

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

JOHN BROWN AND
DUNCAN STEEL
CURRY (*Defendants*).....

} APPELLANTS;

AND

THE MUNICIPAL-
ITY OF THE
TOWN OF EDMONTON (*Plaintiff*).....

} RESPONDENT.

*Highways—Old trails in Rupert's
Land—Substitution of new way—
—Dedication of highway.*

A statement of the case is given by His Lordship Mr. Justice Gwynne in the following judgment.

Ferguson Q.C. for the appellants.
Latchford for the respondent.

PRESENT :—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

Counsel having been heard on behalf on both parties on the seventeenth of March, 1894, judgment was reserved and on the first of May, 1894, the judgment of the court was delivered by :

GWYNNE J.—This is an appeal against the judgment of the Supreme Court of the North-west Territories(1), dismissing an appeal by the defendants against the judgment of Mr. Justice Rouleau, in an action instituted against them by the Municipality of the Town of Edmonton, whereby the defendants were adjudged to remove a log building erected and maintained by them upon land in the town of Edmonton claimed by the plaintiffs in the action to be, and by the judgment declared and adjudged to be, part of a public street in the said town of Edmonton, called Jasper avenue.

Prior to the year 1881, one Colin Fraser was in possession of a portion of unsurveyed lands of the Crown, now within the limits

of the Town of Edmonton; his possession was that of a mere squatter, without title, but making claim to be recognised by the Crown under the provisions of the Dominion Lands Act as an actual settler upon such land. It appears that seven other persons were in like manner and at the same time in possession of other lands adjoining the land of which the said Colin Fraser was so in possession. On the 9th of February, 1881, the said Colin Fraser by an agreement in writing signed by him, agreed to sell to one James McDonald "all the right and interest of him the said Colin Fraser, in that part of his claim situate on the east side of his ploughing," and fronting on the main travelled road, which is described in the agreement as follows: "Beginning at a point three feet east from my ploughing, and extending eastward along the main travelled road fifty (50) feet; thence northward parallel with the ploughing aforesaid one hundred (100) feet; thence westward to within three (3) feet of

the ploughing aforesaid fifty feet; thence southward to the main road one hundred feet." And the said Colin Fraser thereby agreed to furnish to the said James McDonald a clear deed of the above described lots "as soon as the government surveys thereof are made." Upon the same 9th February James McDonald transferred all his interest in the said piece of land to the defendants, Brown & Curry.

The main travelled road mentioned in the above description, the northern limit of which was made the southern limit of the piece of land above described, had then no defined width or boundaries, nor could it have any legally defined limits, as indeed appears from the very terms of the agreement, until the Government surveys should be made. The only road which then was there, was a "trail" which, as is alleged in the defendants' statement of defence, ran along what constitutes the centre line of what is now called Jasper avenue. At or about the same time as Colin Fraser agreed to sell

all his interest in the above described piece of land to James McDonald, he in like manner agreed to sell all his interest in several other pieces of the land of which he was so as aforesaid in possession, to persons respectively named Oliver, Kelly, Sanderson and Lorby, Hogarth and Lauder, and his interest in all the residue of the said land of which he was so in possession to one Samuel Pritchard. In the year 1882 one Deane, a Dominion Land Surveyor, was employed by the Dominion Government to make a survey of what is called the Edmonton Settlement in the North-west Territory. Upon that survey he laid down on a plan the several pieces of land of which the said Colin Fraser and the six other persons in possession of lands adjoining the land of which he was so possessed, and in such plan the name of S. Pritchard is entered as the person in possession of the whole lot, which is on the plan numbered as river lot no. 10 of the Edmonton Settlement survey. This plan was, upon the 26th May, 1883, approved and confirmed under the provisions of

the Dominion Lands Act in that behalf.

