

Privy Council Appeal No. 104 of 1913.

J. Henry Peters - - - - - *Appellant,*
v.
Angus Sinclair - - - - - *Respondent.*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 4TH AUGUST 1914.

Present at the Hearing:

THE LORD CHANCELLOR.	LORD SUMNER.
LORD MOULTON.	SIR JOSHUA WILLIAMS.

[*Delivered by* LORD SUMNER.]

This was an action of trespass brought to determine the claim of the defendant to open a gate from his property into Ancroft Place in the City of Toronto (the solum of which belongs to the plaintiff in fee), and to pass freely, in and out, to Sherbourne Street and the rest of the City. In substance, the defendant's case was either that Ancroft Place had been dedicated as a public street, or alternatively that he had a right of way over it, appurtenant to his house and grounds, resting on prescription. Thrice he was defeated; before Sutherland, J., the trial judge, in the Court of Appeal of Ontario, by the unanimous judgment of four members of the

Court, and in the Supreme Court of Canada, two members of that Court out of five dissenting. Three judgments of three courts have decided that in fact there was neither dedication nor user giving a right by prescription. Leave to appeal to their Lordships' Board was granted on the suggestion that the case raised important questions of law as to the right of purchasers of building plots to have access to the roads adjoining them. No doubt such questions are of wide interest and considerable importance, if the facts raise them for decision, but whether they are raised or not is the real question in the present case.

Ancroft Place is a cul de sac about fifty feet wide and about thrice as long, which forms part of what was originally Lot 22 on a certain registered plan of land in the outskirts of Toronto. Roughly its direction is east and west. The defendant's property is on its northern side. He derives his title to it by various mesne assignments from one McCully, to whom a Mrs. Patrick sold it in 1887. The question on this appeal depends on the condition of Ancroft Place (then known as Rachael Street) and of the neighbouring plots in 1887, and on what McCully thought and was told about them at and before the time of the purchase. The evidence on this question was but a small and very subordinate part of the whole case presented to the trial judge.

Mrs. Patrick, or her deceased husband before her, had at one time owned the whole of Lot No. 22. Before 1887 it had all been sold, except the site of Ancroft Place and the plot which McCully bought. Three separate plots had been created and disposed of, two on the south side of Ancroft Place and one which was reached from its eastern extremity, and all three enjoyed rights of way over it by express grants in

which it was called a "street" or "road." After the transaction with McCully, Mrs. Patrick had no further interest in Lot 22 except her ownership of the solum of Ancroft Place, which in itself as subject to these servitudes was probably of little or no value. Of course it was of value to the owners of the plots to the south and east of it, and in fact the respondent did, not long before his action was begun, get in Mrs. Patrick's title to the site of Ancroft Place for a nominal consideration and claims it to be private and free from any servitude or right in favour of the defendant.

The argument for the appellant rests (a) on an estoppel *in pais*, consisting of parol statements made by Mrs. Patrick's selling agent to Mr. McCully, his predecessor in title, just before the sale in 1887; (b) on an estoppel, arising at the same time, out of the alleged fact that this cul de sac then looked like a street and apparently accommodated the plot, which McCully proceeded to buy; and (c) on the existence of a way *de facto*, which, being enjoyed with that plot as parcel thereof, would pass with it under Act No. 119 of the Revised Statutes of Ontario, section 12. These arguments require as their foundation that certain facts should be established, namely, (a) that Mrs. Patrick's agent said what he is alleged to have said and had her authority to do so; (b) that the *locus in quo* bore the appearance alleged and that McCully bought on the footing of it; and (c) that there actually was a way from Ancroft Place on to the plot now owned by the defendant which was enjoyed with it. The trial judge did not find any of these facts in the defendant's favour, and it is doubtful, if he was ever asked to do so as separate issues. The further the case was carried the more concurrent findings there were against the defendant on the issues really pressed,

to wit, dedication and prescriptive right, and the more it became worth while to make these matters separately prominent, and eventually the dissentient members of the Supreme Court treated them, or some of them, as established by the evidence. It is not necessary to examine the appellant's legal argument resting on these facts until it is clear how far this basis of fact is made good and how far it fails.

McCully, who was examined 24 years after the event and apparently had never had any occasion to recur to this aspect of it in the meantime, testified that he went to Mrs. Patrick's agent, a lawyer whose name and address he was quite unable to recall, having seen this place, "which was being laid off as a street then." He says that he asked if it was a street and got the answer "yes"; that he said, "if I purchase it, it won't be any difficulty about it at all" and was told "No difficulty." Only one thing about this latter statement is clear, namely, that whatever it meant it was a statement *de futuro* and apparently in the nature of a promise. The conveyance contained no such promise and expressed no undertaking with regard to Rachael Street as it was then called, nor did it even name it. This representation may, therefore, be disregarded. The other statement that it was a street, is very inconclusive. As the "street" was then "being laid off as a street" this also seems to be a statement about an intention *de futuro*, but it is enough to say that there is no evidence that, if the statement was made at all, the agent had any authority to make it. Nobody called this nameless agent or gave evidence that he might have been traced. Nobody called Mrs. Patrick. As the conveyance said nothing about this "street" or any rights over it, the inference, if any, would be that the vendor had not authorised her agent to say anything

about it, for rights over it formed no part of what she wished to sell. Idington, J. and Duff, J., for reasons which seem to their Lordships anything but cogent, accept McCully's evidence as given, press it somewhat to extremity and then infer this anonymous agent's authority in fact, because the plaintiff called no one to prove that he had none. The trial judge and all the other members of both the Courts of Appeal either ignore this evidence or treat it as inadequate, and, in their Lordships' opinion, it fails to establish the facts required to raise the first point (a) above mentioned.

