered with the use by the Plaintiff of that part of the street. The Bill of Complaint cannot therefore be supported on this ground.

As regards the alleged user by the Plaintiff of the rest of Mount Stewart Street, the Plaintiff was the only person called to prove such user. That he did, in fact, use it to some extent after he bought the property is not disputed; but as to the circumstances under which he so used it, and whether as of right and without leave, or by permission, there is a conflict of evidence. Their Lordships do not think it necessary to refer in detail to that evidence; it was gone into very carefully by Mr. Justice Barker; and they agree with the conclusion to which he came, that the alleged right of way there was not proved, and with his reasons for coming to that conclusion. There is no evidence whatever that before the Plaintiff's purchase this part of the road was ever used by any persons except the proprietors and tenants of Lot 11; and even if the Plaintiff had established a user as of right from the time of his purchase it would be insufficient to establish a title by prescription, as the interval of time between his purchase and the filing of the bill was only 15 years.

Their Lordships will humbly advise His Majesty that this Appeal should be allowed; that as against the Appellant the Order of the Appellate Court should be discharged, and the Appeal dismissed with costs, and that the Decree of the 21st of October 1902 should be restored.

The costs of this Appeal must be paid by the Respondent.