Upon this plan there is laid down with dotted lines the northern and southern limits of the road across the said river lot No. 10 and the other neighbouring lots. The surveyor's notes of survey have not been produced showing the width of the road intended to be designated by such dotted lines, but the plan is made upon a scale of twenty chains to an inch, and by the application of such a scale to the space between the dotted lines inclusive of the dots, it appears to exceed one chain. Now prior to the 1st of January, 1883, Pritchard had a survey and plan made for him of the whole of the said river lot no. 10, but divided into town lots wherein were represented the several pieces thereof which had been agreed to be sold by Fraser to divers persons as well as several other lots wherein the names of other persons were entered, presumably persons to whom Pritchard himself had agreed to sell such pieces. On this plan Jasper avenue is laid down as being of the width of eighty feet, and another street

called Fraser avenue extending northerly through the lot from Jasper avenue. Upon the plan the name of Brown is entered upon a lot designated on the plan as being fifty feet in width, abutting on the northerly limit of Jasper avenue, and extending in a northerly direction 100 feet the south-westerly angle of which lot is placed as being 119 feet easterly from the south-easterly angle of the street called Fraser avenue, that is from the intersection of the easterly limit of Fraser avenue with the northern limit of Jasper avenue. This survey and the plan thereof were made by Geo. A. Simpson, a Deputy Land Surveyor, as and for a "sub-division of river lot no. 10." "Pritchard estate," and it is called "Plan A," "Edmonton," and was registered upon the 15th of March, 1886, under the provisions of the Northwest Territories Registration of Titles Ordinance, 1884, as appears by a copy certified by the registrar. Up to this time no patent had issued for any part of the said river lot no. 10, but on or about the 25th January, 1886, the before named Oliver,

Kelly, Sanderson and Lorby, Colin Fraser, Hogarth and Lauder and the defendants, Brown and Curry signed under their respective hands and seals, a petition to the Minister of the Interior wherein, alleging themselves to be severally entitled to different portions of river lot number 10 in Edmonton according to the Dominion Government survey, which different portions compose in the whole the lands embraced in an accompanying description and shewn on an accompanying plan, they requested and consented that letters patent should issue for the whole of the lands so embraced in such description, and plan, to John Brown, of Edmonton, in the District of Alberta, in the Northwest Territories of Canada, Merchant, as trustee, and they requested that the patent should be forwarded to Mr. Robert Strachan, Edmonton, Solicitor.

Upon the 27th January, 1886, Mr. Strachan forwarded this petition to the minister with statutory declarations made by Colin Fraser and James McDonald respectively, in the former of which Fraser declared that the above

named parties were all the persons who were applying for patent to issue to John Brown, that he had not sold any of the said lands for which the patent was so applied for to any person, that any other sales he had made were entirely distinct from the lands described in a description accompanying his declaration, that the piece described as his own was a piece he had previously sold to, but afterwards purchased from James McDonald, who in his declaration confirmed this latter statement, and also declared that the lot marked on the accompanying plan "J. Brown" was purchased by him from Fraser and subsequently sold to John Brown and D. S. Curry, and he also declared that the description accompanying the declaration did not in any way encroach upon the lands of the Rev. Samuel Pritchard. This petition and the plan, descriptions and declarations accompanying the same, together with the letter of Mr. Strachan of the 27th January were received in the Department of the Interior on the 11th February, 1886, and in reply thereto a letter

from the department to Mr. Strachan was addressed and sent upon the 16th March, 1886, wherein Mr. Strachan upon behalf of the petitioners was informed that "before any further consideration could be given to the matter of the petition a tracing of a plan to be prepared as thereafter stated, must be filed in the department, and that upon the receipt of such tracing the question as to the propriety of issuing patents direct to the several parties who purchased parts of the lot in question from Mr. Colin Fraser for their respective portions thereof, will be further considered." The directions given for further preparation of the required plan were as follows: "1st. It must show river lot 10 as it is shown on a plan of the survey of the Edmonton Settlement made by Mr. Deane, a Dominion Land Surveyor. 2ndly. It must be prepared by a Dominion Land Surveyor on a scale of one chain to an inch and be certified in the usual manner by such surveyor; 3rdly. It must have indorsed on it a certificate of the registrar of the district to the effect that it is

a record in his office ; 4thly. The tracing to be filed in this department must be certified by the said registrar to be a true and correct copy of the above mentioned plan."

