IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Mason v. Partridge, 2003NSSC254

Date: 20031229
Docket: S.A.T. 2306
Registry: Antigonish

Between:

Leonard Mason

Plaintiff

v.

Wayne Partridge, Marie Partridge, Thomas Partridge,
Lori Brown and CIBC Mortgages Inc.

Defendants

Judge: The Honourable Chief Justice Joseph Kennedy

Heard: May 26, 2003, in Antigonish, Nova Scotia

Written Decision: December 29, 2003

Counsel: Donald L. Macdonald for the plaintiff
Daniel J. MacIsaac, for the defendants Wayne and Marie Partridge
Hector J. MacIsaac for the defendants Thomas Partridge and Lori Brown

Chief Justice Kennedy:

[1] This is a right-of-way dispute. The plaintiff, Leonard Mason came back home to Nova Scotia after living elsewhere in Canada and eventually acquired the 250 acres of land in North Grant, Antigonish County, that had been the old Mason homestead unoccupied since roughly 1960.

[2] Leonard Mason's father had conveyed this property to his brother Donald Mason in 1943 and Leonard got it from his brother's heirs by deeds recorded between 1991 and 1993.

[3] The land has frontage on highway # 245 and goes back northeastwardly from the highway. The Wright's River, which runs roughly parallel to the highway, dissects the property several hundred feet to the east of the highway.

[4] It is the portion of the Mason property beyond, to the east of the river that is central to this lawsuit.

[5] Leonard Mason wants to cut and remove timber from his property beyond the river. He claims that he can't get access to that property for that purpose over his own land, because the river is a barrier.

[6] He therefore wants to use a road that crosses adjacent property and extends onto his east side property. Leonard Mason claims that he has a right-of-way over this road for purposes of access to that property.

[7] The road is accessible from the "North Grant Road," a public road that intersects with highway #245.

[8] The adjoining property in question belongs to the defendants.

[9] The defendants, Wayne and Marie Partridge acquired the adjacent property from one Elgin Allen in 1986. They subdivided a nine acre parcel of that land and conveyed it to the defendant Lori Brown, who is the common-law spouse of the defendant, Thomas Partridge, in 1998. Thomas Partridge is a brother to Wayne Partridge. The Defendant C.I.B.C. Mortgage is no longer a party to this action.

[10] The claimed right-of-way runs across both of these properties before it reaches the plaintiff's land east of the river.

[11] The defendants have responded to the action, claiming that no such right-of-way over their land exists.

[12] The plaintiff, Leonard Mason, testified in support of his position. He was born 1938. He said that he lived on this 'homestead' property as a child and that the adjacent property now owned by the defendants was then, or soon became, the "Sullivan" property.

[13] In an aerial photo dated 1945 *(Exhibit Book, Tab 2)* he pointed out both the Mason and Sullivan houses, then both occupied. He identified the roadway that leads from the public North Grant Road past the Sullivan house and then eventually onto the Mason property on the east side of the Wright River visible on that photo.

[14] He said that he, together with other Mason family members, regularly use that roadway to retrieve logs from their property east of the river. On that property, he identified a clearing, which he said was known as the "deer field."

[15] He testified that he was aware of and participated in the logging of the east side from the age of seven or eight years until he was 15 years old and moved off the homestead property. He was seven years in 1945 and 15 years in 1953.

[16] He testified that the Masons would use a horse to haul the cut logs to the "deer field," where the logs would then be loaded on the trucks to be transported off the property.

[17] He said that these trucks would come and go to the "deer field" from that road that continued from the North Grant Road, across the Sullivan house property, the right-of-way that he claims by this action. He testified that no one ever, to his knowledge, asked permission to use that right-of-way.

[18] Leonard Mason said that his brother, Donald continued to log the "east side of the river" after their father died in 1960. He, Leonard, came home in 1968. He said he would go back to the east side of the property three or four times a year using the road past the Sullivan place.

[19] He said that he never asked permission and no one ever tried to stop him from exercising such use. He said that when the Masons lived on the property there was a foot bridge across the river that connected the west and east sides of their property. However, it was for walking only. It was never used to remove wood.

[20] After he purchased the Mason property from his brother's heirs, he began to work the west side of his property, next to the highway and then, in 1997, he became interested in access to and logging the east side of the river.

[21] He said he intended to use the right-of-way across the old Sullivan property and intended to fix the road up so he could do so. He contacted the defendant, Wayne Partridge to tell him what he proposed to do. After considering the situation for a couple of months, Wayne Partridge refused access, and Leonard Mason subsequently found that the roadway had been blocked with a load of rocks.