What this "street" looked like at the time of McCully's transaction in 1887 is left very vague. Though there is plenty of evidence about its subsequent state, given because the defendant's chief case was dedication, its state at this date was spoken to by very few of the witnesses. The conveyances of the plots previously sold speak of it as a fifty-foot street, and one of them has a plan, on which it is so laid out. In 1887 it would seem, from the evidence of Mr. Unwin and of McCully who alone really deal with it, that it was neither macadamised nor planked; there was a track for waggons up the middle but no sidewalk, and there were fences on each side, north, south, and east. It was Unwin himself who, without authority from or communication with the owner, then not even resident in Toronto, for his own convenience dubbed it "Rachael Street," whether just before or soon after McCully's purchase is not clear. Previously the place was called "69 x 370," which might mean anything. James Dickson, McCully's successor in title, says that when he bought in 1888 "it was a kind of a mud road" and that "there were no improvements done to it" at the time." It may be assumed that at some time prior to the end of 1884 Mrs. Patrick or her

husband intended this rough cartway to be a street sometime and contemplated that an access over it might be granted to the property abutting on it, which McCully afterwards bought. By 1887 she may have changed her mind. Certainly she named neither street nor right of way in her conveyance to McCully. Afterwards acts were done which were no doubt some evidence of a user of the "street" by McCully's successors as of right, and might serve to show that she had not changed her mind between 1884 and 1887 as she never objected to them. Still it must be remembered that the sale to McCully finally disposed of the original Lot 22 as far as she was concerned; that she could not sell the site of the street for building purposes as it was subject to three rights of way by express grant; and that accordingly it was a matter of indifference to her who used the street and whether it was done as of right or by indulgence.

The appellant's point on this part of the case was that McCully saw marked out on the ground what he took to be a street, and what was planned as a street, that he bought the property abutting on it upon the faith that it was a street in being, to which his purchase would have an access as of right, and that accordingly Mrs. Patrick and those who claim through her cannot deny to him and his successors in title the full benefit of this apparent accommodation.

The value of the facts which have been supposed to raise this argument may be tested by referring at once to the appellant's remaining point. He alleged that just before McCully bought the property in 1887 there was a way of communication actually existing and in actual use between Rachael Street and the site in question, so that, although Mrs. Patrick enjoyed it as proprietor of both

pieces of ground and not as one entitled to a servitude over another's soil, it would actually be appurtenant to the plot, which McCully bought, because it existed and did appertain to it, and so by force of the statute passed under the general words of the conveyance or merely by implication.

Now there was no such way, and even McCully did not pretend that he had seen one. Rachael Street was not a way to the appellant's plot but a way past it to other people's plots. The appellant's plot was fenced off from Rachael Street; the fence, if rotten, was continuous and unbroken; there was neither gate nor gap in it. The fences on the other side of Rachael Street had gates in them, because the plots on the other side enjoyed easements over the street appurtenant to them. The northern plot had no gate and it had no communication or way either. The evidence is quite clear as to this, and, except for one witness, a vague and self-contradictory person, it was uncontradicted.

Not only does the argument (c), based on this supposed third fact, fail *in limine* for want of foundation, but the truth about it greatly strengthens the conclusion, already pretty clear, that there was really no such demarcation of a street or appearance of one on the ground, as would be necessary to raise the appellant's contention (b), whatever it may be worth. What McCully saw was merely an oblong strip of ground, open at one end and fenced on three sides. There were two or three gates in the fences, but none in the northern one which alone concerned him, and the surface was somewhat cut up with cart wheels, and consisted of mud. This could not in law entitle him to assume that what his proposed purchase abutted on was a road or street, to the use of which he would be entitled,

if he bought the plot; nor can his successors in title eke out some right to use this access from the fact that Mrs. Patrick granted to others an express right of way, which McCully either did not venture to ask for or at any rate did not get.

Their Lordships are of opinion that this appeal raises no question of law requiring examination, but that it fails on the facts. They are not disposed to draw conclusions in the appellant's favour from the evidence, which should have been drawn by the trial judge, if at all, nor, if they were, could they find sufficient materials for such conclusions in the evidence as it stands. They will accordingly humbly advise His Majesty that this appeal ought to be dismissed with costs.

In the Privy Council.

J. HENRY PETERS

v.

ANGUS SINCLAIR.

DELIVERED BY LORD SUMNER.

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