In accordance with these directions, Mr. Strachan on behalf of the petitioners had a plan prepared by Geo. A. Simpson, the Dominion Land Surveyor, who in 1882 had surveyed and made the plan for Mr. Pritchard. This plan which bears date the 18th of August, 1886, and is designed "A. 1," and was duly certified by the said Geo. A. Simpson and registered in the registry office on the 28th August, 1886, was forwarded to the Department of the Interior, and upon it were marked the boundaries of the several lots which had been sold by Colin Fraser to all others than to Pritchard. The lot so as aforesaid sold to J. McDonald and by him transferred to the defendants, Brown & Curry, was designated by the letter "P," and the dimensions, location and boundaries thereof were laid down precisely in the same manner as the lot whereon the name

of "J. Brown" was laid down on the plan prepared by the same surveyor for Mr. Pritchard in 1882, and the said street called Jasper avenue was laid down as being eighty feet wide. After receipt of this plan by the Department of the Interior, a letter was addressed and sent by the department to Mr. Strachan informing him that the tracing of lot no. 10 in the Edmonton settlement referred to in the above letter of the 16th March, 1886, had been duly received, and that patents for the several portions of the lot were then in course of preparation in favour of the respective owners as shown on the tracing in question with the exception of that for lot "P" in favour of John Brown and D. S. Curry, which was stayed pending the receipt by the department of information giving Mr. D. S. Curry's Christian name in full. This information having been supplied, the said lot designated by the letter "P" was granted, by letters patent dated the 22nd day of April, 1887, to the defendants John Brown and Duncan Steel Curry, their heirs and assigns as tenants in com-

mon by the following description : "All that parcel or tract of land situate, lying and being in the Edmonton Settlement in the Northwest Territories, in our Dominion of Canada, and being composed of lot lettered "P" as shown on a plan of the subdivision of a portion of the lot numbered 10 in the Edmonton Settlement aforesaid filed in the Department of the Interior signed by George A. Simpson, Dominion Land Surveyor, dated the 18th day of August, 1886, and registered in the registry office for the Edmonton District on the 28th day of August, 1886, the said lot numbered 10 in the Edmonton Settlement being shown on a plan of the said settlement signed by Andrew Russell for the Surveyor General of Dominion Lands, and dated 25th May, 1883." Letters patent to the other petitioners granted upon and in accordance with the designation and description of their several portions as the same appeared upon the said plan, under the designation of lots lettered respectively "A," "F," "P," "R,"

"S," "T," "V," and, upon the 31st day of August, 1887, letters patent were granted to Mr. Pritchard of all that portion of said river lot no. 10 coming within the following description : "All that parcel or tract of land situate, etc., etc., in the Edmonton Settlement, etc., etc., being composed of river lot number 10, in the Edmonton Settlement aforesaid, as shewn upon a plan of the said settlement, signed by A. Russell for the Surveyor General of Dominion Lands, dated 25th May, 1883, and of record in the Department of the Interior, containing by admeasurement eighty-one acres, more or less, saving and excepting thereout the following portions particularly described as follows :—"1st. A portion containing eight and seven-tenths acres abutting on the most northerly limit of said river lot number ten (particularly describing it by metes and bounds)" ; "2ndly. The portions or lots indicated and specified by the letters "A," "F," "V," "P," "R," "S," "T," etc., etc., shewn on a plan of a portion of the said river lot number 10,

Edmonton Settlement, of record in the Department of the Interior, signed by Geo. A. Simpson, D.L.S., and duly certified to be a correct copy of a plan of part of lot numbered 10, registered in the registry office in and for the Registration District of Edmonton, in the Provisional District of Alberta, in the Northwest Territories, at two o'clock, p.m., on the 28th day of August, A.D. 1886, and signed by George Roy, Registrar."