[22] Leonard Mason says, that without access to the claimed right-of-way he cannot remove timber from the east side, because he can't get trucks or equipment across the river.

[23] Margaret Terrieau testified on behalf of the plaintiff. She is from North Grant and is 69 years of age. She is the granddaughter of the Sullivans and lived on the Sullivan property either full time, or during the summers when she was between the ages of six and 15 years, which would have been roughly between 1940 and 1949.

[24] She testified, "We used to see trucks go through with logs on them" travelling along the road that went by the house and back to the "deer field." "We never objected - it was a routine." She said that there was a gateway back of the Sullivan house which had four or five poles on it. The truck drivers would put the poles aside and travel through. She acknowledged that she didn't know if anyone had ever sought permission from her grandparents.

[25] Teressa Mason testified. She is the sister of the plaintiff and is 73 years of age. She lived at the Mason property and looked after her father, vintage 1953. She remembered making lunches and taking them to her brothers and her father,

logging up at the “deer field.” She knew that the only access road for the logs was across the Sullivan property.

[26] William Reddick testified. He is 81 years of age. Starting in 1955 he drove a truck that hauled logs, pulpwood and Christmas trees from the Mason east side property. He said the route that he drove was up the North Grant Road then cross the Sullivan house property (it was owned by a Robicheau at that time) and onto the Mason property, as far as the “deer field” where he would turn the truck around. He said that he did this ten or twenty times over the course of four years between 1955 and 1959. He said there was nobody on the Sullivan property at the time.

[27] John Robertson testified. He is 59 years of age. His family owned land that was to the north of the Mason property behind the river. He said the Robertsons used to log their property and take the logs out to the “deer field” on the Mason property, and then transport those logs across the Sullivan property to the North Grant Road. His father used the access across the Sullivan property to do this, until as late as 1960.

THE DEFENDANTS CALLED WITNESSES

[28] Wayne Partridge testified - he testified that when he bought his property in 1986, the North Grant Road was impassable. He had to rebuild it. It was a public road, but not used. He said there was no mention of a right-of-way in the deed that conveyed the property to him, nor was there any mention, to his knowledge, in any previous deeds that convey this property.

[29] Further, there was no evidence of any right-of-way on the ground, it was grown up.

[30] He said in his time, in North Grant, he lived in the community with his parents between 1961 and 1973, no timber was taken out the North Grant Road.

[31] Thomas Partridge, 47 years of age, brother of Wayne testified. He is married to Lori Brown who owns the nine acre lot carved out of the Sullivan property.

[32] He said that he worked for Donald Mason, the brother of Leonard Mason who owned the Mason property until his death.

[33] He said that Donald Mason hauled logs off the east side of the property, across the river and out to the Mason house all on the Mason property.

[34] He said that in the summertime there were numerous places on the Mason property at which the river could be crossed. He said we never took logs out over the Sullivan property. It had been grown in for years. He said that as far back as 1982, the North Grant Road was impassable.

[35] Elgin Allen, a retired accountant testified. He sold the Sullivan property to the Partridges. He said he bought the Sullivan property in 1963. There was no indication to him of any right-of-way, either in his deed, or otherwise.

[36] He had a camp and garden on the property from 1963 to 1976.

THE LAW

[37] There is no evidence before me in this action that indicates an express grant of the right-of-way sought has ever been given.

[38] Rather, the plaintiff argues that the evidence establishes a prescriptive easement, either by way of the doctrine of "lost modern grant," or pursuant to s. 32 of the *Limitation of Actions Act*.

[39] The bible of Nova Scotia real estate law is *Nova Scotia Real Property Practice Manual* by Charles MacIntosh, Q.C.. He says at 7-21:

> In Nova Scotia, prescriptive easements may arise in two ways: under the doctrine of lost modern grant or under s. 31 of the *Limitation of Actions Act*. The former is a judge-created theory which presumes that if actual enjoyment has been shown for 20 years, an actual grant had been made when the enjoyment began, but the deed granting the easement has since been lost. However, the presumption may be rebutted.
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> Section 32 of the *Statute of Limitations* is as follows:

> 32 No claim which may be lawfully made at the common law by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water to be enjoyed or derived upon, over or from any land or water of our Lady the Queen, her heirs or successors, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned has been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned has been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement expressly given, or made for that purpose by deed or writing.