Now the piece of land designated above by the letter "A" is that which on the above plan A, made by Geo. A. Simpson in 1882 for Mr. Pritchard, and of a portion of which the plan "A," which is the one mentioned in the above letters patent, is a facsimile, is designated as belonging to Mr. Oliver above mentioned; that marked letter "F," is the lot which on the Pritchard plan is marked as belonging to Hogarth; that marked "V," is the lot numbered 40 on the Pritchard plan; that marked with the letter "P" is the one marked in the Pritch-

ard plan as belonging to J. Brown, (the plaintiff of that name); that marked with the letter "R" is that upon which the name of Sanderson is entered in the Pritchard plan; that marked with the letter "S" is the lot upon which in the Pritchard plan the name of Kelly is entered, and that marked with the letter "T" is part of the piece upon which, in the Pritchard plan, is entered the name of Lauder, all of which persons were the petitioners in 1886 for letters patent to be granted to them. Now of these pieces of land the lot "P," as above granted to the defendants, and the lots designated by the letters "R," "S," and "V," abut for their southerly boundaries upon the northern limit of the street called Jasper avenue, as shewn on the Pritchard plan and the plan mentioned in the letters patent, in accordance with which plan the lots were granted; and the pieces marked respectively with the letters "A" and "F" are lots the northern boundaries of which abut upon the southerly limit of the said Jasper avenue,

as shewn on said plans. It is obvious therefore that the space marked upon the plan as Jasper avenue in accordance with which plan alone the lots abutting on that street are granted, was dedicated by the Crown as and for a street or public highway, to no part of which can the plaintiffs or any other persons, grantees of lots abutting upon the street, assert any claim whatever. The fact that the terms of the letters patent to Pritchard are such as to convey to him the whole of the river lot 10, except the excepted parts, can make no difference, for even though it should be held that the soil of what is designated as Jasper avenue on the plan in accordance with which his letters patent were granted, passed to him by his said letters patent, it could only so pass as subject to the public easement of being used as a street and public highway which being situate within the Municipality of the Town of Edmonton, is subject to the jurisdiction of

the said municipality by ch. 8 of the Revised Ordinances of the Territories, and having such jurisdiction, the municipality, there can be no doubt, are entitled to maintain the present suit. The appeal must therefore be dismissed with costs.

The case of *Fisher v. Prowse* (1), relied upon by the defendants was a case very different from the present. The question there was whether a cellar flat of the defendants' house which although being in the footwalk of a public street had existed in the same condition as far back as living memory went, was unlawful, and so subjected the defendant for maintaining it to liability for injury sustained therefrom by a person using the footwalk, and it was held that it must be presumed that an erection made so far back was lawfully erected and that the dedication was made subsequently and subject to the right to maintain

(1) 2 B. & S. 770.

the erection. In the present case there is no pretence of the defendants having ever had any right as against the Crown to erect and maintain the log house which obstructs the public street in front of the lot "P" granted by the Crown to them, for about one-third of its width. The defendants obtained their letters patent for their lot "P," having its boundaries precisely as shown in Pritchard's plan "A," made in 1882, and precisely as the defendants had in 1886 petitioned that it should be granted. They obtained the only title they have to their lot according to a plan which shows the southerly limit of the

piece of land granted to them to be the northerly limit of a piece in front of their lot of 80 feet in width dedicated by the Crown as and for a public street. To hold that in such case it is to be presumed that the dedication by the Crown was subject to the right of the defendants to maintain an obstruction which when erected by them was so erected without any right whatever in law, would be, in my opinion, a perversion of common sense.

Appeal dismissed with costs.

Solicitors for the Appellants:

S. S. & H. C. Taylor.

Solicitors for the Respondents:

Beck & McNamara.