A claim under this section is based on 20 years adverse user. The statutory provision was enacted as a simpler alternative to, but not a replacement for, the lost modern grant. In many cases both methods apply, but the latter may be relied upon where evidence required to prove a prescriptive title is defective.

...

Section 32 operates only when there is litigation; in order to establish a prescriptive right, an action must be brought. Pursuant to s. 33, the relevant period of user must immediately precede the bringing of the action.

...

The operation of this provision was considered in two recent cases. In *Gilfoy v. Westhaver* (1989), 92 N.S.R. (2d) 425, Tidman, J. stated as follows:

> (30) The major difference in prescription based upon lost modern grant as opposed to the *Limitation of Actions Act* is that the time of usage in order to establish the former must be counted from the outset of use, while in order to establish prescription under the *Limitation of Actions Act* the time usage is counted backwards from the time action is commenced under the Act and it provides for persons who do not opposed the fight because of a disability.

> (31) Usage of the roadway, in either case, must be open continuous, unobstructed, and without permission of the landowner.

This case was cited with approval by Roscoe, J. in *Publicover v. Publicover* (1991), 101 N.S.R. (2d) 75 who, after quoting the foregoing passage, went on to state:

> [23] In this case, for the defendant to rely on the *Limitation of Actions Act*, the time should be counted back from when this action commenced, that is May 12, 1989. If the defendant is able, on the balance of probabilities, to prove that, since May 1949, the owners and occupiers of lot C-2 have used a right-of-way over lots A and B in an open, continuous and unobstructed manner, without written permission of the owners from time to time, of lots A and B, the defence to this action would succeed.

In order to establish an easement by prescription, the claimant must show that as owner of the dominant tenement it has actually used the claimed easement. This will make it clear to the person in possession of the servient tenement that a continuous right to enjoyment is being asserted and ought to be resisted if such right is not recognized, and if resistance to it is intended. The claimant must show such use was made without force, secrecy, or evasion and without consent of the servient owner. Work done as a neighbourly gesture will not establish such an easement.

Use of property permitted, as a neighbourly gesture, and enjoyed on that basis, is not sufficient to acquire an easement by prescription. In some cases, however, the court will find that the extent of usage and the circumstances of the parties go beyond a “neighbourly gesture” and can lead to the acquisition of property rights to the user. This is particularly the case where the precise location of the boundary is uncertain.

FINDING OF FACT

[40] On the evidence I am satisfied that the roadway that is the subject of this action, the roadway that travels from public road number 245 along, the North Grant Road and then over the former Sullivan property, now owned by the defendants, to the Masons property, was used to take timber off the Mason land east of the river and was accessed for other reasons from at least the early 1940's until as late as 1963.

[41] I believe the testimony of witnesses called by the plaintiff, that speak to such usage as far back as 1945, when Leonard Mason was a child. The aerial photograph *(Exhibit Book, Tab 2)* dated 1945, shows that the roadway existed at that date.

[42] Leonard Mason's dating of the existence of the roadway in the 1940's is corroborated by Margaret Terrieau who spent summers on the Sullivan property between 1940 and 1949 and saw logging trucks using the road past the Sullivan house during those years.

[43] William Reddick actually drove a log truck over the roadway until 1959.

[44] The plaintiff, Leonard Mason testified that when he lived with his brother in 1968, he again used the roadway over the Sullivan property to get to the east side of the plaintiff's land without asking permission. However, he did not log the property at that time.

[45] I am further satisfied that the defendants' submission, that the roadway access to the Mason property has not been used as a logging road since as far back as 1963, is correct.

[46] Elgin Allen bought the property in 1963 and testified that nothing was hauled out on that road during that time, and that by 1974, the North Grant Road was not longer passable.

[47] Having made those findings, I conclude that the plaintiff cannot claim a prescriptive easement based on the *Statute of Limitations*, because there was not usage of this right-of-way for the 20 years prior to the commencement of this action. *Gilfoy v. Westhaver, supra.*

[48] The plaintiff's evidence does raise the issue (possibility) of "lost modern grant."

[49] Having found that the roadway was used to remove logs from the early 1940's (I find this to be 1942, if not before) until 1963. I am satisfied that there was at least a 20 year period of "open" use. Those trucks going past the Sullivan house loaded with logs would fit this description.

[50] However use that is as demonstrative for a 20 year period is not definitive.

[51] The use must have been without permission.

[52] *Mason v. Morrow* (1998), 114 O.A.C. 194 (Ont.C.A.) is a case in which the plaintiff claimed a prescriptive right to use stairs located on the defendant's property. The Ontario Court of Appeal states at p. 195, para. 5:

> In order to acquire a prescriptive right to use the stairs the appellant had to establish that the use was known to the owner of the property on which the stairs were located and had continued without interruption for at least 20 years. Such use did not have to be exclusive but it must have been "as of right" and not pursuant to the express or implied permission of the owner of the servient land. While the evidence was adequate to establish 20 years' uninterrupted use to the knowledge of the owner, it was not sufficient to prove use "as of right": namely, use from which a reasonable person would infer that a right was being claimed or asserted. The evidence was at least equally consistent with use by the appellant's predecessors in title, the Gottliebs, in reliance "throughout their period of occupation" on the express or tacit permission of the owner of the property. Use permitted through good-neighbourliness, and enjoyed on that basis, is not sufficient to acquire an easement by prescription *Henderson et al. v. Volk et al.* (1982), 35 O.R. (2d) 379 (C.A.).

[53] Of interest is the case noted in *Mason v. Morrow, Henderson et al. v. Volk et al.* (1982), 35 O.R. (2d) 379 (C.A.) in which Justice Cory of the Ontario Court of Appeal (as he then was) says as to the doctrine of lost modern grant at pgs. 382, 383:

> The doctrine indicates that where there has been upwards of 20 years uninterrupted enjoyment of an easement and such enjoyment has all the necessary qualities to fulfill the requirements of prescription, then apart from some aspects such as incapacity that might vitiate its operation but which do not concern us here, the law will adopt the legal fiction that such a grant was made despite the absence of any direct evidence that it was in fact made. See *Tehidy Minerals Ltd. et al. v. Norman et al.*, [1971] 2 Q.B. 528 (C.A.).
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> It should be emphasized that the nature of the enjoyment necessary to establish an easement under the doctrine of lost modern grant is exactly the same as that required to establish an easement by prescription under the *Limitations Act*. Thus, the claimant must demonstrate a use and enjoyment of the right-of-way under a claim of right which was continuous, uninterrupted, open and peaceful for a

> period of 20 years. However, in the case of the doctrine of lost modern grant, it does not have to be the 20-year period immediately preceding the bringing of an action.
>
> As well, the enjoyment must not be permissive. That is to say, it cannot be a user of a right-of-way enjoyed from time to time at the will and pleasure of the owner of the property over which the easement is sought to be established.

[54] In that case Cory, J. determined, based on the findings of the trial judge, that the use of the claimed easement, a sidewalk, was a permissible one, no more than "good neighborliness" and therefore did not create an easement.

[55] The onus is on the plaintiff to show that the use of the easement from the early 1940's to the early 1960's was done without permission of the servient owners.

[56] In this case we are dealing with usage that last occurred more than 40 years ago. Neither the dominant nor servient landowners at that time are alive to testify today.

[57] I will repeat what witnesses said about "permission."

[58] Leonard Mason testified "I never asked permission, no one ever tried to stop me" and later "I wasn't involved in decisions at that age."

[59] Margaret Terrieau testified from the perspective of the Sullivan family: "We never objected - it was a routine" (meaning the log trucks coming across the Sullivan property). She also said "I don't know about permission." She testified to a gate on the property that was opened and closed by the truck drivers.

[60] William Reddick testified that when he drove trucks across the property between 1955 and 1959, no permission was sought. At that time the owner Robicheau was no longer living on the land so there was "nobody to ask permission from."

[61] I find that, as was the situation in *Mason v. Morrow*, the evidence is "at least equally consistent with expressed or tacit permission" by the owners of the servient property.

[62] Those trucks travelling across that land and proximate to the house were as likely to have been there by permission as not.

[63] The existence of a gate across the roadway that could be opened and closed by the drivers is indicative of access by permission.

[64] While it is no doubt correct that the plaintiff's witnesses had never been aware of permission being sought, they were either children or employees at the relevant time and would not be likely to have been involved in negotiations for use.

[65] Having found that the evidence of use supports the possibility of prescription by "lost modern grant," I conclude, finally, that the plaintiff has failed to establish that the use enjoyed was not by permission.

[66] Having failed to do so I find that a right-of-way by prescription has not been established by the evidence.

[67] I do not find that the plaintiff has a right-of-way across the defendant's property.

Joseph P. Kennedy
Chief Justice